



## Chapter

# Appeal of Zoning Board Decisions

Zoning board decisions may be appealed to circuit court. When reviewing zoning board decisions on appeal, the circuit court generally reviews the record using certiorari standards. To minimize having their decisions overturned by the courts, zoning boards should understand and apply the certiorari standards to create an accurate and complete record for each of their decisions. When making decisions, zoning boards and the courts are governed by rules in local ordinances, state statutes, and the constitution.

### What is an appeal?

For the purposes of this chapter, an appeal is the submission of a decision made by a zoning board to a circuit court for review to determine whether the board erred and to affirm, reverse, or remand the decision.<sup>172</sup> *Chapter 13* discusses administrative appeals which occur when decisions made by zoning administrators or plan commissions are appealed to the zoning board.

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<sup>172</sup> *Black's Law Dictionary*, 2nd pocket edition, 2001, 38; Klein, Bobbie, Attorney and Laura Dulski, Attorney. "Filing an Appeal: A Citizen's Guide to Filing an Appeal in the Wisconsin Court of Appeals." June 1991 (Revised effective January 1, 2004). Available at <http://www.courts.state.wi.us/ca/citizens.pdf>

## Who may appeal zoning board decisions?

An aggrieved person, taxpayer, municipal officer, or municipal body may appeal a zoning board decision to circuit court.<sup>173</sup> A “person” includes partnerships, corporations, associations, and governmental units.<sup>174</sup> These people and bodies are said to have **standing** to appeal zoning board decisions. The test for standing has two parts:

**Standing** - the status required by law to allow a person or body to appeal a decision.

1. whether the decision of the agency directly causes injury to the interest of the petitioner, and
2. whether the interest asserted is recognized by law.<sup>175</sup>

The DNR, because of its role as trustee of the navigable waters of Wisconsin, has standing to appeal shoreland, wetland, and floodplain zoning decisions.<sup>176</sup> The DNR has standing to appeal decisions that violate the public trust and in fact, has a duty to appeal decisions that do not comply with shoreland zoning administrative rule standards.<sup>177</sup>

## How long does a person have to appeal a zoning board decision?

A person has 30 days after the filing of the decision in the office of the zoning board to appeal a decision.<sup>178</sup> In the absence of zoning board by-laws defining what it means to “file the decision,” the appeal period begins when the decision is physically filed in the office of the zoning board. The 30-day appeal period runs from the filing of the original decision and is not extended by filing a motion to reconsider unless the motion raises a new issue.<sup>179</sup> In

<sup>173</sup> Wis. Stat. §§ 59.694(10) & 62.23(7)(e)10. The municipal law and tax sections of the statutes are pretty clear in distinguishing between a resident (which can include a renter) and taxpayer (used in this context as a “taxpayer of the municipality,” which generally refers to a property taxpayer. While there may be an argument that a renter is a taxpayer in a county which collects a county sales tax, it’s questionable that the term taxpayer used in this section of the statute was intended to include renters--- but rather, a person who pays property taxes directly to the municipality. A renter may fit within the term “aggrieved person”, if the decision affects the property that they are renting; *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*, 131 Wis. 2d 101, 388 N.W.2d 593 (1986) states residents had appeal rights even though they did not appear at planning and zoning committee hearings because statutes provide that persons aggrieved, not parties, have a right to appeal.

<sup>174</sup> Wis. Stat. § 990.01(26)

<sup>175</sup> *Mendonca v. DNR*, 126 Wis. 2d 207, 376 N.W.2d 73 (Ct. App. 1985); *Kammes v. State, Mining Inv. & Local Impact Fund Bd.*, 115 Wis. 2d 144, 340 N.W.2d 206 (Ct. App. 1983).

<sup>176</sup> *State ex rel. DNR v. Walworth County Bd. of Adjustment*, 170 Wis. 2d 406, 489 N.W.2d 631 (Ct. App. 1992)

<sup>177</sup> Wis. Admin. Code ch. NR 115; *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761 (1972)

<sup>178</sup> Wis. Stat. §§ 59.694(10) & 62.23(7)(e)10

<sup>179</sup> *Bettendorf v. St. Croix County Bd. of Adjustment*, 188 Wis. 2d 311, 525 N.W.2d 89 (Ct. App. 1994)

one case in which a zoning board first issued a tentative decision<sup>180</sup> and after a subsequent public hearing on the case issued a more complete decision, the court determined the 30-day appeal period began after the final zoning board decision.<sup>181</sup>

### **What must be done within the 30 day time period to appeal a zoning board decision?**

A lawsuit must be filed in circuit court seeking **certiorari** review of the zoning board decision. In a certiorari lawsuit, the person or body with standing requests that the circuit court issue a **writ** requiring the zoning board to submit the record of their decision to the court. The request to the circuit court must identify which certiorari standards the decision did not meet, but does not need to make a full argument describing all of the reasons they feel the zoning board decision is insufficient.

**Certiorari** - A writ from a higher court to a lower court (or zoning board) requesting a transcript of the proceedings of a case for review.

### **If a certiorari lawsuit is filed, what is the zoning board required to do?**

The board must submit the transcript of the proceedings of the decision (the record) or certified or sworn copies of the record to the circuit court.<sup>182</sup>

**Writ** - A written order issued by a court requiring specific action.

### **When a zoning board decision is pending before the circuit court, what may the zoning administrator and zoning board do?**

When the zoning board decision is pending before the court, the court has exclusive jurisdiction over the dispute, and neither the zoning administrator nor the zoning board may reevaluate their decision until the court relinquishes that jurisdiction. To allow otherwise would encourage conflicting and competing decisions of courts and administrative agencies.<sup>183</sup>

<sup>180</sup> *Miswald v. Waukesha County Bd. of Adjustment*, 202 Wis.2d 401, 550 N.W.2d 434 (Ct. App. 1996); first decision stated that the zoning board's decision may be taken up at the next hearing and the decision may be subject to change and modification.

<sup>181</sup> *Miswald v. Waukesha County Bd. of Adjustment*, 202 Wis.2d 401, 550 N.W.2d 434 (Ct. App. 1996)

<sup>182</sup> Wis. Stat. §§ 59.694(10), 62.23(7)(e)10 & 781.03

<sup>183</sup> *Mills v. Vilas County Bd. of Adjustment*, 2003 WI App 66, 261 Wis.2d 598, 660 N.W.2d 705

## What happens to the construction project if the zoning board decision is appealed?

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

A zoning board decision is not automatically **stayed** by filing an appeal with the court.<sup>184</sup> For instance, construction may go forward if authorized by a board decision. However, upon petition, the court may find cause to issue a **stay**.

## What decisions may a circuit court make on appeal?

Court review of a zoning board decision is highly deferential to the board,<sup>185</sup> with the court presuming the decision of the board is correct and valid when reviewing it by certiorari.<sup>186</sup> Even if the court would not have made the same decision, it will uphold the zoning board’s decision if the decision is supported by any reasonable view of the evidence. However, the zoning board decision must be consistent with the law and based on evidence in the record, not on its attitude toward the applicant, the proposal or the zoning ordinance.<sup>187</sup>

Courts may interpret ordinance language de novo if the language is similar to that used in communities across the state.<sup>188</sup> For instance, after the Town of Saukville decided on a conditional use permit 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.<sup>189</sup> Note that the court did not hear the entire conditional use permit anew.

**Remand** - to send a case back to a court or original decision-making body from which it came for

The court may wholly or partly affirm, reverse, or modify the decision appealed.<sup>190</sup> The court, in overturning a decision, will typically send the case back to the board, or **remand** it, for further proceedings consistent with the court’s opinion. Courts may

<sup>184</sup> Wis. Stat. §§ 59.694(10) & 62.23(7)(e)10

<sup>185</sup> *Clark v. Waupaca County Bd. of Adjustment*, 186 Wis. 2d 300, 519 N.W.2d 782 (Ct. App. 1994)

<sup>186</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401; *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514; *Nielsen v. Waukesha County Bd. of Supervisors*, 178 Wis. 2d 498, 511, 504 N.W.2d 621 (Ct. App. 1993)

<sup>187</sup> *Schalow v. Waupaca County*, 139 Wis. 2d 284, 407 N.W.2d 316 (Ct. App. 1987)

<sup>188</sup> *Marris v. Cedarburg*, 176 Wis. 2d 14, 498 N.W.2d 842 (1993); *Weber v. Town of Saukville*, 209 Wis. 2d 214, 223-4, 562 N.W.2d 412 (1997)

<sup>189</sup> *Bd. of Regents v. Dane County Bd. of Adjustment*, 2000 WI App 211, 238 Wis. 2d 810, 618 N.W.2d 537

<sup>190</sup> Wis. Stat. § 59.694(10)

remand decisions to the zoning board for workload or process-related reasons, including:

1. If they did not, local zoning boards might be tempted to go along with public opinion on difficult or controversial decisions rather than applying the legal standards governing zoning boards, thereby leaving the unpopular decisions to the circuit court.
2. Circuit courts do not have the time to hear numerous local zoning appeals that are the responsibility of local zoning boards.
3. Local zoning boards learn correct procedure and decision making standards if they revisit decisions where the court disagreed and must decide them in ways consistent with the instructions that accompany a remand from circuit court.

There is wide variability in the detail and direction provided by the court when it remands decisions to the zoning board. It is very helpful when the court clarifies whether the zoning board is to conduct a de novo hearing or whether they are only allowed to address the issue the court decided on. Typically, a zoning board only collects additional evidence on remand when the court finds that the evidence in the record is insufficient to support their decision or if the decision standards have changed.

*Zoning boards should understand and apply the certiorari standards in all of their decisions to minimize having their decisions overturned by the courts.*

### **May the circuit court take additional evidence?**

While state law allows circuit courts to take evidence if necessary to properly decide a matter,<sup>191</sup> this seldom happens. Due to the three political and workload reasons described above, courts often remand decisions back to the zoning board with instructions if they do not provide sufficient evidence.

While there is not a complete list of circumstances that might justify the circuit court to take evidence, courts have concluded that a reviewing court may decide to take additional evidence in the following circumstances:

- When the record before the zoning board is incomplete because the aggrieved party was refused an opportunity to be fully heard or the board excluded relevant evidence.
- When good and sufficient cause is shown for the failure to have offered the evidence to the board.

<sup>191</sup> Wis. Stat. § 59.694(10)

- When the record presented to the circuit court does not contain all the evidence actually presented to the zoning board.
- When the zoning board’s record fails to present the hearing in sufficient scope to determine the merits of the appeal.
- When new evidence is discovered after the zoning board’s proceedings were closed, although the circuit court may remand to the board to consider the new evidence first.<sup>192</sup>

**If the circuit court does not take additional evidence, what standards does the court use in reviewing zoning board decisions?**

The circuit court reviews the record under the traditional standards of common law certiorari listed on page 117.<sup>193</sup> We recommend that zoning boards understand and apply the same certiorari standards in all of their decisions to minimize having their decisions overturned by the courts. The circuit court may not substitute their discretion for the discretion of the zoning board.<sup>194</sup>

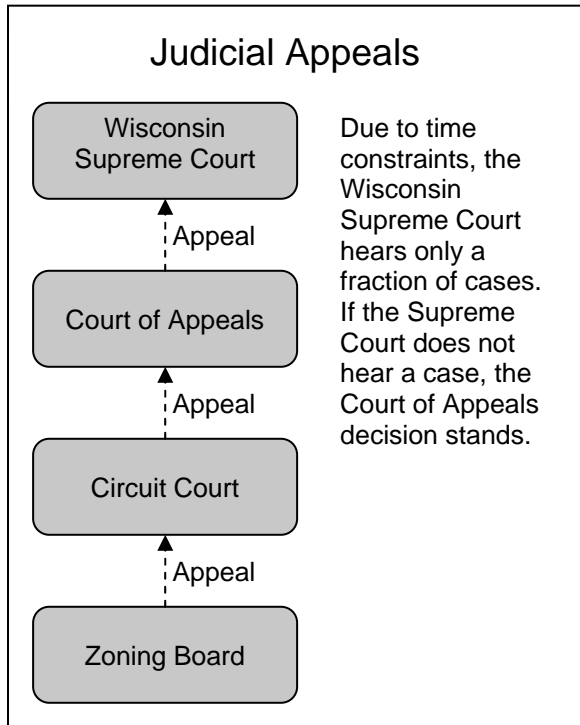
<sup>192</sup> *Klinger v. Oneida County*, 149 Wis.2d 838 , 440 N.W.2d 348 (1989) .

<sup>193</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401; *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514

<sup>194</sup> *Clark v. Waupaca County Bd. of Adjustment*, 186 Wis. 2d 300, 519 N.W.2d 782 (Ct. App. 1994); *Klinger v. Oneida County*, 149 Wis.2d 838, 440 N.W.2d 348 (1989)

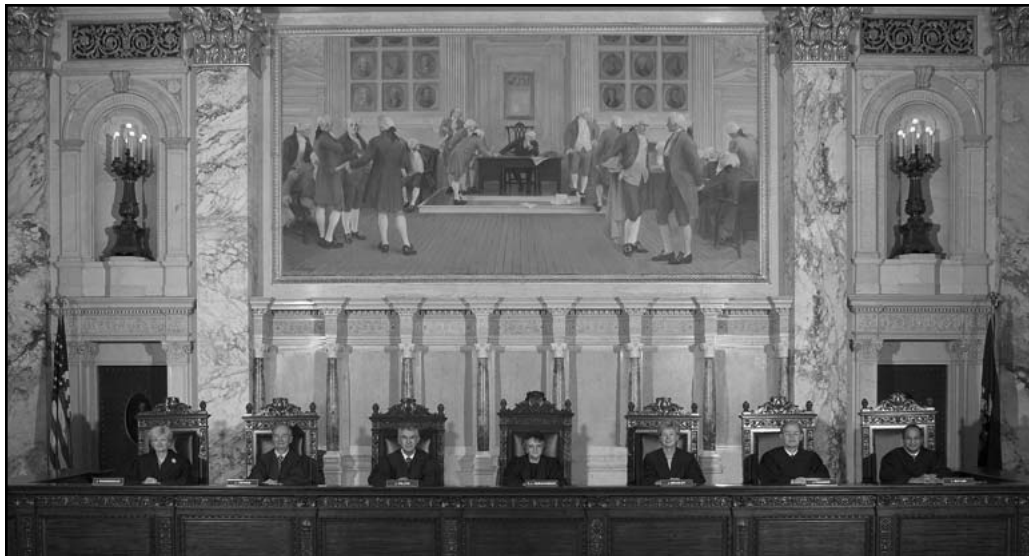
<b>Figure 28: Certiorari Review Standards</b>		
<b>Standard</b>	<b>Questions the court will ask when reviewing a BOA decision</b>	<b>Tips to help the zoning board comply with this standard</b>
1. Jurisdiction	Did the board have the authority to make this decision?	<ul style="list-style-type: none"> <li>■ For each hearing, ensure that the geographical location and type of decision are within the jurisdiction of the board.</li> </ul>
2. Proper procedures	Did the board follow proper legal procedures?	<ul style="list-style-type: none"> <li>■ Ensure that public notice and open meeting laws are followed as well as other procedures specified in local or state codes.</li> </ul>
3. Proper legal standards	Did the board follow the proper legal standards?	<ul style="list-style-type: none"> <li>■ Ensure that variance decisions are based on the 3-step statutory test.</li> <li>■ Ensure that conditional use decisions are based on ordinance standards.</li> </ul>
4. Unbiased decision-makers	Was the zoning board's action arbitrary, oppressive or unreasonable, and representative of its will and not its judgment?	<ul style="list-style-type: none"> <li>■ Ensure that board members are unbiased</li> </ul>
5. Substantial evidence	Could a fair and reasonable person have reached the same conclusion as the zoning board based on the facts in the record?	<ul style="list-style-type: none"> <li>■ Make sure that all evidence, including that from site inspections, is included in the record.</li> <li>■ Ensure that the decision explains the reasons why the board feels each decision standard was or was not met and specifies which evidence supports each part of their decision.</li> </ul>

**Figure 29:** Common Route for Appealing a Zoning Board Decision



**Can zoning board decisions be appealed beyond circuit court?**

Yes, there are multiple levels of appeal possible. In the most common route of appeal, the zoning board decision is first appealed to the circuit court. The circuit court decision can be appealed to the court of appeals, which must either take the case or ask the Wisconsin Supreme Court to take the case directly.<sup>195</sup> If the court of appeals issues a decision, its decision can be appealed to the Wisconsin Supreme Court, which hears only a small fraction of the cases sent to it.<sup>196</sup> For a full range of appeal routes, see the diagram on the Wisconsin Supreme Court webpage.<sup>197</sup>



Wisconsin Supreme Court. Photo courtesy of Bob Rashid Photography.

<sup>195</sup> Wisconsin Supreme Court website, <http://www.courts.state.wi.us/about/organization/moves.htm>

<sup>196</sup> The Wisconsin Supreme Court receives about 1,000 petitions for review each term, and agrees to hear about 100 of these cases. Wisconsin Supreme Court, 2000, <http://www.courts.state.wi.us/about/organization/moves.htm>

<sup>197</sup> <http://www.courts.state.wi.us/about/organization/moves.htm>

# Section V – Review

## Keywords

- Certiorari
- Writ
- Stay
- Remand

## **Test Your Knowledge** (answers on page 120)

### **Chapter 17 - Appeal of Zoning Board Decisions**

- 1) How long does a person have to appeal a decision made by the zoning board?
- 2) What are the five certiorari standards that zoning board decisions must meet to be upheld?
- 3) Do the circuit courts take additional testimony related to zoning board decisions?
- 4) When a court overturns a zoning board decision, why do they typically remand the decision to the zoning board?

## Answers

- 1) 30 days after the filing of the decision in the office of the board.
- 2)
  - a. Jurisdiction – geographic and subject matter
  - b. Proper procedures
  - c. Proper legal standards
  - d. Exercise of judgment
  - e. Substantial evidence test
- 3) While state law allows circuit courts to take evidence if necessary to properly decide a matter, this seldom happens
- 4)
  - a. If they did not, local zoning boards might be tempted to go along with public opinion on difficult or controversial decisions rather than applying the legal standards governing zoning boards, thereby leaving the unpopular decisions to the circuit court
  - b. Circuit courts do not have the time to hear numerous local zoning appeals that are the responsibility of local zoning boards
  - c. Local zoning boards learn correct procedure and decision making standards if they revisit decisions with which the court disagreed and must decide them in accordance with the instructions that accompany a remand from circuit court