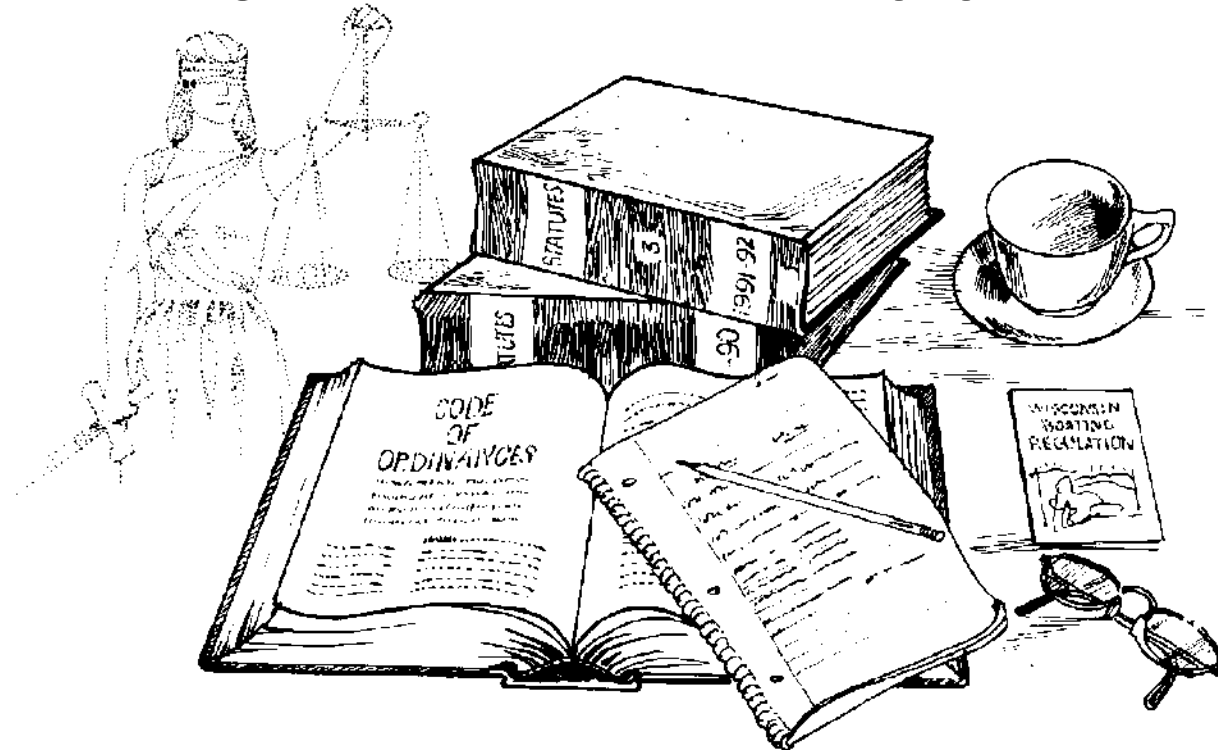


Role of the Zoning Board of Adjustment / Appeals



Lynn Markham
Center for Land Use Education
UW-Stevens Point/Extension



Center for Land Use Education
College of Natural Resources
University of Wisconsin-Stevens Point



Extension
UNIVERSITY OF WISCONSIN-MADISON

Workshop Outline

1. Introduction
2. Role of the zoning board
3. Decisions
 - Administrative appeals
 - 3-step variance test
4. Would you grant the variance?

Do you have specific
questions about zoning
boards that you want us to
cover today?



Terminology

State statutes define:

- Counties (and towns) have boards of adjustment

Wis. Stat. s. 59.694, stats. for counties, s. 60.65 for towns

- Cities, villages (and towns) have boards of appeal

Wis. Stat. s. 62.23(7)(e), stats. for cities, s. 61.35 for villages,
s. 60.62 for towns with village powers

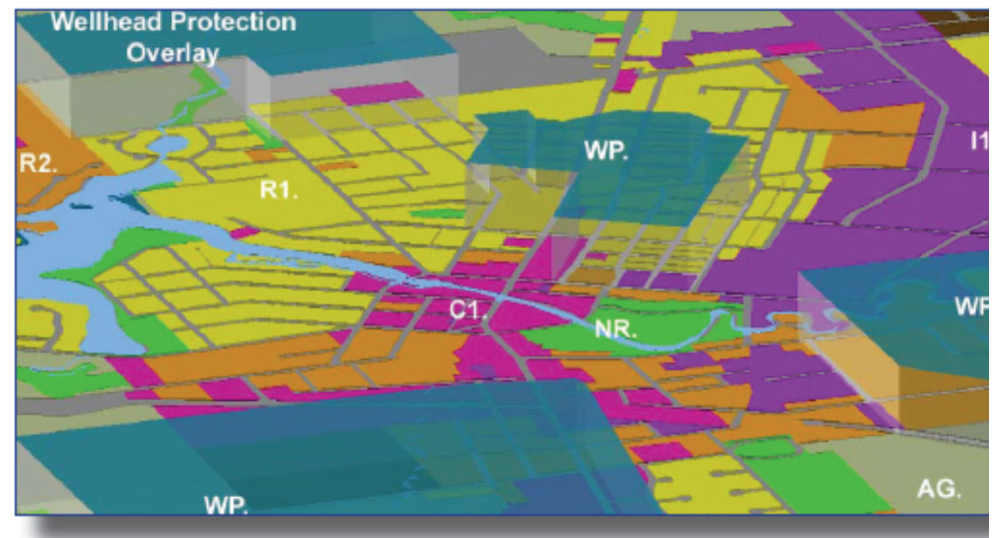
Both are commonly referred to as:

- Zoning Board
- BOA, ZBA
- Different from the 'zoning committee'

Overlay zoning

- A special zoning district, placed over an existing base zone(s), which creates special provisions in addition to those in the underlying base zone to protect a specific resource

- Examples
 - Floodplain zoning
 - Shoreland zoning
 - Historic overlay
 - Wellhead protection

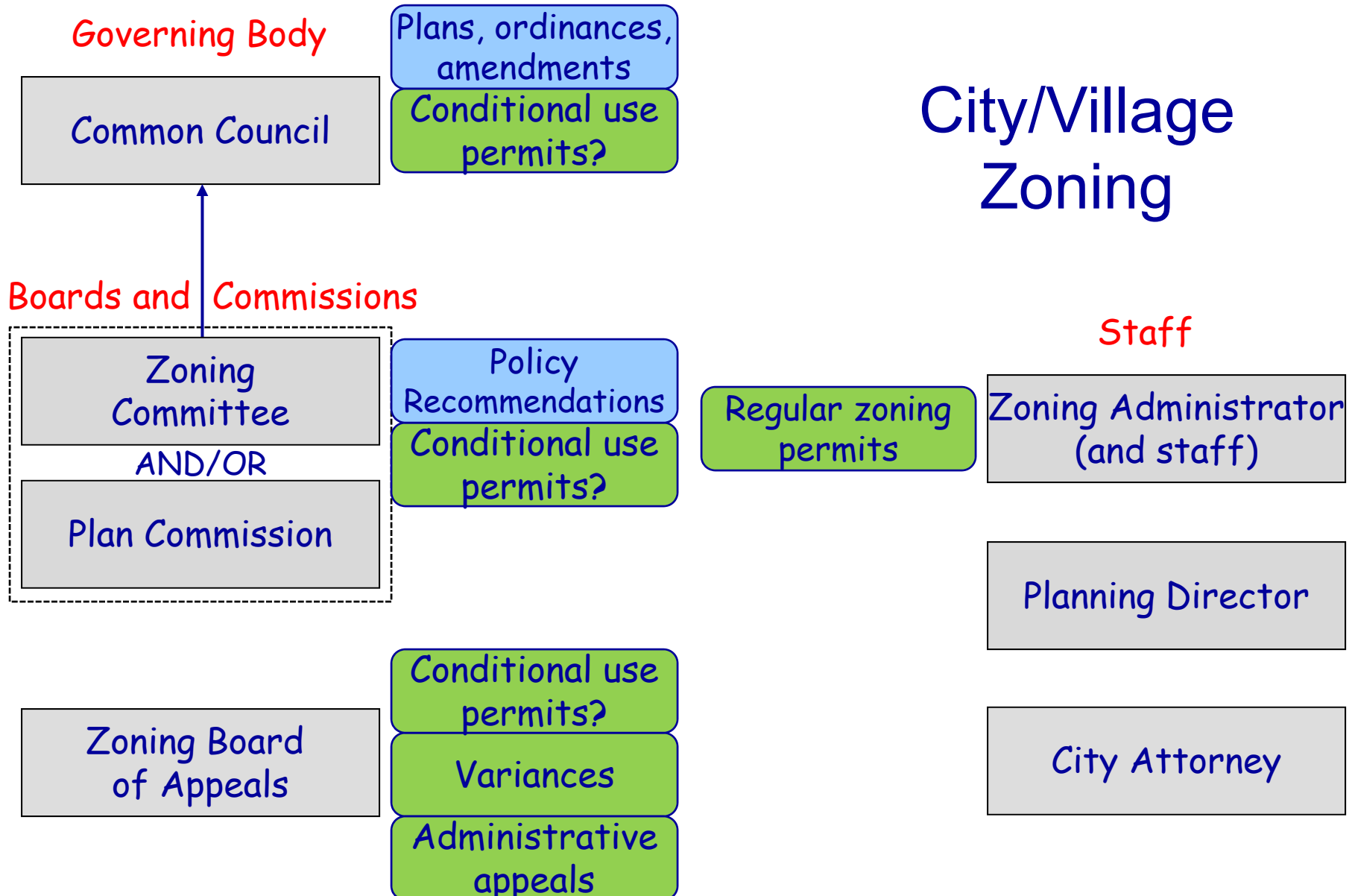


- Standards from all zoning layers apply, including most restrictive setback, etc.

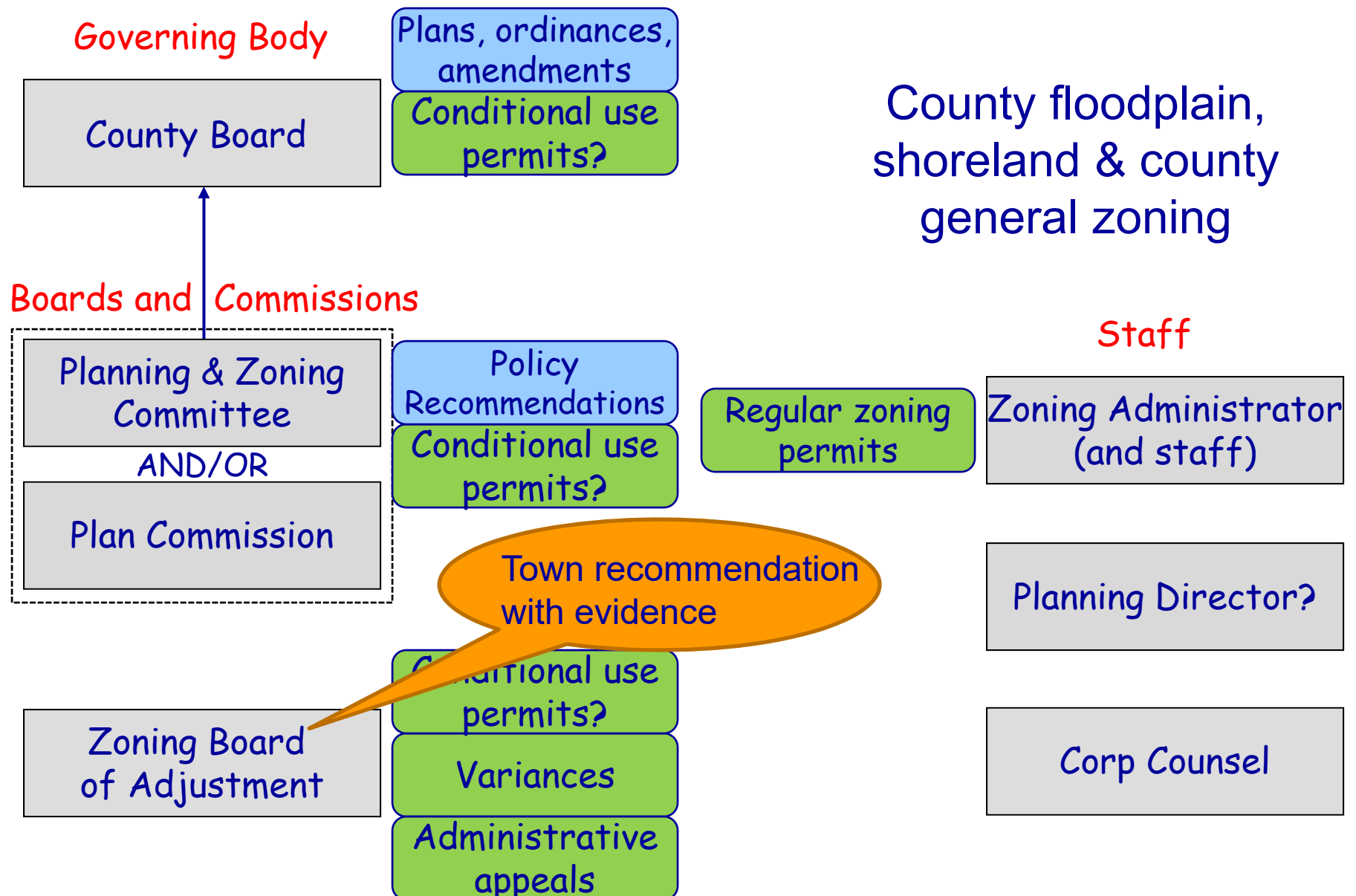
Local Government Structure



City/Village Zoning



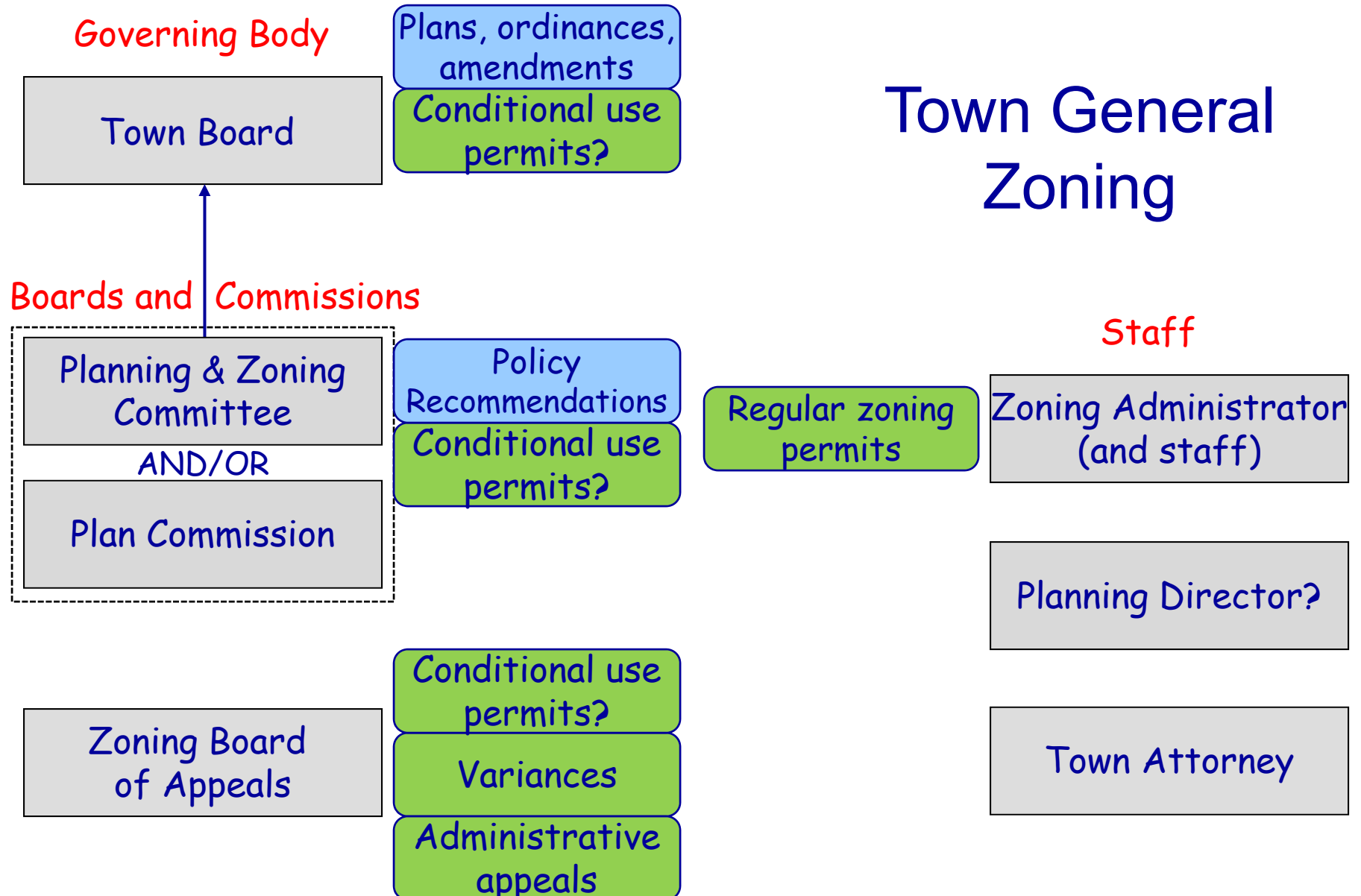
Local Government Structure



Local Government Structure



Town General Zoning



Zoning Board roles & responsibilities

The zoning board functions like a court



- 1) Decision-making criteria are outlined in state statutes, case law, and local ordinances
- 2) The board applies these laws to particular fact situations to make *quasi-judicial* decisions
- 3) Must apply the laws as written

If you want to
change the
law/ordinance,
run for office

The zoning board functions like a court



- Like a court, zoning board decisions can be appealed to higher courts
- If state statutes and case law are followed, decisions will generally be upheld
- A solid legal record minimizes legal costs and zoning board reconsideration

Leaky bucket



If the purposes of a zoning ordinance are held in a bucket, and variances are granted that don't meet the legal standards, the purposes of the ordinance (water) are lost.



Leaky bucket?

Shoreland zoning

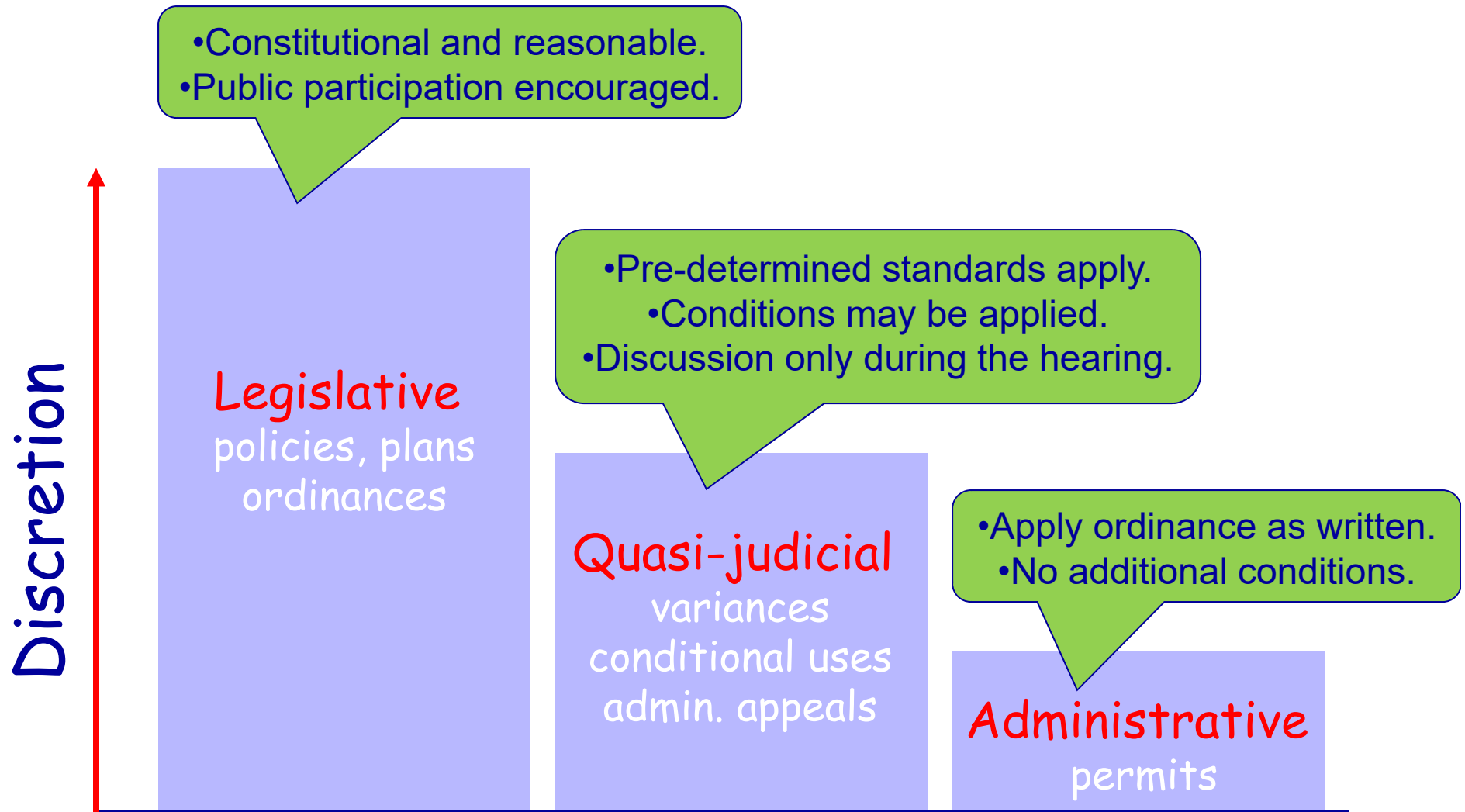
Granting variances that don't meet the legal standards harms fish and water quality due to:

- More runoff carrying pollutants to water
- Sediment suffocating fish eggs
- Reducing property values



Discretion...

Flexibility in decision-making



Zoning Board Decisions

1. **Variances** - allow landowners to do things prohibited by the zoning ordinance.
2. **Special exceptions/conditional uses** - uses which must be tailored to a site.
3. **Administrative appeals** - contested decisions & interpretations of administrative officials.

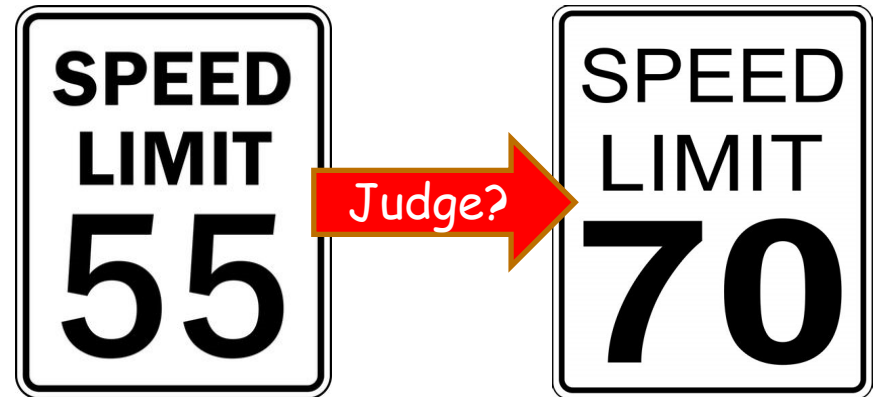
Zoning roles

- Elected officials create zoning ordinance with recommendations from the plan commission
- BOA members act like judges and apply the ordinance and state laws as written
- According to Wisconsin law, variances may only be granted if all of the legal standards are met
- It's not easy to say "no" to neighbors. Leaning on the state and local laws helps.

Joe wants a variance so he can build a home in the floodway. No neighbors object to Joe's request. His county board member is in favor of his variance. Many people would like to build in the floodway.

How should the zoning board react to this information...

?



Hint: What would a judge do?

Open Meetings



- Closed sessions are limited by statute:
 - Personnel matters including employee performance, compensation, discipline, etc.
 - Damaging personal information
 - Legal consultation for current/likely litigation
 - Others listed at Wisc. Stat. §19.85
- Decisions to grant or deny a variance, CUP or appeal may not be decided in closed session
(State ex rel. Hodge v. Town of Turtle Lake, 1993)

Recording Decisions

- Courts will review the written and audio record if appealed and need to be able to follow the BOA's reasoning
- BOA must express, on the record:
 - the statutory or ordinance criteria under which the application is decided and
 - the reasons the criteria are or are not satisfied
- The written decision is not required to include the reasons

Lamar Central Outdoor v. Board of Zoning Appeals of the City of Milwaukee, 2005 WI Supreme Ct.

Decision must include

1. Findings of fact (based on ordinance jurisdiction and standards)
 - Determine whether the application contains the information necessary to make a decision
 - Determine whether the board has the authority to make a decision
 - Record pertinent facts from the record/ hearing on the decision form

Zoning staff should present their staff report. The report may contain whether they feel the legal standards are met.

After the variance hearing is closed, there should be no more input from the property owner/applicant while the BOA is deliberating.

Decision must include

2. Conclusions of law

- Specify applicable legal standards
- Determine which facts relate to the legal standards
- Determine whether the legal standards are met. **Reasons must be provided** (Lamar)
- If legal standards are met, agree on any permit conditions

3. Order and Determination

- Decide/ vote on the case
- Direct the zoning administrator to take any necessary action

Do zoning board decisions set a legal precedent

- No. Zoning board decisions do not set a legal precedent.
- The public does expect some type of consistency in decision-making. However, every fact situation is different. Also, if a zoning board realizes that past decisions were made in error, there is no need to repeat them.



Administrative Appeals

- Legal process to resolve disputes regarding:
 - Ordinance interpretation (text, maps, jurisdiction, measurements, etc.)
 - Reasonableness of zoning decision (zoning permit, CUP)

Administrative Appeals

Who can file an appeal?

- Any *aggrieved* person:
 - appellant/applicant given unfavorable decision
 - Neighbors/property owners affected by decision
 - state program oversight agencies (DNR, DATCP)
- Any officer, department, board or bureau of the municipality affected by a decision of an administrative officer

Administrative Appeals

Time limits on appeal:

- State statutes do not specify time limit
- Limits can be set by local ordinance or rule (e.g., within 30 days of notice of administrative decision)
- If there is no time limit, clock begins ticking when aggrieved parties find out about decision

In some cases courts have decided that an appeal period began when construction commenced

Administrative Appeals

Interpret the ordinance:

- Review purpose statement for ordinance intent
- Determine if ordinance language is ambiguous
- Rely on ordinance definitions first, dictionary definitions next
- Interpret to avoid conflicting language
- Give effect to all provisions

Administrative Appeals

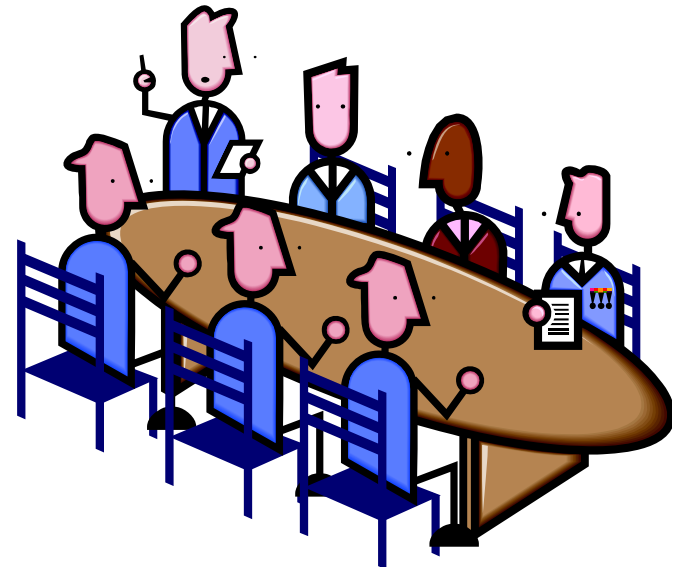
Interpreting evidence beyond ordinance:

- Examine administrative history
- Rely on documented evidence of intent
- Determine objectivity of testimony and interpretations

Keep records of interpretations & recommend clarifying ordinance amendments

Case law

How should the BOA
proceed when
hearing an appeal of
a CUP decision?



Review the record
looking for errors?

Fact finding hearing to
collect more evidence?

*Osterhues v. Board of Adjustment for
Washburn County, 2005 WI Supreme Ct.*

Case law

When BOAs hear appeals, they have the authority to:

- Conduct a de novo hearing, and
- Review the record by the PC/ZC, and
- Take new evidence, and
- Substitute their judgment for the zoning committee or zoning administrator's judgment

WARNING

BOA may have to defend its action on an incomplete record if challenged

Osterhues v. Board of Adjustment for Washburn County, 2005 WI Supreme Ct.

Variances

Allow a property owner to do something prohibited by the zoning ordinance



- Variances not meant to provide general flexibility in ordinances.
- Ordinance should provide some level of flexibility to preserve regulatory objectives while maintaining community support.

Variances

Area variances "provide an increment of relief (normally small) from a physical dimensional restriction such as a building height, setback, and so forth."

Ziervogel v. Washington County Board of Adjustment, 2004 WI Supreme Ct.

Variance standards for general, shoreland and floodplain zoning

An applicant has burden of proof to show that **all three tests** are met:

1. unnecessary hardship
2. due to conditions unique to the property &
3. no harm to public interests

Don't allow zoning staff to accept variance applications if the applicant has not provided reasons that all 3 tests are met.

Additional standards that an applicant must meet in granting a floodplain variance:

- The variance shall not cause any increase in the regional flood elevation;
- Variances can only be granted for lots that are less than one-half acre and are contiguous to existing structures constructed below the RFE; and
- Variances shall only be granted upon a showing of good and sufficient cause,
 - shall be the minimum relief necessary,
 - shall not cause increased risks to public safety or nuisances,
 - shall not increase costs for rescue and relief efforts and
 - shall not be contrary to the purpose of the ordinance.



Floodplain Management Bulletin

Variances and the National Flood Insurance Program

FEMA P-993 / July 2014



FEMA

Resources

www.FEMA.gov

Michelle Staff
State National Flood Insurance
Program Coordinator
Wisconsin DNR
Michelle.Staff@Wisconsin.gov

Variances

Conditions unique to the property
test

Conditions unique to the property
include physical limitations of the
property, such as steep slopes or
wetlands must prevent compliance
with the ordinance.

Does every small, steep or irregularly
shaped parcel qualify for a variance??

Variances

Conditions unique to the property test

- Limitations that prevent ordinance compliance & are common to a number of properties should be addressed by ordinance amendment.
- Circumstances of an applicant such as a growing family or need for a larger garage, are not a factor in deciding variances.



Variances

Public interest test

- A variance granted may not harm public interests
- “Public interests” are the purpose and intent of the ordinance that were agreed upon by the county board, representing the community. Those who provide testimony may try to convince you other factors (like neighborhood character) are the “public interests”. Consider listing public interests/purposes on your variance application form.
- Short-term, long-term and cumulative impacts of variance requests must be considered. Zoning staff can provide an impact analysis.

Case law

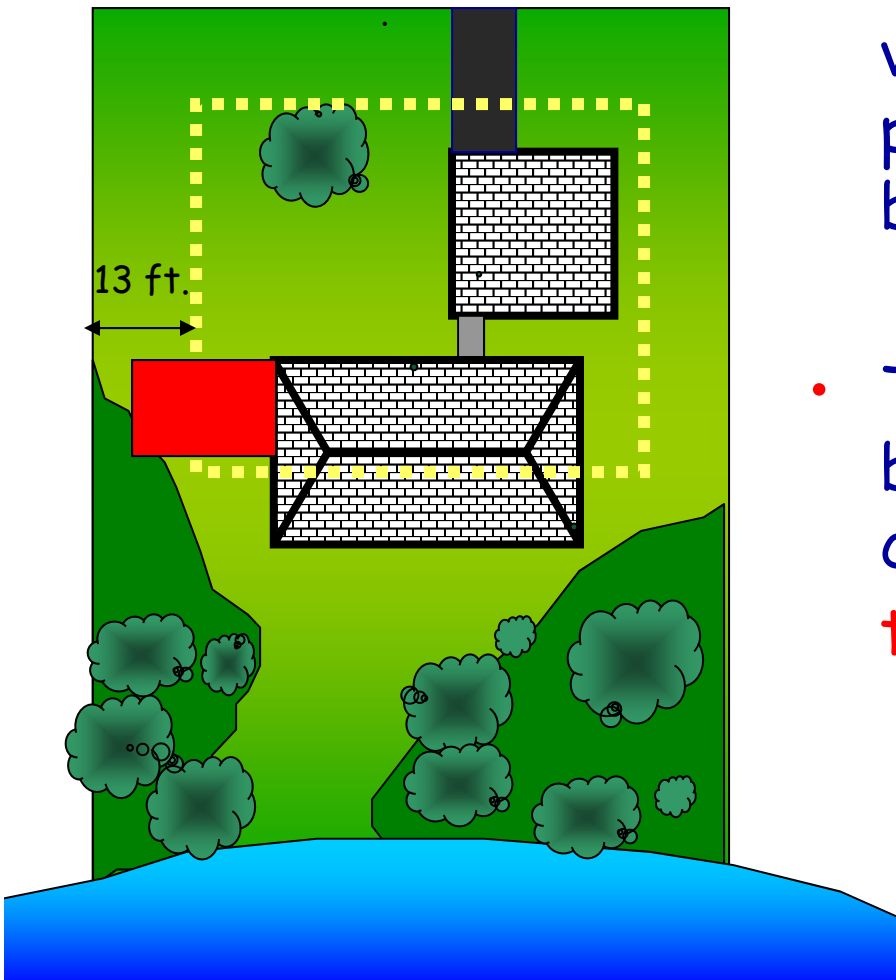
Unnecessary hardship test for area variances...

- Unnecessary hardship = when compliance with the ordinance would:
 - unreasonably prevent the owner from using the property for a permitted purpose, or
 - be unnecessarily burdensome in view of ordinance purposes

Ziervogel v. Washington County Board of Adjustment, 2004 WI Supreme Ct.

What does "unnecessarily burdensome" mean??

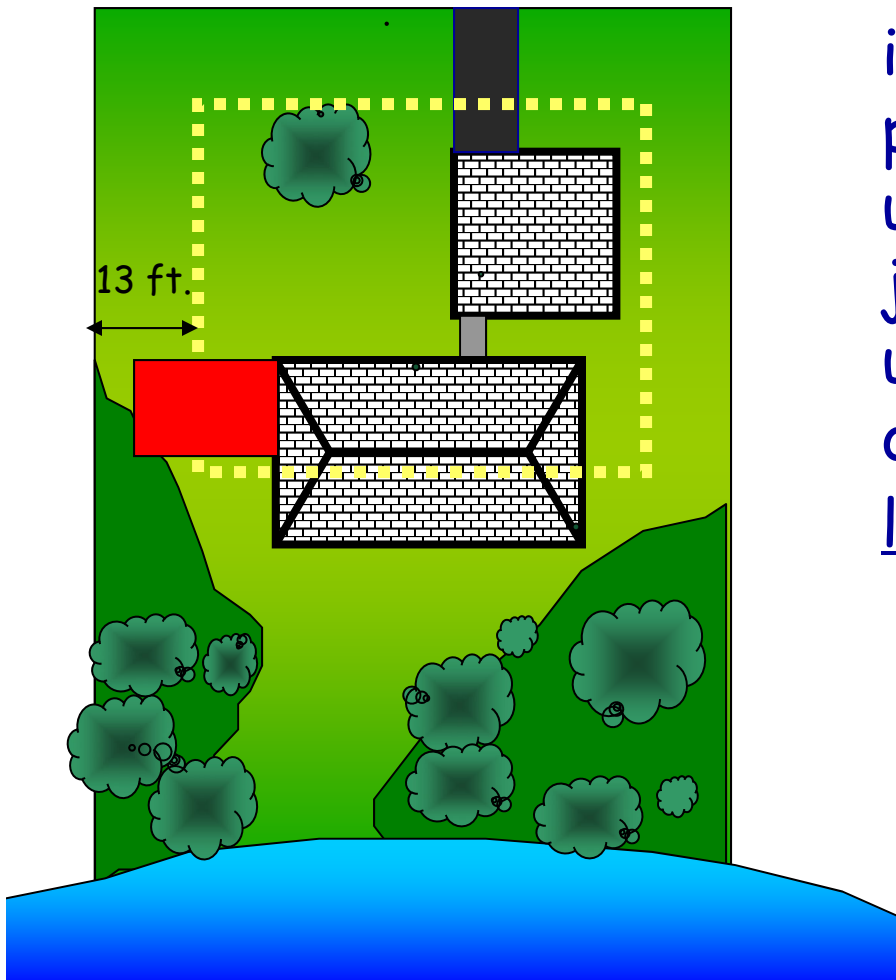
- Should an after-the-fact variance be granted for the red porch because its removal would be "unnecessarily burdensome"?
- The WI Supreme Court said NO because the "hardship was self-created and the porch **no more than a personal convenience**".



Snyder v. Waukesha County Zoning Board, 1976

What constitutes an unnecessary hardship?

- “Growth of a family and personal inconvenience do not constitute practical difficulties or unnecessary hardship which justify a variance. It is not the uniqueness of the plight of the owner, but uniqueness of the land which is the criterion”.



Snyder v. Waukesha County Zoning Board, 1976

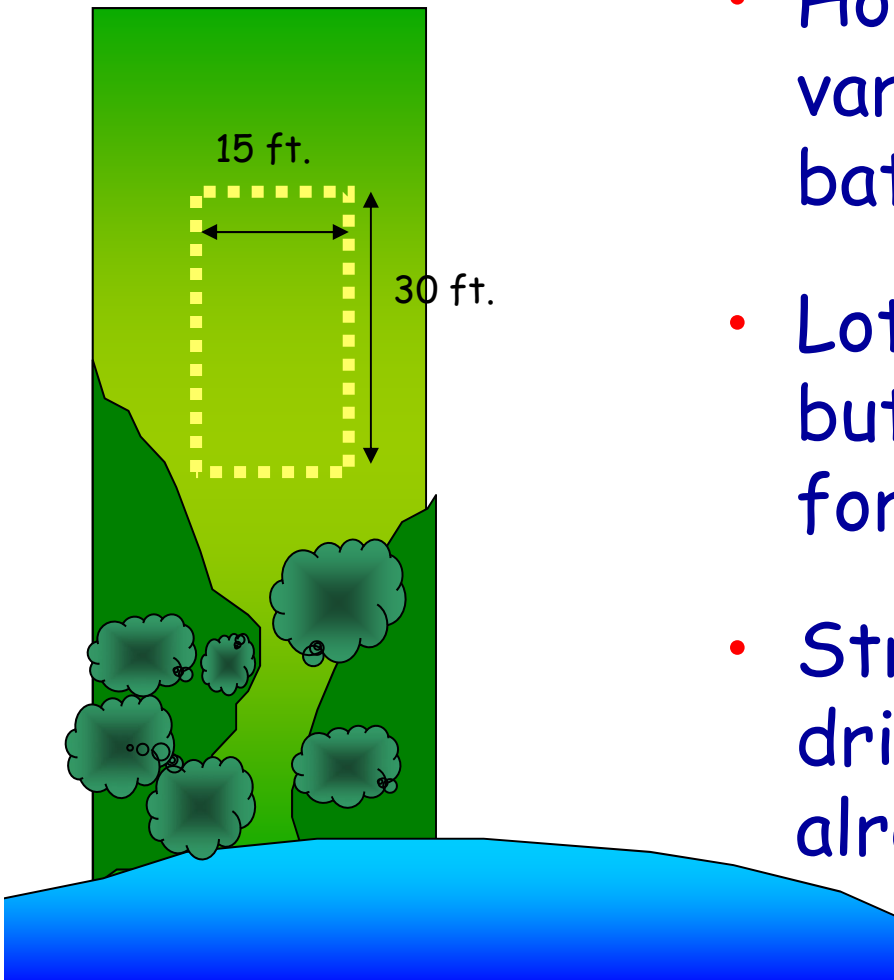
Variances...

- Loss of profit or financial difficulty do not constitute hardship
- A variance runs with the property
- A variance does not create a nonconforming structure
- A zoning board may consider an error of local government staff when deciding whether to grant a variance
- Lack of objections from neighbors does not justify a variance
- Nor do nearby ordinance violations

What is an unnecessary hardship?

Possibilities:

- Homes that would require a variance to add an indoor bathroom
- Lots that are zoned residential but setbacks do not leave room for a modest home
- Stronger case for hardship if a driveway or septic permit was already granted



BOA should not be providing applicants with reasons tests are met

Variances

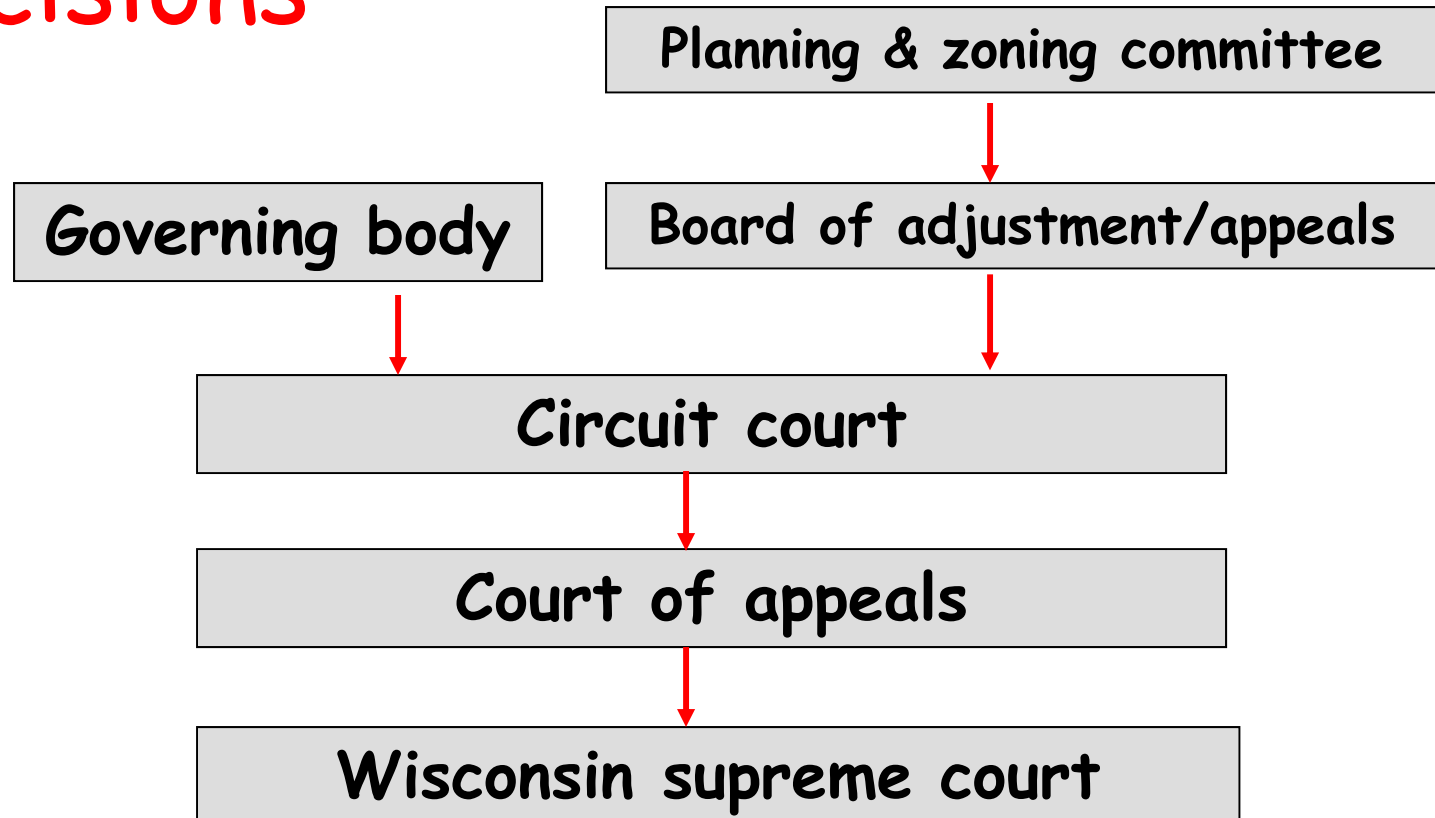
A variance can only be granted if an applicant has shown that all three tests are met:

1. unnecessary hardship
2. due to conditions unique to property &
3. no harm to public interests



For county zoning, recommendations from towns & the DNR should provide reasons the 3 legal standards are or are not met because these standards are what the BOA must base their decision on.

Appeal of zoning decisions



Standards on judicial review...

Courts defer to local decision makers when these tests are met:

1) Subject matter jurisdiction

Did the body decide a matter that it is empowered by statute or ordinance to act on?

2) Proper procedures

Did the body follow proper procedures (open meeting law, public notice, hearing, record of decision, etc.)?

3) Proper standards

Did the body apply proper standards in making the decision (e.g. 3-step test for a variance)?

4) Rational basis for the decision

Could a *reasonable person* have reached this conclusion?

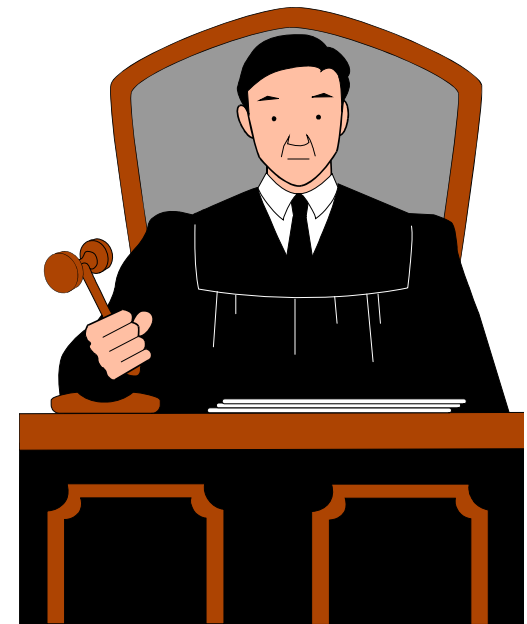
5) Evidence in the record

Do facts in the record of the proceedings support the decision?

Judicial decisions...

The court may reverse, affirm or modify a decision, in whole or in part.

An overturned decision is typically remanded to the BOA with directions to decide it consistent with the court's findings.



Would you grant the
variance?

3-step variance test

1. The hardship (is/is not) due to physical limitations of the property rather than the circumstances of the applicant because...
2. The variance (will/will not) harm the public interest because...
3. Unnecessary hardship (is/is not) present because...

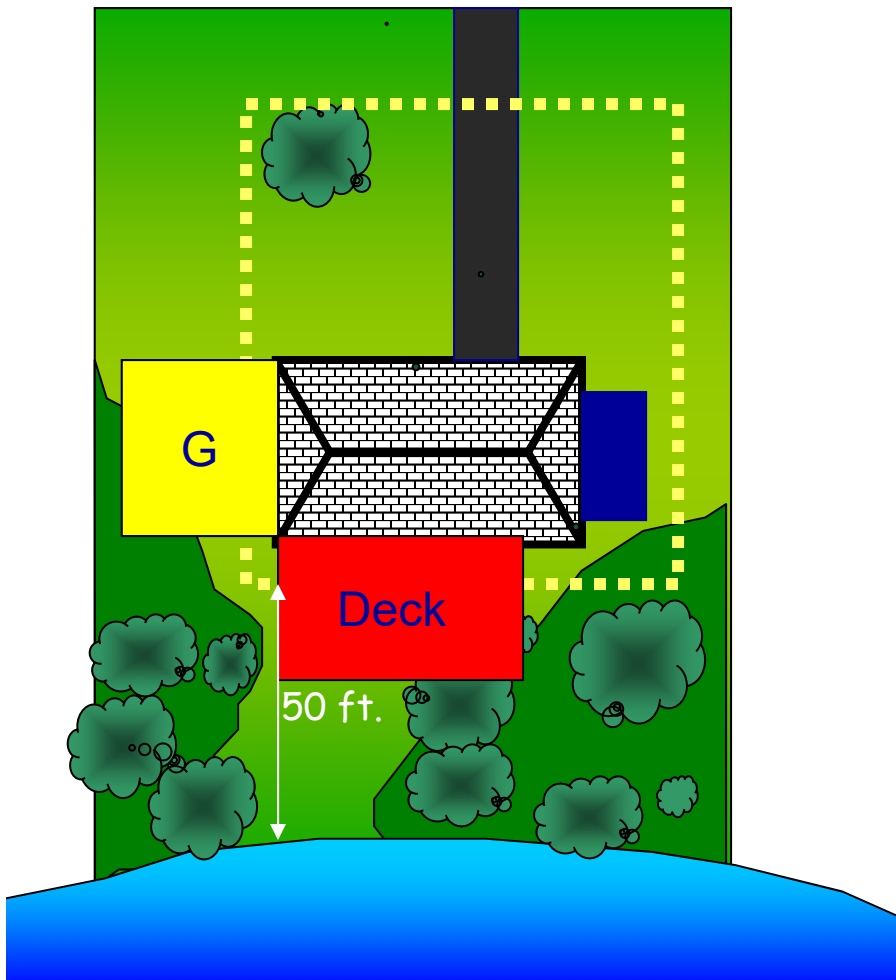
Now, let's use the variance decision form in your folder

Suggested variance decision-making process

1. Listen and take notes during hearing. Think about whether the applicant is meeting the 3 legal standards
2. After hearing, each BOA member fills out decision form individually, providing reasons that each legal standard is or is not met
3. BOA members come together and each member reads their form to the others
4. BOA members may ask questions of each other and revise their forms
5. Motion and vote. Motion to grant a variance can only be made if applicant has met all 3 legal standards.

Case law

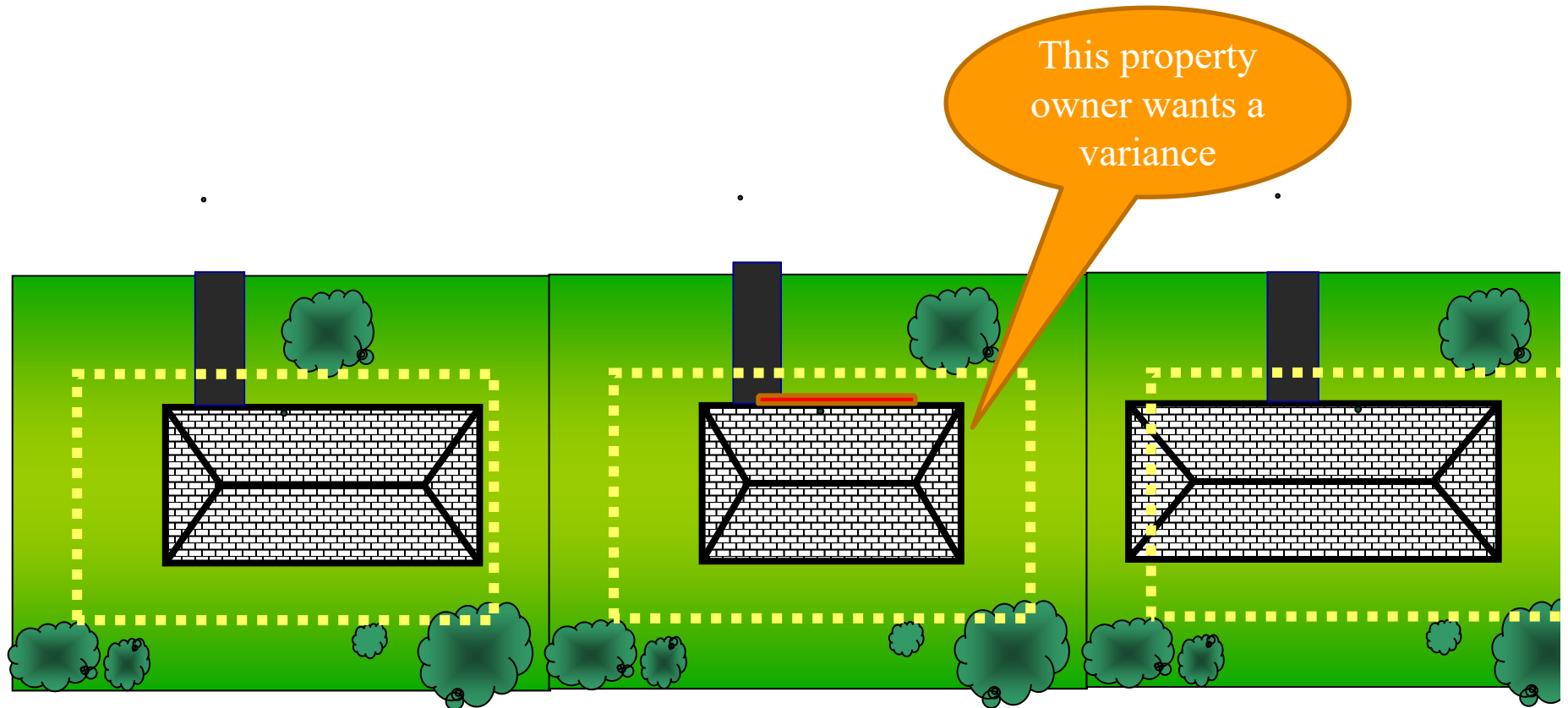
Would you grant a variance for the red addition?



- Steep slope under deck
- Other lake properties also have steep slopes
- High value house
- Owners want to enclose the deck closest to water and add on a garage (G)

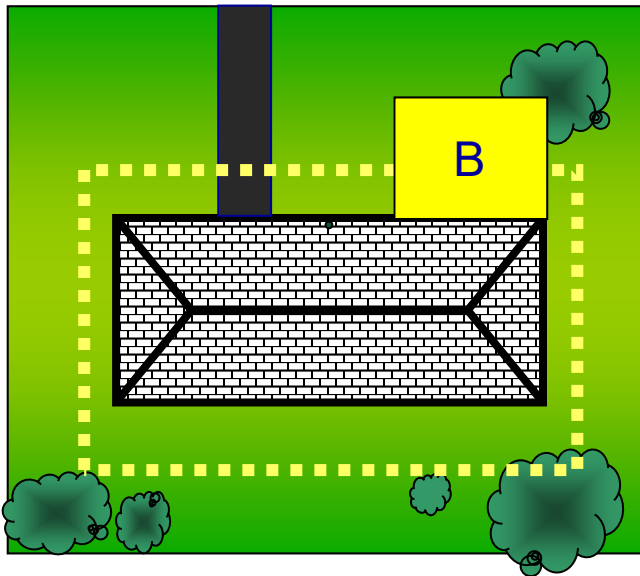
Block v. Waupaca County Zoning Board, July 2007

Neighborhood view



No steep slopes or wetlands in this neighborhood

Would you grant a variance for 3rd bedroom for their 2nd child?



- Owners want to add a 10'x16' bedroom
- In their proposal, the bedroom does not comply with the roadway setback of 25 feet; it encroaches by 5 feet

Lynn Markham
Center for Land Use Education
www.uwsp.edu/cnr-ap/clue
lmarkham@uwsp.edu
715-346-3879



Center for Land Use Education
College of Natural Resources
University of Wisconsin-Stevens Point



Extension
UNIVERSITY OF WISCONSIN-MADISON