



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 Romans⁶⁰ and is reiterated in the constitutions of the United States and Wisconsin.⁶¹ 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 or process employed to make the government decision in question.⁶²

Not all government actions require compliance with procedural due process principles. A rule or law that applies generally does not trigger due process guarantees.⁶³ Instead, procedural due process requirements are demanded of government only in cases

⁶⁰ 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>

⁶¹ Fourteenth Amendment to the United States Constitution and Article I, Section I of the Wisconsin Constitution.

⁶² 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>

⁶³ *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.

where the government makes an individualized determination affecting a specific individual or specific individuals or a limited identifiable class of people.⁶⁴

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.⁶⁵ 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, and
- Basing decisions on clear, pre-existing standards and factual evidence in a record that is available for review.⁶⁶

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.⁶⁷ A personal opinion or stance, such as pro-growth or anti-growth, should not influence your decision. 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.⁶⁸

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

⁶⁴ *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.

⁶⁵ Easley, V. Gail and David A. Theriaque. *The Board of Adjustment*. 2005. Planners Press, p. 95.

⁶⁶ 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.

⁶⁷ *Marris v. Cedarburg*, 176 Wis. 2d 14, 498 N.W.2d 842 (1993)

⁶⁸ Dale, Gregory. "The Ethics of Bias." *Planning Commissioners Journal*, article #571.

- 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.⁶⁹
- 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.⁷⁰

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.

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

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.

⁶⁹ *Marris v. Cedarburg*, 176 Wis. 2d 14, 498 N.W.2d 842 (1993)

⁷⁰ *Keen v. Dane County Bd. of Supervisors*, 2004 WI App 26, 269 Wis. 2d 488, 676 N.W.2d 154.

Ex Parte - without the other party being present.

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.

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 to present at a hearing, followed by all interested parties. 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.⁷¹ To ensure that all interested parties 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

⁷¹ *Roberts v. Manitowoc County Bd. of Adjustment*, 2005 WI App 2111

else who wants to testify about the proposal at hand.

Avoid Statutory Conflicts of Interest

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 laws⁷² 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 General⁷³ with forfeitures up to \$1000 per violation.⁷⁴
- **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.⁷⁵
- **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.⁷⁶ In certain cases, recusal will not prevent a violation of the law,⁷⁷ 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.

⁷² Wis. Stat. § 19.59(1)

⁷³ Local officials online tutorial, State of Wisconsin Ethics Board, available: <http://ethics.state.wi.us/LocalOfficials/LocalOfficial1.htm>

⁷⁴ Wis. Stat. § 19.59 (7)(a)

⁷⁵ 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.”

⁷⁶ Wis. Stat. § 946.13

⁷⁷ Wis. Stat. § 946.13(1)(a)

