ANATOMY OF A PERMIT
Part One: Drafting the Ordinance

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Prologue:

"'We are a government of laws, and not of men.' Unless one is trying to obtain a conditional use permit from a municipality's land-use committee, in which case the opposite is true. A government of laws requires us to conform our actions to pre-existing standards with discernible content. A government of men requires us to conform our actions to a governing authority's ad hoc wishes." Justice Daniel Kelly, dissenting opinion in *AllEnergy Corp. v. Trempealeau County Environment and Land Use Committee.*

"It is impossible to prescribe the criteria upon which such a permit may be granted in each and every case." *Trempealeau County Zoning Ordinance*.

"Everything is politics." Thomas Mann, novelist.

1. TYPES AND USES OF PERMITS AND LICENSES.

A. *PURPOSES AND TYPES OF PERMITS.*

(1) Licensing and permitting ordinances require people to obtain the government's approval to engage in otherwise lawful activities. The government's purpose for requiring a license or permit varies depending on the circumstances.

a. Monitoring permits. In some cases, there seems to be no reason to require the permit, other than to monitor and track certain activities deemed to require special attention, or to obtain information useful to other regulatory purposes.

(1) Dog and cat licenses.
(2) Bicycle license.
(3) Solicitation permit.
(4) Peddler's license.
(5) Transient merchant permit.
(6) Vending permit.
(7) Weights and measures permit.

(8) License for selling on public streets.
(9) Secondhand dealers.

b. Compliance verification permits. In some cases the government uses the permit process to verify compliance with established health, safety, environmental or other regulations, or keep track of certain activities. Examples include:

(1) Building permit.
(2) Erosion control permit.
(3) Stormwater management permit.
(4) Sexually oriented business.
(5) Keeping chickens.
(6) Keeping of honeybees.
(7) Wind energy systems.
(8) Telecommunications towers and infrastructure.
(9) Mobile homes and mobile home parks.

c. Regulatory permits. In some cases, such as alcohol beverage licenses and conditional use permits, the government uses the permit process to evaluate (and further regulate) the proposed activity by a particular person under particular circumstances. In these cases, the government typically delegates a degree of discretionary authority to gather information about the proposed activity and approve or disapprove the activity under the particular circumstances.

(1) Conditional use permits.
(2) Alcohol beverage licenses.
(3) Certificate of appropriateness (in historic district).
(4) Non-metallic mining permits.

(2) *Licensing and permitting distinguished from zoning*.

a. A licensing or permitting approach to exercising police power authority may exist where zoning power does not exist.

b. A licensing or permitting approach to exercising police power authority may capture existing operations, where zoning would not.

c. *Zwiefelhofer v. Town of Cooks Valley*, 338 Wis. 2d 488 (2012).

(1) The Town of Cooks Valley was located in Chippewa County, which had adopted a countywide zoning ordinance. Consequently, the Town could not regulate non-metallic mining through its zoning power without County Board approval.

(2) The Town adopted an ordinance requiring a permit to engage in non-metallic mining.

(3) "[T]raditionally, though not always, zoning ordinances make a fixed, forward-looking determination about what uses will be permitted, as opposed to case0by-case, ad hoc determinations of what individual landowners will be allowed to do. It has become increasingly common for zoning ordinances to allow for uses that are conditionally permitted, which gives local officials the power to make decision on an individual, ad hoc basis. Today, most zoning ordinances contain a combination of permitted uses and conditionally permitted uses." *Zwiefelhofer*, at 509-510.

(4) "[T]raditional zoning ordinances allow certain landowners whose land use was legal prior to the adoption of the zoning ordinance to maintain their land use despite its failure to conform to the zoning ordinances. This practice is motivated by constitutional considerations." *Zwiefelhofer*, at 510.

2. AUTHORITY TO REGULATE THROUGH LICENSING AND PERMITTING.

A. Wis. Stat. § 61.34(1): Except as otherwise provided by law, the village board shall … have the power to act for the government and good order of the village, for its commercial benefit and for the health, safety, welfare and convenience of the public, and may carry its powers into effect by *license,* regulation … and other necessary or convenient means.

B. Wis. Stat. § 62.11(5): Except as elsewhere in the statutes specifically provided, the council shall have … the power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by *license,* regulation … and other necessary of convenient means.

3. DELEGATION OF AUTHORITY AND PROVIDING ADEQUATE STANDARDS TO GUIDE DECISION-MAKING.

A. Wisconsin courts have long required ordinances to provide adequate standards to guide permitting and licensing decisions. The legal foundation for that requirement is not always clear. What type of standards are required is also not always clear. The courts continue to debate these issues.

B. *Little Chute v. Van Camp*, 136 Wis. 526 (1908).

(1) The Village of Little Chute ordinance provided as follows: "All saloons in said village shall be closed at 11 o'clock p.m. each day and remain closed until 5 o'clock on the following morning, unless by special permission of the president."

(2) "We regard the ordinance a void for two reasons: First, because it attempts to confer arbitrary power upon an executive officer, and allows him, in executing the ordinance, to make unjust and groundless discriminations among persons similarly situated…; second, because the power to regulate saloons is a lawmaking power vested in the village board … which cannot be delegated. A legislative body may cannot delegate to a mere administrative officer power to make a law, but it can make a law with provisions that it shall go into effect or be suspended in its operation upon the ascertainment of a fact or state of facts by an administrative officer or board." *Little Chute*, 136 526, 527.

C. *Milwaukee v. Ruplinger*, 155 Wis. 391 (1914).

(1) The ordinance at issue provided for the submission of all applications for junk-shop licensees to the mayor "who may grant or refuse to grant such license as to him may seem best for the good order of the city."

(2) "The ordinance dealt with the keeping of junk shops as a legitimate business. Therefore it is not to be thought that there was any purpose to clothe the mayor with power to permit or suppress such business. The idea embodied in the ordinance, by reasonable if no necessary inference, is that any suitable person, considering all things bearing on the question, for the operation of the junk business, shall, if he desires, upon compliance with the ordinance, have a license to run such a business. *Manifestly, the question of suitability must depend*

upon the existence or non-existence of facts and the facts must vary somewhat according to character, temperament, age, history, and many other things. The idea that the purpose of the ordinance was to confer upon the mayor power to act arbitrarily so as to suppress the business or keeping junk shops instead of regulating it, or to pass favorably upon one candidate for a license and unfavorably upon another under the same or similar circumstances, or to do otherwise than, having the "good order of the city" as the objective, pass reasonably upon the suitability of a candidate for license, within the field of that discretion which is administrative as distinguished from acting upon mere whim, prejudice, or caprice, is repellent to the whole scheme embodied in the ordinance and must be rejected." *Ruplinger*, 155 Wis. 391, 396-397. (emphasis added)

D. How can *Little Chute v. Van Camp* and *Milwaukee v. Ruplinger* be reconciled?

(1) Both cases were municipal prosecutions in which the defendant challenged the validity of the ordinance.

(2) In *Ruplinger*, the court assumed that the mayor was required to evaluate the facts of the particular case and make a reasonable decision. Why not in *Little Chute*?

(3) What did the Village of Little Chute have in mind? Probably wanted to give some flexibility to allow latter closings on a case-by-case basis, and delegated the authority to the village president to evaluate each case and make a reasonable decision.

E. *Lerner v. Delavan*, 203 Wis. 32 (1930).

(1) The ordinance required a permit from the common council to run a junkyard.

(2) The ordinance specified that the applications for permits had to contain the applicant's name, information as to the location and description of the premises, an explanation as to the type of business envisioned, and an enumeration of the materials to be handled. The ordinance did not expressly identify standards to guide the decision.

(3) The court found that the application requirements set forth sufficient standards to guide the council in evaluation applications. The court relied on the inclusion of these application requirements to infer that

the ordinance did not give the council arbitrary power to grant or deny licenses.

F. *Wadhams Oil Co. v. Delavan*, 208 Wis. 578 (1932).

(1) The ordinance prohibited the operation of a gasoline station within 165 feet of the main street of the city without city council consent. Applicants were not required to submit any information regarding the proposed station.

(2) The court found that the ordinance imposed on the council the duty to exercise sound discretion in regard to traffic, and upheld the ordinance.

(3) "The ordinance in question is not well drafted. It would not be difficult to improve upon it from the standpoint of a lawyer. However, as was stated in Lerner v. Delevan, it must be held that was no intention to vest in the common council of the city of Delevan and arbitrary power, but the ordinance imposes upon the council the duty to consider and exercise a sound discretion with reference to those matters which have made the businesses of the kind described in the ordinance a proper subject of special legislation."

G. *Juneau v. Badger Co-operative Oil Co.,* 227 Wis. 620 (1938).

(1) The City of Juneau adopted two ordinances relating gasoline or bulk oil storage or filling stations: The ordinances contained the following provisions, among others:

a. "No person or corporation shall maintain, rect or operate a gasoline or oil bulk or filling station within the corporate limits of the city of Juneau, without first obtaiing a permit from the common council of the city."

b. "No tank, receptacle or other container, used or intended to be used for the storage of gasoline ... or other petroleum products and having a storage capacity in excess of fifty gallons shall *hereafter* be erected or constructed or moved underground or upon any premises within the cororate limits of the city of Juneau *not now so used* … except as hereinafter expressly provided.

(2) The court voided the ordinances for two reasons, one involving the standardless delegation of authority, and the other involving an equal protection analysis.

a. Regarding the standardless delegation:

(1) "The general rule is that any ordinance which attempts to clothe an administrative officer with arbitrary decision discretion without a definite standard or rule for his guidance, is an unwarranted attempt to delegate legislative functions to such officer and for that reason unconstitutional."

(2) "The exceptions to the general rule are in situations and circumstances where necessity would require the vesting of discretion in the officer charged with the enforcement of an ordinance, as where it would be either impractical or impossible to fix a definite rule or standard, or where the discretion vested in the officer relates to the enforcement of a police regulation requiring prompt exercise of judgment."

(3) "[W]hen a municipal legislative body, as a means of regulating a legitimate business, by ordinance assumes the function of granting licenses to persons conducting such business, it must prescribe a standard to govern the granting of the license which shall be appropriate to the regulation of the business and applicable alike to all applicants for the license." [*Interesting application of the non-delegation doctrine to the legislative body itself. I've found no explanation for why the non-delegation doctrine prohibits the governing body itself from deciding whether to authorize permits on a case-by-case basis.).*

b. Regarding equal protection. The ordinance applied prospectively only to new fuel storage tanks and property "not now so used." The court noted that the only lawful purpose of the ordinance is to protect public safety, and that the public safety basis for the ordinance applies equally to existing as to new storage tanks. The court found no basis for the classification and discriminatory treatment of new vs. existing facilities.

H. *Smith v. Brookfield*, 272 Wis. 1 (1956).

(1) The ordinance required board approval to engage in certain uses in the agricultural zoning district.

(2) The ordinance required the applicant to submit the "location and plan of operation" to the board.

(3) The ordinance contained a purpose statement: Whereas, the town board of supervisors of the town of Brookfield deem it necessary in order to provide adequate light, pure air, and safety from fire and other dangers, con conserve the taxable value of land and buildings throughout the township, to avoid congestion in the public streets and highways, and to promote the public health, safety, comfort, morals, and welfare …."

(4) The court found that the purpose section provided sufficient standards to guide the decision in evaluating the "location and plan of operation," and upheld the ordinance.

I. *State ex rel. Humble Oil & Refining Company v. Wahner*, 25 Wis. 2d 1 (1964).

(1) Town of Allouez zoning ordinance said: "[N]o permit shall be granted for any public garage or filling station in the Commercial District, except on a hearing before the Board of Appeals of the Town…."

(2) The purpose section of the ordinance said: "In interpreting and applying the provisions of this ordinance they shall be held to be the minimum requirements for the promotion of the public health, safety, convenience, prosperity or general welfare ….."

(3) "When an ordinance vests discretionary power in administrative officials it must prescribe standards to guide their action."

(4) "The Allouez ordinance is completely silent as to any such factor to be considered."

(5) "Where a local zoning board of appeals is given authority to exercise discretion and judgment in the administration of a zoning ordinance, some standards must be prescribed for the guidance of the board in exercising the discretion and judgment with which it is vested. Where

no such definite standards are written into the ordinance the door is opened 'to favoritism and discrimination, a ready tool for the suppression of competition through the granting of authority to one and the withholding from another."

J. [How do we reconcile *Humble Oil* and *Smith v. Brookfield*?]

K. *Edward Kraemer & Sons , Inc. v. Sauk County Board on Adjustment*, 183, Wis. 2d 1 (1994).

(1) Kraemer applied for a special exception (conditional use) permit to conduct mineral extraction activities in Sauk County, near the lower narrows of the Baraboo bluffs.

(2) The purpose section of the ordinance said that one purpose was to provide for wise use of the county's resources. Another section of the ordinance required the board to consider the ability of the operation to avoid harm to the public health, safety and welfare and to the legitimate interests of nearby properties. The board denied the application based on these elements of the ordinance.

(3) The court said: "'[G]eneralized standards are acceptable in most jurisdictions. The purpose of the special exception-conditional use technique is to confer a degree of flexibility in the land use regulations. This would be lost if overly detailed standards covering each specific situation in which the use is to be granted or, conversely, each situation in which it is to be denied, were required to be placed in the ordinance.' Thus, the mere fact that the "wise use of the county's resources" and "public health, safety and welfare standards are general in nature does not impair the validity of those portions of the ordiance." *Edward Kraemer & Sons, Inc*, quoting 3 Edward H. Ziegler, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 41.11, at 41-49 (4th ed. 1993).

L. *AllEnergy Corporation v. Trempealeau County Environment and Land Use Committee*, 2017 WI 52, 375 Wis. 2d 329.

(1) AllEnergy Corporation applied for a conditional use permit to operate a frac sand mine in an Exclusive Agricultural zoning district.

(2) The ordinance described the purpose of the Exclusive Agriculture district to "preserve class I, II and III soils and additional irrigated farmland from scattered residential developments that would threaten

the future of agriculture and to preserve woodlands, wetlands, natural areas and the rural atmosphere of the county. Notwithstanding these stated purposes of Exclusive Ag zoning, the ordinance allowed frac sand mining in that district as a conditional use.

(3) AllEnergy proposed a 550-acre project that included a 265-acre mine site, a processing plant, a conveyor system, storm water ponds, and a rail spur connecting the facility to a Canadian Norther rail line.

(4) The ordinance listed numerous criteria the Environment & Land Use Committee is to consider in acting on conditional use permits, including the following general standards:

a. A CUP may be approved only if the Committee determines that the proposed use at the proposed location will not be contrary to the public interest and will not be detrimental or injurious to the public health, public safety, or character of the surrounding area.

b. Additional factors as are deemed by it to be relevant to its decision making process.

c. The ordinance said that it is "impossible to prescribe the criteria upon which such a permit may be granted in each and every case."

d. The Environment & Land Use Committee denied AllEnergy's application. AllEnergy petitioned for certiori review. While AllEnergy' s argument did not explicitly challenge the constitutionality of the ordinance, it implicitly did so by arguing that general considerations of public health, safety and welfare are not legally sufficient standards.

(5) Justices Shirley Abrahamson authored the lead opinion, joined by Justice Ann Walsh Bradley. Justice Annette Ziegler wrote a concurring opinion, joined by Chief Justice Patience Roggensack, agreeing with the mandate but not agreeing with the lead opinion. Justice Daniel Kelly dissented, joined by Justices Michael Gableman and Rebecca Grassl Bradley.

(6) Justice Abrahamson's lead opinion.

a. Justice Abrahamson directly responded to AllEnergy's implicit challenge to the constitutionality of the ordinance, including specifically the use of general "public interest standards."

b. Quoting *Edward Kraemer & Sons, Inc.*: "[T]he "public health, safety and welfare" standard [ ] is a general standard that provides the Board with flexibility and discretion to consider how a proposed special exception could affect the public welfare.

c. "The *Kraemer* court … further declared that these 'generalized standards are acceptable in most jurisdictions.' The mere fact that the "standards are general in nature does not impair the validity of these portions of the ordinance.'"

d. "The purpose of the special exception-conditional use technique is to confer a degree of flexibility ibn the land use regulations. This would be lost if overly detailed standards covering each specific situation in which the use is to be granted or, conversely, each situation in which it is to be denied, were required to be placed in the ordinance."

(7) The concurring opinion.

a. "In my view, the lead opinion and the dissent have made this case much more complicated and potentially more far-reaching in effect that it should be. This case can and should be decided narrowly: ours is a certiorari review."

b. "Indeed, one would think that if the lead opinion's constitutional detour were necessary to our decision, the word "constitution" might appear somewhere in AllEnergy's briefing. It does not. That word does appear, however, in the Committee's briefing, where it explains that "of course, AllEnergy has made no argument in this case that the Zoning Ordiance is unconstitutional. And even if AllEnergy were attempting to sneak a constitutional argument in through the back door, I fail to see why its gambit should be rewarded."

c. Bottom line, Justices Ziegler and Roggensack do not address the merits of the constitutionality of the ordinance.

(8) Justice Kelley's dissent.

a. Justice Kelley's dissent calls for a dramatic change to the way conditional use permit applications are evaluated. Under existing law, a conditional use permit should be denied if the reviewing authority concludes that the application does not meet the standards in the ordinance, including generalized, public interest standards. Justice Kelley argues that if the standards are not met, the applicant must be given the opportunity to develop conditions to address the problems. Justice Kelley's approach would mean that an application must be approved unless the record demonstrates that no set of conditions are sufficient to control potential adverse impacts of the proposed use.

b. With respect to the standards in the ordinance, the dissent takes aim at the language in the ordinance stating that it is not possible to prescribe the criteria upon which such a permit may be granted in each and every case: "The court's opinion today identifies a lengthy list of standards AllEnergy must navigate en route to issuance of a conditional use permit. Some are relatively specific. Others are as broad as those struck down in other jurisdictions. There may be legitimate debate about where to place these standards on the continuum between "sufficiently specific" and "unbridled discretion." But there should be no debate that an explicit refusal to identify all of the applicable standards rings the "unbridled discretion" bell, and smartly.

4. ALCOHOL BEVERAGE LICENSING – A STANDARDLESS DELEGATION OF AUTHORITY BY THE STATE LEGISLATURE.

A. Under Chapter 125, alcohol beverage licenses are issued by the municipality in which the proposed licensed establishment is to be located.

B. Although Chapter 125 sets forth minimum qualifications an applicant must meet to obtain a license, it does not provide any standards a municipality must follow in deciding whether to approve an application.

C. The courts have treated the decision to issue a license as a purely discretionary decision to be made by the municipality. *State ex rel. Smith v. City of Oak Creek*, 139 Wis. 2d 788, 801, 407 N.W.2d 901 (1987); *Norton v.*

Town of Sevastopol, 108 Wis. 2d 595, 598, 323 N.W.2d 148 (Ct. App. 1982); *Marquette Savs. and Loan Ass'n v. Village of Twin Lakes*, 38 Wis. 2d 310, 315, 156 N.W.2d 425 (1968).

D. An applicant for a liquor license is not entitled to the license even if the applicant satisfies the minimum statutory licensure requirements. *See State ex rel. Smith*, 139 Wis. 2d at 801 (stating that "there is no right to an alcohol beverage license ..."); *Rawn v. City of Superior*, 242 Wis. 632, 635-637, 9 N.W.2d 87 (1943) (holding that an applicant is not entitled to an alcohol license even if the applicant meets statutory qualifications or there are "no objections to his personal fitness or to the place where he proposed to conduct the tavern"); *Johnson v. Town Bd. of Wyocena*, 239 Wis. 461, 463-65, 1 N.W.2d 796 (1942) (holding that town board could refuse to issue "a license for reasons wholly unconnected with [plaintiff's] fitness merely because [the town] considered that no licenses should be granted in view of community sentiment."); *State ex rel. Higgins v. City of Racine*, 220 Wis. 107, 264 N.W. 490, 490-92 (1936) (holding that even if an applicant meets all statutory qualifications for issuance of an alcohol license, city has discretion to deny license "because the place of business… is not a proper place"); *Scott v. Vill. of Kewaskum*, 786 F.2d 338, 339–42 (7th Cir. 1986) (holding that the issuance of liquor licenses is within municipal discretion, and that an applicant, even if he or she meets statutory qualifications for a license, has no right to be issued a retail license).

E. Under certiorari review, action on an alcohol beverage license cannot be arbitrary, oppressive, or unreasonable. *Nowell v. City of Wausau*, 2013 WI 88, 31 Wis. 2d 1.

F. Municipalities may adopt additional regulations not in conflict with Chapter 125. Wis. Stat. § 125.10.

G. The City of Milton established a "quota" on the number of Class A license that could be issued in the City (one for every 1,500 resident).

H. When the quota became problematic, the City changed it: "Notwithstanding the quotas established in … above, the common council may, by majority vote, grant or issue new licenses in excess of said quotas." But not to a place that sells gasoline.

I. Then there was a proposed Kwik Trip development. Kwik Trip wouldn't build a new store without a license to sell beer. The City changed the quota again, this time eliminating the reference to selling gasoline.

J. The City also adopted a resolution setting forth the factors the city council "may consider" in acting on above-quota licenses:

(1) Whether the building in which the proposed licensed establishment is to be located is in excess of 4,000 sq. ft.;
(2) Whether the proposed licensed establishment is located more than 1,500 feet from school district property;
(3) Whether the proposed licensed establishment would derive less than fifty percent (50%) of its gross revenue from the sale of alcoholic beverages;
(4) Whether the proposed licensed establishment has submitted a plan that adequately ensures that all alcohol sales will be conducted in compliance with all state laws and local ordinances;
(5) Whether the proposed licensed establishment demonstrates a positive economic impact to the community;
(6) Other factors which the Common Council may deem relevant to a specific application.

K. The effect of the City's ordinance and resolution was to create two layers of classifications in which applications for licenses were subject to differential treatment. The first layer differentiated between applicants seeking a license available within the quota, and applicants seeking licenses in excess of the quota. Procedurally, applicants seeking a license in excess of the quota were subject to a public hearing requirement that does not apply to applications under the quota. Substantively, applicants seeking a license in excess of the quota were subject to the criteria in Resolution 2014-23, while applicants seeking a license below the quota are not.

L. The second layer of classification was found within the resolution. Under that resolution, applicants that met the criteria in the resolution were treated differently from applicants that did not meet the criteria.

M. If the City had not adopted a quota, it would have had broad discretion to act on licenses on a case-by-case basis.

5. THE CONSTITUTIONAL FRAMEWORK UNDERPINNING NON-DELEGATION, VAGUENESS AND EQUAL PROTECTION DOCTRINES.

A. *Non-delegation doctrine*.

(1) The non-delegation doctrine that emerges from the above cases provides that the governing body may not delegate authority to grant or deny permits or licenses without providing adequate standards to guide the decision. The legal foundation of the non-delegation doctrine is less easy to describe, but appears to be rooting in the Wisconsin constitution.

(2) "The legislative power shall be vested in a senate and assembly." Wisconsin Constitution, Art. IV, § 1.

(3) Wisconsin's early constitution authorized the legislature to form municipal governments by either general or special laws, and to determine their powers.

(4) In *State ex. Rel. Mueller v. Thompson,* 149 Wis. 488 (1912), the court invalidated a statute authorizing cities to alter or amend their charters and to conduct their own affairs. The court invalidated the statute as an unconstitutional delegation of power to the city to make law. The court reasoned that the constitution gave all legislative power to the senate and assembly, and that the legislature could not delegate its authority without a constitutional amendment.

(5) In response to *State ex. rel Mueller*, the constitution was amended to give us Article XI, § 3, which authorizes cities and villages to determine their local affairs and government, subject only to the constitution and "such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature."

(6) As noted above, the legislature has authorized "village boards" and "city councils" to *exercise* legislative powers, but not to delegate or abrogate those powers. Wis. Stat. §§ 61.34(1) and 62.11(5). This seems to be the foundation of the non-delegation doctrine, as it relates to municipal government.

(7) A municipal governing body that gives itself discretionary authority to act on a permit must also establish standards to govern that

decision. McQuillins § 26:80. [Query: Why is this so in the context of the non-delegation doctrine?]

B. *The vagueness doctrine*.

(1) A number of cases say that an ordinance lacking adequate standards is unconstitutional on "vagueness" grounds.

(2) With regards to the actual constitutional authority the court points to as having been violated by a vague ordinance's arbitrariness, the courts deflect. In *Guse v. City of New Berlin*, 2012 WI App 24, 339 Wis. 2d 399, the court does not specify what portion of the constitution (Wisconsin or Federal) provides the authority for its decision that the ordinance is not vague and thus enforceable. The *Guse* court does not cite due process concerns or equal protection issues as its reasoning. It merely states that if the ordinance is vague, it encourages arbitrary enforcement, and thus is unconstitutional. *Guse*, 2012 WI App 24, ¶ 5.

(3) This is a recurring theme. In *Humble Oil*, the court uses the same method as in *Guse* and uses the blanket term "unconstitutional" without providing specific constitutional authority for striking down the ordinance. The court states that the question at issue is "whether these provisions save the ordinance from being declared unconstitutional for failing to prescribe adequate standards to govern the board in its disposition of a request." *Humble Oil*, 25 Wis. 2d at 7. The court does not specify which portion of the constitution is violated by this ordinance, instead broadly stating that if it is vague and may lead to arbitrary results, it is unconstitutional.

(4) The courts in both *Guse* and *Humble Oil* (and other cases) neglect to point to a specific constitutional provision that a vague ordinance violates.

(5) To understand the vagueness doctrine then, one must return to the original justification for it, which *Guse* and *Humble Oil* seem to be implicitly relying on. The roots of the vagueness doctrine stem from criminal law and the concern for constitutional due process. The doctrine – based on the Due Process Clause – requiring that a criminal statute state explicitly and definitely what acts are prohibited or restricted, so as to provide fair warning and preclude arbitrary enforcement" *Vagueness Doctrine*, Black's Law Dictionary (9th ed. 2009).

(6) Case law also shows that the vagueness doctrine is tied to due process. "(1) To satisfy due process, 'a penal statute [must] define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement.' The void-for-vagueness doctrine embraces these requirements." *Skilling v. United States*, 561 U.S. 358, 364 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). The U.S. Supreme Court stated that the vagueness doctrine is born out of due process concerns of the fifth and fourteenth amendments.

C. *Equal Protection Clause*.

(1) The Equal Protection Clause of the 14th Amendment protects individuals from governmental discrimination. *Swanson v. City of Chetek*, 719 F.2d 780, 783 (7th Cir. 2013).

(2) Equal protection claims are analyzed under rational basis review unless there is a suspect class or a fundamental right is involved. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

(3) A suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to commend extraordinary protection from the majoritarian political process." *San Antonio Independent School District v. Rodrigues*, 411 U.S. 1, 28 (1973). A fundamental right is a right the Constitutional explicitly or implicitly protects. Id. at 17 (holding that education is not a fundamental right).

(4) Rational basis review requires that the governmental classification bears some rational relationship to a legitimate state end. *Clements v. Fashing*, 457 U.S. 957, 963, (1982).

(5) The rational basis test has been characterized as creating a "frequently insurmountable task" for the challenger of an ordinance to prove "beyond a reasonable doubt that the ordinance possesses no rational basis to any legitimate municipal objective." Moreover, ordinances enjoy a presumption of validity, even when challenged on the basis of equal protection. An opponent of an ordinance must establish the ordinance's unconstitutionality beyond a reasonable doubt. *Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 44, 235 Wis. 2d 610, 612, (quoting

Grand Bazaar, 105 Wis.2d at 209, and *State v. Post*, 197 Wis.2d 279, 301 (1995).

6. LEGISLATIVE RESPONSES TO THE EXERCISE OF LOCAL LICENSING AND PERMITTING AUTHORITY.

A. *Wind Energy System Siting Law*. A political subdivision may not deny or impose a restriction on an application for approval unless the political subdivision enacts an ordinance that is no more restrictive than the rules promulgated by the PSC. Wis. Stat. § 66.0401(4)(f)(1).

B. *Stormwater management*. A city, village, town or county may enact an ordinance regulating stormwater management only if the ordinance strictly conforms with uniform statewide standards established by the DNR. A city, village, town, or county may enact and enforce standards that are more stringent than statewide standards for stormwater management if the stricter provisions are necessary to do any of the following: control stormwater quantity or control flooding or comply with federally approved total maximum daily load requirements.

C. *Concentrated Animal Feeding Operations / Livestock Facility Siting Law*.

(1) Pursuant to Wis. Stat. § 93.980, a political subdivision may not prohibit the siting or expansion of a livestock facility in a district zoned as agricultural unless one of a number of statutory conditions are met. These conditions include that the facility will have 500 or more animal units and would either violate a state DNR standard, or would violate a more stringent standard and the political subdivision has adopted that standard by ordinance prior to the facility's filing of its application *and the requirement is based on reasonable and scientifically defensible findings of fact that clearly show the requirement is necessary to protect public health or safety*.
D

(2) Under Wis. Stat. § 92.15(2), a political subdivision may enact ordnances regulating livestock operations that are consistent with and do not exceed performance standards established pursuant to Wis. Stat. § 281.16(3). A political subdivision may enact ordinances with more stringent standards only if the local governmental unit demonstrates to the satisfaction of the DNR or DATCP that the regulations are necessary to achieve water quality standards. Wis. Stat. § 92.15(3).

D. *Mobile Tower Siting Regulations*.

(1) A municipality may regulate the siting and construction of a new mobile service support structure or the substantial modification of an existing support structure only as provided in this section. Wis. Stat. § 66.0404(2)(h).

E. *Proposed Conditional Use Permit Legislation*.

(1) 2017 AB 479: Conditional use standards must be "reasonable and measurable."

7. SAMPLE LANGUAGE AND DRAFTING SUGGESTIONS.

A. Example of an actual conditional use permit standard:

"A proposed conditional use shall be denied unless the Applicant can demonstrate … that the proposed conditional use will not create undesirable impacts on nearby properties, the environment, or the community as a whole."

B. Example of a historic preservation overlay zoning permit standard: "The Plan Commission shall…focus its review on sound aesthetics and site design, urban design, historic preservation and architectural practices."

C. Problems with ambiguity, inconsistency, or bad ideas.

(1) Example of overlay zoning district regulations requiring "project review approval" to make changes to the appearance of a building in the district, such as a building addition, or demolishing the building.

a. "The plan commission shall serve as the final discretionary review body on aesthetics and site design, and shall focus its review on the application's compliance with sound aesthetic, land use, site design, and economic revitalization practices."

b. Project review proposals shall follow procedures for conditional use permits.

(1) Inconsistent language regarding the procedure.
(2) Standards that are very difficult to apply, particularly in the context of demolishing a building.

(2) Example of historic preservation regulations – relating to demolition approval.

a. Upon the filing of an application, the commission may refuse to approve the work for up to ten months from the date of filing, during which time the commission and the applicant shall undertake serious, continuing discussions to try to find a method to save such property. During such time, the applicant and the commission shall cooperate to try to avoid demolition of the property. At the end of the ten months, if no mutually agreeable method of saving the property bearing a reasonable prospect of eventual success is underway, or if no formal application for funds from any governmental unit or nonprofit organization to preserve the property is pending, the commission shall inform the building inspector to deny issuance of the permit. Appeal of the denial of the demolition permit shall go to the city council ….

b. Better language: Demolition shall be approved if: (1) the physical characteristics of the building have changed; (2) the change has caused the building to no longer have the physical characteristics that led to its landmark designation; and (3) the change was not caused by a current or prior owner's failure to maintain the building.

8. ALTERNATIVES TO PERMITTING OR LICENSING.

A. If the community is concerned about possible negative impacts, regulate those impacts directly.

B. Rather than open the door to a potentially problem use as a conditional use, make it a permitted use but only in areas where it should not be a problem.