

It is expected that a Quorum of the Personnel Committee, Board of Public Works, and Common Council will be attending this meeting: (although it is not expected that any official action of any of those bodies will be taken)

**CITY OF MENASHA  
BOARD OF APPEALS  
Third Floor Council Chambers  
140 Main Street, Menasha  
OCTOBER 10, 2011  
3:00 PM**

**AGENDA**

- A. CALL TO ORDER
- B. ROLL CALL/EXCUSED ABSENCES
- C. MINUTES TO APPROVE
  - 1. [Board of Appeals, 2/10/09](#)
- D. COMMUNICATION
  - 1. [Information from League of Wisconsin Municipalities on Zoning Boards of Appeal](#)
- E. ACTION ITEMS
  - 1. Appointment of Chairman
  - 2. [Request for Variance, Daniel L. Gueths, W7255 Manitowoc Road, Menasha](#)
- F. ADJOURNMENT

CITY OF MENASHA  
BOARD OF APPEALS  
Third Floor Council Chambers  
140 Main Street, Menasha  
February 10, 2009  
MINUTES

A. CALL TO ORDER

Meeting called to order by Chairman Klein at 11:00 a.m.

B. ROLL CALL/EXCUSED ABSENCES

PRESENT: Comm Eckstein, Koslowski, Klein

ALSO PRESENT: CA/HRD Brandt, AP Beckendorf, Clerk Galeazzi,  
Kevin & Julia LeNoble, Leon Church, Cathy & Marty Pavich

C. MINUTES TO APPROVE

1. Board of Appeals, 9/24/08

Moved by Comm. Koslowski, seconded by Comm. Eckstein to approve minutes  
Motion carried on voice vote.

D. ACTION ITEMS

1. Request for Variance, Kevin and Julia LeNoble, 533 Broad Street

Clerk Galeazzi reported public hearing notice was properly noticed. It was published in the local newspaper and sent to property owners within 100 feet of subject property.

CA/HRD Brandt explained to the Commissioners they act on the evidence and testimony presented at today's hearing.

CA/HRD Brandt swore in the people that would be speaking in front of the Board.

AP Beckendorf explained staff's reason for not allowing the variance. She presented a map of a section of the City showing other properties with a similar lot size of the applicants. Granting the variance could adversely impact public interest by creating a precedent. Staff feels the applicants have other options for a new garage on the lot in a manner that complies with all requirements of the zoning ordinances.

Leon Church, Sweetwood Builders. He has explored other options with the LeNobles. Part of the lot is in the flood plain, which limits their options.

Kevin LeNoble, 533 Broad Street, explained the property was vacant when they purchased it a few years ago. Adding an attached garage would increase the value of the property.

Cathy Pavich, 529 Broad Street. She remodeled her property in 2003 and revised the original plans for a garage to stay within the requirements of the zoning ordinances. They have lived with the restriction. Also, if the variance is granted the width between their garage and the LeNoble's garage would be reduce which could cause a safety issue.

D. ACTION ITEMS, Cont'd

1. Request for Variance, Kevin and Julia LeNoble, 533 Broad Street, cont'd

Julia LeNoble, 533 Broad Street, explained they are required to purchase flood insurance as the current garage is located in a floodplain. Building an attached garage will not block the neighbor's view of the water. She showed pictures to the Board.

Marty Pavich, 529 Broad Street. Concerned with safety, mainly fire. Allowing to build so close to lot line would limit width between structures, which may cause limited access to the back of his property. Mr. Pavich showed the Board pictures of the two properties.

Commissioners asked questions.

Moved by Comm. Koslowski, seconded by Comm. Klein to deny variance.

Discussion

Moved on roll call 3-0.

E. ADJOURNMENT

Moved by Comm. Eckstein, seconded by Comm. Koslowski to adjourn at 11:46 a.m.

Motion carried on voice vote.

Respectfully submitted by  
Deborah A. Galeazzi, City Clerk



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## Zoning FAQ 3

### What are the primary standards for obtaining a zoning variance?

A city or village zoning board of appeals abuses its power if it routinely grants zoning variance requests. A zoning board may grant a zoning variance request only in limited circumstances and only when the applicant provides evidence that proves they have met all of the legal criteria for a requested variance.

There are three main criteria that a variance applicant must satisfy: unnecessary hardship, a unique property condition and no harm to the public interest.

The Wisconsin Supreme Court recognizes two types of zoning variances that may be granted by a zoning board: area variances and use variances. *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401. However, these terms are not defined by state law. Consequently, this is a critical area for local action to define the terms in the local zoning code because case law establishes separate unnecessary hardship tests for use and area variances.

A use variance applicant must show that they will have no reasonable use of the subject property without the requested variance. *Ziervogel*, 269 Wis. 2d at para. 31. This is an extremely difficult burden to satisfy and rightly so. A use variance is effectively a rezoning of property to allow a land use that the governing body of a municipality already determined is incompatible with other uses in the zoning district and risks great changes in neighborhood character.

An area variance applicant must show that "compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." *Snyder v. Waukesha County Bd. of Adjustment*, 74 Wis. 2d 468, 247 N.W.2d 98 (1976). Thus, it is not enough that an area variance applicant show that a zoning regulation prevents or burdens their planned activity. They must show by competent evidence that the regulation **unreasonably** prevents or **unnecessarily** burdens the activity.

All zoning variance applicants must also show that the alleged unnecessary hardship is due to a unique property condition. *Snyder*, 74 Wis. 2d at 479. This phrase is not defined by statute but court decisions establish that it means a special physical feature of the property (soil conditions, steep slope, wetland, etc.) that is not shared by nearby land. See *Arndorfer v.*

*Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 258, 469 N.W.2d 831 (1991). More importantly, if a variance applicant fails to prove the existence of a unique property condition and a connection between the condition and the hardship, even if the hardship is great, a zoning board has no power to grant the requested variance.

Finally, all variance applicants must show that the requested variance will not be contrary to the public interest. *Arndorfer*, 162 Wis. 2d at 256. This criteria requires the zoning board to consider the purposes of the ordinance at issue and determine "whether the relief requested is consistent with the public interest such that the variance should be granted, or whether a variance would subvert the purpose of the zoning restriction to such an extent that it must be denied." *Ziervogel*, 269 Wis. 2d at para. 34.

#### Other Zoning FAQs

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## ZONING BOARDS OF APPEAL

By Daniel M. Olson, Assistant Legal Counsel

A zoning board of appeals (ZBA) occupies an important role in municipal land use policy. ZBAs possess substantial land use power including the ability to review other land use decisions, grant zoning variances and, in some communities, approve special exceptions/conditional uses. These ZBA decisions have the potential to impact land use activity for decades or even generations since zoning variances are transferable from one owner to the next without any future government approval. Accordingly, it is im-

portant that local government officials have some working knowledge of ZBAs, ZBA powers and the ZBA decision process.

### ZBA MEMBERSHIP AND ORGANIZATION

Cities and villages that enact zoning regulations must by ordinance provide for the appointment of a ZBA.<sup>1</sup> State law further directs that a ZBA shall consist of five members appointed by the mayor or village president subject to confirmation of the city council or village board and that the mayor or village president shall designate one of the members as chairperson.<sup>2</sup>

In addition to regular members, two alternates must be appointed to the ZBA.<sup>3</sup> However, unlike regular ZBA members, ZBA alternate appointments are not subject to confirmation by the municipal governing body.<sup>4</sup>

ZBA alternates serve only when a member of the board refuses to vote because of conflict of interest or when a member is absent and, of course, in the case of the second alternate to similar circumstances with respect to the first alternate.<sup>5</sup> And, based on League

opinion, ZBA alternates cannot serve to fill permanent vacancies on the board since vacancies in regular board positions must filled by appointment of the mayor/village president, subject to council/village board confirmation.<sup>6</sup>

There are no statutory qualifications for regular or alternate ZBA members in Wisconsin, which gives governing bodies significant discretion as to ZBA member qualifications. Nonetheless, the 1960 League publication, *Zoning Boards of Appeal: A Manual on Their Powers and Duties with Suggested Rules of Procedure*, aptly states that: "members of the board should be persons whose decisions will not be influenced by personal interest and who are not subject to political pressures."<sup>7</sup>

Both regular and alternate ZBA members serve three-year terms and there is no limit on the number of terms that can be served.<sup>8</sup> Given that state law does not establish any qualifications for service, ZBA membership qualifications are probably a matter of local affairs and government. Therefore, a

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1. Wis. Stat. sec. 62.23(7)(e).

2. Wis. Stat. sec. 62.23(7)(e)2, which is applicable to villages pursuant to sec. 61.35.

3. *Id.*

4. League Opinion - Zoning 364.

5. Wis. Stat. sec. 62.23(7)(e)2.

6. *Id.*

7. Accordingly, even though no state law or court decision specifically states that elected members of a municipal governing body member may not serve on their ZBA, this guideline suggests that they should not since "political pressures" are a fundamental feature of an elective office.

8. Wis. Stat. sec. 62.23(7)(e)2.

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city or village probably has general or home rule authority to enact an ordinance limiting the number of terms a person may serve on the ZBA.<sup>9</sup>

ZBA 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 they are associated.<sup>10</sup> Moreover, like all other public officials, ZBA members are subject to criminal penalties for bribery, self-dealing and misconduct in office.

### POWERS

Although vested with others, a Wisconsin ZBA is typically viewed in light of three main statutory powers:

1. 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 Wis. Stat. sec. 62.23 or of any ordinance adopted pursuant thereto; and
2. To authorize upon appeal in specific cases 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; and

3. To hear and decide special exception to the terms of the ordinance upon which such board is required to pass under such ordinance.<sup>11</sup>

### ADMINISTRATIVE APPEALS

Despite the somewhat broad language in Wis. Stat. sec. 62.23(7)(e)7, granting ZBAs power to review alleged errors in other zoning decisions, the statute does not authorize ZBA review of every kind of zoning or land use regulation decision made in a city or village. Rather, it is well-established that the power only extends to administrative decisions.

To ensure the proper exercise of its administrative review authority, it is critical for ZBAs to focus on the character of the decision that it is asked to review, not the person or body making the decision since administrative decisions can be made by local government bodies that exercise both administrative and legislative functions.

In *Brandt v. Pewaukee Town Board*,<sup>12</sup> 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 deci-

sion 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.<sup>13</sup>

Interpretations of state zoning law or a local zoning code by a city or village zoning administrator are certainly administrative decisions appealable to a ZBA. A building inspector decision based upon sec. 62.23 or a local ordinance adopted under sec. 62.23 is also an administrative decision appealable to a ZBA. Administrative decisions of a plan commission are also appealable to a ZBA.<sup>14</sup>

On the other hand, a plan commission decision to recommend amendment of a zoning ordinance or a city council decision to deny a rezoning petition is a quasi-legislative or legislative decisions. Accordingly, although made pursuant to sec. 62.23 or a local ordinance adopted pursuant to sec. 62.23, a ZBA has no power to review them.

Although the ZBA may reverse or affirm, wholly or partly, or may modify a prior decision, its powers are gener-

9. See League Opinion - Commissions 176.

10. See Wis. Stat. sec. 1959(1)(c)1. and 2.

11. Wis. Stat. sec. 62.23(7)(e)7.

12. 15 Wis.2d 6, 112 N.W.2d 157 (1961).

13. *Id.* at 9-10.

14. See League Opinion - Zoning 410 (Plan commission denial of development project approval may be appealed to ZBA).

ally limited to determining whether or not the official or body making the administrative decision complied with applicable state or local zoning law. Accordingly, unless specifically vested with additional power by local ordinance, a ZBA 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.<sup>15</sup> The sole function of a ZBA in the exercise of its administrative appeal function is to determine whether a zoning enforcement decision was authorized or supported by sec. 62.23 or the applicable local zoning ordinance.

#### ZONING VARIANCES

Variance power is probably a ZBA's most notorious authority. Notably, this power is exclusively vested in a ZBA by state law and cannot be transferred to a plan commission or other municipal body by local ordinance.<sup>16</sup>

Unless otherwise specifically vested with additional variance power by local ordinance, a ZBA only has authority to grant zoning variances, not subdivision or other non-zoning variance relief.<sup>17</sup> Moreover, a ZBA's zoning variance power cannot "legalize" an unauthorized encroachment by one private property owner upon the land of another.<sup>18</sup>

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.<sup>19</sup>

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.<sup>20</sup> Use variances give a landowner approval to put a property to an otherwise prohibited use.<sup>21</sup>

In order to grant a variance, a ZBA 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

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15. See *Great Lakes Tanning Co. v. Milwaukee*, 250 Wis. 74 (1947).

16. See *League Opinion - Zoning* 386.

17. See *League Opinion - Platting* 147.

18. See *League Opinion - Zoning* 394.

19. *State ex rel. Skelly Oil Co. v. City of Delafield*, 58 Wis. 2d 695, 701, 207 N.W.2d 585 (1973) (citations omitted).

20. *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, para. 23, 269 Wis. 2d 549, 676 N.W.2d 401.

21. *Id.*



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3. the special condition creates an unnecessary hardship.<sup>22</sup>

Other legal comments have discussed variance standards in some detail, so full comment will not be repeated here.<sup>23</sup> 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.<sup>24</sup>

Proof of a "special condition" or "unique condition affecting the land" is the key to every variance request.<sup>25</sup> 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.<sup>26</sup>

It is also important to note the potency of use variances as compared to rezonings. Like rezoning, a use variance authorizes different land use than previously allowed. However, unlike rezoning, a use variance is not subject to future legislative modification. Instead, since zoning variances with the land, a use variance essentially grants a permanent use classification protected from legislative action.<sup>27</sup>

Finally, it should be noted that indiscriminate approval of zoning variances by a ZBA damages public faith in government. A ZBA 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 ZBA that never says no is pay-

ment of the variance application fee. Finally, such behavior conveys disdain for the general public since the public hearing a ZBA must hold for each variance request is a fraud if the variance will be granted despite any public testimony. To avoid these results, a ZBA must faithfully follow and apply the applicable variance law to every application.

#### SPECIAL EXCEPTIONS (CONDITIONAL USES)

In an early conditional use case, the Wisconsin Supreme Court noted that the terms "special exception" and "conditional use" are interchangeable.<sup>28</sup> More recently, the Wisconsin court of appeals found a similar interchangeability between the terms "special use" and conditional use.<sup>29</sup>

Nonetheless, there is no legal requirement that conditional use and special exception mean the same thing in every zoning code. The sec. 62.23(7)(a) zoning power "easily incorporates the granting or denial of conditional use permits."<sup>30</sup> Thus, zoning codes might

22. See *State v. Trudeau*, 139 Wis. 2d 91, 110, 408 N.W.2d 337 (1987).

23. 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.

24. See *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 256, 469 N.W.2d 831 (1991).

25. 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).

26. See *Arndorfer*, 162 Wis. 2d at 256.

27. 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.

28. *State ex rel. Skelly Oil Co., Inc. v. City of Delafield*, 58 Wis. 2d 695, 702, 207 N.W.2d 585 (1973).

29. 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).

30. *Town of Cedarburg v. Shewczyk*, 2003 WI App 10, para. 16, 259 Wis.2d 818, 656 N.W.2d 491.

have both conditional uses, based on 62.23(7)(a), and special exceptions, based on 62.23(7)(e)1.

While a ZBA is statutorily authorized to issue special exceptions, state law also allows cities and villages to vest special exception/conditional use authority in their city council/village board or plan commission.<sup>31</sup> Therefore, unlike zoning variance power, special exception authority is not the exclusive domain of a ZBA.

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

In *League of Woman Voters v. Outagamie County*,<sup>32</sup> 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, there-

fore, aggrieved parties had a statutory right to appeal the decision to the county zoning board of adjustment.<sup>33</sup> Likewise, in *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*,<sup>34</sup> 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*<sup>35</sup> and *Master Disposal v. Village of Menomonee Falls*,<sup>36</sup> implicitly support ZBA 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 Bd. of Adjustment*<sup>37</sup>, wherein the court of appeals concluded that 62.23(7)(e) did not authorize a town zoning board of adjustment to review a town board, exercising village board powers pursuant to 60.10(2)(c) and 60.22(3), decision to deny a conditional use permit because the town board was not an administrative "officer." The other is *Magnolia*

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31. Wis. Stat. sec. 62.23(7)(e)1.

32. 113 Wis.2d 313, 334 N.W.2d 887 (1983).

33. 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.

34. 131 Wis.2d 101, 388 N.W.2d 593 (1984).

35. 78 Wis.2d 416, 254 N.W.2d 310 (1977).

36. 60 Wis.2d 653, 211 N.W.2d 477 (1973).

37. 158 Wis.2d 263, 461 N.W.2d 827 (Ct. App. 1990).

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*Twp. v. Town of Magnolia*,<sup>38</sup> 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 ZBA 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 ZBA review on appeal.

#### ZBA DECISIONS

While a ZBA 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 ZBA is not a court and is not bound by the same technical rules of legal procedure applicable in traditional courts. ZBA proceedings are less formal. However, judicial acceptance of ZBA informality should never be considered a free pass to deliberately or irresponsibly ignore legal requirements. A ZBA is a “quasi-judicial” body<sup>39</sup> and, as such, a ZBA 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 decisionmaker. The most elaborate ZBA hearing is a meaningless sham if ZBA 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.<sup>40</sup> Bias can distort judgment and lead to decisions not founded on facts or rational analysis.<sup>41</sup> Accordingly, ZBA members need to recuse themselves when they are biased and when there is an impermissibly high risk of bias.<sup>42</sup>

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

Wisconsin law supports the proposition that a ZBA member may not communicate to the ZBA in support of an applicant and then participate in the applicant’s proceeding.<sup>43</sup> Likewise, an attorney cannot be both an advocate for a ZBA party (i.e., the municipality) and legal advisor for the ZBA.<sup>44</sup>

ZBA 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 ZBA and its members operate only to fairly apply facts to the law that it is empowered to consider, without favor or preference.

38. 2005 WI App 119, 284 Wis. 2d 361, 701 N.W.2d 60.

39. 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.”)

40. See *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 25, 498 N.W.2d 842 (1993).

41. See *id.* at 25-26.

42. See *id.* at 25.

43. 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).

44. *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).

## Deliberation and Voting

Once evidence has been received and the public hearing closed, a ZBA must make a decision. In all ZBA 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 ZBA has no authority to grant the requested relief.

A ZBA's decision must be based on credible evidence in the hearing record.<sup>45</sup> ZBA decisions based on speculation or information that is not in the record will not be sustained by a reviewing court.

While a ZBA hearing must be in open, there is authority for ZBA deliberation in closed session.<sup>46</sup> However, the authority for closed session deliberation is very limited and only applies if the ZBA hearing would "possess characteristics common to adversarial proceedings."<sup>47</sup> Since the vast majority of ZBA hearings lack such characteristics, very few ZBA hearings are likely to qualify, which means deliberation in an open session.

In 2005, the Wisconsin Legislature changed the voting requirements for ZBAs to allow ZBA decisions by a simple majority of a quorum.<sup>48</sup> As a result, current law allows 3 members (a quorum) of a five-member ZBA 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 ZBA members.

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

## Findings

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

Nonetheless, a ZBA 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 ZBA actually evaluated any evidence in the hearing record. Accordingly, such a decision fails to show whether a ZBA exercised its will or its judgment.

To demonstrate that it exercised its judgment, a ZBA must provide more than simple conclusions. Instead, the ZBA 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.<sup>49</sup>

Otherwise, the ZBA's decision will be deemed an impermissible exercise of its will, rather than a valid exercise of judgment.

## CONCLUSION

ZBA members hold substantial power to shape land-use policy in cities and villages. ZBA variance approvals are practically permanent. Moreover, ZBA 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 ZBA relief they seek should receive it. But, those who do not, should not.

Nonetheless, ZBA decisions are difficult. Land use matters are frequently dynamic and complex, not routine. Moreover, ZBA members will often know the land owners, neighbors or applicants personally. Therefore, it is essential that every ZBA 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 ZBA.

Zoning 508

45. See *Schalow v. Waupaca County*, 139 Wis. 2d 284, 289, 407 N.W.2d 316 (Ct. App. 1987).

46. 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."

47. See *State ex rel. Hodge v. Town of Turtle Lake*, 180 Wis.2d 62, 74, 508 N.W.2d 603 (1993).

48. Wis. Stat. sec. 62.23(7)(e)3m

49. 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.

# City of Menasha

## SPECIAL ZONING APPROVAL

Owner Daniel L. Gueths Case or Plan No. BOA 2011-01  
Address W 7255 Manitowoc Rd Fee \$350.00

Applicant (if different than Owner) \_\_\_\_\_

Address Neighbors, City of Menasha, Wingame Dog Club

Zoning \_\_\_\_\_ Parcel Number(s) 700012-00

PLEASE INDICATE WHICH REQUEST IS BEING MADE

- |  |  |  |
|--|--|--|
| <input type="checkbox"/> Rezoning                      | <input type="checkbox"/> Special Use       | <input type="checkbox"/> Flood Plain Map Amendment |
| <input checked="" type="checkbox"/> Appeal or Variance | <input type="checkbox"/> PUD Plan Approval |  |

Description of Request: To be able to divide the above lot on a zero lot line the present building on the lot <sup>is to</sup> be used as presently used.

Owner/Agent Daniel L. Gueths 9/17/11  
Signature

(If applicable)

Formal Hearing 10/10/11

Informal Hearing \_\_\_\_\_

Notice Mailed 9/30/11

Notice Mailed \_\_\_\_\_

Notice Mailed \_\_\_\_\_

Action Taken: \_\_\_\_\_ 20\_\_\_\_

☐ APPROVED

☐ DENIED

Conditions (if any): \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**City of Menasha  
Variance Application Questionnaire**

Applicant:

Daniel L. Gurtis

Site Address:

W 7255 Manitowoc Rd.

Menasha Ordinance 13-153(d) provides that the Board of Appeals shall evaluate a variance request based on the foregoing criteria. Before granting such a request, the Board must find that all of the criteria enumerated apply to the variance requested. Please address each statement; use additional sheets if necessary.

Describe the hardship to the property owner that would result if the variance were not granted and the exceptional, extraordinary, or unusual circumstance or conditions applying to the lot or parcel, structure, use, or intended use that do not apply generally to other properties or uses in the same district:

I wish to sell the property + retire. This lot is not ordinary with a 30' wide by 400' long building on a 100' wide lot. 25 years ago the building was put on the lot going north and south to Ingersoll, the use of the lot with the entrance on Manitowoc Rd. The only road at the time. Now there is a road to the south, Gaffey St. which allows access from north and south. I wish to split the building and sell the north half, building and property. Under section 13-1-29 (GENERAL Commercial District) under F.4 it allows for a zero lotline which only makes good common sense.

Explain why the conditions upon which the petition for the variance is based are unique to the property and necessary for the preservation and enjoyment of substantial property rights possessed by other properties in the same district and same vicinity:

(SAME AS ABOVE) The building will not change, or the use change. It will only change owners. With access from the north and south and possibly even the west in the future. There is no logic in splitting the building apart and taking out two 100' x 30' storage units. There will be nothing to gain. It does not affect any other property rights. It will only hurt the property value and there would be a loss of income. And also the demolition cost.

Provide evidence demonstrating that the purpose of the variance is not based exclusively upon a desire to increase the value or income potential of the property:

Purpose of the variance is to be able to sell the property, as I was encouraged to do so by the city of Menasha. I wish to retire. With the troubled economy and

poor real estate market requiring large downpayments, it is not easy to sell property. It will not affect any other property in any way. The buyer I have can only afford to get a loan to buy half of the property.

Describe how the granting of the variance will not be detrimental to the public welfare or injurious to the other property or improvements in the neighborhood in which the property is located:

Basically nothing is going to change other than ownership. It will not affect any other property in anyway. This building has been here 25 years. If any thing by putting a 20' area between the two halves of the building would allow an area for junk to collect and also dog club members ~~members~~ would be able to see the outside parking now on the west side of the building. THE BUILDING blocks that now. I have made an effort to keep things out of sight.

Explain why the proposed variance will not undermine the spirit and general or specific purposes of the zoning code:

My opinion is that this is a text book example where a zero lot is the most logical way to split this property and makes good common sense. It would be senseless to destroy part of the building without any good reason and have to pay money to do it and then suffer future lost income from those two units. I believe this boils down to interpretation of the code. The code does not clarify how to determine the front lot, or the back lot, or the side lots. Continued on back →

Please submit a site plan showing an accurate depiction of the property and any other relevant or required documents.

I certify that all information provided is to the best of my knowledge accurate and true.

Property Owner:

Daniel A. Gueths  
Signature

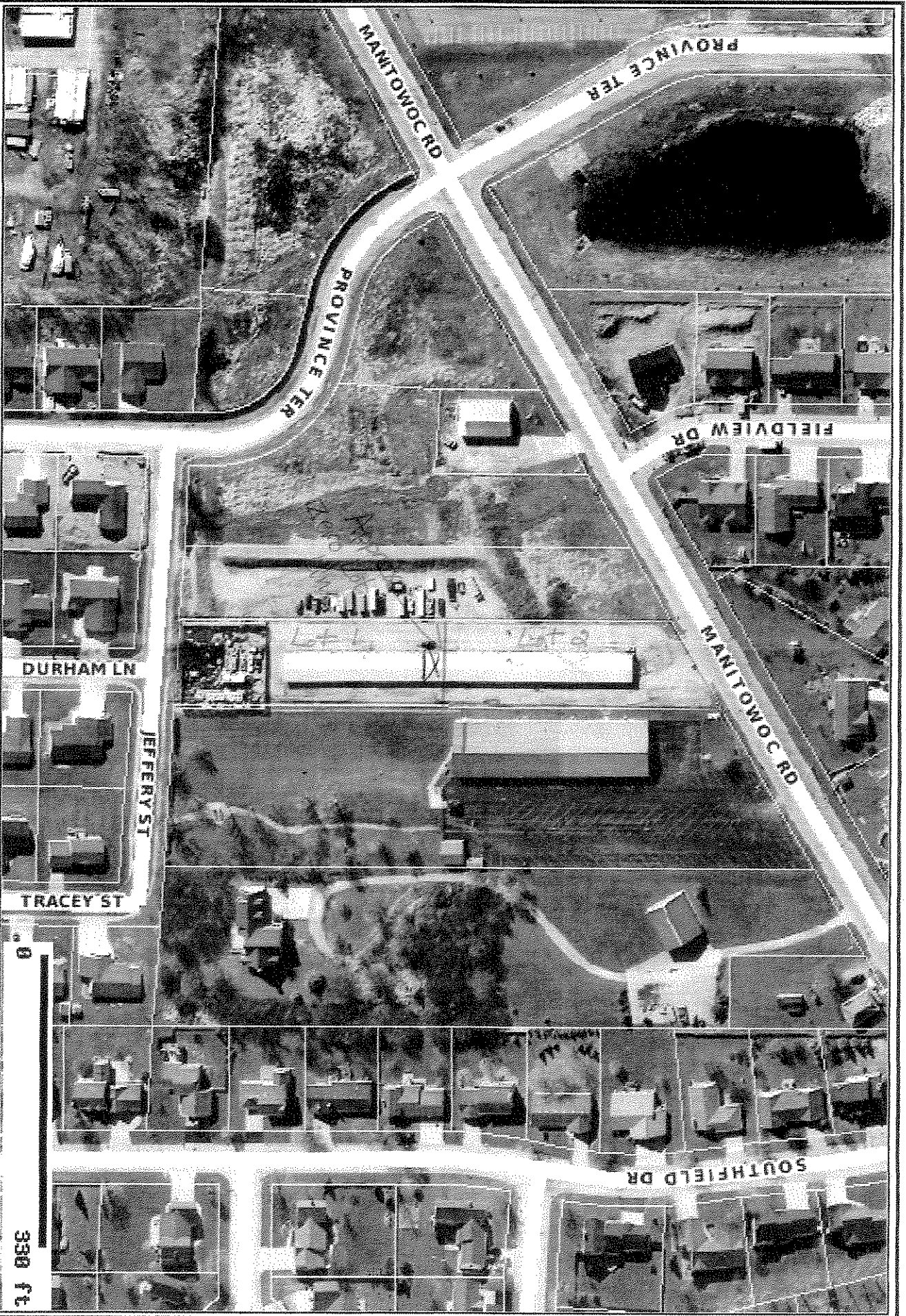
Date:

9/19/11

Usually the ends of the building are the sides. This building was built 25 years ago to maximize the use of the lot. It is the duty of City Government to use logic and good common sense. This is not a new building site which I think the code is more applicable to. To have to destroy 2 of the storage units senselessly would not benefit anyone and would only hurt the value of the property.

Daniel D. Gueth





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To: Zoning Board of Appeals  
From: Kara Homan, AICP, Principal Planner  
Date: October 4, 2011  
**RE: Variance Request for W7255 Manitowoc Road**

### **OVERVIEW**

**Property Address:** 7255 Manitowoc Road

**Property Owner:** Daniel L. Gueths

**Property Zoning:** C-1 – General Commercial District

**Surrounding Zoning:** R-1 – Single Family Residential to the North and South; C-1 – General Commercial to the East and West.

**Variance Requested:** Section 13-1-29(f)(5); Minimum Rear Yard of 10 Feet.  
Requesting that there be no setback, thus allowing for a zero lot line.

**Reason for Variance:** To allow Mr. Gueths to divide his property and business as a means of facilitating a sale.

### **REGULATIONS FOR GRANTING A VARIANCE**

Per Chapter 13-1-153(d), the Zoning Board of Appeals must find the following five items to be true prior to granting a variance:

- 1) Hardship to the Property Owner due to Physiographical Considerations
- 2) Unique Property Conditions
- 3) Exclusive Desire to Increase Property Value or Income
- 4) Will Not be Detrimental to the Neighborhood
- 5) Will not Undermine the Spirit of the Zoning Code

Please see the enclosed copy of the municipal code for more detailed information on each of these items; the entire text of each item is also included in the discussion below.

### **ANALYSIS OF VARIANCE REQUEST**

Below is staff's analysis of each of the five required items per Chapter 13-1-153(d) as they pertain to the variance requested by Mr. Gueths.

### **1. Hardship to the Property Owner due to Physiographical Considerations**

*SEC 13-1-153(D)1: "Denial of variation may result in hardship to the property owner due to physiographical consideration. There must be exceptional, extraordinary or unusual circumstances or conditions applying to the lot or parcel, structure, use or intended use that do not apply generally to other properties or uses in the same district and the granting of the variance would not be of so general or recurrent nature as to suggest that the Zoning Code should be changed."*

ANALYSIS: The current and intended use for the site is as a storage locker facility; no modifications or additions to the site are planned, thus there are no physiographic barriers to even consider. The land is flat and the lot is rectangular in nature. The parcel has a suitable building envelope that would not prevent any future re-development of the site.

Not granting this variance to allow the property and building to be split thus creating a "zero lot line" at the rear lot line would not preclude the property from continuing in its current use.

In addition, there are several other options for Mr. Gueths to accomplish the division of his building for the purpose of facilitating a sale. These include 1) creating a condominium; or 2) creating two separate building by eliminating storage units within 10 feet of a new rear yard lot line.

### **2. Unique Property Conditions**

*SEC 13-1-153(D)2: The conditions upon which a petition for a variation is based are unique to the property for which variation is being sought and that such variance is necessary for the preservation and enjoyment of substantial property rights possessed by other properties in the same district and same vicinity.*

ANALYSIS: Their variance is not required to preserve the current use and enjoyment of the property. As stated above, the property is flat and rectangular in nature, and faces the same zoning regulations (e.g. rear yard setback requirements) that other similarly zoned properties are subject to. Granting the variance is not required for preservation and continued use as a Storage Locker facility.

### **3. Exclusive Desire to Increase Property Value or Income**

*SEC 13-1-153(D)3: The purpose of the variation is not based exclusively upon a desire to increase the value or income potential of the property.*

ANALYSIS: It appears as if the primary reason for requesting the variance is to allow for a prospective buyer to purchase a portion of the building, thus increasing income for Mr. Gueths. Mr. Gueths states in his application that dividing the building in a way that is compliant with the zoning code (e.g. creating two separate buildings) would "only hurt the property value and there would be a loss of income, and the demolition costs."

**4. Will Not be Detrimental to the Neighborhood**

*SEC 13-1-153(D)4: The granting of the variation will not be detrimental to the public welfare or injurious to the other property or improvements in the neighborhood in which the property is located.*

ANALYSIS: Although the proposed use will remain the same, should the two newly created lots and parts of the storage lockers ever be in different ownership, the south part of the property may require access onto Jeffrey drive, thus substantially increasing traffic and noise in what is currently a quiet residential neighborhood.

**5. Will not Undermine the Spirit of the Zoning Code**

*SEC 13-1-153(D)5: The proposed variation will not undermine the spirit and general and specific purposes of the Zoning Code.*

ANALYSIS: Approving the proposed variance would undermine the rear yard setbacks of the C-1 General Commercial District (Sec 13-1-29) of the zoning code, by setting a precedent that variances to setbacks can be granted for reasons other than those allowed for in Chapter 13-1-153(d) of the City Code.

**STAFF RECOMMENDATION**

**Staff recommends the variance, as requested, be denied by the Board of Zoning Appeals.** Per the analysis presented above, staff believes that of the five required items to be met prior to granting a variance, none have been satisfied.



**City of Menasha  
Board of Zoning Appeals  
Public Hearing**

A Public Hearing will be held by the Board of Zoning Appeals on October 10, 2011 at 3:00 p.m. in the City Hall Council Chambers, 140 Main Street, Menasha, WI to hear the appeal of Daniel L. Gueths, for the property at W7255 Manitowoc Road, Menasha, WI.

The applicant is requesting to split parcel 7-000012-00 (W7255 Manitowoc Road, Menasha, WI) into two parcels. Absent a variance, this action would create two lots that would not have a 10 foot rear yard setback as required in the C1 General Commercial zoning district.

All interested persons objecting to or supporting this appeal are requested to be present. Written comments may be considered by the Board.

Deborah A. Galeazzi  
City Clerk

Run: Sept. 30, 2011

## ARTICLE L

### Appeals

#### SEC. 13-1-150 APPEALS TO THE ZONING BOARD OF APPEALS.

- (a) **SCOPE OF APPEALS.** Appeals to the Board of Appeals may be taken by any person aggrieved or by any officer, department, board or bureau of the City affected by any decision of the administrative officer. Such appeal shall be taken within thirty (30) days of the alleged grievance or judgment in question by filing with the officer(s) from whom the appeal is taken and with the Board of Appeals a notice of appeal specifying the grounds thereof, together with payment of a filing fee as may be established by the Common Council. The officer(s) from whom the appeal is taken shall forthwith transmit to the Board of Appeals all papers constituting the record from which action the appeal was taken.
- (b) **STAY OF PROCEEDINGS.** An appeal shall stay all legal proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certified to the Board that, by reason of facts stated in the certificate, a stay would, in his opinion, cause immediate peril to life or property. In such cases, proceedings shall not be stayed otherwise than by a restraining order which may be granted by the Board of Appeals or by a court of record on application, on notice to the officer from whom the appeal is taken and on due cause shown.
- (c) **POWERS OF ZONING BOARD OF APPEALS.** In addition to these powers enumerated elsewhere in this Code of Ordinances, the Board of Appeals shall have the following powers:
- (1) Errors. To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by the Zoning Administrator or Building Inspector.
  - (2) Variances. To hear and grant appeals for variances as will not be contrary to the public interest where, owing to practical difficulty or unnecessary hardship, so that the spirit and purposes of this Chapter shall be observed and the public safety, welfare and justice secured. Use variances shall not be granted.
  - (3) Interpretations. To hear and decide application for interpretations of the zoning regulations and the boundaries of the zoning districts after the City Plan Commission has made a review and recommendation.
  - (4) Substitutions. To hear and grant applications for substitution of more restrictive nonconforming uses for existing nonconforming uses provided no structural alterations are to be made and the City Plan Commission has made a review and recommendation. Whenever the Board permits such a substitution, the use may not thereafter be changed without application.
  - (5) Unclassified Uses. To hear and grant applications for unclassified and unspecified uses provided that such uses are similar in character to the principal uses permitted in the district and the City Plan Commission has made a review and recommendation.
  - (6) Temporary Uses. To hear and grant applications for temporary uses, in any district provided that such uses are of a temporary nature, do not involve the erection of a substantial structure and are compatible with the neighboring uses and the City Plan Commission has made a review and recommendation. The permit shall be temporary, revocable, subject to any condition required by the Board of Zoning Appeals and shall be issued for a period not to exceed twelve (12) months. Compliance with all other provisions of this Chapter shall be required.

- (7) Permits. The Board may reverse, affirm wholly or partly, modify the requirements appealed from and may issue or direct the issue of a permit.

#### **SEC. 13-1-151 HEARING ON APPEALS.**

The Board of Appeals shall fix a reasonable time for the hearing, cause notice thereof to be published in the official newspaper not less than seven (7) days prior thereto, cause notice to be given to the appellant or applicant and the administrative officer(s) appealed from by regular mail or by personal service not less than five (5) days prior to the date of hearing. In every case involving a variance, notice shall also be mailed not less than five (5) days prior to the hearing of the fee owners of records of all land within one hundred (100) feet of any part of the subject building or premises involved in the appeal.

#### **SEC. 13-1-152 DECISIONS OF BOARD OF APPEALS.**

- (a) **TIME FRAME.** The Board of Appeals shall decide all appeals and applications within thirty (30) days after the public hearing and shall transmit a signed copy of the Board's decision to the appellant or applicant and the Zoning Administrator.
- (b) **CONDITIONS.** Conditions may be placed upon any zoning permit ordered or authorized by this Board.
- (c) **VALIDITY.** Variances, substitutions or use permits granted by the Board shall expire within six (6) months unless substantial work has commenced pursuant to such grant.

#### **SEC. 13-1-153 VARIATIONS.**

- (a) **PURPOSE.**
  - (1) A request for a variance may be made when an aggrieved party can submit proof that strict adherence to the provisions of this Zoning Code would cause him undue hardship or create conditions causing greater harmful effects than the initial condition. A variance granted to a nonconforming use brings that use into conformance with the district and zoning requirements.
  - (2) The Board of Appeals may authorize upon appeal, in specific cases, such variance from the terms of the Zoning Code as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of the Zoning Code will result in unnecessary hardship and so that the spirit of the Zoning Code shall be observed and substantial justice done. No variance shall have the effect of allowing in any district uses prohibited in that district, permit a lower degree of flood protection that the flood protection elevation for the particular area or permit standards lower than those required by state law.
  - (3) For the purposes of this Section, "unnecessary hardship" shall be defined as an unusual or extreme decrease in the adaptability of the property to the uses permitted by the zoning district which is caused by facts, such as rough terrain or poor soil conditions, uniquely applicable to the particular piece of property as distinguished from those applicable to most or all property in the same zoning district.
- (b) **APPLICATION FOR VARIATION.** The application for variation shall be filed with the Zoning Administrator. Applications may be made by the owner or lessee of the structure,



land or water to be affected. The application shall contain the following information:

- (1) Name and address of applicant and all abutting and opposite property owners of record.
  - (2) Statement that the applicant is the owner or the authorized agent of the owner of the property.
  - (3) Address and description of the property.
  - (4) A site plan showing an accurate depiction of the property.
  - (5) Additional information required by the City Plan Commission, City Engineer, Board of Zoning Appeals or Zoning Administrator.
  - (6) Fee receipt in the amount of Two Hundred Twenty-five Dollars (\$225.00).
- (c) **PUBLIC HEARING OF APPLICATION.** The Board of Appeals shall conduct at least one (1) public hearing on the proposed variation. Notice of such hearing shall be given not more than thirty (30) days and not less than ten (10) days before the hearing in one (1) or more of the newspapers in general circulation in the City of Menasha, and shall give due notice to the parties in interest, the Zoning Administrator and the City Plan Commission. At the hearing the appellant or applicant may appear in person, by agent or by attorney. The Board shall thereafter reach its decision within thirty (30) days after the final hearing and shall transmit a written copy of its decision to the appellant or applicant, Zoning Administrator and Plan Commission.
- (d) **ACTION OF THE BOARD OF APPEALS.** For the Board to grant a variance, it must find that:
- (1) Denial of variation may result in hardship to the property owner due to physiographical consideration. There must be exceptional, extraordinary or unusual circumstances or conditions applying to the lot or parcel, structure, use or intended use that do not apply generally to other properties or uses in the same district and the granting of the variance would not be of so general or recurrent nature as to suggest that the Zoning Code should be changed.
  - (2) The conditions upon which a petition for a variation is based are unique to the property for which variation is being sought and that such variance is necessary for the preservation and enjoyment of substantial property rights possessed by other properties in the same district and same vicinity.
  - (3) The purpose of the variation is not based exclusively upon a desire to increase the value or income potential of the property.
  - (4) The granting of the variation will not be detrimental to the public welfare or injurious to the other property or improvements in the neighborhood in which the property is located.
  - (5) The proposed variation will not undermine the spirit and general and specific purposes of the Zoning Code.
- (e) **CONDITIONS.** The Board of Appeals may impose such conditions and restrictions upon the premises benefitted by a variance as may be necessary to comply with the standards established in this Section.

#### **SEC. 13-1-154 REVIEW BY COURT OF RECORD.**

Any person or persons aggrieved by any decision of the Board of Appeals may present to a court of record a petition, duly verified, setting forth that such decision is illegal and specifying the grounds of the illegality. Such petition shall be presented to the court within thirty (30) days after the filing of the decision in the offices of the Board.



**SEC. 13-1-155 THROUGH SEC. 13-1-159 RESERVED FOR FUTURE USE.**

## **SEC. 13-1-29 C-1 GENERAL COMMERCIAL DISTRICT.**

- (a) **INTENT.** The purpose of this district is to accommodate a wide range of retail and commercial service and product establishments. It is also intended to accommodate the development of mixed land uses which will allow the association of commercial and residential land uses in the same zoning district.
- (b) **PERMITTED USES.**
  - (1) All permitted uses in the R-2 Two Family Residence District.
  - (2) Administrative, management, and support services.
  - (3) Arts, entertainment, and recreation facilities and services, indoor only.
  - (4) Construction services and contractors offices.
  - (5) Day care facilities.
  - (6) Education services and schools serving thirty (30) students or less.
  - (7) Financial and insurance services.
  - (8) Food services and drinking establishments.
  - (9) Health, medical and social services.
  - (10) Hotels and motels.
  - (11) Parks and playgrounds.
  - (12) Personal services.
  - (13) Professional, scientific, and technical services.
  - (14) Public administration buildings.
  - (15) Real estate services.
  - (16) Religious, grant making, civic, professional, and similar organizations.
  - (17) Rental and leasing services, excluding mini-warehousing.
  - (18) Retail trade:
    - a. Automotive, truck, recreational vehicle, and heavy equipment parts and accessory stores, excluding facilities with repair or maintenance facilities.
    - b. Furniture and home furnishings stores.
    - c. Electronics and appliance stores.
    - d. Building material, garden equipment and supplies dealers, indoor only.
    - e. Food and beverage stores.
    - f. Health and personal care stores.
    - g. Clothing and clothing accessories stores.
    - h. Sporting goods, hobby, book, music, and similar stores.
    - i. General merchandise and retail stores.
  - (19) Repair services, excluding automotive, truck, recreational vehicle, and heavy equipment repair and maintenance services.
  - (20) Utility substations.
  - (21) Other permitted uses.
    - a. Adult establishments which are more than five hundred (500) feet from schools, churches, community living arrangements, day care centers, nursery schools, family day care homes, parks, playgrounds, other community facilities, and other adult establishments.
    - b. Uses not explicitly enumerated in the section as permitted uses, but determined by the Community Development Director to be closely similar thereto provided that these uses are not specified elsewhere as requiring a special use permit.
- (c) **SPECIAL USES.**
  - (1) Airport/heliport.

- (2) Amusement and recreation facilities, outdoor only.
- (3) Automotive, truck, recreational vehicles, and heavy equipment sales, rental, and leasing.
- (4) Automotive, truck, recreation vehicle, and heavy equipment repair and maintenance services.
- (5) Bed and breakfast facilities.
- (6) Building and garden equipment and supply dealers with outdoor displays.
- (7) Gasoline stations.
- (8) Landscape nurseries, orchards, and commercial greenhouses.
- (9) Manufactured or mobile home dealers.
- (10) Multi-family uses permitted in the R-4 Multi-Family District.
- (11) Museums, historical sites, and similar institutions, outdoor only.
- (12) Radio and television broadcasting facilities.
- (13) Railroad right-of-way and uses essential to railroad operation.
- (14) RV Parks and recreational camps.
- (15) Schools serving more than thirty (30) students.
- (16) Spectator sport facilities, outdoor only.
- (17) Other uses requiring a special use permit:
  - a. Any use which utilizes outdoor storage or outdoor display of merchandise or equipment. This requirement does not apply to outdoor display items which are removed each night.
  - b. Office buildings exceeding three (3) stories in height.
  - c. Major telecommunications facilities in accordance with 13-1-81.

**(d) SITE, ARCHITECTURAL, LANDSCAPING AND LIGHTING REVIEW**

- (1) Review shall be required for projects and uses listed in 13-1-12(b)

**(e) ACCESSORY BUILDINGS AND USES.**

- (1) Accessory building and uses customary with and incidental to the principal use are permitted unless otherwise excluded by this chapter.
- (2) Warehousing customarily incidental to any of the preceding permitted uses or special uses.

**(f) GENERAL STANDARDS.**

- (1) Minimum Lot Width. Eight (80) feet for lots established after the effective date of this ordinance.
- (2) Minimum Lot Size. Nine thousand five hundred (9,500) square feet for lots established after the effective date of this ordinance.
- (3) Minimum Front Yard Setback. Ten (10) feet for all structures, parking, and paving, except for points of ingress and egress approved by the Plan Commission. For properties abutting a residential district, the front yard setback requirement of the adjacent residential district shall apply.
- (4) Minimum Side Yard. None, unless abutting a residential use or district, then transitional area requirements apply.
- (5) Minimum Rear Yard. Ten (10) feet, unless abutting a residential use or district, then transitional area requirements apply.
- (6) Maximum Height. Forty-five (45) feet or three (3) stories, except as provided herein.
- (7) Maximum lot coverage of buildings shall not exceed thirty percent (30%). The Plan Commission, upon review, may reduce this requirement by up to fifty percent (50%).
- (8) If residential development is the principal use, then all requirements and standards of the applicable residential district apply.
- (9) Design Standards.

- a. Permitted uses requiring conditional site plan approval shall comply with the requirements of Section 13-1-12.
- b. The following shall apply to additions or expansions not required to obtain site plan approval;
  - i. The primary façade material for all additions or expansions shall be brick or natural stone. Where there is an addition or an expansion to an existing building, the façade materials on the portion of the building being altered or added must visually match or complement the appearance of the existing building. The Plan Commission may consider the use of alternative façade materials that are durable and of high quality for such additions or expansions.
  - ii. Secondary façade materials may be used for architectural details or enhancements to additions or expansions. Such materials shall be high quality, durable, and cover not more than twenty-five percent (25%) of the building façade. The Plan Commission shall approve all secondary materials.
- (10) Screening. Permitted uses requiring conditional site plan approval shall comply with the requirements of Section 13-1-12.
- (11) Landscaping. Permitted uses requiring conditional site plan approval shall comply with the requirements of Section 13-1-12. Requirements set forth in Sec. 13-1-17 for commercial transitional landscaping areas shall apply to this district. If multi-family residential development is the principal use, then transitional area requirements apply.
- (12) Lighting. Permitted uses requiring conditional site plan approval shall comply with the requirements of Section 13-1-12.
- (13) Parking. The parking requirements listed in Section 13-1-51(b) shall apply to this district.
- (14) Loading. No loading shall be allowed in between any building and any street right-of-way. The loading requirements stated in Section 13-1-50 shall apply to this district.
- (g) **NUISANCE CONTROL.** No operation, process, manufacturing, or building shall produce or create excessive noise, light, odor, smoke, vibration, heat, glare, dust, gas, electronic interference, toxic matter, industrial waste, or other external nuisance.
- (h) **SIGNS.** Refer to Article F.

#### **SEC. 13-1-30 C-2 CENTRAL BUSINESS DISTRICT.**

- (a) **INTENT.** The purpose of this district is to provide a centrally located, pedestrian-oriented business district with a wide range of retail and commercial service and product establishments. It is also intended to accommodate the development of mixed land uses that will allow the association of commercial and residential uses in the same zoning district.
- (b) **PERMITTED USES.**
  - (1) Administrative, management, and support services.
  - (2) Arts, entertainment, recreation and sport facilities and services, indoor only.
  - (3) Construction services and contractors offices.
  - (4) Day care facilities.
  - (5) Educational services and schools serving thirty (30) students or less at any one

## Variance Decision Form

### FINDINGS OF FACT

Variance – The variance (does/does not) meet all three of the following tests:

- A. The hardship (is/is not) due to physical limitations of the property rather than the circumstances of the appellant because

---

---

- B. The variance (will/will not) harm the public interest because

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---

- C. Unnecessary hardship

- For a dimensional variance, unnecessary hardship exists when compliance would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. Whether this standard is met depends upon a consideration of the purpose of the zoning restriction in question, its effect on the property, and the effect of a variance on the neighborhood and the larger public interest.
- For a use variance, unnecessary hardship exists only if there is no reasonable use of the property without the variance.

Unnecessary hardship (is/is not) present because

---

---

---

### ORDER AND DETERMINATION

On the basis of the above findings of fact, conclusions of law and the record in this matter the board orders:

Variance/Conditional Use – The requested (variance/conditional use) is (denied/granted/granted-in-part) subject to the following conditions/mitigation:

1. 

---
2. 

---
3. 

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4. 

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5. 

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