Land Use Decisions and the Rule Of Law

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This article explores how the rule of law applies to decisions made by municipal officials. In particular, it examines differences between how the rule of law applies to broad-based policy decisions (such as adopting a budget or enacting a new law of general application) on the one hand, and decisions about specific projects or individuals on the other.

There is a noticeable difference between how candidates for legislative office and candidates for judicial office conduct themselves. Candidates for legislative office are free to be vocal about their positions on matters of public policy and how they would vote on specific legislative proposals. This information helps voters evaluate candidates and decide who they want to support. Legislators are expected to be responsive to public sentiment. Candidates for judicial office walk a different line, particularly when talking about how they would vote on specific issues that might come before them if they are elected or appointed to serve. We see this dynamic play out dramatically in hearings before the Senate Judiciary Committee to consider nominees to the United States Supreme Court or other judicial offices. Senators push the nominee to explain their position on issues that may come before the court, and the nominee carefully explains that they cannot prejudge a matter that is likely to come before the court.

Members of city councils and village boards are in an interesting position, because on some days they make legislative decisions, and on other days they are called upon to make quasi-judicial decisions. At times, matters can be made even more difficult by requiring local officials to make quasi-judicial decisions in a politically charged atmosphere, frequently involving specific land use proposals.

Local officials make countless decisions about specific land use and development proposals. Examples include decisions about conditional use permits, site plan approvals, variances, and virtually any other situation in which a person is requesting some kind of special zoning approval or permission required under a zoning code. Other examples include land divisions and requests for special exceptions under land division regulations. Outside the land use context, officials decide whether they may consider a person's arrest and conviction record in alcohol licensing decisions, decide cases involving the suspension or revocation of an alcohol license, and decide disciplinary matters before police and fire commissions. In all of these types of cases (land use or otherwise), sometimes called quasi-judicial proceedings, officials must make factual determinations about an individual situation, and then apply the applicable law to those facts. The decision-making process and elements of due process of law in quasi-judicial decisions are fundamentally different from legislative, policy decisions.

One essential element of quasi-judicial decision-making is a fair and impartial decision-maker. In a case called *Marris v. City of Cedarburg*, the Wisconsin Supreme Court considered an appeal from a board of zoning appeals decision about whether Marris' property had lost its legal nonconforming use status. Marris claimed the chairperson of the board had prejudged her case before the hearing, based on several statements the chairperson made before the hearing, including referring to Marris' legal position as a "loophole" in need of "closing," and suggesting that the board should try to "get her [Marris] on the Leona Helmsley rule." (Leona Helmsley was convicted of federal income tax evasion and other crimes in 1989.) The court noted that 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 area, and the adjudicative, legislative, and political nature of the zoning process. The court determined that the chairperson's statements indicated prejudgment of the case, and created an impermissibly high risk of bias, requiring reversal of the decision.

The principle that an applicant is entitled to a fair and impartial decision maker reminds me of an understandable but concerning approach I once observed a local official take with a conditional use permit applicant. A homeowner had requested approval of something that required conditional use approval. The plan commission chair told the applicant that they should work

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with their neighbors to address the neighbors' concerns before asking the plan commission for a decision. The plan commission chair saw this as simply encouraging people to be good neighbors. But in the case of a quasi-judicial decision, an applicant should not be asked to work out a solution with neighbors. On the other hand, if an applicant is seeking to rezone their property, then it is legally appropriate to consider political support or opposition to the proposed zoning change, and an applicant would be well-advised to consult with their neighbors and build political support. This is because changing zoning is legislative in nature, while acting on a conditional use permit application is quasi-judicial.

To serve as an impartial decision-maker, I recommend following a few simple rules. First, don't discuss the case with anyone outside the official proceedings. If constituents (or even the applicant) want to discuss the case, don't do it. Don't allow yourself to be "lobbied" on quasi-judicial matters. Second, don't attempt to investigate the facts of the case on your own, outside the official proceedings. Allow the facts to be developed and presented during the formal proceedings. Third, be judicious about what you say about the matter, at all times.

Another essential element of quasi-judicial decision-making is to make factual findings based on evidence, and specifically evidence presented during the official proceedings. Although the rules of evidence that would apply in a courtroom don't apply to a hearing on a conditional use permit, decisions in those and similar proceedings must be based on "substantial evidence." The Wisconsin legislature recently adopted legislation expressly requiring "conditional use" decisions to be based on substantial evidence. Wis. Stat. § 62.23(7)(de). The statute defines "substantial evidence" as "facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion." This definition can prove challenging, particularly for members of the public who want to be heard at a public hearing, but are not versed in the law defining substantial evidence. Speculative assertions and personal opinions will not provide a legitimate evidentiary basis to support a decision.

A third essential element of quasi-judicial decision-making is for decisions to be based on existing legal standards. The decision-maker's job is to apply the "substantial evidence" to the applicable legal standards, and use that process of legal reasoning to make a decision. This process of making decisions is the essence of what it means to be a government of laws, and also shows the intersection between legislative decision-making and judicial decision-making. I once saw a city alderperson faced with voting on a development proposal say something like, "we tell them what to do, they don't tell us what to do." In the context of passing legislation, that is true enough. But once a specific development application is made, the time for legislating is over, the time for judging has begun, and then it is the law that must guide the decision, not policy preferences or responses to public sentiment.

The requirement that decisions be based on existing law is brought home by Wis. Stat. § 66.10015(2), which states: "if a person has submitted an application for an approval, the political subdivision shall approve, deny or conditionally approve the application solely based on existing requirements, unless the applicant and the political subdivision agree otherwise." Decisions in individual cases must be based on the law, and once an application has been submitted, it is too late to change the rules. If you care about the quality of land use and development in your community, the important takeaway is this: an ounce of prevention (i.e., forward-thinking legislation to guide future decision making) is worth a pound of cure (i.e., attempting to force a proposed development to conform to your policy preferences without existing legal standards to achieve that result). Investments in careful planning (such as a Comprehensive Plan), and carefully crafted zoning, land division, building, stormwater management, and other standards are the key to achieving your desired policy outcomes.

Finally, I don't want to leave the impression that legislative decisions can be made without regard to the rule of law, because there are legal constraints even when legislating. Some legal constraints are obvious, such as constitutional prohibitions on legislation that discriminates on the basis of race. The more common and difficult problem, particularly in the context of land use regulation, is the need to provide adequate standards when adopting legislation to guide future decision-making. It is common, for example, for a zoning code to define certain uses as conditional uses, and require a plan commission to evaluate proposed conditional uses on a case-by-case basis, based on the specific circumstances of the case. As discussed above, those individual cases must be decided based on the existing standards in the ordinance. The challenge then, is to adopt legally sufficient standards that will achieve the desired policy result.

For example, imagine an ordinance that says a plan commission must approve a conditional use only if it thinks the proposed conditional use is a "good idea" at the proposed location. Most of

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us would find that to be an unhelpful standard for a plan commission to follow. There is good reason to think that it would be more than unhelpful, and cross the line into legally insufficient territory. But the "is it a good idea" standard is not very different from a conditional use standard that is fairly typical in zoning codes, and that requires the plan commission to determine whether a proposed conditional use is "contrary to the public health, safety, and general welfare" at the proposed location. The legislature has provided some direction on this issue in Wis. Stat. § 62.23(7)(de)2.b., which states that the requirements and conditions for obtaining a conditional use permit that are specified in a zoning ordinance "must be reasonable and, to the extent practicable, measurable…."

In conclusion, whether legislating or judging, there is no escaping the rule of law. While that can make our jobs more challenging at times, in the end that is what makes us truly different from political systems that are not based upon the rule of law. That is what protects us from arbitrary and capricious decisions by those in power. As municipal officials, you are custodians of the rule of law. Keep it well.

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Costly Missteps

Controversial land use decisions are already challenging, but decisions that do not follow appropriate procedures can cost both wasted time and money. The League of Wisconsin Municipalities Mutual Insurance (LWMMI) provides liability insurance for most of Wisconsin's cities and villages, and CEO Matt Becker said, "Undoubtedly, land use cases are among the highest-dollar claims brought against them. The cost of doing it wrong can easily run into the millions. Even winning can cost a lot of money." He cited a couple recent examples (details removed for confidentiality).

A development was rejected by a village, resulting in a lawsuit that raised issues of equal protection, open meetings, and due process law violations, and alleging a conflict of interest on the part of one board member. The lawsuit was settled, but not before $150,000 in legal costs were spent defending the village.

Another development case claimed more than $50 million in damages. The property owner filed a public records demand that ran thousands of pages. That request shut down city hall for a time. Although both issues have been settled, legal costs for both parties reached six figures.

"Land use controversies come with the job for local officials," Becker concluded. "You may not be able to please all sides; council members and trustees need to respect everyone in the process, understand the law and local ordinances, and listen carefully to the guidance of their legal counsel."