Testimony Before the Buffalo County Board of Adjustment to the Public Hearing Record Regarding the Conditional Use Permit application submitted by R & J Rolling Acres, LLP, dated January 13, 2012.

This testimony is in addition to that provided by me at the Public Hearing before the Board of Adjustment on February 2, 2012. Attached to this testimony is the Spring 2011 issue of **The Land Use Tracker**, published by the UW Extension Center for Land Use Education at the UW-Stevens Point. I will refer to it in my testimony. Thank you for the opportunity to provide my citizen input to this issue.

In am testifying about the Conditional Use Permit (CUP) application dated January 13, 2012, and submitted by R & J Rolling Acres, LLP. Any use of the word "application" without modification refers to this document.

My name is Gary LeMasters. My wife Ruth Ann and I live at W1194 Yaeger Valley Road, a short distance from its intersection with State Highway 88. Ruth Ann has lived here since 1985, and I have lived here since 2005. We love Yaeger Valley and we love Buffalo County. We enjoy sitting on our deck in the evenings, listening to the sandhill cranes in the distance. We enjoy the dark nighttime skies with lots of stars. And we enjoy the quiet at night. I can hear one semi-truck coming up State Highway 88 for at least a minute before I can see the vehicle.

I have great admiration for the difficult task you face under these circumstances. I am sure it is more than you bargained for when you agreed to serve on the Buffalo County Board of Adjustment (BOA). No matter what I may say in the heat of discussion, please keep this in mind.

For the past 24 years I was a public servant for the State of Wisconsin Department of Agriculture, Trade and Consumer Protection. It was a thankless job at times, but I had to remember that I was enforcing rules and regulations that represented the will of all of the citizens of Wisconsin.

You find yourselves in a similar situation. You may know the landowner(s) applying for this Conditional Use Permit (CUP). You may know their relatives. You may know their neighbors. However, you must remember that your decision must consider the **Public Interest**. Not just the interests of the applicants, or their relatives, or neighbors who want to mine their land, or those who may be employed by the mine. IT IS NOT JUST ABOUT THE MINE! If anybody has told you that you need only consider the mine, they are very wrong and are giving you bad advice.

We live on about 4 acres. Our latest property tax bill is $3517.42. As near as I can tell from the Buffalo County tax records, the applicant paid about $700 I property taxes on the 80 acres he wants to mine.

If the applicant sticks with the original 80 truckloads per day, 5 days a week schedule, and if he is paid $1.00 for every ton of sand hauled from the mine, he will receive

$520,000 per year of operation. (80 loads x 25 tons per load x 5 days per week x 52 weeks x $1.00 per ton = $520,000). If he can do 150 trucks per day, 365 days per year, he will receive $1,368,750 per year of operation. These numbers help explain his desire to create jobs by getting this mine approved. I am sure he would still want the permit if he did not create any jobs, just so long as he got the same revenue. So, while jobs are very important, this is not primarily a job creation initiative. It is a get rich quick initiative.

The Board of Adjustment has approved a number of limestone quarries in Buffalo County. There are big differences between these mines and the proposed sand mine. Foremost to me is that the sand mine wants operate every day of the year, and will use the same haul route every day. The impacts are much greater for those who live along the haul route. The truck traffic on State Highway 88, less than ¼ mile from my house, will not go away after a few months, or even a year. If anything, it will increase. The highway cannot handle the additional traffic. And, the county may bear much of the cost of fixing the highway. I doubt that the state has extra money for increased highway maintenance. The constant noise from the trucks as they speed up and down the highway will shatter the peace and quiet we value so much. It will also reduce our property values and discourage us from sinking any more money into the property.

You should deny the R & J Rolling Acres Conditional Use Permit (CUP) application for the following reasons:

1. The application was incomplete.

    a. The developer listed on the CUP application dated January 13, 2012 is: Glacier Sands, LLC, 17730 Breconwood Road, Wayzata, MN 55391. I searched the State of Minnesota Secretary of State website at http://www.sos.state.mn.us/index.aspx?page=790 for this LLC. There is no record of an active or inactive LLC by that name.

    b. The application was first published on January 19th, 2012 in Cochrane-Fountain City Recorder and the Mondovi Herald News. The CUP application that was available to the public on this date **did not contain the same information presented at the public hearing**. The application stated “There will be 80 trucks/day leaving the site, Monday through Friday.” The mine spokesman at the Public Hearing on February 2, 2012 began by saying that they had to operate the mine and run the trucks 24 hours a day, 365 days a year, with 150 loads every day. He mentioned something about this being necessary to “make it work”. He offered absolutely no concrete evidence to support this statement. I don’t believe the BOA asked for any evidence. You should have either denied the permit out of hand, or limited the testimony to the application. (Wisconsin legal opinions have held that any public hearing must be limited to the information available to the public on the date the hearing was first

noticed.) This is not just a technical correction to the application, but a huge increase in the hours of operation and in the truck traffic and attendant noise and safety risks to everybody who lives along and/or travels State Highway 88. I prepared by testimony for the hearing based on the application in my possession. Other members of the public may not have attended the hearing based on the application.

c. The application makes no mention of how much water they will be using. This is very important information that citizens are entitled to know.

d. The application makes no mention of whatever "polymer" they will use when they wash the sand. The spokesman mentioned this issue at the Public Hearing.

e. The application does not contain an accurate map of the proposed buildings and their relationship to the site. They merely drew some lines on an aerial photograph. How can you determine if they really meet all the setbacks if you do not have an accurate map of the proposed site? This information is to be included with the zoning permit, as stated in Section 202, "Application for Zoning Permit. *"An application for a Zoning Permit shall be made…and shall include…1. An accurate map of the property, in duplicate and properly dimensioned…".*The lines on the aerial photographs in the CUP application hardly meet this requirement. The BOA is required to consider this information. This is clearly stated in Section 211, of the Buffalo County Zoning Ordinance, entitled "Required Information". It states, in part, *"In order to secure evidence upon which to base its determination, the Board of Adjustment may require,* ***in addition to the information required (for) a Zoning Permit,*** *the submission of plans of buildings…"* This means that you are **required** to consider the information required for a Zoning Permit. The applicant must provide this information along with the CUP application. I reviewed the permit forms used by the Zoning Department. The form for the Zoning Permit does not accurately reflect the requirements in the Zoning Ordinance. The Zoning Permit form is incorrect.

2. The purpose of the Buffalo County Zoning Ordinance is to **"promote the public health, safety and general welfare;…"** These are not just words – they are the very foundation of the ordinance! You **must** consider them in evaluating any CUP application. How does this sand mine contribute to any of these purposes? I am very concerned for the safety of anyone who uses State Highway 88 every day, to commute to work, to move equipment and materials from one farm field to another, to pick up and drop off school children, and so on. My wife had a head-on collision with another car on a corner on this highway a few years ago. The other car lost traction on a snowy night and crossed the centerline. My wife and

the other driver survived without serious injuries, but both vehicles were total losses. Had she met a sand truck, she would surely have died. No matter what the applicant and/or his agents say, they will contract the trucking and will have no day to day control over how these trucks are operated. Time is money in trucking, and they will push their speeds at every opportunity. They could easily hit 70 miles per hour on the few straight sections of State Highway 88. Drive on Interstate 94 at the legal speed of 65 miles per hour and tell me how many semi-trucks you pass. Furthermore, there is very little enforcement of the speed limits on State Highway 88. There will be even less if budget cuts at the county level further reduce patrol staff.

3. In Section 212 of the Buffalo County Zoning Code, "Standards Applicable to all conditional uses", Factor 7 says that the Board of Adjustment must consider is **"Its relationship** (the conditional use – my addition) **to the public interest, the purpose and intent of this ordinance and substantial justice to all parties concerned."** I have already discussed the intent of the zoning ordinance. The applicant talks about jobs. Yes, there will be jobs, and that is very important. But, past experience in nearby counties has shown that job creation numbers provided by mines before permits are granted are very optimistic. In any case, most of the money will be spent outside Buffalo County. Where do you buy your groceries? Your durable goods, like appliances? In Buffalo County? AND, there will be reduced revenue to Buffalo County due to reduced property values all along the haul route. These reductions are well documented from experience with other mines. So, I fail to see how the Public Interest is served by this mine. Buffalo County will not see increased tax revenue from the mine. Personal property is not taxed, so the mine equipment will not be taxed. The State of Wisconsin levies the industrial tax on the sand, and it is minimal. It does not come back to Buffalo County. Overall, Buffalo County will loose money on every mine. In your decision, you must consider these factors. They are not just "feel good" phrases.

4. What are the plans for this site? I have been told that the developer hopes to use the wash plant and truck loading site to process and ship sand from other mines. There is no mention of this in the application. They want to get the permit, and then expand the operation well beyond the scope of the permit. Yes, they have to get BOA approval for any significant changes in operation, but why would you deny them? After all, they would already have invested lots of money in the site.

5. There is considerable uncertainty right now about where the haul route ends. There are lots of rumors about a railroad loading spur being considered on State Highway 35, possibly near the Cochrane-Fountain City School. The people behind this are rumored to be the same people wanting to develop the R & J Rolling Acres site. Approving this mine and the State Highway 88 haul route will open the rest of the valley to mining activity. The pressure will only increase if the

railroad spur becomes a reality. People who live on State Highway 88 and those who rely on it every day for safe transportation must be considered in your decision.

6. The burden of proof to meet the "Seven Factor" test in Article XXI, Section 212 of the Buffalo County Zoning Ordinance lies with the applicants. There is ample case law in Wisconsin to support this statement. I refer you to the Spring 2011 issue of the Land Use Tracker, published by the University of Wisconsin Extension Center for Land Use Education at the UW-Stevens Point. On Page 8, under the heading **Deliberation and Voting** it reads as follows: *In all zoning board cases, it is well established that applicants have the burden of proof and must provide all necessary evidence to show they satisfy the applicable legal standard. If not, the zoning board has no authority to grant the requested relief."* The Buffalo County Zoning Department should not be preparing the list of conditions. It is up to the applicant to offer conditions that they believe will meet the "Seven Factors" test as well as the overall purpose of the Zoning Ordinance.

Thank you for the opportunity to testify on this matter of the utmost importance to all of us who live along and drive State Highway 88.

Sincerely,

Gary LeMasters

Gary LeMasters
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Cochrane, WI 54622

Attachment: *Roles and Responsibilities of the Zoning Board*, The Land Use Tracker, Volume 10, Issue 4, Spring, 2011. Published by the University of Wisconsin-Extension Center for Land Use Education, University of Wisconsin-Stevens Point. Nine pages.

Roles and Responsibilities of the Zoning Board

Written by Daniel M. Olson, Assistant Legal Counsel, League of Wisconsin Municipalities. Originally published in the December 2010 Municipality. Revised by Rebecca Roberts to reflect the roles and responsibilities of the zoning board at the town and county level.

Zoning boards of adjustment and zoning boards of appeal (zoning boards) occupy an important role in local land-use policy. Zoning boards possess substantial land use power including the ability to review zoning administrative appeals, grant zoning variances and, in some communities, approve conditional uses/special exceptions. These decisions have the potential to impact land use activity for decades or even generations since zoning variances and conditional use permits are transferable from one owner to the next without any future government approval. Accordingly, it is important that local government officials have some working knowledge of zoning board authority and procedures.

Local governments that enact zoning regulations must by ordinance provide for the appointment of a zoning board. As shown in Table 1, state law further specifies the terms and membership of zoning boards. Zoning board alternates serve only when a member of the board refuses to vote because of conflict of interest or when a member is absent.

There are no statutory qualifications for regular or alternate zoning board members in Wisconsin, which gives governing bodies significant discretion as to zoning board member qualifications.

Terminology

Zoning Board—refers to a county or town board of adjustment or city, village or town board of appeals.

Governing Body—refers to a county board, town board, village board or city council.

Nonetheless, members of the zoning board should be persons whose decisions will not be influenced by personal interest and who are not subject to political pressures.

Given that state law does not establish any qualifications for service, zoning board membership qualifications are probably a matter of local affairs and government. Therefore, local governments probably have general or home rule authority to enact an ordinance limiting the number of terms a person may serve on the zoning board.[2]

Zoning board members are public officials. As public officials, they must comply with the state ethics law for government officials which prohibits official action or use of their office for personal gain or the benefit of an immediate family member or an organization with which

Table 1: Zoning Board Authority, Membership and Terms

	Zoning Board of Appeals	Zoning Board of Adjustment
Statutory Authority	Cities (62.23(7)(e)), Villages (61.35), Towns with village powers (60.62)	Counties (59.694), Towns without village powers (60.65)
Membership	5 members plus 2 alternates appointed by city mayor, village president or town board chair. Appointment of regular members (not alternates)[1] is subject to confirmation of governing body.	3-5 county members plus 2 alternates appointed by county executive or county administrator, if present, or county board chair. All appointments subject to confirmation of governing body. 3 town members appointed by town board chair.
Terms	3 year staggered terms.	3 year staggered terms.

they are associated.[3] Moreover, like all other public officials, zoning board members are subject to criminal penalties for bribery, self-dealing and misconduct in office.

Zoning Board Decisions

Though vested with others,[4] a Wisconsin zoning board is typically viewed in light of three main statutory powers:

1. Administrative Appeals - To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an official in the enforcement of state and local zoning laws;

2. Variances - To hear and decide variances from the terms of the zoning ordinance where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in practical difficulty or unnecessary hardship and the public interest will not be harmed; and

3. Conditional Uses/Special Exceptions - To hear and decide special exceptions to the terms of the zoning ordinance.

▶ Administrative Appeals

Despite the somewhat broad language in state statutes granting zoning boards authority to review alleged errors in zoning decisions, state law does not authorize zoning board review of every kind of zoning or land use regulatory decision made in a community. Rather, it is well-established that the power only extends to administrative decisions.

Administrative decisions can be made by local government bodies that exercise both administrative and legislative functions. Therefore, it is critical that zoning boards focus on the character of the decision that it is asked to review, not the person or body making the decision.

In *Brandt v. Pewaukee Town Board*,[5] the Wisconsin Supreme Court held that the applicant for a nonconforming use permit had a right, under the town's zoning ordinance, to appeal the decision to the board of appeals. In concluding that the town board was acting as an administrative officer whose decision the applicant had a right to appeal, the court explained that:

It makes no difference that the decision is one by an administrative body or an administrative single officer. The administrative decision is the subject of the grievance and the subject of the appeal. We think the board of appeals had jurisdiction under the ordinance and should have exercised it.[6]

Interpretations of state zoning law or a local zoning code by a zoning administrator are certainly administrative decisions appealable to a zoning board. A building inspector decision based upon state and local zoning laws is also an administrative decision appealable to a zoning board. Administrative decisions of a plan commission are also appealable to a zoning board.[7]

On the other hand, a plan commission decision to recommend amendment of a zoning ordinance or the decision of a governing body to deny a rezoning petition is a quasi-legislative or legislative decision. Accordingly, a zoning board has no power to review them.

Although the zoning board may reverse or affirm, wholly or partly, or may modify a prior decision, its powers are generally limited to determining whether or not the official or body making the administrative decision complied with applicable state or local zoning laws. Accordingly, unless specifically vested with additional power by local ordinance, a zoning board has no authority to grant or deny an appeal based on its interpretation of local subdivision regulations, state groundwater regulations or any other non-zoning law.[8] The sole function of a zoning board in the exercise of its administrative appeal function is to determine whether a zoning enforcement decision was authorized or supported by state statutes and local zoning ordinances.

▶ Zoning Variances

Variance power is probably a zoning board's most notorious authority. Notably, this power is exclusively vested in a zoning board by state law and cannot be transferred to a plan commission or other municipal body by local ordinance.[9]

Unless specifically vested with additional variance power by local ordinance, a zoning board only has authority to grant zoning variances, not subdivision or other non-zoning variance relief.[10] Moreover, a zoning board's zoning variance power cannot "legalize" an unauthorized encroachment by one private property owner upon the land of another.[11]

Almost forty years ago, the Wisconsin Supreme Court defined a variance by distinguishing it from a conditional use as follows:

While a variance authorizes a particular property owner to use his property in a manner which is prohibited by the ordinance when not to be able to do so would be a hardship, a conditional use allows him to put his property to a use which the ordinance expressly permits when certain conditions have been met.[12]

Zoning law makes an additional distinction between types of variances. Area variances provide an increment of relief (normally small) from a dimensional zoning restriction such as building height or setback.[13] Use variances give a landowner approval to put a property to an otherwise prohibited use.[14]

In order to grant a variance, a zoning board must make three essential findings:

1. The proposed variance will not be contrary to the public interest;
2. The property has a special condition; and
3. The special condition creates an unnecessary hardship.[15]

Other legal comments have discussed variance standards in some detail, so full comment will not be repeated here.[16] However, the critical role of the "special condition" element in the variance standard is worth highlighting. The term "special condition" is not defined in state law. Accordingly, its meaning has been left in large part for the courts to define. As part of this process, the Wisconsin Supreme Court has exchanged "special condition" for comparable phrases such as "unique condition affecting the land" in its decisions.[17]

Proof of a "special condition" or "unique condition affecting the land" is the key to every variance request.[18] Whether phrased as a "special condition" or "unique condition affecting the property" or "hardship unique to the property," the meaning is the same; the hardship for which either area or use variance relief is sought must flow from a **property** condition that is not common to neighboring properties.[19]

It is also important to note the potency of use variances as compared to rezonings. Like a rezoning, a use variance authorizes different land use than previously allowed. However, unlike rezonings, a use variance is not subject to future legislative modification. Instead, since zoning variances run with the land, a use variance essentially grants a permanent use classification protected from legislative action.[20]

Finally, it should be noted that indiscriminate approval of zoning variances by a zoning board damages public faith in government. A zoning board that routinely grants zoning variances to people who do not legally qualify communicates to the public that zoning regulations adopted by publicly elected governing bodies are worthless laws that can be ignored. The practice also says that government approvals are for sale since the only requirement for variance approval from a zoning board that never says no is payment of the variance application fee. Finally, such behavior conveys disdain for the general public since the public hearing a zoning board must hold for each variance request is a fraud if the variance will be granted despite any public testimony. To avoid these results, a zoning board must faithfully follow and apply the applicable variance law to every application.

▶ Conditional Uses/Special Exceptions

In an early conditional use case, the Wisconsin Supreme Court noted that the terms "special exception" and "conditional use" are interchangeable.[21] More recently, the Wisconsin court of appeals found a similar interchangeability between the terms "special use" and conditional use."[22] Nonetheless, there is no legal requirement that conditional use and special exception mean the same thing in every zoning code.

While a zoning board is statutorily authorized to

issue special exceptions, state law also allows local governments to vest special exception/conditional use authority in the governing body or plan commission. Therefore, unlike zoning variance power, special exception authority is not the exclusive domain of a zoning board.

In communities where the zoning board does not issue conditional use/special exception approvals, a particularly significant enforcement issue is whether a conditional use or special exception decision is an administrative decision subject to zoning board review. This enforcement issue arises in Wisconsin because the cases regarding the appealability of conditional use/special exception decisions to a zoning board do not consistently treat such decisions as administrative.

In *League of Woman Voters v. Outagamie County*,[23] the Wisconsin Supreme Court held that a county board zoning committee's decision to grant a conditional use permit to a developer under the county's shoreland zoning ordinance constituted a decision by an "administrative official" in the enforcement of the ordinance and, therefore, aggrieved parties had a statutory right to appeal the decision to the county zoning board of adjustment.[24] Likewise, in *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Board of Adjustment,*[25] the Court held that persons who were aggrieved by a county board committee conditional use permit decision, but who did not appear at the committee's hearings, were entitled to appeal the decision to the board of adjustment. Finally, the Court's rulings in two cases involving plan commission decisions, *Nodell Investment Corp. v. City of Glendale*[26] and *Master Disposal v. Village of Menomonee Falls*,[27] implicitly support zoning board review of conditional use/special exception decisions.

There are two contrasting decisions that suggest conditional use/special exception decisions are not administrative. The first is *Town of Hudson v. Hudson Town Board of Adjustment*,[28] wherein the court of appeals concluded that 62.23(7)(e) did not authorize a town zoning board to review the decision of a town board to deny a conditional use permit because the town board was not an administrative "officer." The other is *Magnolia Township v. Town of Magnolia,*[29] in which the court of appeals concluded that the statutory counterpart to 62.23(7)(e) for towns not exercising village powers, 59.694(7)(a), "plainly does not apply to appeals from the decisions of a town board granting or denying a conditional use permit because a town board is not an 'administrative official.'"

The inconsistent treatment of conditional use/special exception decisions by Wisconsin courts produces some uncertainty about whether a conditional use or special exception determination is an administrative decision subject to zoning board administrative review. Nonetheless, the greater weight of authority appears to be that a conditional use/special exception decision is administrative in nature and, therefore, subject to zoning board review on appeal.

Procedural Considerations

While a zoning board decision in a particular matter involves a number of procedural or substantive considerations, three warrant specific comment here: impartiality, deliberation and voting, and findings.

▶ Impartiality

A zoning board is not a court and is not bound by the same technical rules of legal procedure applicable in traditional courts. Zoning board proceedings are less formal. However, judicial acceptance of zoning board informality should never be considered a free pass to deliberately or irresponsibly ignore legal requirements. A zoning board is a "quasi-judicial" body[30] and, as such, a zoning board and all of its members must comply with statutory, constitutional and common law legal requirements that ensure a fair decision.

An essential requirement of constitutional or common law procedural fairness is an impartial decision-maker. The most elaborate zoning board hearing is a meaningless sham if zoning board members are biased in favor of or against an applicant or any other party.

The Wisconsin Supreme Court noted that zoning decisions are particularly vulnerable to bias due to the localized nature of the decisions and the fact

that zoning decisions are made by officials drawn from the immediate area.[31] Bias can distort judgment and lead to decisions not founded on facts or rational analysis.[32] Accordingly, zoning board members need to recuse themselves when they are biased and when there is an impermissibly high risk of bias.[33]

At its core, impartiality demands neutrality. This duty to neutrality imposes significant limitations on the legally permissible conduct of Wisconsin zoning board members and associated officials.

Wisconsin law supports the proposition that a zoning board member may not communicate to the zoning board in support of an applicant and then participate in the applicant's proceeding.[34] Likewise, an attorney cannot be both an advocate for a zoning board party (i.e., the municipality) and legal advisor for the zoning board.[35]

Zoning board members simply cannot take sides in a matter they are deciding. They cannot represent the municipality or the applicant without violating their duty to impartiality. A zoning board and its members operate only to fairly apply facts to the law that it is empowered to consider, without favor or preference.

▶ Deliberation and Voting

Once evidence has been received and the public hearing closed, a zoning board must make a decision. In all zoning board cases, it is well established that applicants have the burden of proof and must provide all necessary evidence to show they satisfy the applicable legal standard. If not, the zoning board has no authority to grant the requested relief.

A zoning board's decision must be based on credible evidence in the hearing record. Zoning board decisions based on speculation or information that is not in the record will not be sustained by a reviewing court.[36]

While a zoning board hearing must be open to the public, there is authority for zoning board deliberation in closed session.[37] However, the authority for closed session deliberation is very limited and only applies if the zoning board hearing would "possess characteristics common to adversarial proceedings."[38] Since the vast majority of zoning board hearings lack such characteristics, very few zoning board hearings are likely to qualify, which means deliberation in an open session.

In 2005, the Wisconsin Legislature changed the voting requirements for zoning boards to allow zoning board decisions by a simple majority of a quorum.[39] As a result, current law allows three members (a quorum) of a five-member zoning board to issue decisions. Thus, two votes in favor of or against a requested variance can be sufficient to decide a matter heard by only three zoning board members.

Notably, the law provides that a zoning board "may" take action by a majority of members present; it does not require that zoning board decisions be made in such instances. Therefore, a zoning board can adopt provisions in their bylaws to require a greater number of votes for a decision.

▶ Findings

Wis. Stats. ss. 62.23(7)(e)10 and 59.694(10) provide that judicial review of a zoning board may be commenced "within 30 days after the filing of the decision in the office of the board." Thus, some form of written determination from a zoning board is required, but there is no statutory requirement that this written determination contain a detailed statement of findings.

Nonetheless, a zoning board decision comprised only of conclusory statements that an applicant does or does not meet the relevant criteria is insufficient. A decision with such declarations does not provide any evidence that a zoning board actually evaluated any evidence in the hearing record. Accordingly, such a decision fails to show whether a zoning board exercised its will or its judgment.

To demonstrate that it exercised its judgment, a zoning board must provide more than simple conclusions. Instead, the zoning board must specify, either orally on the record or in a written decision, the particular reasons why an applicant has or has not met each statutory or ordinance

criteria for the relief requested.[40] Otherwise, the zoning board's decision will be deemed an impermissible exercise of its will, rather than a valid exercise of judgment.

Conclusion

Zoning board members hold substantial power to shape land-use policy. Zoning board variance approvals are practically permanent. Moreover, zoning board administrative review and special exception/conditional use decisions can affect the quality of life in communities and neighborhoods for many, many years.

Meanwhile, every person who meets their burden of proof for the zoning board relief they seek should receive it. But, those who do not, should not.

Nonetheless, zoning board decisions are difficult. Land use matters are frequently dynamic and complex, not routine. Moreover, zoning board members will often know the land owners, neighbors or applicants personally. Therefore, it is essential that every zoning board decision be based on a fair and impartial process, rest on credible evidence, and be stated with sufficient specificity, not only to ensure the integrity of the zoning ordinance but the credibility of the zoning board.

Endnotes:

[1] League Opinion - Zoning 364.
[2] See League Opinion - Commissions 176.
[3] See Wis. Stat. sec. 1959(1)(c)1. and 2.
[4] For a full list of zoning board powers see Figure 3 on page 13 of the Zoning Board Handbook, 2nd Edition (2006) Center for Land Use Education.
[5] 15 Wis.2d 6, 112 N.W.2d 157 (1961).
[6] *Id*. at 9-10.
[7] See League Opinion - Zoning 410 (Plan commission denial of development project approval may be appealed to zoning board).
[8] See *Great Lakes Tanning Co. v. Milwaukee,* 250 Wis. 74 (1947).
[9] See League Opinion - Zoning 386.
[10] See League Opinion - Platting 147.
[11] See League Opinion - Zoning 394.
[12] *State ex rel. Skelly Oil Co. v. City of Delafield*, 58 Wis. 2d 695, 701, 207 N.W.2d 585 (1973) (citations omitted).
[13] *State ex rel. Ziervogel v. Washington County Bd. of Adjustment,* 2004 WI 23, para. 23, 269 Wis. 2d 549, 676 N.W.2d 401.
[14] *Id*.
[15] See *State v. Trudeau,* 139 Wis. 2d 91, 110, 408 N.W.2d 337 (1987).
[16] See e.g. Olson, Daniel M. "Zoning Variances in Wisconsin: The Ziervogel Decision- Deja Vu All Over Again- With a Twist," *the Municipality*, May 2004. League of Wisconsin Municipalities. pp. 153-163.
[17] See *Arndorfer v. Sauk County Bd. of Adjustment,* 162 Wis. 2d 246, 256, 469 N.W.2d 831 (1991).
[18] One legal commentator suggests that a strict and consistent application of the uniqueness requirement "could help alleviate the wholesale and improvident granting of variances that has resulted in a crazy-quilt pattern of ad-hoc zoning -- the antithesis of zoning according to a comprehensive plan -- that now characterizes some communities." Osborne M. Reynolds, "The Unique Circumstances Rule in Zoning Variances — An Aid in Achieving Greater Prudence and Less Leniency," 31 Urb. Law. 1, 148 (1999).
[19] See *Arndorfer*, 162 Wis. 2d at 256.
[20] Although the Wisconsin court of appeals indicated in *Goldberg v. City of Milwaukee Bd. of Zoning Appeals,* 115 Wis. 2d 517, 525 and fn. 6, that a municipality should be able to revoke a zoning variance, revocation of a use variance is very unlikely given that a valid use variance probably prevented an unconstitutional taking of property.
[21] *State ex rel. Skelly Oil Co., Inc. v. City of Delafield,* 58 Wis. 2d 695, 702, 207 N.W.2d 585 (1973).
[22] See *Delta Biological Resources, Inc. v. Board of Zoning Appeals of City of Milwaukee*, 160 Wis.2d 905, fn. 10, 467 N.W.2d 164 (Ct. App. 1991).
[23] 113 Wis.2d 313, 334 N.W.2d 887 (1983).
[24] The right to appeal in that case was granted by sec. 59.99(7)(a), which is identical in relevant language to sec. 62.23(7)(e)7.
[25] 131 Wis.2d 101, 388 N.W.2d 593 (1984).
[26] 78 Wis.2d 416, 254 N.W.2d 310 (1977).
[27] 60 Wis.2d 653, 211 N.W.2d 477 (1973).
[28] 158 Wis.2d 263, 461 N.W.2d 827 (Ct. App. 1990).
[29] 2005 WI App 119, 284 Wis. 2d 361, 701 N.W.2d 60.
[30] See *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 415-16, 577 N.W.2d 813 (1998) ("when a Board of Adjustment acts on application for a variance, it acts in a quasi-judicial capacity.") and *Schalow v. Waupaca County*, 139 Wis. 2d 284, 289, 407 N.W.2d 316 (Ct. App. 1987) ("In acting on an application for a variance, a board of appeals or adjustment acts in a quasi-judicial capacity.")
[31] See *Marris v. City of Cedarburg,* 176 Wis. 2d 14, 25, 498 N.W.2d 842 (1993).
[32] See *id*. at 25-26.
[33] See *id*. at 25.
[34] See *Keen v. Dane Cty. Bd. of Supervisors*, 2004 WI App 26, 269 Wis. 2d 488, 676 N.W.2d 154 (Letter in support of permit application that was written by a member of county zoning committee and submitted to zoning committee acting on application evidenced an impermissibly high risk of bias).
[35] *Nova Services, Inc. v. Village of Saukville*, 211 Wis. 2d 691, 565 N.W.2d 283 (Ct. App. 1997) (Village attorney who acted as prosecutor and decision maker in hearing to consider ordering group home to cease operations violated group home operator's procedural due process rights).
[36] See *Schalow v. Waupaca County*, 139 Wis. 2d 284, 289, 407 N.W.2d 316 (Ct. App. 1987).
[37] Wis. Stat. sec. 19.85(1)(a) authorizes closed session deliberation "concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body."
[38] See *State ex rel. Hodge v. Town of Turtle Lake*, 180 Wis.2d 62, 74, 508 N.W.2d 603 (1993).
[39] Wis. Stat. sec. 62.23(7)(e)3m and 59.694(3m).
[40] See *Lamar Central Outdoor, Inc. v. Board of Zoning Appeals of the City of Milwaukee,* 2005 WI 117, 284 Wis. 2d 1, 700 N.W.2d 87.