

SECTION II: LAWS THAT APPLY TO THE ZONING BOARD

4. Overview of Laws that Apply to the Zoning Board

Zoning boards must look to several sources for guidance on proper procedures, including 1) state statutes, 2) local ordinances, 3) zoning board bylaws or operating rules, and 4) case law.

State statutes outline the authority of zoning boards (see chapter 2) and describe many procedural and ethical guidelines that zoning boards and other local government bodies must follow, such as the open meetings law, public records law and state ethics code (see chapters 5 and 6).

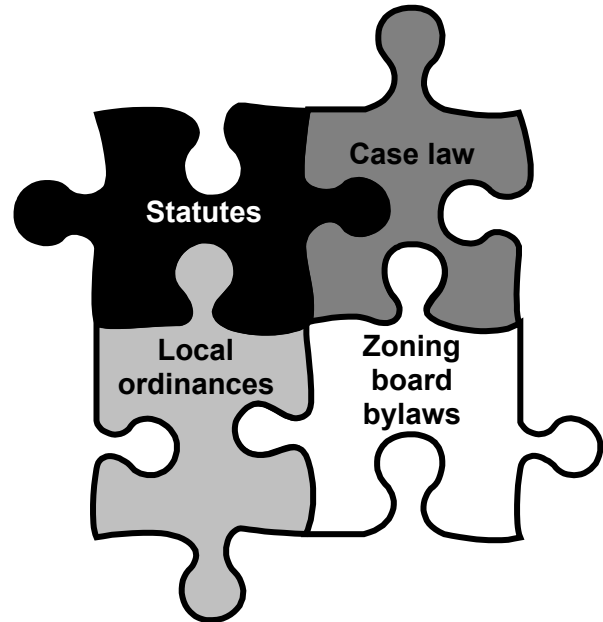
Local ordinances further define the authority and procedures to be followed by zoning boards. In addition, local ordinances provide specific details about the purpose and intent of zoning codes and criteria for making zoning decisions. Chapter 13 and Appendix B provide guidance on accessing, reading and interpreting state statutes and local ordinances.

Day-to-day operational procedures of the zoning board that are not covered in state statutes or local ordinances should be addressed in zoning board bylaws or rules of procedure. These procedures should be created by the local governing body with input from the zoning board and staff (see chapter 7).

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

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

Figure 6: Rules that apply to the zoning board are derived from multiple sources.



5. Open Meetings Law

All zoning board meetings and hearings must comply with Wisconsin's open meetings law.¹ The law is intended to give the public prior notice of meetings of governmental bodies and to assure that they are held in places that are open to the public and reasonably accessible to the public, including the disabled. Some meetings or portions of meetings are permitted to be held as closed sessions, but generally, discussion and decision-making at governmental meetings must be conducted in open session and motions and voting must be open and recorded.

Open Meetings

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

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

- **The Purpose Test** is met when discussion, information gathering, or decision-making take place on a matter within the jurisdiction of the governmental body. For zoning boards, that includes matters pertaining to conditional uses, variances, and administrative appeals as well as appeals of the zoning board's decisions.
- **The Numbers Test** is met when enough members of the body are present to determine the outcome of an action. By statute, if a quorum is present (generally one-half of the members of the body), there is presumed to be a meeting unless the purpose test is not met. A lesser number of members may also meet the numbers test if sufficient numbers are present to block a decision (e.g., two members of a five-member city/village/town zoning board where four votes are required to carry an issue). This is known as a "negative quorum."

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

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

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

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

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

¹ Wis. Stat. §§ 19.81-19.98

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

Closed Sessions

Permitted exemptions for closed sessions

Unless specifically exempted by state statute, all meetings of governmental bodies must be open and reasonably accessible to the public. Recognizing that opportunities for zoning boards to go into closed session are extremely limited, statutory exemptions that may apply to zoning boards are listed below:²

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

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

Closed session procedures

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

- **To enter closed session** - The body must initially convene in open session. To move into a closed session, the presiding officer must announce the specific subject matter and

² Wis. Stat. § 19.85(1)(a-j)

³ State ex rel. Hodge v. Turtle Lake, 180 Wis.2d 62, 508 N.W.2d 301 (1993)

statutory authority for closure. A motion and recorded individual vote by a majority of the body are required to convene in closed session.

- **Discussions, motions and decisions** - The body may consider only the matter(s) for which the session was closed. Motions and decisions must be recorded. If a decision made in closed session is appealed, the record must contain sufficient detail to show that the zoning board considered the proper legal standards and evidence presented. Where feasible, zoning boards should vote in open session.
- **To reconvene in open session** - Once a body convenes in closed session, it may not reconvene in open session for at least 12 hours, unless public notice of its intent to return to open session was given in the original notice of the meeting. Absent such notice, the body should amend its agenda to place any closed session at the end of the agenda.⁴ When there is good cause, two-hour prior notice of a planned closed session and reopening can be provided to allow reopening a meeting, but this approach is rarely necessary.

Attendance at closed sessions

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

Public Notification

Notice of a public meeting is required and may be accomplished by posting in one or more public places likely to give notice to the public and those affected by the decision.⁵ A minimum of three locations is recommended. Generally, the zoning board secretary or administrative staff of the zoning department perform meeting and hearing notification duties and provide evidence of compliance. However, board members must individually determine compliance with all aspects of the open meetings law in deciding whether to participate in a meeting. The following are minimum requirements of Wisconsin's open meetings law:

- **24-hour prior notice.** Notice of a public meeting must be provided at least 24 hours prior to the meeting. Where such notification is impossible or impractical for good cause, notice may be provided not less than 2 hours prior to the meeting.
- **Notice to media.** Notice (written, phone, or fax) must be provided to the governmental unit's official newspaper and to any media who have filed a written request. If there is no official newspaper, notice should be provided to a newspaper or other media likely to give notice in the affected area.⁶

⁴ Wis. Stat. § 19.85(2)

⁵ OAG 86-76, 65 Op. Att'y Gen. 250 (1976) & Wis. Stat. § 19.84(1)

⁶ Wis. Stat. §§ 985.03 & 985.05

- **Separate notices.** A separate notice is required for each meeting. A general notice at the beginning of the year is not sufficient.
- **Content of notice.** Notice must specify the time, date, place, and subject matter of the meeting; any contemplated closed sessions; and intent to reconvene in open session within twelve hours after completion of a closed session.⁷ The meeting agenda may also provide for a period of public comment and discussion. Though most meetings must be open to public attendance, the law does not require all meetings to provide a forum for public comment. Hearings, on the other hand, must include a period for public comment/testimony.
- **Specificity of notice.** The public notice must describe agenda items in sufficient detail to allow anyone likely to be affected by a decision to identify those items on the agenda. General subject matter designations such as “miscellaneous business,” “agenda revisions,” or “other such matters as authorized by law” should be avoided.⁸ Only issues described in sufficient detail in the public notice and agenda may be decided. If a discussion item or decision is continued or postponed for a later date that item should be fully described in the subsequent meeting notice.

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

- State statutes governing procedures for zoning boards,⁹
- DNR rules for shoreland, shoreland-wetland, and floodplain zoning matters,¹⁰ and
- Other notice requirements imposed by local ordinance or bylaws.

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

Public Notification of Hearings

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

Figure 7: Statutory Notice Requirements for Zoning Board Hearings			
County (population	County (population	City ¹³	Village or Town ¹⁴

⁷ Wis. Stat. §§ 19.84(2) & 19.85(2)

⁸ Memo from Peggy Lautenschlager, Attorney General to Mr. Charles Rude, Mayor, City of Lake Geneva, dated March 5, 2004.

⁹ Wis. Stat. §§ 59.694(6) & 62.23(7)(e)6

¹⁰ Wis. Admin. Code §§ NR 115.05(6)(h) & NR 116.20(2)(d)

of 250,000 or more) ¹¹	less than 250,000) ¹²		
<ul style="list-style-type: none"> ▪ Class 2 notice required. ▪ Posting recommended. 	<ul style="list-style-type: none"> ▪ Posting two weeks prior required. ▪ Class 2 notice recommended. 	<ul style="list-style-type: none"> ▪ Class 1 notice required. ▪ Posting recommended. 	<ul style="list-style-type: none"> ▪ Posting one week prior required.

Posting – Display of a notice in at least 3 public places likely to give notice to the public and those affected by a decision.¹⁵

Class 1 Notice – One newspaper publication at least one week before the act or event.¹⁶

Class 2 Notice – Two newspaper publications, at least once each week for consecutive weeks, the last at least one week before the act or event.¹⁷

¹³ Wis. Stat. § 62.23(7)(e)6 merely requires the city zoning board to give “public notice” of the hearing on the “appeal or other matter referred to it” (e.g. variance or special exception/conditional use). Wis. Stat. § 985 applies to publication of “legal notices,” which term includes “public hearings.” The hearing before the city zoning board is merely called a “hearing,” in contrast to a “public hearing” as in the case of zoning amendments under Wis. Stat. § 62.23(7)(d). Because members of the public are typically allowed to testify at zoning board hearings, the conservative interpretation is that § 985 applies. In § 985, a class 1 notice is required for cities because the hearing requirement in Wis. Stat. § 62.23(7)(e)6 predates the date specified in Wis. Stat. § 985.07.

¹⁴ Wis. Stat. §§ 59.694(6) & 62.23(7)(e)6 refer to Wis. Stat. § 985. Under § 985, cities, but not villages or towns, must have official newspapers. Since villages and towns do not have official newspapers, the publication requirement may be satisfied by posting [Wis. Stat. §§ 985.02(2), 985.07 & 985.01(1)]

¹¹ Wis. Stat. § 59.694(6) provides that notice of the hearing of an appeal must be given by publication of a class 2 notice under Wis. Stat. § 985. It is somewhat unclear whether class 2 publications should also be made for variances and special exceptions/conditional uses. Requirements for designation of an official newspaper for counties with population of 250,000 or more is found in Wis. Stat. § 985.065(2)(a).

¹² See previous footnote. Counties with a population less than 250,000 are not required to have an official newspaper and apparently may elect to satisfy the class 2 publication requirement by posting [Wis. Stat. § 985.05(1)]. However, newspaper publication is strongly recommended.

¹⁵ Wis. Stat. § 985.065(2)(a) concerns requirements for an official newspaper; Wis. Stat. § 985.05(1) provides a posting option if there is no official newspaper; Wis. Stat. § 985.02(2) provides guidelines for posting & Wis. Stat. § 985.01(3) defines *municipality*.

¹⁶ Wis. Stat. §§ 985.07 & 985.01(1)

¹⁷ Wis. Stat. §§ 985.07 & 985.01(1)

Figure 8: Class 2 Notice Calendar

Calendar						
S	M	T	W	Th	F	Sa
				N1		
				N2	1	2
3	4	5	6	7H		

N1 – 1st newspaper notice
N2 – 2nd newspaper notice
H – Scheduled hearing

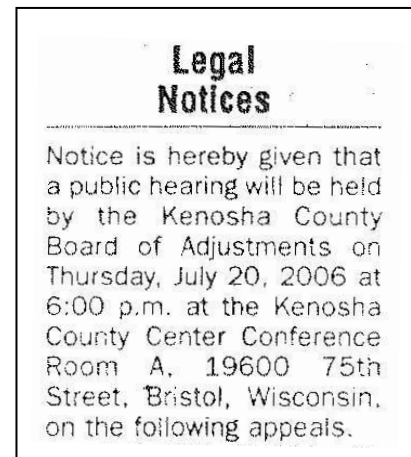
The calendar at right illustrates a sample timeframe for publishing a Class 2 notice for a zoning board hearing consistent with state law. Counting backward from the date of the scheduled hearing (highlighted in red) the second newspaper publication must occur at least one week prior to the hearing (not less than seven days prior). In computing the minimum time for publication, the first day of publication is excluded and the day of the meeting or event is included.¹⁸ State statutes are silent on how far in advance the notice may occur. Therefore, the second notice may be published earlier than the dates noted, but not later. The first publication must appear the week prior to the second publication and may occur on any day of the week.¹⁹ One court of appeals has interpreted the law as requiring insertions to be exactly one week apart; however, this is likely not binding precedent.²⁰ Working within statutory guidelines, local governments may wish to clarify by ordinance when zoning board hearing notices should be provided.

Content of hearing notice

The following information should be included in the hearing notice:

- Name of the governmental body that will meet.
- Date, time and location of the hearing.
- Name of the applicant, appellant, or petitioner.
- Location of property involved.
- General description of the proposed project and nature of the request (variance, conditional use/special exception, or appeal).
- Subject matter, statutory authority (recommended), and notice of any anticipated closed session and any intent to reconvene in open session within 12 hours after completion of a closed session.²¹ (Review the exemptions and procedures for closed sessions.)
- A notice that interested persons may present testimony regarding matters on the agenda at the meeting/hearing or in writing to the board.
- Contact information for further information about the petition or application.

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



¹⁸ Wis. Stat. § 985.09

¹⁹ Wis. Stat. § 985.01(1m) states that “any such notice that may, by law or the order of any court, be required to be published for any given number of weeks may be published on any day in each week of such term”.

²⁰ A court of appeals interpreted the law as requiring Class 2 notice insertions to be exactly one week apart [*Gloudeman v. City of St. Francis*, 143 Wis.2d 780, 422 N.W.2d 864, 866 (Ct. App. 1988)]. However, this is likely *obiter dictum*, and thus not binding precedent [League of Wisconsin Municipalities, FAQ3, February 1997. Available: <http://www.lwm-info.org/legal/faz/faz3.html>].

²¹ Wis. Stat. § 19.85 (2)

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

Proof of hearing notice

An affidavit of publication by a newspaper editor or his/her designee showing the name of the newspaper and dates of publication affixed to a copy of the published notice is presumptive evidence of publication.²² A similar affidavit by a person posting legal notice showing the time, place and manner of posting serves the same function for posted notices.²³

Notification of hearing to interested parties

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

- **Media** - The information provided in a published or posted notice must be provided by phone, fax, or written copy to any media requesting it and to the community's official newspaper. If an official newspaper is not designated, notice must be given to news media likely to give notice in the area.²⁴
- **Interested Parties** - Notice must also be given by mail to parties in interest,²⁵ including:
 - The applicant/appellant/petitioner,
 - Any zoning officer whose decision is appealed, and
 - Adjacent/nearby property owners as specified by local ordinance. We recommend that zoning staff provide notice to people within a greater distance if the proposed use could affect people farther away (e.g., gravel pit, landfill).
- **Department of Natural Resources** - The appropriate local DNR office must be provided with 10-day prior notice of hearings on shoreland, shoreland-wetland, and floodplain zoning appeals, variances, and conditional uses/special exceptions and provided with copies of related decisions within 10 days.²⁶
- **Department of Agriculture, Trade and Consumer Protection** - DATCP must be notified of any approval in the case of a conditional use/special exception or variance in an exclusive agricultural zoning district under the state farmland preservation program.²⁷

Violations of the Open Meetings Law

Suggested procedures to avoid violations

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

²² Wis. Stat. § 985.12

²³ Wis. Stat. § 985.02(2)(d)

²⁴ Wis. Stat. §§ 19.84(1)(b) & 985.065

²⁵ Wis. Stat. §§ 59.694(6) & 62.23(7)(e)6

²⁶ Wis. Admin. Code §§ NR 115.05(6)(h) & NR 116.20(2)(d); DNR notification is usually accomplished by providing a written copy of the notice.

²⁷ Wis. Stat. § 91.75(5). Forms for notifying DATCP are available by calling (608) 224-4648.

1. **Determine proper notice.** At the beginning of a meeting, each member of the zoning board should determine whether proper notice was provided. If compliance is questionable, the municipal attorney should be able to provide counsel on the matter.
2. **Limit closed sessions.** Members should vote against convening closed sessions that are not authorized by specific exemptions of the open meetings law. They should also insist that proper procedures be used to close and reopen sessions. Members who vote against convening in closed session may participate in the closed session if it is held.
3. **Document proceedings.** A log or minutes documenting proper notice and recording motions, rationale, and any votes on abbreviated notice, amended agendas, or closed sessions is a useful defense against allegations of open meetings law violations (most often made by media or persons displeased by decisions).

Liability and voided decisions

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

6. Ethical and Procedural Considerations

Zoning Boards Must Follow the Rules of Due Process

Due process is a basic concept of fairness in legal proceedings that has its roots in the decision making processes used by the Greeks and Romans²⁸ and is reiterated in the constitutions of the United States and Wisconsin.²⁹ These constitutional provisions guarantee two distinct forms of due process: substantive and procedural. Substantive due process is concerned with the reasonableness of government action and therefore, is focused on assessing the rationality of a government decision. Procedural due process, the focus of this chapter, is concerned with the means employed to make the government decision in question.³⁰

Not all government actions require compliance with procedural due process principles. A rule or law that applies generally does not trigger due process guarantees.³¹ Instead, procedural due process requirements are demanded of government only in cases where the government makes an individualized determination affecting a specific individual or specific individuals or a limited identifiable class of people.³²

Because zoning board decisions often affect specific individuals, zoning boards must follow the rules of due process to ensure that all parties involved in a hearing before the board are treated fairly.³³ Procedural rules of due process include:

- Providing adequate notice of a pending decision to affected persons,
- Ensuring that each decision maker is impartial and unbiased,
- Avoiding or disclosing any ex parte contacts,
- Providing an opportunity to present at hearings,
- Basing decisions on clear, pre-existing standards and factual evidence in a record that is available for review.³⁴

²⁸ Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities. pp. 416-427. Available: <http://www.lwm-info.org/legal/2005/12december/comment.html>

²⁹ Fourteenth Amendment to the United States Constitution and Article I, Section I of the Wisconsin Constitution.

³⁰ Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities. pp. 416-427. Available: <http://www.lwm-info.org/legal/2005/12december/comment.html>

³¹ *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372 (U.S. 1915) cited by Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities.

³² *Londoner v. Denver*, 210 U.S. 373, 28 S. Ct. 708, 52 L. Ed. 1103 (U.S. 1908) cited by Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities.

³³ Easley, V. Gail and David A. Theriaque. *The Board of Adjustment*. 2005. Planners Press, p. 95.

³⁴ Blaesser, Brian W. et al. *Land Use and the Constitution: Principles for Planning Practice*. 1989. Planners Press. pp.42-43; Hunter, Ted and Jim Driscoll. "The Planning Commissioner as Judge." *The Commissioner*, Summer 1996; *Old Tuckaway Assocs. Ltd. Partnership v. City of Greenfield*, 180 Wis.2d 254, 509 N.W.2d 323 (Ct. App. 1993); Stephens, Otis and John Scheb. *American Constitutional Law*, 3ed. 2003. Belmont, CA: Wadsworth.

Zoning Board Members Must Be Impartial

Wisconsin case law requires that zoning board members be impartial, that is, free of bias and conflicts of interest. Zoning decisions are particularly vulnerable to concerns about impartiality because decision-makers are local residents with numerous social and economic ties to their communities. However, it is important to point out that as a zoning board member your opinions about specific local regulations or zoning in general do not necessarily disqualify you from making decisions.³⁵ Ensure you come to the table neither pro-growth nor anti-growth. Bias related to applicants' ethnicity, gender, or religion is also inappropriate. Reviewing your voting record to determine whether any patterns are apparent may be an eye-opening experience.³⁶

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

- A zoning board member made negative comments about the applicant and her request, referring to it as a “loophole in need of closing.” The court determined the applicant was deprived of a fair hearing and required a rehearing without the participation of the member.³⁷
- A county zoning committee member, who was also a town board chair, co-signed a letter as town board chair expressing his positive opinion of a gravel company. Within a few months, the gravel company applied to the county for a conditional use permit and included the town chair's letter as part of their application. When the town board chair/county zoning committee member voted to grant this conditional use permit, the court determined he was an advocate who had demonstrated an impermissibly high risk of bias.³⁸

If You Are Not Impartial, Recuse Yourself

For each request before the zoning board, individual zoning board members must decide for themselves whether their relationships or interests could bias their judgment or give an appearance of bias causing them to be or appear partial. We recommend that zoning board members use the “sniff test” when determining whether they are biased or impartial: If it would smell fishy for you to vote on the matter at hand, recuse yourself.

Another way to determine whether you are impartial *and* appear impartial is to think about whether you would be

comfortable if the headline in your local newspaper described your background, your personal and professional relationships, and your participation or vote on the matter at hand. If you are unsure, you should discuss the matter with the zoning board's legal counsel.

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

If you recuse yourself:

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

³⁵ *Marris v. Cedarburg*, 176 Wis. 2d 14, 498 N.W.2d 842 (1993)

³⁶ Dale, Gregory. “The Ethics of Bias.” *Planning Commissioners Journal*, article #571.

³⁷ *Marris v. Cedarburg*, 176 Wis. 2d 14, 498 N.W.2d 842 (1993)

³⁸ *Keen v. Dane County Bd. of Supervisors*, 2004 WI App 26, 269 Wis. 2d 488, 676 N.W.2d 154.

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

Avoid Ex Parte Communication

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

Ex Parte - without the other party being present.
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The reason for this requirement is fairly simple: an applicant who comes before the zoning board is entitled to know about and have an opportunity to rebut any information that decision makers rely on in making the decision. Discussion outside the meeting regarding procedural matters, such as scheduling a meeting or explaining how to file an application, are permissible. Ex parte communication is not a concern for legislative (ordinance or rule adoption) or ministerial matters (simple permits).

We recommend the following steps regarding ex parte communication:

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

Provide an Opportunity to Present at Hearings

Typically the zoning board chair invites the applicant and then all interested people to present at a hearing. A zoning board that set a 5-minute time limit per presenter and allowed additional time for the applicant to describe the proposal complied with due process.³⁹ To ensure that all interested people have a chance to provide testimony, we recommend that after everyone interested in presenting appears to have done so, the chair ask if there is anyone else who wants to testify about the proposal at hand.

Avoid Statutory Conflicts of Interest

³⁹ *Roberts v. Manitowoc County Bd. of Adjustment*, 2005 WI App 2111

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

- **Personal financial gain** - State laws⁴⁰ prohibit public officials from taking official actions that substantially affect a matter in which the official, an immediate family member, or an organization with which the official is associated has a substantial financial interest. Similarly, an official may not use public office for financial gain or to gain anything of substantial value for the official, an immediate family member, or an organization with which the official is associated. This statute is enforced by local district attorneys and the State Attorney General⁴¹ with forfeitures up to \$1000 per violation.⁴²
- **Misconduct in office** - State law prohibits an officer from intentionally performing, or failing to perform, certain acts including actions the officer knows are in excess of their lawful authority or are forbidden by law in their official capacity.⁴³
- **Private interests in public contracts** - State laws also prohibit certain actions when an official bids for a contract, or has authority to exercise duties under a contract, if the official has a private financial interest in the contract, subject to a \$15,000 per year exception for total receipts and disbursements under the contracts.⁴⁴ In certain cases, recusal will not prevent a violation of the law,⁴⁵ and the official may have to choose between doing business with the governmental unit and serving as an officer. This may be an issue when the zoning board decides conditional use permits or retains consulting services in which members have an interest.

In short:

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

⁴⁰ Wis. Stat. § 19.59(1)

⁴¹ Local officials online tutorial, State of Wisconsin Ethics Board, available: <http://ethics.state.wi.us/LocalOfficials/LocalOfficial1.htm>

⁴² Wis. Stat. § 19.59 (7)(a)

⁴³ Wis. Stat. § 946.12; *State v. Tronca*, 84 Wis.2d 68, 267 N.W.2d 216 (1978) states when 946.12(3) was created in 1953 the notes of the Judiciary Committee on the Criminal Code carried the following comment: "quasi-judicial functions call for the exercise of judgment, and if the officer acts honestly although with not the best of judgment, he is not guilty."

⁴⁴ Wis. Stat. § 946.13

⁴⁵ Wis. Stat. § 946.13(1)(a)

7. Adoption of Operating Rules

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

Figure 10: Adoption of Zoning Board Rules	
County or Town Zoning Board of Adjustment	City, Village, or Town Zoning Board of Appeals
<ul style="list-style-type: none"> ▪ The county board must adopt rules for the zoning board.⁴⁶ ▪ The zoning board may adopt rules to implement the county board⁴⁷ or town board regulations.⁴⁸ ▪ The county board sets filing fees for appeals to the zoning board.⁴⁹ 	<ul style="list-style-type: none"> ▪ The zoning board must adopt rules in accordance with any ordinance adopted under Wis. Stats. § 62.23.⁵⁰

Content of Operating Rules

Many communities adopt *Robert's Rules of Order* to guide parliamentary procedures not already addressed in specific ordinances, rules, or statutory requirements. For communities wishing to adopt more detailed operating rules, the following list of topics may be considered:⁵¹

- A. General provisions
 - Applicability of state statutes, local ordinances, board rules, and case law
 - Requirements for familiarity with them

- B. Membership
 - General membership requirements (number, appointment, terms)
 - Desired qualifications and member education
 - Alternates (attendance requirements)
 - Conduct (ex parte communication, conflicts of interest, bias)
 - Compensation, travel, counsel, and other expenses
 - Vacancies, resignations (general and by absence), and removal

- C. Officers, duties, and staff assistance

⁴⁶ Wis. Stat. § 59.694(3)

⁴⁷ Wis. Stat. § 59.694(3)

⁴⁸ Wis. Stat. § 60.65(4)

⁴⁹ Wis. Stat. §§ 59.696 & 59.697

⁵⁰ Wis. Stat. § 62.23(7)(e)3

⁵¹ For additional guidance and model rules, refer to Chapter 4: "Rules of the Board" in *The Zoning Board Manual*, 1984 by Frederick H. Bair, Jr.

D. Powers and duties of the board

E. Meetings

- Procedural requirements (open meetings, public notice, public records)
- Quorum (how many constitute quorum)
- Order of business and agenda revision
- Meeting conduct

F. Appeal procedures

- Filing procedures and fees
- Time limits on appeal (*time limits on appeal of administrative decisions are not specified in state statutes and should be included in local ordinance)
- Stays on appeal
- Contested case requests
- Conduct of on-site inspections
- Members to attend as group or individuals

G. Hearings

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

H. Decisions

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

I. Refilings and rehearings

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

Options for addressing some of the topics outlined above are discussed in related sections of this manual. A number of counties and municipalities have adopted fairly comprehensive rules that may serve as examples⁵².

⁵² See, for example, bylaws from Oneida County, St. Croix County, and the City of Fitchburg.

Section II – Review

Keywords

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

Test Your Knowledge

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

- 1) Name the four sources that zoning boards must look to for guidance on proper procedures.
 - a) State statutes,
 - b) Local ordinances,
 - c) Zoning board bylaws or operating rules, and
 - d) Case law.

Chapter 5 - Open Meetings Law

- 2) What are the two tests to determine if a zoning board must comply with the open meetings law?
 - a) The purpose test
 - b) The numbers test
- 3) What is the difference between quorum, negative quorum, and walking quorum? Which is illegal?
 - a) (See the definitions in the text.)
 - b) Walking quorum is illegal.
- 4) What type of notice is required for local zoning board hearings in your community?
 - a) Counties with population > 250,000 - Class 2 notice (posting recommended).
 - b) Counties with population < 250,000 - Posting two weeks prior (class 2 notice recommended).
 - c) Cities - Class 1 notice (posting recommended).
 - d) Villages and towns - Posting one week prior.

- 5) When are zoning boards able to enter closed session?
 - a) To deliberate concerning a case,
 - b) To consider action concerning a public employee(s),
 - c) To consider potentially damaging personal information,
 - d) To confer with legal counsel,
 - e) To consider a request from an ethics board,
 - f) Other narrow exemptions.
- 6) What are the procedures for going into closed session?
 - a) Convene in open session.
 - b) Cite statutory reason for entering closed session.
 - c) Vote to move into closed session.
 - d) Record motions and decisions.
 - e) Reconvene in open session only if specified in agenda.
- 7) What are the three steps to follow to avoid violating the open meetings law?
 - a) Determine proper notice.
 - b) Limit closed sessions to those specified by statute.
 - c) Document proceedings.

Chapter 6 - Ethical and Procedural Considerations

- 8) Why should zoning boards follow due process of law?
 - a) To ensure that all parties involved in a hearing before the board are treated fairly.
- 9) Can a zoning board chair deem a member biased and make the member recuse him or herself?
 - a) No. This decision is up to the board member.
- 10) If a neighbor talks to a zoning board member at the grocery store about an upcoming case before the board member can cut the neighbor off, what should the board member do at the hearing of this case?
 - a) Disclose the communication at the hearing and make the information part of the record so that it can be considered in decision-making.

Chapter 7 - Adoption of Operating Rules

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