

**NOTICE OF MEETING
VILLAGE OF FOX POINT
SEX OFFENDER RESIDENCE BOARD**

SCHWEMER HALL - MUNICIPAL BLDG.
7200 N. SANTA MONICA BLVD.
FOX POINT, WISCONSIN

MONDAY
FEBRUARY 13, 2023
1:00 P.M.

Zoom Participant Information

<https://us02web.zoom.us/j/81890567657>

Meeting ID: 818 9056 7657

Dial: (312) 626-6799

AGENDA

- 1. Roll Call**
- 2. Selection of Acting Chair**
- 3. Sex Offender Residence Board Education.** The Village Attorney will present training on the duties and responsibilities of the Board.
- 4. Adjournment**

PLEASE NOTE: Upon reasonable notice, efforts will be made to accommodate the needs of disabled individuals through sign language interpreters or other auxiliary aids. For additional information or to request these services, contact the Village Clerk at (414) 351-8900. It is possible that members of, and possibly a quorum of members of, other governmental bodies of the municipality may be in attendance at the above-stated meeting to gather information; no action will be taken by any governmental body at the above-stated meeting other than the governmental body specifically referred to above in this notice.

Municipal **LAW**
& L I T I G A T I O N G R O U P

DALE W. ARENZ – 1935-2022
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JOHN P. MACY
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Village of Fox Point
Sex Offender Residence Appeal Manual

Prepared by Attorney Eric J. Larson
Municipal Law & Litigation Group, S.C.
February 2, 2023

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Note: The issues described in this outline are based upon State laws, Village of Fox Point ordinances and other legal sources. Such laws are often modified from time to time. As issues arise, it will be important to ensure that this outline continues to describe the laws then in effect. The applicable laws will apply and will control.

SECTION 1: Introduction.

This manual is intended to serve as a guide to the members of the Village of Fox Point Sex Offender Residence Board (“Residence Board”) to describe general roles and responsibilities. In general, the Residence Board will have the obligation of administering the exemption process described in Section 670-43(f) of the Village of Fox Point Village Code. The members of the Residence Board shall make a determination based upon evidence presented, applying the standards of the Ordinance to the facts received at the hearing. This manual should not be interpreted as modifying any standard shown in the Village Ordinance or in applicable laws, but is only intended to serve as a guide and further research may be required as issues are presented case by case.

SECTION 2: Role of the Residence Board.

The Village Ordinance describes the role of the Residence Board in hearing petitions for exemption to the Sex Offender Residency Restrictions ordinance (Village Code Chapter 670, Article X). A copy of the Ordinance is attached as Exhibit A. Particular duties include the following:

- A. The Residence Board may approve the exemption of residency restrictions as they apply to sex offenders under Section 670-43 of the Village Code, upon appeal.

- B. The Residence Board will be referred the petition from the Village Clerk and shall hold a hearing on the petition. The Residence Board may review any pertinent information, and accept oral or written statements from any person. The Residence Board’s decision shall be based on factors related to the Village’s interest in promoting, protecting, and improving the health, safety, and welfare of the community. The Residence Board must consider factors which shall include, but are not limited to:
 1. Nature of the offense that resulted in sex offender status.
 2. Date of offense.
 3. Age at time of offense.
 4. Recommendation of probation or parole officer.
 5. Recommendation of Police Department.
 6. Recommendation of any treating practitioner.
 7. Counseling, treatment and rehabilitation status of sex offender.
 8. Remorse of sex offender.
 9. Duration of time since sex offender's incarceration.
 10. Support network of sex offender.
 11. Relationship of sex offender and victim(s).
 12. Presence or use of force in offense(s).
 13. Adherence to terms of probation or parole.
 14. Proposals for safety assurances of sex offender.
 15. Conditions to be placed on any exception from the requirements of this article.

- C. The Residence Board shall make its decision by majority vote whether to grant or deny the exemption. The decision may be unconditional or limited to a certain address or time, or subject to other reasonable conditions as decided by the Residence Board.
- D. The Residence Board's decision shall be final for purposes of appeal. A written copy of the decision must be provided to the sex offender.

SECTION 3: Quasi-Judicial Capacity: Ethical Considerations.

The members of this Residence Board ("Reviewer(s)") serve as judges, not as legislators. The decisions are not based on policy, but based upon facts presented and standards applied. Service in this quasi-judicial capacity requires all of the following:

- A. The Reviewers must be impartial.
- B. If a Reviewer is not impartial, or cannot be fair to both sides, or has expressed opinions publicly in favor of one side in the issue, the member should recuse himself or herself.
- C. Reviewers should not participate in communication with others outside of the public hearing process. Like a court procedure, the information that informs the decision-making should all be received at the hearing, so that all parties have an opportunity to respond to the relevant information.
- D. There must be an opportunity for the interested parties to be heard.

Attached as Exhibit B is an outline with further explanation of this quasi-judicial role, which comes from a Zoning Board Handbook (2nd Edition, Marcum and Roberts, 2006). While that document was prepared for Zoning Boards, it applies equally to the Reviewers, because both serve in a quasi-judicial capacity.

Failure to follow these ethical and procedural guidelines would subject the municipality to potential claims, and would subject the decisions made in the matter to possibly being overturned on appeal. Attached as Exhibit C is a landmark case on this issue of bias of decision makers entitled, *Marris v. City of Cedarburg*. In that case one of the decision makers made certain statements reflecting bias ("Let's get her [Marris] on the Leona Helmsley rule"), which the Court found to violate the Applicant's rights to due process and fair play in the proceeding. The Court overturned the decision of the Board in that case. Another case attached as Exhibit D, is *Keen v. Dane County Board of Supervisors*, in which the Court of Appeals overturned the decision of the Zoning Board due to what it found to be an impermissibly high risk of bias of the decision makers. The Court found that one of the members of the Zoning Board had submitted a letter in favor of the Applicant prior to the decision being made, which it found created an impermissibly high risk of bias requiring reversal of the decision. These cases underscore that when you act in a quasi-judicial role, you must not only maintain neutrality on the issues before the case is heard, you must be careful in statements you make orally and in writing prior to the hearing to ensure that you do not say something that reflects bias one way or the other in the matter.

SECTION 4: Draft Documentation.

I am enclosing numerous documents that outline recommended procedures, recommended notice forms, recommended findings templates and the like, which may be used to facilitate your procedures. The attachments include the following:

- A. Sex Offender Appeal Form (Exhibit E).
- B. Clerk's Process Outline (Exhibit F).
- C. Sample Agenda (Exhibit G).
- D. Sample Findings (Decision) Form (Exhibit H).
- E. Sample Notice of Hearing (Exhibit I).
- F. Sample Letter to Applicant (Exhibit J).
- G. Affidavit of Posting (Exhibit K).
- H. Affidavit of Mailing (Exhibit L).

Exhibit A

Village of Fox Point, WI
Wednesday, January 25, 2023

Chapter 670. Offenses Against Public Peace, Safety and Welfare

Article X. Sex Offenders

[Amended 11-9-2010 by Ord. No. 2010-14; 12-14-2010 by Ord. No. 2010-19]

§ 670-41. Findings and intent.

[Amended 5-8-2018 by Ord. No. 2018-02]

- A. The Village Board finds that repeat sex offenders, sex offenders who use physical violence, and sex offenders who prey on children are sex predators who present an extreme threat to the public safety. Sex offenders are extremely likely to use physical violence and to repeat their offenses, and most sex offenders commit many offenses, have many more victims that are never reported, and are prosecuted for only a fraction of their crimes. This makes the cost of sex offenders' victimization to society at large, while incalculable, clearly exorbitant.
- B. It is the intent of this article to not impose a criminal penalty but instead to serve the Village's compelling interest to promote, protect, and improve the health, safety, and welfare of the citizens of the Village by creating areas around locations where children regularly congregate in concentrated numbers wherein certain sex offenders and sex predators are prohibited from loitering and residing. The Village Board has closely considered this issue and has made numerous findings and expressions of intent within the preamble to the ordinance which adopted these Code provisions, which is incorporated herein by reference.

§ 670-42. Definitions.

As used in this article, the following terms shall have the meanings indicated:

CHILD

A person under the age of 18 for purposes of this article.

CHILD DAY CARE

Any facility that provides care and supervision for compensation to four or more children for less than 24 hours a day where a license is required under § 48.65(1), Wis. Stats., for the operation of such facility.

DESIGNATED SEX OFFENDER

Any person who is required to register under § 301.45, Wis. Stats., for any sexual offense against a child and any person who is required to register under § 301.45, Wis. Stats., and who has been designated a Special Bulletin Notification (SBN) sex offender pursuant to § 301.46(2) and (2m), Wis. Stats. The term "designated sex offender" also includes any person subject to the sex crimes commitment provisions of § 975.06, Wis. Stats., and any person found not guilty by reason of disease or mental defect placed on lifetime supervision under § 971.17(1j), Wis. Stats.

[Amended 5-8-2018 by Ord. No. 2018-02]

GOLF COURSE

Any public or private golf course or range.

LIBRARY

Any library that is held open for use by the public where such library includes a collection of material specifically intended for use by children.

MINOR

A person under the age of 17.

PARK/CONSERVATION AREA

Any area held open for use by the public for active or passive leisure purposes, including but not limited to any park, parkway, recreation or open space area, beach, playground, conservation area, lake access point or recreational trail. "Park/conservation area" also means any private lake access point or private beach that owners of two or more lots or condominium units are entitled use, pursuant to a deed restriction, subdivision plat, condominium declaration, condominium plat, homeowners' association regulation or similar rights of common use.

PERMANENT RESIDENCE

A place where the person abides, lodges, or resides for 14 or more consecutive days.

PUBLIC/PRIVATE SCHOOL

Any public or private elementary or secondary school.

SPECIALTY SCHOOL

Any specialized school for children, including but not limited to a gymnastics academy, dance academy, or music school.

SWIMMING POOL

Any swimming pool, wading pool, or aquatic facility held open for use by the public.

TEMPORARY RESIDENCE

A place where the person abides, lodges, or resides for a period of 14 or more days in the aggregate during any calendar year and which is not the person's permanent address or a place where the person routinely abides, lodges, or resides for a period of four or more consecutive or nonconsecutive days in any month and which is not the person's permanent address.

§ 670-43. Prohibited location of residence for designated sex offenders; exemptions; Residence Board.

[Amended 5-8-2018 by Ord. No. 2018-02]

- A. Child safety zones. No designated sex offender shall establish a permanent residence or temporary residence on property that is within 1,000 feet of real property consisting of any of the following:
- (1) Public/private school.
 - (2) Specialty school.
 - (3) Child day care.
 - (4) Library.
 - (5) Park/conservation area.
 - (6) Swimming pool.
 - (7) Golf course.

- (8) Movie theater.
- B. Original domicile restriction. In addition to and not to the exclusion or prejudice of the foregoing, no designated sex offender shall be permitted to reside in the Village of Fox Point unless the person was domiciled in the Village of Fox Point at the time of the offense resulting in the person's most recent conviction of a designated sex offender crime.
- C. Distances for purposes of this section shall be measured in a straight line from the closest boundary line of the real property supporting the residence of a person to the closest real property boundary line of the applicable above-enumerated use(s). A map/list depicting the above-enumerated uses and the resulting residency restriction distances, as amended from time to time, is on file with the Village Clerk/Treasurer and available for public inspection pursuant to § 670-46 of this article.
- D. Exception. A designated sex offender residing within a prohibited area as described in Subsection **A** or **B** does not commit a violation of this section if any of the following apply:
- (1) The person established the permanent residence or temporary residence and reported and registered the residence pursuant to § 301.45, Wis. Stats., before the effective date of this article.
 - (2) The person is a minor and is not required to register under § 301.45 or 301.46, Wis. Stats.
 - (3) The applicable use described in Subsection **A** was opened after the person established the permanent residence or temporary residence and reported and registered the residence pursuant to § 301.45, Wis. Stats.
 - (4) An exception has been granted by the Residence Board.
- E. Exception for placements under Chapter 980 of the Wisconsin Statutes. To the extent required by § 980.135, Wis. Stats., and notwithstanding the foregoing provisions of this chapter, the Village of Fox Point hereby exempts and may not enforce any portion thereof that restricts or prohibits a sex offender from residing at a certain location or that restricts or prohibits a person from providing housing to a sex offender against an individual who is released under § 980.08, Wis. Stats., or against a person who provides housing to such individual, so long as the individual is subject to supervised release under Ch. 980, Wis. Stats., the individual is residing where he or she is ordered to reside under § 980.08, Wis. Stats., and the individual is in compliances with all court orders issued under Ch. 980, Wis. Stats.
- F. Petition for exemption.
- (1) A designated offender may seek an exemption from this article by petitioning to the Sex Offender Residence Board ("Residence Board").
 - (2) The Residence Board shall consist of three citizens residing in the Village. Members shall be selected by the Village Board. Members shall serve for a term of five years and shall serve no more than two consecutive terms. The terms for the initial members of the Residence Board shall be staggered with one member serving one year, a second serving three years and the third serving five years.
 - (3) The Residence Board shall approve an official petition form. The sex offender seeking an exemption must complete the petition and submit it to the Village Clerk who shall forward it to the Residence Board. The Residence Board shall hold a hearing on each petition, during which the Residence Board may review any pertinent information and accept oral or written statements from any person. The Residence Board shall base its decision on factors related to the Village's interest in promoting, protecting, and improving the health, safety and welfare of the community. Applicable factors for the Residence Board's consideration shall include, but are not limited to:
 - (a) Nature of the offense that resulted in sex offender status.

- (b) Date of offense.
 - (c) Age at time of offense.
 - (d) Recommendation of probation or parole officer.
 - (e) Recommendation of Police Department.
 - (f) Recommendation of any treating practitioner.
 - (g) Counseling, treatment and rehabilitation status of sex offender.
 - (h) Remorse of sex offender.
 - (i) Duration of time since sex offender's incarceration.
 - (j) Support network of sex offender.
 - (k) Relationship of sex offender and victim(s).
 - (l) Presence or use of force in offense(s).
 - (m) Adherence to terms of probation or parole.
 - (n) Proposals for safety assurances of sex offender.
 - (o) Conditions to be placed on any exception from the requirements of this article.
- (4) The Residence Board shall decide by majority vote whether to grant or deny an exemption. An exemption may be unconditional or limited to a certain address or time, or subject to other reasonable conditions. The Residence Board's decision shall be final for purposes of appeal. A written copy of the decision shall be provided to the sex offender.

§ 670-44. Loitering by designated sex offender prohibited.

- A. It shall be unlawful for any designated sex offender in the Village of Fox Point to loiter or prowl in any child safety zone identified on the map required by § 670-46 if any of the foregoing is done in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of the persons or property in the vicinity. Among the circumstances that may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a law enforcement officer, refuses to identify himself or herself, or manifestly endeavors to conceal himself or herself or any object. Unless flight by the actor or other circumstances make it impractical, a law enforcement officer shall, prior to any arrest for an offense under this section, afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him or her to identify himself or herself or explain his or her presence and conduct at the aforementioned locations. No person shall be convicted of an offense under this section if the law enforcement officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the law enforcement officer at the time, would have dispelled the alarm.
- B. The prohibitions set forth in Subsection **A** above shall not apply where the designated sex offender is a minor and is accompanied by one or both of his or her parents, guardian, or other adult person having his or her care.

§ 670-45. Other prohibited activity.

It is unlawful for any designated sex offender to participate in a holiday event in the Village of Fox Point involving one or more children by means of distributing candy or other items to such child or children on Halloween; wearing a Santa Claus costume on, or during any of the 30 days preceding, Christmas;

wearing an Easter Bunny costume on, or during any of the 30 days preceding, Easter; or by engaging in other similar type(s) of activity that may, under the circumstances then present, tend to entice a child to have contact with a designated sex offender. Holiday events in which the designated sex offender is the parent or legal guardian of the child or children involved, and no other children are present, are exempt from this section.

§ 670-46. Child safety zones map/list.

[Amended 5-8-2018 by Ord. No. 2018-02]

The Village Clerk/Treasurer shall maintain an official map/list showing locations identified in § 670-43A of this article. The Village Clerk/Treasurer shall cause such map/list to be updated at least annually to reflect any changes in the location of prohibited zones. These shall be designated on the map/list as "child safety zones." The map/list is on file with the Village Clerk/Treasurer and available for public inspection. In the event of a conflict, the written terms of this article shall control.

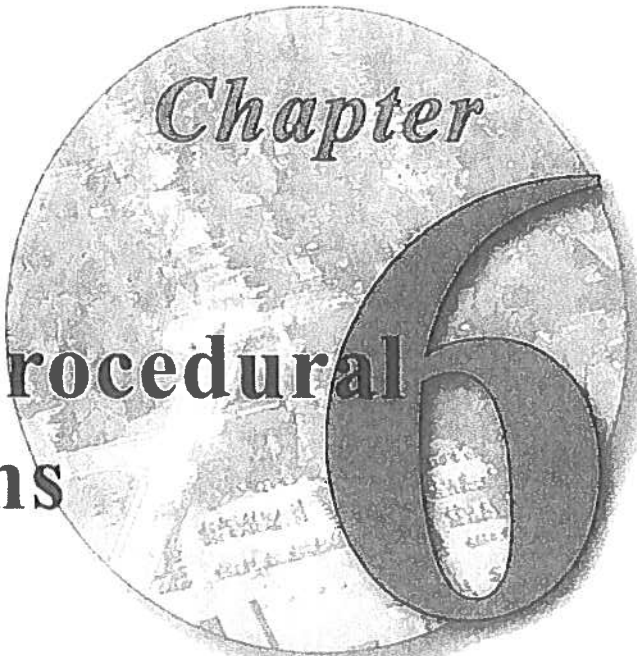
§ 670-47. Designated sex offenders prohibited in child safety zones.

- A. It is unlawful for any designated sex offender to enter or be present upon any real property upon which there exists any facility used for or which supports a use of:
- (1) Public/private school.
 - (2) Specialty school.
 - (3) Child day care.
 - (4) Library.
 - (5) Park/conservation area.
 - (6) Swimming pool.
 - (7) Golf course.
 - (8) Movie theater.
- B. Exception. A designated sex offender present within a prohibited area as described in Subsection A does not commit a violation if any of the following apply:
- (1) The property supporting an enumerated use under Subsection A also supports a church, synagogue, mosque, temple or other house of religious worship, subject to the following conditions:
 - (a) Entrance and presence upon the property occurs only during hours of worship or other religious program/service as posted to the public;
 - (b) Written advance notice is made from the designated sex offender to an individual in charge of the house of worship, and approval from an individual in charge of the house of worship as designated by the house of worship is made in return, of the attendance by the designated sex offender;
 - (c) The designated sex offender shall not participate in any religious education programs which include individuals under the age of 18; and
 - (d) The attendance is authorized by the designated sex offender's conditions of supervision, if on parole.

- (2) The property supporting an enumerated use under Subsection **A** also supports a use lawfully attended by a designated sex offender's natural or adopted child(ren), which child's use reasonably requires the attendance of the designated sex offender as the child's parent upon the property, subject to the following conditions:
 - (a) Entrance and presence upon the property occurs only during hours of activity related to the use as posted to the public;
 - (b) Written advance notice is made from the designated sex offender to an individual in charge of the use upon the property, and approval from an individual in charge of the use upon the property as designated by the owner of the use upon the property is made in return, of the attendance by the designated sex offender; and
 - (c) The attendance is authorized by the designated sex offender's conditions of supervision, if on parole.
- (3) The property supporting an enumerated use under Subsection **A** also supports a polling location in a local, state or federal election, subject to the following conditions:
 - (a) The designated sex offender is eligible to vote;
 - (b) The designated polling place for the designated sex offender is an enumerated use;
 - (c) The designated sex offender enters the polling place property and proceeds to cast a ballot with whatever usual and customary assistance is provided to any member of the electorate, and the designated sex offender vacates the property immediately after voting; and
 - (d) The attendance is authorized by the designated sex offender's conditions of supervision, if on parole.
- (4) The property supporting an enumerated use under Subsection **A** also supports an elementary or secondary school lawfully attended by the designated sex offender as a student, under which circumstances the designated sex offender who is a student may enter upon that property supporting the school at which the designated sex offender is enrolled, as is reasonably required for the educational purposes of the school, provided that the attendance is authorized by the designated sex offender's conditions of supervision, if on parole.

§ 670-48. Violations and penalties.

- A. Any violation of this article shall be subject to the penalties and remedies as set forth in § 1-4 of the Village Code. Each day of each violation shall constitute a separate offense.
- B. Violation of this article shall constitute a public nuisance which, in addition to monetary forfeitures, shall be subject to action by the Village to abate and enjoin such nuisance.



Ethical and Procedural Considerations

Zoning Boards Must Follow the Rules of Due Process

Due process is a basic concept of fairness in legal proceedings that has its roots in the decision making processes used by the Greeks and Romans⁶⁰ and is reiterated in the constitutions of the United States and Wisconsin.⁶¹ These constitutional provisions guarantee two distinct forms of due process: substantive and procedural. Substantive due process is concerned with the reasonableness of government action and therefore, is focused on assessing the rationality of a government decision. Procedural due process, the focus of this chapter, is concerned with the means or process employed to make the government decision in question.⁶²

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

⁶⁰ Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities. pp. 416-427. Available: <http://www.lwm-info.org/legal/2005/12december/comment.html>

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

⁶² Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities. pp. 416-427. Available: <http://www.lwm-info.org/legal/2005/12december/comment.html>

⁶³ *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372 (U.S. 1915) cited by Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities.

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

Because zoning board decisions often affect specific individuals, zoning boards must follow the rules of due process to ensure that all parties involved in a hearing before the board are treated fairly.⁶⁵ Procedural rules of due process include:

- Providing adequate notice of a pending decision to affected persons,
- Ensuring that each decision maker is impartial and unbiased,
- Avoiding or disclosing any ex parte contacts,
- Providing an opportunity to present at hearings, and
- Basing decisions on clear, pre-existing standards and factual evidence in a record that is available for review.⁶⁶

Zoning Board Members Must Be Impartial

Wisconsin case law requires that zoning board members be impartial, that is, free of bias and conflicts of interest. Zoning decisions are particularly vulnerable to concerns about impartiality because decision-makers are local residents with numerous social and economic ties to their communities. However, it is important to point out that as a zoning board member your opinions about specific local regulations or zoning in general do not necessarily disqualify you from making decisions.⁶⁷ A personal opinion or stance, such as pro-growth or anti-growth, should not influence your decision. Bias related to applicants' ethnicity, gender, or religion is also inappropriate. Reviewing your voting record to determine whether any patterns are apparent may be an eye-opening experience.⁶⁸

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

⁶⁴ *Londoner v. Denver*, 210 U.S. 373, 28 S. Ct. 708, 52 L. Ed. 1103 (U.S. 1908) cited by Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities.

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

⁶⁶ Blaesser, Brian W. et al. *Land Use and the Constitution: Principles for Planning Practice*. 1989. Planners Press. pp.42-43; Hunter, Ted and Jim Driscoll. "The Planning Commissioner as Judge." *The Commissioner*, Summer 1996; *Old Tuckaway Assocs. Ltd. Partnership v. City of Greenfield*, 180 Wis.2d 254, 509 N.W.2d 323 (Ct. App. 1993); Stephens, Otis and John Scheb. *American Constitutional Law*, 3ed. 2003. Belmont, CA: Wadsworth.

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

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

- A zoning board member made negative comments about the applicant and her request, referring to it as a “loophole in need of closing.” The court determined the applicant was deprived of a fair hearing and required a rehearing without the participation of the member.⁶⁹
- A county zoning committee member, who was also a town board chair, co-signed a letter as town board chair expressing his positive opinion of a gravel company. Within a few months, the gravel company applied to the county for a conditional use permit and included the town chair’s letter as part of their application. When the town board chair/county zoning committee member voted to grant this conditional use permit, the court determined he was an advocate who had demonstrated an impermissibly high risk of bias.⁷⁰

If You Are Not Impartial, Recuse Yourself

For each request before the zoning board, individual zoning board members must decide for themselves whether their relationships or interests could bias their judgment or give an appearance of bias causing them to be or appear partial. We recommend that zoning board members use the “sniff test” when determining whether they are biased or impartial: If it would smell fishy for you to vote on the matter at hand, **recuse** yourself. Another way to determine whether you are impartial and appear impartial is to think about whether you would be comfortable if the headline in your local newspaper described your background, your personal and professional relationships, and your participation or vote on the matter at hand. If you are unsure, you should discuss the matter with the zoning board’s legal counsel.

If, as a zoning board member, you do not feel you can be and appear impartial in a given decision, the best approach is to recuse yourself. To recuse yourself, do not vote and do not have any discussion or involvement in the matter in question. We recommend that you physically remove yourself from the table where the zoning board is seated while the matter is discussed to make it clear you are not serving as a member of the zoning board. The meeting minutes should reflect that you have recused yourself. If you have recused yourself on a matter, you may offer testimony

Recuse - to disqualify because of prejudice or conflict of interest on a matter.

If you recuse yourself:

- Do not vote AND
- Do not discuss the topic with the zoning board.

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

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

Ex Parte - without the other party being present.

as a member of the public.

Avoid Ex Parte Communication

Zoning board members should not have conversations or receive correspondence regarding a variance, appeal or conditional use that is before the board or which may come before the board except during a noticed meeting or hearing. Such contacts outside a meeting or hearing are known as ex parte communication.

The reason for this requirement is fairly simple: an applicant who comes before the zoning board is entitled to know about and have an opportunity to rebut any information that decision makers rely on in making the decision. Discussion outside the meeting regarding procedural matters, such as scheduling a meeting or explaining how to file an application, are permissible. Ex parte communication is not a concern for legislative (ordinance or rule adoption) or ministerial matters (simple permits).

We recommend the following steps regarding ex parte communication:

- First, avoid ex parte communication by suggesting that members of the public who approach you outside of a meeting present information in open hearings or by written comment to the decision-making body.
- Second, if you are not able to avoid ex parte communication, disclose the communication at the hearing and make the information part of the record so that it can be considered in decision-making. The individual zoning board members will then determine its credibility and weight in deciding their vote on the matter.

Provide an Opportunity to Present at Hearings

Typically the zoning board chair invites the applicant to present at a hearing, followed by all interested parties. A zoning board that set a 5-minute time limit per presenter and allowed additional time for the applicant to describe the proposal complied with due process.⁷¹ To ensure that all interested parties have a chance to provide testimony, we recommend that after everyone interested in presenting appears to have done so, the chair ask if there is anyone

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

else who wants to testify about the proposal at hand.

Avoid Statutory Conflicts of Interest

In addition to due process and impartiality, zoning board members are also subject to specific conflict of interest provisions found in Wisconsin Statutes:

- **Personal financial gain** - State laws⁷² prohibit public officials from taking official actions that substantially affect a matter in which the official, an immediate family member, or an organization with which the official is associated has a substantial financial interest. Similarly, an official may not use public office for financial gain or to gain anything of substantial value for the official, an immediate family member, or an organization with which the official is associated. This statute is enforced by local district attorneys and the State Attorney General⁷³ with forfeitures up to \$1000 per violation.⁷⁴
- **Misconduct in office** - State law prohibits an officer from intentionally performing, or failing to perform, certain acts including actions the officer knows are in excess of their lawful authority or are forbidden by law in their official capacity.⁷⁵
- **Private interests in public contracts** - State laws also prohibit certain actions when an official bids for a contract, or has authority to exercise duties under a contract, if the official has a private financial interest in the contract, subject to a \$15,000 per year exception for total receipts and disbursements under the contracts.⁷⁶ In certain cases, recusal will not prevent a violation of the law,⁷⁷ and the official may have to choose between doing business with the governmental unit and serving as an officer. This may be an issue when the zoning board decides conditional use permits or retains consulting services in which members have an interest.

In short:

- Don't accept items or services offered to you because of your position.
- Don't participate in decisions which affect you financially.

⁷² Wis. Stat. § 19.59(1)

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

⁷⁴ Wis. Stat. § 19.59 (7)(a)

⁷⁵ Wis. Stat. § 946.12; *State v. Tronca*, 84 Wis.2d 68, 267 N.W.2d 216 (1978) states when 946.12(3) was created in 1953 the notes of the Judiciary Committee on the Criminal Code carried the following comment: "quasi-judicial functions call for the exercise of judgment, and if the officer acts honestly although with not the best of judgment, he is not guilty."

⁷⁶ Wis. Stat. § 946.13

⁷⁷ Wis. Stat. § 946.13(1)(a)

Marris v. City of Cedarburg, 176 Wis.2d 14 (1993)

498 N.W.2d 842

KeyCite Yellow Flag - Negative Treatment
 Declined to Extend by Sills v. Walworth County Land Management
 Committee, Wis App., April 3, 2002

176 Wis.2d 14
 Supreme Court of Wisconsin.

Jean E. MARRIS, Plaintiff-Appellant-Petitioner,
 v.
 CITY OF CEDARBURG, a municipal corporation,
 and the Board of Zoning Appeals for the City
 of Cedarburg, Respondents-Respondents.

No. 91-1160.

Oral Argument March 2, 1993.

Decided May 11, 1993.

City board of zoning appeals ruled that property had lost its legal nonconforming use status because of owner's structural repairs or alterations in excess of 50% of property's current assessed value. Property owner sought review. The Circuit Court, Ozaukee County, Warren A. Grady, J., affirmed. Property owner appealed. The Court of Appeals, 168 Wis.2d 358, 485 N.W.2d 838, affirmed. Property owner appealed. The Supreme Court, Shirley S. Abrahamson, J., held that: (1) comments of chairperson of board referring to property owner's legal position as "loophole" in need of "closing" and suggestion that board members and assistant city attorney get property owner "under the Leona Helmsley rule" created impermissibly high risk of bias requiring chairperson to recuse himself, and (2) remand was required to board of zoning appeals for application of guidelines set forth in court's opinion to determine whether property owner's improvements constituted structural repairs or alterations so that property lost its nonconforming use status.

Court of Appeals reversed; case remanded to circuit court.

Attorneys and Law Firms

****844 *18** For the petitioner-appellant-petitioner there were briefs by Leslie F. Kramer, Frederick T. Rikkers and Tomlinson, Gillman & Rikkers, S.C., Madison, and oral argument by Frederick T. Rikkers.

For the respondents-respondents there was a brief by Lowell K. Levy, Dennis H. Milbrath and ***19** Levy & Levy, S.C., Cedarburg, and oral argument by Dennis H. Milbrath.

Amicus curiae brief was filed by Curtis A. Witynski, Madison, for the League of Wisconsin Municipalities.

Opinion

SHIRLEY S. ABRAHAMSON, Justice.

This is a review of an unpublished decision of the court of appeals filed March 11, 1992, 168 Wis.2d 358, 485 N.W.2d 838, affirming a judgment of the circuit court for Ozaukee County, Warren A. Grady, Circuit Judge. The circuit court affirmed a decision of the Board of Zoning Appeals for the ****845** City of Cedarburg (the Board) determining that Jean E. Marris's property had lost its legal nonconforming use status¹ because total lifetime structural repairs or alterations to the property, as defined by the city ordinance, exceeded 50% of the property's current assessed value. The court of appeals also rejected Marris's argument that she was deprived of a fair hearing before the Board when the chairperson of the Board failed to recuse himself.

The case presents two issues: (1) Did the chairperson of the Board prejudice the matter and create an impermissibly high risk of bias so that his refusal to recuse himself deprived Marris of a fair hearing? (2) What improvements to Marris's property constitute "structural repairs or alterations" under the city of Cedarburg ordinance which limits the total lifetime ***20** structural repairs or alterations to not more than 50% of the property's assessed value?²

We conclude that Marris was denied her right to a fair hearing. Statements made by the Board's chairperson indicated that he had prejudged Marris's case and created an impermissibly high risk of bias. Under these circumstances he should have recused himself in order that Marris have a fair hearing. Accordingly, we reverse the court of appeals' decision. We remand the matter to the circuit court with instructions to remand it to the Board to determine, consistent with our interpretation of the city of Cedarburg zoning code, whether the total lifetime structural repairs or alterations to Marris's property exceed 50% of the property's current assessed value.

*21 I.

The material facts are not in dispute for purposes of this appeal. Marris owns real property located in the city of Cedarburg, Ozaukee County, Wisconsin. The property is zoned for residential use. Two buildings exist on the property, a residence located on the front portion and a second building on the rear portion. The rear building is the subject of this case.

When Marris purchased the property in 1976, her offer to purchase was contingent upon obtaining approval from the Cedarburg Plan Commission to use the rear building as office space for her construction and real estate businesses.³ After Marris submitted plans to the Commission, it granted her petition for a substitute legal nonconforming use. Marris took possession of the property in 1977. Over the next two years, she gradually converted the building to office use.

In 1988, Marris began converting the rear building into office space for three rather than two businesses. She did not seek or obtain building permits for this project. Alerted by a neighbor's complaint, the city building inspector examined the rear building. Because no building permits had been issued and because the effect of the construction on the structure's status **846 as a legal nonconforming use was unclear, the building inspector issued a stop work order. The building inspector advised Marris that any use of the building other than that permitted by a proper continuation *22 of the legal nonconforming use would violate the zoning code. Consequently, Marris sought approval from the city Plan Commission for the proposed change in the use of the building.

On March 7, 1988, the Plan Commission recommended that the Board conduct a public hearing and asked the Board for an interpretation of the nonconforming use provisions of the county zoning ordinance at issue in this case. The Board conducted public hearings on April 12, 1988, and May 3, 1988, and conducted an on-site inspection of the building in question. At the May 3, 1988, hearing, the Board decided the property had lost its legal nonconforming use status. This oral ruling was subsequently incorporated in a written decision dated June 17, 1988. Marris sought judicial review and, in a

decision dated May 31, 1989, the Ozaukee County circuit court held that the Board had erred and remanded the case for further findings consistent with its opinion.

After the case was remanded, the Board held a closed meeting on October 3, 1989, during which the assistant city attorney presented a status report on Marris's case. At the close of the meeting, the Board scheduled a public hearing for December 5, 1989, to determine whether to confirm the stop work order and whether to retain the legal nonconforming use status of Marris's building.

By letter dated November 17, 1989, Marris's attorney requested Board chairperson John Kuerschner to recuse himself from the December 5, 1989, hearing. The request was based on comments Kuerschner had made at the Board's closed meeting on October 3, 1989. At the December 5, 1989, hearing, Marris's attorney renewed his request that the chairperson recuse himself, *23 but Kuerschner refused to do so, stating that he was impartial.

The Board reviewed the building inspector's videotape of the property at the hearing on December 5 and heard Marris's testimony. The hearing was adjourned until December 14, 1989, when the Board conducted an on-site inspection of the property. On February 20, 1990, the hearing was reconvened and the Board heard additional testimony. Both parties filed briefs in lieu of argument.

The Board rendered its decision at a public hearing on March 27, 1990, and filed its written decision on May 4, 1990. The Board concluded that the lifetime structural repairs or alterations to Marris's property exceeded 50% of the current assessed value and that the property had therefore lost its legal nonconforming use status. For the second time, Marris petitioned the Ozaukee County circuit court for review.

In a written decision dated March 28, 1991, the Ozaukee County circuit court affirmed the Board's determination that Marris's property had lost its legal nonconforming use status because lifetime structural repairs or alterations to the property exceeded 50% of the property's current assessed value. Marris appealed to the court of appeals and then sought review in this court.

Further facts will be set forth in the discussion of each issue.

II.

[1] [2] Since no statutory provision is made for judicial review of a local zoning board's decision, our review of the Board's action in this case is by way of certiorari.

*24 *State ex rel. Johnson v. Cady*, 50 Wis.2d 540, 549-50, 185 N.W.2d 306 (1971). The scope of our review by certiorari is limited to determining the following: (1) Whether the Board "kept within its jurisdiction"; (2) whether the Board "acted according to law"; (3) whether the Board's action "was arbitrary, oppressive, or unreasonable and represented its will and not its judgement"; and (4) whether the evidence was such that the Board "might reasonably make the order or determination in question."⁴ The **847 phrase "acted according to law" has been interpreted as including "the common-law concepts of due process and fair play."⁵

[3] The parties agree that Marris was entitled to a fair and impartial hearing under these common law concepts of due process and fair play, which include the right to have matters decided by an impartial board.⁶ *25 The parties further agree that due process and fair play can be violated "when there is bias or unfairness in fact[, or when] ... the risk of bias is impermissibly high."⁷ The parties disagree whether Marris received a fair and impartial hearing.

[4] In determining whether Marris was afforded due process and fair play, we recognize that zoning decisions implicate important private and public interests; they significantly affect individual property ownership rights as well as community interests in the use and enjoyment of land. Furthermore, zoning decisions are especially vulnerable to problems of bias and conflicts of interest because of the localized nature of the decisions, the fact that members of zoning boards are drawn from the immediate geographical area, and the adjudicative, legislative and political nature of the zoning process.⁸ Since biases may distort judgment, impartial decision-makers are needed to ensure both *26 sound fact-finding and rational decision-making as well as to ensure public confidence in the decision-making process.⁹

[5] Nevertheless, a board member's opinions on land use and preferences regarding land development should not necessarily disqualify the member from hearing a zoning matter. Since they are purposefully selected from the

local area and reflect community values and preferences regarding land use,¹⁰ zoning board members will be familiar with local conditions and the people of the community and can be expected to have opinions about local zoning issues.

The zoning decision in this case requires that the Board examine a specific piece of land and the activities of a particular property owner. It must engage in fact-finding and then make a decision based on the application of those facts to the ordinance. In this case, where established criteria direct the Board's fact-finding and decision-making, Marris should expect that a decision will be made on the basis of the facts and the law. If a Board member prejudges the facts or the application of the law, then Marris's right to an impartial decision-maker is violated.

Determining whether a board member has prejudged a matter requires an examination of the facts of the individual case. In this case we look to the statements **848 made by chairperson Kuerschner. A clear statement "suggesting that a decision has already been reached, or prejudged, should suffice to invalidate a decision."¹¹

*27 Marris asserts that the chairperson of the Board prejudged her case before the December 5 public hearing and before the Board reached a final decision. Accordingly, she contends that she did not have a fair and impartial hearing. To support her position Marris points to three comments made by the chairperson.¹² First, the chairperson referred to Marris's legal position as a "loophole" in need of "closing." Marris claims that this reference indicates the chairperson's intention to terminate her legal nonconforming use status rather than to apply the ordinance objectively and impartially to the facts of her case. Second, the chairperson suggested to Board members and the assistant city attorney that they should try to "get her [Marris] on the Leona Helmsley rule." Marris argues *28 that this suggestion illustrates the chairperson's personal bias against Marris and her claim. Third, the chairperson questioned how the Board, in analyzing expenditures, could know whether Marris "bought a door for that building or for another building she built." Marris asserts that this question indicates that the chairperson had prejudged her credibility. Marris asserts that because the totality of the comments indicate

prejudgment, the chairperson's refusal to recuse himself denied her a fair hearing.

The Board explains that the chairperson's comments, when taken in context, do not demonstrate prejudice of the matter. While the Board acknowledges that "loopholes" was an "unfortunate" word choice, it claims that the chairperson was referring to questions about the zoning ordinance and was merely attempting to clarify the findings required by the circuit court.¹³ The Board asserts that, regardless of the "loopholes" comment, it engaged in objective fact-finding. In support of its contention, the Board's brief points out that, as a result of the October 3, 1989, discussion, it hired experts to determine when Marris made the improvements and their cost. According to the Board, it needed this information to comply with the ordinance and the circuit court's directive.

The Board explains the chairperson's statement about "get[ting Marris] on the Leona Helmsley rule" by stating that Helmsley's extensive remodeling expenditures were in the news at the same time that the Board was grappling with Marris's remodeling expenditures. The Board's brief argues that these references to Leona *29 Helmsley, while they may seem inappropriate, cannot be understood when taken out of this context three years after the fact. The brief asserts that these references do not mention Helmsley's legal problems, do not compare Marris with a convicted felon, and do not show actual bias.¹⁴

Finally, the Board argues that the chairperson's question about the documentation **849 of Marris's renovation expenses was proper, since Marris's records concerning the expenses were incomplete at the time the comment was made.

We recognize that it may be difficult, several years after the fact, to differentiate a predisposition from an ill-advised choice of words and from a statement showing prejudice. Nevertheless we conclude that the chairperson's comments about Marris created a situation in which the risk of bias was impermissibly high.

We consider Kuerschner's reference to Marris's legal position as a "loophole" in need of "closing" more than an "unfortunate choice of words" when viewed in the context of the Leona Helmsley comment. Taken together, these statements overcome the presumption *30 of honesty and integrity that would ordinarily be applied to this case.

Guthrie v. WERC, 111 Wis.2d 447, 455, 331 N.W.2d 331 (1983); *State ex. rel. Northwestern Dev. Corp. v. Gehrz*, 230 Wis. 412, 421-22, 283 N.W. 827 (1939).

While it is true that Leona Helmsley's remodeling expenditures were in the news during the time the Board decided Marris's case, that fact alone does not explain why the chairperson would suggest to Board members and the assistant city attorney that they "get her [Marris] under the Leona Helmsley rule." The phrase "get her" indicates prejudice and a desire to prosecute. Impartial decision-makers do not "get" the parties before them. Rather, they objectively apply the law to the facts of each case. The chairperson's use of this phrase created an impermissibly high risk of bias because the statement indicates the chairperson's opinion that Marris's legal position was without merit and was in fact deserving of punishment.

While it is impossible to determine exactly what the chairperson meant, it seems clear that "the Leona Helmsley rule" is not synonymous with the zoning ordinance the Board was required to apply to the facts of Marris's case. Furthermore, by making this statement, the chairperson implicitly compared Marris to Leona Helmsley. Since Helmsley was convicted of tax evasion, this statement indicates that the chairperson's intent was to rule against Marris at the December 5, 1989, hearing. The comment created an impermissibly high risk of bias.

[6] We do not believe that the chairperson's question regarding the documentation of Marris's renovation expenditures is indicative of prejudice or creates a situation where the risk of bias is impermissibly high. *31 This comment could well have been made within the context of a proper factual inquiry. However, some of the chairperson's comments clearly indicated that he had prejudged Marris's case, thus creating an impermissibly high risk of bias. Therefore we conclude that the chairperson erred when he refused to recuse himself from the December 5, 1989, hearing and that he deprived Marris of her right to common law due process. Accordingly, the Board's decision must be vacated and the matter remanded to the Board for a new hearing, without chairperson Kuerschner's participation.

III.

[7] The second issue before us is a determination of what improvements¹⁵ to Marris's property constitute structural repairs or alterations under the Cedarburg zoning ordinance. Identifying the structural repairs or alterations is important because the ordinance provides that to retain legal nonconforming use status the "total lifetime structural repairs or alterations" to a property "shall not exceed 50% of the current assessed value." Cedarburg Zoning Code sec. 16.0901.¹⁶ While it permits **850 improvements to nonconforming use structures, *32 the Cedarburg zoning ordinance imposes restrictions on the dollar amount of structural repairs or alterations.

The parties agree that the word "structural" modifies the word "alterations" as well as the word "repairs" and that the ordinance defines the phrase "structural alterations." They accept the definition of "structural alterations" as set forth in the ordinance and do not debate the meaning of this phrase.¹⁷ The parties' disagreement centers on the proper meaning of the phrase "structural repairs," which is not defined in the ordinance.

[8] [9] In the interpretation of ordinances, the rules of statutory interpretation apply. *County of Columbia v. Bylewski*, 94 Wis.2d 153, 169 n. 7, 288 N.W.2d 129 (1980). The meaning of words in an ordinance presents a question of law, and the "blackletter" rule is that a court decides the meaning of an ordinance independently of a board's or other courts' interpretations. *33 Courts, however, give varying degrees of deference to agency interpretations of a law and frequently refrain from substituting their interpretation for that of the agency charged with administration of the law. *West Bend Educ. Assn. v. WERC*, 121 Wis.2d 1, 11-12, 357 N.W.2d 534 (1984). The Board argues that it has had extensive experience interpreting the ordinance and that its interpretation therefore is entitled to great weight and should not be upset if a rational basis for the interpretation exists. While we concede that the Board has expertise, we are concerned that any discussion of the phrase "structural repairs" in the Cedarburg ordinance may have significance beyond interpreting the Cedarburg ordinance. The ordinance in question is substantially similar to a state statute and to ordinances across the state, although the language of the state statute and the various ordinances may vary. Under these circumstances, we conclude that one board's interpretation of the language in a single case should not be viewed as controlling or persuasive and

that we should interpret the term "structural repairs" *de novo*. Furthermore, as our discussion makes clear, we do not think the Board's interpretation of the Cedarburg ordinance is reasonable.

[10] [11] In determining the meaning of the Cedarburg ordinance it is helpful to understand its objective. Ordinances governing the improvement of a structure that has legal nonconforming use status are intended to balance two competing policies: protection of property ownership rights and protection of the community's interest in the speedy elimination of nonconforming uses. *State ex rel. Covenant Harbor Bible Camp v. Steinke*, 7 Wis.2d 275, 283, 96 N.W.2d 356 (1956). These ordinances avoid imposing undue hardship *34 on property owners by allowing them to continue the nonconforming use of the property and to make reasonable renovations to prevent deterioration. However, to ensure that the life of the structure is not extended indefinitely and that the nonconforming use is gradually eliminated, these ordinances also limit the amount of structural repairs or alterations property owners can make. The underlying policy goal is to "encourage at least some improvement and modernization of nonconforming buildings at the expense of extending the life expectancy of nonconforming uses." *Waukesha County v. Seitz*, 140 Wis.2d 111, 120-21, 409 N.W.2d 403 (1987) (quoting 1 R. Anderson, *American Law of Zoning* 3d sec. 6.56, at **851 617 (1986)). Thus, an interpretation and application of the ordinance must accomplish the objective of the ordinance by balancing the competing interests in a reasonable way.

[12] Marris asserts that the phrase "structural repairs or alterations" simply means "structural alterations" as that phrase is defined in the ordinance. Thus, according to Marris, structural repairs or alterations means changes of supporting members of a structure such as foundations, bearing walls, columns, beams or girders. The import of Marris's argument is that the word "repairs" in the ordinance is superfluous.

Marris's interpretation of the ordinance does not persuade us to declare words of the ordinance superfluous. We do not believe her interpretation strikes the proper balance between the rights of the property owner and the community. By allowing the property owner to extend the life of the nonconforming use by making drastic changes

in the building, Marris's interpretation favors the property owner's interest over that of the community.

*35 The Board argues that the phrase "structural repairs" is not mere surplusage. It urges, and the circuit court and court of appeals agree, that the phrase "structural repairs" means each and every improvement to a legal nonconforming use that is not considered ordinary maintenance.

The Board bases its interpretation of "structural repairs" on the last sentence of the ordinance's definition of the phrase "substantial improvement." The ordinance defines "substantial improvement" as any repair, reconstruction or improvement of a structure, the cost of which equals or exceeds 50% of the present equalized assessed value of the structure. Section 16.1402.¹⁸ The ordinance then goes on to say that "[o]rdinary maintenance repairs are not considered structural repairs, modifications or additions; such ordinary maintenance repairs include internal and external painting, decorating, paneling, and the replacement of doors, windows, and other structural components." The Board argues that the provision in the ordinance that "ordinary maintenance repairs are not considered structural repairs" implies that structural *36 repairs include any improvements that are not considered ordinary maintenance. The Board's brief seems to urge that the court interpret the ordinance's list of ordinary maintenance repairs as all-inclusive.¹⁹

The Board asserts that its interpretation is consistent with the ordinance's purpose: the definition of ordinary maintenance repairs is broad enough to allow the property owner to preserve the building's integrity, thereby protecting property rights, and yet limited enough to ensure that the nonconforming use of the structure is not extended beyond a reasonable time. We do not agree with the Board. We conclude that its interpretation favors the community's interest over that of the property owner.

While the ordinance does state that ordinary maintenance repairs are not structural **852 repairs, it does not state, as the Board contends, that all improvements except ordinary maintenance repairs constitute structural repairs. Some improvements, such as the installation of additional lighting, fall outside the Board's definition of ordinary maintenance, yet they *37 appear unlikely to prolong the life of the nonconforming use structure.

Our task is to distinguish between structural repairs, which fall within the 50% limitation of the ordinance, and non-structural repairs which do not. It is not an easy task. Throughout the country, laws similar to the Cedarburg ordinance have generated litigation over the types of improvements that are limited by law. Indeed one of the most complex problems besetting municipalities, according to at least one commentator, is how to handle nonconforming uses of property. 4 E.C. Yokley, Zoning Law and Practice sec. 22-1, p. 1 (1979).

The cases grappling with statutory terms such as "structural alteration" or "structural repairs" do not provide a clear or consistent definition.²⁰ Each case turns on the precise language of the applicable law and the particular facts before the court. Courts interpreting these provisions have generally concluded that no one rule can be established or applied and that each case must be judged on its own unique facts.

We cannot set forth a hard and fast definition which easily distinguishes between structural and non-structural repairs. Any discussion of the meaning of the phrase "structural repairs" must be in terms of the purpose of this type of ordinance, the language of *38 the ordinance, and the proposed improvement. Nonetheless, some general guidelines can be set forth. These guidelines must be applied by zoning boards with common sense and consideration of all the circumstances.

[13] [14] We construe structural repairs in this ordinance to include work that would convert an existing building into a new or substantially different building, or work that would affect the structural quality of the building. We also construe structural repairs in this ordinance to include proposed improvements that would contribute to the longevity or permanence of the building. This characterization of structural repairs satisfies the public interest in eliminating nonconforming uses. If work indefinitely prolonging the natural life of nonconforming buildings were permitted, the purpose of zoning to achieve uniformity would be defeated.

[15] However, under our characterization of structural repairs an owner is permitted to modernize facilities. The right to continue a use existing at the time a zoning restriction becomes effective necessarily embraces preservation of that use. Therefore proposed improvements such as the addition of acoustical ceilings

or the installation of heating, electricity, plumbing (including fixtures) or insulation, might not ordinarily be regarded as structural repairs. Such improvements might be characterized as remodeling, or as improving the appearance or efficiency of a nonconforming use structure. Likewise, repairs that are reasonably necessary to prevent deterioration might not be classed as structural repairs. It is in the community's interest that buildings be maintained in good, safe and sanitary condition. We recognize that any modernization or maintenance carries with it some possibility of extending the life expectancy of the nonconforming *39 use. Yet, in order to respect ownership rights, some modernization and maintenance must be permitted.

We have attempted to provide a functional definition to guide the Board in the exercise of its discretionary decision-making. The Board must use its discretion in

applying this functional definition of structural repairs in a fair and reasonable manner in each case, considering the language of the ordinance, the purposes of the ordinance **853 and the need to balance individual and community interests.

For the reasons set forth, we reverse the decision of the court of appeals and remand the matter to the circuit court for remand to the Board of Zoning Appeals for the City of Cedarburg for further proceedings consistent with this opinion.

The decision of the court of appeals is reversed and the cause remanded to the circuit court.

All Citations

176 Wis.2d 14, 498 N.W.2d 842

Footnotes

- 1 A legal nonconforming use is usually defined in the law of zoning as a use that lawfully existed on the effective date of a zoning ordinance and that may be maintained thereafter although it does not conform to the use restrictions of the ordinance. *City of Lake Geneva v. Smuda*, 75 Wis.2d 532, 536-37, 249 N.W.2d 783 (1976); *Walworth County v. Hartwell*, 62 Wis.2d 57, 60, 214 N.W.2d 288 (1974).
- 2 The respondents are the City of Cedarburg and the Board of Zoning Appeals for the City of Cedarburg. In discussing the respondents' arguments, we refer to the Board of Zoning Appeals for the City of Cedarburg and the City of Cedarburg collectively as the Board.
At the court of appeals the meaning of "current assessed value" and the 50% calculation were litigated. Neither party challenges the court of appeals' interpretation of these provisions.
Marris also argues in this court that the Board and the City of Cedarburg are estopped from including in their calculations the work performed in 1972 and 1977. We have examined her arguments, and we agree with the circuit court and the court of appeals that she has not set forth sufficient grounds to establish estoppel. *McKenna v. State Highway Commn*, 28 Wis.2d 179, 135 N.W.2d 827 (1965); *Snyder v. Waukesha Zoning Board*, 74 Wis.2d 468, 247 N.W.2d 98 (1976); *State v. City of Green Bay*, 96 Wis.2d 195, 291 N.W.2d 508 (1980).
- 3 The former owner had, since 1972, used the rear building as a retail flower shop, which had legal nonconforming use status. Prior to 1972, the rear building had been used as a beer distributing company's warehouse. Originally, the rear building was used as a barn or a tool shed.
- 4 *State ex rel. Lomax v. Leik*, 154 Wis.2d 735, 739-40, 454 N.W.2d 18 (Ct App. 1989) (citing *State v. Goulette*, 65 Wis.2d 207, 215, 222 N.W.2d 622 (1974)). See also *Snyder v. Waukesha County Zoning Board of Adjustment*, 74 Wis.2d 468, 475, 247 N.W.2d 98 (1976).
- 5 *State v. Goulette*, 65 Wis.2d 207, 215, 222 N.W.2d 622 (1974) (quoting *State ex rel. Ball v. McPhee*, 6 Wis.2d 190, 199, 94 N.W.2d 711 (1959)).
In this case no statute or ordinance governs disqualification of a board member. The court has recognized a common law duty of disqualification. *Kachian v. Optometry Examining Board*, 44 Wis.2d 1, 13, 170 N.W.2d 743 (1969); *Guthrie v. WERC*, 111 Wis.2d 447, 457-58, 331 N.W.2d 331 (1983).
- 6 Although the parties characterize the Board's hearing as adjudicative, we need not label these proceedings quasi-legislative or quasi-judicial to determine whether the decision-maker must be impartial. We need look only to the characteristics of the proceedings to determine whether the decision-maker must be impartial. In this case the Board must make factual determinations about an individual property owner and then apply those facts to the ordinance. We conclude that common law notions of fairness require an impartial decision-maker under these circumstances.

7 *Guthrie v. Wisconsin Employment Relations Commn*, 111 Wis 2d 447, 454, 331 N.W.2d 331 (1983). Both parties rely on *Guthrie* which involved a state, not a local governmental, agency. The case recognizes common law as well as constitutional concepts of due process and fair play. It adopted and applied the rule (originating in the common law and sec. 757.19(2)(c) which applies only to judges) that when an attorney represents a party in earlier proceedings due process requires that the attorney may not act as a decision-maker in the same case. Although *Guthrie* speaks of both common law and constitutional due process, the parties have not analyzed this case in terms of federal or state constitutional due process.

8 Mark Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N D L Rev. 161, 161-62 (1989).

9 *Id.* at 162-63.

10 *Id.* at 208.

11 *Id.* at 208.

12 The comments to which Marris objects were set forth by Marris's counsel in a letter to the chairperson dated November 17, 1989, requesting that the chairperson recuse himself. The letter is part of the record.

The chairperson's full comments are preserved on a tape recording of the October 3, 1989, meeting of the Board. Marris requested that the Ozaukee County circuit court supplement the record with this tape. The Board objected to supplementing the record. The Ozaukee County circuit court entered its decision affirming the decision of the Board without ruling on the motion. The circuit court did not address the issue of bias. The tape recording was included in the record on appeal to the court of appeals as certified by the circuit court even though apparently it was not part of the certiorari record in the circuit court. According to the files in this court both parties argued the merits of the issue of bias before the court of appeals.

Prior to oral argument the Board moved this court to strike references in Marris's brief to direct quotations taken from the tape recording of the Board's meeting because the tape recording was not properly before the circuit court. This court denied the Board's motion.

13 The circuit court ordered the Board to determine the assessed value of the property at the last structural repair or alteration and the cumulative total of that proposed alteration and all previous like repairs or alterations.

14 In September, 1989, New York real estate billionaire Leona Helmsley was convicted of 33 counts of tax evasion. Helmsley, the self-proclaimed queen of the Helmsley Palace hotel, had been charged with evading personal income taxes by disguising as business expenses some \$4 million in renovation costs at her estate in Greenwich, Connecticut. Typical of the items reported about Helmsley in news magazines was the following: "As testimony revealed, she was as ferocious with her employees as a bulldog, albeit one with a face-lift, summoning workmen with, Hey, you with the dirty fingernails! and icily firing a vice president at Christmas time while being fitted by her dressmaker." Margaret Clarson, *Revenge of the Little People*, Time, Sept. 11, 1989, at 27.

15 The disputed items include pouring concrete over an existing dirt floor, the replacement of a staircase and loose boards on the second floor, the installation of bathroom fixtures and the installation of electricity and additional lighting.

16 **EXISTING NONCONFORMING USES.** The lawful nonconforming use of a structure, land or water existing at the time of the adoption or amendment of this Ordinance may be continued although the use does not conform with the provision of this Ordinance, subject to the following conditions:

....

Total lifetime structural repairs or alterations shall not exceed 50 percent of the current assessed value of the structure unless the use thereafter conforms to the provisions of this Ordinance...

Section 62.23(7)(h), Stats.1990-91, provides: "(h) *Nonconforming uses.* The lawful use of a building or premises existing at the time of the adoption or amendment of a zoning ordinance may be continued although such use does not conform with the provisions of an ordinance. Such nonconforming use may not be extended. The total structural repairs or alterations in such a nonconforming building shall not during its life exceed 50 per cent of the assessed value of the building unless permanently changed to a conforming use...."

17 Section 16.1402 **SPECIFIC WORDS AND PHRASES.**

....

Structural Alteration

Any change in the supporting members of a structure, such as foundations, bearing walls, columns, beams, or girders.

18 16.1402 **SPECIFIC WORDS AND PHRASES.**

....

Substantial Improvement

Any repair, reconstruction or improvement of a structure, the cost of which, equals or exceeds 50 percent of the present equalized assessed value of the structure either before the improvement or repair is started or if the structure has been damaged, and is being restored, before the damage occurred ...

.... Ordinary maintenance repairs are not considered structural repairs, modifications or additions; such ordinary maintenance repairs include internal and external painting, decorating, paneling and the replacement of doors, windows, and other structural components.

- 19 The definition of structural repairs that the Board urges is very broad. For example, in the videotape of the premises, the city building inspector repeatedly described work, such as electrical wiring, plumbing, and lighting, as penetrating structural walls or beams, intimating that any such penetration constituted a structural repair. Also, a contractor testified that any repair not set forth as ordinary maintenance in the ordinance is a structural repair. He testified that the following are "structural repairs" because they become part of the structure: (1) pouring a concrete floor in place of a gravel floor; (2) adding a bathroom or toilet; (3) adding a partition; (4) adding a shower door on the shower; (5) adding electrical wiring; and (6) placing a sink in the basement. The Board relied on this testimony in its briefs to support its conclusions.
- 20 For discussions of the issue and cases, *see e.g.*, 1 Robert M. Anderson, *American Law of Zoning* 3d sec. 6.02, 6.04, 6.07, 6.45, 6.46, 6.47, 6.56, 6.57 (1986); 8A McQuillin, *The Law of Municipal Corporations*, secs. 25.183, 25.184, 25.210-25.212a (3d ed. 1986 rev. ed.); 4 E.C. Yokley, *Zoning Law and Practice* sec. 22-10 (1979); Annot., *Alteration, Extension, Reconstruction, or Repair of Nonconforming Structure or Structure Devoted to Nonconforming Use as Violation of Zoning Ordinance*, 63 A.L.R.4th 275 (1988).

KeyCite Yellow Flag - Negative Treatment
 Declined to Extend by Murphy v. Oconto County Drainage Bd.,
 Wis.App., March 1, 2016

269 Wis.2d 488

Court of Appeals of Wisconsin.

William KEEN, Lisa Keen, Oliver Himsel, Karen
 Lamere, Clement Lamere, Floyd Lamere, Bertilla
 Lamere, and Manfred Engburg, Plaintiffs,
 Margaret L. Jones, Plaintiff-Appellant,

v.

DANE COUNTY BOARD OF SUPERVISORS, Dane
 County Zoning and Natural Resources Committee
 and Payne & Dolan, Inc., Defendants-Respondents.

No. 03-0734.

Submitted on Briefs Oct. 14, 2003.

Opinion Filed Dec. 23, 2003.

Synopsis

Background: Local landowners brought certiorari action challenging decision of county board that upheld decision of county zoning and natural resources committee to grant conditional-use permit to operate gravel pit. The Circuit Court, Dane County, Patrick J. Fiedler, J., affirmed. Landowners appealed.

Holdings: The Court of Appeals, Dykman, J., held that:

[1] presumption-of-validity doctrine would not be expanded to presume a basic fact that committee considered all required factors;

[2] committee's determinations constituted findings;

[3] letter that was written by member of committee and that was submitted in support of application evidenced an impermissibly high risk of bias; and

[4] lease from member of committee to applicant's agent did not constitute impermissible bias.

Reversed and remanded with directions.

Attorneys and Law Firms

****156 *491** On behalf of the plaintiff-appellant, the cause was submitted on the briefs of Robert J. Kay and Robert A. Mich, Jr., of Kay & Andersen, S.C., Madison.

On behalf of the defendant-respondent, Payne & Dolan, Inc., the cause was submitted on the brief of William F. White and Thomas P. Heneghan of Michael Best & Friedrich LLP, Madison.

On behalf of the defendant-respondent, Dane County Corporation Counsel, the cause was submitted on the brief of David R. Gault, assistant corporation counsel, Madison.

Before DYKMAN, VERGERONT and LUNDSTEN, JJ.

Opinion

¶ 1 DYKMAN, J.

Margaret L. Jones appeals from an order affirming the Dane County Board (board) which upheld the decision of the Dane County Zoning and Natural Resources Committee (ZNR) to grant a conditional-use permit. She asserts that ZNR failed to meet the requirements of Dane County Ordinances (DCO) §§ 10.255(2)(h) and 10.123(3)(a)1 and that two ZNR members were impermissibly biased. We reverse and remand with directions for ZNR to consider the factors in § 10.123(3)(a)1 and to reconsider § 10.255(2)(h) because of an impermissibly high risk of bias in the prior deliberations.

BACKGROUND

¶ 2 Two residents of Verona applied for a conditional-use permit through their agents, Payne & *492 Dolan, Inc. (P & D) to operate a gravel pit on the their property. ZNR held a lengthy hearing and considered sixty-one conditions before it granted the permit. Minutes from the hearing are the only record of how ZNR reached its decision. Local landowners challenged ****157** ZNR's decision and the board and trial court affirmed. Jones, one of the plaintiffs, appeals. Among other things, she alleges that two ZNR members, Lyman Anderson and Carlton Hamre, impermissibly favored P & D. The bias allegations

derive from the fact that Anderson had leased his property in Oregon, Wisconsin, to P & D to operate a gravel pit. And Hamre had allegedly endorsed the company by co-signing a letter that vouched for the quality of P & D's work. Hamre signed this letter as Town of Vienna chair in November 2001. P & D included the letter in its application to ZNR for a conditional-use permit. After ZNR issued the permit, Hamre made the following comment to a newspaper:

There are some operators I wouldn't support, but I've worked with Payne & Dolan before....

... I'm sorry for the people who will live close to it, but I can't change my mind on voting for the pit.

Although Hamre has since retired, Anderson currently serves as chair of ZNR.

STANDARD OF REVIEW

[1] [2] [3] ¶ 3 We review the board's affirmance of ZNR's decision using the same standard as the trial court. *Delta Biological Res., Inc. v. BOZA*, 160 Wis.2d 905, 910, 467 N.W.2d 164 (Ct.App.1991). While we are not bound by the board's conclusions of law, we will sustain them if reasonable. *Id.* We hesitate to interfere with *493 administrative determinations and presume they are correct and valid. Therefore, we limit our review to:

- (1) Whether the Board kept within its jurisdiction;
- (2) whether it acted according to law;
- (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and
- (4) whether the evidence was such that it might reasonably make the order or determination in question.

Id. (citation omitted).

DISCUSSION

¶ 4 Jones does not seek review of the merits of ZNR's determination. She challenges only whether ZNR (1) considered the requisite agriculture district factors in DCO § 10.123(3)(a)1; (2) made the findings DCO §

10.255(2)(h) requires; and (3) allowed biased members to deliberate and vote. She claims that these failings render ZNR's determination arbitrary, oppressive and unreasonable and contrary to law.

a. Agriculture District Considerations

[4] ¶ 5 The parties do not dispute that Verona has elected to be an exclusive agriculture district pursuant to DCO § 10.123. Section 10.123(3)(a)1¹ requires ZNR to **158 consider ten factors before issuing a conditional-use *494 permit in an agriculture district. Nothing in the hearing minutes refers to these ten factors. Jones asserts that this shows ZNR did not act according to law. We agree. The sparse record contains no mention of the special concerns for an agriculture district. We have no basis to conclude that ZNR considered those factors.

[5] ¶ 6 P & D urges us to presume that the agency considered all the factors the Dane County Ordinances require it to consider. It claims the law presumes the board's decision is valid and correct. "A presumption is a rule of law, statutory or judicial, by which a finding of a basic fact gives rise to existence of presumed fact, until presumption is rebutted." *Delta Biological Res., Inc.*, 160 Wis.2d at 912, 467 N.W.2d 164 (citation omitted). We decline to expand the presumption of validity doctrine such that we presume a basic fact. Affording boards such deference would render judicial review meaningless. We conclude that a record devoid of any reference to the *495 agriculture district factors does not satisfy the requirements of DCO § 10.123(3)(a)1.

¶ 7 P & D also argues that Jones has the burden of demonstrating that ZNR's decision was contrary to law or arbitrary, oppressive, or unreasonable. It claims that the only proof Jones has offered is testimony from an unidentified speaker at the board hearing that stated that ZNR did not consider the agriculture district factors.² P & D argues that this testimony is unreliable and not sufficient to overcome the presumption of validity. We do not need to address the reliability of this testimony because the record, or lack thereof, resolves the question of whether ZNR considered the factors in DCO § 10.123(3)(a)1.

¶ 8 P & D contends that ZNR complied with DCO § 10.123(3)(a)1 because it held a lengthy hearing and

considered sixty-one conditions for the conditional use. P & D offers no legal authority to support its position that ZNR may consider use conditions rather than the ten factors in § 10.123(3)(a)1. We reject this argument.

¶ 9 Similarly, the board contends that ZNR considered the factors in DCO § 10.123(3)(a)1 when it found that the conditional-use permit complied with *496 DCO § 10.255(2)(h). Section 10.255(2)(h) requires ZNR to find that the conditional use “conform[s] to all applicable regulations of the district in which it is located.” The board argues that such a finding encompasses the considerations in § 10.123(3)(a)1. This reasoning, however, eviscerates the special consideration that Verona opted for when it became an agriculture district. If ZNR necessarily considers § 10.123(3)(a)1 when it makes the requisite findings for § 10.255(2)(h), then electing to be an agriculture district becomes meaningless. This result contradicts the plain purpose of distinguishing agriculture from other types of districts. We are not persuaded.

¶ 10 Both P & D and the board suggest that if we conclude that ZNR did not **159 consider the requisite factors in DCO § 10.123(3)(a)1, we will be requiring increased formality in ZNR’s deliberations. We disagree. We reverse only because ZNR failed to consider certain factors, not because its considerations lacked formality.

b. Findings of Fact

[6] ¶ 11 Jones also asserts that ZNR only approved the considerations in DCO § 10.255(2)(h) and did not actually make findings as required by the ordinance. Both P & D and the board argue that although ZNR used the term “approve” when it addressed § 10.255(2)(h), its determinations constituted findings. We agree. It is immaterial that ZNR used the word “approve” rather than stating that it was making a finding. ZNR specifically addressed and voted on all the concerns in § 10.255(2)(h). Those deliberations constitute findings.

*497 c. Bias

[7] ¶ 12 Jones claims that two members of ZNR were impermissibly biased. Specifically, she contends Anderson and Hamre were not impartial decisionmakers because of their prior business relationships with P & D. She

argues that Hamre expressed a “personal and close feeling about” P & D’s work in his letter that supported P & D’s application. She also contends that his comments to the press reveal prejudgment of the issues. Accordingly, she claims that all of ZNR’s deliberations were fatally flawed because of bias.

¶ 13 Both P & D and the board argue that Jones’ evidence does not overcome the presumption of honesty and integrity we afford ZNR. They claim that Hamre’s letter simply shows that he was familiar with the quality of P & D’s work, which is the kind of experience and knowledge zoning committees often utilize in deliberations. The board also contends that merely forming an opinion prior to a hearing does not constitute prejudgment under *State ex rel. DeLuca v. Common Council*, 72 Wis.2d 672, 690, 242 N.W.2d 689 (1976).

[8] [9] ¶ 14 To act in accordance with law, a decisionmaker must comport with the “common law concepts of due process and fair play.” *Marris v. City of Cedarburg*, 176 Wis.2d 14, 24, 498 N.W.2d 842 (1993). A decisionmaker violates due process and fair play by harboring bias, or an impermissibly high risk of bias, or prejudging the facts or the application of the law. *Id.* at 25, 498 N.W.2d 842 (citation omitted). The Wisconsin Supreme Court applied this rule in *Marris*, where a board member made several prejudicial statements about a permit applicant, including that he wanted “to get [the applicant] on the Leona Helmsley rule.” *Id.* at 28-30, 498 N.W.2d 842. Those remarks *498 overcame the presumption of honesty and integrity that would ordinarily lie. *Id.* at 30, 498 N.W.2d 842. Accordingly, the court vacated the board’s decision because the bias violated due process.

¶ 15 Hamre became an advocate for P & D when P & D submitted his letter as part of its permit application. He cannot be both an advocate and an impartial decisionmaker on this issue. In the letter, Hamre proclaimed P & D “has always stood out above the rest in their efforts and success in being a good corporate citizen and caretaker of the land.” Hamre’s “close and personal view” promotes P & D’s good track record and recommends them as a good business to operate a gravel pit in the community. This advocacy surpasses merely forming an opinion about a subject and overcomes the presumption of integrity and honesty. We conclude the letter evidences an impermissibly high risk of bias.

****160** ¶ 16 Because the letter evidences an impermissibly high risk of bias, we do not reach the board's claims that the newspaper article Jones references was not part of the record before this appeal or P & D's argument that Hamre's comments after the decision are irrelevant.

[10] ¶ 17 Jones also asserts that Anderson was impermissibly biased in favor of P & D. Although Hamre's impermissibly high risk of bias alone warrants reversal, we will also address Jones' allegations against Anderson because her brief informs us that Anderson still serves as chairman of the ZNR. Therefore, we need to clarify whether Anderson may deliberate and vote in the rehearing.

¶ 18 The parties do not dispute that Anderson had leased his property to P & D for the operation of a ***499** gravel pit. Jones claims that Anderson benefited from "financially assisting his long-term business partner" and "avoiding the appearance of hypocrisy had he denied a gravel pit operation while maintaining one on his own property."

¶ 19 Both P & D and the board maintain that Anderson's lease is unrelated to the conditional-use permit at issue in this case. They also contend that Anderson has an economic interest in not allowing P & D to operate a gravel pit in Verona because it would compete with his own. They argue that Anderson's lease with P & D does not rebut the presumption that Anderson acted with honesty and integrity.

¶ 20 We conclude that Anderson's lease with P & D does not constitute impermissible bias. Unlike the board member in *Marris*, Anderson's lease with P & D does not evidence bias. The lease was an independent, prior business transaction unrelated to the property at issue. *Marris* does not require board members to have no prior dealings with applicants; rather, the court recognized the localized nature of county boards and that members "can be expected to have opinions about local zoning issues." *Id.* at 26, 498 N.W.2d 842. Similarly, members may have conducted business with applicants that appear before them, as in Anderson's case. We conclude the property lease alone does not suffice to meet the standard of *Marris*.

CONCLUSION

¶ 21 We conclude that ZNR complied with DCO § 10.255(2)(h) by making the requisite findings, despite using the term "approve." However, because Hamre's letter evidences an impermissibly high risk of bias and ***500** he participated in making those findings, we reverse with directions for ZNR to reconsider § 10.255(2)(h) without Hamre. We do not preclude Anderson's participation. Likewise, we direct ZNR to consider the factors DCO § 10.123(3)(a)1 requires before issuing a conditional-use permit for the operation of a gravel pit.

Order reversed and cause remanded with directions.

All Citations

269 Wis.2d 488, 676 N.W.2d 154, 2004 WI App 26

Footnotes

1 Dane County Ordinance § 10.123(3)(a)1 provides in pertinent part:

In passing applications for conditional use permits the committee shall consider the following relevant factors:

- a. The statement of purposes of the zoning ordinance and the A-1 District.
- b. The potential for conflict with agricultural use.
- c. The need of the proposed use for a location in an agricultural area.
- d. The availability of alternative locations.
- e. Compatibility with existing or permitted use on adjacent lands.
- f. The productivity of the lands involved.
- g. The location of the proposed use so as to reduce to a minimum the amount of productive agricultural land converted.
- h. The need for public services created by the proposed use.
- i. The availability of adequate public services and the ability of affected local units of government to provide them without an unreasonable burden.
- j. The effect of the proposed use on water or air pollution, soil erosion and rare or irreplaceable natural resources.

- 2 An unidentified member of the ZNR Committee stated the following at a subsequent board meeting:
- They never once addressed the point that the Zoning and Natural Resources Committee, of which I am a member, did not address Section 10.123(3)(A) of the Dane County Code of Ordinances, and within there there is ten different factors....
- ...
- ... We have got to follow our own ordinance and consider those factors. We have got to address those. We can even discuss them. We never discussed them in ZNR. None of those standards or factors were discussed

Exhibit E

Village of Fox Point	Village of Fox Point Sex Offender Residence – Petition Form					
Instructions – Return the completed Petition form to the Village Clerk’s Office. Attach a copy for each offense: Judgement of Conviction, Criminal Complaint, and Certificate of Treatment (current and/or completed). If the address you are requesting to move to within the Village’s jurisdiction is a rental property, provide a letter from the landlord showing willingness to rent to you and knowledge that you are a sex offender. YOUR PETITION WILL NOT BE HEARD UNTIL ALL DOCUMENTATION IS RECEIVED. You will be notified of the date and time of your hearing before the Village of Fox Point’s Sex Offender Residence Board, which may be 30-45 days after receipt of your petition.						
PETITIONER INFORMATION						
NAME (FIRST, MIDDLE, LAST)						
FORMER/MAIDEN NAME/ALIAS						
CURRENT ADDRESS				CITY	STATE	ZIP CODE
TELEPHONE NUMBER			DATE OF BIRTH			
WHAT ADDRESS DO YOU WISH TO MOVE TO?						
ID THE ABOVE ADDRESS RENTAL PROPERTY? <input type="checkbox"/> YES <input type="checkbox"/> NO IF YES, PROVIDE A LETTER FROM THE LANDLORD WHICH SHOWS WILLINGNESS TO RENT TO YOU AND KNOWLEDGE THAT YOU ARE A REGISTERED SEX OFFENDER. YOUR PETITION WILL NOT BE HEARD UNTIL YOU PROVIDE SUCH PROOF.						
AGE/RELATIONSHIP OF THOSE WHO YOU LIVE WITH NOW AND THOSE YOU PLAN TO LIVE WITH AT THE ABOVE ADDRESS						
RELATIONSHIP	AGE	LIVE WITH NOW AT CURRENT ADDRESS		PLAN TO LIVE WITH AT ABOVE ADDRESS		
		YES	NO	YES	NO	
		YES	NO	YES	NO	
		YES	NO	YES	NO	
		YES	NO	YES	NO	
		YES	NO	YES	NO	
		YES	NO	YES	NO	
SEXUAL OFFENSE(S) LIST EVERY SEXUAL OFFENSE ON YOUR CONVICTION RECORD AND ANSWER THE FOLLOWING QUESTIONS						
<input type="checkbox"/> Additional space needed check box if sheet(s) attached. Be sure to report exact information requested.						
SEXUAL OFFENSE #1	<input type="checkbox"/> ADULT <input type="checkbox"/> JUVENILE		OFFENSE DEGREE (Circle one) 1 st 2 nd 3 rd			
OFFENSE DESCRIPTION						
OFFENSE DATE	CONVICTION DATE	COUNTY	VICTIM’S AGE	SENTENCE	TIME SERVED	
ARE YOU CURRENTLY UNDER SUPERVISION WITH THE DEPARTMENT OF CORRECTIONS FOR THIS OFFENSE? <input type="checkbox"/> YES <input type="checkbox"/> NO						
HOW DO YOU FEEL THE SEXUAL CRIME AFFECTED YOUR VICTIM? (Do not identify victim)						
SEXUAL OFFENSE(S) LIST EVERY SEXUAL OFFENSE ON YOUR CONVICTION RECORD AND ANSWER THE FOLLOWING QUESTIONS						
<input type="checkbox"/> Additional space needed check box if sheet(s) attached. Be sure to report exact information requested.						
SEXUAL OFFENSE #2	<input type="checkbox"/> ADULT <input type="checkbox"/> JUVENILE		OFFENSE DEGREE (Circle one) 1 st 2 nd 3 rd			
OFFENSE DESCRIPTION						
OFFENSE DATE	CONVICTION DATE	COUNTY	VICTIM’S AGE	SENTENCE	TIME SERVED	
ARE YOU CURRENTLY UNDER SUPERVISION WITH THE DEPARTMENT OF CORRECTIONS FOR THIS OFFENSE? <input type="checkbox"/> YES <input type="checkbox"/> NO						
HOW DO YOU FEEL THE SEXUAL CRIME AFFECTED YOUR VICTIM? (Do not identify victim)						
CRIMINAL HISTORY LIST ALL PREVIOUS CRIMINAL CONVICTIONS BELOW:						
<input type="checkbox"/> Additional space needed, check box if sheet(s) attached						

Exhibit E

CRIME	OFFENSE YEAR	LOCATION

COMPLETED TREATMENT PROGRAM(S) *Confidential portion only available to Board, not to Public*

LIST THE NAMES OF ANY TREATMENT PROGRAMS YOU HAVE COMPLETED AND ATTACH A DOCUMENT PROVING THAT YOU HAVE COMPLETED THAT TREATMENT PROGRAM, OR ANSWER "NONE" IF YOU HAVE COMPLETED NO PROGRAMS. **NOTE: THE BOARD WILL PRESUME THAT YOU HAVE NOT COMPLETED A TREATMENT PROGRAM UNLESS YOU PROVIDE DOCUMENTATION WHICH PROVES YOU HAVE COMPLETED THE TREATMENT PROGRA AND YOUR DEPARTMENT OF CORRECTIONS AGENT SIGNS BELOW.**

	SUBJECT	NAME(S) OF COMPLETED TREATMENT PROGRAM(S)
<input type="checkbox"/>	SEX OFFENDER	
<input type="checkbox"/>	ANGER	
<input type="checkbox"/>	ALCOHOL	
<input type="checkbox"/>	DRUGS	

DEPARTMENT OF CORRECTIONS AGENT SIGNATURE (Required)

I HAVE REVIEWED THE INFORMATION COMPLETED BY THE PETITIONER REGARDING THE CRIMINAL HISTORY AND TREATMENT INFORMATION AND BELIEVE THAT IT IS TRUE AND COMPLETE TO THE BEST OF MY KNOWLEDGE.

SIGNATURE ➡

PRINT ➡

DATED ➡

COMMUNITY (TIES) AND SUPPORT

HAVE YOU LIVED IN THE VILLAGE OF FOX POINT BEFORE? YE NO IF YES, WHAT YEARS?

IDENTIFY BY NAME WHICH OF THE PEOPLE OR GROUPS WILL SUPPORT YOU IF YOU MOVE TO THE VILLAGE OF FOX POINT

	NETWORK	NAME(S) OF COMPLETED TREATMENT PROGRAM(S)
<input type="checkbox"/>	FAMILY	
<input type="checkbox"/>	WORK	
<input type="checkbox"/>	CHURCH	
<input type="checkbox"/>	FRIENDS	
<input type="checkbox"/>	OTHER SUPPORT	

SIGNATURE

BY SIGNING BELOW, I HEREBY CERTIFY THAT ALL STATEMENTS MADE ON THIS PETITION FORM ARE TRUE AND COMPLETE. I UNDERSTAND THAT ANY OMISSIONS OR UNTRUTHFUL STATEMENTS WILL BE GROUNDS FOR DENIAL OF MY PETITION. FURTHERMORE, I AUTHORIZE THE VILLAGE OF FOX POINT TO CONDUCT A CRIMINAL BACKGROUND CHECK AND USE ANY INFORMATION OBTAINED THEREFROM AT MY HEARING. I HOLD HARMLESS AND INDEMNIFY THE VILLAGE OF FOX POINT, ITS OFFICERS, AGENTS, AND EMPLOYEES, AND ANY PERSON PROVIDING THE INFORMATION, FROM ANY LIABILITY RELATED TO PERFORMING THE BACKGROUND CHECK.

SIGNATURE ➡

PRINT ➡

DATED ➡

RETURN TO

VILLAGE OF FOX POINT
 VILLAGE CLERK
 7200 N. Santa Monica Boulevard
 Fox Point, WI 53217
 (414) 351-8900

Exhibit F

Clerk's Process

- Receipt of Petition form
 - Verify completeness
 - Not complete, send letter
 - To petitioner via US mail
- Schedule hearing before Residence Board 30 – 45 days
- Agenda
 - Hearing
 - As needed
 - During regular business hours
 - Location
 - Village Hall
 - Notification to petitioner and board members
 - Board members
 - Quorum
 - Send notification via email
 - Notice of Hearing to petitioner via US mail
 - Post Agenda on website and posting board
- Prepare Petition packet for each case (each member?)
 - Petition Application
 - Petition Documentation (supplied by petitioner)
 - Judgment of Conviction
 - Letter from landlord, if rented property
 - Treatment – Certificate of Completion from Counselor
 - Sex Offender Treatment document
 - Additional Documentation
 - Sex offense
 - What? (Check with PD)
 - Clerk request from PD -- DOC/CCAP/etc.
- Website – SEX OFFENDER INFORMATION
 - Ordinance
 - Petition form
 - Residence Boundary Map
 - Sexual offender Registry Database (search by name and/or area)
- Prepare Decision
 - Written decision (FINDINGS OF FACT/RECORD OF DECISION)
 - Offender w/Affidavit of Mailing
- Minutes
 - Post minutes (Action Minutes)
 - Ordinary manner
 - Disclose Votes and Decision

Exhibit G

**VILLAGE OF FOX POINT
SEX OFFENDER RESIDENCE BOARD
VILLAGE HALL
7200 N. Santa Monica Boulevard
Fox Point, WI 53217
INSERT DATE**

AGENDA

1. Call to Order
2. Petition Case(s)
 - a. **Call Case #2023-**
Request of _____ [insert name] for an exemption to the Residence restrictions that would allow him/her to reside at ADDRESS.
 - i. **Closed session.** A portion of this public hearing may convene into closed session pursuant to Wis. Stats. §19.85(1) (f), to consider medical history of alcohol, drug, and sex offender treatment, juvenile conviction records, and other health information. At the conclusion of any such closed session, the Sex Offender Residence Board will reconvene in open session for continuation of the public hearing.
 - ii. **Closed session.** At the conclusion of the hearing, the Sex Offender Residence Board may convene in closed session pursuant to Wis. Stats. §19.85(1)(a) to deliberate concerning the hearing regarding the petition of _____ [insert name] for an exemption to the Residence restrictions that would allow him/her to reside at ADDRESS.
 - iii. **Action.** At the conclusion of the closed session, if any, the Sex Offender Residence Board will reconvene in open session for possible further deliberation before taking any action/
3. Adjournment

Posted:

The Village Hall is handicapped accessible. If you have other special needs, please contact the Village Clerk
7200 N. Santa Monica Boulevard, Fox Point, WI 53217 (414) 351-8900

Exhibit H
**VILLAGE OF FOX POINT
SEX OFFENDER RESIDENCE BOARD**

PETITION CASE NO. 2023 –

**NAME OF PETITIONER
ADDRESS
CITY, STATE ZIP**

FINDINGS OF FACT

The Petitioner appeared in person before the Sex Offender Residence Board hereinafter referred to as “Residence Board” on **INSERT DATE** to provide evidence to support the Petitioner’s Sex Offender Residency Restrictions Petition filed with the Village Clerk’s office on **INSERT DATE**.

The Petitioner’s basis for the petition is strictly to request an exemption to the Residence restrictions that would allow him/her to reside at: **INSERT ADDRESS** Said address is within the 1,000 feet of a prohibited location within the jurisdictional boundaries of the Village of Fox Point pursuant Section 670-43 of the Village Code.

RECORD OF DECISION

NOW, THEREFORE, based upon the evidence presented in open and closed sessions before the Residence Board on **INSERT DATE**, the Residence Board hereby makes the following Determination:

A decision was made by majority vote to **GRANT or DENY** the Petitioner’s request for an exemption to the Residence restrictions that would allow him/her to reside at: **INSERT ADDRESS** Said address is within the 1,000 feet of a prohibited location within the jurisdictional boundaries of the Village of Fox Point.

Such a decision was made for the following reasons:

1. This exemption is subject to the designated offender maintaining compliance with all terms and conditions of probation and parole. If probation or parole are revoked, that revocation automatically voids this Decision unless the designated offender requests a hearing before the Residence Board within ninety (90) days of the date of revocation and upon such hearing the Residence Board shall consider the circumstances of the revocation along with the factors described in Section 670-43 of the Village Code as though it were a new application.
2. This exemption is subject to the designated offender complying with all other terms and conditions of Chapter 670, Article X of the Village Code of the Village of Fox Point. Any conviction for violation of any part of Chapter 670, Article X of the Village Code of the Village of Fox Point or of any violation that would define the person as a designated offender per Section 670-42 of the Village Code shall void this Decision.

3. In the event this Decision is rendered void based upon the foregoing conditions, the designated offender shall have thirty (30) days to come into compliance with the requirements of Chapter 670, Article X of the Village Code to the same extent as though this Decision had not been granted.

[Insert other reasonable conditions as applicable]

The Residence Board's decision is final for the purpose of any Appeal.

Dated this _____ day of _____, 20__.

SEX OFFENDER RESIDENCE BOARD

By: _____
Chairman

Sex Offender Residence Board
Village of Fox Point
7200 N. Santa Monica Boulevard
Fox Point, WI 53217

Sample

Exhibit I
**VILLAGE OF FOX POINT
SEX OFFENDER RESIDENCE BOARD**

PETITION CASE NO. 2023 –

**NAME OF PETITIONER
ADDRESS
CITY, STATE ZIP**

NOTICE OF HEARING

PLEASE TAKE NOTICE that a hearing on your Petition filed with the Village Clerk's office shall be heard before the Village of Fox Point's Sex Offender Residence Board as follows:

**PLACE: Village Hall
7200 N. Santa Monica Boulevard
Fox Point, WI 53217**

DATE:

TIME:

Your failure to appear will result in the dismissal of your Petition.

Dated this _____ day of _____, 20____.

Village Clerk

Village Clerk
Village of Fox Point
7200 N. Santa Monica Boulevard
Fox Point, WI 53217
(414) 351-8900

The Village Hall is handicapped accessible. If you have other special needs, please contact the Village Clerk
7200 N. Santa Monica Boulevard, Fox Point, WI (414) 351-8900

Exhibit J

PETITIONER NAME
ADDRESS
CITY, STATE ZIP

Re: Sex Offender Residence Board

Dear NAME:

We have received your Petition for Exemption for permission to reside at **INSERT ADDRESS** in the Village of Fox Point. NOTE that you **DO NOT HAVE PERMISSION** to reside at this residence at this time.

A hearing will be scheduled only after you have provided this office with: (1) A letter from the new landlord which shows willingness to rent to you and acknowledges you are a sex offender; (2) a copy of the Criminal Complaint and Judgment of Conviction for your sex offense(s); (3) a copy of the police reports investigating the sex offense(s); (4) documentation verifying the status of any Sex Offender Treatment or other mental health counseling; and (5) a list of your attempts to find housing that would not require an exemption from the Village.

Enclosed is a copy of the Village's Ordinance Chapter 670 Article X and, in particular, Section 670-43 of said Article. The Sex Offender Residence Board shall consider the public interest as well as the affected party's presentation and concerns before making its decision. In making its decision under this provision, the Sex Offender Residence Board may consider any or all factors as contained in this section that may be applicable to your request.

Please feel free to contact the Clerk's office if you have any questions.

Sincerely,

Village Clerk

/

Enclosure

cc: DOC Probation & Parole (if agent involved)
PD Lt. (if PD involved)

