



**ECKBERG
LAMMERS**
ATTORNEYS AT LAW

www.eckberglammers.com

Writer's Direct Dial:
(715) 808-8843

Writer's E-mail:
nvian@eckberglammers.com

Reply to Hudson

January 4, 2021

Burnett County Land Use & Information Committee
Burnett County
7410 County Road K
Suite 120
Siren, WI 54872

Via Email
jtowne@burnettcounty.org

Norman Bickford, Chair
Craig Conroy, Vice Chair
Chuck Awe
Chuck Anderson
James Pearson
Brent Blomberg
Jim Paden

Re: Johnson Enterprises – Campground CUP Application

Dear Burnett County Land Use & Information Committee:

I serve as counsel to Preserve Burnett County, a group of concerned land owners in Burnett County (“PBC”) regarding the conditional use permit (“CUP”) application (“Application”) filed by Steve Austin, on behalf of Johnson Enterprises PTSP, Gregory and Elizabeth Johnson and North Camp Properties I, LLC (collectively, “Applicant”) for a seasonal campground (“Campground”) on approximately 157.01 acres of property (“Property”) located in the Town of Swiss (“Town”), Burnett County (“County”). On behalf of PBC, I strongly object to the Application as grossly deficient, and ask the Land Use & Information Committee (“Committee”) to deny the Application.

In advance of your consideration of my comments, please note, the Applicant has submitted only the Conditional Use Permit Application dated October 1, 2020 and a rudimentary Concept Plan produced by Wagner Surveying Associates, Inc. The Concept Plan is undated and shows the vague outline of 180 units with an average size of 80’ x 120’.¹ The Burnett County Conditional Use Permit (“CUP”) Application Form requires the following submissions which are not included in the Application. As these submissions are required by the Application Form, the Application should be rejected on its face. The Applicant has failed to submit the following as required by the County:

1. A Plat Plan drawn to scale. The Concept Plan provided is not drawn to scale.
2. Road centerlines including distances to property lines, road rights of way.

¹ While the Concept Map references 180 units in the Campground consistent with the Application request, a hand count of the number of proposed units actually included on the Concept Map reveals the inclusion of 192 units. This inconsistency must be clarified with the Applicant.

Stillwater Office
1809 Northwestern Avenue
Stillwater, MN 55082
Phone: 651-439-2878
Fax: 651-439-2923
[32358-34807/2798623/1]

Hudson Office
430 Second Street
Hudson, WI 54016
Phone: 715-386-3733
Fax: 715-386-6456

3. Existing uses on parcels adjacent to the parcel for the request.
4. All existing zoning districts on parcels adjacent to the parcel for the request.
5. Vegetation proposed to be removed or disturbed.
6. Floodplain and wetland boundaries.
7. Dimensions, locations and setbacks of all proposed structures including all decks/porches/walkways/etc; must show dimensions for ALL items.
8. Existing and proposed utilities and utility easements.
9. Sanitary system, drain field and well with distances to property lines, Ordinary High Water Mark, wetlands, floodplains, existing and proposed buildings.
10. Location and extent of filling / grading.
11. Location and type of erosion control measures.
12. Any other construction related to the project.

The Application Form specifically provides “PARTIAL OR INCOMPLETE APPLICATIONS WILL BE RETURNED TO THE APPLICANT. ONLY COMPLETE APPLICATIONS WITH ALL REQUIRED SUBMITALS AND REQUIRED FEE WILL BE INCLUDED ON THE HEARING AGENDA.” The Applicant’s incomplete submission should render the Application ineligible for consideration on the hearing agenda.

However, should the Committee desire to proceed with the public hearing of the Application, I ask you consider the following information.

Background and Proposed Project

The Property is located in the County’s Agricultural Residential District (A-2). The Purpose of the A-2 Agricultural Residential District as provided in Section 30-170 of the Code of Ordinances is to “primarily provide for the continuation of general farming and related activities in areas currently being used for such development and to additionally provide for limited residential development.” The Application states that the Campground is to include seasonal camping with 180 campsites. While campgrounds may be identified as uses conditionally permitted in the A-2 District, this proposal is wildly in conflict with the stated purpose of the intention to provide for the continuation of general farming and additional limited residential development.

On October 13, 2020, the Town of Swiss Board reviewed and considered the request for a conditional use permit for the Property to construct a 180-unit seasonal campground, restaurant/bar and event center. The Town Board unanimously voted to oppose the Application. On October 23, 2020, Jason Town

requested a response from the Town of Swiss requesting additional information under 2017 Wisconsin Act 67. By letter dated December 8, 2020, a copy of which is enclosed, Chair Terrance Nelson, Supervisor Gerald Pardun and Supervisor George Costello submitted a detailed letter outlining the following objections to the Application:

1. The Application does not comply with the Town of Swiss focus on preserving the unique rural character of the Town.
2. The Application does not comply with the Town of Swiss focus on minimizing land use conflicts by avoiding high density developments in rural areas.
3. The Application does not comply with the Town of Swiss focus on protecting the intricate and complex hydrologic system in the Town.
4. The Application is in direct conflict with the Burnett County Comprehensive Plan because it does not seek compatibility with surrounding uses.
5. The Application does not comply with the desire locate new commercial development near existing commercial sites in the Village of Danbury along the Highway 35/77 corridor.
6. The Application does not promote the creation of commercial zones rather than leapfrog development.
7. The Application does not comply with the Town’s agricultural / open space requirements.
8. The Application fails to satisfy Burnett County’s Basis for Approval as required by Chapter 30 of its Code of Ordinances. Namely, the Application fails:
 - a. To include any environmental study or impact statement.
 - b. To include any information regarding septic needs, stormwater runoff, erosion, noise or light pollution.
 - c. To include any information regarding traffic or the impact on Town roads.
 - d. To include any information regarding development, operations or security.
 - e. To include any traffic management plan, emergency response plan or security plan.

The Burnett Code of Ordinances (“Code of Ordinances”) includes numerous criteria for evaluation of the Application and for the operation of the Campground. Code of Ordinances Section 30-633 requires that “[a]ny conditional uses listed in this chapter shall be permitted only when authorized by the county land use and information committee and subject to its approval.” Further, “The county land use and information committee shall consider the effect of such grant on the health, general welfare, safety and economic prosperity of the county and of the immediate area in which such use would be located

consideration Wis. Stat. §59.59(5e). Wis. Stat. §59.69(5e)(b)(2), the Wisconsin statute regulating conditional use permits, mandates that, “The applicant must demonstrate that the application and all requirements and conditions established by the county relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence.” The state law defines “substantial evidence” as follows: “substantial evidence means facts and information.” The Committee must evaluate the Application in light of these legal requirements and render a decision in a quasi-judicial capacity.

PBC respectfully requests that the Committee deny the Application because there is no substantial evidence supporting it. The little information provided by the Applicant fails to demonstrate the Application can meet the Code of Ordinances standards. Given the lack of adequate information contained in the Application, the Committee does not have the information necessary to lawfully approve the Application and therefore must deny it for the reasons stated below.

Further, in opposition to the Application, the Town of Swiss Board clearly articulated its opposition to the Application detailing the facts and information requiring denial of the Application. Namely, the Application conflicts with the Town’s Comprehensive Plan and further fails to satisfy Burnett County’s Basis for Approval as required by Chapter 30 of its Code of Ordinances.

Code of Ordinances - Conditional Use Permit (CUP) Criteria

In order to understand whether a campground can be approved under the Code of Ordinances and Wis. Stat. §59.59(5e), the Committee must consider the language of Sections 30-170 (A-2 Agricultural-Residential District – Purpose), Section 30-543 (Campgrounds) and Section 30-633 / 634 (Conditional Use Permits). Considered together, these Sections form the framework for the Committee’s consideration and require analysis of the following:

1. The appropriateness of the location, nature, and size of the proposed use.

The Application does not provide sufficient detail to assess the appropriateness of the location, nature, and size of the proposed use. The Code of Ordinances requires the following basic information be provided in conjunction with a campground application:

- A. Compliance with all sanitary requirements of the County sanitary ordinance.
- B. Campground map including layout, location of campsites, roads, property lines, required setbacks, structures, water supplies, private waste disposal system, recreation areas.
- C. Sufficient parking areas on the site.
- D. Screening.

Code of Ordinances Sec. 30-543. The Application only includes a “Concept Plan,” that identifies the approximate areas of campsites with limited proposed sites. The Applicant has failed to provide even the most basic required information, let alone the detailed description of the proposed Campground such

as densities, accessory structures, or sanitary facilities. The Application contains no information regarding compliance with sanitary requirements, nor does it include any reference to structures, water supplies or waste disposal. Moreover, the Concept Plan includes no information about parking within the Campground.

The Committee does not have the facts and information necessary to make a decision on this finding. Given that this information is required under Code of Ordinances, the Application is deficient and must be denied because no substantial evidence supports it.

2. *Its compatibility with existing uses on land adjacent thereto.*

The Campground is incompatible with the surrounding adjacent uses. The Campground would eclipse the surrounding very-low density uses in the vicinity. The Campground would add 180 campsites, which would dramatically increase the local population. The Campground use itself is not consistent with the continuation of farming nor does it provide for limited residential development. The introduction of a restaurant and bar in conjunction with the 180 campsites would dramatically increase traffic, noise and light pollution, as well as pressure on local emergency services.

Even if the Campground were to be occupied only by single-occupancy tents, the use of the Property would dramatically intensify. However, the proposed use of the campsites is unclear and further information is required before the Committee can make a legally sufficient evaluation of the compatibility of the Campground on the adjacent uses.

3. *Its compatibility with the immediate and surrounding environment.*

Based on the limited information, it is impossible to adequately evaluate the compatibility of the Campground on the surrounding environment. The Applicant has provided none of the required information pertaining to sewer, water, or sanitary facilities. The Campground would introduce hundreds of additional vehicles and campers to the Property, which would produce significant amounts of pollutants, including solid waste and sewage. The construction of a restaurant/bar will also result in increased noise and light pollution, as well as increased need for emergency services. The Committee cannot make a legally sufficient evaluation of this requirement under the substantial evidence standard without adequate information detailing waste management, sewer, and water.

4. *The public need for the particular use at the particular location.*

The Code of Ordinances recognizes that such uses may be desirable to be allowed in a particular district when there is a public need for the particular uses at a particular location. Applicant has provided no information as to any need for a Campground on the Property. There is no demand by the public for a Campground at this location, nor is there any deficiency in Burnett County for available campground sites.

5. *The necessity or desirability of the use based on consideration of location, development and operation.*

Based on the limited information, it is impossible to adequately evaluate the compatibility of the Campground with respect to its development and operation. The Applicant has failed to provide any of information required by Burnett County’s Conditional Use Permit application form and accordingly, it is impossible to evaluate the desirability of the use based on its location, development or operation as required by the Code of Ordinances. The Application includes no information regarding the environmental impact, operations plan, traffic plan, hours of operation, intensity of operation or any other detail as to the manner in which the Campground is proposed to operate. For this reason alone, the Application must be denied.

6. *Its relationship to the public interest and the purpose and intent of this article.*

As proposed, the Application will be detrimental to the public interest and contrary to the Code of Ordinances in the following areas:

- a. Promotion and protection of the public health, morals, safety, and general welfare of Burnett County.
- b. Encouragement of the use of lands and natural resources in Burnett County in accordance with their character and adaptability.
- c. Promotion of orderly development.
- d. Securing safety to health, life and property.
- e. Prevention of highways from economic suffocation by encroaching uses;
- f. Preservation of land values and insuring a quality environment for future generations.

The Application does not contain sufficient information to find that the Campground will protect natural resources; promote orderly development; ensure public health, safety, and welfare; or prevent adverse impacts on surrounding roadways. The proposed campground will be detrimental to the surrounding land values, including the existing homes in the community, and there is no indication of how the Campground will prevent adverse impacts on water quality or the surrounding properties. The Application is so woefully deficient that it does not identify a single building or structure associated with the 180 campsites proposed; further, there is no indication of how water, sewage, and waste will be addressed on site. Approval of the Application as submitted would be inconsistent with the express requirements, purpose and intent of both the Code of Ordinances and the State CUP law. Simply put, there is not substantial evidence presented in support of the Application to allow the Committee to make a legally sufficient determination that a CUP should issue.

For all these reasons, on behalf of PBC, I respectfully request that the Committee deny the Application. The Applicant’s submittal is deficient overall, incomplete, fails to demonstrate compliance with the

required criteria and therefore lacks substantial evidence to support the granting of a CUP for the proposed Campground. These inadequacies prevent the Committee from making a legally sufficient evaluation of the Application. Accordingly, it must be denied.

Act 67 Impact on Committee Consideration

Act 67 does not limit the underlying power of the County from deciding whether the CUP Application should be granted or denied. While Act 67 does require approval of a CUP in appropriate circumstances, the Act focused on requiring proper process in regulating and enforcing existing land use codes.

The Wisconsin Legislature enacted changes to the zoning enabling statutes in July 2017. These “Act 67” changes amended Wis. Stats. § 59.69 by adding the following provisions:

(5e) Conditional use permits. (a) In this subsection:

1. “Conditional use” means a use allowed under a conditional use permit, special exception, or other special zoning permission issued by a county, but does not include a variance.

2. “Substantial evidence” means facts and information, other than merely personal preferences 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.

(b) 1. If an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the county ordinance or those imposed by the county zoning board, the county shall grant the conditional use permit. Any condition imposed must be related to the purpose of the ordinance and be based on substantial evidence.

2. The requirements and conditions described under subd. 1. must be reasonable and, to the extent practicable, measurable and may include conditions such as the permit's duration, transfer, or renewal. ***The applicant must demonstrate that the application and all requirements and conditions established by the county relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence. The county's decision to approve or deny the permit must be supported by substantial evidence.***

The changes to Act 67 codify what was already existing law with respect to review of conditional use permits. The requirement that there be “substantial evidence” has always been a part of the standard of review of a local decision *approving or denying* a CUP. And the requirement of a nexus between conditions that are imposed on a particular property is also a common law requirement.

January 4, 2021

Johnson Enterprises – Campground CUP Application

Moreover, conditional use permits remain an *exception* and are *not presumed* to be permitted under the enabling statutes and case law. The Supreme Court’s decision in *AllEnergy Corporation v. Trempealeau County Land Services Committee* 375 Wis.2d 329 (2017), including the discussion in the dissent, does not alter that established law. And neither the decision in *AllEnergy*, nor the enactment of Act 67, allow a local government to use Act 67 or adopt or enforce a local practice that would have the effect of creating a presumption that CUP’s are permitted uses unless shown otherwise. They are not.

Under Act 67, the County may deny conditional use permit requests outright and may impose appropriate conditions. More significantly, municipal bodies must be well advised to apply the proper standard of review to both approval and denial of conditional use permits and all permit and land use requests.

As the plain language of the statute requires, if an applicant does not meet an express *requirement* within the language of the zoning and land use code, the conditional use permit may not be granted. There was never a requirement that conditional use permits be granted to any applicant and there still is no such requirement if the land owner’s proposed use does not comply with all requirements of state law and the County’s land use regulations.

Accordingly, because the Applicant has provided so little information regarding the operation of the Campground and further because the Campground use conflicts with the Town of Swiss Comprehensive Plan and the express Purpose of the County’s A-2 Zoning District, the Application must be denied.

Please do not hesitate to contact me with any questions, concerns or additional information that you may require.

Sincerely,

/ S / Electronically signed by Nicholas J. Vivian

Nicholas J. Vivian

Enclosures – Town of Swiss – December 8, 2020 Correspondence

c: Preserve Burnett County