STATE AND FEDERAL COURT RELIEF FROM LICENSING AND PERMIT DECISIONS

WISCONSIN TOWN LAW CONFERENCE

UNIVERSITY OF WISCONSIN LAW SCHOOL

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Atty. David C. Moore
Nowlan & Mouat LLP
Janesville, WI

Nowlan & Mouat LLP

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I. TYPES OF LICENSES AND PERMITS

a. "Monitoring" Permits – e.g. dogs, cats and bicycles

b. Compliance Verification Permits – e.g. building permits

c. Our Focus: Regulatory Permits

- Conditional Use Permits
- Alcohol licenses
- Other licenses and permits issued in the discretion of municipal government

II. FORMS OF REVIEW

a. Certiorari

"Certiorari is a mechanism by which a court may test the validity of a decision rendered by a municipality, an administrative agency, or an inferior tribunal." *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 34, 332 Wis. 2d 3, 796 N.W.2d 411.

"Certiorari is used to test the validity of decisions made by administrative or quasi-judicial bodies." *Acevedo v. City of Kenosha*, 2011 WI App 10, ¶ 8, 331 Wis. 2d 218, 793 N.W.2d 500.

b. Constitutional Challenges

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

III. CASE STUDY – *CASEY'S MARKETING COMPANY V. CITY OF MILTON*

a. The Quota.

- The City establishes a "quota" limiting the number of Class "A" licenses for sale of fermented malt beverages – 3, or one for every 1500 residents

- One is held by a liquor store, one by a grocery store, and one by a convenience store.

b. The Competitors

- Casey's has a pre-existing store with no license

- A new Kwik Trip is proposed at a new freeway exit; Kwik Trip will not build if it can't sell beer.

c. The Politics

- The "pro-development" faction of the Council wants the new Kwik Trip.

- The "anti-alcohol" faction is worried about opening up a floodgate of beer sales.

d. The Compromise

- The ordinance is amended to allow the Council, in its discretion, to exceed the quota.

- New "factors" are created (by resolution) to allow Common Council the discretion to allow for exceptions to the 3-license quota:

"[T]he Common Council *may* consider the following *factors*:

1. Whether the building in which the proposed licensed establishment is to be located is in excess of 4000 sq. ft.;

2. Whether the proposed licensed establishment is located more than 1500 feet from school district property;

3. Whether the proposed licensed establishment would derive less than fifty percent (50%) of its gross revenue from the sale of alcoholic beverages;

4. Whether the proposed licensed establishment has submitted a plan that adequately ensures that all alcohol sales will be conducted in compliance with all state laws and local ordinances;

5. Whether the proposed licensed establishment demonstrates a positive impact to the community;

6. Other *factors* which the Common Council *may deem relevant* to a specific application."

e. The Applications

- Kwik Trip applies and is summarily granted a license.
- Casey's applies and is summarily denied.

f. A Few Extra Facts

- Casey's is slightly less than 4000 sq. ft. in area.
- Kwik Trip proposes a store larger than 4000 sq. ft.
- Casey's is slightly within 1500 of the high school
- Kwik Trip is more than 1500 feet from any school
- "Factors" apply only to those businesses exceeding the quota

IV. CERTIORARI

a. "The Remedy Available by Certiorari"

- The writ of certiorari:

  "A writ of superior court to call up the records of an inferior court or a body acting in a quasi-judicial capacity." *Certiorari,* Merriam-Webster Dictionary (11th ed. 2016)

- Wis. Stat. § 753.04 :

  "All writs issued from the circuit court shall be in the name of the state of Wisconsin, shall bear date the day they are issued, be *attested in the name of the judge* of the circuit in which issued, and if there is no such judge, then in the name of the chief judge of the court of appeals or the chief justice of the supreme court, be returnable on a date certain which is not more than 60 days from the date of issuance, unless otherwise directed by law, by the judge or by rule of court, be *signed by the clerk, sealed with the seal of the court* and directed to some officer or person authorized to serve or execute the writs. All writs of certiorari issued to review any action taken by a county board, town board, common council of any city or board of trustees of any village,

or any record lawfully in the custody of a county clerk, town clerk, city clerk or village clerk may be addressed to and served upon the proper county clerk, *town clerk*, city clerk or village clerk, respectively, who shall make return thereto.

- Wis. Stat. § 781.01 (Ch. 289, Laws of 1981):

"The remedy available by a writ of mandamus, prohibition, quo warranto, *certiorari* or habeas corpus may be granted by the final judgment or allowed as a provisional remedy in an action or proceeding. *The use of a writ is not necessary*. This section does not alter the nature of any extraordinary remedy or the scope of the proceedings, including without limitation the relief available, discovery, the availability of jury trial and the burden of proof."

b. Certiorari as a Provisional Remedy.

Certiorari gets you the *remedy* of a review – not the remedy of reversal, remand or modification.

c. Certiorari by Statute:

- Example: Wis. Stat. § 68.13 (1):

"Any party to a proceeding resulting in a final determination may seek review thereof *by certiorari* within 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."

- Example: Wis. Stat. 62.23(7)(e) 10.:

"Any person or persons, jointly or severally aggrieved by any decision of the board of appeals, or any taxpayer, or any officer, department, board or bureau of the municipality, may, within 30 days after the filing of the decision in the office of the board of appeals, *commence an action seeking the remedy available by certiorari. . . .*"

d. Common Law Certiorari:

"It is well established in this state that where there are no statutory provisions for judicial review, the action of a board or commission may be reviewed by way of certiorari." *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 549-50, 185 N.W.2d 306 (1971).

e. Process of Review

- The Four Inquiries:

  There are four standard inquiries in a certiorari action in common law:

  (1) [W]hether the municipality 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.

  Nowell v. City of Wausau, 2013 WI 88, ¶ 48, 351 Wis. 2d 1, 838 N.W.2d 852.

- Common Law Limits on the Scope of Review

  Unless the statute limits or enlarges the scope of review, it is confined to the same four inquiries as common law certiorari and the record of the administrative proceedings.

  E.g., *State ex rel. Ruthenberg v. Annuity & Pension Bd.*, 89 Wis. 2d 463, 474, 278 N.W.2d 835 (1979); *State ex rel. Harris v. Annuity & Pension Bd., Emp. Ret. Sys. of City of Milwaukee*, 87 Wis. 2d 646, 652, 275 N.W.2d 668 (1979).

- Presumption of Validity

  "Certiorari review accords the decision of the local governmental entity a presumption of 'correctness and validity.'"

  AllEnergy Corp. v. Trempeleau Cty. Env't & Land Use Comm., 2017 WI 52, 375 Wis. 2d 329, ¶ 88, 895 N.W.2d 368; *citing Kapischke v. Cty. Of Walworth*, 226 Wis. 2d 320, 328, 595 N.W.2d 42 (Ct. App. 1999).

- Standard of Review

  "The board's findings will not be disturbed if any reasonable view of the evidence sustains them."

Kapischke, 266 Wis. 2d at 328; *State ex rel. Morehouse v. Hunt*, 235 Wis. 358, 291 N.W. 745, 749 (1940).

f. Time Limitations

Time limitations on appeals are normally set by statute (usually 30 days) under statutory certiorari. *If a statute does not apply or does not specify a time limitation*, action must be brought *within 6 months*.

Firemen's Annuity & Ben. Fund of Milwaukee v. Krueger, 24 Wis. 2d 200, 206, 128 N.W.2d 670 (1964).

g. Alternative Procedures

There are three different ways to begin a certiorari action. *Nickel River v. City of LaCrosse*, 156 Wis. 2d 429, 431-432, 457 N.W.2d 333 (Ct. App. 1990):

- Filing of a Summons and Complaint:

  Wis. Stat. § 801.02(5) permits the procedures for civil actions to be applied to certiorari proceedings, allowing filing by summons and complaint. Generally, this is the easiest and most practical method.

- Service of an Original Writ.

  If writ procedure is used, the writ must be *served* within the required time period (again, 30 days under most statutes – 6 months under common law).

- Filing of a Complaint with Service of Complaint and Order

  The "complaint and order" method is an option for an emergency situation where the case may be moot before a response would be filed. *See generally Koenig v. Pierce Cty. Dep't of Human Servs.*, 2016 WI App 23, ¶ 20, 367 Wis. 2d 633, 877 N.W.2d 632 (discussing the use of a complaint and order in an emergency situation). The appellant need not prove there is an "emergency." *Id.*, ¶ 21. Wis. Stat. § 801.02(5) does not require that the order be signed within the 30-day time limit; the beginning of the action is measured from when the complaint is filed. *Id.*, ¶ 26.

V. STATUTORY REVIEW OF MUNICIPAL ADMINISTRATIVE DECISIONS

a. The Statutory Catch-All:

Wis. Stat. § 68.01:

"Any person having a substantial interest which is adversely affected by an administrative determination of a governing body, board, commission, committee, agency, officer or employee of a municipality or agent acting on behalf of a municipality as set forth in s. 68.02, may have such determination reviewed as provided in this chapter. The remedies under this chapter shall not be exclusive. No department, board, commission, agency, officer or employee of a municipality who is aggrieved may initiate review under this chapter of a determination of any other department, board, commission, agency, officer or employee of the same municipality, but may respond or intervene in a review proceeding under this chapter initiated by another."

b. Exceptions

Wis. Stat. § 68.03:

"Except as provided in s. 68.02, the following determinations are *not* reviewable under this chapter:

(1) A legislative enactment. A legislative enactment is an ordinance, resolution or adopted motion of the governing body of a municipality.
(2) Any action subject to administrative or judicial review procedures under other statutes.

. . .

(8) Any action which is subject to administrative review procedures under an ordinance providing such procedures as defined in s. 68.16.
(9) Notwithstanding any other provision of this chapter, any action or determination of a municipal authority which does *not* involve the constitutionally protected right of a specific person or persons to due process in connection with the action or determination."

c. Time Limitation

Wis. Stat. § 68.13 (1):

"Any party to a proceeding resulting in a final determination may seek review thereof by certiorari within *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."

d. Opting Out

- Option for Alternative Review Procedure

  Wis. Stat. § 68.16:

  "The governing body of any municipality may elect not to be governed by this chapter in whole or in part by an ordinance or resolution which provides procedures for administrative review of municipal determinations."

- Opting Out and Judicial Review

  If a municipality opts out of the statute "and has not provided for judicial review by certiorari, review by common law certiorari is available." *Toubl v. Town of Beloit*, 2011 WI App 58, ¶ 11 n.2, 332 Wis. 2d 806, 798 N.W.2d 320 (UNPUBLISHED); *citing Franklin v. Housing Authority of Milwaukee*, 155 Wis. 2d 419, 424, 455 N.W.2d 668 (Ct. App. 1990).

- Time Limits in Opting-Out

  - Can a municipality adopt its own time limit? If not, what time limit applies? 6 months? Suggestion for drafting ordinance: Create a 30 day limit, or opt out of everything *except* the statutory time limit.

  - What does "30 days of receipt of the final determination" mean?

    - *Pulera v. Town of Richmond*, 2017 WI 61, 375 Wis. 2d 676, 896 N.W.2d 342.

      In order to reconfigure an intersection with a county road, two portions of town roads in two towns were discontinued. A resident filed for review bey certiorari. The towns alleged the petition was untimely. The statutory provision for appeal (§ 82.15) referenced § 68.13.

      The Supreme Court concluded "that the thirty-day period during which certiorari review is available for a town board's highway order to lay

out, alter or discontinue a highway begins to run on the date that the highway order is recorded by the register of deeds."

Query: What happens if the decision is ***not*** to issue the order?

- *Zelman v. Town of Erin*, 2017AP1529 (July 11, 2018, recommended for publication):

  A neighbor opposed issuance of a CUP for a wine business. The Plan Commission approved the permit. The neighbor appealed to the Town Board. A hearing was held on 9-19-16. An amended complaint seeking certiorari review was filed on 11-9-16. The court determined that the appeal was timely because the neighbor received no final determination until (in this case, a signed decision) less than 30 days before filing.

VI. CERTIORARI REVIEW OF CONDITIONAL USE PERMIT DECISIONS

a. "Special Exceptions" and CUPs.

"Conditional use permit" is now a statutory term under 2017 Wis. Act 67 (previously "special exception" in chapters 59, 60 and 62 – the county, town and city statutes governing zoning authority)

b. The Statutory Menu after 2017 Wisconsin Act 67:

- Appeals from city's denial of conditional use permit (or from a town board or plan commission exercising village powers):

  Wis. Stat. § 62.23 (7) (de) 5.:

  "If a city denies a person's conditional use permit application, the person may appeal the decision to the circuit court under the procedures contained in par. (e) 10."

- City Board of Appeals Procedure:

  Wis. Stat. § 62.23(7)(e) 10.:

  "Any person or persons, jointly or severally aggrieved by any decision of the *board of appeals*, or *any taxpayer, or any officer,*

department, board or bureau of the municipality, may, within 30 days after the *filing of the decision* in the office of the board of appeals, commence an action seeking *the remedy available by certiorari*. The court shall not stay proceedings upon the decision appealed from, but may, on application, on notice to the board of appeals and on due cause shown, *grant a restraining order*. The board of appeals shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof. *If necessary for the proper disposition of the matter, the court may take evidence*, or appoint a referee to take evidence and report findings of fact and conclusions of law as it directs, which shall constitute a part of the proceedings upon which the determination of the court shall be made. *The court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review*."

- Appeals from denial of conditional use permit by a town that is not exercising village powers:

  Wis. Stat. § 60.61 (4e) (e):

  "If a town denies a person's conditional use permit application the person may appeal the decision to the circuit court under the procedures contained in s. 59.694 (10)."

- County Board of Adjustment Procedure:

  Wis. Stat. § 59.694 (10):

  "Any person or persons, jointly or severally aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board or bureau of the municipality, may, within 30 days after the filing of the decision in the office of the board of appeals, *commence an action seeking the remedy available by certiorari. . . .*"

c. Characteristics of Certiorari Under the Statutory Procedures for Denial of a CUP

- Applicant ("the person") may appeal from denial of CUP.
- *Any taxpayer* may appeal from decision of a board of appeals, or a county board of adjustment.
- A municipal board may appeal from a decision of a board of appeals, or a county board of adjustment.

- 30-day time limit.
- Limit runs from *filing of decision*.
- Court *may* grant a restraining order "on due cause shown."
- The court *may* take additional evidence (e.g., e-mails obtained under open records request ?).
- The court "may reverse or affirm, wholly or partly, *or may modify* the decision brought up for review."

c. Appeals from Decisions Other Than Denial

What if the decision was not to deny, but to grant, or to impose particular conditions?

- CUPs ("special exceptions") may be (and usually are) issued by the Town Board or Plan Commission under village powers (and not by the board of appeals).

  Wis. Stat. § 62.23(7)(e) 10.:

  "The council which enacts zoning regulations pursuant to this section shall by ordinance provide for the appointment of a board of appeals, and shall provide in such regulations that said board of appeals may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained. *Nothing in this subdivision shall preclude the granting of special exceptions by the city plan commission or the common council* in accordance with the zoning regulations adopted pursuant to this section which were in effect on July 7, 1973 or adopted after that date."

- Conditional use permits are "special exceptions" by definition under Wis. Stat. § 62.23 (7) (de) a., and by common law. *Hudson v. Hudson Town Bd. of Adjustment*, 158 Wis. 2d 263, 273, 461 N.W.2d 827 (Ct. App. 1990).

- Wis. Stat. § 62.23(7)(e) 10. permits certiorari review of decisions made by *the board of appeals*. The statute is "exclusive" as to "a zoning board's decision." *Dujardin v. Barry*, 121 Wis. 2d 694, 359 N.W.2d 179 (Ct. App. 1984) (UNPUBLISHED).

- Act 67 makes the same procedure applicable to appeals *by applicants from denial* of conditional use permits in general.

    - The statute says nothing about: 1) appeals by a taxpayer from the granting of a CUP; or 2) appeals by an applicant from conditions imposed under a CUP.

    - Thus, it appears that common law certiorari applies to such appeals.

- There are consequences to pursuing common law vs. statutory certiorari

    - Six-month limitation instead of 30 days:

      "The City does not cite to a statute that places a time limit on certiorari review of a *determination of a common council* denying a CUP application. Rather, the City cites to Wis. Stat. § 62.23(7)(e)10. (2015-16), which governs the *time limit on certiorari review of a decision of a city zoning board of appeals*. That, however, is inapplicable here, as the appeal was from the Common Council's final decision. *Therefore, as the circuit court correctly concluded, the six-month time limitation for common law certiorari applies . . . .*"

      Hartland Sportsmen's Club, Inc. v. City of Delafield, 2016 AP 666, Aug. 30, 2017 (District II, unpublished).

    - No evidence may be taken by court

      Unlike common law certiorari, Wis. Stat. § 62.23 (7) (e) 10. explicitly authorizes the court to take evidence if it is necessary for proper disposition of the matter. *Unless the statute limits or enlarges the scope of review*, it is confined to the same four inquiries as common law certiorari and the record of the administrative proceedings.

      E.g., State ex rel. Ruthenberg v. Annuity & Pension Bd., 89 Wis. 2d 463, 474, 278 N.W.2d 835 (1979); *State ex rel. Harris v. Annuity & Pension Bd., Emp. Ret. Sys. of City of Milwaukee,* 87 Wis. 2d 646, 652, 275 N.W.2d 668 (1979).

VII. A DIGRESSION: ARE RE-ZONING DECISIONS APPEALED BY CERTIORARI?

"The role of courts in zoning matters is limited because zoning is a legislative function." *Town of Rhine v. Bizzell*, 2008 WI 76, ¶ 26, 311 Wis. 2d 1, 751 N.W.2d 780.

Beverly Materials, LLC v. Town of LaPrairie Bd. of Supervisors, 2007 Wisc. App. LEXIS 1142 (unpublished, internal citations omitted):

"[T]he case law on the procedure for and scope of a court's review of a zoning or rezoning request does not appear to be consistent. Review by certiorari tests the validity of a judicial or quasi-judicial decision . . . and the court's review is generally limited to review of the record before the decision-maker. . . . The legislative process does not have the same requirements for presenting evidence and making a record as do quasi-judicial proceedings. Most of the challenges to zoning and rezoning decisions that we are aware of are not by means of certiorari review of a record but an action alleging the decision to be unconstitutional.

However, Beverly Materials is correct that in [*State ex rel. Madison Landfills, Inc. v. Dane County*, 183 Wis. 2d 282, 515 N.W.2d 322 (Ct. App. 1994)], we reviewed the denial of a rezoning petition using the standard of review for a certiorari proceeding. At the same time, we cited [*Buhler v. Racine County*, 33 Wis. 2d 137, 146-47, 146 N.W.2d 403 (1966)] for our limited role in reviewing the decision, *Id*. at 288, and we did not, as Beverly Materials suggests in its brief, refer to "substantial evidence" as the appropriate test in reviewing the evidence. Rather, mindful of *Buhler*, we stated that "the extent of our authority" was to determine if the denial of the petition for rezoning "was arbitrary, unreasonable and not based on the evidence before it.'"

But, cf. *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 549-50, 185 N.W.2d 306 (1971): "It is well established in this state that where there are no statutory provisions for judicial review, the action of a board or commission may be reviewed by way of certiorari.".

VIII. LIQUOR LICENSES

a. Statutory Review

Wis. Stat. § 125.12 (2) (d):

"The action of any municipal governing body in *granting or failing to grant, suspending or revoking* any license, or the failure of any municipal governing body to revoke or suspend any license for good cause, *may be reviewed* by the circuit court for the county in which the application for the license was issued, upon application by any applicant, licensee or resident of the municipality. *The procedure on review shall be the same as in civil actions instituted in the circuit court.* The person desiring review shall file pleadings, which shall be served on the municipal governing body *in the manner provided in ch. 801 for service in civil actions* and a copy of the pleadings shall be served on the applicant or licensee. The municipal governing body, applicant or licensee shall have *20 days to file an answer* to the complaint. Following filing of the answer, the matter shall be deemed at issue and hearing may be had within 5 days, upon due notice served upon the opposing party. The hearing shall be before the court without a jury. *Subpoenas for witnesses may be issued* and their attendance compelled. The decision of the court shall be filed within 10 days after the hearing and a copy of the decision shall be transmitted to each of the parties. The decision shall be binding unless it is appealed to the court of appeals."

b. Certiorari.

The statute does not address whether certiorari review should be applied, but the Supreme Court has determined that certiorari review is appropriate. *Nowell v. City of Wausau,* 2013 WI 88, ¶ 3, 351 Wis. 2d 1, 838 N.W.2d 852.

Certiorari review also extends to decisions to *not* renew alcohol licenses. *Wisconsin Dolls, LLC v. Town of Dell Prairie,* 2012 WI 76, ¶¶ 18–19, 342 Wis. 2d 350, 815 N.W.2d 690.

c. Regulation of Alcohol – a Constitutionally-Favored Power

There is a particularly strong interest in the police power to regulate alcohol. The "states, under the broad sweep of the Twenty-first Amendment, are endowed with something more than the normal police power in regulating the sale of liquor." *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee,* 105 Wis. 2d 203, 217, 313 N.W.2d 805 (1982).

d. Filing Procedure.

The statute assumes 20 days to answer, suggesting a summons and complaint procedure.

e. Taking Evidence.

The court allows evidence to be taken that is relevant to one of the four prongs of certiorari review. The "circuit court is to address, the evidence the court takes should be relevant to one of the four prongs of certiorari review … such an approach accords a licensee *broad latitude to introduce evidence* under prong three. At the same time, it accords the appropriate deference to the municipality's exercise of its police powers." *Nowell v. City of Wausau*, 2013 WI 88, ¶ 48, 351 Wis. 2d 1, 24–25, 838 N.W.2d 852, 863–64.

IX. REMEDIES

a. Chapter 68 Appeal:

"The court may *affirm or reverse* the final determination, *or remand* to the decision maker for further proceedings consistent with the court's decision." Wis. Stat. § 68.13(1).

- Reversal

  "Outright reversal is appropriate when the due process violation cannot be cured on remand . . . Because a new hearing with a constitutionally sufficient notice could cure the due process violation in this case, [the appellant] is not entitled to outright reversal." *Guerrero v. City of Kenosha Housing Authority*, 2011 WI App 138, ¶ 13, at fn. 5 337 Wis. 2d 484, 805 N.W.2d 127.

- Remand

  "[R]emand is appropriate when the due processs violation can be corrected without permitting the agency to introduce new evidence or assert new allegations." (Court cites *State ex rel. Gibson v. DHSS*, 86 Wis. 2d 345, 353, 272 N.W.2d 395 (Ct. App. 1978) for the proposition that "a remand permitting correction of the due process violation with a second hearing is within the jurisdiction of a court on certiorari review.") *Id*. at fn. 5.

- Can a Court Order the Issuance of a Permit?

    - The Wisconsin Supreme Court has held that a certiorari court cannot order a board to provide equitable relief. *Guerrero v. City of Kenosha Housing Authority*, 2011 WI App 138, ¶ 13, 337 Wis. 2d 484, 805 N.W.2d 127. *Guerrero*, however, was a Section 8 housing case.

    - However, in *State ex rel. Humble Oil & Refining Co. v. Wahner*, 25 Wis. 2d 1, 15, 130 N.W.2d 304, 311-312 (1964), the court held:

      "It would be manifestly unfair to allow the town board to cut Humble off in its quest for a building permit after the town has been taken to court to test the validity of its ordinance and the alleged arbitrary and unreasonable conduct of the zoning board in denying the permit. If the town's contention is upheld it would be tantamount to approving the proposition that every time a party came close to successfully challenging a town and its zoning board on its zoning actions, his gains could be legislated away by the enactment of an amendment to the ordinance."

    - Before the adoption of Chapter 68, the Wisconsin Supreme Court ordered issuance of a municipal permit in a mandamus case, *State ex rel. O'Neil v. Hallie*, 19 Wis. 2d 558, 568, 120 N.W.2d 641 (1963):

      A town chose to arbitrarily deny a permit to operate an outdoor theater, although a license had been previously issued to another theater. The court held that, "[b]y licensing the existing outdoor theater the town board has effectively estopped itself from refusing to license other outdoor theaters" unless there was evidence that "the entertainment offered will differ substantially from that already offered at the existing outdoor theater." *Id.* at 567. Thus, the court held that the refusal of a license to the second applicant was "a denial of the equal protection of the laws and constitutes an arbitrary and capricious administration of the police power by the town board of Hallie." *Id*. at 568. The court found that "[t]o refuse a license to "O'Neil on the facts in the instant action is a denial of the equal protection of the laws and constitutes an arbitrary and capricious administration of the police power by the town board of Hallie." Thus, the court directed "the trial court to issue a peremptory writ of

mandamus requiring the defendants . . . to issue a license" to the applicant.

"It is a fundamental rule of law that arbitrary administration of an ordinance contravenes the provisions of the Fourteenth amendment relating to due process and equal protection of the laws." *Id.* at 567.

b. Conditional Use Permit Appeal:

"The court may reverse or affirm, wholly or partly, *or may modify the decision brought up for review*." Wis. Stat. § 62.23(7)(e) 10.

- Does the power to "modify" include the power to issue a permit?

- What about a review under common law certiorari?

X. CONSTITUTIONAL CHALLENGES UNDER 42 U.S.C. § 1983

a. Distinction from Certiorari.

"[T]here is a distinction between presenting an equal protection argument in a Wis. Stat. ch. 68 certiorari proceeding and asserting an equal protection claim for money damages under § 1983." *Hanlon v. Town of Milton*, 235 Wis. 2d 597, 604-605, 612 N.W.2d 44, 48 (2000)

"One purpose of a § 1983 claim is to create a tort remedy for the deprivation of federal constitutional rights by government action. The relief available to a litigant from the circuit court under Wis. Stat. § 68.13(1) is limited. Under § 68.13(1) the court can only affirm, reverse, or remand for additional proceedings in accord with the court's judgment. In contrast, remedies demanded by Hanlon in his § 1983 claim included monetary damages and reasonable attorney fees." *Hanlon*, 235 Wis. 2d at 604.

Constitutional challenges are not required to be joined with certiorari claims, but they can be. *Hanlon*, 235 Wis. 2d, ¶ 27.

b. Six-Year Limitation

"[U]nder Wis. Stat. § 68.13(1), an individual has 30 days after receiving a final determination from a municipality in which to seek certiorari review. However a six-year statute of limitation governs § 1983 claims." *Hanlon*, 235 Wis. 2d, ¶ 25; *Hemberger v. Bitzer*, 216 Wis. 2d 509).

c. Standard of Review

Constitutional challenge to zoning ordinance must be proven beyond a reasonable doubt. *State ex. rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973).

d. Causes of Action

- Substantive Due Process

  To bring a substantive due process claim a plaintiff must demonstrate either that the ordinance infringes on a fundamental liberty interest or that the ordinance is arbitrary and unreasonable. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

- Rational Basis Attacks

  a. The burden is on the plaintiff to prove that the ordinance lacks a rational relationship to a valid government objective. *Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 40, 235 Wis. 2d 610, 612 N.W.2d 59.

  b. To have a legitimate end, ordinance must have a rational relationship to public health, safety, morals, or general welfare. *State ex. rel Grand Bazaar Liquors, Inc. v. Milwaukee*, 105 Wis. 2d 203, 211, 313 N.W.2d 805 (1982).

  In *Grand Bazaar*, the court found that an ordinance requiring alcohol licensees to receive at least 50% of their income from liquor sales did not have a rational relationship to a legitimate end.

  The city cited limiting the number of total licenses and encouraging adherence to liquor regulations as the rational bases for the ordinance. *Id.* at 210.

  The court reasoned that the ordinance served to classify applicants for a license, but did not limit the amount of liquor licenses and that there was no evidence there was a problem with adherence to liquor ordinances.

  The ordinance must actually seem to accomplish the stated goals.

c. Zoning by CUP Only

An ordinance that effectively only allows conditional use permits violates substantive due process rights because it did not bear a rational relationship to a legitimate end. *Town of Rhine v. Bizzell,* 2008 WI 76, ¶ 43, 311 Wis. 2d 1, 751 N.W.2d 780.

- Attacks on Standardless/Unconstitutionally Vague Ordinances

When an ordinance delegates power to a municipal legislative body without standards to exercise that power, the delegation "constitutes an unlawful delegation of power to the members" of the body. *Hobart v. Collier,* 3 Wis. 2d 182, 188, 87 N.W.2d 868 (1958).

- Standardless Ordinances:

1. Allow for arbitrary and uncontrolled discretion. *In re Garrabad*, 84 Wis. 585, 594, 54 N.W. 1004 (1893).

2. Open the door to favoritism and discrimination. *State ex rel. Humble Oil & Ref. Co. v. Wahner*, 25 Wis. 2d 1, 11, 130 N.W.2d 304(1964).

- Example of standardless/unconstitutionally vague ordinance:

State ex rel. Humble Oil & Ref. Co. v. Wahner, 25 Wis. 2d 1, 11, 130 N.W.2d 304 (1964). City ordinance permitted gas stations only if they were approved by the zoning board, and provided no standards.

2. Equal Protection Claims

- Two alternative levels of scrutiny are applied to equal protection challenges:

Strict scrutiny applies to statutes that involve fundamental interests or rights, or suspect classifications or discrete and insular minorities. *State ex. rel. Watts v. Combined Community Serv.*, 122 Wis. 2d 65, 81, 362 N.W.2d 104(1985).

Unless the Plaintiff is alleging that they belong to a suspect class, the level of scrutiny is a rational basis test. *State ex. rel.*

Watts v. Combined Community Serv., 122 Wis. 2d 65, 81, 362 N.W.2d 104(1985).

- The rational basis test is the same for equal protection and due process claims that are not subject to strict scrutiny. *Medeiros v. Vincent,* 431 F.3d 25 (1st Cir. 2005).

- 5-part test for reviewing equal protection challenges in Wisconsin based on classification:

    a. All classification must be based upon substantial distinctions

    b. The classification must be germane to the purpose of the law (rationally related to articulated purposes)

    c. The classification must not be based upon existing circumstances only

    d. The law must apply equally to each member of the class

    e. The characteristics of each class should be so far different from those other classes as to reasonably suggest the propriety of substantially different legislation

    Omernik v. State, 64 Wis.2d 6, 19, 218 N.W.2d 734 (1974); *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 215, 313 N.W.2d 805 (1982).

- Creating a class for the purpose of limiting competition: *Grand Bazaar*:

    a. The record "supported the conclusion that the ordinance was supported by special interest groups as an anticompetitive measure to keep large retail stores out of the retail liquor business." *Id. at* 209-210.

    b. The purpose articulated by the City, however, was to limit the number of retail liquor outlets.

c. The ordinance has to seem to accomplish the stated goals.

d. "First, there is no evidence in the record to demonstrate that there is any public need to limit the number of new liquor licenses. Second, we note that the Common Council retains the ultimate right to limit the number of licensed establishments, with or without this ordinance. Ultimately, as we view it, the ordinance only discriminates among *applicants* for a license; it does not limit the number of licenses issued." *Id.* at 212 (emphasis by the court).

- Arbitrary administration as unconstitutional act

  "It is a fundamental rule of law that arbitrary administration of an ordinance contravenes the provisions of the Fourteenth amendment relating to due process and equal protection of the laws." *State ex rel. O'Neil v. Hallie*, 19 Wis. 2d 558, 567, 120 N.W.2d 641 (1963)

e. Remedies Under § 1983

- Attorney fees

  Under 42 U.S.C. § 1988 (b), the "prevailing party" may seek an award of attorney fees. "[A] prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 297, 340 N.W.2d 704 (1983).

- Injunctive relief

  "Local governing bodies (and local officials sued in their official capacities) can, therefore, be sued directly under § 1983 for monetary, declaratory, and injunctive relief in those situations where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy."

Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 659, 98 S. Ct. 2018 (1978).

- Damages

  - Punitive damages are not available against municipalities under § 1983, unless expressly authorized by statute. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259, 101 S. Ct. 2748, 2756 (1981).

  - Compensatory damages are available against municipalities. *Id.*

XI. CONCLUDING THOUGHTS

a. Arbitrary acts and decisions can have multiple consequences.

b. Reversal of a bad decision is not the worst-case scenario.

c. E-mail has raised the bar for judicial review.