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Connecting Land Use and Transportation in Your Comprehensive Plan

By Barbara Feeney, AICP and Kassandra Walbrun, AICP
Wisconsin Department of Transportation

Land use and transportation are significantly connected to each other and have an effect on virtually everyone in a community. While land use decisions are generally considered local and regional issues, the transportation impacts that accompany land use decisions can transcend the boundaries of communities and regions.

Many communities often decide how to handle automobile and truck traffic, transit connections, bicycle and pedestrian movements, and access on a reactionary basis to a specific development proposal. Often there is not enough time or information to address the long-term needs in the community with one development decision. Over time, decision after decision made outside the context of a long term plan can have detrimental effects to a community's transportation system.

A decision to allow a new commercial shopping center, for example, will impact the traffic along adjacent roads. To what extent will depend on the volume of traffic the development will generate and the existing roadway conditions. If congestion or safety problems already exist on the road, that new development may compound the problem.

Decision makers need to have an appropriate amount of information and a long-term vision for the community's transportation system when approving development proposals. Developers need to provide adequate information on their proposal to assist the decision-making process. So how should a community accommodate economic development while not causing unbearable congestion or safety troubles?

Comprehensive Planning is the Key to Success

While not a magic tonic that alleviates all controversy in land use decision-making, the comprehensive planning process is the best way to address the

*(See **Connecting Land Use** on page 3)*

CLUE Staff

Anna Haines
Center Director/Asst. Professor/Land Use Specialist
Anna.Haines@uwsp.edu

Michael D. Dresen
Land Use Specialist
Michael.Dresen@uwsp.edu

Lynn Markham
Land Use Specialist
Lynn.Markham@uwsp.edu

Douglas Miskowiak
Project Planner
Doug.Miskowiak@uwsp.edu

Rebecca Roberts
Project Planner
Rebecca.Roberts@uwsp.edu

Chin-Chun Tang
Project Planner
Chin-Chun.Tang@uwsp.edu

Robert Newby
Office Manager
Robert.Newby@uwsp.edu

Affiliated faculty

Alicia Acken
Land Use Specialist, UW-River Falls
alicia.acken@uwrf.edu

Merritt Bussiere
Land Use Specialist, UW-Green Bay
merritt.bussiere@ces.uwex.edu

Brian W. Ohm
Assoc. Professor/Land Use Specialist
UW-Madison, Urban & Regional Planning
bwohm@facstaff.wisc.edu

James H. Schneider
Local Government Specialist
UW-Madison Local Government Center
jhschnei@facstaff.wisc.edu

Kevin Struck
Growth Management Educator
Sheboygan and Washington Counties
kevin.struck@ces.uwex.edu

Susan Thering
Asst. Professor/Extension Specialist
UW-Madison—Landscape Architecture
sathering@facstaff.wisc.edu

What's New at the Center

On the web: click on "*What's New at the Center*" on our homepage.

CLUE Director, Michael Dresen, To Retire

After almost 30 years of state service I have decided to retire at the end of April. CLUE leadership will be left in the capable hands of Dr. Anna Haines. Our fledgling unit here at the College of Natural Resources will continue to provide educational support for regional and community land use planning efforts, especially those directed at natural resource protection and management. It will also continue educational programs for local zoning boards, plan commissions and other appointed or elected land use decision makers.

I have been fortunate to work with colleagues and to meet many Wisconsinites (Wisconsinians?) that value our waters and wild places as highly as I do and who have likewise dedicated themselves to their stewardship in order that following generations might enjoy them. A special thanks to each of you.

As a boy and young man I anticipated each May 1 as the traditional beginning of Wisconsin's open water fishing season. This spring I will revisit the trout streams of southwestern Wisconsin that too often lured me away from my studies at UW Madison. I wonder if they will be as cool, clear and full of hungry brown trout as I remember. I hope so! ■

PLEASE HELP US CONTACT TEACHERS!

The Center for Land Use Education is inviting Wisconsin Social Studies and Environmental Education teachers to participate in a focus group. The activity will determine and validate the placement of land use concepts with their correlating WDPI standards in order to produce a suggested scope and sequence and eventually the CLUSTER guide, a Creative Land Use Series for Teachers and Educator Resources. There will be a stipend offered for time and travel along with all meals for the day. If you are interested in getting involved or would like more information go to our website and contact: Rebecca Mattano (rmatt533@uwsp.edu) ■

WCCA Spring Conference
Holiday Inn – Wausau/Mosinee
Friday, March 26
Rural Conservation Subdivision Design

8:00–10:00am Nicholas R. Patera, RLA, Senior Vice-President, Teska Associates, Evanston, IL
Presentation, discussion and exercise in conservation design by one of the Midwest's leading designers of rural conservation subdivisions.

10:15–12:00pm Bill Baudhuin, Civil Engineer and Surveyor, specializing in rural developments. Sturgeon Bay, WI
Continued Discussion of Rural Conservation Subdivisions
Onsite Waste Disposal Alternatives for Rural Conservation Subdivisions ■

Connecting Land Use *(cont. from page 1)*

connections between economic development, land use and transportation by developing a long-term view for the community's future. Meaningful public involvement that engages all citizens and community interests is imperative.

Transportation issues reach everyone and are often the most controversial parts of land use decision-making. If policies and standards are in places that apply to all development proposals, it is easier for local officials to make sound decisions, and ensures a fair process for all.

To prepare communities and local officials to make well-informed decisions, **the best plans do the following:**

- **Have a clear connection between the issues and opportunities element, and the data collected.**
  Many plans contain a plethora of data, but are limited in the analysis and future direction provided to the community in the plan elements. It is relatively easy to collect data – and comprehensive plans can become a basket into which all available data is tossed, regardless of its value to the planning process. Avoid this tendency by completing the Issues and Opportunities identification first, and then decide what kinds of data are needed to support further planning efforts.

- **Reflect communication with stakeholders.**
  Build time into the planning process to meet with stakeholders whose actions can affect the community, or whose support is needed to accomplish community goals. The list includes state agencies (Departments of Natural Resources and Transportation most particularly), developers, economic development agencies, groups representing aging and disabled persons, businesses and the local school system.

- **Include analysis of the adequacy of existing zoning and subdivision regulations**.
  Many communities have regulations that have become outdated, or are not consistent with the goals the community identifies in the planning process. For example, the goal of encouraging more pedestrian and bicycle trips can only be achieved if subdivision regulations limit block lengths and require sidewalks. The Model Ordinance for Traditional Neighborhood Development available on the Wisconsin Department of Administration's website can provide guidance on these issues.

- **Uncover important opportunities that already exist**.
  Local communities are sometimes unaware of opportunities that already exist that could be take advantage of to achieve community goals. Examples of this include a community's waterfront that is underutilized or its proximity to a rail line. The comprehensive planning process can seek input from stakeholders who may see overlooked opportunities.

- **Reflect a realistic understanding about major state or local investments.**
  Being visionary is one thing, and being blind to reality is its opposite. Communities should not stake their plans upon a major investment in a state transportation facility, for example, if no such project is on the horizon. Some comprehensive plans have assumed major state investments will be made and base the land use element upon these assumptions even when a transportation project is not planned for in the future by Wisconsin Department of Transportation (WisDOT). Likewise, plans predicated upon local initiatives that are hopelessly unrealistic are doomed to failure. That being said, the combination of a motivating vision and effective leadership can move communities to accomplish great things. The key is finding the balance between vision and reality.

- **Prioritize actions, activities and implementation efforts.**
  A plan that tries to accomplish everything may sink under its own weight. The planning process should build in checkpoints along the way to select the highest priorities for further investment of planning resources.

Working Within the Planning Process

WisDOT's *Transportation Planning Resource Guide,* which can be found at http://www.dot.state.wi.us/localgov/land/resourceguide.htm, gives detailed recommendations for developing the transportation element of the plan. Below is a general list of things that, at a minimum, the plan should accomplish related to transportation and land use in order to be complete and useful:

1. **Plan for a local transportation system to meet local travel needs.**
   Communities often try to minimize road maintenance costs by skimping on the extent of the local road system. This may

result in local traffic using the state highway system. WisDOT views state highways as a scarce commodity whose primary function is to carry traffic between regions of the state. The functionality of the state highway system is degraded when communities depend upon it to be the only arterial in town. In the long term this will not serve the needs of the community because as congestion increases, the area becomes less attractive for investors and for shoppers.

2. **Identify existing safety problems.**
The local planning process should identify safety problems associated with the existing road system and seek ways to resolve those problems.

3. **Address access management issues.**
Access management is one of the most cost-effective measures a community can take to maximize the usefulness of its roadway investments. WisDOT District staff can provide educational materials that will help your community understand the value of managing access properly.

4. **Plan the local transportation system to meet the needs of various planned land uses. Seek balance.**
Communities often want to concentrate certain land uses, especially commercial development, along the main arterials. Lining up all the development along a few arterials doesn't just affect the local traffic patterns - it also can affect regional traffic. From an aesthetic perspective, stripping out a highway with development does little to enhance a community's visual character and sense of identity. For safety, mobility and visual appeal, communities should consider a planned approach that builds development in blocks or groups, instead of strips, with multiple pathways and connections for all modes to move into and out of the development. Planning to accommodate residential development in the vicinity of commercial and business uses (with appropriate buffers) also provides a customer and employee base nearby, encouraging walking or bicycle trips.

5. **Propose standards for meeting bike and pedestrian needs and consider transit options.**
There is increasing anecdotal evidence that successful communities address the needs of non-motorists. Many surveys show that transportation is considered part of the set of quality of life issues. Children, the disabled, and many elderly people rely on modes other than the automobile for mobility. Additionally, many people would prefer to use other modes for some of their trips if routes are safe and efficient. Meeting these needs and desires requires that communities plan for and make investments in these modes.

6. **Identify missing connections for all modes.**
Most communities have broken links in their transportation systems. Sometimes relatively small investments can make big improvements in the overall system. Congested roads may point to broken links in the road network. Users are the best source of information about missing links in the pedestrian and bike networks.

7. **Propose connectivity standards.**
The best way to avoid the retrofit activities discussed above is to require new development to connect to the existing transportation system and include a logical street grid. Even if curvilinear streets are preferred over a more traditional rectangular grid system, internal neighborhood connectivity is achievable and should be required. Including these standards in the subdivision ordinance gives upfront direction to developers.

Example of Implementation Chart

Item	Lead Agency	Item	Priority (H/M/L)	Links or Partners
Revise subdivision ordinance	Zoning/Planning	Dec 2004	H	UW Extension, WisDOT
Form economic development commission	Chamber of Commerce	June 2005	H	UW Extension, Tech college
ID well recharge points	Utilities/Public Works	June 2004	M	DNR
Develop capital improvements plan	Administrator's office	Sept 2005	M	All local agencies

The Money Problem

Most communities cannot afford to address all potential community issues in depth in the comprehensive plan and, indeed comprehensive plans generally are not intended to do this. However, the "plan collecting dust on the shelf" syndrome is often the result. The solution is to include an implementation section that is specific about tasks to accomplish and identifies lead agencies or departments to take responsibility for implementation.

On the next page is an example of how a chart in the Implementation element might look for a small, incorporated community's plan.

WisDOT Staff Expert Assistance is Available

WisDOT staff in eight district offices across the state are ready to help your community in the development of your comprehensive plan. For WisDOT staff contact information for your community, go to http://www.dot.state.wi.us/localgov/land/contacts.htm or call 608-261-8618 for more information.

Your community can request that WisDOT staff be involved in your planning process in a number of ways. Some of these include participating on a technical committee, meeting with your community and/or consultant to discuss transportation issues and reviewing your community's draft transportation element. This coordination helps you to ensure your community's plan is coordinated with WisDOT and various state and regional transportation plans. WisDOT staff can help in many ways including:

Data and Information. WisDOT has a number of transportation data and information resources useful for your community's inventory and analysis process, such as traffic data, functional classifications and maps. This can reduce the time and cost of your data gathering. WisDOT District staff can help to identify state and regional transportation plans and assist in determining how to "*incorporate*" these plans into your community's comprehensive plan.

State and Local Transportation Issues. WisDOT District staff can identify planned state transportation projects that may affect your community and comprehensive planning process. These projects often involve improvements to state highways in your community, however project information regarding other transportation modes will also be available. Your community will be able to share its vision and local transportation plans with WisDOT as well as WisDOT sharing the state's transportation issues that directly affect your community. Coordination helps improve your comprehensive plan and foster long-term cooperation between your community and WisDOT.

State Planning Grants. Discussing your community's transportation issues and coordinating with WisDOT District staff will help your community to better address grant application questions relating to transportation. If you have received a state grant, staff can assist you in the requirements of the grant including coordinating with a Metropolitan Planning Organization, where applicable.

For more information visit WisDOT's website on Transportation and Land Use found at: http://www.dot.state.wi.us/localgov/land/index.htm.

For WisDOT staff contacts, go to http://www.dot.state.wi.us/localgov/land/contacts.htm or call 608-261-8618.

Part 1 of this two-part article describes the basics of conditional uses: what they are, who decides them and what conditions may be included. Part 2 discusses how conditional uses are appealed and recent case law that sheds light on an unanswered question: when a conditional use decision of the Plan Commission is appealed to the Board of Adjustment or Board of Appeals, what standards of review apply?

Conditional uses: What are they, who decides them and what conditions may be included? - Part 1

By Lynn Markham

What is a conditional use?

In a zoning ordinance, each zoning district generally allows two categories of land uses: permitted uses and conditional uses. A permitted use is allowed as a matter of right in all locations in a district and is authorized by a simple zoning or building permit.

A *conditional use*, also known as a *special exception,*[1] is a land use or activity that is not suited to all locations in a zoning district, but is allowed if it meets specific conditions set out in the zoning ordinance as well as the ordinance's general purpose.[2] These conditions generally relate to site suitability and compatibility with neighboring land uses due to noise, odor, traffic and other factors. In short, conditional uses must be custom tailored to a specific location. A conditional use must be listed as such in the zoning ordinance, along with the standards and conditions which it must meet.

Conditional uses are distinct from variances. Conditional uses allow a property to be used in a way expressly listed in the ordinance, whereas a variance allows a property to be used in a manner forbidden by the zoning ordinance.[3] More specifically, variances in Wisconsin typically allow a property owner to construct buildings that do not meet dimensional standards limits in the ordinance such as setbacks or height.

How are conditional uses decided?

To allow a conditional use, a public notice and hearing are customary and may be required by ordinance (though not specifically required by state law) 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. In other words, a conditional use permit may be denied if the project cannot be tailored to a site to meet the specific conditional use standards and general purposes of the ordinance. Once a conditional use is granted, subsequent owners of a property are entitled to continue the conditional use subject to the limitations imposed in the original permit.

Local government acronyms

GB: Governing Body, which can be a county board, village board, town board or city council

BOA: Board of Adjustment for counties and Board of Appeals for cities, villages and towns

PC: Plan Commission, which is used in a broad sense in this article to refer to city, village and town plan commissions as well as county bodies with similar functions, sometimes known as "planning and zoning committees"

Who decides whether to grant conditional uses?

The local **governing body** (GB) determines by ordinance whether the **Board of Adjustment/Appeals** (BOA), the governing body or the **Plan Commission** (PC) will decide conditional use permits.[4]

When deciding which body is best suited to decide on conditional uses, consider the following factors:

- Plan Commission. This body commonly decides CUPs because they are usually the most knowledgeable about the community plan and zoning ordinance, as well as relevant state statutes and case law. The PC is continuously involved in the process of recommending legislative changes in the zoning ordinance and therefore more apt to be conversant with the "purpose and intent" of the ordinance than the BOA.[5] In some cases, the PC makes recommendation on CUPs to the GB.

  There are drawbacks to the PC deciding CUPs. Their biases about ordinance provisions may be on record from the time of ordinance adoption/amendment. In addition, there could be a conflict between the role of being an unbiased decision maker when deciding CUPs and the fact that some PC members are elected and may be tempted to represent their constituents rather than make

objective decisions based on the applicable standards and evidence in the record.

- Board of Adjustment/Appeals. This body should be relatively familiar with the zoning ordinance due to its responsibilities for deciding variances and administrative appeals, yet may not have considered community-wide planning issues to the same extent as the PC. Because BOA members are appointed rather than elected, they clearly do not represent a group of constituents.

- Governing body. The GB typically does not know the ordinance as thoroughly as the PC and often already has a full workload. Sometimes, the PC makes a recommendation to the GB on CUPs. The GB has the same drawbacks as the PC in deciding CUPs by having recorded biases and being elected officials. Additionally, the total amount of time invested in CUP decisions will likely increase significantly if assigned to the governing body as it has many more members than either of the other two bodies.

What conditions may be included in a conditional use permit?

General performance standards and specific design standards for approval may be provided by ordinance for conditional uses.[6] 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.

TYPES OF DEVELOPMENT STANDARDS

Performance Standard

Example: *Projects may not result in any increase in stormwater discharge which exceeds predevelopment conditions.*

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.

Design Standard

Example: *Each lot shall provide 500 cubic feet of stormwater storage.*

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 they meet the:

- Essential nexus test: 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,[7] and
- Rough proportionality test: the exaction or limitation is commensurate with the extent of the resulting harm or need for services.[8]

For example, a developer could be required to dedicate ten 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.

Part 2 – Conditional uses...

Who decides appeals of conditional use decisions?

If conditional uses are decided by the BOA, they 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 BOA.[9]

A conditional use decided by the GB may be appealed to Circuit Court[10] as provided by the applicable ordinance, or if the ordinance is silent, to Circuit Court within six months of the decision.[11] To achieve a reasonable balance between a short appeal period for landowners and developers that want to get started on their project and a long enough appeal period for neighbors and other affected people to react, we suggest including a 30 day appeal period in local ordinances where the GB makes CUP decisions.

If the local ordinance authorizes the PC to decide conditional uses, the decisions may be appealed to the BOA[12] by any aggrieved person or by an officer or body of the county, city, village or town subject to time limits specified by local ordinance or rules.[13]

When a conditional use decision is appealed to Circuit Court, what standards of review apply?

If a conditional use decision of a BOA or GB is appealed to Circuit Court, the following **certiorari** review standards are used: [14]

Certiorari: A remedy by which a higher court reviews the decision of a lower court or government decision maker based on the record of the proceedings.

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 follow the law and apply proper standards in making the decision (e.g. the standards listed in the ordinance for the particular conditional use)?
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?

In addition to being used by Circuit Court, the certiorari review standards also serve as a valuable checklist for good decision-making. As for standard 3 above, the applicant has the burden to show that the project satisfies all applicable criteria in the ordinance.[15] To expand on standard 4 above, court review of a BOA or GB decision is highly deferential to the original decision maker.[16] Even if the court would not have made the same decision, it will uphold the decision of the BOA or GB decision if supported by any reasonable view of the evidence. However, the conditional use decision must be based on the law articulated by local ordinance and evidence in the record, not on the decision-maker's attitude toward the applicant, the proposal or the zoning ordinance.[17] The court, in overturning a decision, will typically **remand** the case to the original decision making body for further proceedings consistent with the court's opinion. Courts do this so that a higher court does not rehear many of the decisions heard by the courts below it and to provide learning opportunities for local government bodies. However, by statute the court has the authority to wholly or partly affirm, reverse or modify the decision appealed.[18]

Remand: To send a case back to a lower body with instructions about further proceedings

Courts may interpret ordinance language de novo if the language is similar to that used in communities across the state.[19]
For instance, after the Town of Saukville decided on a CUP that included their interpretation of whether "mineral extraction operations" included "blasting and crushing," the Wisconsin Supreme Court interpreted these terms **de novo**. The rationale for this decision is that one county agency's interpretation of the language in a single case should not be controlling or persuasive for the many other counties that have ordinances with the same or similar language.[20] Note that the court did not hear the entire CUP anew.

De novo: anew; collecting new information

When a conditional use decision of the Plan Commission is appealed to the Board of Adjustment/Appeals, what standards of review apply?

Case law decisions
Published case law does not state what review standards are to be used when the BOA hears appeals of conditional use decisions made by PCs. Two recent unpublished cases, though they do not set legal precedent, do provide preliminary interpretations of the relevant statutes and ordinances.

The Court of Appeals decision, *Wolff v. Grant County Board of Adjustment,* states that sections 59.694(7) & (8) of Wisconsin statutes provide the BOA with the authority to hear conditional use appeals de novo because the BOA has all of the powers of the PC.[21] Though this case refers to the statute for counties, the statute for cities, villages and towns has parallel wording.[22] Therefore, the author of this article concludes that the BOA may also hear CUP appeals de novo in cities, villages and towns with village powers.

The *Wolff* decision, however, is limited by the 2003 case, *Town of Dayton v. Waupaca County Zoning.* In this case, the Court of Appeals

upheld the Waupaca County ordinance authorizing the PC to decide conditional uses. Based on local ordinance provisions, this case also limited the authority of the BOA hearing conditional use appeals to the correction of erroneous interpretations of the terms of the ordinance (certiorari review standards).[23]

To summarize these two unpublished cases: Wisconsin statutes provide authority for the BOA to hear conditional use appeals de novo,[24] but this statutory authority may be limited by local ordinances stating that BOA will hear appeals using certiorari standards.[25] While these legal decisions are not binding because they were not published, they do show how a local government can set the standard of review for BOA reviews of conditional use decisions made by the PC.

Practical considerations

You can argue that a BOA should apply certiorari standards when hearing an appeal of a CUP decision. From an administrative efficiency standpoint, it doesn't make sense to hear the same case twice. In addition, the goal is for the PC to make legally defensible decisions, not give applicants the opportunity to appeal their case for an additional de novo hearing if they don't like the PC's decision.

If you have a PC that repeatedly makes decisions that fail to meet the certiorari standards, consider providing training on legal standards for conditional use decisions or reassign the authority to decide conditional uses to the BOA.

Helpful hints for zoning staff regarding this issue

- Review ordinance appeal provisions and clarify whether de novo or certiorari standards apply.
- If CUPs are decided by the GB, clearly state the appeal period in the ordinance.
- Consult with municipal counsel.
- Advise BOA of proper standards to use when hearing conditional use appeals.
- Promote well documented decisions by providing decision forms listing the appropriate decision standards. Forms should provide space for the BOA to note whether the standards are met and note the relevant evidence.
- If needed, schedule a training session for new BOA members or a refresher for more experienced members. The *Center for Land Use Education* offers these training sessions upon request.

This article was reviewed for form and content by: Mike Dresen and Becky Roberts from the Center for Land Use Education; James Schneider, UWEX Local Government Center; JoAnne Kloppenberg from the Wisconsin Department of Justice; and Claire Silverman and Dan Olsen from the Wisconsin League of Municipalities. Any errors, mistakes and omissions remain the responsibility of the author.

Resources:

Dresen, Michael D. and Lynn Markham. *Zoning Board Handbook for Zoning Boards of Adjustment/Appeals*, The Land Use Education Center, July 2001.

Lindberg, Neil. Special Permits: What They Are & How They Are Used. *Planning Commissioners Journal*, Issue 3, March/April 1992.

Ohm, Brian *Guide to Land Use Planning in Wisconsin*, University of Wisconsin-Extension, 1999.

[1] *State ex rel. Skelly Oil Co. v. City of Delafield*, 58 Wis.2d 695 (1973)

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

[3] *Fabyan v. Wauksha County Board of Adjustment*, 00-3103, (Ct. App. 2001)

[4] Counties s. 59.694(7)(a) Stats.; Cities, villages and towns with village powers s. 62.23(7)(e)1 Stats.

[5] *State ex rel. Skelley Oil Co. v. Common Council*, 58 Wis.2d 703, 207 N.W.2d 588 (1973)

[6] *Kraemer & Sons v. Sauk Co. Adjustment Board*, 183 W (2d)1, 515 NW (2d) 256 (1994)

[7] *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)

[8] *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994)

[9] ss. 59.694(10) & 62.23(7)(e)10, Stats.

[10] *Town of Hudson v. Board of Adjustment*, 158 Wis.2d 263 (Ct. App. 1990) states there is no statutory authorization for BOA review of the town board. Though this case refers to the statute for cities, villages and towns, the BOA statutes regarding CUP decisions and appeals for counties have parallel wording. Therefore, the author concludes that the *Hudson* decision also applies to counties.

[11] s. 781.01, Stats.

[12] *League of Women Voters v. Outagamie County* 113 Wis.2d 313, (WI Supreme Ct. 1983) referencing s. 59.694(7), Stats. & 69 OAG 146, 1980 which clarified that "administrative official" includes the planning and zoning committee. Though this case refers to the statute for counties, s. 62.23(e)7 Stats. for cities, villages and towns has parallel wording. Therefore, the author concludes that the *League* decision also applies to cities, villages and towns with village powers.

[13] Counties s. 59.694(4), Stats.; Cities, villages and towns with village powers s. 62.23(7)(e) 4, Stats.

[14] *Town of Hudson v. Bd. of Adjustment*, 158 Wis.2d 263 (Ct. App. 1990)

[15] *Kraemer & Sons v. Sauk County Adj. Bd.*, 183 Wis. 2d 1 at 16-17 (WI Supreme Ct. 1994)

[16] *Clark v. Waupaca County Board of Adjustment*, 186 Wis. 2d 300 (Ct. App. 1994); *Town of Hudson v. Bd. of Adjustment*, 158 Wis.2d 263 (Ct. App. 1990)

[17] *Schalow v. Waupaca County*, 139 Wis. 2d 284 (Ct. App. 1987); *Marris v. City of Cedarburg*, 176 Wis. 2d 14 (WI Supreme Ct. 1993)

[18] ss. 59.694(10) & 62.23(7)(e)10, Stats.

[19] *Marris v. City of Cedarburg,* 176 Wis. 2d 14 (WI Supreme Ct. 1993) and *Weber v. Town of Saukville*, 209 Wis.2d 214, 223-4, 562 N. W.2d 412 (WI Supreme Ct. 1997)

[20] *University of Wisconsin v. Dane County*, 2000 WI App 211, 238 Wis.2d 810

[21] *Wolff v. Grant County BOA, 2002 WI App 85, 252 Wis.2d 766, 642 N.W.2d 645*

[22] s. 62.23(7)(e)7 Stats.

[23] Town of *Dayton v. Waupaca County Zoning*, 2003 WI App 22, 259 Wis.2d 933, 657 N. W.2d 439

[24] *Wolff v. Grant County BOA, 2002 WI App 85, 252 Wis.2d 766, 642 N.W.2d 645*

[25] Town of *Dayton v. Waupaca County Zoning*, 2003 WI App 22, 259 Wis.2d 933, 657 N. W.2d 439

E-Mail: Important Considerations for Local Officials

By Claire Silverman, Legal Counsel, League of Wisconsin Municipalities, originally published in *The Municipality*, February 2001

Although the use of e-mail as a way of communicating is relatively new, it has quickly become a routine form of communication for many. E-mail offers many advantages over communication by telephone or "snail mail." The biggest advantages are that it offers the ability to send information to a single person or a very large number of people almost instantaneously, any time of day or night, regardless of the day of the week, at no more than the cost of a local phone call. It also provides an accurate record of who said what, and when they said it.

These attributes make e-mail an attractive way to communicate with others. However, local officials need to bear two important things in mind as they use e-mail. First, governmental bodies are subject to Wisconsin's open meetings law. Second, local governments are also subject to Wisconsin's public records law. Local officials who use e-mail to communicate with others about government business would be wise to keep these two laws in mind when they use e-mail to communicate regarding municipal business. This Comment seeks to explain briefly how the use of e-mail might trigger the requirements of these laws. Such knowledge will allow officials to avoid running afoul of these laws, and make informed decisions regarding whether e-mail is an appropriate way to communicate regarding certain matters.

E-Mail and the Open Meeting Law

Wisconsin's open meeting law requires that all meetings of governmental bodies be preceded by public notice and be open and accessible to the public except as otherwise permitted by law.[1] Although there are no Wisconsin court decisions addressing whether the use of e-mail by members of a governmental body can constitute a meeting which triggers the requirements of the open meeting law, the writing is on the wall. If faced with the issue, the League believes Wisconsin courts will have no difficulty concluding that the use of e-mail, by a sufficient number of members of a governmental body, constitutes a meeting and triggers the various requirements of the open meeting law.

The open meeting law defines a "meeting" as the "convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body."[2] If one-half or more of the members of a governmental body are present, the meeting is presumed to be for the purpose of exercising the duties delegated to or vested in the body.[3] That presumption may be rebutted by competent evidence to the contrary.

However, the requirements of the open meeting law can also be triggered when less than an actual quorum is present or participating. The Wisconsin Supreme Court has held that the open meeting law applies whenever members of a governmental body meet to engage in government business, whether it's for purposes of discussion, decision or merely information gathering, if the number of members present are sufficient to determine the parent body's course of action regarding the proposal discussed at the meeting. See State ex rel. Newspapers, Inc. v. Showers, 135 Wis.2d 77, 398 N.W.2d 154 (1987). This number can be the number sufficient to pass a proposal or the number necessary to defeat a measure, termed a "negative quorum."

In Showers, the court recognized that members of a governmental body can violate the open meeting law by participating in what is called a "walking quorum." A walking quorum is a series of gatherings among separate groups of members, each less than quorum size, who agree, tacitly or explicitly, to act and vote in a certain manner in numbers sufficient to reach a quorum.

Thus, members of a governmental body can violate the open meeting law by communicating regarding city or village business if there is communication amongst a sufficient number of the members. In an informal (i.e., not published) attorney general opinion,[4] the attorney general opined that the University of Wisconsin Athletic Board had probably violated the open meeting law by using e-mail to approve proposed compromise language regarding a contract with Reebok.

The Athletic Board had considered the proposed contract at a public meeting. The minutes from that meeting indicated that the Athletic Board would approve the proposed contract if Reebok agreed to four amendments specified in the minutes. The minutes further indicated that the board's chair would contact board members as soon as possible, to gauge board reaction, if Reebok did not agree to any of the four amendments or proposed compromise language. The minutes noted that the chair might call a special meeting if reaction was divided, but

that he would consider the amendments approved without an additional meeting being required if reaction largely supported the changes. When Reebok proposed compromise language, the chair e-mailed each of the board members asking them to let him know as soon as possible if they opposed signing the contract as a result of the compromise language. The chair subsequently e-mailed all members of the board to let them know that he had heard from each of the members and, given the members' unanimous support of the amended language, had informed the Chancellor's Office that the Athletic Board supported the contract as amended.

It's worth stating that there's nothing special about e-mail that makes its use by a sufficient number of members of a body a violation of the open meeting law. The above discussion applies equally to the use of telephone or other forms of communication. The necessary ingredient for violation is communication amongst a sufficient number of members.

The penalty for violating the open meeting law is not less than $25 nor more than $300 for each violation.[5] Liability is personal and is not reimbursable by the municipality,[6] so protect your pocket and, more importantly, protect Wisconsin's strong tradition of open government and public confidence in the integrity of local government.

E-Mail and the Public Records Law

Although Wisconsin case law does not address the use of e-mail in the context of Wisconsin's public records law, it is virtually certain that Wisconsin courts would conclude that e-mails are public records under the law. Wisconsin's public records law defines "record" broadly. A "record" is "any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority...."[7] It also includes records which are not required to be maintained if they are in the possession of an officer.[8] However, materials must have sufficient connection with the function of the office to qualify as a public record.[9]

"Authority" is defined to include elected officials, local offices, agencies, boards, councils, commissions, committees, departments and any other public body corporate and politic created by constitution, law, ordinance, rule or order, or any subunits of any of the foregoing.[10]

Although the law may not require that e-mails by individual officers or members of a governmental body be kept or maintained, e-mails clearly fit within the definition of "record" and elected local officials clearly fit within the definition of an "authority." Thus, to the extent that an e-mail is maintained or kept on a computer, or in the possession of an official, it is subject to request under the public records law and is probably subject to the limitations imposed by the public records law on the destruction of records. In particular, local officials should be aware that documents which are the subject of a request for inspection may not be destroyed.[11]

Where the content of an e-mail makes it a record that must be maintained, custodians should be aware that it may not be enough to print out hard copies and that it may be necessary to preserve the e-mail in its electronic format. In a federal case where it was determined that e-mails constituted records under the Federal Records Act,[12] the court noted that attempting to preserve the record by printing out a hard copy of the record did not satisfy the preservation requirements of the Federal Records Act because the hard copy would not necessarily contain all the information contained in the electronic copy. For example, the hard copy might not indicate the time the e-mail was sent, the time it was received which would be noted if the sender had requested what is termed an acknowledgment, or all the people the message was sent to if the message was sent to a list serve or a large number of persons.

Although there are currently more questions than answers regarding how Wisconsin's public records law applies to e-mails of local officials regarding municipal business, one thing is clear. Local officials should anticipate that any e-mails relating to official business and being kept or maintained on a computer or elsewhere, are likely records which can be requested under Wisconsin's public records law.

Endnotes

1 Sec. 19.83(1), Stats.
2 Sec. 19.82(2), Stats.
3 Sec. 19.82(2), Stats.
4 Informal Op. Att'y Gen to Paul Kritzer dated August 20, 1996.
5 Sec. 19.96, Stats.
6 66 Op. Att'y Gen. 226 (1977).
7 Sec. 19.32(2), Stats.
8 State ex rel. Youmans v. Owens, 28 Wis.2d 672, 679, 137 N.W.2d 470 (1965).
9 72 Op. Att'y Gen. 99, 101 (1983).
10 Sec. 19.32(1), Stats.
11 Sec. 19.21(7).
12 Armstrong v. Executive Office of President, 1 F.3d 1274 (D.C. Cir. 1993).

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Center for Land Use Education

University of Wisconsin - Stevens Point
College of Natural Resources
1900 Franklin Street
Stevens Point, WI 54481

Phone: 715-346-3783
Fax: 715-346-4038
E-mail: landcenter@uwsp.edu