

Open Meetings Law

All zoning board meetings and hearings must comply with Wisconsin’s open meetings law.³³ 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:

- **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

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.

³³ Wis. Stat. §§ 19.81-19.98

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.”

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.

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

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.

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.

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.³⁴

³⁴ Wis. Stat. § 19.85(1)(a-j)

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.³⁵
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 - a meeting where public attendance is not allowed; must be specifically authorized by state 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 statutory authority for closure. A motion and recorded individual vote by a majority of the body are required to convene in closed session.

³⁵ State ex rel. Hodge v. Turtle Lake, 180 Wis.2d 62, 508 N.W.2d 301 (1993)

- **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.³⁶ 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.³⁷ 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

³⁶ Wis. Stat. § 19.85(2)

³⁷ OAG 86-76, 65 Op. Att’y Gen. 250 (1976) & Wis. Stat. § 19.84(1)

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.³⁸
- **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.³⁹ 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.⁴⁰ 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

³⁸ Wis. Stat. §§ 985.03 & 985.05

³⁹ Wis. Stat. §§ 19.84(2) & 19.85(2)

⁴⁰ Memo from Peggy Lautenschlager, Attorney General to Mr. Charles Rude, Mayor, City of Lake Geneva, dated March 5, 2004.

requirements of:

- State statutes governing procedures for zoning boards,⁴¹
- DNR rules for shoreland, shoreland-wetland, and floodplain zoning matters,⁴² 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.

⁴¹ Wis. Stat. §§ 59.694(6) & 62.23(7)(e)6

⁴² Wis. Admin. Code §§ NR 115.05(6)(h) & NR 116.20(2)(d)

Figure 7: Statutory Notice Requirements for Zoning Board Hearings			
County (population of 250,000 or more) ⁴³	County (population less than 250,000) ⁴⁴	City ⁴⁵	Village or Town ⁴⁶
<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.⁴⁷

Class 1 Notice – One newspaper publication at least one week before the act or event.⁴⁸

Class 2 Notice – Two newspaper publications, at least once each week for consecutive weeks,

⁴³ 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).

⁴⁴ 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.

⁴⁵ 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.

⁴⁶ 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)]

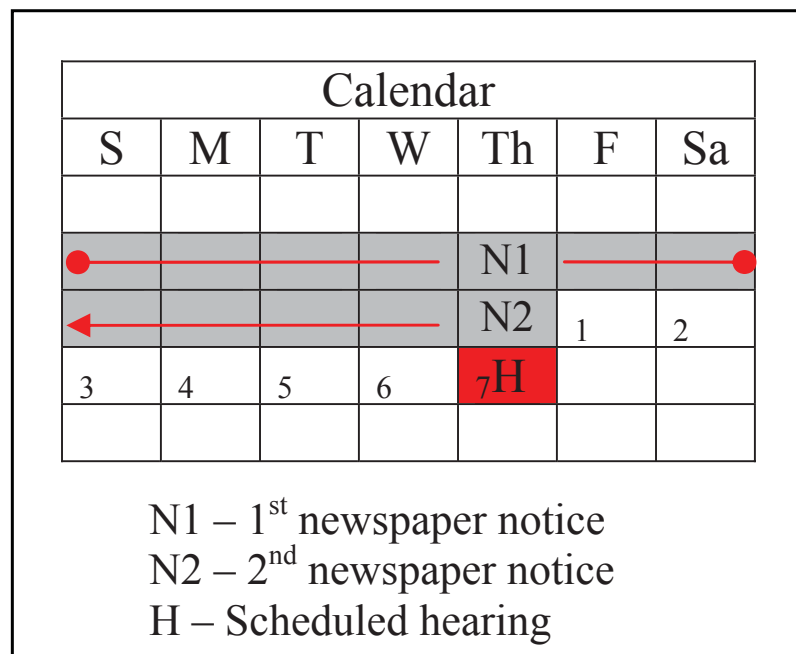
⁴⁷ Wis. Stat. § 985.065(2)(a) concerns requirements for an official newspaper; Wis. Stat. § 985.05(1) provides a posting option if there is no official newspaper; Wis. Stat. § 985.02(2) provides guidelines for posting & Wis. Stat. § 985.01(3) defines *municipality*.

⁴⁸ Wis. Stat. §§ 985.07 & 985.01(1)

⁴⁹ Wis. Stat. §§ 985.07 & 985.01(1)

The calendar in Figure 8 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.⁵⁰ 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.⁵¹ One court of appeals has interpreted the law as requiring insertions to be exactly one week apart; however, this is likely not binding precedent.⁵² Working within statutory guidelines, local governments may wish to clarify by ordinance when zoning board hearing notices should be provided.

Figure 8: Class 2 Notice Calendar



⁵⁰ Wis. Stat. § 985.09

⁵¹ 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”.

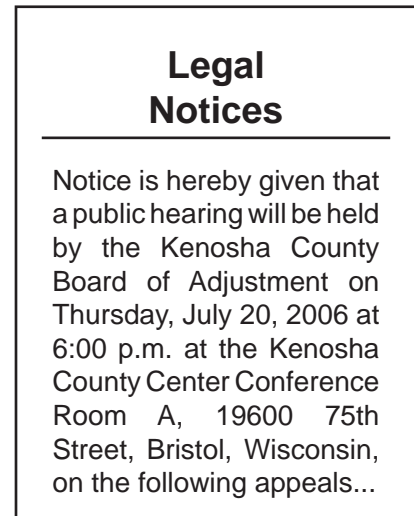
⁵² A court of appeals interpreted the law as requiring Class 2 notice insertions to be exactly one week apart [*Gloudeman v. City of St. Francis*, 143 Wis.2d 780, 422 N.W.2d 864, 866 (Ct. App. 1988)]. However, this is likely *obiter dictum*, and thus not binding precedent [League of Wisconsin Municipalities, FAQ3, February 1997. Available: <http://www.lwm-info.org/legal.faz/faz3.html>].

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.⁵³ (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.



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.⁵⁴ A similar affidavit by a person posting legal notice showing the time, place and manner of posting serves the same function for posted notices.⁵⁵

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

⁵³ Wis. Stat. § 19.85(2)

⁵⁴ Wis. Stat. § 985.12

⁵⁵ Wis. Stat. § 985.02(2)(d)

to news media likely to give notice in the area.⁵⁶

- **Interested Parties** - Notice must also be given by mail to parties in interest,⁵⁷ 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.⁵⁸

- **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.⁵⁹

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:

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.

⁵⁶ Wis. Stat. §§ 19.84(1)(b) & 985.065

⁵⁷ Wis. Stat. §§ 59.694(6) & 62.23(7)(e)6

⁵⁸ 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.

⁵⁹ Wis. Stat. § 91.75(5). Forms for notifying DATCP are available by calling (608) 224-4648.

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.

