

## **CHAPTER 7**

### **APPEALS**

ZN 7.01	Administrative Appeals
ZN 7.02	Variances Before the Board of Review
ZN 7.03	Judicial Review

## **ZN 7.01 ADMINISTRATIVE APPEALS.**

### **(1) MUNICIPAL ADMINISTRATIVE PROCEDURE.**

Chapter 68, Wis. Stats., Municipal Administrative Procedure, as hereinafter modified pursuant to the authority granted in §68.16, Wis. Stats., is hereby adopted by reference.

### **(2) DETERMINATIONS REVIEWABLE.**

The following determinations are reviewable under this chapter:

- (a) The granting or denial in whole or in part after application of an initial permit, (including a conditional use permit), license, right, privilege or authority, with the exception, however, of the granting or denial of a variance or any other decision of the Board of Adjustments and with the exception of any amendment made pursuant to Section ZN 8.01 of this Ordinance.
- (b) The suspension, revocation or non-renewal of an existing permit, license, right, privilege or authority.
- (c) Any decision of the historical preservation commission made pursuant to Section ZN 4.08(2) of this Ordinance.
- (d) The failure to list a particular principal or accessory use in Sections ZN 4.02 through Section ZN 4.08 of this Ordinance or the failure to list a home occupation in Section ZN 3.03(2) of this Ordinance.

### **(3) PERSONS AGGRIEVED.**

A person aggrieved includes any individual, partnership, corporation, association, public or private organization, officer, department, board, commission or agency of the municipality, whose rights, duties or privileges are adversely affected by a determination made pursuant to this Ordinance. No department, board, commission, agency, officer, or employee of the Village who is aggrieved by an administrative decision may initiate a review under this chapter of a determination of any other department, board, commission, agency, officer or employee of the Village. However, said department, board, commission, agency, officer or employee may respond or intervene in a review proceeding under this chapter initiated by another.

### **(4) WRITTEN DETERMINATIONS.**

If a determination that is reviewable under this section is made orally, or, if in writing, does not state the reasons therefore, the administrative authority making that determination shall, upon written request of any person aggrieved by such determination made within ten (10) days of notice of such determination, reduce the determination and the reasons therefore to writing and mail or deliver such determination and reasons to the person making the request. The determination shall be dated, and shall advise such person of the right to have such determination reviewed, the time within which such review may be obtained, and the office or person to whom a request for review shall be addressed. For purposes of this section, an authority making a determination is defined to include the Village Board and its Plan Commission, the Village Director of Planning and Development and his employees or deputies.

### **(5) PETITION FOR REVIEW.**

Any aggrieved person may have a written or oral determination that was previously made reviewed by:

- (a) Forwarding a written request by mail or hand delivery to the authority which made the determination within thirty (30) days after having been advised and notified of such determination.
  - (b) Including in said request for review the ground or grounds upon which the person aggrieved contends that the decision should be modified or reversed.
  - (c) Requesting that the review shall be made by the officer, employee, agent, agency, committee, board, commission or body who made the initial determination.
  - (d) Failure to make a request as noted above to the proper party shall not preclude the person aggrieved from review unless such failure has caused prejudice to the municipal authority.
- (6) **INITIAL REVIEW.**
- (a) The request for review made to the officer, employee, agent, agency, committee, board, commission or body who made the initial determination shall review the initial determination within fifteen (15) days of the receipt of a request for review. This time for review may be extended by written agreement with the person aggrieved.
  - (b) The person aggrieved may file with the request for review or within the time agreed with the municipal authority written evidence and argument in support of the person's position with respect to the initial determination.
  - (c) The authority making the initial determination may affirm, reverse or modify the initial determination and shall mail or deliver to the person aggrieved a copy of the decision on review, which shall state the reasons for such decision. The decision shall advise the person aggrieved of the right to appeal the decision, the time within which appeal shall be taken and the office or person with whom the notice of appeal shall be filed. Appeals from a decision shall be taken within thirty (30) days of notice of such decision by filing with or mailing to the authority making the decision by written notice to the Village Board of Appeals.
- (7) **ADMINISTRATIVE APPEAL HEARING.**
- (a) Time of hearing. Within fifteen (15) days of the receipt of the notice of appeal filed pursuant to Section ZN 7.01(6)(c) of this Ordinance an administrative appeal hearing shall be held. The Village Department of Planning and Development shall serve the appellant with notice of such hearing before the Village Board by mail or personal service at least ten (10) days before such hearing.
  - (b) Conduct of hearing. At the hearing, the appellant and the determining authority may be represented by counsel and may present evidence and call and examine witnesses and cross-examine witnesses of the other party. Such witnesses shall be sworn by the person conducting the hearing before the Village Board which shall make the decision on the administrative appeal. The decision maker may issue subpoenas. The hearing may employ such other

procedures as deemed applicable and appropriate and as set forth in Section ZN 7.02 of this Ordinance. In reviewing decisions pursuant to Section ZN 7.01(2) of this Ordinance dealing with similarities between intended principal and accessory uses and those provided for in the ordinance, the Village Board may make whatever use it deems advisable of the United States Government Office of Management and Budgets Standard Industrial Classification Manual in determining similarities.

- (c) Record of hearing. The person conducting the hearing or a person employed for that purpose shall take notes of the testimony and shall mark and preserve all exhibits. The person conducting the hearing may, and upon request of the appellant shall, cause the proceedings to be taken by a stenographer or by a recording device, the expense thereof to be paid by the Village Department of Planning and Development.

(8) **FINAL DETERMINATION.**

Within twenty (20) days of completion of the hearing conducted pursuant to Section ZN 7.01(7) and the filing of briefs, if any, the Village Board shall mail or deliver to the appellant its written determination stating the reasons therefore. Such determination shall be a final determination.

(9) **JUDICIAL REVIEW.**

A judicial review of any final determination may be had pursuant to the provisions of Section ZN 7.03(1).

## **ZN 7.02 VARIANCES BEFORE THE BOARD OF REVIEW.**

(1) **INTENT.**

It is the intent of this section of the Ordinance to recognize that under certain conditions and circumstances, it may be necessary to obtain a variance from the terms of this Ordinance so long as said variance will not be contrary to the public interest, and where, owing to special conditions, a literal enforcement of the provisions of the Ordinance will result in unnecessary hardship or practical difficulties and where the granting of such variance will uphold the spirit of this Ordinance and contribute to the justice of the particular case in question. Any variance granted under the terms of this Ordinance shall, however, relate only to area requirements and not to use. Furthermore, it is the intent of this section to establish a Board of Review for the purpose of reviewing applications for variances as well as reviewing orders and decisions made by the Department of Planning and Development.

(2) **BOARD OF REVIEW ESTABLISHED.**

Pursuant to the Wisconsin Statutes and Section 1.16 of the Code of Ordinances of the Village there is hereby established a Board of Review for the Village of Somers for the purpose of hearing appeals and applications and granting variances to the provisions of this Ordinance in harmony with the purpose and intent of this Ordinance.

(3) **JURISDICTION AND POWERS OF THE BOARD OF REVIEW.**

- (a) The Board of Review shall have the following powers:

- 1 To hear and decide appeals as may be authorized by Section ZN 7.01 of this Ordinance or where it is alleged that there is error in any order, requirement, decision or

determination made by an administrative official in the enforcement of §59.69, Wis. Stats., or this Ordinance.

- 2 To hear and to authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, or, owing to special circumstances a literal enforcement of the provisions of the ordinance will result in unnecessary hardship and so that the spirit of the ordinance shall be observed and substantial justice done.
  - 3 To hear and decide applications for interpretations of the zoning regulations and the location of the boundaries of the zoning district, floodlands, and shorelands after the Plan Commission has made a review and recommendation. Shoreland boundaries shall be altered by the Board of Review only when the applicant presents evidence that clearly and conclusively establishes that the location as shown on the zoning map is incorrect. If the boundary is incorrectly mapped, the Board should inform the Plan Commission or the person contesting the boundary location to petition the governing body for a map amendment according to Section ZN 8.03(4) Amendments.
  - 4 To hear and grant applications for substitution of more or equally restrictive non-conforming uses for existing non-conforming uses provided no structural alterations are to be made and the Department of Planning and Development has made a review and recommendation. Whenever the Board permits such a substitution, the use may not thereafter be changed without application.
  - 5 To hear and grant applications for temporary uses, in any district provided that such uses are of a temporary nature, do not involve the erection of a substantial structure, and are compatible with the neighboring uses and the Department of Planning and Development has made a review and recommendation. The permit shall be temporary, revocable, subject to any conditions required by the Board of Adjustment, and shall be issued for a period not to exceed twelve (12) months. Compliance with all other provisions of this Ordinance shall be required.
- (b) No variance shall have the affect of permitting any use in a district that is prohibited in that district, nor shall a variance have the effect of a re-zoning.
  - (c) The Board may reverse, affirm wholly or partly or modify the order, requirement, decision, or determination appealed from, and may make such order, requirement, decision or determination as ought to be made.
  - (d) The Board may request assistance from other Village officers, departments, commissions, and boards.
  - (e) The Chairman may administer oaths and compel the attendance of witnesses by subpoena.
- (4) **APPEALS AND APPLICATIONS FOR VARIANCES.**
- (a) Appeals to the Board of Review may be taken by any persons aggrieved or by any officer,

department, or Commission of the Village affected by a decision of the Department of Planning and Development. Such appeal shall be filed in triplicate in the Department of Planning and Development within thirty (30) days after the date of written notice of the decision or order. Applications may be made by the owner or lessee of the structure, land or water to be affected at any time and shall be filed in the Department of Planning and Development. Such appeals shall be commenced by filing with the Department of Planning and Development and with the Board of Review a notice of appeal specifying the grounds thereof. The Department of Planning and Development shall forthwith transfer to the Board all the papers constituting the record upon which the action appealed from was taken. In addition, such appeals and application shall include the following as deemed appropriate by the Board of Review:

- 1 Name, addresses and phone numbers of the applicant, owner of the site, architect, professional engineer, contractor, and authorized agent if applicable.
- 2 A description of the subject site by lot, block and recorded subdivisions or by metes and bounds; address of the subject site, tax parcel number, type of structure; existing or proposed use of the structure or site; the zoning district within which the subject site is located; classification of the subject site either being conforming or non-conforming in its use; and whether or not the property is located within a shoreland or floodplain area.
- 3 A plat of survey prepared by a land surveyor registered by the State of Wisconsin showing all of the information required under Section ZN 2.02(1)(h)3 for a zoning permit. In addition, the Department of Planning and Development may require that the plat of survey show the location, elevation and use of any abutting lands and the location and foundation elevations of structures within fifty (50) feet of the subject site; soil mapping unit lines; ordinary high water mark, historic high water marks and floodlands on or within fifty (50) feet of the subject premises, and existing and proposed landscaping.
- 4 For variances located within shoreland areas, the application shall include but not be limited to, a map plan which accurately locates or describes the proposal for a variance with respect to the shoreland, and shall provide all pertinent information such as fill dimensions and elevations, and building floor elevations. For all subdivision proposals and all other proposals, if the area affected exceeds five (5) acres or the estimated cost of the proposal exceeds One Hundred Twenty-five Thousand (\$125,000.00) Dollars, the applicant shall provide all computations which are required to show the effect of the proposal for a variance on flood heights, velocities and floodplain storage, which information may be transmitted to the Department of Natural Resources for review. In addition to the foregoing requirements required by Wis. Admin. Code §NR 116.20(2), the applicant shall be further required to submit any information hereinafter required by Chapter NR116 of the Wisconsin Administrative Code and amendments thereto. In addition, the Department of Planning and Development may require additional information such as but not limited to that data set forth in Section ZN 5.03(4) of this Ordinance.
- 5 Additional information relative to those standards and guidelines which must be met

prior to the issuance of the variance as set forth in Section ZN 7.02(13) of this Ordinance.

6 The fee specified in Section ZN 2.02(8) of this Ordinance.

(b) Any application for a variance under this Ordinance shall be accompanied by a sworn statement by the owner of the subject property or the applicant for a variance for said property that said property and its use will be operated in accordance with the provisions of this Ordinance.

(5) **STAYS.**

An appeal shall stay all proceedings and furtherance of the action appealed from unless the Department of Planning and Development shall certify to the Board of Review after the notice and appeal shall have been filed that by reason of facts as stated in the certificate, a stay would cause imminent peril to life or property. In such case, notice shall be given to the appellant and proceedings shall not be stayed otherwise than by a restraining order, which may be granted by the Board of Review or by a Court of record, on application and notice to the Department of Planning and Development and for good cause shown.

(6) **NOTICE PROCEDURES.**

(a) Upon receipt of a petition for a variance, the Department of Planning and Development shall place the matter on the agenda for a public hearing before the Village Board of Review provided, however, that the requirements of this Ordinance have been complied with.

(b) Notice of the aforementioned public hearing shall be published as a Class 1 notice in a newspaper of general circulation within Village pursuant to Chapter 985, Wis. Stats., and the Wisconsin Open Meeting Law, §19.81 to §19.98, Wis. Stats. In addition, notice of said public hearing shall be mailed by certified mail, return receipt requested, to the last known address of all abutting property owners. Failure to receive notice shall not invalidate any action taken by the Board of Review. After publication and notice, the petitioner may request the Board of Review for a one (1) month postponement of the public hearing for good cause and no further publication or notice shall be required, provided, however, that notice of the adjourned hearing date is given in the record at the time of the published hearing.

(c) Upon receiving a petition for an appeal or variance, the Department of Planning and Development shall forward a copy of the petition to the board of any other town that may be immediately adjacent or opposite of such parcel and shall allow such board or planning commission forty-five (45) days to comment on said application. Within said period of forty-five (45) days, the Village board and/or planning commission shall forward their recommendation to the Village Board of Review regarding the appeal along with standards or conditions which are found by them to be necessary for the allowance of a variance. Said standards or conditions or recommendation to grant or deny the variance or appeal shall not be binding on the Board of Review or Village Board.

(7) **HEARING PROCEDURES.**

In hearing a petition requesting an appeal or allowance of a variance, the Board of Review shall call the petition at the public hearing. Upon the call of the petition, the petition shall be read by the Chairman

of the board and at the conclusion thereof, the chairman shall hear and receive any evidence or sworn testimony presented by the petitioner or his authorized agent or attorney. At the conclusion of the petitioner's presentation, the Chairman shall first ask for any public comments from those in support of the petition and secondly from those in opposition to the petition. Any relevant and material evidence or sworn testimony presented by interested individuals either in favor of or in opposition to the petition shall be received by the Chairman provided however that said evidence or sworn testimony is properly identifiable for the record. Lastly, the Chairman may ask for a recommendation from a representative of the Department of Planning and Development.

**(8) CONTINUANCES.**

Upon receiving the recommendation of the Department of Planning and Development, the board may table the petition for a period of up to three (3) months from the date of public hearing so as to allow the petitioner an opportunity to provide any further information deemed pertinent by the board or so as to allow the board members an opportunity to view the site or similar situations already in existence if a comparison is warranted in accordance with the guidelines set forth in Section ZN 7.02(9) or consider the conditions for allowing the appeal or variance.

**(9) SITE VIEWS.**

En route to view a site as provided for in Section ZN 7.02(8) of this Ordinance, board members traveling together or visiting the site at the same time shall refrain from discussing board business. Furthermore, testimony shall not be received during such view nor shall any argument be heard. The Board may, however, gather information and ask questions provided that information, data, and questions and answers are recited into the record if that information will not be entered by testimony or exhibits.

**(10) FINDINGS AND CONCLUSIONS.**

Upon having received all evidence and hearing all sworn testimony relating to the petition, the Board of Review shall review the site plan, existing and proposed structures, architectural plans, neighboring land and water uses, parking areas, driveway locations, highway access, traffic generation and circulation, drainage, sewage and water systems, the proposed operation, the effects of the proposed use, structure, operation and improvement upon flood damage protection, water quality, shoreland cover, natural beauty and wildlife habitat, and any other pertinent requirements deemed necessary by the board when considering the standards set forth in Section ZN 7.02(11) of this Ordinance. Upon completion of said review, the board chairman shall entertain a motion that the board either grant or deny the appeal or application for a variance based upon specific findings and conclusions which shall be part of the Board's written decision and minutes.

**(11) STANDARDS AND GUIDELINES.**

(a) In determining whether a variance is to be granted, the following standards and guidelines must be met in view of the evidence presented and in making its decision, these standards and guidelines shall be addressed by the Board of Review:

- 1 The existence of special conditions or exceptional circumstances on the land in questions.
- 2 The experiencing of unnecessary hardships or practical difficulties on the land in question either presently or in the future.

- 3 That these hardships or difficulties are the result of the aforementioned special conditions existing on the land and are not self-inflicted.
  - 4 That the existence of these special conditions will restrict the use of the land if the Ordinance is applied literally so as to render the land useless.
  - 5 That the limitation on the use of the land does not apply generally to other properties in the district.
  - 6 That limiting the use of the property does not afford compensating gains to the public health, safety and welfare.
  - 7 That the variance(s) requested are the minimum variance(s) needed to alleviate difficulties or hardships.
  - 8 That the use of the parcel in question presently does conform to the ordinance.
  - 9 That granting the variance applied for will not affect the public health, safety, morals and welfare of the community and other properties in the area.
- (b) Variances may be granted for example for reasons of topography, environmental protection or where permitted by state statute but in no event may a variance be granted where the primary reason for obtaining a variance is to obtain a more profitable use of the property, personal inconvenience, construction errors, economic reasons, self-created hardships, or where the property is presently a non-conforming use. Furthermore, variances may not be granted for the purpose of altering the sanitary requirements of this Ordinance except for existing structures.
- (c) The Board of Review in considering the propriety of granting a variance shall not consider the number of persons for or against the granting of a variance but shall base their decision solely upon the equities of the situation involved.
- (d) Variances may be granted in the form of an area or distance variance, however, use variances shall be specifically prohibited under this Ordinance.

(12) **CONDITIONS.**

In order to insure that any variance so granted by the Board of Review is consistent with the spirit of the Ordinance and recognizing that there could be fact situations where the spirit of this Ordinance could be observed only if conditions were imposed upon the granting of the variance, the Board of Review is specifically empowered to grant a variance upon conditions such as, but not limited to, landscaping, type of construction, hours of operation, traffic patterns, parking requirements, yard sizes, time periods, deed restrictions, bonds, etc. and further provide that in the absence of said conditions being met, said variance shall be null and void.

(13) **DECISIONS.**

- (a) The concurring vote of the majority of the Board shall be necessary to reverse any order, requirement, decision or determination of the Department of Planning and Development, or to

decide in favor of the applicant on any matter upon which it is required to pass under this Ordinance, or to effect any variation in this Ordinance.

- (b) The Board of Review shall decide all appeals and applications in compliance with the Wisconsin Open Meeting Law and within thirty (30) days after final hearing and shall transmit a signed copy of the Board's decision and order to the appellant or applicant and the Department of Planning and Development along with the Board's Findings and Conclusions and a statement as to which members of the board viewed the property in question and the date of such viewing.
- (c) Variances granted by the Board that require issuance of a zoning permit shall expire within one (1) year of approval unless the zoning permit is issued. Zoning permits issued in accordance with Board of Review approval may not be renewed without Board of Review approval. Variances are approved for specific sizes and dimensions. No additions shall be approved which affect the area for which the variance was granted unless approved by the Board of Review.

(14) **ORDER ON APPEAL.**

In exercising the above mentioned powers, the Board of Review may, in conformity with the provisions of this section, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from, and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all powers of the officer from whom the appeal was taken.

(15) **CONFLICT OF INTEREST.**

Any member of the Board of Review having a conflict of interest in any matter coming before the board shall refrain from any voting or discussion either prior to, at, or after the matter has been heard by the Board.

(16) **NOTICE TO DNR.**

The Board of Review shall transmit a copy of each application for a variance to shoreland regulations, and a copy of each appeal to shoreland regulations to the Wisconsin Department of Natural Resources (DNR) for review and comment at least ten (10) days prior to any public hearing. Final action on the application or appeal shall not be taken for thirty (30) days or until such time as the DNR has made their recommendations, whichever comes first. A copy of all decisions relating to variances to shoreland regulations, and a copy of all decisions to shoreland appeals shall be transmitted to the DNR within ten (10) days of the effective date of such decision.

(17) **MOTION TO RECONSIDER AND RE-APPEAL.**

- (a) Where an error in judgment or procedure resulted in granting an improper variance or in denying an appeal, a motion to reconsider made by a board member or upon motion of any interested party, may be considered and the prior action of the Board rescinded if vested rights are not violated.
- (b) A petition for a variance having been denied or a decision or order of the Department of Planning and Development having been affirmed, a petition seeking a similar variance or relief shall not be entertained by the Board of Review until the expiration of a minimum of one (1) year.

**(18) APPEAL OF BOARD RULING OR ORDER.**

Any decision of the Village Board of Review related to the granting or denial of an appeal or allowance or denial of a variance may be appealed as provided for in Section ZN 7.03 of this Ordinance.

**(19) RECORDING OF RULING OR ORDER.**

The Department of Planning and Development shall keep a record and/or map of all such variances which shall be open to the public.

## **ZN 7.03 JUDICIAL REVIEW.**

**(1) JUDICIAL REVIEW OF FINAL DETERMINATION OF ADMINISTRATIVE APPEAL.**

(a) Any party to a proceeding resulting in a final determination pursuant to Section ZN 7.01(8) of this Ordinance may seek review thereof by writ of certiorari within thirty (30) days of receipt of the final determination. The court may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court's decision.

(b) If review is sought of a final determination, the record of the proceedings shall be transcribed at the expense of the person seeking review. A transcript shall be supplied to anyone requesting the same at the requester's expense. If the person seeking review establishes impecuniousness to the satisfaction of the reviewing court, the court may order the proceedings transcribed at the expense of the municipality and the person seeking review shall be furnished a free copy of the transcript. By stipulation, the court may order a synopsis of the proceedings in lieu of a transcript. The court may otherwise limit the requirement for a transcript.

**(2) REMEDIES.**

Any person aggrieved by the operation of this Ordinance may seek judicial relief in the form of declaratory judgments, and petitions for a writ of mandamus along with any and all other remedies available to said individual either at law or in equity. Compliance with this Ordinance may also be enforced by injunctive order at the suit of the Village or the owner or owners of real estate affected by such regulation. Forfeitures and penalties shall be in accordance with Section ZN 6.04 of this Ordinance.

**(3) JURY TRIAL.**

A jury trial may be requested by either party in any action involving an issue of fact relating to the operation of this Ordinance.