



11333 N. Cedarburg Road
Mequon, WI 53092
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www.cityofmequonwi.gov

Office of the City Clerk

BOARD OF APPEALS
Thursday, April 3, 2025
6:00 PM
Christine Nuernberg Hall

Agenda

- 1) Call to Order**
- 2) Approve meeting minutes of March 6, 2025**
- 3) Discussion**
 - a. Procedures and Processes of the Board of Appeals
- 4) Adjourn**

Dated: April 3, 2025

/s/ Kathleen Massey, Chair

.....
Notice is hereby given that a quorum of other governmental bodies may be present at this meeting to present, discuss and/or gather information about a subject over which they have decision-making responsibility, although they will not take formal action thereto at this meeting.

Persons with disabilities requiring accommodations for attendance at this meeting should contact the City Clerk's Office at 262-236-2914, twenty-four (24) hours in advance of the meeting.

Any questions regarding this agenda may be directed to the City Clerk's Office at 262-236-2914, Monday through Friday, 8:00 AM – 4:30 PM



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Office of the City Clerk

BOARD OF APPEALS
Thursday, March 6, 2025
6:00 PM
Christine Nuernberg Hall

Minutes

1) Call to Order

Present:

Chair Kathleen Massey
 Board Member Ramona Larson
 Board Member Robert Stern
 Board Member James Wawrzyn
 Vice Chair Thomas Flanagan -- **Excused**
 Board Member Steve Helfer -- **Excused**

Also present City Attorney Sajdak and City Clerk Fochs.

2) Approve meeting minutes of February 6, 2025

Motion to approve Board of Appeals meeting minutes of February 6, 2025.

RESULT: **Approved by Voice Acclamation [Unanimous]**
MOVED BY: Board Member Wawrzyn
SECONDED BY: Board Member Stern

AYES: Massey, Larson, Stern, Wawrzyn

3) Discussion

a. Procedures and Processes of the Board of Appeals

The Board tasked City Attorney Sajdak with summarizing the current process for the Board to determine if any changes could be adopted. Chair Massey reviewed each section of the Board procedures and added revisions, which will be incorporated into the final version.

The Board began its discussion of the application process. City Attorney Sajdak said some municipalities have a subject expert vet the application. Generally, larger communities have the Clerk manage the application process and prepare the meeting packets, agendas, postcards, etc.

Attachment: BOA 3.6.25 Minutes SHORT (10194 : BOA minutes of 3.6.25)

Chair Massey said the City Clerk and staff do an excellent job organizing and providing notice for the Board of Appeals in a timely manner, but the Clerk should not be expected to know all the zoning and building codes.

The Board discussed the need for the public to understand what the standards are and what constitutes a hardship. City Attorney Sajdak said the staff tries to educate applicants before and during the process to prevent unnecessary appeals. Supervisor Golden has often explained to applicants that they do not have a hardship, but they choose to proceed with the appeal regardless. An updated application should include a script that covers question by question some guidelines that help the applicant determine if they have a hardship.

City Attorney Sajdak will revise the Board of Appeals procedures and Variance Application using the samples highlighted in this meeting for the Board to review and approve. These revisions should be ready for the April meeting.

4) Adjourn

Motion to adjourn at 6:51 PM.

RESULT: Approved by Voice Acclamation [Unanimous]
MOVED BY: Board Member Stern
SECONDED BY: Board Member Wawrzyn

AYES: Massey, Larson, Stern, Wawrzyn

Respectfully Submitted,

Beth Kong
Deputy Clerk

Attachment: BOA 3.6.25 Minutes SHORT (10194 : BOA minutes of 3-6.25)



11333 N. Cedarburg Road
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 Phone: 262-242-3100
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www.cityofmequonwi.gov

Office of City Attorney

TO: Board of Appeals
FROM: Brian Sajdak, City Attorney
DATE: March 28, 2025
SUBJECT: Revised Regulations and Application

Background

Following discussion last month, there are two items back for your review. First, the Rules and Regulations document is in its final form and incorporates the few small changes that were discussed at the meeting. These are, I believe, ready for your adoption - unless changes are made as discussed below. Second, is a draft variance application form. This version looks to incorporate the thoughts and discussion that occurred last month. The primary goal was to set up an application that helps walk the applicant (and also the Board) through the questions necessary to obtain a variance as a way of assisting the applicant in making sure they have a complete application.

Analysis

After last month's discussion, I also investigated what process other communities use for accepting applications. In nearly all of them, the planning or community development department was tasked with accepting applications. However, I also note that in most communities, they have a Board of Zoning Appeals, which hears only variances or zoning-related administrative appeals. Other appeals are handled by other bodies. Further, in a couple cases, the attorneys wondered why we would even want to have staff evaluate an application for completeness. They argued that whether an application is complete and thus justifying a variance is a matter for the Board itself. In these communities, if the application is deficient, that deficiency is raised before the Board as a basis for denying the request. This approach is not unlike a motion before a court for summary judgment or to dismiss for failing to meet the applicable jurisdictional or factual requirements. If the Board were to consider this approach, the Rules and Regulations would need to be amended to reflect this change.

Attachments:

Board of Appeals Rules and Regulations (PDF)
 BOA Variance Application v2 (PDF)
 BS Memo from 2.24.25 (PDF)

**RULES AND REGULATIONS
FOR THE CITY OF MEQUON BOARD OF APPEALS**

SECTION 1. GENERAL GOVERNING RULES

The board of appeals of the City of Mequon, Wisconsin, adopts these rules in compliance with, and shall be governed by Wis. Stat. § 62.23 and Article IX of Chapter 2 and Sec. 58-41 of the Mequon Municipal Code, as amended. In the event of a conflict between these rules and the laws of the state or the ordinances of the City, the state laws and local ordinances shall prevail.

SECTION 2. ORGANIZATION, OFFICERS and PERSONNEL

- 1. The mayor shall, at each common council organizational meeting, appoint a chair and vice-chair from among the board’s members.
- 2. The chair shall preside at all meetings of the board. In the absence of the chair, the vice-chair shall preside.
- 3. The chair shall decide all points of order and procedure, unless overruled by a majority of the board present at that time.
- 4. The officer presiding at the meeting and the secretary shall sign the resolutions, and other official documents adopted or approved by the Board.
- 5. The Clerk shall conduct all correspondence of the board; file all appeals, papers and records; publish and mail all notices required by law, ordinance, rule or request of the chair; prepare and keep calendars, dockets and minutes of board proceedings; and generally attend to all clerical work of the board.
- 6. The attorney representing the board shall provide legal guidance, information, and opinions to the board, assist the chair by providing interpretations as to points of order and procedure including parliamentary procedure, and prepare decisions, resolutions, ordinances, rules, and other official documents to be adopted or approved by the board.

SECTION 3. MEETINGS

- 1. Regular meetings of the board for the hearing of cases and the transaction of other business shall be held on the first Thursday of each month at 6:00 p.m. in Christine Neurnberg Hall at City Hall. The chair may cancel any such monthly meeting where there is no business to be conducted by the board, or where the meeting falls on a holiday.
- 2. Special meetings may be called by the chair to handle business of the board as necessary.
- 3. A quorum shall consist of four (4) members of the board. In the event of one absence, abstention, or vacancy, the first alternate shall act with full power. The second alternate shall so

Attachment: Board of Appeals Rules and Regulations (10205 : Regulations and Application)

act only when the first alternate so refuses or is absent or when more than one member of the board so refuses or is absent.

4. All meetings shall be held in accordance with the Wisconsin open meetings law and shall be open to the public except as provided therein.

5. The proceedings of the board shall be governed by Robert's Rules of Order. Newly Revised, insofar as applicable.

6. No board member shall participate in the hearing, decision of, or vote upon any case in which they shall be financially interested, directly or indirectly, but the chair shall direct the alternate member to act in their stead.

7. The clerk shall keep minutes of the meeting and record the vote of each member on every question in the minutes, or, if the member is absent or fails to vote, shall indicate such in the record of the proceedings.

8. The applicant¹ may appear in person at the hearing, or may be represented by an attorney or a duly authorized agent having a power of attorney. In the absence of an appearance for or against an applicant, the board may dismiss the application or may dispose of the matter on the records before it.

9. The chair may compel the attendance of witnesses by subpoena either upon a motion of the board approved by a majority vote of those members present or as requested by the applicant or a representative of the applicable city department. Written request for subpoenas must be filed with the clerk not less than five (5) days prior to the hearing except by special permission of the chair.

10. All witnesses shall be sworn by the chair, clerk, or attorney for the board before testifying.

11. Members of the board shall attempt to avoid *ex parte* contact. As defined here, *ex parte* contact refers to communication that occurs outside of a noticed meeting. Members of the board have a duty to not prejudge a case, and to base their decisions only on the material and facts presented at public meetings and hearings on the case. Despite best efforts it is sometimes not possible to avoid *ex parte* contact. When that happens the member should publicly report the content and context of the *ex parte* contact in full at the public hearing or meeting.

SECTION 4. Applications

1. Unless otherwise provided for in the municipal code, a written application for a variance or appeal from any order, requirement, decision, or determination by city staff shall be filed with

¹ Note: When used within these Rules and Regulations, the terms applicant or application are used interchangeably with the terms appellant and appeal.

the clerk of the board on forms furnished by the clerk. The board shall consider no appeal or application unless it is made on the required form. Any communication, except on prescribed forms, purporting to be an appeal shall be deemed a mere notice of intention to file and shall not be deemed a filing to comply with requirements of timely filing. Upon receipt of any communication purporting to be an appeal or application, the clerk shall supply the applicant with the proper forms in order to be considered by the board.

2. The applicant shall provide all information requested on the form. The reason for the application or appeal must be stated and the reasons why the request should be approved must also be stated by the applicant. If a variance is requested, facts should be stated upon which findings may be made by the board to justify the granting of the variance. If an appeal is based upon an alleged error or abuse of discretion of an administrative official or body, facts should be stated as to the nature thereof.
3. If in the opinion of the chair or clerk, after consultation with the attorney representing the board, determines that the application is lacking any required information, or if any additional information is necessary to inform the board of the facts of the appeal or application, the chair or clerk shall provide a written request to the applicant or appellant to complete or supplement the application. Failure to supply such information within thirty (30) days of the date of the request may be considered by the board as a failure to comply with application and appeal procedure and the case may be dismissed for failure of timely filing.
4. At the time of the application, and as part of the written application materials, the applicant shall provide all information and arguments to be considered as part of their application except where completion or supplementation of the application is required under paragraph 3 above.
5. An applicant may withdraw their application at any time prior to decision thereon, but if a motion is pending to grant or dismiss the application, such motion shall have precedence. Withdrawal of the application shall not entitle the applicant to refund of the filing fee.
6. Rehearings, reconsiderations and new applications seeking the same relief concerning the same property after a previous application has been denied will not be heard by the board unless a substantial change of conditions or circumstances has intervened between the time the matter was first decided by the board and the subsequent application. A change of ownership or the passage of time without additional conditions or circumstances will not justify another hearing before the board. The clerk, after consultation with the chair and the attorney representing the board, shall provide written notice to the applicant that the requested rehearing, reconsideration, or new application will not be considered under this rule. The applicant may appeal this determination to the full board who may agree to hear the rehearing, reconsideration, or new application by an affirmative vote of 3/4 of the members present and voting upon a finding that substantial new evidence or a change in circumstances exists which could not reasonably have been presented at the previous hearing. Such appeal shall be made within five business days of the applicant's receipt of the notice from the clerk, and shall be in writing, duly verified (made under oath and subject to penalty for perjury) and shall recite the reasons for the request and be accompanied by necessary data and diagrams.

SECTION 5. Contested Hearings

1. The applicant has the burden of proof to establish through substantial evidence that they are entitled to a variance or other relief being sought. Substantial evidence is less than a preponderance of the evidence, but more than a mere scintilla of evidence and more than conjecture and speculation. It is evidence of such convincing power that reasonable persons could reach the same decision as the BOA, that is, credible, relevant and probative evidence upon which reasonable persons could rely to reach the decision of the board.
2. Hearings on cases shall normally follow this order:
 - (a) Chair makes statement of hearing notice.
 - (b) Staff presents report and recommendations.
 - (c) Applicant presents evidence.
 - (d) Members of the public present evidence, questions and comments.
 - (e) The staff and applicant may make rebuttals.
3. Prior to the staff report and recommendations, the board may hear arguments on any question of jurisdiction and may request that briefs be filed on the point. The board may proceed with the hearing and the taking of testimony in any event and reserve its determination on a jurisdictional question and render a decision on the merits as if it had jurisdiction. The board may make an immediate determination upon a finding that it lacks jurisdiction. If the board determines by motion that it lacks jurisdiction, it shall be recorded in the decision as a vote to deny the application.
4. During the hearing, the chair, board members, the applicant, and members of the staff may ask questions and make appropriate comments pertinent to the case; however, debate or argument directly with another participant shall be avoided. The chair, board members, and the attorney representing the board may direct any question to the applicant or to any person speaking in order to bring out all relevant facts, circumstances and conditions affecting the case.
5. All supporting evidence for and against each case shall be presented to the assembled board. The applicant shall be responsible for the presentation of all information supporting their case. If new factual information or arguments are made at the hearing that were not part of the application, the board shall, upon request, consider an appropriate adjournment to allow city staff or a material party in opposition to the application sufficient time to verify or rebut the new information.
6. The board may take administrative notice of the laws of the State of Wisconsin, ordinances of the city, appropriate performance standards which are available in model codes or ordinances or which have been developed by planning, manufacturing, health, architectural and engineering research organizations, and of other relevant facts not reasonably subject to dispute on its own motion or motion of a party.
7. Prior to the any hearing, the applicant and city staff may mutually agree in writing to an adjournment of the hearing for a period specified in the written agreement. Alternatively, an

appellant may make a written request of the chair for adjournment with a waiver of the timing requirement. The chair may grant or deny the request in his or her discretion. If an appeal involves the use of property, and the appellant is not the owner of the subject property, the owner must consent to an adjournment described above. No adjournment may extend the hearing of an application beyond one year from the date of the determination that is the subject of the appeal, or the date of application in the event of a variance application.

8. The board shall not be bound by court rules of evidence, but it may exclude irrelevant, immaterial, incompetent, unduly argumentative or repetitious testimony or evidence. The chair shall rule on all questions relating to the admissibility of evidence, which may be overruled by a majority of the board present.

9. The board may take a case under advisement for later consideration and determination, or may defer action when it concludes that it is appropriate to gather additional information, to hear from additional witnesses, to seek additional input from legal counsel, or to allow additional time for deliberation, the board may adjourn from day to day or to a day certain, as it may order, and such adjourned day shall be construed as a continuance of the hearing, except that in the case of an appeal no adjournment shall extend the hearing beyond one year from the date of the determination that is the subject of the appeal, or the date of application in the event of a variance application. Notice of such adjournment shall be given to the absent members of the board.

SECTION 6. Decisions and Disposition of Cases

1. If a quorum is present, the board may take action under this section by a majority vote of the members present. The grounds of every such determination shall be stated.

2. The board's decision shall be rendered in written form pursuant to the provisions of Sec. 58-41(g) of the municipal code.

3. Conditions stated in the board's decision shall also be set forth in the building or occupancy permit issued by the city. Such permit shall be valid only as long as the conditions upon which it is granted are observed. Upon request of the board, the operator of an approved use shall file with the city a written report certifying conformity with all conditions or limitations imposed by the board. Failure to comply with this request may result in revocation.

4. Variances or special exceptions approved by the board shall expire one (1) year after issuance, or as directed within the board's decision, if the performance of work is required and substantial work has not commenced. Applicants must apply to the board for an extension of time to comply with such conditions prior to the expiration of the time to act. Failure to do so may result in revocation.

5. Any person or persons, jointly or severely aggrieved by any decision of the board, or any officer, department, board or bureau of the city, may appeal the decision of the board to the circuit court. Such petition shall be presented to the circuit court within thirty (30) days after the written decision of the board has been filed.

SECTION 7. Amendment or Suspension of Rules

1. These rules may be amended or revoked by a majority vote of the board at any meeting, provided written notice of the proposed amendment or change is given to each member at least ten (10) days before such meeting.
2. Suspension of these rules may be had at any meeting upon the passage of a motion to suspend the rule(s) by the affirmative vote of a majority of the board members present and voting.

Adopted April 3, 2025

BOARD OF APPEALS VARIANCE APPLICATION
CITY OF MEQUON, WISCONSIN

Owner: _____ Mailing Address: _____

City/ZIP: _____

Phone Number: _____ Email: _____

If there is another person representing the Property Owner, include their information below. This person will be the point of contact for the application.

Applicant: _____ Address: _____

City/ZIP: _____

Phone Number: _____ Email: _____

TO THE BOARD OF APPEALS:

The above hereby requests a variance to City of Mequon Code Sec. #: _____

regarding: _____
(street address or legal description of the property where the variance is requested)

in order to: _____

I understand that as part of my variance request, City staff will need access to my property to take photographs and do a pre-hearing inspection of the property. By checking here, I give City Staff permission to enter my property, inspect the property, and take photographs.

APPLICANT MUST PROVIDE:

1. Application form
2. \$250 filing fee
3. One (1) copy each of the following documents:
 - Copy of denial letter if any, or a description of the denial
 - Detailed dimension drawing drawn to reasonable scale of/and indicating area where variance is requested including contour lines, floodplain/wetland boundaries, etc.
 - Detailed plans of the building or structure including existing and new room layouts
 - To-scale and dimensioned elevation drawings of all building elevations if appropriate
 - Photos showing existing buildings/structures and existing site conditions
 - All other supporting information or evidence to be presented (photographs, etc.)

FOR OFFICE USE ONLY	
Receiving Officer: _____	Received Date: _____
Parcel #: _____	Hearing Date: _____
Zoning District: _____	Receipt #: _____
Alderman & District #: _____	Published: _____

c: Notice of scheduled hearing to DISTRICT ALDERPERSON, OWNER(S) OF RECORD as listed in the Office of the Assessor and all parcels in the City of Mequon as per state statute and City of Mequon Communication Policy.

Introduction

The Board of Appeals (“Board”) is a quasi-judicial body created and regulated by Wis. Stat § 62.23(7)(e) and City of Mequon ordinances section 58-41. The purpose of the Board is to hear appeals taken by any person aggrieved by any officer, department, board or bureau of the city or affected by any decision of any administrative officer or body and to hear applications for variances from zoning ordinance terms.

It is very important that your application provide information that is clear and accurate. In order for City staff and the members of the Board to understand the scope of your request, your application must have enough information to effectively communicate the nature of your requested variance. At the hearing, the members of the Board and representatives from various City departments will depend on the materials you have submitted in order to fairly evaluate your claim, and render an appropriate decision.

Variance Standard

Pursuant to Wisconsin Statute and the Mequon Municipal Code, the Board of Appeals may in specific cases grant “such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in practical difficulty or unnecessary hardship, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done.”¹ The applicant “bears the burden of proving ‘unnecessary hardship,’ . . . by demonstrating that strict compliance with a zoning ordinance would unreasonably prevent the property owner from using the property owner’s property for a permitted purpose or would render conformity with the zoning ordinance unnecessarily burdensome”² The unnecessary hardship must be “based on conditions unique to the property, rather than considerations personal to the property owner, and [cannot be] created by the property owner.”³ In general, economic loss or financial hardship cannot serve as the basis for justifying a variance.

Accordingly, the Board of Appeals must consider the following questions when deciding whether to grant your requested variance. Add additional sheets if necessary.

1. Describe the unnecessary hardship created by the ordinance. In other words, how does strict compliance with the ordinance unreasonably prevent use of the property for a permitted purpose or render compliance with the ordinance unnecessarily burdensome.

¹ Wis. Stat. § 62.23(7)(e)7.b.; Mequon Code § 58-41(a)(1)b.
² Wis. Stat. § 62.23(7)(e)7.d.
³ Id.

Attachment: BOA Variance Application v2 (10205 : Regulations and Application)

2. Describe whether the unnecessary hardship is the result of conditions on the property that do not exist on, or apply to, other properties.

3. Describe whether the conditions creating the unnecessary hardship are created by the terms of the ordinance, or whether they are the result of circumstances or desires unique to the applicant?

4. Describe why the requested variance is not contrary to the spirit, purpose, and intent of the regulations in the zoning district and is not contrary to the public interest.

5. Describe why the requested variance will not create substantial detriment to adjacent property.

6. Describe why the requested variance is compatible with the character of the immediate neighborhood.

The Process

Step 1: Applying for a variance

Complete this application in full. Part of the application submittal process requires that detailed information be provided regarding the nature of your variance request. This may include photos of the property, floor plans, and/or a plan of operation for a proposed use. Depending on what type of variance you are seeking from the Board, different types of documents may be required.

Please contact the City Clerk's Office if you have any questions about what materials are needed for your application.

When you have prepared all of the necessary materials, return them to the City Clerk's Office, along with the \$250 application filing fee. Checks may be made payable to: The City of Mequon.

Step 2: City staff will process your application and forward it to Board of Appeals

The City Clerk's Office will review your application and it may be determined that more information is required before a recommendation can be made. If such a request for additional information is made, it is very important that you respond to it promptly. Any delay in responding to requests for additional information may result in further scheduling delays before your item can be considered before the Board or possible denial of your application.

Once your application is deemed complete, it will be placed on the next available agenda. The Board meets on the first Thursday of each month at 6:00 pm at City Hall, 11333 N. Cedarburg Road.

Step 3: A public hearing is held

At the public hearing, the Board will review submitted materials, staff reports, and any written letters or comments that the Board has received. The Board will take oral testimony from the applicant, City staff and any interested parties at the public hearing. As a general rule, all of the Board's hearings are open to the public and the public is invited to attend any session of the Board of Appeals.

In making its findings and determinations, the Board of Appeals may consider factors such as: characteristics of the property, including, but not limited to: relative placement of improvements thereon with respect to property boundaries or otherwise applicable setbacks; existing and future use of the property; useful life of improvements at issue; disability of an occupant; aesthetics; degree of non-compliance with the requirements allowed by the variance; proximity to and character of any surrounding properties; zoning of the area in which property is located and neighboring areas; and the purpose and intent of the municipal code subsection imposing the requirements.

Step 4: The Board will render a verbal decision and will provide a written decision

After the hearing, a copy of the written decision will be mailed to you according to City of Mequon ordinance section 58-41(g). Any variance granted by the Board of Appeals may contain conditions that it deems necessary, including, but not limited to, conditions that:

1. Prescribe the duration of the variance to be:
 - a. Permanent, thereby remaining permanently with the property;
 - b. A specified length of time; or,
 - c. The time period during which the property is owned or occupied by a particular person.
2. Require the performance of additional actions to the mitigation or enhancement of impacts resulting from the variance.
3. Prescribe a limitation on the action effectively authorized by the variance.

If your appeal is denied by the Board, you have the right to appeal. Anyone aggrieved by a decision of the Board of Appeals has the right to appeal that decision to Circuit Court within 30 calendar days of the date of the written decision.

NOTE: If you have questions regarding whether going to the Board of Appeals is your best course of action, appeals to the Circuit Court, or the effect of a Board of Appeals decision, please contact a legal professional.

NOTE: Additional information can be gained from the Rules and Regulations of the Mequon Board of Appeals, which is provided with this application form.



Private Office:
 Wesolowski, Reidenbach & Sajdak, S.C.
 11402 W. Church St.
 Franklin, WI 53132
 (414) 529-8900

www.cityofmequonwi.gov

Office of the City Attorney

MEMORANDUM

TO: Board of Appeals
 FROM: Brian C. Sajdak, City Attorney
 DATE: February 24, 2025
 RE: Board of Appeals Rules and Regulations

Introduction

You have asked that I provide some background concerning the adoption of rules/procedures for the Board's operations. Below you will find a discussion concerning this topic. It begins with a review of the general authority granted to the Board, and then a discussion of specific topics follows. Lastly, you will also find attached a set of proposed rules for your consideration.

Discussion

Under Wis. Stat. § 62.23(7), local municipalities have broad discretion to enact zoning ordinances and land use regulations. McKee Fam. I, LLC v. City of Fitchburg, 2017 WI 34, ¶ 35, 374 Wis. 2d 487, 502, 893 N.W.2d 12, 20. When a municipality adopts a zoning regulation, the ordinance adopting such regulation must “provide for the appointment of a board of appeals, and shall provide in such regulations that said board of appeals may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.” Wis. Stat. § 62.23(7)(e)1.

Once created, a board of appeals adopts “rules in accordance with” the ordinance. Wis. Stat. § 62.23(7)(e)3. See also Powers—Procedure and procedural powers, 8A McQuillin Mun. Corp. § 25:323 (3d ed.) (“a board ordinarily is authorized to adopt rules”); Rules and regulations as to procedure, 3 Rathkopf's The Law of Zoning and Planning § 57:70. Rules adopted by a board of appeals must not be inconsistent with the enabling statute and ordinance. See Rules governing practice and procedure before boards, 8A McQuillin Mun. Corp. § 25:345 (3d ed.); Power to make rules, 4 Am. Law. Zoning § 40:10 (5th ed.). In general, “a zoning board of appeals is vested with discretion to dispose of matters within its province, [however] its acts are judicial in nature and are subject to review and reversal when they constitute an abuse of discretion and are arbitrary.” Powers—Procedure and procedural powers, 8A McQuillin Mun. Corp. § 25:323 (3d ed.)

A decision of a board of appeals should be based upon substantial evidence, which is

Attachment: BS Memo from 2.24.25 (10205 : Regulations and Application)

evidence of such convincing power that reasonable persons could reach the same decision as the BOA, that is, credible, relevant and probative evidence upon which reasonable persons could rely to reach the challenged decision by the BOA. Substantial evidence is less than a preponderance of the evidence, but more than a mere scintilla of evidence and more than conjecture and speculation. [T]he weight to accord the evidence lies within the discretion of the municipality.

Savich v. Columbia Cnty. Bd. of Adjustment, 2024 WI App 43, ¶ 93, 413 Wis. 2d 140, 195–96, 11 N.W.3d 160, 187 (internal quotations and citations omitted). Substantial evidence can exist ever where there is substantial evidence to support a different or opposite conclusion. Sills v. Walworth Cnty. Land Mgmt. Comm., 2002 WI App 111, ¶ 11, 254 Wis. 2d 538, 549, 648 N.W.2d 878, 883. However, in general proceedings before a board of appeals “are not governed by strict rules of judicial procedure. Of necessity, the proceedings are more or less informal, and technical rules of procedure usually are not required to be zealously enforced.” Rules governing practice and procedure before boards, 8A McQuillin Mun. Corp. § 25:345 (3d ed.) As one commentator notes:

The primary purpose of hearings before a board of appeals is to permit persons interested in the event to furnish information which may assist the board in the discharge of its duty of determining whether or not a variance or an exception should be granted in a particular case. Consequently, the hearing should be conducted informally, and considerable latitude should be given to those present. But while a hearing of this nature may be more or less informal, and technical and legal rules of evidence and procedure need not be followed, no essential element of a fair hearing can be dispensed with.

Hearsay and necessity of sworn testimony—Necessity that factual statements be made under oath, 3 Rathkopf’s The Law of Zoning and Planning § 57:59. As such, proceedings before a board of appeals do not follow rigid rules of evidence. See The rules of evidence, 4 Am. Law. Zoning § 40:31 (5th ed.) “Whether evidence shall be received is, in general, a matter which is left to the discretion of the board of appeals. Refusals to hear testimony are infrequent, and such refusals are relied upon as grounds for reversal only in instances of gross abuse or where the testimony actually admitted does not support the conclusions of the board.” Id. Nonetheless, “the attitude and conduct of members of the board should be judicial and impartial.” Conduct of board, 8A McQuillin Mun. Corp. § 25:351 (3d ed.)

The Application

In short, an applicant can invoke the jurisdiction of the board to grant a particular kind of relief only by requesting the kind of relief he desires. An application must, of course, include anything which is required by the zoning ordinances as a condition precedent to the granting of the relief sought. Failure to meet statutory

requirements in drafting the application for relief is grounds for judicial annulment if the applicant is successful on the administrative level.

It should not be concluded that the courts view board pleadings in a highly technical manner, without regard to the intended informality of board procedure. A defective application can be amended by the applicant. Where an application for relief is ambiguous, the courts will undertake to construe it. . . . Occasionally, where the record discloses that certain relief is proper, such relief will be granted although the applicant technically requested other relief. As a reviewing court usually has broad authority to grant relief, it is within the power of such a court to grant a variance on an application which technically requested a special exception. Applicants who are in doubt as to the form of relief to which they are entitled can apply for both.

Whether an application states grounds for relief which is within the jurisdiction of the board of appeals is a question which will be reviewed by the courts. If a board declines jurisdiction of a matter within its cognizance, the matter will be remitted to the board for further action.

Application for relief, generally—Content of application, 4 Am. Law. Zoning § 40:14 (5th ed.)

Witnesses & Cross Examination

The Chair may compel the attendance of any witnesses. Wis. Stat. § 62.23(7)(e)3. “A zoning and hearing board is free to accept or reject, in whole or in part, the testimony of any witness.” Hearing—Witnesses, 8A McQuillin Mun. Corp. § 25:357 (3d ed.) “The credibility of witnesses and the determination of issues of fact are matters solely within the province of a zoning board of appeals.” Id. “A zoning hearing board acting in the capacity of fact finder has the discretion to reject even uncontradicted testimony if it finds that the testimony lacked credibility.” Id. While not expressly required, cross examination of witnesses should ordinarily be allowed. Id.; see also The right of cross examination, 4 Am. Law. Zoning § 40:33 (5th ed.) (“cross-examination is the best way to get at the truth, and . . . should not be denied in administrative hearings.”)

Ex Parte Communications

An ex parte communication is a one-sided communication between a litigant or their representative and the judge presiding over a case involving the litigant. In re Paternity of B.J.M., 2019 WI App 10, ¶ 24, 386 Wis. 2d 267, 279–80, 925 N.W.2d 580, 586. These communications are important to avoid because they “have the potential to erode public confidence and create the appearance of partiality.” Id. at ¶ 25; see also Ex parte communications with interested parties, 8A McQuillin Mun. Corp. § 25:352 (3d ed.) (board “members acting in a quasi-judicial capacity are held to a high standard: neutrality and the appearance of neutrality are equally critical in maintaining the integrity of the judicial and quasi-judicial processes.”)

Attachment: BS Memo from 2.24.25 (10205 : Regulations and Application)

Evidence

The decision of a board of adjustment or zoning appeals must be based upon facts as established by the evidence properly introduced and before it,¹ or in some instances upon the basis of proof produced and the facts otherwise within the knowledge of the board,² or merely upon the basis of the board's own knowledge,³ and in this respect it is said that members of a zoning board of review are presumed to have a special knowledge of local conditions and needs.

All relevant evidence may be introduced in the proper mode, at hearings before zoning boards. However, such boards are not bound by strict rules of evidence and the procedure may be informal. Incompetent, irrelevant and immaterial evidence should be rejected and not considered by the board. However, the admission or reception of improper or illegal evidence will not of necessity render invalid the action of the board. "Material evidence," as required to support zoning board's decision, is relevant evidence that a reasonable person would accept as adequate to support a rational conclusion. The amount of material evidence required to support a zoning board's or agency's decision must exceed a scintilla of evidence but may be less than a preponderance of the evidence.

Hearing—Evidence, 8A McQuillin Mun. Corp. § 25:356 (3d ed.)

Board members may utilize their own personal knowledge of a matter in making a decision, but when they do so the record must reflect that they used such knowledge. See Personal knowledge of board members, 4 Am. Law. Zoning § 40:37 (5th ed.); Utilization of personal knowledge of members of the board—Facts of personal knowledge must be set forth in the record, Rathkopf's The Law of Zoning and Planning § 57.61. However,

The federal courts, in three zoning cases, have held that if there are facts pertinent to the inquiry and relied upon by the board in reaching its decisions, arising either out of the "expertise" of its members or from an inspection of the premises or area, these facts should be revealed at the hearing so the opportunity is afforded to meet them by evidence or argument. Opinions of the board members as to such matters as the cost of the construction of a building, cost of site preparation, or the suitability of particular construction methods are not, however, matters so related to the administration of a zoning ordinance as to come within the presumptive expertise of a board of appeals. Consequently, where expert testimony that the land development cost was prohibitive, taking the property out of the market for residential use, was uncontradicted and unimpeached, a contrary finding was an abuse of discretion.

Utilization of personal knowledge of members of the board—Opportunity to refute purported personal knowledge, Rathkopf’s The Law of Zoning and Planning § 57:62.

Rehearing, Reconsideration and Repeat Applications

Wisconsin courts have determined that a board of appeals is without power to reopen or reconsider cases. See Goldberg v. City of Milwaukee Bd. of Zoning Appeals, 115 Wis. 2d 517, 521–22, 340 N.W.2d 558, 560 (Ct. App. 1983)(“our research persuades us that the better rule is that a zoning board acts in excess of its power in reopening a proceeding which has once been terminated.”) As a quasi-judicial body, this rule is necessary because otherwise “there would be no finality to the proceeding; the result would be subject to change at the whim of members, or due to influence exerted upon them or other undesirable elements tending to uncertainty and impermanence.” Id. (Quoting Miles v. McKinney, 174 Md. 551, 199 A. 540, 546 (App.1938)). As the Court of Appeals notes:

We discern no persuasive reason why the Board should be required to revisit variance requests already denied, notwithstanding a change of ownership of the property, if the facts underlying the Board's denial have not changed. . . . the rule brings “certitude and finality” to a decision of the Board. We deem that a legitimate purpose. As such, the rule does not violate . . . due process rights.

Tateoka v. City of Waukesha Bd. of Zoning Appeals, 220 Wis. 2d 656, 669–70, 583 N.W.2d 871, 876–77 (Ct. App. 1998). In Tateoka, the Court upheld a the Waukesha Board of Appeals rule that read:

Rehearings, reconsiderations and new applications seeking the same relief concerning the same property after a previous application has been denied will not be heard by the Board of Appeals unless a substantial change of conditions or circumstances has intervened between the time the matter was first decided by the Board of Appeals and the subsequent application. A change of ownership or the passage of time without additional conditions or circumstances will not justify another hearing before the Board.

Id. at 661. As such, the “board of appeals has power to adopt reasonable rules for rehearing.” Rehearings; reconsiderations of decisions, 8A McQuillin Mun. Corp. § 25:365 (3d ed.)

“Under the ‘successive application’ doctrine, the general rule is that a zoning board or planning commission may not entertain a second application concerning the same property after a previous application has been considered unless a substantial change of conditions has occurred or other considerations materially affecting the merits of the request have intervened between the first and second application.” Id.

Attachment: BS Memo from 2.24.25 (10205 : Regulations and Application)

The basis for these rules has been held to be both an application of *res judicata* and also collateral estoppel:

While it is well established that the doctrine of *res judicata* applies to administrative decisions such as those relating to special permits and variances, it is said that "... the rule of *res judicata* does not bar the making of a new application for a variance, or for modification or enlargement of one already granted, or for lifting conditions previously imposed in connection with the grant of a variance, upon a proper showing of changed circumstances or other good cause warranting a reconsideration by the local authorities.

Authority to rehear—Res judicata, 4 Am. Law. Zoning § 40:49 (5th ed.).

Given limited authority of governmental agencies, collateral estoppel, rather than *res judicata*, is often more appropriate for application in the administrative context. The factors considered in applying collateral estoppel include: (1) whether issue decided in prior adjudication was identical with issue presented in present action; (2) whether prior adjudication resulted in a judgment on merits; (3) whether party against whom collateral estoppel is asserted was a party or in privity with a party to prior adjudication; and (4) whether party against whom collateral estoppel is asserted had a full and fair opportunity to litigate issue in prior proceeding.

New applications for same relief; collateral estoppel, 8A McQuillin Mun. Corp. § 25:366 (3d ed.) Under both theories, however, change in circumstances is critical. "In fact, an allegation that circumstances have changed since the prior decision is essential to the jurisdiction of the board." Change of circumstances, 4 Am. Law. Zoning § 40:51 (5th ed.) "Where there was no change of facts or circumstances between the time of the prior determination denying the variance and the present application for the same relief, the board's determination to adhere to a prior decision cannot be challenged as arbitrary and unreasonable even if the prior determination might have been questioned at the time, where there was no review of the earlier ruling, since to permit a review of the later denial would, in effect, constitute permission to review the earlier one after the statutory time for review had passed." Power to entertain new application for same relief, 3 Rathkopf's The Law of Zoning and Planning § 57:73. However, whether there has been a substantial change in circumstances is a determination for the board and there should be an opportunity for a hearing. Id. See also New applications for same relief; collateral estoppel, 8A McQuillin Mun. Corp. § 25:366 (3d ed.); New application for identical relief, 4 Am. Law. Zoning § 40:52 (5th ed.).

"New evidence" is not, however, without limitations. "Even where change of circumstances is proved, a board of appeals may not reopen a case where a person has changed his position, relying upon the decision in question." Change of circumstances, 4 Am. Law. Zoning § 40:51

(5th ed.) “Evidence of changed circumstances will support a different decision only if it relates to the objections which supported the board's decision under the earlier application. An applicant cannot, absent proof of new and relevant circumstances, support a new application solely on the basis of new arguments.” New application for identical relief, 4 Am. Law. Zoning § 40:52 (5th ed.) “Since the function of the board is quasi-judicial, it has no inherent power to review its decision by vacating, rescinding, or altering it after it has been made.¹ It may, however, without holding a further public hearing, correct a clerical or mathematical error in the form of its decision so that the record will reflect the true intention of the board.” Power to reconsider decision already made, Rathkopf’s The Law of Zoning and Planning § 57:72.

BCS