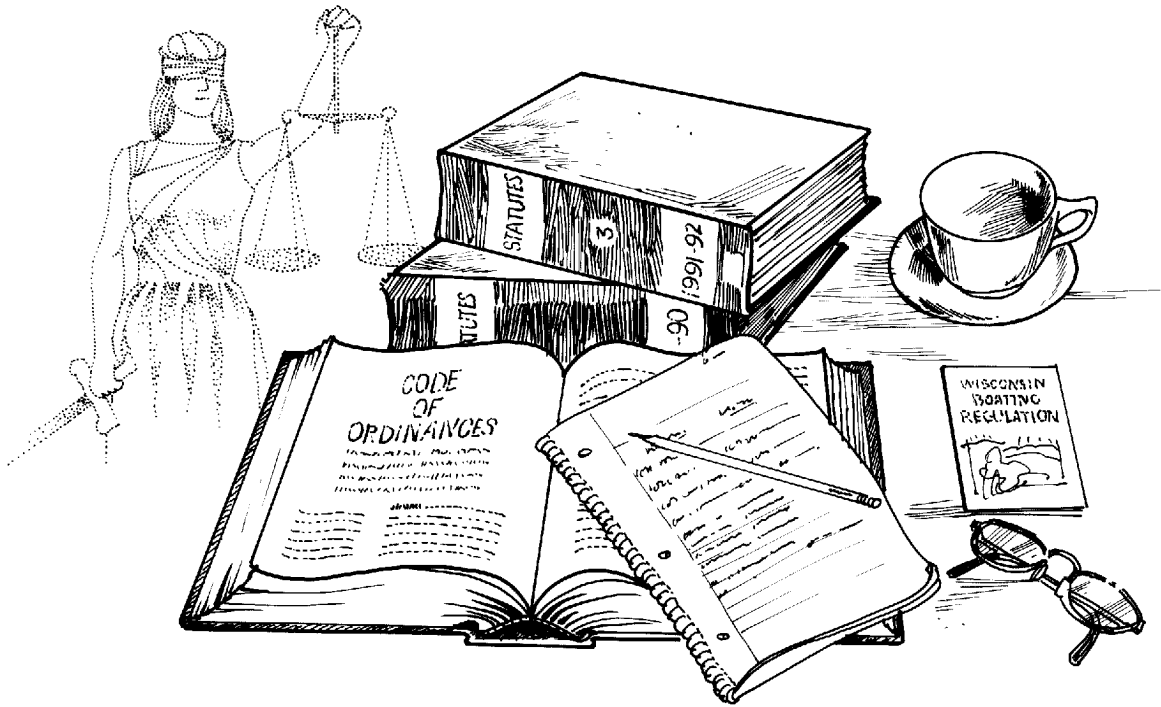


# ZONING BOARD HANDBOOK



*For Zoning Boards of Adjustment/Appeals*

*July 2001*

*Michael D. Dresen & Lynn Markham*



**The Land Use Education Center**

The College of Natural Resources and Cooperative Extension  
University of Wisconsin – Stevens Point

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## An Introduction to the Zoning Board Handbook

This handbook is intended to assist zoning board members in the exercise of their responsibilities and to aid local government officials and citizens in understanding the role of the zoning board and the procedures and standards with which their decisions must comply. Local ordinances implement local land use plans that affect many economic and quality of life issues in communities throughout Wisconsin. Citizen zoning boards are essential to the fair and effective administration of these laws. The boards are known by a number of names: boards of adjustment in counties and boards of appeals for cities, villages and towns or just the BOA.

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.

# Role, Authority and Composition of the Zoning Board

## Quasi-Judicial Role of the Zoning Board

Zoning boards function in many respects like courts and are therefore known as quasi-judicial bodies. The primary role of a zoning board is to apply local ordinances and related state laws to specific development proposals in three general categories<sup>1</sup> (described in following sections):

- ✍ administrative appeals,
- ✍ variances, and
- ✍ special exceptions/conditional uses (if granted the authority).

It is tempting to think of zoning boards as providing flexibility in administration of zoning and to some extent that is true. However, that flexibility is strictly limited by the state and local laws that determine their authority and provide criteria for their decision-making. Zoning board authority is determined by Wisconsin Statutes (a table of statutory authorities is included in the appendix). The interpretation of these laws by litigation over the years must also be considered by boards in exercising their duties. 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.

## Due Process

Since a zoning board makes quasi-judicial decisions, it must conduct its business as a court does following rules of fair play. These rules, known as due process, include:

- ✍ giving notice of a pending decision to affected persons,
- ✍ providing an opportunity for a hearing,
- ✍ basing decisions on pre-existing standards and factual evidence in a record that is available for review,
- ✍ making written decisions, and
- ✍ remaining unbiased in their decision-making.

A zoning board must apply ordinances as they are written and may not substitute its judgment for that of the elected local governing body. Ordinance proposal, adoption and revision are legislative functions reserved by state law for the planning and zoning committee/commission and the local governing body following prescribed procedures.<sup>2</sup> The *Zoning Permit Decision Process* diagram in this section describes legislative, quasi judicial and ministerial functions in land use law administration and distinguishes zoning board roles from those of other local government bodies.

## Composition of the Zoning Board

Requirements for the board and procedures for appointment of its members are provided in state statutes and summarized below:

***Zoning boards function in many respects like courts.***

***A zoning board must conduct its business following rules of fair play.***

## COMPOSITION OF THE ZONING BOARD

### County Zoning Board of Adjustment<sup>3</sup>

- 3 to 5 members
- 2 additional alternate members may be appointed
- no more than 1 member from each town
- appointed by the county board chair (except that, in counties with a county executive or administrator that officer shall make appointments<sup>4</sup>)
- subject to approval by the county board
- members are appointed for 3-year staggered terms, starting July 1

### City, Village or Town<sup>5</sup> Zoning Board of Appeals<sup>6</sup>

- 5 members
- 2 additional alternate members may be appointed
- appointed by the chair of the governing body
- subject to approval by the full governing board
- members are appointed for 3-year staggered terms.

***Members of the governing body should not be appointed to the zoning board.***

Members of the local governing body probably should not be appointed to serve on the zoning board. In such a dual position it would be very difficult for an individual to separate legislative from quasi-judicial roles. Wide discussion of public policy issues (such as land use laws) and constituent representation are encouraged in the legislative process but are prohibited or strictly limited by due process concerns in the quasi-judicial role of a zoning board member (see *ex parte* communication et al in *Voting and Decisions*). It would also be difficult in such a circumstance for an individual to maintain objectivity (and its appearance) in interpreting or applying a zoning policy he/she may have voted against as an elected official.

Appointment of a zoning board member is an important decision and should be influenced by recognition of the unique role of the board. Following are suggested criteria for appointment of members:

1. Geographic diversity. Members from each distinct geographic area should be appointed in order to provide board familiarity with the differing landscapes, natural resources and development patterns in the jurisdiction.
2. Land use/natural resource expertise. Members with academic or professional knowledge of land use law, zoning, construction/development practices or natural resources and who are able to read site plans and related maps should be appointed in order to provide zoning board members capable of understanding development proposals and determining their impacts.
3. Commitment to community service and continuing education. Members who have demonstrated an interest in community service in the past 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 importantly, 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.

Zoning board members may be removed only for cause, after written charges and opportunity for a public hearing. If a zoning board member cannot serve the full length of their term, the vacancy is filled for the remaining portion of the term. The appointment of alternate members is authorized by law and is advisable:

- ✍ Postponement of decisions due to absences, resignations or conflicts of interest are minimized;
- ✍ Alternates gain experience by serving a sort of apprenticeship before becoming regular zoning board members; and
- ✍ A full board optimizes critical review of applications/petitions.

By statute, the first alternate serves when a zoning board member cannot vote due to absence or a conflict of interest. The second alternate serves only if the first alternate is not available or is already in service.

**Selection of Zoning Board Officers**

- ✍ A county zoning board of adjustment chooses its own chair<sup>7</sup> and may choose a vice-chair and a secretary.
- ✍ The chair of a city, village or town<sup>8</sup> governing body designates the zoning board of appeals chair subject to approval by the governing body.<sup>9</sup>

**Duties of Officers**

The Chairperson<sup>10</sup>

- 1) Determines dates and times of meetings and hearings, other than those set by the board as a whole.
- 2) Exercises responsibilities under the open meeting law (see the section on *Open Meetings*).
- 3) Presides at meetings and hearings.
- 4) Leads the board through agenda items and calls for votes.
- 5) Decides points of order subject to reversal by majority vote of the board.
- 6) Administers oaths to witnesses and issues subpoenas to compel their attendance.
- 7) Supervises work of the board secretary.

Duties of the Secretary

- 1) Performs record keeping and clerical duties.
- 2) Provides public notice of hearings and meetings.
- 3) Implements compliance with the Wisconsin public records law.

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.

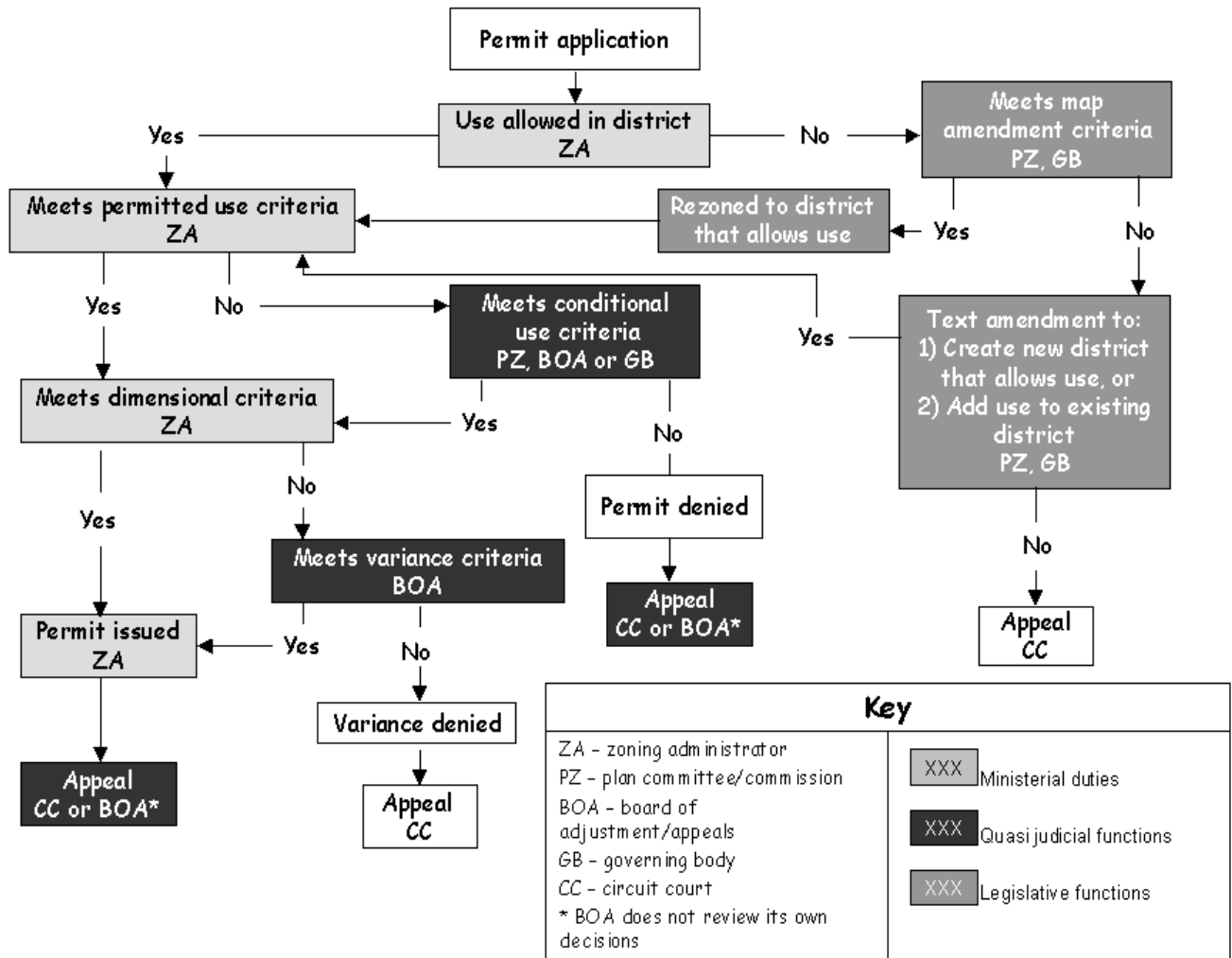
***A staff person who presents testimony should not serve as board secretary.***

**Procedures and the extent of discretion vary for ministerial, quasi-judicial and legislative zoning decisions.**

## Zoning Permit Decision Process

The following diagram illustrates the zoning permit decision process. It describes related ministerial, quasi-judicial and legislative roles of local government officers and bodies. Generally, discretion associated with ministerial duties is limited to ordinance interpretation essential for day-to-day administration. Quasi-judicial discretion is strictly prescribed by local ordinance and related state laws while legislative bodies enjoy greater latitude necessary for local policy development (limited by constitutional concerns).

## Zoning Permit Decision Process





# Operating Rules of the Zoning Board

## 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.

***Provide operating guidelines for the board by ordinance or formal rules.***

ADOPTION OF ZONING BOARD RULES
County Zoning Board of Adjustment
<ul style="list-style-type: none"> <li>☞ County board must adopt rules for the zoning board.<sup>11</sup></li> <li>☞ Zoning board may adopt rules to implement the county board rules.<sup>12</sup></li> <li>☞ County board sets filing fees for appeals to zoning board.<sup>13</sup></li> </ul>
City, Village or Town Zoning Board of Appeals <sup>14</sup>
<ul style="list-style-type: none"> <li>☞ Zoning board must adopt rules in accordance with any ordinance adopted under sec. 62.23 Wis. Stats.<sup>15</sup></li> </ul>

## Content of Operating Rules

Topics included in operating rules for a zoning board may include:

- ☞ General provisions (additional membership requirements, member education, public records procedures, office of record)
- ☞ Officers, duties and staff assistance
- ☞ Meetings (open to public, public notice requirements, agenda revision, quorum, attendance of alternates, rules of order, compensation, travel and other expenses)
- ☞ Powers and duties of the board
- ☞ Appeal procedures (filing procedure, fees, timing, stays on appeal, contested case requests)
- ☞ Conduct of on-site inspections
- ☞ Hearings (oaths, order of business, jurisdiction, continuances, recording, rules of evidence)
- ☞ Decisions (voting requirements, participation in decisions where there may be a conflict of interest, response to ex parte communications, timing where multiple decisions/authorities are required, form of decision, development conditions, filing and notice to the public and parties)
- ☞ Refilings and rehearings

Options for addressing these topics in operating rules for the zoning board are discussed in related sections of this manual. A number of counties and municipalities have adopted fairly comprehensive rules that may serve as examples.<sup>16</sup>

***The Open Meetings Law is intended to give the public notice of governmental meetings and access to them.***

## Open Meetings and Public Notification of Meetings

### Open Meetings Law

All zoning board meetings and hearings must comply with the Wisconsin Open Meetings Law<sup>17</sup>. 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 reasonably accessible and open to the public. 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. Though most meetings must be open to public attendance, the law does not require all meetings to provide a forum for public comment (working committee/board meetings are perfectly acceptable). The zoning board usually designates its secretary or a staff person to provide proper notice of board meetings and hearings. However, board members must individually determine compliance with all aspects of the Open Meetings Law in deciding whether to participate in a meeting.

### 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.
- ⌘ The numbers test is met when enough members of the body are present to determine the outcome of an action. By statute, if one-half of the members of the body are present, 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 (e.g. 2 members of a 5 member city/village/town zoning board where 4 votes are required to carry an issue).

Phone conferences may constitute a meeting if the numbers and purpose tests are met. A sequence of phone calls to “line up votes” or conduct other zoning board business (known as a *running quorum*) constitutes an illegal meeting since it is not noticed and open to the public.

Chance and social gatherings and conferences where the numbers test is met are not meetings provided the purpose test is not met (i.e. no board business is discussed).

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 where 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.

**Meeting Access and Notice**

Open meetings. Unless specifically exempted, all meetings of governmental bodies must be open to the public and reasonably accessible to the public, including persons with disabilities.

Notice of meetings. 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.<sup>18</sup> (A minimum of three locations is recommended.) Paid, published notices are not required by the Open Meetings Law. However, where other statutes require paid publication of a hearing or meeting notice, the following Open Meetings Law requirements may be incorporated in the published notice (posting is recommended in addition to publication):

- 1) 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.
- 2) Notice to media. Notice (written, phone or fax) must be provided to any media who have filed a written request and to the governmental unit's official newspaper, or, if there is no official newspaper, to media likely to give notice in the area.
- 3) Separate notices. A separate notice is required for each meeting (a general notice at the beginning of the year is not sufficient).
- 4) Content of notice. Notice must specify the time, date, place and subject matter of the meeting, any contemplated closed session and intent to reconvene in open session within 12 hours after completion of a closed session.<sup>19</sup> The notice must describe issues on the agenda in enough detail to allow them to be identified by those likely to be affected by any decision. It may provide for a period of public comment and discussion. However, only issues included in the public notice and agenda may be decided.

**Permitted Exemptions for Closed Sessions**

Statutes provide specific exemptions from the Open Meetings Law. Those listed below are most likely to apply to zoning boards.

- 1) Deliberation concerning a case. Deliberation concerning a case that was the subject of a quasi-judicial hearing.<sup>20</sup> The courts have determined a case to be an adversarial proceeding with opposing parties, not merely a petition for appeal or variance or an application for a conditional use permit.
- 2) 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.<sup>21</sup> Consideration of employment, promotion, compensation or performance evaluation data of a public employee.<sup>22</sup>
- 3) Potentially damaging personal information. Consideration of financial, medical, social or personal histories or disciplinary data of *specific* persons that would be likely to have a substantial adverse effect on the reputation of a person.<sup>23</sup>
- 4) Conferring with legal counsel. Conferring with legal counsel about strategy regarding current or likely litigation.<sup>24</sup>
- 5) Request to an ethics board. Consideration of a request for confidential written advice from a local ethics board.<sup>25</sup>

***Statutes provide specific Open Meetings Law exemptions.***

- 6) Other narrow exemptions. Specified deliberation regarding unemployment and workers compensation, burial sites and other narrow exemptions provided by statute.<sup>26</sup>

### Conduct Of Closed Sessions

- 1) Convene in open session. The body must initially convene in open session.
- 2) Move to closed session. To convene in closed session (from open 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.
- 3) 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. The zoning administrator or staff person who presented testimony and the municipal counsel (if he/she represented the zoning department at hearing) should not attend closed sessions. Generally, members of the local governing body may not attend closed sessions of the zoning board. The board is not a subunit of the governing body since the governing body does not review board decisions. Therefore the statutory exemption which allows a parent body to attend closed meetings of its subunits does not apply.
- 4) Motions and decisions. Motions and decisions must be recorded. Where feasible, vote in open session.
- 5) Matters for discussion. The body may consider only the matter(s) for which the session was closed.
- 6) 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.<sup>27</sup> When there is good cause, 2-hour prior notice of a planned closed session and reopening can be provided to allow reopening a meeting but this approach is rarely necessary.

### Violations and Liability

- 1) Determine proper notice. At the beginning of a meeting, each member of the zoning board should determine whether the meeting had proper notice. If compliance is questionable, the municipal attorney should be able to provide counsel on the matter.
- 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 a closed session may participate in the closed session if it is held.
- 3) Individual liability. Zoning board members can be sued individually or as a group for alleged violations. Forfeitures (\$25-\$300) can be levied against members who break the law. The municipality may not reimburse members for these forfeitures.
- 4) Decisions may be voided. 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.
- 5) Document proceedings. A log or minutes documenting proper notice and recording motions, rationale and any votes on abbreviated notice,

***Each board member should determine whether a meeting had proper 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).

**Combined Notices**

All zoning board *meetings* and *hearings* must comply with notice requirements of:

- ✍ the Wisconsin Open Meetings Law,<sup>28</sup>
- ✍ statutes governing procedures for zoning boards,<sup>29</sup>
- ✍ DNR rules for shoreland, shoreland wetland and floodplain zoning matters,<sup>30</sup> and
- ✍ other notice requirements imposed by local ordinance or bylaws.

Local notification procedures must be crafted to include all of these requirements.

Generally, the zoning board secretary or administrative staff of the zoning department perform meeting and hearing notification duties and provide evidence of compliance. The following information is provided for their information and so that board members can confirm compliance.

<b>STATUTORY NOTICE REQUIREMENTS FOR ZONING BOARD HEARINGS</b>	
<b>County</b> Population of 250,000 or more <sup>31</sup>	<ul style="list-style-type: none"> <li>✍ <del>C</del>lass 2 notice required.</li> <li>✍ <del>P</del>osting recommended.</li> </ul>
<b>County</b> Population less than 250,000 <sup>32</sup>	<ul style="list-style-type: none"> <li>✍ <del>P</del>osting required (2 weeks prior complies).</li> <li>✍ <del>C</del>lass 2 notice recommended.</li> </ul>
<b>City</b> <sup>33</sup>	<ul style="list-style-type: none"> <li>✍ <del>C</del>lass 1 notice required.</li> <li>✍ <del>P</del>osting recommended.</li> </ul>
<b>Village or Town</b> <sup>34</sup>	<ul style="list-style-type: none"> <li>✍ <del>P</del>osting one week prior required.</li> </ul>

Class 1 notice – 1 newspaper publication at least one week before the act or event.<sup>35</sup>

Class 2 notice – 2 newspaper publications, at least once each week for consecutive weeks, the last at least one week before the act or event.<sup>36</sup>

Posting – Display of a notice in at least 3 public places likely to give notice to the public and those affected by a decision.<sup>37</sup>

In computing the time for publication the first day of publication is excluded and the day of the event/meeting is included.<sup>38</sup> Newspaper publication must be in the community's *official* newspaper or, if no official newspaper is designated, in a newspaper likely to give notice in the affected area.<sup>39</sup>

**Notice Contents**

The following information should be included in the notice:

- ✍ Name of the governmental body that will meet.
- ✍ Date, time and location of hearing.
- ✍ Name of the applicant, appellant or petitioner.
- ✍ Location of property involved.

***A public notice can be crafted to address a number of notification requirements.***

- ✍ 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.<sup>40</sup> (Review the exemptions and procedures for closed sessions.)
- ✍ 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.

### **Proof of 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.<sup>41</sup> A similar affidavit by a person posting legal notice showing the time, place and manner of posting serves the same function for posted notices.<sup>42</sup>

### **Agency Notification**

#### Department of Natural Resources (DNR) notification.

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.<sup>43</sup>

Department of Agriculture, Trade and Consumer Protection (DATCP) notification. 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.<sup>44</sup>

### **Media Notification**

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 to news media likely to give notice in the area.<sup>45</sup>

### **Notice to Other Parties**

Notice must also be given by mail to the parties in interest.<sup>46</sup> The parties include:

- ✍ the applicant/appellant/petitioner,
- ✍ a zoning officer whose decision is appealed and
- ✍ adjacent/nearby property owners as specified by ordinance.

***Notice must be given to the parties in interest.***

# Conduct of Zoning Board Hearings

Information to guide the zoning board in conducting its meetings and hearings is provided in two parts. The first is a checklist that the board chair and members can use to prepare for and conduct meetings and hearings. The second part may be read by the board chair 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/hearing.

***Prepare a checklist for  
conduct of meetings  
and hearings.***

## Zoning Board Checklist

- 1 Prior to meeting/hearing [board secretary or designated staff]
  - ☞ A. Arrange for alternate/s (due to anticipated absence or conflict of interest)
  - ☞ B. Send agenda, applications and staff reports to board members
  - ☞ C. Comply with open meeting law/public notice requirements
  - ☞ D. Arrange for tape recording (meeting minutes) or a court reporter
- 2 Preliminary matters at meeting
  - ☞ A. Distribute and collect appearance slips (see appendix)
  - ☞ B. Call meeting to order [chair]
  - ☞ C. Take roll and confirm that a quorum is present [secretary]
  - ☞ D. Confirm compliance with open meeting law and public notice requirements [members]
  - ☞ E. Read agenda and amend as necessary (reorder hearings) [chair & members]
  - ☞ F. Inform the public in attendance of hearing procedures (see the following script) [chair]
- 3 Public hearings
  - ☞ A. Open first public hearing [chair]
  - ☞ B. Read application or appeal [secretary]
  - ☞ C. Report on any site inspection [secretary]
  - ☞ D. Request statement by the applicant [chair with questions by board]
  - ☞ E. Read staff report [zoning department with questions by board]
  - ☞ 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 response by the applicant (or after each witness) [chair with questions by board]
  - ☞ J. Request response by the zoning department [chair with questions by board]
  - ☞ K. Final questions [board]
  - ☞ L. Close record & hearing [chair]
- 4 Deliberation and decision (many boards conduct all hearings before deliberating on decisions)
  - ☞ A. Findings of fact (based on ordinance jurisdiction & standards)
    - ☞ Determine whether application contains information necessary to make decision
    - ☞ Determine whether board has authority to make decision
    - ☞ Record pertinent facts from record/hearing on decision form
  - ☞ B. Conclusions of law
    - ☞ Specify applicable legal standards
    - ☞ Determine which facts relate to the legal standards
    - ☞ Determine whether legal standards are met (agree on any permit conditions)
  - ☞ C. Order and Determination
    - ☞ Decide/vote on case
    - ☞ Direct any action to be taken by zoning administrator
- 5 Repeat steps 3 and 4 for other hearings
- 6 Other agenda items
- 7 Adjourn meeting

***Help participants understand the role of the board and the sequence of events at hearings.***

The text below can be read by the zoning board chair or secretary to applicants/petitioners and the public prior to meetings and hearings before the board. It is intended to help participants understand the role of the board and the sequence of events in order to promote orderly and fair conduct of meetings and hearings.

### **Zoning Board Announcement of Proceedings**

#### **Role of the Board**

The county board of adjustment (city, village or town board of 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 to dimensional standards 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 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 that 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 will each be followed by related board questions. Witness testimony (from those that 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 this matter before proceeding to the next hearing. Decisions will be reduced to writing, filed in the office of the board and mailed to parties as soon as practicable. Minutes of board meetings and decisions are available in the Zoning Department.



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 may be sworn (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. 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).

***Help witnesses to present relevant testimony.***

**Administrative appeals provide a process to resolve disputes regarding ordinance interpretation or administrative decisions.**

## Administrative Appeals

### Appeals

An administrative appeal is a legal process provided to resolve disputes regarding ordinance interpretation (including decisions about jurisdiction, district boundary location, development standards, related measurements and procedures) and where the reasonableness of a zoning department order is challenged. Where zoning ordinance language is unclear or contested, it must be interpreted in order to implement local land use policies. Appointed officials and staff who administer an ordinance interpret its provisions routinely and must apply them consistently. Their interpretations should reflect the understanding of the planning committee or 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. However, when 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 the legal standards for appeals and guidelines for ordinance interpretation.

Standing to appeal. 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.<sup>47</sup>

Time limit for 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*).<sup>48</sup> Determining when to commence the appeal period and its length present practical problems. An appeal period should commence when parties have notice of a decision that may affect them. 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 sight to give additional notice (e.g. *Coming soon...the new Last National Bank!*).

Stay on appeal. Filing of 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.<sup>49</sup>

### Ordinance Organization

The terms used to identify legislative acts can be confusing but their proper identification is important to local ordinance interpretation. For example local ordinances cannot contradict state statutes. The state legislature adopts

laws called *statutes*. These laws often provide only general policies. State agencies hold public hearings and adopt *administrative rules* to provide the detailed regulations needed to implement general statutory policies. After review by the state legislature, administrative rules have full force of law (e.g., Natural Resources Code 115, *Shoreland Management* (or NR 115)). State statutes and administrative rules are available at many libraries and on-line at <http://www.legis.state.wi.us>. You can purchase copies from the Wisconsin Department of Administration, Document Sales Office, Box 7840, Madison, WI 53707. A good description of Wisconsin state government, the legislative process and functions of state agencies is provided in the Wisconsin Blue Book. You can find a copy in most libraries and on-line at <http://www.legis.state.wi.us/lrb/bb/index.html> or purchase it from the state Document Sales Office.

State laws give counties, towns, cities and villages powers to protect public health, safety and welfare. In some cases local governments are required by the state to enforce specific regulations (e.g., state mandated shoreland, wetland and floodplain zoning and sanitary codes). They implement these programs by adopting and administering land use, zoning and other ordinances. You may hear them referred to as the *local code* (a collection of ordinances).

Numbering Systems. Understanding the numbering system, terms and abbreviations used to identify specific provisions and to organize an ordinance is essential to interpretation. The following example from Wisconsin Statutes illustrates an organizational scheme that must be mastered in order to determine a law's meaning.

Example: In the Wisconsin Statutes, "s. 62.23(7)(i)2r.a, Stats." refers to:  
 Chapter = ch. 62  
 Section = s. 62.23 or sec. 62.23 [Literally "section 23 of chapter 62" but common usage is "section 62 *point* 23"]  
 Subsection = sub. (7)  
 Paragraph = par. (i)  
 Subdivision = subd. 2r [The use of "r" in "2r" reflects an amendment which added new subdivisions between existing subds. 2 and 3.  
 Subdivision paragraph = subd. 2r.a

Internal References. The entire citation is not used to refer to a provision within the same section in the Wisconsin Statutes.

Example: In s. 59.69(4), "sub. (4e)" refers to s. 59.69(4e).

Local Usage. The primary source of information about ordinance interpretation is the language of the ordinance itself. Initially, board members should look at the table of contents and index to familiarize themselves with the organization of the code and individual ordinances. Look for definitions, rules of interpretation and related charts or tables and pay particular attention to statements of purpose or intent to guide interpretation. Understand the organizational system of an ordinance in order to identify provisions and to determine which provisions are modified by preceding or subordinate provisions.

***Examine the organization and language of the ordinance.***

***Ordinance interpretation is a two-step process.***

## **Ordinance Interpretation - Determining Ambiguity and Intent**

Ordinance interpretation has been described as a two-step process requiring the zoning board to determine first whether the ordinance language is ambiguous and, if it is, to apply the following rules to determine its intent.

Start by examining these features of provisions requiring interpretation:

- ✍ 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*.
- ✍ In other cases, refer to evidence beyond the ordinance. The information must be objective and contained in a *record*. For example, a staff report produced at the time of an 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.

Plain Meaning Rule. Use the plain, dictionary meaning of words that are not defined in the ordinance (if a word is defined, use that meaning). Technical words are used in their technical sense.

Harmonizing. When a provision is ambiguous, it must be interpreted to give effect to the primary legislative intent/purpose of the ordinance. Unreasonable and unconstitutional interpretations must be avoided.

Conflicting Provisions. When two provisions conflict, they should be interpreted to give effect to the primary legislative intent/purpose of the ordinance and to their respective requirements to the extent reasonable.

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.

### **Amendments and Record Keeping**

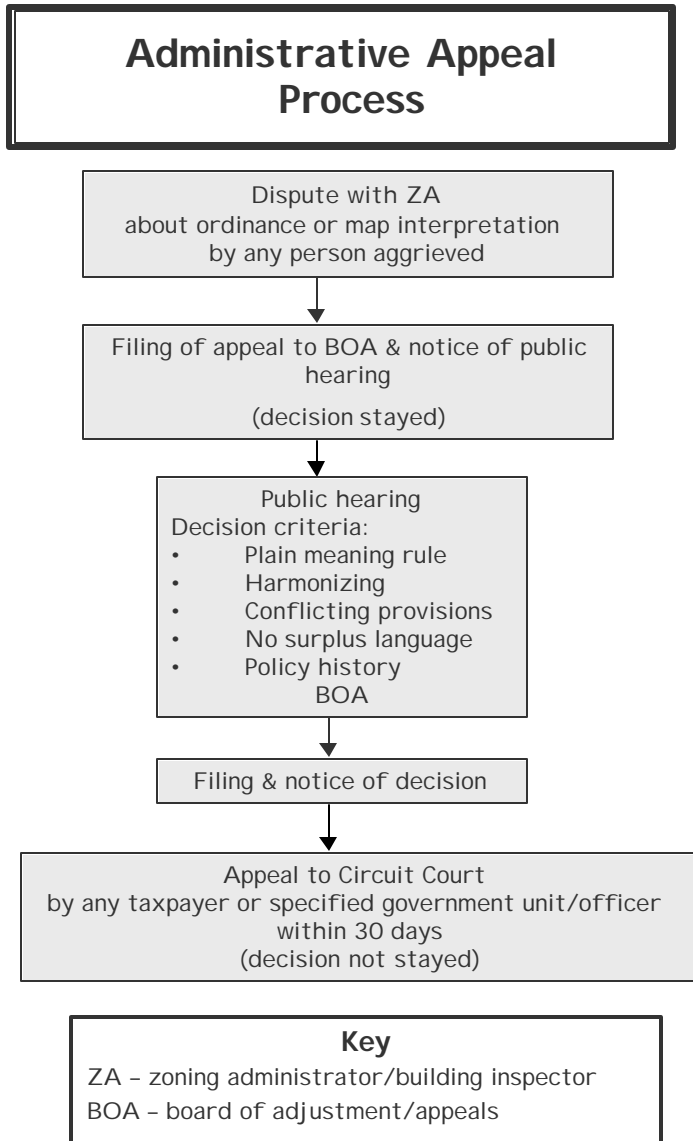
If interpretation of an ordinance proves difficult, a clarifying ordinance amendment should be considered. If a satisfactory interpretation is reached,

***A clarifying amendment should be considered.***

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.

**Appeals**

A zoning board decision on an administrative appeal may be contested in circuit court by any aggrieved person, *taxpayer*, officer, department, board or bureau of the municipality within 30 days of filing of the decision in the office of the board.<sup>50</sup> (See *Judicial Appeal of Zoning Board Decisions*.)



## Conditional Uses/Special Exceptions

### Permitted Uses

Generally, two categories of land uses are allowed in each zoning district: permitted uses and conditional uses. A permitted use is allowed as a matter of right in all locations in a district provided it complies with general standards for the district, any overlay district or design standards and related building or construction codes. Authorization by the zoning administrator or building inspector is non-discretionary if a project meets the standards. Additional conditions on design or construction may not be imposed. A permitted use is authorized by a simple zoning or building permit.

### Conditional Uses for Each District

The terms *special exception* and *conditional use* are used synonymously.<sup>51</sup> In designating conditional uses, a community has determined that such uses are not suited to all locations in a zoning district but may be authorized if adaptable to the limitations of a particular site and adjacent land uses. In short, they must be custom tailored to a specific location. Conditional uses are generally limited to those listed in an ordinance for each zoning district. They may include both uses of land (e.g. a public safety facility in a residentially zoned area) and specified construction activities (e.g., filling and grading in excess of 10,000 square feet adjacent to water bodies). Review of applications is assigned by ordinance to the planning and zoning committee/commission, the zoning board of adjustment/appeals or the governing body. A public notice and hearing are customary (though not required by state law) in order to provide neighbors and the public an opportunity to voice concerns about potential effects of proposed conditional uses. The decision to grant or deny a conditional use permit (CUP) is discretionary i.e., a permit may be denied if the project cannot be tailored to a site without significant harm to ordinance objectives.

### Standards for Approval

General performance standards and specific design standards for approval may be provided by ordinance for conditional uses.<sup>52</sup> An applicant must demonstrate that the proposed project complies with each of the standards. The permit review body may impose additional limitations (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*). This approach can achieve a high level of compliance with ordinance objectives if the parties can reach agreement. Permit conditions that are routinely imposed for similar projects should be adopted by ordinance as additional standards for approval of specified conditional uses. Incorporating standards in an ordinance allows permit applicants to anticipate and plan for design, location and construction requirements.

***The decision to grant or deny a conditional use is discretionary.***

<b>Types of Development Standards</b>	
<b>Performance Standard</b>	
Example:	<i>Projects may not result in any increase in stormwater discharge which exceeds predevelopment conditions.</i>
Features:	? Expected results are stated. ? Project may be "custom tailored" to the site. ???Requires more technical expertise to design and evaluate proposal. ???More complex project monitoring and enforcement. ???Opportunity for optimal compliance/performance.
<b>Design Standard</b>	
Example:	<i>Each lot shall provide 500 cubic feet of stormwater storage.</i>
Features:	? Project specifications are stated. ? Easy to understand, administer and enforce. ? Little flexibility (many variance requests). ? May not achieve ordinance objectives in all cases.

**Exactions**

Exactions require a developer to dedicate land or provide public improvements (or fees in lieu) in order for a project to be approved. They are not unique to permitting of conditional uses. Exactions and other conditions on development are generally legal and acceptable provided:

- ✎ *(essential nexus test)*<sup>53</sup> they are designed to remedy a harm to public interests or to address a need for public services that is likely to result from the proposed development and
- ✎ *(rough proportionality test)*<sup>54</sup> the exaction or limitation is commensurate with the extent of the resulting harm or need for services.

For example, a developer could be required to dedicate 10 acres of parkland if the proposed development created a corresponding demand for recreational facilities in the community. If there were a greater need for recreational facilities, the new development should be charged only its proportional share. Exactions cannot be used to remedy existing deficiencies. A community must be able to document that an exaction is reasonable and to that end some local ordinances provide rationale and formulae for computing appropriate exactions and impact fees.

**Continuance of Use**

Subsequent owners of a property are entitled to continue a conditional use subject to the limitations imposed in the original permit. 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. However, where a new owner changes the use or violates permit conditions, the board may revoke the permit or modify conditions after notice and a hearing. Requiring periodic permit renewal to monitor compliance with development conditions is common and acceptable.<sup>55</sup> It is often required by ordinance for specified types of uses (e.g., quarry and mineral extraction operations).

**Conditions on development must meet "essential nexus" and "rough proportionality" tests.**

**Generally, subsequent owners may continue a conditional use.**

***Citizens must have information necessary to evaluate a proposal and provide testimony.***

### **Completion of Application Prior to Hearing**

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 the local ordinance provides otherwise.<sup>56</sup> This court ruling assures that citizens will have information necessary to evaluate a proposal and provide testimony at hearing and that controversial information will not be withheld until after the hearing.

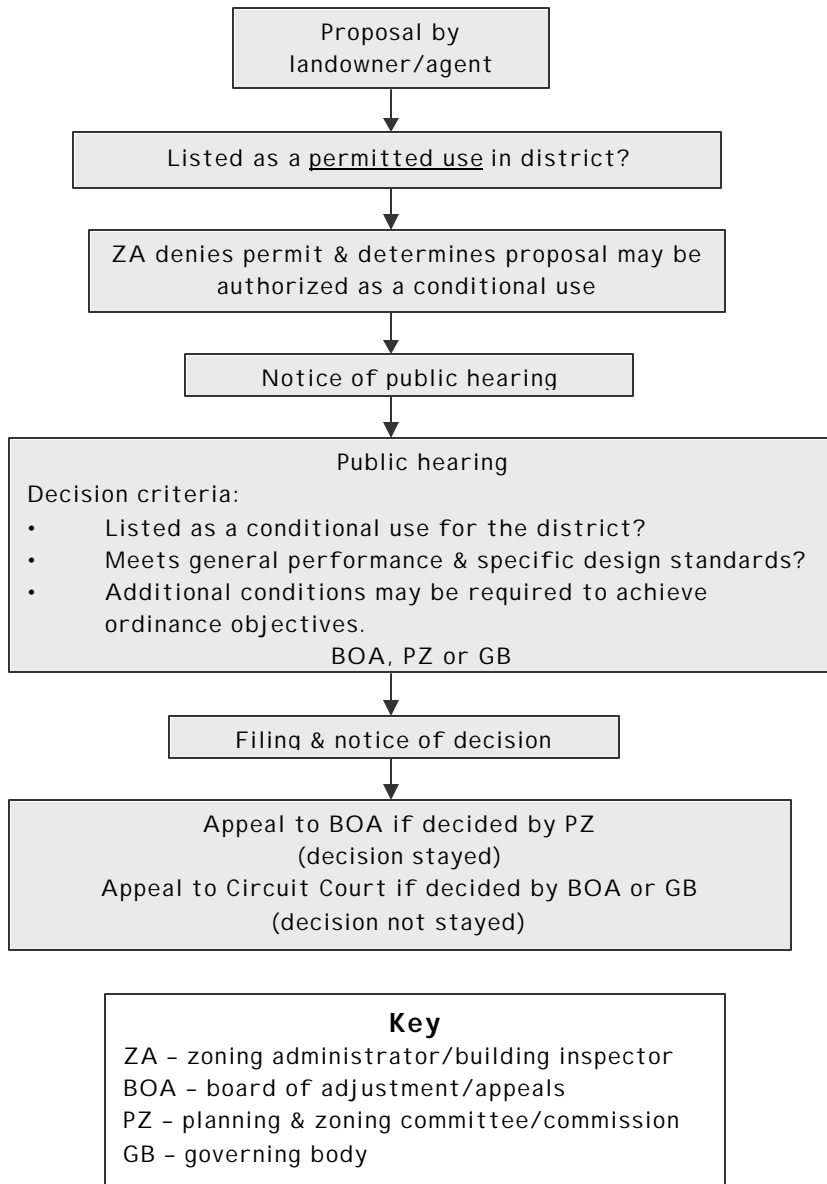
### **Appeal of Decision**

How appeals of conditional use decisions are handled varies locally depending on which body is designated to make the initial decision. Where a county committee makes the initial determination, the board of adjustment hears appeals.<sup>57</sup> In a city, village or town with village powers, the final local decision may be by either the governing body or the board of appeals as provided by the local ordinance. Appeals to the zoning board may be taken by any aggrieved person or by an officer or body of the municipality subject to time limits specified by local ordinance or rules.<sup>58</sup> Appeal of a final local decision is to circuit court. A zoning board decision may be contested in circuit court by any aggrieved person, *taxpayer*, officer or body of the municipality within 30 days of filing of the decision in the office of the board.<sup>59</sup> (See *Judicial Appeal of Zoning Board Decisions*.)

**Special exceptions in exclusive agricultural districts** are limited to agricultural and governmental uses that do not conflict with agricultural uses.<sup>60</sup>



## Conditional Use Process



**... a relaxation of a dimensional standard.**

**A three-part test must be met.**

## Zoning Variances

Two types of zoning variances are generally recognized: variances to land use provisions of an ordinance and area variances. Uses variances are rare and problematic for reasons discussed later. An area variance is a relaxation of a dimensional standard in a zoning ordinance (e.g., setbacks, lot area, height, etc.) that may be granted by a zoning board if procedural and substantive requirements are met. These requirements are specified in state statutes<sup>61</sup> and in local ordinances (usually in sections dealing with zoning board duties or administration). Few areas of land use law are as extensively litigated as the standards necessary to qualify for a variance. Published court cases provide guidance for board members and are cited in the endnotes (your county zoning department has been provided with a summary of related cases).

### Burden of proof

To qualify for a variance, an applicant must demonstrate that all three criteria of the three-part test outlined below are met.<sup>62</sup> The zoning department can assist a petitioner in meeting this burden by providing clear application materials including detailed explanations of the process and standards for approval (see the application form and notice appended).

### Unnecessary Hardship

The most difficult test is demonstrating *unnecessary hardship*. The Wisconsin Supreme Court has determined that *unnecessary hardship is present where, in the absence of a variance, no reasonable use can be made of the property*.<sup>63</sup> What constitutes *reasonable use* of a property, is a pivotal question that the board must answer on a case-by-case basis. The answer is important on two levels. First, where a property currently supports a reasonable use, the hardship test is not met and a variance may not be granted. Second, where 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* where it:

- ? does not conflict with uses on adjacent properties or in the neighborhood,
- ? does not require alteration of the basic nature of the site (e.g., conversion of wetland to upland),
- ? does not result in harm to public interests,
- ? does not require multiple or extreme variances, and
- ? where the proposed land use is consistent with current zoning district requirements.

The rich case law concerning dimensional variances provides guiding principles that a zoning board can rely on in their decision-making:

Whole parcel must be considered. If a parcel as a whole (but not necessarily each portion of the parcel) provides some reasonable use for its owner, then the unnecessary hardship test is not met and a variance cannot be granted.<sup>64</sup>

No self-imposed hardship. An applicant may not claim hardship because of conditions which are self-imposed.<sup>65</sup> Examples include claiming hardship for a substandard lot after having sold off portions that would have allowed building in compliance and claiming hardship where construction was commenced without required permits in violation of ordinance standards or during a pending appeal.

Financial hardship not a deciding factor. Economic loss or financial hardship does not justify a variance.<sup>66</sup> The test is *not* whether a variance would maximize economic value of a property.

Accessory structures not eligible. Decks and other accessory structures not essential to the reasonable use of property are not eligible for variances.<sup>67</sup>

Minimum variance authorizes specific construction. The board may grant only the minimum variance that preserves reasonable use of a parcel for its owner.<sup>68</sup> A variance grants only the specific relief requested (as described in the application and plans for the project) and as modified by any conditions imposed by the zoning board. For example, a petitioner requests a variance of 30 feet from setback requirements but the board finds that a 10-foot reduction allows a structure of reasonable size (*reasonable use*). This variance authorizes the 10-foot setback reduction only for the current project and not for any subsequent construction on the lot.

Variance to meet code. Variances to allow a structure to be brought into compliance with building code requirements have been upheld by the courts.<sup>69</sup>

**Hardship Due to Unique Property Limitations**

Unnecessary hardship must be due to unique limitations of the property i.e., physical features of the property prevent compliance with the ordinance (steep slopes, wetlands, etc.).<sup>70</sup>

Circumstances of an applicant are not a deciding factor. The circumstances of an applicant (growing family, need for a larger garage, etc.) are not legitimate factors in deciding variances.<sup>71</sup>

Amendments for common limitations. Property limitations that prevent ordinance compliance and that are not unique but common to a number of properties should be addressed by amendment of the ordinance.<sup>72</sup> For example, an ordinance may, in some cases, be amended to provide reduced setbacks for a subdivision that predates the current ordinance and where lots are not deep enough to accommodate current standards.

**No Harm to Public Interests**

A variance may not be granted which results in harm to public interests.<sup>73</sup>

Purpose of ordinance. The zoning board should review the purpose statement of the ordinance and related statutes in order to identify public interests. This section of an ordinance is very important and should provide specific guidance regarding objectives for the zoning board while allowing for broad consideration of public interests as well. Statutes also provide that variances must observe the spirit of the ordinance, secure public safety and welfare and do substantial justice. In considering effects of a variance on public

***The circumstances of an applicant are not deciding factors.***

interests, the board should examine broad community and even statewide interests and should not confine itself to scrutiny of impacts on neighbors or residents in the vicinity of a project.

Conditions on development. The board may impose conditions on development (mitigation measures) to eliminate or substantially reduce adverse impacts of a project under consideration for a variance. Conditions may relate to project design, construction activities or operation of a facility<sup>74</sup> and must address and be commensurate with project impacts (review the *essential nexus* and *rough proportionality* tests in the previous section on conditional uses).

### Other Considerations

Nearby violations. Nearby ordinance violations, even if similar to the requested variance, do not provide grounds for granting a variance.<sup>75</sup>

Objections from neighbors. A lack of objections from neighbors does not provide a basis for granting a variance.<sup>76</sup>

### Multiple variances

Single projects. In some cases a single project may require more than one variance to provide reasonable use of a property. The 3-step test should be applied to each variance request in determining whether relief can be granted by the zoning board.

Sequential variances. In other cases original development of a property may have been authorized by variance/s. The owner later requests an additional variance. The later request should be denied since, in granting the original variance, the zoning board was required to determine that a variance was essential to provide reasonable use of the property. The board cannot subsequently find that reasonable use has *not* been provided in order to justify the later variance (the unnecessary hardship test cannot be met) unless there have been significant changes on the property or on neighboring properties which make granting of a variance necessary to protect the use that was established by the original variance.

### Variance transfers with property

Because a property rather than its owner must qualify for a variance to be granted (unique property limitations test), a variance transfers with the property to subsequent owners.<sup>77</sup>

### Use Variances

Statutory language in Wisconsin does not specifically prohibit use variances. However, courts recognize that they are difficult to justify because they may undermine ordinance objectives and change the character of the neighborhood.<sup>78</sup> There are a number of practical reasons why they are not advisable:

Unnecessary hardship must be established to qualify for a variance. An applicant would have to demonstrate that none of the uses allowed as permitted or conditional uses in the current zoning district are feasible for the property in order to comply with this test. This circumstance is highly unlikely.

Many applications for use variances are administrative appeals. Often the

***Use variances are difficult to justify.***

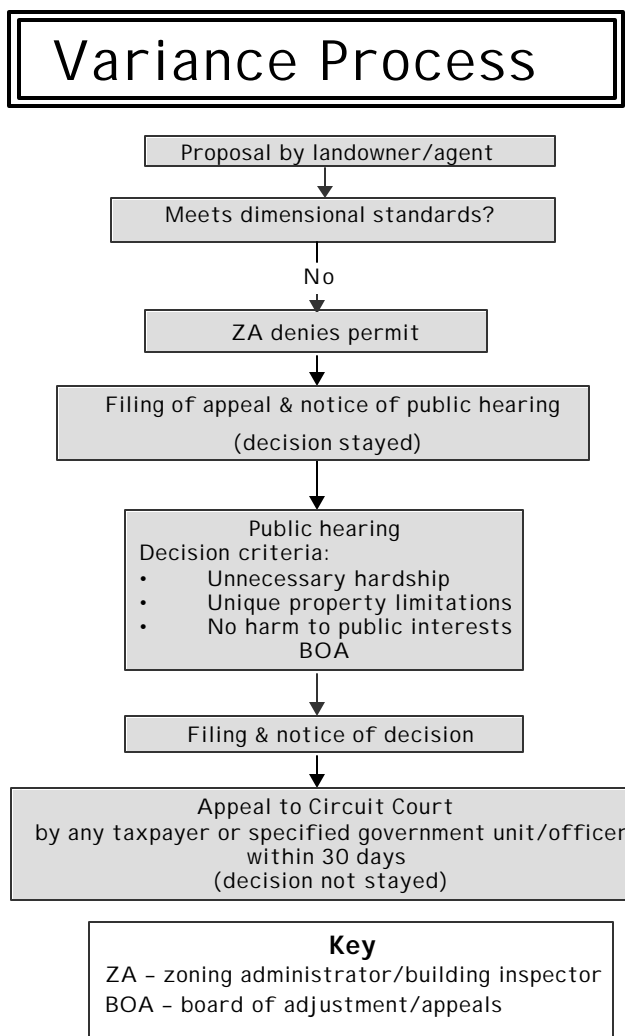
zoning board is asked to determine whether a proposed use is included within the meaning of a particular permitted or conditional use or whether it is sufficiently distinct as to exclude it from the ordinance language. Such a decision is not a *use variance* but an appeal of the administrator's interpretation of ordinance text.

Alternative methods for changing use requirements avoid piecemeal decisions that may lead to conflict between adjacent incompatible uses or that may undermine land use plan and ordinance objectives.

- ? Zoning map amendments can change zoning district boundaries so as to allow uses provided in other zoning districts.
- ? Zoning text amendments can add (or delete) permitted or conditional uses allowed in each zoning district.

### Appeals

A variance decision may be appealed to circuit court by any aggrieved person, *taxpayer*, officer or body of the municipality within 30 days of filing of the decision in the office of the board.<sup>79</sup> Zoning board rules or the local ordinance should specify when a decision is considered to be *filed* so that the beginning of the appeal period is certain. (See *Judicial Appeal of Zoning Board Decisions*.)



## Voting and Decisions

### The Nature Of Zoning Board Decisions

Zoning boards like our courts must apply rules of fairness to their decision-making. Due process requirements regarding notice to affected persons, providing an opportunity for a hearing and basing decisions on pre-existing standards have been discussed previously. Codified and common law (i.e. published court decisions) also require that:

- ? decision-makers must be fair and unbiased;
- ? decisions must be written;
- ? decisions must be based on factual evidence in a record; and
- ? the record must be available for review.

As previously stated, a zoning board must apply the law (local ordinances and related statutes or rules) as it is written and may not substitute its judgment for that of elected local or state legislators.

### Fair Play and Impartial Decisions

Common law concepts of due process (fair play) require an impartial decision maker free of bias and conflicts of interest. For example, a zoning board chairperson's negative comments about the applicant and her request (a "loophole in need of closing") showed prejudgment, deprived the applicant of a fair hearing and required rehearing without the participation of the chairperson.<sup>80</sup> Zoning decisions are particularly vulnerable to these concerns because decision-makers are local residents with social and economic interests in their communities. However, it is important to point out that a zoning board member's opinions about specific local regulations or zoning in general do not necessarily disqualify the member from making decisions.<sup>81</sup>

Decisions involving relatives, persons or organizations with whom a zoning board member is closely associated or the economic or property interests of a the member may require recusal. This term means that the member may not vote or have any official involvement in the matter subject to bias. It is advisable for the board member to remove him/herself from the table where the board is seated or from the meeting room while the matter subject to ethical concerns is discussed. The board member may take a seat with the public in attendance in order to offer testimony on the matter and to avoid the appearance of impropriety. Members must determine for themselves whether their relationships or interests could bias their judgment or give an appearance of bias. In making this determination they should consult local ordinances, rules and by-laws as well as the provisions of state statutes discussed below and seek counsel if necessary.

### Statutory Conflicts of Interest

In addition to common law notions of fairness and due process, Wisconsin Statutes contain specific conflict of interest provisions applicable to local officials.

Code of ethics. State laws<sup>82</sup> prohibit public officials from taking official actions that substantially affect a matter in which the official, an immediate family member or an associated organization has a substantial financial interest. Similarly, an official may not use public office for financial gain or to

***Impartial decision makers are required.***

gain anything of substantial value for the official, an immediate family member or an associated organization. Compliance with the statute will protect a member from prosecution under the statute but does not assure compliance with other fair play and due process requirements.

Private interests in public contracts. State laws<sup>83</sup> also provide for felony prosecution of a public official who engages in specified activities related to public contracts in which the official has an interest. This may be an issue where the zoning board decides conditional use permits or retains consulting services where members may have an interest. (In certain cases abstention will not prevent a violation of the law.)

### Role of Counsel

Municipal or corporation counsel may advise and represent local officers and bodies (such as the zoning administrator and zoning board) but may not represent both sides where their positions conflict. Since a zoning officer or the zoning committee/commission may contest any zoning board decision, circumstances requiring legal representation for the board should be anticipated and provided for in local rules and policies. The Wisconsin court of appeals has ruled that a village attorney cannot, in a hearing before the zoning board, act as both prosecutor examining witnesses and advisor to the board in its deliberations.<sup>84</sup>

### 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 meeting or hearing. Such outside contacts are known as *ex parte communication*. If members do so inadvertently, they should disclose the communication and make the information part of the record so that it can be considered in decision-making. The board as a whole can then determine the admissibility of the information and individual members will determine its credibility and weight in deciding their vote on the matter. Outside discussion regarding procedural matters such as how to file a petition/application or scheduling meetings and hearings are permissible.

### Voting Requirements

Statutes determine voting requirements for zoning boards. In many cases a vote by a majority of a quorum will not decide an issue (a quorum is a majority of the total board). Voting requirements point out the need for alternates and a full compliment of board members at each hearing.

***Confine discussions  
about quasi-judicial  
decisions to meetings  
and hearings.***

VOTING REQUIREMENTS FOR ZONING BOARDS		
Decision	Voting Requirement	
	County	City/Village/Town
<ul style="list-style-type: none"> <li>✗ Reverse the administrator's decision</li> <li>✗ Grant a variance</li> <li>✗ Grant a conditional use permit</li> <li>✗ Decide in favor of the applicant on any zoning matter</li> </ul>	The concurring vote of a majority of all board members (3 of 5 members). <sup>85</sup>	The concurring vote of 4 of 5 board members. <sup>86</sup>
<ul style="list-style-type: none"> <li>✗ Advisory decisions</li> <li>✗ Other decisions</li> </ul>	The concurring vote of a majority of a quorum (e.g., 2 of 3 present on a 5-member board)	

### Open Voting and Records

Minutes of zoning board meetings and hearings must be kept showing how each member voted, including absences and abstentions. In general, elections and decision-making by governmental bodies must be conducted by open voting.<sup>87</sup> By statute, each member's vote must be recorded in specified cases (e.g. motions, seconds and the vote of each member to convene in closed session). Motions, any roll call votes and voting results must be recorded and made available to the public consistent with the Wisconsin Public Records Law.



# Judicial Appeal of Zoning Board Decisions

## Standing to Appeal and Time Limits on Appeal

An aggrieved person, taxpayer, municipal officer or body may appeal a zoning board decision to court within 30 days after filing of the decision.<sup>88</sup> The 30-day appeal period runs from the entry of the original decision in a matter and is not extended by filing a motion to reconsider unless the motion raises a new issue.<sup>89</sup> When a zoning board decision is appealed, the court will require the zoning board to file certified or sworn copies of its proceedings in the matter with the court. A zoning board decision is not automatically stayed by filing an appeal with the court (i.e., construction may go forward if authorized by a board decision). However, upon petition, the court may find cause to issue a stay.

## Court Actions

Court review of a zoning board decision is highly deferential to the board.<sup>90</sup> Even if the court would not have made the same decision, it will uphold the board's decision if supported by any reasonable view of the evidence. However, the zoning board decision must be based on the law and evidence in the record, not on its attitude toward the applicant, the proposal or the zoning ordinance.<sup>91</sup> The court, in overturning a decision, will typically send the case back to the board (remand it) for further proceedings consistent with the court's opinion. The court may wholly or partly affirm, reverse or modify the decision appealed. The court's review is limited to:<sup>92</sup>

- 1) Subject matter jurisdiction  
Did the board decide a matter that it is empowered by statute or ordinance to act on?
- 2) Proper procedures  
Did the board follow proper procedures (notice, hearing, record of decision, open meeting law)?
- 3) Proper standards  
Did the board apply proper standards in making the decision (e.g. 3-step test for a variance)?
- 4) Rational basis for the decision  
Could a reasonable person have reached this conclusion?
- 5) Evidence in the record  
Do facts in the record of the proceedings support the decision?

## Enforcement Of Zoning Board Decisions

The courts. A local government may enforce zoning board decisions by seeking monetary forfeitures and/or injunctions in court. An injunction in such cases is a court order to restore a site or otherwise correct an ordinance violation. In addition, "an owner of real estate within the district affected by the regulation" in counties and an "adjoining or neighboring property owner who would be specially damaged by the violation" in a city, village or town with village powers may seek similar injunctions to require compliance with ordinance provisions.<sup>93</sup> Adversely affected neighbors may sue in a separate action to recover any damages resulting from a violation. A recent Wisconsin decision generally advises courts to grant a requested

***Court review is highly deferential to the board provided its decisions meet basic criteria.***

***Local officials and bodies have discretion in enforcement actions.***

injunction once a violation has been established but notes that courts retain discretion and in rare cases may refuse a request for an injunction or may issue limited injunctions to protect public interests.<sup>94</sup> A concurring opinion in this case cautioned that the decision of the court does not endorse what would amount to the purchase of a variance where an owner violates an ordinance and is merely required to pay a forfeiture rather than correct the violation.<sup>95</sup>

Enforcement discretion. Local officials and bodies have discretion to prioritize and allocate resources in enforcement actions. A municipal attorney or corporation counsel, as lead prosecutor for zoning violations, retains prosecutorial discretion to determine whether evidence is insufficient, ordinance wording is problematic or other complications make successful prosecution unlikely. It is appropriate for the zoning board to ask counsel to identify which issues in a specific case make prosecution problematic so that it can address them. Counsel cannot simply ignore zoning standards he/she finds personally disagreeable. Municipal attorneys and zoning officials are accountable through disciplinary action or dismissal to the political bodies that retain their services, oversee their activities and establish budgets. The standing committee responsible for zoning administration should provide a policy to guide decisions of administrative staff in enforcement matters. Voters will decide whether the enforcement policy is acceptable by voting for or against candidates for the governing body or they may suggest reasons for removal or reassignment of committee members to the chair of the governing body.

# Improving Zoning Board Decisions

## Self-Audit Decisions

Zoning board members may be tempted to *bend the rules* to fit their view of proper zoning policy if they forget their quasi judicial role in deciding variances, appeals and conditional uses. One way to avoid this temptation is to provide an opportunity for the zoning board to become directly involved in local land use policy development. Because of its unique role, the board has special insight about circumstances where flexible development standards may be required, where policies concerning nonconforming lots and structures may need reconsideration or where enforcement or board related procedures require revision. An annual summary of the number and type of board decisions and related development conditions imposed can guide the board in making recommendations for policy changes to the planning committee/commission. An example of such a report is provided among the appended materials. Look for patterns in the report that suggest opportunities for improving ordinance language clarity, effectiveness of standards and administrative efficiency. Discuss recommendations and concerns with the planning committee/commission on a routine basis.

## Review Informational Materials and Forms

Examples of materials and forms are provided in the appendix to this manual.

Application materials must require sufficient information to enable the board to make well-informed decisions and should describe the zoning board hearing process, submittal requirements and decision criteria clearly. Many jurisdictions require project site photos. They are useful to the board in evaluating a proposal and later on to the zoning department in monitoring project compliance.

Application forms should prompt applicants to meet their legal burden of proof and should help them to identify alternative site locations or project designs that comply with ordinance standards. Many jurisdictions supply an example site plan and a sample petition as part of a packet of application materials. The site plan is used to illustrate dimensional standards and other ordinance requirements.

Decision forms should prompt findings of fact and conclusions of law by the zoning board. They should also reflect appropriate legal standards (e.g. variance criteria) and specify appeal rights, a permit expiration date and circumstances that may prompt the board to revisit its decision in the matter.

## Review Enforcement and Appeals Procedures

Adopt necessary rules or ordinances which:

- ✍ provide for adequate notice of decisions of administrative officials to affected parties;
- ✍ limit the time period for appeal of administrative decisions to the zoning board;
- ✍ specify how the filing date of a board decision is determined (establishes the commencement of the 30-day appeal period);

***A zoning board has special insight about circumstances where flexible development standards may be required.***

***Adopt rules to promote hearings that are orderly, fair and efficient.***

- ✍ specify circumstances allowing reconsideration of a decided matter; and
- ✍ specify how after-the-fact variances/permits will be treated.

### **Provide Rules that Allow the Board to Retain Counsel**

Generally, municipal counsel provides legal representation for the governing body of the local unit of government. There are occasions where the interests of the zoning board do not correspond with the interests of the governing body or its committees. In such cases municipal counsel cannot represent both parties (e.g., where the planning committee appeals a zoning board decision). The zoning board should resolve related issues with the appropriate standing committee and governing body (e.g., which circumstances allow the zoning board to retain independent legal counsel and how counsel will be selected and compensated).

### **Review Rules for Conduct of Meetings and Hearings**

Adopt necessary rules, ordinances or materials which:

- ✍ provide proper notice for meetings, hearings and closed sessions;
- ✍ identify and address bias and conflicts of interest;
- ✍ provide for appointment and education of alternate board members;
- ✍ describe how site inspections may comply with Open Meetings Law requirements;
- ✍ determine admissibility of written testimony; and
- ✍ provide instructions for those providing testimony in order to promote hearings that are orderly, fair and efficient.

## End Notes

<sup>1</sup> county – s. 59.694(7), Stats., city, village & town – 62.23(7)(e)7, Stats.

<sup>2</sup> county – s. 59.69, Stats., city – s. 62.23(7), Stats., village – s. 61.35, Stats., town – s. 60.61, Stats.

<sup>3</sup> s. 59.694(2), Stats.

<sup>4</sup> s. 62.23(7)(e)

<sup>5</sup> ss. 59.17(2)(c) & 59.18(2)(c), Stats.

<sup>6</sup> Authority for zoning boards in towns with village powers. Where a town has not adopted village powers, s. 61.65, Stats. applies.

<sup>7</sup> s. 59.694(2)(c), Stats.

<sup>8</sup> Authority for zoning boards in towns with village powers. Where a town has not adopted village powers, s. 61.65, Stats. applies.

<sup>9</sup> ss. 62.23(7)(e)2 & 62.09(3)(e), Stats.

<sup>10</sup> counties – s. 59.694(3), Stats., cities, villages and towns – s. 62.23(7)(e)3, Stats.

<sup>11</sup> s. 59.694(3), Stats.

<sup>12</sup> s. 59.694(3), Stats.

<sup>13</sup> ss. 59.696 & 59.697, Stats.

<sup>14</sup> Zoning boards for towns with village powers are represented in the table. Zoning boards for towns without village powers are governed by s. 61.65. Stats.

<sup>15</sup> s. 62.23(7)(e)3, Stats.

<sup>16</sup> Oneida County and the City of Fitchburg

<sup>17</sup> ss. 19.81-19.98, Stats.

<sup>18</sup> OAG 86-76, 65 Op. Att'y Gen. 250 (1976) & s. 19.84(1) Stats.

<sup>19</sup> ss. 19.84(2) & 19.85(2), Stats.

<sup>20</sup> s. 19.85(1)(a), Stats.

<sup>21</sup> s. 19.85(1)(b), Stats.

<sup>22</sup> s. 19.85(1)(c), Stats.

<sup>23</sup> s. 19.85(1)(f), Stats.

<sup>24</sup> s. 19.85(1)(g), Stats.

<sup>25</sup> s. 19.85(1)(h), Stats.

<sup>26</sup> ss. 19.85(1)(ee, eg, em, i & j), Stats.

<sup>27</sup> s. 19.85(2), Stats.

<sup>28</sup> ss. 19.81 to 19.98, Stats.

<sup>29</sup> ss. 59.694(6) & 62.23(7)(e)6, Stats.

<sup>30</sup> ss. NR 115.05(6)(h) & NR 116.20(2)(d), Wis. Adm. Code

<sup>31</sup> Section 59.694(6), Stats. provides that notice of the hearing of an appeal must be given by publication of a class 2 notice under ch. 985. It is somewhat unclear whether class 2 publication 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 s. 985.065(2)(a), Stats.

<sup>32</sup> See previous endnote. Counties with a population less than 250,000 do not have to have an official newspaper and apparently may elect to satisfy the class 2 publication requirement by posting. [s. 985.05(1), Stats.] However, newspaper publication is strongly recommended.

<sup>33</sup> Subsection 62.23(7)(e)6, Stats. 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). Chapter 985, Stats. 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 s. 62.23(7)(d), Stats. Because members of the public are typically allowed to testify at zoning board hearings, the conservative interpretation is that ch. 985 applies. In ch. 985, a class 1 notice is required for cities because the hearing requirement in s. 62.23(7)(e)6 predates the date specified in s. 985.07, Stats.

<sup>34</sup> Subsections 59.694(6) and 62.23(7)(e)6 Stats. refer to ch. 985, Stats. as described under cities. Under ch. 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 [ss. 985.02(2), 985.07 & 985.01(1), Stats.]

<sup>35</sup> ss. 985.07 & 985.01(1), Stats.

<sup>36</sup> ss. 985.07 & 985.01(1), Stats.

<sup>37</sup> s. 985.065(2)(a), Stats. concerns requirements for an official newspaper; s. 985.05(1), Stats. provides a posting option if there is no official newspaper; s. 985.02(2), Stats. provides guidelines for posting & s. 985.01(3), Stats. defines *municipality*.

<sup>38</sup> s. 985.09, Stats.

<sup>39</sup> ss. 985.03 & 985.05, Stats.

<sup>40</sup> s. 19.85 (2), Stats.

<sup>41</sup> s. 985.12, Stats.

<sup>42</sup> s. 985.02(2)(d), Stats.

<sup>43</sup> ss. NR 115.05(6)(h) & NR 116.20(2)(d) Wis. Adm. Code; DNR notification is usually accomplished by providing a written copy of the notice.

<sup>44</sup> s. 91.75(5) Stats. Forms for notifying DATCP are available at 608-224-4648.

<sup>45</sup> ss. 19.84(1)(b) & 985.065, Stats.

<sup>46</sup> ss. 59.694(6) & 62.23(7)(e)6, Stats.

<sup>47</sup> ss. 59.694(4) & 62.23(7)(e)4, Stats.

<sup>48</sup> ss. 59.694(4) & 62.23(7)(e)4, Stats.

<sup>49</sup> ss. 59.694(5) & 62.23(7)(e)5, Stats.

<sup>50</sup> s. 59.694 (10), Stats.

<sup>51</sup> *State ex rel. Skelly Oil Co. v. City of Delafield*, 58 Wis.2d 695 (1973)

<sup>52</sup> *Kraemer & Sons v. Sauk Co. Adjustment Board*, 183 W (2d)1, 515 NW (2d) 256 (1994)

<sup>53</sup> *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)

<sup>54</sup> *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994)

<sup>55</sup> Anderson, *American Law of Zoning*, 3d, Vol. 3, S. 21.32, pp. 754-5

<sup>56</sup> *Weber v. Town of Saukville*, 209 Wis. 2d 214 (1997)

<sup>57</sup> *League of Women Voters of Appleton v. Outagamie County*, 113 Wis. 2d 313 (1983)

<sup>58</sup> Counties s. 59.694(4), Stats.; Cities, villages and towns with village powers s. 62.23(7)(e)4, Stats.

<sup>59</sup> s. 59.694 (10), Stats.

<sup>60</sup> ss. 91.75(5) & 91.77, Wis. Stats.

<sup>61</sup> Counties s. 59.69 (7)(c), Stats.; cities, villages and towns s. 62.23(7)(e), Stats.

<sup>62</sup> *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d at 420, 577 N.W.2d 813 (1998); *Arndorfer v. Board of Adjustment*, 162 Wis. 2d at 254, 469 N.W.2d 831 (1991)

<sup>63</sup> *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396, 413-414, 577 N.W.2d 813 (1998)

<sup>64</sup> *State v. Winnebago County*, 196 Wis. 2d 836, 844-45 n.8, 540 N.W.2d 6 (Ct. App. 1995)

- <sup>65</sup> *State ex rel. Markdale Corp. v. Bd. of Appeals of City of Milwaukee*, 27 Wis. 2d 154, 163, 133 N.W.2d 795 (1965); *Snyder v. Waukesha County Zoning Bd.*, 74 Wis. 2d 468, 479, 247 N.W.2d 98 (1976)
- <sup>66</sup> *State v. Winnebago County*, 196 Wis. 2d 836, 844-45, 540 N.W.2d 6 (Ct. App. 1995); *State v. Ozaukee County Bd. of Adjustment*, 152 Wis. 2d 552, 563, 449 N.W.2d 47 (Ct. App. 1989)
- <sup>67</sup> *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396, 413-414, 577 N.W.2d 813 (1998)
- <sup>68</sup> Anderson, *American Law of Zoning 3d*, (1986) Vol. 3, s. 20.86, pp. 624-5
- <sup>69</sup> *Thalhofer v. Patri*, 240 Wis. 404 (1942); see also *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396, 419-420 (1998)
- <sup>70</sup> *State ex rel. Spinner v. Kenosha County Bd. of Adjustment*, 223 Wis. 2d 99, 105-6, 588 N.W.2d 662 (1998); *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396, 410, 577 N.W.2d 813 (1998); *Arndorfer v. Board of Adjustment*, 162 Wis. 2d 246, 255-56, 469 N.W.2d 831 (1991); *Snyder v. Waukesha County Zoning Bd.*, 74 Wis. 2d 468, 478, 247 N.W.2d 98 (1976)
- <sup>71</sup> *Snyder v. Waukesha County Zoning Bd.*, 74 Wis. 2d 468, 478-79, 247 N.W.2d 98 (1976)
- <sup>72</sup> *Arndorfer v. Board of Adjustment*, 162 Wis. 2d 246, 256, 469 N.W.2d 831 (1991); *State v. Winnebago County*, 196 Wis. 2d 836, 846, 540 N.W.2d 6 (Ct. App. 1995)
- <sup>73</sup> *State v. Winnebago County*, 196 Wis. 2d 836, 846-47, 540 N.W.2d 6 (Ct. App. 1995); *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396, 407-8, 577 N.W.2d 813 (1998)
- <sup>74</sup> Anderson, *American Law of Zoning 3d*, (1986) Vol. 3, ss. 2070 and 20.71, pp. 587-95
- <sup>75</sup> *Von Elm v. Board of Appeals*, 258 App. Div. 989 (N.Y. 1940)
- <sup>76</sup> *Arndorfer v. Board of Adjustment*, 162 Wis. 2d 246, 254, 469 N.W.2d 831 (1991)
- <sup>77</sup> *Goldberg v. City of Milwaukee Bd. of Zoning App.*, 115 Wis. 2d 517, 523-24, 340 N.W. 2d 458 (Ct. App. 1983)
- <sup>78</sup> *Kenosha County Board of Adjustment*, 218 Wis. 2d 396, 412 fn. 10 (1998); *Snyder v. Waukesha County Zoning Bd.*, 74 Wis. 2d 468, 473 (1976)
- <sup>79</sup> s. 59.694 (10), Stats.
- <sup>80</sup> *Marris v. City of Cedarburg*, 176 Wis. 2d 14 (1993)
- <sup>81</sup> *Marris v. City of Cedarburg*, 176 Wis. 2d 14 (1993)
- <sup>82</sup> s. 19.59(1), Stats.
- <sup>83</sup> s. 946.12, Stats.
- <sup>84</sup> *Nova Services, Inc. v. Village of Saukville*, 211 Wis.2d 691 (Ct. App. 1997)
- <sup>85</sup> s. 59.694(9), Stats.
- <sup>86</sup> s. 62.23(7)(e)9, Stats.
- <sup>87</sup> s. 19.88(1), Stats.
- <sup>88</sup> ss. 59.694(10) & 62.23(7)(e)10 Stats.
- <sup>89</sup> *Bettendorf v. St. Croix Cty. Adjustment Bd.*, 188 Wis. 2d 311 (Ct. App. 1994)
- <sup>90</sup> *Clark v. Waupaca County Board of Adjustment*, 186 Wis. 2d 300 (Ct. App. 1994)
- <sup>91</sup> *Schalow v. Waupaca County*, 139 Wis. 2d 284 (Ct. App. 1987)
- <sup>92</sup> *Clark v. Waupaca County Board of Adjustment*, 186 Wis. 2d 300 (Ct. App. 1994)
- <sup>93</sup> s. 59.69(11) & s. 62.23(8), Stats.
- <sup>94</sup> *Forest County v. Goode*, 219 Wis. 2d 655, 684 (1988)
- <sup>95</sup> *Forest County v. Goode*, 219 Wis. 2d 655, 685 (1988)

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## Resources for Zoning Boards

### Written Materials

County Zoning Board of Adjustment Handbook. Jean Setterholm, edited by Gary Heinrichs. (40 pp., 1993) An overview of the composition and roles of the Board of Adjustment. Available from DNR Service Centers (publication WZ-220) or (in limited quantities) the Land Use Education Center at 715 346-3783.

City, Village and Town Zoning Board of Appeals Handbook. Jean Setterholm, edited by Gary Heinrichs. (40 pp., 1993) An overview of the composition and roles of the Board of Appeals. Available from DNR Service Centers (publication WZ-202) or the Land Use Education Center at 715 346-3783.

Guide for County Boards of Adjustment. Robert Horowitz. (41 pp., 1999) Addresses related topics in question and answer form with legal citations. Published by Wisconsin County Mutual Insurance Corporation at 608 224-5330.

Law of the Land: A Citizen's guide...Influencing Local Land Use Decisions that Affect Water Quality. Michael Dresen and Rita Kozak. (93 pp., no date) A primer on land use planning, zoning, ordinance administration and related water issues. Published by UWEX-Lakes at 715 346-2116.

Understanding Wisconsin's Open Meeting Law. Burt P. Natkins and James H. Schneider. (145 pp., 1994) Describes application of the open meeting law, required notice, exemptions and more. Available from Local Government Services, Inc., 185 W. Netherwood St., Oregon, WI 53575-1153, 608 835-3944.

### Agency/organization Websites

Floodplain Zoning. This Department of Natural Resources site describes floodplain management programs and rules. [www.dnr.state.wi.us/org/water/wm/dsfm/flood/rules.htm](http://www.dnr.state.wi.us/org/water/wm/dsfm/flood/rules.htm)

League of Wisconsin Municipalities. This website describes the league and its services. <http://www.lwm-info.org/links.html>

Shoreland Zoning. This Department of Natural Resources site contains shoreland management rationale and rule standards. <http://www.dnr.state.wi.us/org/water/wm/dsfm/shore/title.htm>

UW Extension Local Government Center. This site contains planning and zoning fact sheets and descriptions of related educational programs for local government officials. <http://www.uwex.edu/lgc>

Wisconsin Counties Association. This site describes the association and its services. <http://www.wicounties.org>

Wisconsin State Legislature. This site contains state statutes, administrative rules and new legislation. <http://www.legis.state.wi.us>

Wisconsin Towns Association. This site describes the association and its services. <http://www.wisctowns.com>

## Authority of Zoning Boards

Statutory Authority Of Zoning Boards				
	County Zoning Board	City Zoning Board	Village Zoning Board	Town Zoning Board
General zoning	59.694(7)	62.23(7)(e)7	61.35	60.62(1) & 60.65
Shoreland zoning	59.692(4)(b)			
Shoreland wetland zoning		62.231(4)(a)	61.351(4)(a)	
Construction site erosion control & storm water management	59.693(4)(b)	62.234(4)(b)	61.354(4)(b)	60.627(4)(b)
Floodplain zoning	NR 116.19			No <sup>1</sup>
Exclusive agricultural zoning	91.73(1) <sup>2</sup>			
Renewable energy systems	59.694(7)	62.23(7)(c)		
Subdivision/land division	No <sup>3</sup>			
Uniform Dwelling Code	No <sup>4</sup>			
Well codes	No <sup>5</sup>			
Private sewage systems	No <sup>6</sup>			
Solid waste management	No <sup>7</sup>			
Public utility permits	No <sup>8</sup>	62.23(7)(e)7		

<sup>1</sup> NR 116.05 & 116.19 do not mention town authority to implement floodplain zoning.

<sup>2</sup> s.91.73(1), Stats., requires administration of local farmland preservation ordinances consistent with the general zoning authority for county, city, village & town jurisdictions.

<sup>3</sup> ss. 236.10(1)&(3), Stats. delegates this authority to the governing body or a plan committee/commission unless provisions are adopted under s. 59.69, Stats..

<sup>4</sup> COM 20.02 requires strict conformity with Uniform Dwelling Code provisions. COM 20.19 allows only the Dept. of Commerce to consider variances to UDC provisions.

<sup>5</sup> Under s. 280.21, Stats. only counties are able to assume administration of the state well code & requests for variances & interpretations are for DNR (NR 845.06).

<sup>6</sup> Under s. 145.24(1), Stats. the Dept. of Commerce considers variances to siting & design standards for privately owned wastewater treatment systems.

<sup>7</sup> Under s. 59.70(2h), Stats. counties may adopt ordinances necessary to conduct solid waste management activities but there is no express authority for BOA authority unless related ordinances are adopted under authority of s. 59.69, Stats. There is no express authority for solid waste management activities by cities, villages or towns.

<sup>8</sup> No express mention of authority for BOA unless such an ordinance is adopted under s. 59.69, Stats.

# Hearing Appearance Slip

Date: \_\_\_\_\_  
Hearing name/number: \_\_\_\_\_  
Regarding: \_\_\_\_\_

Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
Representing: \_\_\_\_\_

- I wish to speak in favor of the appeal or application.
- I wish to speak in opposition of the appeal or application.
- I wish to speak for informational purposes only.

Comments:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Tear off this portion and deliver to the Board Chair)

**Instructions for witnesses:**

- ? Complete an appearance slip and deliver it to the Board chair.
- ? You will be recognized by the Board chair when you are to speak.
- ? Your testimony may be sworn if required by rules of the Board.
- ? Direct all comments, questions and replies to the chair.
- ? When asked to speak:
  1. State your name and place of residence.
  2. Indicate whether you represent a group or association.
  3. Indicate whether or not you favor the appeal or application or are speaking for informational purposes.
  4. Please state your qualifications to speak on this matter or the source of your information.
  5. Limit your testimony to facts relevant to the case at hand.
  6. Limit your comments to the time period specified by the chair.
  7. Avoid repetitive testimony.

\_\_\_\_\_ Zoning Board of Adjustment/Appeals  
[address for correspondence with the zoning board]

# Administrative Appeal - Application Form

\_\_\_\_\_ BOARD OF ADJUSTMENT/APPEALS

Petition # \_\_\_\_\_ Date filed \_\_\_\_\_ ~~✓~~ \$ \_\_\_\_\_ fee paid (payable to \_\_\_\_\_)

Name	
Address	
Phone	

Legal description: \_\_1/4, \_\_1/4, S \_\_, T\_\_N, R\_\_E, City/Village/Town of \_\_\_\_\_  
 Fire number \_\_\_\_\_ Tax parcel number \_\_\_\_\_  
 Lot area & dimensions: \_\_\_\_\_ sq. ft., \_\_\_\_\_ x \_\_\_\_\_ ft.  
 Zoning district \_\_\_\_\_  
 Current use & improvements \_\_\_\_\_  
 Nature & disposition of any prior petition for appeal, variance or conditional use \_\_\_\_\_

Description of all nonconforming structures & uses on the property \_\_\_\_\_  
 \_\_\_\_\_

**Reason for Appeal** Check the type of administrative decision appealed.

~~✓~~ Zoning district boundary dispute (location and districts involved)

Describe petitioner's boundary location criteria:

\_\_\_\_\_  
 \_\_\_\_\_

Describe petitioner's boundary determination:

\_\_\_\_\_

~~✓~~ Ordinance interpretation (include section number)

Describe petitioner's interpretation and rationale:

\_\_\_\_\_  
 \_\_\_\_\_

~~✓~~ Administrative decision/measurement/order in dispute

\_\_\_\_\_  
 \_\_\_\_\_

I certify that the information I have provided in this application is true and accurate.

Signed: \_\_\_\_\_ Date: \_\_\_\_\_  
                     Petitioner

Remit to: [Zoning office address, phone & e-mail]

# Conditional Use/Special Exception Application

Application to \_\_\_\_\_ (governing body/committee/commission/zoning board)

Date filed \_\_\_\_\_ ✍ \$\_\_\_\_\_ fee paid (payable to \_\_\_\_\_)

	Owner or agent	Contractor
Name		
Address		
Phone		

Legal description: \_\_\_\_\_ 1/4, \_\_\_\_\_ 1/4, S \_\_\_\_\_, T \_\_\_\_\_ N, R \_\_\_\_\_ E, City/Village/Town of \_\_\_\_\_

Fire number \_\_\_\_\_ Tax parcel number \_\_\_\_\_

Lot area & dimensions: \_\_\_\_\_ sq. ft., \_\_\_\_\_ x \_\_\_\_\_ ft.

Zoning district \_\_\_\_\_

Current use & improvements \_\_\_\_\_

Nature and disposition of any prior petition for appeal, variance or conditional use \_\_\_\_\_

Description of all nonconforming structures & uses on the property \_\_\_\_\_

Conditional use requested (ordinance section # & specific use):

General standards for approval:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Design/practices proposed to achieve standards:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Specific (design) standards for approval:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Design/practices proposed to achieve standards:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attach a plat or other map of your site and detailed construction plans.

I certify that the information I have provided in this application is true and accurate.

Signed: \_\_\_\_\_  
Agent/Applicant/Owner

Date: \_\_\_\_\_

Remit to: [Zoning office address, phone and e-mail]

## Zoning Variance - Notice & Application

A variance is a relaxation of a dimensional standard in a zoning ordinance (e.g., setbacks, lot area, height, etc.). Variances are decided by a zoning board of adjustment/appeals that must follow rules of due process and functions almost like a court. The board's duty is not to compromise ordinance requirements for a property owner's convenience but to apply legal standards for granting of a variance to a specific fact situation. Variances are meant to be an infrequent remedy where an ordinance imposes a unique and substantial burden on use of property. It is not appropriate to contact individual board members regarding a pending decision. You will be asked to provide written materials and testimony at the public hearing in support of your petition for a variance.

### Process

At the time of application you will be asked to:

1. **complete an application** form and submit a \$ \_\_\_\_\_ fee;
2. **provide detailed plans** describing your lot and project (location, dimensions, materials, limiting site conditions, etc.);
3. **provide a written statement** of verifiable facts showing that your project meets the legal criteria for a variance (three-step test below); and
4. **stake lot lines**, the proposed building footprint and other features of your property related to your request so that the zoning board may inspect the site.

Following these steps, the zoning agency will publish notice of your request for a variance in the county's official newspaper describing your project and noting the location and time of the required public hearing before the zoning board. Your neighbors and any affected state agency will also be notified. You must provide information to show that you qualify for a variance. At the hearing, you and other interested parties may appear in person or may be represented by an agent or attorney. If you or your agent do not appear at the public hearing, the board must deny your request for a variance and your fee will be forfeited.

### Three-Step Test

To qualify for a variance, your property must meet the following requirements:

#### 1. Unnecessary Hardship

Strict application of an ordinance requirement (dimen-

sional standard) must result in unnecessary hardship. Wisconsin case law describes hardship as being *present where, in the absence of a variance, no reasonable use can be made of the property*. In some more extreme cases open space uses may be the only reasonable use of a property while in others a scaled down home and some relaxation of a setback requirement may provide a reasonable use. The zoning board will balance public interests in preserving the objectives of the ordinance and private interests in a property in determining which uses are reasonable. If a parcel as a whole (but not necessarily each portion of the parcel) provides some reasonable use for its owner, then this test is not met and a variance cannot be granted. An applicant may not claim hardship because of conditions which are self-imposed or created by a prior owner (for example, excavating a pond on a vacant lot and then arguing that there is no suitable location for a home). Courts have determined that loss of profit or financial hardship do not, by themselves, justify a variance. Decks and similar minor accessory structures are not essential to the reasonable use of property and are not eligible for variances.

#### 2. Hardship Due to Unique Physical Limitations of the Property

Hardship must be due to unique physical limitations of the property, i.e. compliance with ordinance requirements is prevented by limitations (steep slopes, wetlands, etc.) that are not generally shared by other properties. The circumstances of an applicant (growing family, need for a larger garage, etc.) are not a factor in deciding variances. Nearby ordinance violations, prior variances or lack of objections from neighbors do not provide a basis for granting a variance. Minor property limitations that prevent ordinance compliance and are common to a number of properties should be addressed by amendment of the ordinance.

#### 3. No Harm to Public Interests

A variance may not be granted which results in harm to public interests. In applying this test, the board must consider impacts of your proposal and the cumulative impacts of similar projects on the interests of the entire community. These interests are listed as objectives in the purpose statement of an ordinance and may include general public health, safety and welfare as well as more specific issues such as environmental protection, clean drinking water and other concerns.

**If Your Property Qualifies For A Variance**

- ? Minimum variance. The board may grant only the minimum variance that preserves a reasonable use of the parcel for its owner.
- ? Conditions on development. It may impose limitations on project design, construction activities or operation of a facility as mitigating measures to assure that public interests and neighboring properties are protected.
- ? Appeals. A variance decision may be appealed to circuit court by an aggrieved party within 30 days of filing the decision in the office of the board. Consider delaying construction until the appeal period has expired to minimize the risk that the court may overturn the board decision and void your variance.
- ? Expiration of permit. If you do not substantially complete construction authorized by the variance within \_\_\_ months of the decision, the variance is void.
- ? Transfers of rights. Because a property (rather than its owner) may qualify for a variance, a variance transfers with the property to subsequent owners.

**Judicial Review**

Courts review zoning board decisions. Consider these standards for review to determine whether a decision of interest to you is likely to be reversed on appeal.

- ? ?? **Subject matter jurisdiction.** Did the board decide a matter that it is empowered by statute or ordinance to act on?
- ? ?? **Proper procedure.** Did the board follow proper procedures (notice, hearing, record of decision, open meeting law)?
- ? ?? **Proper standards.** Did the board apply proper standards in making the decision (3 step test for a variance)?
- ? ?? **Rational basis.** Could a reasonable person have reached this conclusion?
- ? ?? **Evidence in the record.** Do facts in the record of the proceedings support the decision?

# Variance Application

\_\_\_\_\_ BOARD OF ADJUSTMENT/APPEALS

Petition # \_\_\_\_\_ Date filed \_\_\_\_\_ \$ \_\_\_\_\_ fee paid (payable to \_\_\_\_\_)

	Owner/agent	Contractor
Name		
Address		
Phone		

Legal description: \_\_\_\_ 1/4, \_\_\_\_ 1/4, S \_\_\_\_, T\_\_N, R\_\_E, City/Village Town of \_\_\_\_\_  
 Fire number \_\_\_\_\_ Tax parcel number \_\_\_\_\_  
 Lot area & dimensions: \_\_\_\_\_ sq. ft., \_\_\_\_\_ x \_\_\_\_\_ ft.  
 Zoning district \_\_\_\_\_ Current use & improvements \_\_\_\_\_

Nature and disposition of any prior petition for appeal, variance or conditional use \_\_\_\_\_

Description of all nonconforming structures & uses on the property \_\_\_\_\_

Terms of Ordinance (requirement & section #) \_\_\_\_\_

Variance Requested \_\_\_\_\_

Address the variance criteria described in the application materials (attach additional pages):  
 Unnecessary hardship is present because... \_\_\_\_\_

Compliance with the terms of the ordinance is prevented by unique features of this property... \_\_\_\_\_

A variance will not be contrary to the public interest because... \_\_\_\_\_

Attach construction plans detailing:

- ✍ Property lines
- ✍ Vegetation removal proposed
- ✍ Contour lines (2 ft. interval)
- ✍ Ordinary highwater mark
- ✍ Floodplain & wetland boundaries
- ✍ Dimensions & locations of existing & proposed structures
- ✍✍✍ Utilities, roadways & easements
- ✍✍✍ Well & sanitary system
- ✍✍✍ Location & extent of filling/grading
- ✍✍✍ Location & type of erosion control measures
- ✍✍✍ Any other construction related to your request

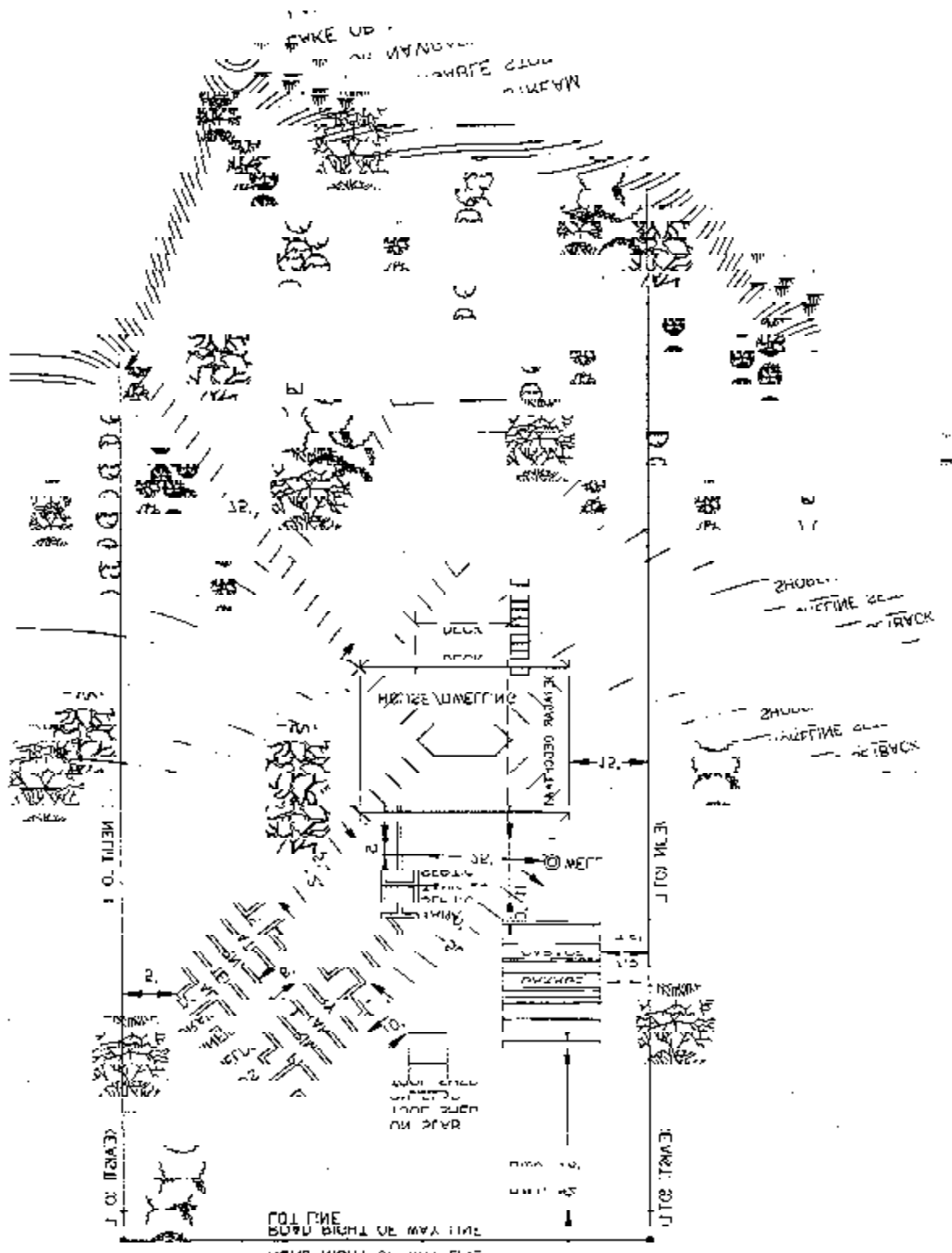
I certify that the information I have provided in this application is true and accurate.

Signed: \_\_\_\_\_ Date: \_\_\_\_\_  
 (applicant/agent/owner)

Remit to: [Zoning office address, phone and e-mail]



EXAMPLE SITE PLAN  
FOR A COMMERCIAL ZONING DISTRICT  
WITH A MIXED-USE DEVELOPMENT



# Decision of Zoning Board of Adjustment/Appeals

\_\_\_\_\_, WISCONSIN

Application/petition # \_\_\_\_\_

## FINDINGS OF FACT

Having heard the testimony and considered the evidence presented, the Board determines the facts of this case to be:

Filing Date: \_\_\_\_\_

Affidavit of publication/posting is on file.

Hearing Date: \_\_\_\_\_

1. The applicant or appellant is (name and address):  
\_\_\_\_\_
  
2. The applicant or appellant is the owner/lessee/mortgagee of the following described property which is the subject of the application or appeal:  
\_\_\_\_ 1/4 of \_\_\_\_ 1/4, City/Village/Town of \_\_\_\_\_, \_\_\_\_\_ County  
known as (street address) \_\_\_\_\_.
  
3. The property is presently in use for \_\_\_\_\_ and has been so used continuously since \_\_\_\_\_.
  
4. The property includes a nonconforming structure/use described as  
\_\_\_\_\_
  
5. The property has been the subject of a prior appeal/variance/conditional described as  
\_\_\_\_\_
  
6. The applicant or appellant proposes (brief project description/attach plans):
  
7. The applicant or appellant requests:
  - An appeal of the zoning administrator's determination.
  - A conditional use/special exception.
  - A variance.

...under Section \_\_\_\_\_ of the ordinance.

The features of the proposed construction and property that relate to the grant or denial of the application or appeal are (refer to the language/standards of the ordinance):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**CONCLUSIONS OF LAW**

Based on the above findings of fact the Board concludes that:

Appeal/Interpretation – The order of the zoning administrator is/is not in excess of his/her authority because (or) The zoning administrator's interpretation of Section \_\_\_\_\_ of the zoning code is/is not a correct interpretation because \_\_\_\_\_  
\_\_\_\_\_

Variance – The variance does/does not meet all three of the following tests:

- A. Unnecessary hardship is/is not present since strict application the terms of the zoning ordinance would/not deny the applicant all reasonable use of the property because \_\_\_\_\_  
\_\_\_\_\_
- B. The hardship is/is not due to physical limitations of the property rather than the circumstances of the appellant because \_\_\_\_\_  
\_\_\_\_\_
- C. The variance will/will not be contrary to the public interest and will/ will not observe the purpose of the ordinance and do justice because \_\_\_\_\_  
\_\_\_\_\_

Conditional Use – The application for a conditional use permit does/does not qualify under the criteria of Section \_\_\_\_\_ of the ordinance because \_\_\_\_\_  
\_\_\_\_\_

**ORDER AND DETERMINATION**

On the basis of the above findings of fact, conclusions of law and the record in this matter the board orders:

Appeal/Interpretation – The zoning administrator's order/interpretation of the zoning code or map is affirmed/modified/reversed and the administrator is ordered to:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Variance/Conditional Use – The requested variance/conditional use is denied/granted/granted-in-part subject to the following conditions:

- 1. \_\_\_\_\_
- 2. \_\_\_\_\_
- 3. \_\_\_\_\_
- 4. \_\_\_\_\_
- 5. \_\_\_\_\_

The zoning administrator is directed to issue a zoning permit incorporating these conditions and certifying by the petitioner/applicant's signature that he/she understands and accepts the conditions.

Expiration of permit. Any privilege granted by this decision must be exercised within \_\_\_\_\_ months of the date of this decision after obtaining the necessary building, zoning and other permits for the proposed construction. This period will be extended if this decision is stayed by the order of any court or operation of law.

Revocation. This order may be revoked by the Board after notice and opportunity to be heard for violation of any of the conditions imposed.

Appeals. This decision may be appealed by a person aggrieved by this decision or by any officer, department, board or bureau of the municipality by filing an action in certiorari in the circuit court for this county within 30 days after the date of filing of this decision. The municipality assumes no liability for and makes no warranty as to reliance on this decision if construction is commenced prior to expiration of this 30-day period.

\_\_\_\_\_ Zoning Board of Adjustment/Appeals

Signed \_\_\_\_\_  
Chairperson

Attest \_\_\_\_\_  
Secretary

Dated: \_\_\_\_\_

Filed: \_\_\_\_\_

## Zoning Board Decision Audit

Use an annual self-assessment of board activities to increase board efficiency and the effectiveness of ordinance standards:

1. Revise ordinance language to reflect interpretations of the board;
2. Adjust dimensional standards where similar limiting site conditions make current standards unworkable or ineffective (e.g. nonconforming lots); and
3. Convert conditional uses to permitted uses if appropriate location, design and use standards can be developed.

Track and assess disposition of individual petitions/applications or categories of similar requests. Discuss your findings with the planning committee/commission and cooperate to propose appropriate amendments to the local governing body.

### Examples

<b>Administrative Appeals</b>		
Section & Subject	Decision/Interpretation	Recommendations
9.12 - Modification of nonconforming structures	Modifications requiring permit & subject to limitations: 1. Construction beyond foundation footprint? 2. Additional story or basement? 3. Replacement of structural members? 4. Foundation replacement included?	Revise ordinance to enumerate activities requiring permit
3.4 - Minimum area requirement	Are screened porches included in "enclosed area" requirements?	Revise ordinance to better describe "enclosed areas."
4.6 - Setback measurement	From what point on a structure and in what plane are setbacks measured?	Revise ordinance to state "setbacks are measured from nearest connected portion of a structure and in a horizontal plane."

Variances				
Section & Subject	Relaxation requested	Granted/Denied	Conditions	Recommendations
3.2 - 75' shore setback for new home	< 5' 5-10' 11-20' 21-30' 31-50' > 50'	5/4 6/3 3/12 2/22 1/5	1. Remove NC accessory bldg. (6) 2. Plant/maintain screening vegetation (4) 3. Restore 50' shore buffer (5)	Standardize conditions 1-3 as amitigation requirements in ordinance.

Conditional Use Permits			
Section & Subject	Granted/Denied	Conditions	Recommendations
4.1 - Fill & Grade	23/4	1. Avoid areas > 15% slope (23) 2. Divert runoff around site during construction & stabilization (23) 3. Stabilize according to NRCS guidelines for site (23)	Convert to permitted use for areas < 2,000 sq. ft. & < 15% slope provided conditions 2 & 3 are implemented & pre-construction photo is submitted.



This handbook produced by:  
**THE LAND USE EDUCATION CENTER**

- ?? A joint venture of the College of Natural Resources at the University of Wisconsin–Stevens Point and Cooperative Extension in collaboration with UW system institutions and county Extension educators.
- ?? A focal point for education related to land use planning and management.
- ?? An opportunity to address priorities of the state legislature expressed in recent adoption of state “Smart Growth” initiatives.

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