

Wisconsin Supreme Court Rules Zoning Board of Appeals Must Express Reasons for Decisions

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Practice Area: County and Municipal Governance

The Wisconsin Supreme Court recently released a decision concluding that the Board of Zoning Appeals of the City of Milwaukee did not satisfactorily express its reasons for denying a variance application.

Background

In *Lamar Central Outdoor, Inc. v. Board of Zoning Appeals of the City of Milwaukee*, 2005 WI 117, the Court unanimously held that in order for meaningful certiorari review to take place, a Board must “adequately express its reasons” for its decision. While stopping short of requiring boards to issue written decisions, the Court made clear its belief that boards can – and must – do a “far better job” of expressing the reasons for their decisions on the record.

The Court’s decision originated from a variance application filed by Lamar Central Outdoor, Inc. (Lamar), an advertising company that leased space in Milwaukee used for an “outdoor advertising structure” overlooking Interstate 43. When the structure became partially obstructed by trees planted by the Wisconsin Department of Transportation to serve as a noise barrier, Lamar requested an area variance from the City to raise the height of the structure above the maximum height allowed by the Milwaukee Code of Ordinances.

The Milwaukee Department of City Development denied Lamar’s request for the variance and Lamar appealed the decision to the City’s Board of Zoning Appeals (Board). Following the hearing on the variance application, the five Board members discussed the application and ultimately voted three in favor of granting the variance and two opposed. Because a supermajority was required to grant the variance, Lamar’s application for variance was denied. The Board then issued a written decision, reciting the relevant ordinance provisions and concluding that, based upon the record, Lamar’s variance application was “not consistent with” those provisions.

Lamar pursued certiorari review in the circuit court, which affirmed the Board’s decision, stating:

It was reasonable for the board to conclude a height variance for a billboard was an economic issue. The fact that the board might have reached a different conclusion does not make the conclusion it did reach either arbitrary or capricious.

Lamar then appealed to the court of appeals. By unpublished order, the court of appeals reversed the circuit court, concluding that the Board's "perfunctory recitation" of the relevant criteria reflected a failure to reasonably exercise its discretion. The appellate court remanded the case with direction for the board to "provide an explicitly reasoned decision" on the variance application.

The Board then sought Supreme Court review. Attorneys for the League of Wisconsin Municipalities filed an amicus curiae brief expressing the League's concern that board members, in most cases, are not attorneys and could not be expected to prepare intricate legal opinions in support of their decisions.

Wisconsin Supreme Court's Decision

In conducting its certiorari review, the Supreme Court reiterated the well-established criteria to which the Court's review is limited:

1. whether the Board kept within its jurisdiction;
2. whether it proceeded on a correct theory of law;
3. whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and
4. whether the Board might reasonably make the order or determination in question based on the evidence.

While the court found that the Board's decision failed to satisfy both the second and third prongs of the test, it is primarily the court's review and analysis of the third prong that municipalities need be concerned with. Although the court acknowledged the presumption of validity and correctness to be accorded the Board's decision, it equated the court of appeals' conclusion that the Board's written decision exhibited an "absence of discretion" to a violation of the third prong of certiorari review. The supreme court agreed that the conclusory statements in the Board's written decision were insufficient because they failed to explain the reasons why the Board believed the facts did not meet the provisions of the ordinance.

Because a written decision was not required, however, the supreme court then went on to conduct a thorough review of the transcript of the hearing to evaluate the adequacy of the Board's reasoning. The court found numerous faults with the reasoning of the Board members. Various statements made by individual Board members during the discussion were rejected by the court as conclusory, circular, invalid or irrelevant; the comments failed to explain why the variance application did not meet the relevant criteria.

Ultimately, the supreme court concluded that the Board's comments were insufficient to justify the Board's decision and that the Board "did not satisfactorily express its reasons" for denying the variance application. Expressing sympathy to the League's concerns, the court recognized that not all board members are attorneys, but stated that a board still must "express, on the record, its reasoning why an application does or does not meet the statutory criteria." While a written opinion is not required, the board's reasoning must be clear from the hearing transcript in order for its decision to pass judicial muster.

Decision-Making Process Is Critical

The *Lamar Outdoor Advertising* case suggests that zoning boards need to be more scrupulous in their decisionmaking process. Creating a more detailed hearing record is the first step. For example, instead of merely reciting the statutory criteria for showing an unnecessary hardship for a variance request, board members must apply the criteria to the facts of the particular variance request. The board must articulate, either orally or in a written decision, why an applicant has failed to meet its burden of showing an unnecessary hardship or why the provisions of the relevant ordinance are not met based on the specific facts presented.

To support its conclusion that the board's decision must include specific reasons, the supreme court quoted a 1960 League publication, no longer in print, entitled *Zoning Board of Appeals: A Manual on Their Powers and Duties with Suggested Rules of Procedure*, as follows:

It is not sufficient for the board to give its reasons in the words of the statute such as, "The variance is granted because owing to special conditions, a literal enforcement of the provisions of the ordinance will result in practical difficulty or unnecessary hardship." The exact nature of the hardship or difficulty found by the board should be stated.

Of course, board members should continue to take care to avoid expressing any personal feelings or biases about a company, property owner, or economic activity related to the applicant's request. Such comments may be considered expressions of "will" rather than "judgment," and may undermine an otherwise careful decision, leaving an opening for the decision to be overturned as arbitrary or unreasonable.

Zoning boards may find it useful to make a practice of issuing written decisions following hearings. Getting in the practice of issuing written decisions might help a zoning board detail their decision-making process, giving board members time to lay out a more carefully reasoned analysis based upon the evidence and record presented at the hearing. Again, written decisions should not merely recite the statute or ordinance and conclude that it is or is not met by the applicant. The written decision must explain the reasons why the application does not meet the relevant criteria with reference to the particular facts of the case.

Boards that already issue written decisions should review and evaluate their prior decisions to see whether changes in form or substance are needed to ensure that future decisions meet the standards set forth in the *Lamar* decision. "Check-the-box" and other types of decision forms issued by some boards also should be reevaluated for compliance purposes.

Boards also may find it helpful to coordinate their activities with an attorney, if one does not already serve on or regularly advise the board. An attorney can help with written decisions, which, although not required, can supplement a weak or sparse hearing record. An attorney might also provide training to the board members on how to ensure that the board's decisions are based upon adequate reasoning that is properly articulated in the record.

In sum, zoning boards need to evaluate the procedures they utilize in conducting their business. Without careful planning, many local boards may find their decisions questioned or overturned by the courts. By reviewing their procedures and giving detailed reasoning for their decisions, however, most zoning boards should be able to avoid unnecessary and expensive litigation defending their decisions.

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