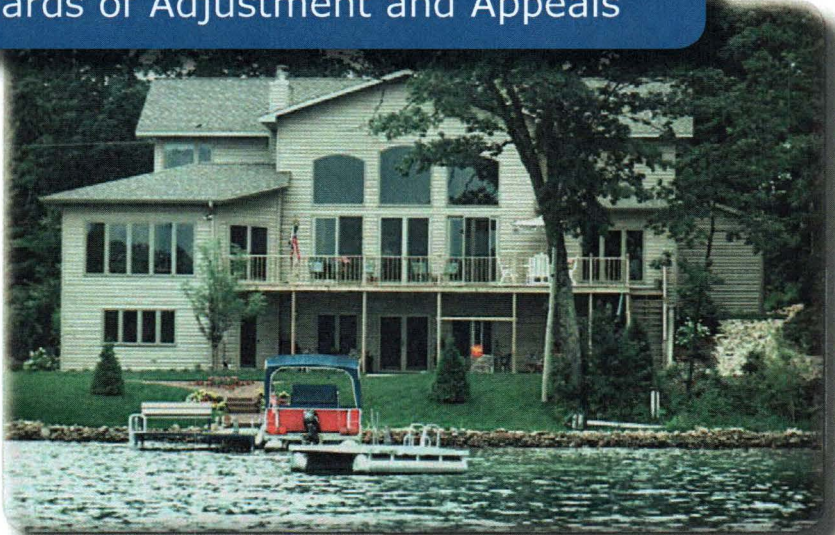


Zoning Board Handbook

For Wisconsin Zoning Boards of Adjustment and Appeals



2nd Edition
2006

Lynn Markham
and
Rebecca Roberts
Center for Land Use Education



ZONING BOARD HANDBOOK

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Cover photos:

Top: Potential land use conflict between gravel pit and adjacent housing. *Photo © Regents of the University of Minnesota. Used with the permission of Metropolitan Design Center.*

Center: Waterfront home in Oneida County lacking shoreland buffer. *Photo courtesy of Robert Korth, UW-Extension Lakes Partnership.*

Bottom: Potential land use conflict between industrial and residential land uses. *Photo © Regents of the University of Minnesota. Used with the permission of Metropolitan Design Center.*

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Introduction



At different points in their lives, people sometimes want more rules and at other times they want fewer rules. They want more rules when the rules apply to what their neighbors can do. And they want fewer rules when the rules apply to what they can do on their own property.

-- A long-time politician from northeast Wisconsin

Many communities use zoning to help them protect the aspects of life that they cherish—from strong communities and scenic vistas to safe drinking water and high quality lakes and streams. Zoning ordinances implement local land use plans that affect many economic and quality of life issues in communities throughout Wisconsin. It takes many groups of people working together to implement zoning effectively and to keep it up-to-date. In this endeavor, zoning boards are essential to the fair and effective administration of these laws as they act like judges to interpret ordinances and uphold the legal standards that were developed to help the community achieve its goals.

This handbook is intended to assist zoning board members with their responsibilities and to aid local government officials and the public in understanding the role of the zoning board and the procedures and standards with which their decisions must comply.

Zoning boards are known by a number of names: boards of adjustment for counties; boards of appeals for cities, villages and towns; or sometimes just the BOA. We will generally refer to them as *zoning boards* in this handbook. We use *plan commission/committee* in a generic fashion to refer to all of the following planning bodies: plan commissions for cities, villages and towns with village powers; planning committees for towns without village powers; and planning agencies (commonly referred to as planning and/or zoning committees) for counties.

Zoning board members should consult their municipal attorney or corporation counsel for advice. In some cases the Wisconsin Department of Justice or a state agency with local program oversight responsibilities may be able to provide information.

Inside the Handbook

The Zoning Board Handbook is organized into the following sections:

- **Section I: Zoning Board Basics** – introduction to zoning and the duties and organization of the zoning board.
- **Section II: Laws that Apply to the Zoning Board** – open meetings law, ethics and operating procedures.
- **Section III: Zoning Board Decision Process** – applications, meetings and decision-making.
- **Section IV: Decisions of the Zoning Board** – legal standards for administrative appeals, conditional uses and variances, plus accommodations for the disabled.
- **Section V: Appeal of Zoning Board Decisions** – procedures and standards used by the circuit court when reviewing zoning board decisions.
- **Section VI: Improving Zoning Board Decisions** – who the zoning board works with, self-audits and improving the zoning ordinance.
- **Section VII: Shoreland and Floodplain Zoning** – purposes, legal standards and management strategies for shoreland and floodplain areas.
- **Appendix** – resources, forms and examples.

At the end of each section there is a list of *key words* and *questions* you should have mastered after reading the section. Use these resources as a checklist to assess your knowledge of zoning boards.

The footnotes provide references to relevant court decisions and other references. In addition, Appendix B provides websites to access the full text of the decisions and summaries of zoning-related court decisions written by the Wisconsin Department of Natural Resources.

Handbook Updates

The Zoning Board Handbook is an evolving document. Please help us keep the handbook up-to-date by letting us know about:

- Errors or omissions
- Unclear language
- Additional topics or questions you would like addressed
- Local examples or case law to illustrate concepts in the handbook

Additional Resources

The following resources are available to supplement the Zoning Board Handbook:

- **Workshops:** The Center for Land Use Education offers zoning board workshops upon request serving multi-county areas of Wisconsin.
- **Videos:** DVD recordings of past zoning board workshops are available from the Center for Land Use Education.
- **Website and Electronic Mailing List:** Updates on recent court decisions and other topics relevant to the zoning board are available on the Center for Land Use Education website: www.uwsp.edu/cnr/landcenter/workshopsdocs.html. You may also sign up by email to receive information about upcoming workshops, revisions to important statutes and case law, and updates to the handbook. Visit our Newsletter web page (www.uwsp.edu/cnr/landcenter/newsletters.html) to subscribe to our electronic mailing list.

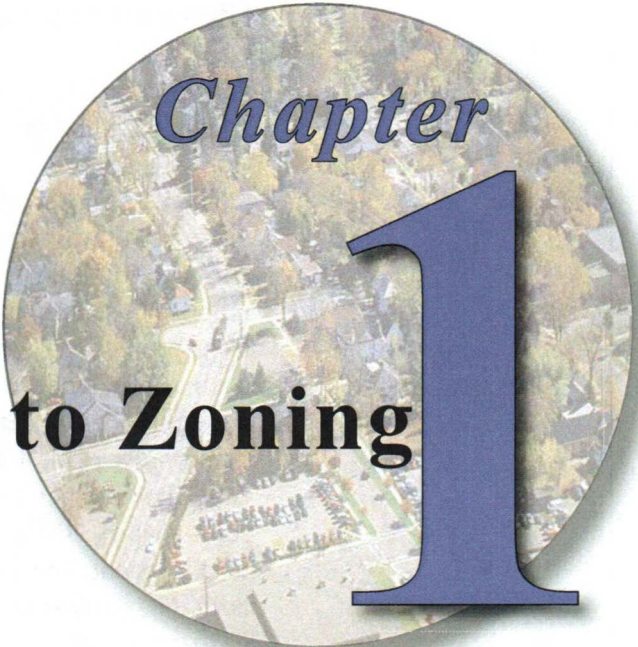
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Chapter 1

Introduction to Zoning

Zoning is one of the most common methods of land use control used by local governments. Zoning refers to the use of the public regulatory power, or **police power**, to specify how land may be used and developed. The intent of zoning is to balance individual property rights with the rights of the general public to a healthy, safe and orderly living environment.

State statutes provide authority and procedures for Wisconsin counties, towns, cities and villages to adopt general zoning (also known as comprehensive zoning) in order to protect public health, safety, morals, and general well-being.¹ Local governments in Wisconsin decide for themselves whether or not to have general zoning.² The majority of communities have chosen to have general zoning as one tool to achieve community goals such as:

- Public health, safety and welfare,
- Natural resource protection,
- Protection of investments, and
- Aesthetics.

Police Power - The right of government to restrict an individual's conduct or use of property in order to protect public health, safety, and welfare.

¹ Counties – Wis. Stat. § 59.69; Towns – Wis. Stat. §§ 60.61 and 60.62; Villages – Wis. Stat. § 61.35; Cities – Wis. Stat. § 62.23(7).

² Some other types of zoning are required by the state as described under *Additional Forms of Zoning*.

Elements of a Zoning Ordinance

A zoning ordinance consists of two legally adopted elements: the zoning map and the text of the zoning ordinance.

General zoning works by dividing the community into districts or ‘zones’ designated for different uses, such as residential, commercial, industrial or agricultural use. Zoning districts are mapped based on land suitability, avoidance of conflict with nearby uses, protection of environmental features, economic factors such as efficient provision of public services and infrastructure, and other locally determined land use objectives articulated in a community plan. Each zone contains a different set of land use rules that is articulated in the text of the zoning ordinance. These rules specify: 1) the use of the land, 2) the density of structural development, and 3) the dimensions of structures and setbacks. In addition, the text of the zoning ordinance describes the purpose of each zoning district and related administrative and enforcement procedures.

To achieve specific objectives, some communities adopt overlay zones that apply restrictions to certain areas identified on a map in addition to the restrictions in the underlying base zoning districts. Figure 1 illustrates a zoning map that includes general zoning and shoreland overlay zoning.



Figure 1: Zoning map showing general zoning with shoreland overlay. (Map courtesy of Kevin Struck)

Allowable Uses for each District

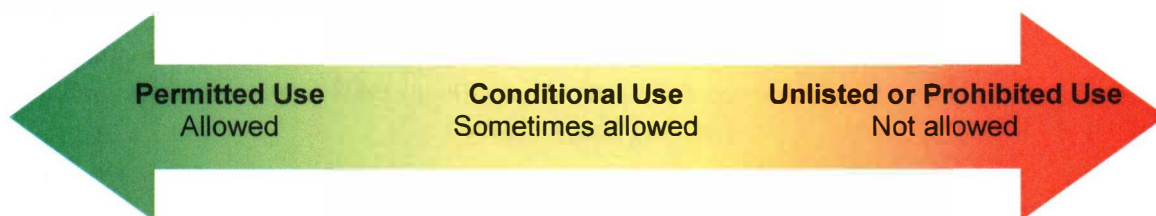
Generally, two categories of allowable uses are listed for each zoning district: permitted uses and conditional uses. **Permitted uses** are allowed as a matter of right in all locations in a zoning district and may be authorized by the zoning administrator or building inspector with a simple permit. Authorization is non-discretionary provided the project complies with general standards for the zoning district, any overlay district or design standards, and related building or construction codes. **Conditional uses** are listed in the zoning ordinance for each district but are subject to an additional layer of scrutiny.³ Conditional uses are authorized on a discretionary basis, meaning they are only authorized if found to be compatible with neighboring land uses, if they can be tailored to meet the limitations of the site, and if they do not violate the objectives of the zoning ordinance. Conditions may be attached to the approval of a conditional use permit. Uses that are not listed in the zoning ordinance for a particular district or that are expressly prohibited are not allowed in the district, except on rare occasions by use variances.

Permitted Use - A use listed in the zoning ordinance that is allowed 'by right' at all locations in a zoning district.

Conditional Use - A use listed in the zoning ordinance that may be allowed if found to be compatible with neighboring uses, limitations of the site, and the purposes of the ordinance. Conditions may also be attached upon approval.

Unlisted or Prohibited Use - A use that is not allowed in a district because it is not expressly listed or is specifically prohibited by the zoning ordinance.

Figure 2: Uses are divided into three categories for each zoning district.



³ In this chapter we use 'conditional uses' to mean both conditional uses and special exceptions. These two terms are discussed in detail in Chapters 2 and 14.

Section I – Zoning Board Basics

Variance - Allows a property to be used in a manner that is not permitted by the zoning ordinance.

Administrative appeal - A process to resolve disputes regarding ordinance interpretation or the reasonableness of a zoning decision.

Relief from Strict Adherence to the Zoning Code

Recognizing the fact that zoning ordinances cannot be written to address every circumstance, zoning ordinances must specify procedures for seeking relief from strict adherence to the zoning code. A **zoning variance** authorizes a landowner to establish or maintain a use that is prohibited in the zoning ordinance. Requests for variances are not always granted. An **administrative appeal** is a process used to resolve disputes regarding ordinance interpretation or the reasonableness of a zoning decision. If applicants or neighboring landowners are unhappy with the decision of a zoning administrator, they may appeal that decision to the zoning board of adjustment or appeals.

Map and Text Amendments

Both the zoning map and the text of the zoning ordinance may be updated and amended over time. Ordinance amendments may be initiated at the request of a landowner or by the governing body. The governing body creates, updates, and amends all zoning ordinances, typically with recommendations from the planning committee/commission.

Additional Forms of Zoning

Though local communities may decide whether or not to adopt general zoning, state statutes require communities to administer certain types of zoning as described below:

- Shoreland zoning provides development standards near waterways to protect water quality, aquatic and wildlife habitat, shore cover and natural scenic beauty. Wisconsin statutes require counties to exercise shoreland zoning.⁴
- Shoreland-wetland zoning generally prohibits or severely restricts development in wetlands near waterways. It has the same objectives as shoreland zoning and is required of counties, cities and villages that have received wetland maps from the state.⁵

⁴ Wis. Stat. § 59.692; Wis. Admin. Code ch. NR 115.

⁵ Counties - Wis. Admin. Code ch. NR 115; Villages - Wis. Stat. § 61.351; Cities - Wis. Stat. § 62.231.

- Floodplain zoning provides location and development standards to protect human life, health and property from flooding. It is required of communities that have been issued maps designating flood prone areas.⁶

In addition, communities may opt to implement additional forms of zoning to protect specific community resources. Examples include exclusive agricultural zoning, stormwater management zoning, extraterritorial zoning, and overlay zoning.

Zoning and the Comprehensive Plan

A comprehensive plan is a tool used by communities to study how various aspects of a community are working and to articulate how the community desires to develop in the future. A comprehensive plan is prepared by a planning commission or committee and is adopted by the governing body. The plan sets forth broad goals, objectives, policies and recommendations that may be implemented using a variety of tools. Zoning is one of many possible tools used to implement a plan. In Wisconsin, local land use actions and regulations such as zoning and land division regulations must be consistent with a locally adopted comprehensive plan by January 1, 2010.⁷ If the zoning ordinance or related zoning decisions are not consistent with the plan, resulting actions may be subject to legal challenge.

Community or comprehensive planning is distinct from zoning in two important ways. First, planning is policy-oriented, whereas zoning is regulatory. Second, a planning process is designed to foster public input. In other words, the plan should be a reflection of the community's desires. Zoning decisions, on the other hand, should be based on the decision criteria outlined in local ordinances, state statutes and case law as well as the individual facts of the case at hand. Decisions of a zoning administrator or the zoning board should not be unduly influenced by public opinion.

⁶ Wis. Stat. § 87.30(1).

⁷ According to Wis. Stat. § 66.1001(3) beginning on January 1, 2010, if a local governmental unit engages in official mapping, subdivision regulation, state-mandated shoreland or shoreland-wetland zoning, or county, city, village or town zoning, these actions must be consistent with the local governmental unit's comprehensive plan. See also: *Step Now Citizens Group v. Town of Utica Planning & Zoning Comm.*, 2003 WI App 109, 264 Wis. 2d 662, 663 N.W.2d 833.

Chapter I – Introduction and Overview

Introduction to the Zoning Board

Chapter

2

Role of the Zoning Board

Communities that have adopted a zoning ordinance are required to appoint a zoning board of adjustment or appeals. The primary role of a zoning board is to review and decide cases where there is an alleged error in a zoning decision or where a relaxation of the ordinance is sought. Zoning boards may be authorized to participate in three types of decision-making:⁸

- **Administrative appeal** - a legally contested order or decision of the zoning official (usually associated with a contested map or text interpretation).
- **Variance** – a relaxation of a dimensional or use standard specified in the zoning ordinance.
- **Special exception/conditional use** – a use or dimensional exception listed in the zoning ordinance that is not permitted by right but may be granted if certain conditions are met. (Zoning boards do not have this authority unless authorized by local ordinance.)

While it is tempting to think of zoning boards as providing flexibility in administration of zoning, flexibility is strictly limited by state and local

⁸ County or town – Wis. Stat. § 59.694(7); City, village or town exercising village powers – Wis. Stat. § 62.23(7)(e)7.

Section I – Zoning Board Basics

A note on special exceptions and conditional uses

Wisconsin Statutes authorize zoning boards to make **special exceptions** to the terms of a zoning ordinance when also authorized by local ordinance. Wisconsin court decisions utilize the terms special exception and conditional use interchangeably. Some Wisconsin communities use the terms interchangeably while others make a distinction.

Special exceptions generally refer to any exception made to the zoning ordinance including dimensional changes.

Conditional uses, in some ordinances, refer only to land *uses*.

Any exception to the zoning ordinance, whether dimensional or use in nature, must be specifically listed in the zoning ordinance. Throughout the remainder of the text we will consider these terms together and refer to them as conditional uses.

laws that determine the authority of zoning boards and provide criteria for decision-making. Local governing bodies and the public must look beyond the zoning board for added flexibility. Map and text amendments, performance standards, alternative design standards, standards for conditional uses and mitigation requirements that compensate for adverse effects of development all provide opportunities for flexibility that can be integrated into local ordinance provisions.

Zoning Board Authority

Authority for zoning board decision-making is determined by Wisconsin Statutes. The primary role of the zoning board, as outlined in state statutes is to hear and decide administrative appeals and variances related to general zoning. In almost all cases, zoning boards also assume this role related to shoreland zoning, shoreland-wetland zoning, exclusive agricultural zoning, construction site erosion control and storm water management zoning. Unless provisions are adopted for county zoning boards under Wis. Stat. § 59.69, zoning boards do not have authority to hear and decide administrative appeals or variances related to subdivision ordinances. This authority is reserved for the governing body or plan commission.

In some but not all communities, zoning boards are authorized to hear and decide special exceptions/conditional use permits related to the types of zoning previously mentioned. A local ordinance must specifically authorize one of three bodies to perform this role: the governing body, the plan commission or the zoning board.

Statutory references for zoning board authority and exceptions are provided in Figure 3 and referenced in the footnotes.

Chapter 2 – Introduction to the Zoning Board

Figure 3: Statutory Authority of Zoning Boards

Figure 3: Statutory Authority of Zoning Boards				
	County	City	Village	Town
General zoning	59.694(7)	62.23(7)(e)7	61.35	60.62(1) and 60.65(3)&(5)
Shoreland zoning	59.692(4)(b)	62.23(7)(e)7	61.35	
Shoreland-wetland zoning	59.692(4)(b)	62.231(4)(a)	61.351(4)(a)	
Floodplain zoning	NR 116.19	NR 116.19	NR 116.19	No authority ⁹
Construction site erosion control & storm water management zoning	59.693(4)(b)	62.234(4)(b)	61.354(4)(b)	60.627(4)(b)
Exclusive agricultural zoning	91.73(1) ¹⁰			
Livestock facility siting	93.90 ¹¹			
Renewable energy systems	59.694(7)(d)	62.23(7)(c) ¹²		
Public utility permits	No authority (unless adopted under 59.69) ¹³	62.23(7)(e)7 ¹⁴		
Solid waste management	No authority (unless adopted under 59.69) ¹⁵	No authority ¹⁶		
Subdivision/land division	No authority (unless adopted under 59.69) ¹⁷	No authority ¹⁸		
Uniform Dwelling Code	No authority ¹⁹			
Well codes	No authority ²⁰			
Private sewage systems	No authority ²¹			

⁹ Wis. Admin. Code §§ NR 116.05 & 116.19 do not mention town authority to implement floodplain zoning.

¹⁰ Wis. Stat. § 91.73(1) requires administration of local farmland preservation ordinances consistent with the general zoning authority for county, city, village, and town jurisdictions.

¹¹ Appeals of livestock facility siting decisions are taken directly by the Livestock Facility Siting Review Board within 30 days of the decision and are appealed to circuit court thereafter. Authority to decide conditional use permits required under general zoning or exclusive agricultural zoning reverts to the decision-maker authorized under those ordinances.

¹² Not explicit in statutes. Stated purposes of zoning include: “to provide adequate light and air, including access to sunlight for solar collectors and to wind for wind energy systems” [Wis. Stat. § 62.23(7)(c)]. Zoning board powers apply to all ordinances adopted pursuant to this chapter [Wis. Stat. § 62.23(7)(e)7].

¹³ No express mention of authority for zoning board unless such an ordinance is adopted under Wis. Stat. § 59.69.

¹⁴ Wis. Stat. § 62.23(7)(e)7 states “The board may permit... a building or premises to be erected or used for such public utility purposes in any location which is reasonably necessary for public convenience and welfare.”

¹⁵ Under Wis. Stat. § 59.70(2h) counties may adopt ordinances necessary to conduct solid waste management activities, but there is no express authority for zoning board unless related ordinances are adopted under authority of Wis. Stat. § 59.69.

¹⁶ There is no express authority for solid waste management activities by cities, villages or towns.

¹⁷ Wis. Stat. §§ 236.10(1)&(3) delegate this authority to the governing body or a plan committee/commission unless provisions are adopted under Wis. Stat. § 59.69.

¹⁸ Wis. Stat. §§ 236.10(1)&(3) delegate this authority to the governing body or a plan committee/commission.

¹⁹ Wis. Admin. Code § Comm 20.02 requires strict conformity with Uniform Dwelling Code (UDC) provisions. Wis. Admin. Code § Comm 20.19 allows only the Department of Commerce to consider variances to UDC provisions.

²⁰ Under Wis. Stat. § 280.21 only counties are able to assume administration of the state well code, and requests for variances and interpretations are made to the DNR (Wis. Admin. Code § NR 845.06).

²¹ Under Wis. Stat. § 145.24(1) the Dept. of Commerce considers variances to siting and design standards for privately owned wastewater treatment systems.

Section I – Zoning Board Basics

Chapter 3

Formation and Organization of the Zoning Board

Composition of the Zoning Board

Legal requirements regarding membership, appointment and terms of zoning board members differ among counties, towns, cities and villages as specified in state statute. Generally, city, village and town zoning boards are called “zoning boards of appeal”. Counties, and the roughly 200 or so towns throughout the state that operate under town zoning (without village powers) are called “zoning boards of adjustment”. The composition of county and town boards of adjustment and city, village and town boards of appeal differ slightly and are summarized in the table in Figure 4.

Figure 4: Composition of the Zoning Board	
County Zoning Board of Adjustment	<ul style="list-style-type: none"> • Three to five members²² plus two additional alternates • Members must reside in the county but outside of incorporated area • No more than one member from each town • Appointed by the county executive or county administrator, if present, or the county board chair²³ • Appointed for three-year staggered terms, beginning July 1 • Appointment subject to approval of the governing body
Town Zoning Board of Adjustment²⁴	<ul style="list-style-type: none"> • Three members plus two additional alternates • Members must reside in the town • No more than one member from the town board • Appointed by the town board for three-year staggered terms
City, Village or Town²⁵ Zoning Board of Appeals	<ul style="list-style-type: none"> • Five members plus two additional alternates • Appointed by the city mayor, village president or town board chair for three-year staggered terms • Appointment subject to approval of the governing body

²² Three members for counties with population greater than 500,000. Up to five, but not less than three members for counties with population less than 500,000 as specified by county resolution.

²³ Wis. Stat. §§ 59.17(2)(c), 59.18(2)(c) & 59.694(2)(a)

²⁴ Applies to towns without village powers operating under Wis. Stat. § 60.65.

²⁵ Applies to towns exercising village powers under Wis. Stat. § 60.62.

Recruitment of Members

The selection and appointment of zoning board members is an important decision. Selecting members with care often improves the quality, acceptability and defensibility of decisions made by the zoning board. Strong candidates should possess effective decision-making skills, the ability to remain open-minded and impartial, an ongoing commitment to continuing education and skill development, familiarity with zoning and land use concepts, an understanding of the unique role of the zoning board, and long-term dedication to the position. Suggested criteria for appointment of members include:²⁶

1. **Diversity of membership.** The zoning board should reflect the diversity and uniqueness of the community it represents. In order to provide broad familiarity with differing landscapes, development patterns and other community issues, members should be appointed to represent the different geographic areas and jurisdictions present in the community. In addition, consideration should be given to the age, gender, ethnicity and professional composition of the zoning board.
2. **Land use expertise.** To ensure that zoning board members are capable of understanding development proposals and determining their impacts, individuals with academic or professional knowledge of land use law, zoning, natural resources or construction and development practices, and those who are able to read site plans and related maps should be considered for appointment.
3. **Commitment to community service and continuing education.** Members who have demonstrated an interest in community service by serving as elected officials, citizen advisors or in some other capacity and who are willing to attend educational sessions provided for zoning board members should be appointed in order to provide stable membership and sound decision-making by the board.
4. **Understanding and acceptance of the nonpartisan, quasi-judicial role of the zoning board.** Perhaps most important,

²⁶ Additional guidance related to recruiting, selecting, and retaining dedicated and representative board or commission members is provided in the Center for Land Use Education bulletin, *Recruiting and Retaining Qualified Plan Commissioners*. Douglas Miskowiak and Chin-Chun Tang. September 2004. Center for Land Use Education. 20pp. Available: <http://www.uwsp.edu/cnr/landcenter/pubs.html>

prospective members must understand and accept that the zoning board is not a policy-making body and that it must apply the law to specific fact situations whether or not they agree with the law or regulation in question.

Considerations for Appointment

In order to ensure the objectivity of zoning board decisions, the personal and professional interests of zoning board members must be carefully considered. Individuals who are selected for their land use or zoning expertise, such as developers or real estate professionals, may find themselves in a position where a zoning board decision involves a professional acquaintance, family member or personal interest. Occasional conflicts of interest are likely to occur and should be avoided by asking members to remove themselves from the decision-making process in these instances (*see statutory conflicts of interest in Chapter 6*). Such occurrences may also be reduced by selecting individuals for the zoning board that do not hold a direct financial interest in local land use decisions.

In all situations, it is necessary to balance the contribution of prospective zoning board members against the potential for conflicts of interest or litigation. We advise that members of the local governing body not be appointed to serve on the zoning board. It is difficult to separate the legislative and quasi-judicial roles associated with each position. Wide discussion of public policy issues (such as land use laws) and constituent representation may be encouraged in the legislative process, but they are strictly limited or prohibited by due process concerns of zoning board decisions (*see ex parte communication in Chapter 6*). Furthermore, it would be difficult for an individual in this position to maintain objectivity when interpreting or applying a zoning policy they had voted against as an elected official. The potential lack of objectivity or even *appearance* of such could lead to litigation.

Appointment of Alternates

The appointment of two **alternate** members to the zoning board is required by law. By statute, the designated “first alternate” is required to act with full powers of the zoning board when a regular member cannot vote due to conflict of interest or absence. The

Alternate - a member of the zoning board required to act in the place of a regular zoning board member if a member is absent or has a conflict of interest.

Section I – Zoning Board Basics

“second alternate” is required to act when the first alternate or multiple members of the zoning board are unable to vote.²⁷

Appointing alternates helps to ensure that landowners and developers are provided with timely and unbiased decisions by minimizing the postponement of decisions due to absences, resignations, or conflicts of interest. Individual communities vary in their expectations of zoning board alternates. Some require that alternates attend all meetings and hearings including opportunities for continuing education, while others simply encourage that first and second alternates attend, or call in the case of known conflicts. The latter scenario presents problems as there may be last minute absences or unforeseeable conflicts of interest.

Filling Vacancies

If a zoning board member or alternate cannot serve the full length of their term, the vacancy is filled for the remaining portion of the term. Though not required, zoning board alternates may serve as ideal candidates to fill these vacancies. After serving in an “apprentice” role and gaining familiarity with the day-to-day issues and operating procedures of the zoning board, these members may easily transition into a regular position.

Removal for Cause

If necessary, zoning board members may be removed from their position, but only for cause after written charges and an opportunity for a public hearing.²⁸ There have been very few instances where such measures have been taken in Wisconsin.

Selection and Duties of Zoning Board Officers

A county zoning board of adjustment chooses its own chair²⁹ and may choose a vice-chair and secretary. The chair of the city, village or town³⁰ governing body designates the zoning board of appeals chair subject to approval by the governing body.³¹

²⁷ Wis. Stat. §§ 59.694(2)(am) & 62.23(7)(e)2

²⁸ City, village and town board of appeals - Wis. Stat. § 62.23(7)(e)2

²⁹ Wis. Stat. § 59.694(2)(c)

³⁰ Authority for zoning boards in towns with village powers. Where a town has not adopted village powers, Wis. Stat. § 60.65 applies.

³¹ Wis. Stat. §§ 62.23(7)(e)2 & 62.09(3)(e)

Chapter 3 – Formation and Organization of the Zoning Board

The duties of the zoning board chairperson include:³²

1. Determining dates and times of meetings and hearings, other than those set by the board as a whole.
2. Exercising responsibilities under the open meetings law (*see Chapter 5*).
3. Presiding at meetings and hearings.
4. Leading the board through agenda items and calls for votes.
5. Deciding points of order subject to reversal by majority vote of the board.
6. Administering oaths to witnesses and issuing subpoenas to compel their attendance.
7. Supervising work of the board secretary.

In the case of the chairperson's absence, the vice chair or acting chair assumes the responsibilities of the chairperson.

The zoning board may use zoning agency staff or retain its own staff for clerical functions as authorized by the governing body. However, the zoning administrator or other staff person who represents the municipality and presents testimony to the board should remain independent from the board and should not serve as board secretary.

The duties of the secretary include:

1. Performing record keeping and clerical duties.
2. Providing public notice of hearings and meetings (*see Chapter 5*).
3. Implementing compliance with the Wisconsin public records law.

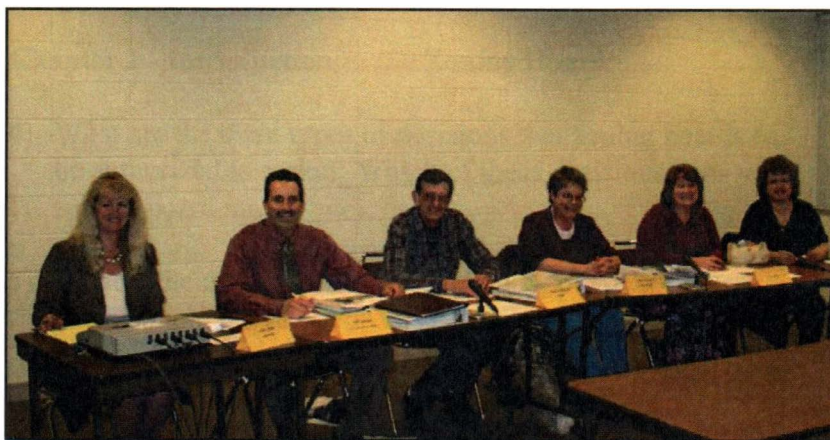


Figure 5: Kenosha County Board of Adjustment (left to right) Secretary Dawn LaPoint, Senior Land Use Planner Andy M. Buehler, Chairman William Glembocki, Vice Chairman Emily Uhlenhake, Members Kay Goergen and Barbara Ford.

³² Counties – Wis. Stat. § 59.694(3); Cities, Villages and Towns – Wis. Stat. § 62.23(7)(e)3.

should be created by the local governing body with input from the zoning board and staff (*see chapter 7*).

Many procedural and decision standards applicable to zoning boards are derived from case law. When locally contested decisions are appealed to and decided by the Wisconsin Supreme Court or courts of appeals, those decisions become precedent and are referred to as **case law**. References to these cases are included throughout the text and are cited in the footnotes. *Appendix B* provides guidance for looking up relevant court cases in Wisconsin.

To ensure that all of these rules are known and followed locally, we recommend that new zoning board members be provided with a packet containing all of these materials upon initial appointment, and that zoning staff provide regular updates to the zoning board when materials change. We also recommend providing a concise version of applicable rules, procedures, and decision-making standards to applicants along with blank application forms.



Chapter 5

Open Meetings Law

All zoning board meetings and hearings must comply with Wisconsin's open meetings law.³³ The law is intended to give the public prior notice of meetings of governmental bodies and to assure that they are held in places that are open to the public and reasonably accessible to the public, including the disabled. Some meetings or portions of meetings are permitted to be held as closed sessions, but generally, discussion and decision-making at governmental meetings must be conducted in open session and motions and voting must be open and recorded.

Open Meetings

Under the law, a meeting is a gathering of members of a governmental body for the purpose of exercising responsibilities and authority vested in the body. A meeting occurs when both a purpose test and a numbers test are met:

- **The Purpose Test** is met when discussion, information gathering, or decision-making take place on a matter within the jurisdiction of the governmental body. For zoning boards, that includes matters pertaining to conditional uses, variances, and

Open Meeting – a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times.

³³ Wis. Stat. §§ 19.81-19.98

administrative appeals as well as appeals of the zoning board's decisions.

- **The Numbers Test** is met when enough members of the body are present to determine the outcome of an action. By statute, if a quorum is present (generally one-half of the members of the body), there is presumed to be a meeting unless the purpose test is not met. A lesser number of members may also meet the numbers test if sufficient numbers are present to block a decision (e.g., two members of a five-member city/village/town zoning board where four votes are required to carry an issue). This is known as a “negative quorum.”

Quorum – at least one-half of the members of a body; sufficient to decide most matters.

Negative Quorum – enough members of a body (generally less than quorum) to block a decision.

Walking Quorum – a series of meetings or discussions, each involving less than a quorum, intended to decide a matter.

Site inspections by the zoning board must comply with the open meetings law if the purpose and numbers tests are met. If board members travel to an inspection site together, they should refrain from discussing board business while in transit. Inspections in which no testimony is taken and no discussions are held constitute meetings if the numbers test is met since their intended purpose is to gather information relating to board business.

Phone conferences, chance and social gatherings, and conferences may also constitute a meeting if the numbers and purpose tests are met. Telephone calls to arrange meeting logistics and gatherings where no board business is discussed do not meet the open meetings test.

Local officials should be aware that a series of gatherings, telephone calls, faxes, or e-mails between zoning board members may constitute an illegal meeting. A series of meetings or discussions, each less than quorum size, to discuss board business (other than logistics) is known as a “walking quorum” and is illegal because it is not noticed and open to the public.

Closed Sessions

Permitted exemptions for closed sessions

Unless specifically exempted by state statute, all meetings of governmental bodies must be open and reasonably accessible to the public. Recognizing that opportunities for zoning boards to go into closed session are extremely limited, statutory exemptions that may apply to zoning boards are listed below:³⁴

³⁴ Wis. Stat. § 19.85(1)(a-j)

1. **Deliberation concerning a case** - Deliberation concerning a case that was the subject of a quasi-judicial hearing. The courts have determined a case to be an adversarial proceeding with opposing parties, not merely deciding whether to grant an administrative appeal, variance or conditional use permit. Neighbors or others testifying for or against the granting of an administrative appeal, variance or conditional use are not parties.³⁵
2. **Conferring with legal counsel** - Conferring with legal counsel about strategy regarding current or likely litigation.
3. **Actions concerning public employees** - Consideration of dismissal, demotion, licensing or discipline of a public employee or licensee unless the employee or licensee requests that the meeting be held in open session. Consideration of employment, promotion, compensation or performance evaluation data of a public employee.
4. **Potentially damaging personal information** - Consideration of financial, medical, social or personal histories or disciplinary data about specific persons that would be likely to have a substantial adverse effect on the reputation of a person.
5. **Request to an ethics board** - Consideration of a request for confidential written advice from a local ethics board.
6. **Other narrow exemptions** - Specified deliberation regarding unemployment and workers compensation, burial sites and other narrow exemptions provided by statute.

Closed Session - a meeting where public attendance is not allowed; must be specifically authorized by state statute.

Closed session procedures

Statutes specify procedures that must be followed when convening and participating in a closed session:

- **To enter closed session** - The body must initially convene in open session. To move into a closed session, the presiding officer must announce the specific subject matter and statutory authority for closure. A motion and recorded individual vote by a majority of the body are required to convene in closed session.

³⁵ State ex rel. Hodge v. Turtle Lake, 180 Wis.2d 62, 508 N.W.2d 301 (1993)

- **Discussions, motions and decisions** - The body may consider only the matter(s) for which the session was closed. Motions and decisions must be recorded. If a decision made in closed session is appealed, the record must contain sufficient detail to show that the zoning board considered the proper legal standards and evidence presented. Where feasible, zoning boards should vote in open session.
- **To reconvene in open session** - Once a body convenes in closed session, it may not reconvene in open session for at least 12 hours, unless public notice of its intent to return to open session was given in the original notice of the meeting. Absent such notice, the body should amend its agenda to place any closed session at the end of the agenda.³⁶ When there is good cause, two-hour prior notice of a planned closed session and reopening can be provided to allow reopening a meeting, but this approach is rarely necessary.

Attendance at closed sessions

Only members of the zoning board and those essential to the business for which the session was closed may attend a closed session. Generally, members of the local governing body may not attend closed sessions of the zoning board. The statutory exemption which allows a parent body to attend closed meetings of its subunits does not apply because the board is not a subunit of the governing body since the governing body does not review board decisions. Additionally, the zoning administrator or staff person who presented testimony at the hearing and the municipal attorney (if he or she represented the zoning department at the hearing) should not attend closed sessions.

Public Notification

Notice of a public meeting is required and may be accomplished by posting in one or more public places likely to give notice to the public and those affected by the decision.³⁷ A minimum of three locations is recommended. Generally, the zoning board secretary or administrative staff of the zoning department perform meeting and hearing notification duties and provide evidence of compliance. However, board members must individually determine compliance with all aspects of the open meetings law

³⁶ Wis. Stat. § 19.85(2)

³⁷ OAG 86-76, 65 Op. Att’y Gen. 250 (1976) & Wis. Stat. § 19.84(1)

in deciding whether to participate in a meeting. The following are minimum requirements of Wisconsin's open meetings law:

- **24-hour prior notice.** Notice of a public meeting must be provided at least 24 hours prior to the meeting. Where such notification is impossible or impractical for good cause, notice may be provided not less than 2 hours prior to the meeting.
- **Notice to media.** Notice (written, phone, or fax) must be provided to the governmental unit's official newspaper and to any media who have filed a written request. If there is no official newspaper, notice should be provided to a newspaper or other media likely to give notice in the affected area.³⁸
- **Separate notices.** A separate notice is required for each meeting. A general notice at the beginning of the year is not sufficient.
- **Content of notice.** Notice must specify the time, date, place and subject matter of the meeting; any contemplated closed sessions; and intent to reconvene in open session within twelve hours after completion of a closed session.³⁹ The meeting agenda may also provide for a period of public comment and discussion. Though most meetings must be open to public attendance, the law does not require all meetings to provide a forum for public comment. Hearings, on the other hand, must include a period for public comment/testimony.
- **Specificity of notice.** The public notice must describe agenda items in sufficient detail to allow anyone likely to be affected by a decision to identify those items on the agenda. General subject matter designations such as "miscellaneous business," "agenda revisions," or "other such matters as authorized by law" should be avoided.⁴⁰ Only issues described in sufficient detail in the public notice and agenda may be decided. If a discussion item or decision is continued or postponed for a later date that item should be fully described in the subsequent meeting notice.

In addition to the notice requirements of the open meetings law, all zoning board meetings and hearings must comply with notice

³⁸ Wis. Stat. §§ 985.03 & 985.05

³⁹ Wis. Stat. §§ 19.84(2) & 19.85(2)

⁴⁰ Memo from Peggy Lautenschlager, Attorney General to Mr. Charles Rude, Mayor, City of Lake Geneva, dated March 5, 2004.

Section II – Laws That Apply to the Zoning Board

requirements of:

- State statutes governing procedures for zoning boards,⁴¹
- DNR rules for shoreland, shoreland-wetland, and floodplain zoning matters,⁴² and
- Other notice requirements imposed by local ordinance or bylaws.

Local notification procedures must be crafted to include all of these requirements. Paid, published notices are not required by the open meetings law. However, where other statutes require paid publication of a hearing or meeting notice, open meetings law requirements may be incorporated into the published notice. Public posting is recommended in addition to the published notice.

Public Notification of Hearings

Zoning board hearings are subject to more stringent public notification requirements than working sessions or regular meetings subject to the open meetings law. The following table describes statutory notice requirements for county, city, village and town zoning board hearings and where they differ.

⁴¹ Wis. Stat. §§ 59.694(6) & 62.23(7)(e)6

⁴² Wis. Admin. Code §§ NR 115.05(6)(h) & NR 116.20(2)(d)

Figure 7: Statutory Notice Requirements for Zoning Board Hearings

County (population of 250,000 or more) ⁴³	County (population less than 250,000) ⁴⁴	City ⁴⁵	Village or Town ⁴⁶
<ul style="list-style-type: none"> ■ Class 2 notice required. ■ Posting recommended. 	<ul style="list-style-type: none"> ■ Posting two weeks prior required. ■ Class 2 notice recommended. 	<ul style="list-style-type: none"> ■ Class 1 notice required. ■ Posting recommended. 	<ul style="list-style-type: none"> ■ Posting one week prior required.

Posting – Display of a notice in at least 3 public places likely to give notice to the public and those affected by a decision.⁴⁷

Class 1 Notice – One newspaper publication at least one week before the act or event.⁴⁸

Class 2 Notice – Two newspaper publications, at least once each week for consecutive weeks,

⁴³ Wis. Stat. § 59.694(6) provides that notice of the hearing of an appeal must be given by publication of a class 2 notice under Wis. Stat. § 985. It is somewhat unclear whether class 2 publications should also be made for variances and special exceptions/conditional uses. Requirements for designation of an official newspaper for counties with population of 250,000 or more is found in Wis. Stat. § 985.065(2)(a).

⁴⁴ See previous footnote. Counties with a population less than 250,000 are not required to have an official newspaper and apparently may elect to satisfy the class 2 publication requirement by posting [Wis. Stat. § 985.05(1)]. However, newspaper publication is strongly recommended.

⁴⁵ Wis. Stat. § 62.23(7)(e)6 merely requires the city zoning board to give “public notice” of the hearing on the “appeal or other matter referred to it” (e.g. variance or special exception/conditional use). Wis. Stat. § 985 applies to publication of “legal notices,” which term includes “public hearings.” The hearing before the city zoning board is merely called a “hearing,” in contrast to a “public hearing” as in the case of zoning amendments under Wis. Stat. § 62.23(7)(d). Because members of the public are typically allowed to testify at zoning board hearings, the conservative interpretation is that § 985 applies. In § 985, a class 1 notice is required for cities because the hearing requirement in Wis. Stat. § 62.23(7)(e)6 predates the date specified in Wis. Stat. § 985.07.

⁴⁶ Wis. Stat. §§ 59.694(6) & 62.23(7)(e)6 refer to Wis. Stat. § 985. Under § 985, cities, but not villages or towns, must have official newspapers. Since villages and towns do not have official newspapers, the publication requirement may be satisfied by posting [Wis. Stat. §§ 985.02(2), 985.07 & 985.01(1)]

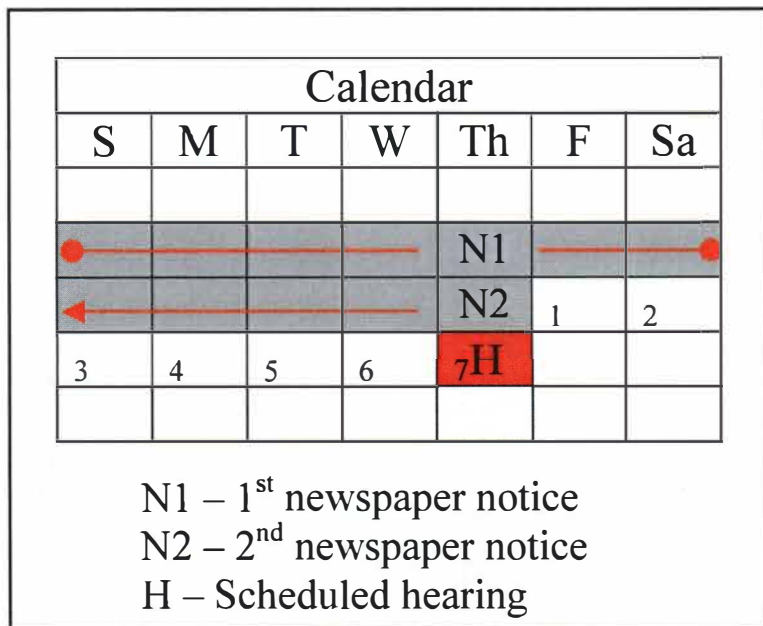
⁴⁷ Wis. Stat. § 985.065(2)(a) concerns requirements for an official newspaper; Wis. Stat. § 985.05(1) provides a posting option if there is no official newspaper; Wis. Stat. § 985.02(2) provides guidelines for posting & Wis. Stat. § 985.01(3) defines *municipality*.

⁴⁸ Wis. Stat. §§ 985.07 & 985.01(1)

⁴⁹ Wis. Stat. §§ 985.07 & 985.01(1)

The calendar in Figure 8 illustrates a sample timeframe for publishing a Class 2 notice for a zoning board hearing consistent with state law. Counting backward from the date of the scheduled hearing (highlighted in red) the second newspaper publication must occur at least one week prior to the hearing (not less than seven days prior). In computing the minimum time for publication, the first day of publication is excluded and the day of the meeting or event is included.⁵⁰ State statutes are silent on how far in advance the notice may occur. Therefore, the second notice may be published earlier than the dates noted, but not later. The first publication must appear the week prior to the second publication and may occur on any day of the week.⁵¹ One court of appeals has interpreted the law as requiring insertions to be exactly one week apart; however, this is likely not binding precedent.⁵² Working within statutory guidelines, local governments may wish to clarify by ordinance when zoning board hearing notices should be provided.

Figure 8: Class 2 Notice Calendar



⁵⁰ Wis. Stat. § 985.09

⁵¹ Wis. Stat. § 985.01(1m) states that “any such notice that may, by law or the order of any court, be required to be published for any given number of weeks may be published on any day in each week of such term”.

⁵² A court of appeals interpreted the law as requiring Class 2 notice insertions to be exactly one week apart [*Gloudeman v. City of St. Francis*, 143 Wis.2d 780, 422 N.W.2d 864, 866 (Ct. App. 1988)]. However, this is likely *obiter dictum*, and thus not binding precedent [League of Wisconsin Municipalities, FAQ3, February 1997. Available: <http://www.lwm-info.org/legal.faz/faz3.html>].

Content of hearing notice

The following information should be included in the hearing notice:

- Name of the governmental body that will meet.
- Date, time and location of the hearing.
- Name of the applicant, appellant, or petitioner.
- Location of property involved.
- General description of the proposed project and nature of the request (variance, conditional use/special exception or appeal).
- Subject matter, statutory authority (recommended), and notice of any anticipated closed session and any intent to reconvene in open session within 12 hours after completion of a closed session.⁵³ (Review the exemptions and procedures for closed sessions.)
- A notice that interested persons may present testimony regarding matters on the agenda at the meeting/hearing or in writing to the board.
- Contact information for further information about the petition or application.

Figure 9: Public notice of hearings should be published in the official newspaper.

Legal Notices

Notice is hereby given that a public hearing will be held by the Kenosha County Board of Adjustment on Thursday, July 20, 2006 at 6:00 p.m. at the Kenosha County Center Conference Room A, 19600 75th Street, Bristol, Wisconsin, on the following appeals...

Sample notice from a public hearing held by the Jefferson County Board of Adjustment is included in *Appendix E*.

Proof of hearing notice

An affidavit of publication by a newspaper editor or his/her designee showing the name of the newspaper and dates of publication affixed to a copy of the published notice is presumptive evidence of publication.⁵⁴ A similar affidavit by a person posting legal notice showing the time, place and manner of posting serves the same function for posted notices.⁵⁵

Notification of hearing to interested parties

Advanced notice of zoning board hearings must be provided to the following parties:

- **Media** - The information provided in a published or posted notice must be provided by phone, fax, or written copy to any media requesting it and to the community's official newspaper. If an official newspaper is not designated, notice must be given

⁵³ Wis. Stat. § 19.85(2)

⁵⁴ Wis. Stat. § 985.12

⁵⁵ Wis. Stat. § 985.02(2)(d)

to news media likely to give notice in the area.⁵⁶

- **Interested Parties** - Notice must also be given by mail to parties in interest,⁵⁷ including:
 - The applicant/appellant/petitioner,
 - Any zoning officer whose decision is appealed, and
 - Adjacent/nearby property owners as specified by local ordinance. We recommend that zoning staff provide notice to people within a greater distance if the proposed use could affect people farther away (e.g., gravel pit, landfill).
- **Department of Natural Resources** - The appropriate local DNR office must be provided with 10-day prior notice of hearings on shoreland, shoreland-wetland, and floodplain zoning appeals, variances, and conditional uses/special exceptions and provided with copies of related decisions within 10 days.⁵⁸
- **Department of Agriculture, Trade and Consumer Protection** - DATCP must be notified of any approval in the case of a conditional use/special exception or variance in an exclusive agricultural zoning district under the state farmland preservation program.⁵⁹

Violations of the Open Meetings Law

Suggested procedures to avoid violations

Zoning board members must individually determine compliance with all aspects of the open meetings law. Prior to participating in a meeting or hearing, zoning board members should review the following procedures to determine whether they are in compliance with the open meetings law:

1. **Determine proper notice.** At the beginning of a meeting, each member of the zoning board should determine whether proper notice was provided. If compliance is questionable, the municipal attorney should be able to provide counsel on the matter.

⁵⁶ Wis. Stat. §§ 19.84(1)(b) & 985.065

⁵⁷ Wis. Stat. §§ 59.694(6) & 62.23(7)(e)6

⁵⁸ Wis. Admin. Code §§ NR 115.05(6)(h) & NR 116.20(2)(d); DNR notification is usually accomplished by providing a written copy of the notice.

⁵⁹ Wis. Stat. § 91.75(5). Forms for notifying DATCP are available by calling (608) 224-4648.

2. **Limit closed sessions.** Members should vote against convening closed sessions that are not authorized by specific exemptions of the open meetings law. They should also insist that proper procedures be used to close and reopen sessions. Members who vote against convening in closed session may participate in the closed session if it is held.
3. **Document proceedings.** A log or minutes documenting proper notice and recording motions, rationale and any votes on abbreviated notice, amended agendas or closed sessions is a useful defense against allegations of open meetings law violations (most often made by media or persons displeased by decisions).

Liability and voided decisions

Zoning board members can be sued individually or as a group for alleged violations of the open meetings law. Forfeitures (\$25-\$300) can be levied against members who break the law. The municipality may not reimburse members for these forfeitures. Additionally, a court may void an action taken by a body at an illegal meeting if it finds that the public interest in enforcement of the open meetings law outweighs any public interest in sustaining the body's decision.

Ethical and Procedural Considerations

Chapter

6

Zoning Boards Must Follow the Rules of Due Process

Due process is a basic concept of fairness in legal proceedings that has its roots in the decision making processes used by the Greeks and Romans⁶⁰ and is reiterated in the constitutions of the United States and Wisconsin.⁶¹ These constitutional provisions guarantee two distinct forms of due process: substantive and procedural. Substantive due process is concerned with the reasonableness of government action and therefore, is focused on assessing the rationality of a government decision. Procedural due process, the focus of this chapter, is concerned with the means or process employed to make the government decision in question.⁶²

Not all government actions require compliance with procedural due process principles. A rule or law that applies generally does not trigger due process guarantees.⁶³ Instead, procedural due process requirements are demanded of government only in cases

⁶⁰ Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities. pp. 416-427. Available: <http://www.lwm-info.org/legal/2005/12december/comment.html>

⁶¹ Fourteenth Amendment to the United States Constitution and Article I, Section I of the Wisconsin Constitution.

⁶² Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities. pp. 416-427. Available: <http://www.lwm-info.org/legal/2005/12december/comment.html>

⁶³ *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372 (U.S. 1915) cited by Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities.

where the government makes an individualized determination affecting a specific individual or specific individuals or a limited identifiable class of people.⁶⁴

Because zoning board decisions often affect specific individuals, zoning boards must follow the rules of due process to ensure that all parties involved in a hearing before the board are treated fairly.⁶⁵ Procedural rules of due process include:

- Providing adequate notice of a pending decision to affected persons,
- Ensuring that each decision maker is impartial and unbiased,
- Avoiding or disclosing any ex parte contacts,
- Providing an opportunity to present at hearings, and
- Basing decisions on clear, pre-existing standards and factual evidence in a record that is available for review.⁶⁶

Zoning Board Members Must Be Impartial

Wisconsin case law requires that zoning board members be impartial, that is, free of bias and conflicts of interest. Zoning decisions are particularly vulnerable to concerns about impartiality because decision-makers are local residents with numerous social and economic ties to their communities. However, it is important to point out that as a zoning board member your opinions about specific local regulations or zoning in general do not necessarily disqualify you from making decisions.⁶⁷ A personal opinion or stance, such as pro-growth or anti-growth, should not influence your decision. Bias related to applicants' ethnicity, gender, or religion is also inappropriate. Reviewing your voting record to determine whether any patterns are apparent may be an eye-opening experience.⁶⁸

Here are two examples of how the courts determined that land use decision makers were not impartial:

⁶⁴ *Londoner v. Denver*, 210 U.S. 373, 28 S. Ct. 708, 52 L. Ed. 1103 (U.S. 1908) cited by Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities.

⁶⁵ Easley, V. Gail and David A. Theriaque. *The Board of Adjustment*. 2005. Planners Press, p. 95.

⁶⁶ Blaesser, Brian W. et al. *Land Use and the Constitution: Principles for Planning Practice*. 1989. Planners Press. pp.42-43; Hunter, Ted and Jim Driscoll. "The Planning Commissioner as Judge." *The Commissioner*, Summer 1996; *Old Tuckaway Assocs. Ltd. Partnership v. City of Greenfield*, 180 Wis.2d 254, 509 N.W.2d 323 (Ct. App. 1993); Stephens, Otis and John Scheb. *American Constitutional Law*, 3ed. 2003. Belmont, CA: Wadsworth.

⁶⁷ *Marris v. Cedarburg*, 176 Wis. 2d 14, 498 N.W.2d 842 (1993)

⁶⁸ Dale, Gregory. "The Ethics of Bias." *Planning Commissioners Journal*, article #571.

- A zoning board member made negative comments about the applicant and her request, referring to it as a “loophole in need of closing.” The court determined the applicant was deprived of a fair hearing and required a rehearing without the participation of the member.⁶⁹
- A county zoning committee member, who was also a town board chair, co-signed a letter as town board chair expressing his positive opinion of a gravel company. Within a few months, the gravel company applied to the county for a conditional use permit and included the town chair’s letter as part of their application. When the town board chair/county zoning committee member voted to grant this conditional use permit, the court determined he was an advocate who had demonstrated an impermissibly high risk of bias.⁷⁰

If You Are Not Impartial, Recuse Yourself

For each request before the zoning board, individual zoning board members must decide for themselves whether their relationships or interests could bias their judgment or give an appearance of bias causing them to be or appear partial. We recommend that zoning board members use the “sniff test” when determining whether they are biased or impartial: If it would smell fishy for you to vote on the matter at hand, **recuse** yourself. Another way to determine whether you are impartial and appear impartial is to think about whether you would be comfortable if the headline in your local newspaper described your background, your personal and professional relationships, and your participation or vote on the matter at hand. If you are unsure, you should discuss the matter with the zoning board’s legal counsel.

If, as a zoning board member, you do not feel you can be and appear impartial in a given decision, the best approach is to recuse yourself. To recuse yourself, do not vote and do not have any discussion or involvement in the matter in question. We recommend that you physically remove yourself from the table where the zoning board is seated while the matter is discussed to make it clear you are not serving as a member of the zoning board. The meeting minutes should reflect that you have recused yourself. If you have recused yourself on a matter, you may offer testimony

Recuse - to disqualify because of prejudice or conflict of interest on a matter.

If you recuse yourself:

- Do not vote AND
- Do not discuss the topic with the zoning board.

⁶⁹ *Marris v. Cedarburg*, 176 Wis. 2d 14, 498 N.W.2d 842 (1993)

⁷⁰ *Keen v. Dane County Bd. of Supervisors*, 2004 WI App 26, 269 Wis. 2d 488, 676 N.W.2d 154.

Ex Parte - without the other party being present.

as a member of the public.

Avoid Ex Parte Communication

Zoning board members should not have conversations or receive correspondence regarding a variance, appeal or conditional use that is before the board or which may come before the board except during a noticed meeting or hearing. Such contacts outside a meeting or hearing are known as ex parte communication.

The reason for this requirement is fairly simple: an applicant who comes before the zoning board is entitled to know about and have an opportunity to rebut any information that decision makers rely on in making the decision. Discussion outside the meeting regarding procedural matters, such as scheduling a meeting or explaining how to file an application, are permissible. Ex parte communication is not a concern for legislative (ordinance or rule adoption) or ministerial matters (simple permits).

We recommend the following steps regarding ex parte communication:

- First, avoid ex parte communication by suggesting that members of the public who approach you outside of a meeting present information in open hearings or by written comment to the decision-making body.
- Second, if you are not able to avoid ex parte communication, disclose the communication at the hearing and make the information part of the record so that it can be considered in decision-making. The individual zoning board members will then determine its credibility and weight in deciding their vote on the matter.

Provide an Opportunity to Present at Hearings

Typically the zoning board chair invites the applicant to present at a hearing, followed by all interested parties. A zoning board that set a 5-minute time limit per presenter and allowed additional time for the applicant to describe the proposal complied with due process.⁷¹ To ensure that all interested parties have a chance to provide testimony, we recommend that after everyone interested in presenting appears to have done so, the chair ask if there is anyone

⁷¹ *Roberts v. Manitowoc County Bd. of Adjustment*, 2005 WI App 2111

else who wants to testify about the proposal at hand.

Avoid Statutory Conflicts of Interest

In addition to due process and impartiality, zoning board members are also subject to specific conflict of interest provisions found in Wisconsin Statutes:

- **Personal financial gain** - State laws⁷² prohibit public officials from taking official actions that substantially affect a matter in which the official, an immediate family member, or an organization with which the official is associated has a substantial financial interest. Similarly, an official may not use public office for financial gain or to gain anything of substantial value for the official, an immediate family member, or an organization with which the official is associated. This statute is enforced by local district attorneys and the State Attorney General⁷³ with forfeitures up to \$1000 per violation.⁷⁴
- **Misconduct in office** - State law prohibits an officer from intentionally performing, or failing to perform, certain acts including actions the officer knows are in excess of their lawful authority or are forbidden by law in their official capacity.⁷⁵
- **Private interests in public contracts** - State laws also prohibit certain actions when an official bids for a contract, or has authority to exercise duties under a contract, if the official has a private financial interest in the contract, subject to a \$15,000 per year exception for total receipts and disbursements under the contracts.⁷⁶ In certain cases, recusal will not prevent a violation of the law,⁷⁷ and the official may have to choose between doing business with the governmental unit and serving as an officer. This may be an issue when the zoning board decides conditional use permits or retains consulting services in which members have an interest.

In short:

- Don't accept items or services offered to you because of your position.
- Don't participate in decisions which affect you financially.

⁷² Wis. Stat. § 19.59(1)

⁷³ Local officials online tutorial, State of Wisconsin Ethics Board, available: <http://ethics.state.wi.us/LocalOfficials/LocalOfficial1.htm>

⁷⁴ Wis. Stat. § 19.59 (7)(a)

⁷⁵ Wis. Stat. § 946.12; *State v. Tronca*, 84 Wis.2d 68, 267 N.W.2d 216 (1978) states when 946.12(3) was created in 1953 the notes of the Judiciary Committee on the Criminal Code carried the following comment: "quasi-judicial functions call for the exercise of judgment, and if the officer acts honestly although with not the best of judgment, he is not guilty."

⁷⁶ Wis. Stat. § 946.13

⁷⁷ Wis. Stat. § 946.13(1)(a)

Chapter 7

Adoption of Operating Rules

Many procedural issues essential for the conduct of zoning board business are not addressed in state statutes and must be determined either by ordinances adopted by the local governing body or by rules formally adopted by the zoning board itself. The table below describes authority of zoning boards to adopt such rules.

Figure 10: Adoption of Zoning Board Rules

County or Town Zoning Board of Adjustment	City, Village, or Town Zoning Board of Appeals
<ul style="list-style-type: none"> The county board must adopt rules for the zoning board.⁷⁸ The zoning board may adopt rules to implement the county board⁷⁹ or town board regulations.⁸⁰ The county board sets filing fees for appeals to the zoning board.⁸¹ 	<ul style="list-style-type: none"> The zoning board must adopt rules in accordance with any ordinance adopted under Wis. Stats. § 62.23.⁸²

⁷⁸ Wis. Stat. § 59.694(3)

⁷⁹ Wis. Stat. § 59.694(3)

⁸⁰ Wis. Stat. § 60.65(4)

⁸¹ Wis. Stat. §§ 59.696 & 59.697

⁸² Wis. Stat. § 62.23(7)(e)3

Content of Operating Rules

Many communities adopt *Robert's Rules of Order* to guide parliamentary procedures. In addition, communities may wish to adopt operating rules from the following list that are not addressed in ordinances, administrative rules or statutes.⁸³

- A. General provisions
 - Applicability of state statutes, local ordinances, board rules, and case law
 - Requirements for familiarity with them
- B. Membership
 - General membership requirements (number, appointment, terms)
 - Desired qualifications and member education
 - Alternates (attendance requirements)
 - Conduct (ex parte communication, conflicts of interest, bias)
 - Compensation, travel, counsel, and other expenses
 - Vacancies, resignations (general and by absence), and removal
- C. Officers, duties, and staff assistance
- D. Powers and duties of the board
- E. Meetings
 - Procedural requirements (open meetings, public notice, public records)
 - Quorum (how many constitute quorum)
 - Order of business and agenda revision
 - Meeting conduct
- F. Appeal procedures
 - Filing procedures and fees
 - Time limits on appeal (*time limits on appeal of administrative decisions are not specified in state statutes and should be included in local ordinance)
 - Stays on appeal
 - Contested case requests
 - Conduct of on-site inspections
 - Members to attend as group or individuals

⁸³ For additional guidance and model rules, refer to Chapter 4: "Rules of the Board" in *The Zoning Board Manual*, 1984 by Frederick H. Bair, Jr.

G. Hearings

- Witnesses to testify under oath (some zoning boards require applicants and other persons providing testimony to do so under oath, reminding them of the risks of perjury if they lie under oath)
- Order of business
- Recording
- Rules of evidence
- Continuances

H. Decisions

- Voting requirements (*state statutes specify that when a quorum is present, zoning boards may take action by a majority vote of the members present; local ordinances may set more stringent voting requirements)
- Timing when multiple decisions/authorities are required
- Findings, rationale, and form of decision
- Development conditions
- Filing and notice to the public and parties

I. Refilings and rehearings

Keep in mind that when creating bylaws it is not necessary to restate all applicable state and local rules or case law that already apply to the zoning board. The bylaws should be a place to create rules for day-to-day conduct of the board and other issues that are not already addressed elsewhere. If you feel it is important to reiterate some of these rules in your local bylaws, it is best to do so by reference to the statute rather than a complete reprinting of those rules. That way, when rules are updated, it is not necessary to update the language of your bylaws. For example, when the state updated alternate and quorum requirements in August 2005, some zoning boards found they had to update the text of their bylaws, creating unnecessary work. However, where other applicable rules are permissive (i.e., using language such as “may” rather than “shall”) zoning boards may opt to include language that is more restrictive.

Options for addressing some of the topics outlined above are discussed in related sections of this manual. A number of counties and municipalities have adopted fairly comprehensive rules that may serve as examples.⁸⁴

⁸⁴ See, for example, bylaws from Oneida County, St. Croix County, and the City of Fitchburg.

Section II – Review

Keywords

- Open meeting
- Quorum
- Negative quorum
- Walking quorum
- Closed session
- Public notice
- Posting
- Class 1 notice
- Class 2 notice
- Recuse
- Ex parte communication
- Operating rules/bylaws

Test Your Knowledge (answers on page 49)

Chapter 4 - Overview of Laws That Apply to the Zoning Board

- 1) Name the four sources that zoning boards must look to for guidance on proper procedures.

Chapter 5 - Open Meetings Law

- 2) What are the two tests to determine if a zoning board must comply with the open meetings law?
- 3) What is the difference between quorum, negative quorum, and walking quorum? Which is illegal?
- 4) What type of notice is required for local zoning board hearings in your community?
- 5) When are zoning boards able to enter closed session?
- 6) What are the procedures for going into closed session?
- 7) What are the three steps to follow to avoid violating the open meetings law?

Chapter 6 - Ethical and Procedural Considerations

- 8) Why should zoning boards follow due process of law?
- 9) Can a zoning board chair deem a member biased and make the member recuse him or herself?
- 10) If a neighbor talks to a zoning board member at the grocery store about an upcoming case before the board member can cut the neighbor off, what should the board member do at the hearing of this case?

Chapter 7 - Adoption of Operating Rules

- 11) Zoning boards may adopt local bylaws or operating procedures to guide zoning board actions not otherwise governed by state statute or local ordinance. Does your zoning board have such procedures?
- 12) How are these rules working for you? Are there any items not currently included in your operating rules that should be added?

Answers

- 1)
 - a. State statutes
 - b. Local ordinances
 - c. Zoning board bylaws or operating rules
 - d. Case law
- 2)
 - a. The purpose test
 - b. The numbers test
- 3)
 - a. See the definitions on page 22.
 - b. Walking quorum is illegal.
- 4)
 - a. Counties with population > 250,000 - Class 2 notice (posting recommended).
 - b. Counties with population < 250,000 - Posting two weeks prior (class 2 notice recommended).
 - c. Cities - Class 1 notice (posting recommended).
 - d. Villages and towns - Posting one week prior.
- 5)
 - a. To deliberate concerning a case.
 - b. To consider action concerning a public employee(s).
 - c. To consider potentially damaging personal information.
 - d. To confer with legal counsel.
 - e. To consider a request from an ethics board.
 - f. Other narrow exemptions.
- 6)
 - a. Convene in open session.
 - b. Cite statutory reason for entering closed session.
 - c. Vote to move into closed session.
 - d. Record motions and decisions.
 - e. Reconvene in open session only if specified in agenda.
- 7)
 - a. Determine proper notice.
 - b. Limit closed sessions to those specified by statute.
 - c. Document proceedings.
- 8) To ensure that all parties involved in a hearing before the board are treated fairly.

Section II – Laws That Apply to the Zoning Board

SECTION II

- 9) No. This decision is up to the board member
- 10) Disclose the communication at the hearing and make the information part of the record so that it can be considered in decision-making
- 11) Answers may vary
- 12) Answers may vary

Application Process

Chapter

8

Both zoning board members and applicants benefit from a clear understanding of the application process for zoning board requests (variances, administrative appeals, and in some cases conditional uses) and the reasons for that process.

Typically persons (applicants) seeking zoning permits first contact the zoning staff to explain their development plans and obtain the necessary permit applications. Most applicants are able to get their permits directly from the zoning staff. If the applicant is seeking a conditional use permit, however, the governing body, planning commission/committee, or zoning board (as specified by local ordinance) makes the decision. If applicants want to do something that is not allowed by zoning ordinances, they may apply for a variance (which is decided by the zoning board) or a rezone (which is decided by the governing body). Applicants who disagree with the zoning staff's interpretation of the ordinance, may file an administrative appeal, which is decided by the zoning board.

In this chapter you will find legal and practical advice regarding the application process for variances, administrative appeals, and conditional uses. Specifically, we will address:

- Who completes the application?
- When do applications need to be complete and can subsequent

changes be made?

- What is included in a complete application?
- Who reviews the application?
- Are zoning staff reports recommended and what do they contain?

Who completes the application to the zoning board?

While statutes do not specify who completes the application, the same person who will represent the landowner at the zoning board hearing (typically the landowner, their attorney, or agent) commonly does it.⁸⁵ Zoning staff often explain the rationale behind the regulations, what application materials must be completed, and the type of information and level of detail that must be included in the application. Due to their experience with the ordinances and processes, the staff may also help the applicant fill out the application by providing technical information. However, the landowner or their representative is ultimately responsible for providing a complete and accurate application.

When do applications need to be complete? Can subsequent changes be made?

The application for a conditional use permit must be completed by the first time notice is given for the final public hearing on the matter, unless an ordinance expressly allows later submission of information.⁸⁶ Although Wisconsin courts have expressly required this only for conditional uses,⁸⁷ we recommend applying this policy to all decisions made by the zoning board in order to:

- Avoid creating an incentive for permit seekers to withhold controversial information from their applications until during or after the public hearing.
- Provide ample time and opportunity for interested parties to review the complete application, digest the information, and develop their ideas prior to the hearing, so that they are prepared to discuss all of their concerns.

⁸⁵ Wis. Stat. §§ 59.694(6) & 62.23(7)(e)6

⁸⁶ *Weber v. Town of Saukville*, 209 Wis. 2d 214, 562 N.W.2d 412 (1997)

⁸⁷ LoisLaw search 3/22/05 revealed no similar standard for variances or administrative appeals.

A simple and straightforward way to ensure that applications are complete prior to notice being given is to require that the application be complete at the time of submittal. Waukesha County uses this approach, and if any changes from the original application are desired after the public notice has been sent, a new application and fee are required.⁸⁸

What is included in a complete application?

Standards for what must be included in an application to the zoning board vary widely and are decided locally. A balance must be struck between having sufficient information to make a good decision and avoiding unnecessary data that may lead to confusion or simple overload for the zoning board members. At the same time, requiring more information in the application can result in a better-informed discussion of the application and more efficient decision-making, with most applications being decided in one hearing. Regardless of the amount of information required, high quality information, such as an accurately scaled site plan, is necessary.

The following list of required application materials is compiled from multiple municipalities.⁸⁹ Compare it to your current application standards and add, modify or delete as appropriate based on your purposes and local issues. Rather than requiring a generic list of information for all applications you may want to tailor the standards based on the specific request for which the application is submitted. . For instance, an application requesting to change only the use within a building probably doesn't need a soils report or topographic survey.

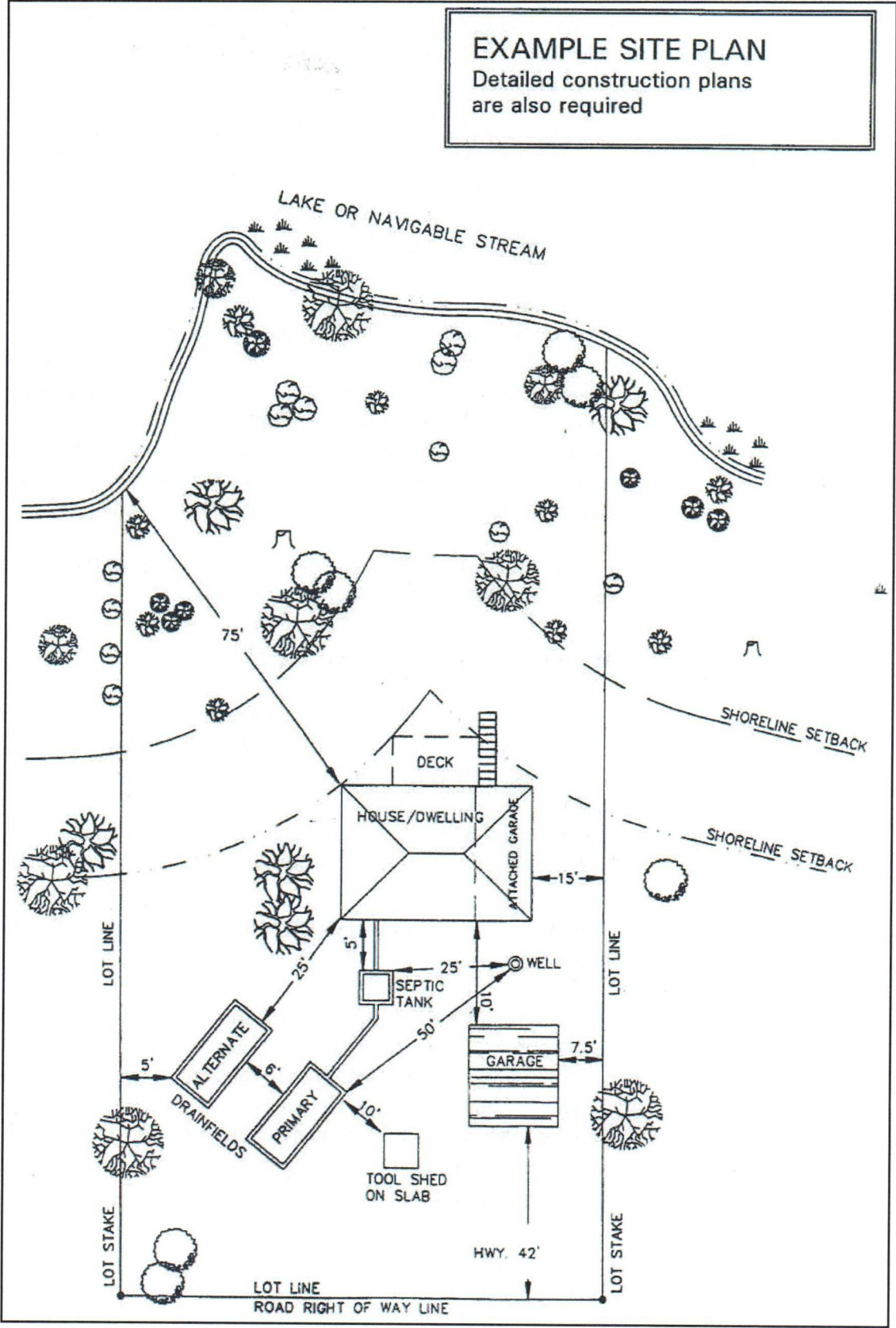
- A. A legal description covering the property for which the permit is sought
- B. Written description of and justification for the proposed permit, consisting of the petitioner's evaluation of the request against the standards in the ordinance

⁸⁸ Waukesha County Board of Adjustment variance and appeal form, available: https://secure.waukeshacounty.gov/filelibrary/Files/Variance_and_Appeals.pdf

⁸⁹ Lincoln County Zoning Ordinance, Section 17.8.30(2), available: <http://www.co.lincoln.wi.us/Zoning%20Ordinance%20Final%20clean%20-%20Dec%202004.pdf>; Waukesha County Board of Adjustment variance and appeal form, available: https://secure.waukeshacounty.gov/filelibrary/Files/Variance_and_Appeals.pdf; and *Administering Township Zoning: A basic guide for citizens and elected officials*, 2nd edition, May 1996, Michigan State University Extension, Extension Bulletin E-1408, page 23.

- C. A specified number of copies of site plans, accurately drawn to a scale of not less than one inch to __ feet, showing and labeling:
- a. Landowner's name
 - b. Preparer, date of preparation and revisions
 - c. Scale and directional arrow
 - d. Boundaries and dimensions of property for which the permit is sought, and all other lands within a specified distance of the boundaries of the property
 - e. Location and dimensions of all existing and proposed structures on the property in question and adjacent properties, including:
 - i. Building elevations
 - ii. Dimensions, colors, and materials used on all exterior sides of buildings
 - iii. Distances between multiple structures
 - iv. Distance between structures and the ordinary high water mark
 - v. Distances between structures and lot lines
 - vi. Distances between structures and the centerlines of abutting streets and highways
 - f. Soils information
 - g. Topographical contour lines: __ foot intervals
 - h. Wetlands, 100-year floodplain, shoreland zone and ordinary high water mark for any adjacent watercourses
 - i. Easement labels and locations
 - j. Adjacent public streets, centerlines, and rights-of-way
 - k. Auto ingress and egress
 - l. Visual clearance triangles
 - m. Parking and loading areas
 - n. Utilities: existing and proposed locations and types of private well and onsite waste treatment systems, or connections to public sanitary sewer, water, and/or storm sewer.
 - o. Grading and drainage plan, showing existing and proposed surface elevations
 - p. Proposed erosion control and stormwater management provisions
 - q. Any outdoor storage or dumpster areas
 - r. Existing and proposed landscaping on the site, including the location, species, size at time of planting, and mature size of all new plantings
 - s. Signs: location, height, dimensions, colors, materials, lighting, and copy area of all signage
 - t. Lighting: location, height, type, orientation, and power of all proposed exterior lighting

Figure 11: Example Site Plan from Langlade County



- D. Names and addresses of the owners of all lands within a specified distance of the property as they appear on the current records of the Register of Deeds, to be used to provide notice of the hearing
- E. Other pertinent information as requested by the zoning administrator to determine if the proposal complies with the ordinance
- F. The required review fee

An applicant has the burden of establishing the need for their relief from the zoning ordinance and the zoning board cannot guess or fill in the blanks of an incomplete application. Thus, an applicant fails to provide sufficiently detailed materials at his or her own peril. If the zoning board determines that it does not have sufficient information to make a decision on an application, it may postpone the decision until the applicant supplies the requested information and notice is provided for an additional hearing.

For examples of applications to the zoning board, staff reports, and zoning board decisions, see *Appendix D and E*.

Who reviews the applications?

Initially, zoning staff members review the application to identify missing or problematic information. They may also ask other specialists, such as engineers or natural resource specialists, to assist in reviewing issues such as erosion control, stormwater management, delineation of ordinary high water marks, floodplains and wetlands, or restoration issues.

Are zoning staff reports recommended and what do they contain?

While Wisconsin Statutes do not specifically address staff reports for the zoning board, the courts have not reacted negatively to staff providing recommendations to the zoning board.⁹⁰ Figures 12 and 13 show the results from a 2004 survey completed by 31 counties. Most zoning staff members prepare reports some or all of the time for zoning board members, summarizing the facts regarding applications. About half of the counties who responded

⁹⁰ *Miswald v. Waukesha County Bd. of Adjustment*, 202 Wis.2d 401, 550 N.W.2d 434 (Ct. App. 1996)

said zoning staff always include recommendations about whether standards are met, whether to grant or deny the permit, and appropriate conditions if the permit is granted. When deciding whether to include recommendations in staff reports, consider preferences of the zoning board, staff and zoning board expertise, workload for staff and zoning board members, and political risk.

Staff reports commonly include the following components:

- Summary of applicant's request
- Additional site information from staff visit and/or research
- Zoning history of the site, including previous permits requested and granted
- Relevant statements from comprehensive or land use plan
- Salient purpose statements and provisions from local ordinance
- Relevant statutes and case law
- Discussion of whether proposal meets standards
- Recommendation to approve, approve with conditions, or deny request

See Appendix E for an example of a staff report.

See Chapter 5 for information about who should be notified about zoning board applications and upcoming hearings.

Figure 12: Staff Reports

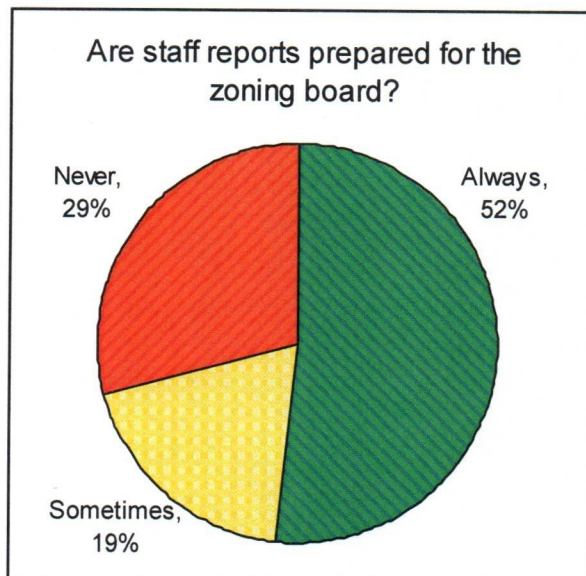
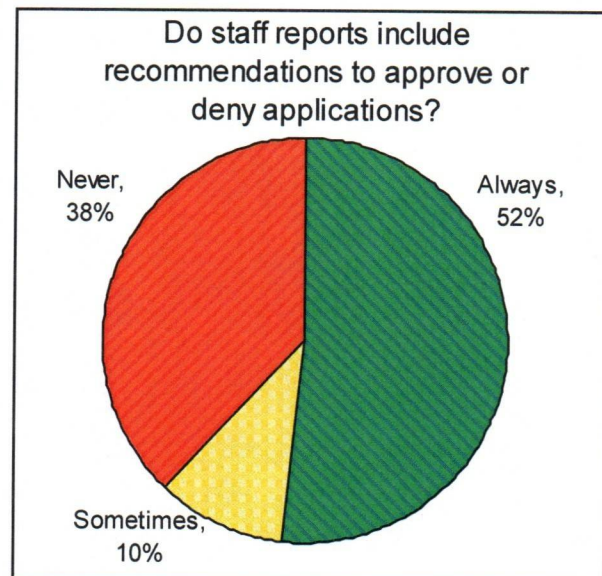
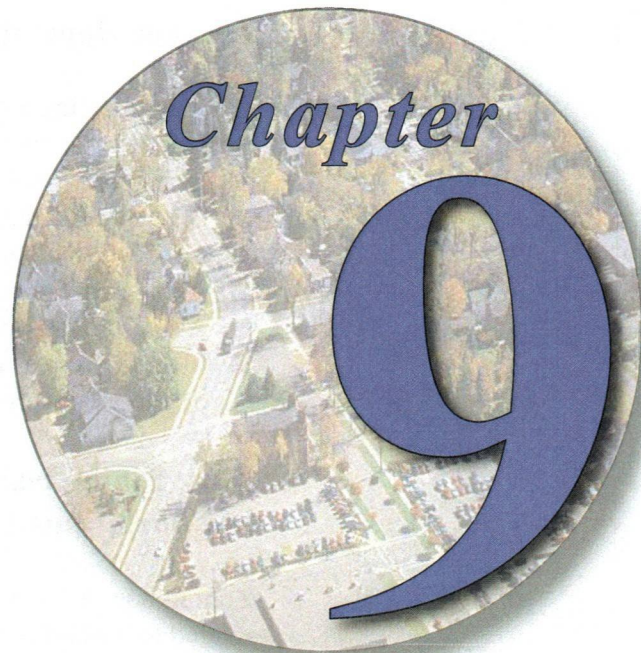


Figure 13: Staff Report Recommendations



Site Visits



Zoning board members or staff regularly visit sites prior to making decisions in order to verify the accuracy of information submitted as part of a development proposal (rezoning, conditional use, variance or subdivision); to gather additional information; and to gain a hands-on understanding of the site in question and its context. Through a combination of field notes and photographs or video recordings, they use the site visit to record the uses of the site and surrounding areas, as well as the location and condition of site features such as topography, vegetation, buildings, surface waters, streets, utilities, parking, and circulation patterns. They can then use this information to identify potential conflicts between the proposed development and neighboring land uses or to identify limitations of the site requiring additional analyses or mitigation.

Figure 14: Zoning boards regularly conduct site visits to gain a better understanding of the physical limitations of a property and neighboring uses.

Photo by Robert Korth, UW-Extension Lakes Program.



What equipment is needed for a site inspection?

When conducting a site visit, we recommend you wear appropriate clothing (boots, durable outerwear, and construction hat, as necessary) and carry:⁹¹

- Base maps and aerial photos of the site and surrounding area
- A measuring device (preferably on a wheel)
- A notepad and clipboard for taking field notes
- A still camera or video recorder
- Identification as a zoning/inspection staff member or member of a local government body

Must zoning boards comply with the open meetings law during site inspections?

Zoning boards have several options for conducting site visits related to variances or conditional use permits in light of the open meetings law. If zoning board members visit the site as a group, they must comply with open meetings law requirements, including providing advance public notice of the meeting and allowing the public to access the site. (The purpose of a site visit is to gather information related to making a decision of a governmental body, so both the numbers and purpose test are met as outlined in *Chapter 5*). If zoning board members visit the site individually, they are not required to comply with the open meetings law. Some zoning boards do not visit the site at all, instead opting to have zoning staff conduct the site inspection. If staff inspect the site, they should take photographs or a video recording of the site and prepare a detailed staff report to share with the zoning board.

Who may access a property for a site inspection?

If a site inspection is noticed as a public meeting, members of the public must be allowed to access the site. Before anyone (including zoning staff, zoning boards, or the public) may physically access a property for a site inspection, permission must be obtained in writing from the landowner. Many communities require this as a condition of submitting an application.

⁹¹ Meck, Stuart. "Site Visits: Purpose, Planning and Practice." *Zoning Practice*, 2.05. American Planning Association.

Meetings and Hearings

Chapter

10

On the following pages, you will find information to guide the zoning board in conducting its meetings and hearings provided in two parts. The first is a checklist that the board chair and members may use to prepare for and conduct meetings and hearings. The second part may be read by the zoning board chair or secretary at the opening of meetings to help petitioners and the public understand the role of the board and the sequence of events at the meeting or hearing.

ZONING BOARD HEARING CHECKLIST

- 1. Prior to a meeting/hearing** [board secretary or designated staff]
 - A. Arrange for alternates (due to anticipated absence or conflict of interest).
 - B. Send the agenda, any applications, and any staff reports to board members.
 - C. Comply with all open meeting law/public notice requirements.
 - D. Arrange for a tape recording (meeting minutes) or a court reporter.
- 2. Preliminary matters at meeting**
 - A. Distribute and collect the appearance slips (*see Appendix D*).
 - B. Call the meeting to order. [chair]
 - C. Take roll and confirm that a quorum is present. [secretary]
 - D. Confirm compliance with the open meeting law and public notice requirements. [members]
 - E. Read the agenda and amend it as necessary (to reorder hearings). [chair & members]
 - F. Inform the public in attendance of hearing procedures (see the script on page 63). [chair]
- 3. Public hearings**
 - A. Open the first public hearing. [chair]
 - B. Read the application or appeal. [secretary]
 - C. Report on any site inspection. [secretary]
 - D. Request a statement by the applicant. [chair with questions by board members]
 - E. Read the staff report. [zoning department with questions by board members]
 - F. Report on related correspondence. [secretary]
 - G. Disclose any ex parte communication. [board]
 - H. Request statements of witnesses (pro/con/information). [chair with questions by board]
 - I. Request a response by the applicant (or after each witness). [chair with questions by board]
 - J. Request a response by the zoning department. [chair with questions by board members]
 - K. Ask any final questions. [board members]
 - L. Close the record and the hearing. [chair]
- 4. Deliberation and decision**

Many zoning boards conduct all hearings before deliberating on decisions.

 - A. Findings of fact (based on ordinance jurisdiction and standards)
 - Determine whether the application contains the information necessary to make a decision.
 - Determine whether the board has the authority to make a decision.
 - Record pertinent facts from the record/hearing on the decision form.
 - B. Conclusions of law
 - Specify applicable legal standards.
 - Determine which facts relate to the legal standards.
 - Determine whether the legal standards are met (agree on any permit conditions).
 - C. Order and Determination
 - Decide/vote on the case.
 - Direct the zoning administrator to take any necessary action.
- 5. Repeat steps 3 and 4 for other hearings.**
- 6. Other agenda items**
- 7. Adjourn meeting**

ZONING BOARD ANNOUNCEMENT OF PROCEEDINGS

Role of the Board

The (county/city/village/town) board of (adjustment/appeals) is an appellate board required by state law in any municipality that has adopted a zoning ordinance. The board does not have authority to amend or repeal any provision of the zoning ordinance. Its authority is limited to appeals regarding interpretations of ordinance provisions, consideration of variances, and (if assigned by ordinance) consideration of conditional use permits. The board functions like a court. Its purpose is to give a full and fair hearing to any person whose property interests are affected by these matters. Its job is to apply the zoning ordinance and appropriate legal standards to the facts of each case. The board meeting and public hearings are open to the public. A taped recording is being made of the proceedings (or a court reporter is recording the proceedings).

Expiration and Revocation of Permission to Develop

Any permission to develop granted by a decision of the board must be authorized by obtaining the necessary building, zoning, and other permits. Construction must be substantially completed within __ months of the date of the board's decision. This period will be extended if a court order or operation of law postpones the final decision and may be extended for other good cause.

Permission to develop may be revoked for violation of any of the conditions imposed by the board. The applicant will be given notice of the violation and an opportunity to be heard.

Appeal of Board Decisions

A decision of the board may be appealed by commencing an action in the circuit court for this county within 30 days after the date of filing of the decision in the office of the board. An applicant who commences construction prior to expiration of the appeal period assumes the risk of having the board decision overturned.

Order of Events for Hearings

Each hearing will be opened by reading the application or appeal. The board's site inspection report (if any) will then be read. The applicant/appellant's statement and the zoning department report (if any) will each be followed by related board questions. Witness testimony (from those who have submitted appearance slips and alternating among those in favor, those opposed, and those appearing to provide information) and related board questions are next, followed by responses from the applicant and zoning department and any remaining board questions. If the board has all of the necessary facts, it will close the record, deliberate, and decide the matter in open session before proceeding to the next hearing. Written decisions based on the discussion of the board and evidence in the record will be filed in the office of the board and mailed to the parties involved as soon as practicable. Minutes of board meetings and decisions are available in the Zoning Department.

ZONING BOARD ANNOUNCEMENT OF PROCEEDINGS (continued)

Instructions for Witnesses

Anyone wishing to speak should complete an appearance slip and deliver it to the board secretary. You must be recognized by the board chair in order to speak. When called upon as a witness, you will be put under oath (if required by board bylaws). Please address your comments and questions to the chair and state:

- Your name and place of residence,
- Whether you represent a group or association,
- Your qualifications to speak on this matter or the source of your information, and
- Whether you favor, oppose, or are only providing information in this matter and your concerns.

Please confine your testimony to facts related to the case at hand and avoid repetitive testimony. [Optional] You will be limited to __ minutes.

Contested cases

[Modify the announcement above for hearings conducted as contested cases.]

A contested case is a proceeding in which:

- Testimony is taken under oath,
- Parties have a right to review and object to evidence presented by other parties,
- Objections are entered in the record, and
- Parties may cross-examine witnesses who present testimony.

In contested cases, a party may object to the introduction of written materials or photographs as evidence unless they are given an opportunity to question the writer/photographer and to provide a written reply regarding the evidence. Contested cases usually include a complete written record of the proceedings (often by a court reporter).

Voting and Recording Decisions

Chapter

11

When voting and making decisions, zoning board members should keep in mind the ethical and procedural requirements discussed in *Chapters 5 and 6*, including following the open meetings law, ensuring decision makers are impartial, avoiding or disclosing ex parte communication, and avoiding using a zoning board position for personal gain. With very limited exceptions, decision-making and voting by the zoning board must be conducted in open session.⁹²

How does the zoning board reach a decision?

The board should consider all of the evidence in the record, including the application, evidence gathered on-site and during the hearing, staff reports, photos, sketches, letters, emails, and audio and video tapes. The board determines the credibility of each piece of evidence and decides whether the applicant(s) have shown that they meet all of the legal standards necessary to grant their request. Remember that applicants have the burden to prove to the zoning board that they should receive the requested relief under the applicable standard of law. If at the end of testimony for a given application, the zoning board is unsure what to do or unsure whether the applicant should be granted the requested permit, then

⁹² Wis. Stat. § 19.88(1)

the applicant has not met their burden of proof and the zoning board must deny the permit.

To what extent must zoning board members explain their reasoning for approving or denying an application?

A zoning board may not grant or deny an application by simply restating the statutory or ordinance language that was or was not met. Rather, the board must explain the “grounds” it relied upon to make its decisions: the specific evidence and reasons the application does or does not fit the legal criteria.

It’s not sufficient to say “based on the evidence, we feel that there is a hardship and therefore grant the variance.” Rather, the zoning board must refer to the specific evidence that either meets or does not meet each of the legal standards for the decision the zoning board is considering. For example, the zoning board might say “the applicant does not meet the ‘unique property limitations’ test for a variance because the applicant’s property is no smaller than two-thirds of the properties surrounding the lake.”

Figure 15: Tips to help zoning board decisions survive a court challenge

1. Ensure all evidence, including on-site observations, is included in the record.
2. If a project has been modified since findings for it were written, make sure that the modifications do not necessitate new or revised findings.
3. Use statutory and case law requirements as guidelines for your findings.
4. Make sure there is a clear logical link articulated between conditions and the impacts of the project.
5. Avoid findings that merely restate the law.
6. Put your findings in clear and understandable language.

Kovacik, Gary A. and Mary L. McMaster. “Drafting Land Use Findings,” *Planning Commissioners Journal*, article 598, no date.

Figure 16: Tips for recording zoning board decisions

1. Zoning boards must determine whether each statutory and ordinance standard is met.
2. Consider requiring applicants to submit proposed decisions or findings of fact as part of the application process or presentation.
3. Distribute decision forms to all zoning board members and ask them to write down whether they feel each standard is met and why (*see Appendix D*).
4. Individual zoning board members should describe their rationale to other members
5. After discussion, motions should be made and votes taken.

If a zoning board's decision is appealed to circuit court, the judge will review the entire record and must be able to follow the reasoning of the board. While the board is not legally required to include reasons in the written decision, they must either be located there or clearly recorded in the transcript of the board proceedings.⁹³ We recommend using a decision form similar to the example provided in *Appendix D* to record the findings of fact, conclusions of law (including the board's reasoning), an order stating what the board has decided, and a notice of appeal rights.

How many zoning board members must vote to make a decision?

In 2005, the Wisconsin Legislature changed the voting requirements for zoning boards to try to ensure that landowners and developers are provided with timely and unbiased decisions. As a result, the current voting requirement is that when a **quorum** is present, a zoning board may take action by a majority vote of the members present.⁹⁴ Because the Legislature used the term "may" in this instance, the zoning board has the ability to adopt provisions in their bylaws requiring a vote by a greater number of members to take action. If the zoning board does not adopt any local provisions on this issue, then if only three members of a five-member zoning board are present, two concurring votes are sufficient to decide an issue such as granting a variance.

Quorum – a majority of the total zoning board.

⁹³ *Lamar Central Outdoor, Inc. v. Bd. of Zoning Appeals of Milwaukee*, 2005 WI 117, 284 Wis. 2d 1, 700 N.W.2d 87

⁹⁴ Wis. Stat. §§ 59.694(3m) & 62.23(7)(e)3m

Should a zoning board rehear or reconsider their decisions?

Some people who are not satisfied with a decision from the zoning board will ask the board to hear their case multiple times hoping for the answer they desire. The courts provide zoning boards with guidance on this topic. In 1998, the court of appeals upheld a board of appeals rule that prohibits hearings, reconsiderations, and new applications seeking the same relief after a previous denial unless there has been a substantial change of conditions or circumstances since the decision. The court held that the rule served a legitimate purpose because it promotes finality of zoning board decisions and avoids the inefficiency that would result from revisiting the same issues when there has been no change of circumstances.⁹⁵ In an earlier case, the court observed that a zoning board should not reopen or reconsider a proceeding that has been terminated, although there are possible exceptions, such as a mistake, public necessity, or other good cause, such as a significant change in circumstances.⁹⁶

What information needs to be in the record?

Minutes of zoning board meetings and hearings must be kept recording motions, seconds, and how each member voted, including absences and abstentions. Hearings, discussion, and decision making by the zoning board should also be recorded by a tape recorder or stenographer and be understandable so they can be transcribed if a decision is appealed to court. These records need to be preserved and available to the public consistent with the Wisconsin Public Records Law.⁹⁷ In addition to the minutes and tape or transcript, the record for a zoning board hearing and decision should include the application; all evidence related to the application (including photos, sketches, letters, emails, audio tapes, and video tapes); minutes; the decision form; and any other information considered in making the decision.

⁹⁵ *Tateoka v. City of Waukesha Bd. of Zoning Appeals*, 220 Wis. 2d 656, 583 N.W.2d 871 (Ct. App. 1998)

⁹⁶ *Goldberg v. Milwaukee Bd. of Zoning Appeals*, 115 Wis. 2d 517, 340 N.W.2d 558 (Ct. App. 1983)

⁹⁷ Wis. Stat. § 19.21

How long must records of the zoning board be kept?

Zoning board records, including meeting minutes and supporting documents submitted to the board must be kept for at least seven years.⁹⁸

Who enforces the decisions of the zoning board?

While the zoning board decides whether to grant or deny specific zoning permits, they do not enforce their decisions.⁹⁹ Zoning decisions, including those made by the zoning board, are typically enforced by the zoning administrator or building inspector.¹⁰⁰ In addition, under county zoning an owner of real estate in the district who is affected by an ordinance violation may also sue to enforce the ordinance.¹⁰¹ Similarly, under zoning by cities, villages, or towns with village powers, any adjacent or neighboring property owner who would be specially damaged may sue to enforce the ordinance.¹⁰²

If the Supreme Court changes a legal decision standard after a zoning board decides a case and before that case is remanded back to the zoning board, what decision standard should the board use when reevaluating the case?

The zoning board should reevaluate the facts under the more recent decision standard if it has previously applied an old standard.¹⁰³

⁹⁸ Wis. Stat. § 19.21 requires town, city, village or county public records to be kept at least 7 years.

⁹⁹ *Forest County v. Goode*, 219 Wis. 2d 654, 579 N.W.2d 715 (1998)

¹⁰⁰ Other people who may enforce the ordinance include the secretary of the zoning agency, or another appropriate person. Wis. Stat. §§ 59.69(2)(bm), 59.69(10)(b), 59.698 & 62.23(8)

¹⁰¹ Wis. Stat. § 59.69(11)

¹⁰² Wis. Stat. § 62.23(8)

¹⁰³ *Lamar Central Outdoor, Inc. v. Bd. of Zoning Appeals of Milwaukee*, 2005 WI 117, 284 Wis. 2d 1, 700 N.W.2d 87

Section III – Review

Keywords

- Onsite inspection
- Meeting
- Hearing
- Contested case
- Quorum

Test your Knowledge (answers on page 72)

Chapter 8 – Application Process

- 1) Why is it recommended to have a complete zoning board application on file for all decisions by the first time that notice is given for the final public hearing on the application?
- 2) Name four items that may be required in a zoning board application.

Chapter 9 – Site Visits

- 3) When conducting a site visit, what are the options for complying with the open meetings law?
- 4) Who may go on-site for a site inspection?

Chapter 10 – Meetings and Hearings

- 5) Does your zoning board follow set procedures for conducting meetings and hearings?

Chapter 11 – Voting and Recording Decisions

- 6) May a zoning board go into closed session to vote on a controversial variance application?
- 7) How much information and rationale needs to be in the record for a zoning board decision?
- 8) Should a zoning board rehear its past decisions?

Answers

- 1)
 - a. To avoid creating an incentive for permit seekers to withhold controversial information from their application until during or after the public hearing.
 - b. To provide ample time and opportunity for interested parties to review the complete application, digest the information, and develop their ideas before the hearing, so that they are prepared to discuss all of their concerns.
- 2) See list on pages 53-56.
- 3)
 - a. Visit the site as a group and follow the public notice and accessibility requirements of the open meetings law.
 - b. Visit the site as individuals or send a staff representative and avoid the requirements of the open meetings law.
- 4) Generally the zoning board or zoning staff, and members of the public if noticed as an open meeting. These persons may access the site only after obtaining permission from the owner.
- 5) If not, consider the checklist and announcement of proceedings contained on pages 62-64.
- 6) No. This is not one of the exceptions to open meetings listed in section 19.88(1) of Wisconsin Statutes. Also see *State ex rel. Hodge v. Turtle Lake*, 180 Wis.2d 62 (1993) .
- 7) The board must refer to the specific evidence related to each legal standard for the decision so that if their decision is appealed, the circuit court judge can follow their reasoning.
- 8) Generally no. Only if they have made a mistake or if there has been a significant change in circumstances.

Chapter 12

Discretion Associated with Zoning Decisions

Zoning decisions are typically divided into three categories (administrative, quasi-judicial and legislative) depending on the type of decision made and the body making the decision. The rules and level of discretion (or flexibility) associated with making these types of decisions varies greatly. Routine ministerial duties, such as the decision to grant or deny a permit by a zoning administrator or building inspector are considered **administrative decisions**. Discretion associated with these decisions is very limited. For example, a zoning administrator is limited to minor ordinance interpretation essential for day-to-day administration, whereas more in-depth interpretation should be reserved for the zoning board in its role as a quasi-judicial decision-maker.

Quasi-judicial decisions involve the application of a set of rules or policies to a particular fact situation. These decisions involve the exercise of some discretion. For example, in deciding whether to grant a variance or conditional use permit, a zoning board has the power to investigate facts, hold hearings, weigh evidence, draw conclusions, and use this information as a basis for their official decisions.¹⁰⁴ Discretion of quasi-judicial decision-makers is strictly limited by local ordinance and related state laws. Zoning boards may only apply ordinances as they are written and may not

If you're on the zoning board, your role is to apply the rules as written.

If you want to make or change the rules, run for elected office.

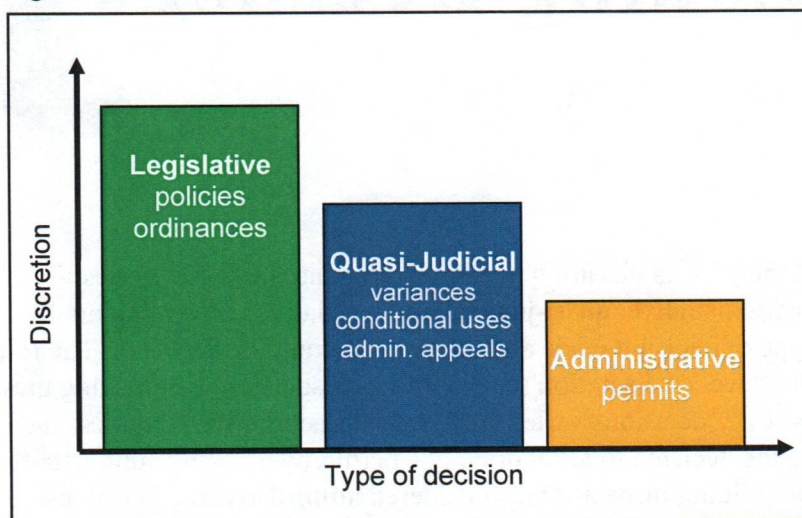
¹⁰⁴ *Universal Glossary of Land Use Terms and Phrases*. 1998. Land Use Law Center, Pace University School of Law. Available: <http://www.nymir.org/zoning/Glossary.html>

Section IV – Decisions of the Zoning Board

substitute their judgment for that of the elected local governing body.

Ordinance proposal, adoption and revision are **legislative decisions** reserved by state law for the planning committee/ commission (in an advisory capacity) and the local governing body following prescribed procedures.¹⁰⁵ These bodies enjoy greater latitude than administrative or quasi-judicial decision-makers. They may involve the public in helping to shape their decisions and are limited only by procedural and constitutional concerns.

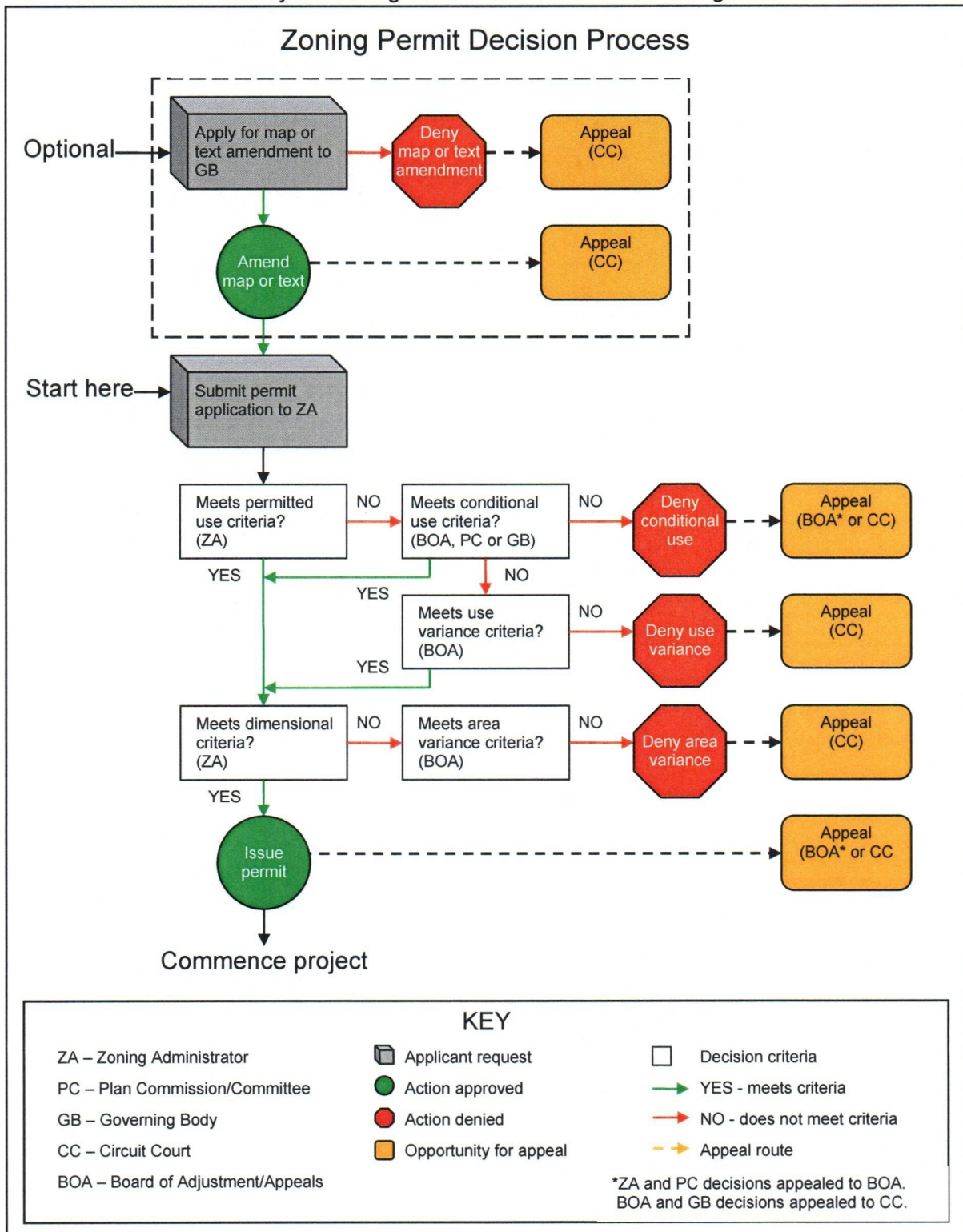
Figure 17: Discretion Associated with Zoning Decisions



¹⁰⁵ Counties are governed by Wis. Stat. § 59.69; cities by Wis. Stat. § 62.23(7); villages by Wis. Stat. § 61.35; and towns by Wis. Stat. § 60.61.

Figure 18: Zoning Permit Decision Process

The following diagram illustrates the zoning permit decision process. The key distinguishes between decisions made by the zoning board and those of other local government bodies.





Chapter 13

Administrative Appeals

An **administrative appeal** is a legal process provided to resolve disputes regarding ordinance interpretation or decisions made by administrative officials related to zoning. Administrative officials generally include the zoning administrator or building inspector. Additionally, if a conditional use decision is made by the planning commission/committee, that decision should be appealed to the zoning board as an administrative appeal. Zoning decisions that are appealed to circuit court are called *judicial appeals* and are discussed in chapter 17.

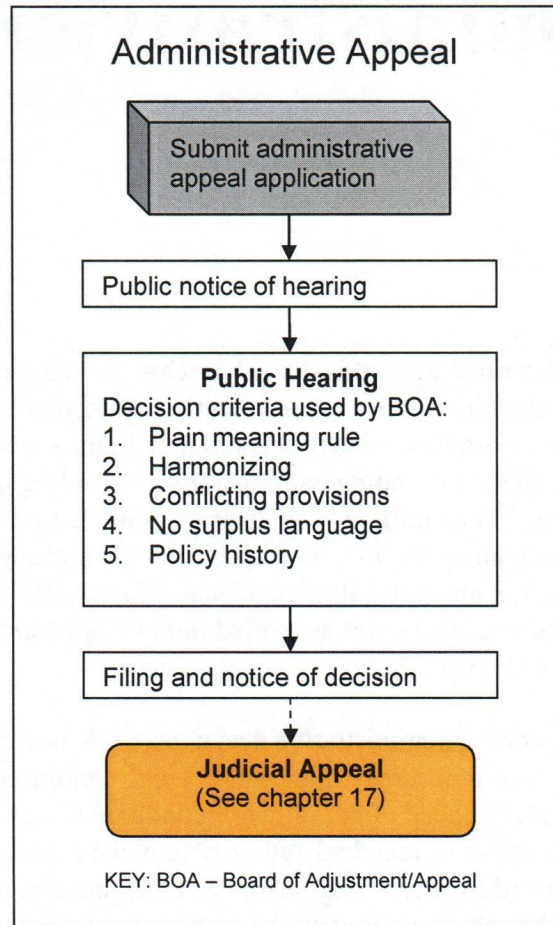
Appeals of zoning administrative decisions, such as the reasonableness or accuracy of measurements, conditions on development, issuance of permitted or conditional uses, or whether the administrative official had authority to make a decision, are generally heard by the zoning board.¹⁰⁶ When hearing an appeal, the zoning board should review the record of proceedings before it and may take new evidence.¹⁰⁷ The applicant has the burden of proof to demonstrate that the administrative decision is incorrect or unreasonable. We recommend that, when deciding administrative

¹⁰⁶ Wis. Stat. §§ 59.694(7)(a) & 62.23(7)(e)7. The exception is conditional use decisions originally heard by the zoning board which must be appealed to circuit court.

¹⁰⁷ Wis. Stat. § 59.694(8) states “board of adjustment may...make the order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.” Also see *Osterhues v. Bd. of Adjustment for Washburn County*, 2005 WI 92, 282 Wis. 2d 228; 698 N.W.2d 701

appeals, the zoning board follow the certiorari review criteria outlined in *Chapter 17* for appeal of judicial decisions. When making a decision, the zoning board has all of the powers of the decision-maker whose decision was appealed. The zoning board may reverse, confirm or modify the decision that was appealed.¹⁰⁸ For specific guidance related to appeals of conditional use permits, refer to *Chapter 14*.

Figure 19: Administrative Appeal Process



¹⁰⁸ Wis. Stat. §§ 59.694(8) & 62.23(7)(e)8

What is the process for filing an administrative appeal?

Who may appeal

Appeals are often initiated by disgruntled landowners, neighbors, and citizens groups, but may also be brought by the governing body or a state oversight agency such as the DNR. According to state statutes, any aggrieved person and any officer, department, board, or bureau of the municipality affected by an administrative decision of a zoning officer may appeal the decision to the zoning board.¹⁰⁹ A “person” includes partnerships, corporations, associations and governmental units.¹¹⁰ A person is “aggrieved” when the decision has a direct effect on the person’s legally protected interests.¹¹¹ The aggrieved party is not required to have attended a previous hearing on the matter.¹¹²

How to appeal

An appeal may be made by filing a notice of appeal (specifying the basis for the appeal) with the zoning board and the administrative official whose decision is being appealed.¹¹³ Once this is filed, the administrative official forwards all records associated with the original decision to the zoning board (including permit application, site plan, photos, transcript or tape of hearing, etc.).

Stay on appeal

Filing an appeal **stays** (puts on hold) the decision appealed. The stay is invalidated if the officer whose decision is appealed certifies to the zoning board that staying the decision would cause imminent peril to life or property. The officer must provide facts supporting that determination. The stay may be reinstated by the zoning board or a court. Reinstatement requires an application, notice to the administrative officer, and a determination that delaying the project would not cause imminent peril to life or property.¹¹⁴

Stay: To delay or stop the effect of an order, by legal action.

¹⁰⁹ Wis. Stat. §§ 59.694(4) & 62.23(7)(e)4

¹¹⁰ Wis. Stat. § 990.01(26)

¹¹¹ *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*, 125 Wis. 2d 387, 390, 373 N.W.2d 450 (Ct. App. 1985), *aff’d*, 131 Wis. 2d 101, 122, 388 N.W.2d 593 (1986).

¹¹² *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*, 131 Wis. 2d 101, 122, 388 N.W.2d 593 (1986)

¹¹³ Wis. Stat. §§ 59.694(4) & 62.23(7)(e)4

¹¹⁴ Wis. Stat. §§ 59.694(5) & 62.23(7)(e)5

Figure 20: Posting at a Project Site



Time limit on appeal

A reasonable time limit within which an appeal must be initiated should be specified by board rules or in the local ordinance (e.g. *within 30 days after effective notice of a decision*).¹¹⁵ If no such provisions are made, the appeal period begins when the aggrieved parties find out about the decision¹¹⁶ or have notice of the decision.¹¹⁷ Most jurisdictions require conspicuous posting of a building permit as one means of providing such notice to neighbors. Since a great number of administrative decisions are made each day, it is reasonable to require or encourage owners and developers to provide notice to potentially affected parties before they start construction. Some developers post a large sign at a project site to give additional notice, as shown in Figure 20.

How are disputes regarding ordinance interpretations resolved?

Appointed officials and staff who administer an ordinance interpret its provisions routinely and must apply them consistently. Where zoning ordinance language is unclear or contested, it must be interpreted in order to implement local land use policies. Interpretations should reflect the understanding of the planning committee/commission on the matter since these bodies are responsible for local land use policy administration. The committee/commission is, in turn, politically responsible to the local governing body for accurate interpretation of adopted policies. When a zoning ordinance interpretation or an administrative decision is formally contested, state statutes require local zoning boards to resolve the question. Their decisions may be appealed through the courts. Following are guidelines for ordinance interpretation.

Local usage

The primary source of information about ordinance interpretation is the language of the ordinance itself. Start by reviewing plan and ordinance statements of purpose or intent. Use these statements to guide interpretation. To familiarize yourself with the organization of the code and individual ordinances, look at the table of contents and index. Use the organizational system of an ordinance to identify provisions and to determine which provisions are modified

¹¹⁵ Wis. Stat. §§ 59.694(4) & 62.23(7)(e)4

¹¹⁶ *State ex rel. DNR v. Walworth County Bd. of Adjustment*, 170 Wis. 2d 406, 414, 489 N.W.2d 631 (Ct. App. 1992)

¹¹⁷ *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*, 131 Wis. 2d 101, 117-18, 388 N.W.2d 593 (1986)

by preceding or subordinate provisions. In addition, look for definitions, rules of interpretation, and related charts or tables.

Ordinance ambiguity and intent

Ordinance interpretation has been described as a two-step process. First, the zoning board determines whether the ordinance language is ambiguous. If it is ambiguous, then the board applies the following rules to determine its intent:

- **Scope or jurisdiction** - Determine whether the geographic area and activity in question are subject to regulation by the provision.
- **Context** - Determine whether general provisions that apply throughout the ordinance or those located nearby modify the ambiguous language.
- **Subject matter** - Determine whether the topic is clearly defined or limited.

Based on a clear understanding of these issues, board members can proceed to examine the purpose and history of the language in question. If meaning remains unclear, compare similar provisions or organizational structure in the same ordinance to determine intent. In most cases, ordinance meaning can be determined by reading its text literally, i.e. *staying within its four corners*. Use the following guidelines to interpret ordinance text:

- **Plain meaning rule** - If a word is defined in the ordinance, use that meaning. If a word is not defined in the ordinance, use the plain, dictionary meaning of the word. Technical words should be used in their technical sense.
- **Harmonizing** - When a provision is ambiguous, it must be interpreted to give effect to the primary legislative intent or purpose of the ordinance. Unreasonable and unconstitutional interpretations must be avoided. See Figure 21 on the next page.
- **Conflicting provisions** - When two provisions conflict, they should be interpreted to give effect to the primary legislative intent or purpose of the ordinance and to their respective requirements to the extent reasonable.

Section IV – Decisions of the Zoning Board

- **No surplus language** - Ordinances must be interpreted to give effect to every provision. Interpretations that render part of an ordinance meaningless must be avoided whenever possible.
- **Value of testimony** - Members of the zoning board should carefully consider interpretations made by staff, legal counsel, and the parties to a proceeding but should remember that the zoning board is responsible for interpreting ordinances within their jurisdiction. The potential interests and motives of those presenting testimony in an appeal should be examined to establish the relative merit of their testimony.

Figure 21: Example for Harmonizing Language

While this example does not deal with zoning, it illustrates how two statutes are harmonized to determine the jurisdiction of a lake district.

Wis. Stat. § 33.21 reads:

Public inland lake protection and rehabilitation districts may be created for the purpose of undertaking a program of lake protection and rehabilitation of a lake or parts thereof within the district.

Wis. Stat. § 33.23 (1) reads:

The governing body of a municipality may by resolution establish a district if the municipality encompasses within its boundaries all the frontage of the public inland lake within the state.

The question argued was “to do lake rehabilitation, does the entire lake need to lie within the lake district or just a part of it?”

One view is that there is an apparent conflict between the two statutes. One can read Wis. Stat. § 33.21 to say that a district may be created for the purpose of rehabilitating a lake which lies within a district or any part of a lake which lies within a district. Because rehabilitating the portion of the lake within the district seems to be authorized by § 33.21, but forbidden by § 33.23, one may assert that the statutes are in conflict.

An alternate view is to read Wis. Stat. § 33.21 as if brackets were inserted as follows:

Public inland lake protection and rehabilitation districts may be created for the purpose of undertaking a program of lake protection and rehabilitation [of a lake or parts thereof] within the district.

By reading “or parts thereof” to modify “lake” rather than “district,” the court interpreted the statute to mean that a district may be created for the purpose of rehabilitating a lake or part of a lake. Construed in conjunction with § 33.23, the statute thus provides that a district may be created to rehabilitate a lake or part of a lake, as long as the *entire* lake lies within the district.

The court chose the latter interpretation because it harmonizes the two statutes and gives both full force and effect.

Kaiser v. City of Mauston, 99 Wis. 2d 345, 299 N.W.2d 259 (Ct. App. 1980)

Evidence in the record

When these guidelines do not provide sufficient guidance to interpret the ordinance, refer to evidence beyond the ordinance. The information must be objective and contained in a local government record. For example, a staff report produced at the time of an ordinance amendment explaining its rationale may be examined to determine ordinance intent, but the oral opinion of an elected official recalling the issue may not be relied upon by the zoning board in deciding an appeal.

Ordinance amendments and record keeping

If interpretation of an ordinance proves difficult, a clarifying ordinance amendment should be considered. If a satisfactory interpretation is reached, staff and other officials should record the interpretation and apply it consistently in future related administrative and quasi-judicial matters. Many jurisdictions adopt clean up amendments periodically to clarify ordinance language settled by appeals over a six or twelve-month period.

How are disputes regarding boundary interpretations resolved?

When a zoning map or boundary is formally contested, zoning boards may be asked to interpret. Sometimes, zoning maps are at a scale that makes it difficult to distinguish the location of a small parcel and determine which zoning district applies. Other times, landowners may contest where a district boundary is drawn (for example, at the centerline of a road or at the current property line). We recommend that local jurisdictions adopt rules for interpreting maps and boundary lines and for determining which zoning district subsequently applies. As with interpretations of the ordinance text, it is good practice to keep a record of map interpretations and incorporate them into future ordinance map or text revisions.

May a zoning board decision of an administrative appeal be appealed to circuit court?

A zoning board decision of an administrative appeal may be contested in circuit court by any aggrieved person, taxpayer, officer, department, board or bureau of the municipality within thirty days of filing of the decision in the office of the board.¹¹⁸ (*See Chapter 17 Appeal of Zoning Board Decisions.*)

¹¹⁸ Wis. Stat. § 59.694(10)

Chapter 14

Conditional Uses and Special Exceptions

What is a conditional use?

A **conditional use**, also known as a **special exception** in Wisconsin case law,¹¹⁹ is any exception expressly listed in the zoning ordinance including land uses or dimensional changes. A conditional use is not suited to all locations in a zoning district, but may be allowed in some locations if it meets specific conditions set out in the zoning ordinance and is not contradictory to the ordinance's general purpose statement.¹²⁰ These conditions generally relate to site suitability and compatibility with neighboring land uses due to noise, odor, traffic, and other factors. In short, conditional uses must be custom tailored to a specific location. A conditional use must be listed as such in the zoning ordinance, along with the standards and conditions which it must meet.

Conditional uses in exclusive agricultural districts are limited to agricultural and other uses determined to be consistent with agricultural use and which require location in the district.¹²¹

Conditional uses and special exceptions are similar and considered together in this chapter. They must be expressly listed in the zoning ordinance.

Special exceptions generally refer to any exception made to the zoning ordinance including dimensional changes.

Conditional uses, in some ordinances, refer only to land uses.

¹¹⁹ *State ex rel. Skelly Oil Co. v. City of Delafield*, 58 Wis. 2d 695, 207 N.W.2d 585 (1973)

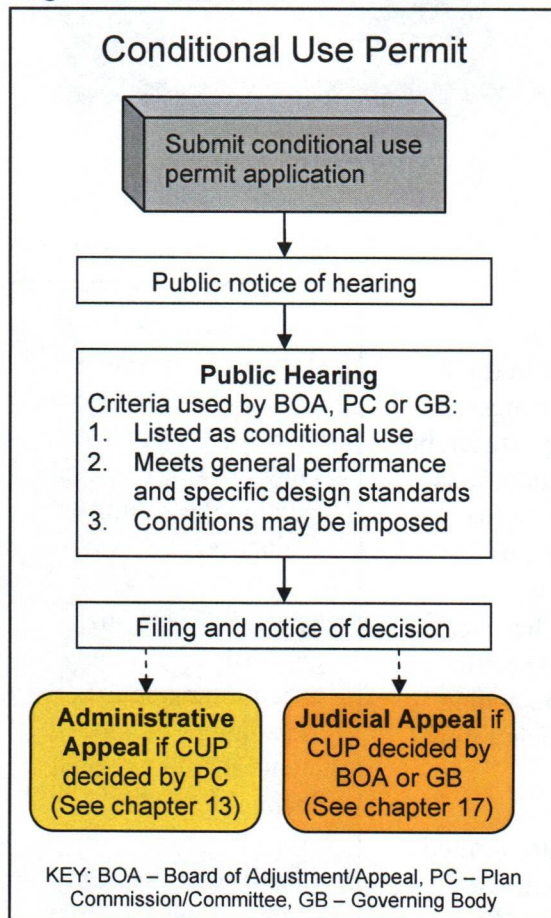
¹²⁰ *Kraemer & Sons v. Sauk County Bd. of Adjustment*, 183 Wis. 2d 1, 515 N.W.2d 256 (1994) referencing Wis. Stat. § 59.694(1) which is parallel to Wis. Stat. § 62.23(7)(e)1 for cities, villages, and towns with village powers.

¹²¹ Wis. Stat. §§ 91.75(5) & 91.77

How are conditional uses decided?

To allow a conditional use, a public notice and hearing are customary and may be required by ordinance (though not specifically required by state law). The application for a conditional use permit must be completed by the first time that notice is given for the final public hearing on the matter, unless the local ordinance provides otherwise.¹²² This court ruling assures that citizens will have information necessary to evaluate a proposal and provide testimony at the hearing, and that controversial information will not be withheld until after the hearing.

Figure 22: Conditional Use Process



The decision to grant or deny a conditional use permit is discretionary. In other words, a conditional use permit may be denied if the project cannot be tailored to a site to meet the specific conditional use standards and general purposes of the ordinance.

Who decides whether to grant conditional uses?

The local governing body determines by ordinance whether the zoning board, the governing body, or the planning commission/committee will decide conditional use permits.¹²³ Once this is specified by local ordinance, a community may not alternate assignment of conditional uses among these bodies unless the ordinance is specifically amended to provide authority to a different body.¹²⁴ This avoids arbitrary or politically driven assignment of conditional use permits to different decision-making bodies.

¹²² *Weber v. Town of Saukville*, 209 Wis. 2d 214, 562 N.W.2d 412 (1997)

¹²³ Counties - Wis. Stat. § 59.694(1) & (7)(a); Cities, villages and towns with village powers - Wis. Stat. § 62.23(7)(e)1 & 7.

¹²⁴ *Magnolia Township v. Town of Magnolia*, 2005 WI App 119, 284 Wis. 2d 361, 701 N.W.2d 60

What conditions may be attached to a conditional use permit?

Performance and design standards

General performance standards and specific design standards for approval of conditional uses may be provided by local ordinance.¹²⁵ An applicant must demonstrate that the proposed project complies with each of the standards. The permit review body may impose additional conditions on development consistent with standards for approval and ordinance objectives. The review body may require an applicant to develop a project plan to accomplish specified performance standards (e.g., meet with land conservation department staff to develop an erosion control plan that contains all sediment on the site). Permit conditions that are routinely imposed for similar projects should be adopted by ordinance as minimum standards for approval of conditional uses. Incorporating standards in an ordinance allows permit applicants to anticipate and plan for design, location, and construction requirements.

Figure 23: Types of Development Standards

Performance Standard	
Example:	<i>Projects may not result in an increase in stormwater discharge which exceeds predevelopment conditions.</i>
Features:	<ul style="list-style-type: none"> • The expected results are stated. • The project may be “custom tailored” to the site. • It requires more technical expertise to design and evaluate a proposal. • It involves more complex project monitoring and enforcement. • It provides an opportunity for optimal compliance/performance.
Design Standard	
Example:	<i>Each lot shall provide 500 cubic feet of stormwater storage.</i>
Features:	<ul style="list-style-type: none"> • Project specifications are stated. • It is easy to understand, administer, and enforce. • It provides little flexibility and so may result in many variance requests. • It may not achieve ordinance objectives in all cases.

¹²⁵ *Kraemer & Sons v. Sauk County Bd. of Adjustment*, 183 Wis. 2d 1, 515 N.W.2d 256 (1994)

Legal limits on conditions

All conditions on development are generally legal and acceptable provided they meet the following tests:

- **Essential Nexus Test** - The limitation must be designed to remedy a harm to public interests or to address a need for public services likely to result from the proposed development.¹²⁶
- **Rough Proportionality Test** - The limitation must be commensurate with the extent of the resulting harm or need for services.¹²⁷

Impact fees

Recent Wisconsin legislation prevents counties from imposing **impact fees**, which include contributions of land or interests in land. Cities, villages, and towns may impose impact fees for highways; facilities for treating sewage, storm waters, and surface waters; facilities for pumping, storing, and distributing water; parks, playgrounds, and athletic fields; fire protection, emergency medical, and law enforcement facilities; and libraries. In doing so, the municipalities are required to report the revenue and expenditure totals for each impact fee imposed by a municipality in the annual municipal budget summary.¹²⁸ Impact fees must also meet the essential nexus and rough proportionality tests.

For example, a developer could be required by a city, village or town to dedicate ten acres to parkland if the proposed development created a corresponding demand in the community. If there were a greater need for parkland, the new development should be charged only its proportional share. Impact fees are one type of condition and cannot be used to remedy existing deficiencies. A community must be able to document that an impact fee is reasonable and that local ordinances provide rationale and formulae for computing appropriate impact fees.

Impact Fees -

Conditions that require a developer to dedicate land or provide public improvements (or fees in lieu of) in order for a project to be approved. They are not unique to permitting of conditional uses.

¹²⁶ *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (U.S. 1987)

¹²⁷ *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed.2d 304 (U.S. 1994)

¹²⁸ 2005 Act 477 amended Wis. Stat. § 66.0617 and others and was published June 13, 2006. For more information see: http://www.legis.state.wi.us/2005/data/lc_act/act477-sb681.pdf

Once granted, how long does a conditional use permit last?***Continuance of use***

Once a conditional use is granted, subsequent owners of a property are entitled to continue the conditional use subject to the limitations imposed in the original permit.¹²⁹ This is so because site conditions and potential conflicts with neighboring land uses, rather than the circumstances of the applicant, determine whether a conditional use can be permitted at a particular location.

Time limits

Conditional uses may be granted for a limited term if the zoning board or other decision-making body can provide a legally defensible reason for the time limit. Periodic permit renewal to monitor compliance with development conditions is common and acceptable.¹³⁰ It is often required by ordinance for specified types of uses (e.g., quarry and mineral extraction operations).

Permit violations

If an owner changes the use or violates permit conditions, the board may revoke a conditional use permit or modify conditions after notice and a hearing. Revoking a conditional use permit is not considered a taking without just compensation because a conditional use permit is a type of zoning designation that is not a property right.¹³¹

Who decides appeals of conditional use decisions?

Appeals of conditional use decisions are handled differently depending on which local governing body makes the initial decision to grant or deny a permit. Conditional use decisions heard initially by the plan commission/committee must be appealed to the zoning board. Note that zoning boards do not have the authority to remand decisions back to the planning and zoning commission/committee.¹³² Conditional use decisions made initially by the governing body or zoning board must be appealed directly to circuit court.

¹²⁹ See Rohan, *Zoning and Land Use Controls*, sec. 44.01[4], p. 44-18, and Anderson, *American Law of Zoning* 3d, vol. 3, sec. 21.32, p. 754-5.

¹³⁰ Anderson, *American Law of Zoning*, 3d, Vol. 3, S. 21.32, pp. 754-5.

¹³¹ *Rainbow Springs Golf Co. v. Town of Mukwonago*, 2005 WI App 163; 284 Wis. 2d 519; 702 N.W.2d 40

¹³² Wis. Stat. §§ 59.694(8) & 62.23(7)(e)8

What standards apply when the zoning board hears an appeal of a conditional use decision?

If the local ordinance authorizes the plan commission/committee to decide conditional uses, their decisions may be appealed to the zoning board¹³³ by any aggrieved person or by an officer or body of the county, city, village, or town subject to time limits specified by local ordinance or rules.¹³⁴

De novo – anew; collecting new information.

When reviewing a conditional use permit decision, the zoning board has authority to conduct a **de novo** review of the record and substitute its judgment for that of the plan commission/committee.¹³⁵ Consistent with a de novo review, the zoning board may take new evidence.

We recommend that the zoning board use the following standards when reviewing conditional use permit decisions originally made by the plan commission/committee:

- **Subject matter jurisdiction.** Does the ordinance assign conditional use permit decisions to the plan commission/committee? Is the conditional use in question listed in the ordinance for this location?
- **Proper procedures.** Were proper procedures followed?
- **Proper standards.** Were the proper standards from the ordinance used?
- **Evidence.** Is there evidence in the record supporting the decision of the plan commission/committee? Is there evidence that is new and relevant to ordinance standards? If so, the zoning board may take additional evidence.

Based on the evidence before it, the zoning board decides whether to grant the conditional use permit. The zoning board may reverse, affirm or modify a plan commission/committee decision, but does not have authority to remand a decision to the plan commission/committee.¹³⁶

¹³³ *League of Women Voters v. Outagamie County*, 113 Wis. 2d 313, 334 N.W.2d 887 (1983) referencing Wis. Stat. § 59.694(7) & 69 OAG 146, 1980, which clarified that “administrative official” includes the planning and zoning committee. Though this case refers to the statute for counties, Wis. Stat. § 62.23(e)7 for cities, villages and towns has parallel wording. Therefore, the author concludes that the League decision also applies to cities, villages, and towns with village powers.

¹³⁴ Counties - Wis. Stat. § 59.694(4); Cities, villages and towns with village powers - Wis. Stat. § 62.23(7)(e)4.

¹³⁵ *Osterhues v. Bd. of Adjustment for Washburn County*, 2005 WI 92, 282 Wis. 2d 228; 698 N.W.2d 701

¹³⁶ Wis. Stat. §§ 59.694(8) & 62.23(7)(e)8

May a conditional use decision by the zoning board or governing body be appealed to circuit court?

Yes. If conditional uses are decided by the zoning board, they may be appealed to circuit court by any aggrieved person, taxpayer, officer, or body of the municipality within 30 days of the filing of the decision in the office of the zoning board.¹³⁷

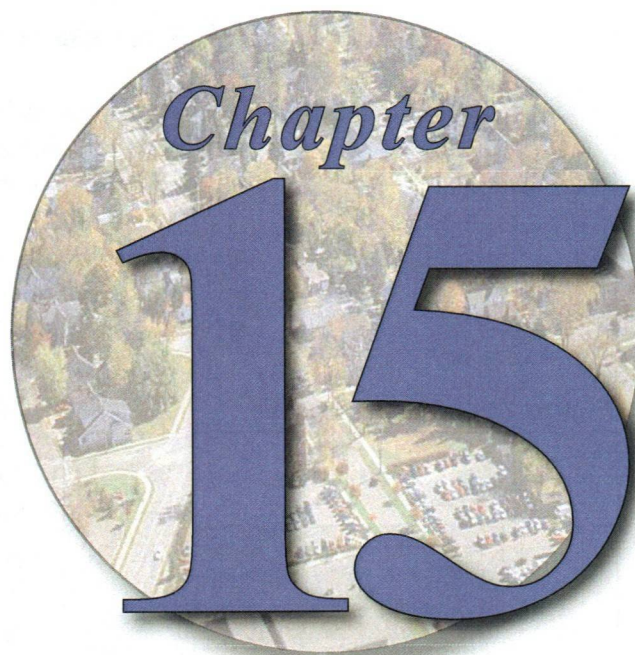
If conditional uses are decided by the governing body, they may be appealed to circuit court.¹³⁸ Circuit courts use the *certiorari* review standards described in *Chapter 17* to review conditional use decisions.¹³⁹

¹³⁷ Wis. Stat. §§ 59.694(10) & 62.23(7)(e)10

¹³⁸ *Town of Hudson v. Hudson Town Bd. of Adjustment*, 158 Wis. 2d 263, 461 N.W.2d 827 (Ct. App. 1990) states there is no statutory authorization for zoning board review of the town board. Though this case refers to the statute for cities, villages, and towns, the zoning board statutes regarding conditional use permit decisions and appeals for counties have parallel wording. Therefore, the author concludes that the Hudson decision also applies to counties.

¹³⁹ *Town of Hudson v. Hudson Town Bd. of Adjustment*, 158 Wis. 2d 263, 461 N.W.2d 827 (Ct. App. 1990)

Variances



Whereas permitted and conditional uses allow a property to be used in a way expressly listed in the ordinance, a variance allows a property to be used in a manner forbidden by the zoning ordinance.¹⁴⁰ Two types of zoning variances are generally recognized: **Area variances** provide an increment of relief (normally small) from a physical dimensional restriction such as a building height or setback.¹⁴¹ **Use variances** permit a landowner to put a property to an otherwise prohibited use.¹⁴² Though not specifically restricted by statute or case law,¹⁴³ use variances are problematic for reasons discussed on page 102. Variance decisions related to zoning are always heard by the zoning board of adjustment or appeals.

¹⁴⁰ *Fabyan v. Waukesha County Bd. of Adjustment*, 2001 WI App 162, 246 Wis. 2d 851, 632 N.W.2d 116

¹⁴¹ *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401

¹⁴² *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401

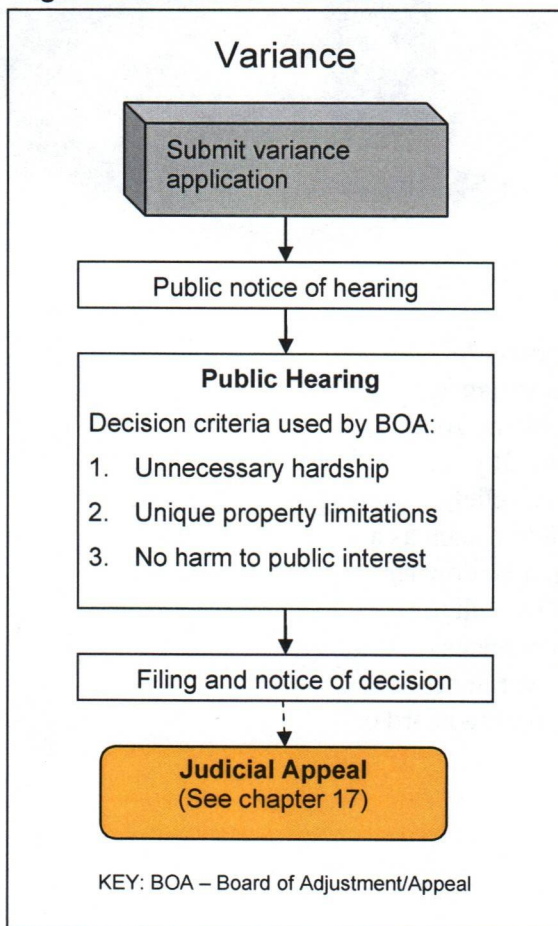
¹⁴³ In the past, it was doubtful that zoning boards of adjustment in Wisconsin had the authority to grant use variances [see *State ex rel. Markdale Corp. v. Bd. of Appeals of Milwaukee*, 27 Wis. 2d 154, 133 N.W.2d 795 (1965)]. Now, the Supreme Court has determined that boards of adjustment do have the authority to issue use variances [see *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401 and *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514].

What are the criteria for granting a variance?

To qualify for a variance, an applicant has the burden of proof to demonstrate that all three criteria defined in state statutes and outlined below are met.¹⁴⁴

- Unnecessary hardship
- Unique property limitations
- No harm to public interests

Figure 24: Variance Process



Local ordinances and case law may also specify additional requirements. The zoning department can assist a petitioner in identifying how these criteria are met by providing clear application materials that describe the process for requesting a variance and the standards for approval (*see the sample application form in Appendix D*).

1. Unnecessary Hardship

The Wisconsin Supreme Court distinguishes between area and use variances when applying the unnecessary hardship test:

For a **use variance**, unnecessary hardship exists only if the property owner shows that they would have no reasonable use of the property without a variance.¹⁴⁵ What constitutes *reasonable use* of a property is a pivotal question that the board must answer on a case-by-case basis. If the property currently supports a reasonable use, the hardship test is not met and a variance may not be granted. If a variance is required to allow reasonable use of a property, only that variance which is essential to support reasonable use may be granted and no more. A proposed use may be *reasonable* when it:

¹⁴⁴ *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d at 420, 577 N.W.2d 813 (1998); *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d at 254, 469 N.W.2d 831 (1991).

¹⁴⁵ *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 413-414, 577 N.W.2d 813 (1998).

- does not conflict with uses on adjacent properties or in the neighborhood,
- does not alter the basic nature of the site (e.g., conversion of wetland to upland),
- does not result in harm to public interests, and
- does not require multiple or extreme variances.

For an **area variance**, unnecessary hardship exists when compliance would unreasonably prevent the owner from using the property for a permitted purpose (leaving the property owner without any use that is permitted for the property) or would render conformity with such restrictions “unnecessarily burdensome.”¹⁴⁶ To determine whether this standard is met, zoning boards should consider the purpose of the zoning ordinance in question (see the appendix for information about the purposes of shoreland and floodplain zoning), its effects on the property, and the short-term, long-term, and cumulative effects of granting the variance.¹⁴⁷

Courts state that “unnecessarily burdensome” may be interpreted in different ways depending on the purposes of the zoning law from which the variance is being sought. For example, the purpose of a shoreland district to *protect water quality, fish, and wildlife habitat and natural scenic beauty for all navigable waters in Wisconsin* would be interpreted differently from the purpose of a residential district to *protect the character of established residential neighborhoods*. In light of increased focus on the purposes of a zoning restriction, zoning staff and zoning boards have a greater responsibility to explain and clarify the purposes behind dimensional zoning requirements.

2. Hardship Due to Unique Property Limitations

Unnecessary hardship must be due to unique physical limitations of the property, such as steep slopes or wetlands that prevent compliance with the ordinance.¹⁴⁸ The circumstances of an applicant (growing family, need for a larger garage, etc.) are not a factor in deciding variances.¹⁴⁹ Property limitations that prevent ordinance compliance and are common to a number of properties

¹⁴⁶ *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d at 475, 247 N.W.2d 98 (1976) (quoting 2 Rathkopf, *The Law of Zoning & Planning*, § 45-28, 3d ed. 1972).

¹⁴⁷ *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401

¹⁴⁸ *State ex rel. Spinner v. Kenosha County Bd. of Adjustment*, 223 Wis. 2d 99, 105-6, 588 N.W.2d 662 (Ct. App. 1998); *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 410, 577 N.W.2d 813 (1998); *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 255-56, 469 N.W.2d 831 (1991); *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 478, 247 N.W.2d 98 (1976)

¹⁴⁹ *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 478-79, 247 N.W.2d 98