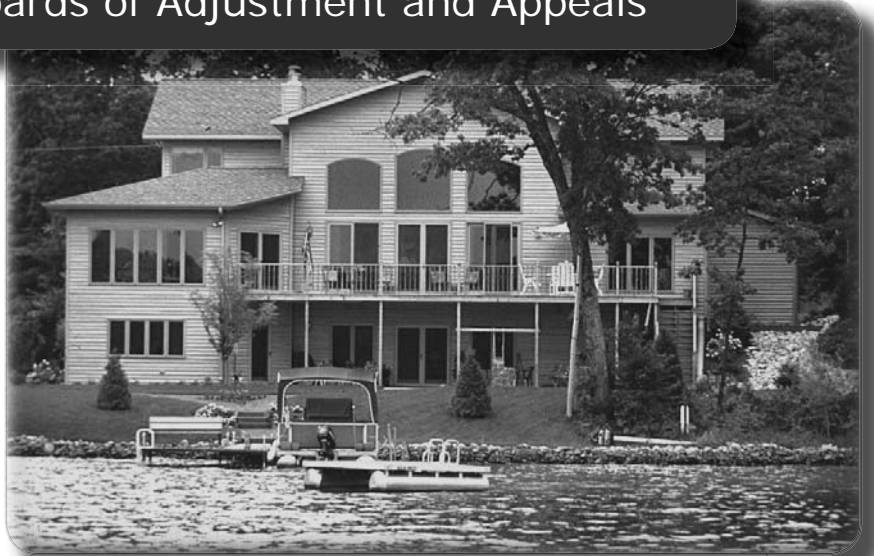


# Zoning Board Handbook

For Wisconsin Zoning Boards of Adjustment and Appeals



2nd Edition  
2006

Lynn Markham  
and  
Rebecca Roberts  
Center for Land Use Education





# **ZONING BOARD HANDBOOK**

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**2006**

**Lynn Markham and Rebecca Roberts**

Cover photos:

Top: Potential land use conflict between gravel pit and adjacent housing. *Photo © Regents of the University of Minnesota. Used with the permission of Metropolitan Design Center.*

Center: Waterfront home in Oneida County lacking shoreland buffer. *Photo courtesy of Robert Korth, UW-Extension Lakes Partnership.*

Bottom: Potential land use conflict between industrial and residential land uses. *Photo © Regents of the University of Minnesota. Used with the permission of Metropolitan Design Center.*

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# Introduction



*At different points in their lives, people sometimes want more rules and at other times they want fewer rules. They want more rules when the rules apply to what their neighbors can do. And they want fewer rules when the rules apply to what they can do on their own property.*  
-- A long-time politician from northeast Wisconsin

Many communities use zoning to help them protect the aspects of life that they cherish—from strong communities and scenic vistas to safe drinking water and high quality lakes and streams. Zoning ordinances implement local land use plans that affect many economic and quality of life issues in communities throughout Wisconsin. It takes many groups of people working together to implement zoning effectively and to keep it up-to-date. In this endeavor, zoning boards are essential to the fair and effective administration of these laws as they act like judges to interpret ordinances and uphold the legal standards that were developed to help the community achieve its goals.

This handbook is intended to assist zoning board members with their responsibilities and to aid local government officials and the public in understanding the role of the zoning board and the procedures and standards with which their decisions must comply.

Zoning boards are known by a number of names: boards of adjustment for counties; boards of appeals for cities, villages and towns; or sometimes just the BOA. We will generally refer to them as *zoning boards* in this handbook. We use *plan commission/committee* in a generic fashion to refer to all of the following planning bodies: plan commissions for cities, villages and towns with village powers; planning committees for towns without village powers; and planning agencies (commonly referred to as planning and/or zoning committees) for counties.

Zoning board members should consult their municipal attorney or corporation counsel for advice. In some cases the Wisconsin Department of Justice or a state agency with local program oversight responsibilities may be able to provide information.

## **Inside the Handbook**

The Zoning Board Handbook is organized into the following sections:

- **Section I: Zoning Board Basics** – introduction to zoning and the duties and organization of the zoning board.
- **Section II: Laws that Apply to the Zoning Board** – open meetings law, ethics and operating procedures.
- **Section III: Zoning Board Decision Process** – applications, meetings and decision-making.
- **Section IV: Decisions of the Zoning Board** – legal standards for administrative appeals, conditional uses and variances, plus accommodations for the disabled.
- **Section V: Appeal of Zoning Board Decisions** – procedures and standards used by the circuit court when reviewing zoning board decisions.
- **Section VI: Improving Zoning Board Decisions** – who the zoning board works with, self-audits and improving the zoning ordinance.
- **Section VII: Shoreland and Floodplain Zoning** – purposes, legal standards and management strategies for shoreland and floodplain areas.
- **Appendix** – resources, forms and examples.

At the end of each section there is a list of *key words* and *questions* you should have mastered after reading the section. Use these resources as a checklist to assess your knowledge of zoning boards.

The footnotes provide references to relevant court decisions and other references. In addition, Appendix B provides websites to access the full text of the decisions and summaries of zoning-related court decisions written by the Wisconsin Department of Natural Resources.

## Handbook Updates

The Zoning Board Handbook is an evolving document. Please help us keep the handbook up-to-date by letting us know about:

- Errors or omissions
- Unclear language
- Additional topics or questions you would like addressed
- Local examples or case law to illustrate concepts in the handbook

## Additional Resources

The following resources are available to supplement the Zoning Board Handbook:

- **Workshops:** The Center for Land Use Education offers zoning board workshops upon request serving multi-county areas of Wisconsin.
- **Videos:** DVD recordings of past zoning board workshops are available from the Center for Land Use Education.
- **Website and Electronic Mailing List:** Updates on recent court decisions and other topics relevant to the zoning board are available on the Center for Land Use Education website: [www.uwsp.edu/cnr/landcenter/workshopsdocs.html](http://www.uwsp.edu/cnr/landcenter/workshopsdocs.html). You may also sign up by email to receive information about upcoming workshops, revisions to important statutes and case law, and updates to the handbook. Visit our Newsletter web page ([www.uwsp.edu/cnr/landcenter/newsletters.html](http://www.uwsp.edu/cnr/landcenter/newsletters.html)) to subscribe to our electronic mailing list.

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# Chapter 1

## Introduction to Zoning

Zoning is one of the most common methods of land use control used by local governments. Zoning refers to the use of the public regulatory power, or **police power**, to specify how land may be used and developed. The intent of zoning is to balance individual property rights with the rights of the general public to a healthy, safe and orderly living environment.

State statutes provide authority and procedures for Wisconsin counties, towns, cities and villages to adopt general zoning (also known as comprehensive zoning) in order to protect public health, safety, morals, and general well-being.<sup>1</sup> Local governments in Wisconsin decide for themselves whether or not to have general zoning.<sup>2</sup> The majority of communities have chosen to have general zoning as one tool to achieve community goals such as:

- Public health, safety and welfare,
- Natural resource protection,
- Protection of investments, and
- Aesthetics.

**Police Power** - The right of government to restrict an individual's conduct or use of property in order to protect public health, safety, and welfare.

<sup>1</sup> Counties – Wis. Stat. § 59.69; Towns – Wis. Stat. §§ 60.61 and 60.62; Villages – Wis. Stat. § 61.35; Cities – Wis. Stat. § 62.23(7).

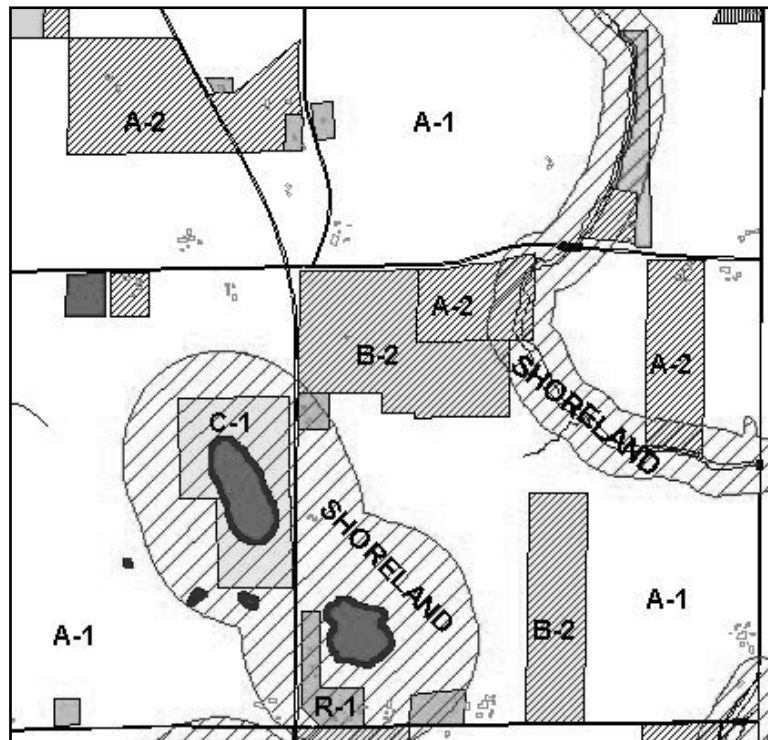
<sup>2</sup> Some other types of zoning are required by the state as described under *Additional Forms of Zoning*.

## Elements of a Zoning Ordinance

A zoning ordinance consists of two legally adopted elements: the zoning map and the text of the zoning ordinance.

General zoning works by dividing the community into districts or ‘zones’ designated for different uses, such as residential, commercial, industrial or agricultural use. Zoning districts are mapped based on land suitability, avoidance of conflict with nearby uses, protection of environmental features, economic factors such as efficient provision of public services and infrastructure, and other locally determined land use objectives articulated in a community plan. Each zone contains a different set of land use rules that is articulated in the text of the zoning ordinance. These rules specify: 1) the use of the land, 2) the density of structural development, and 3) the dimensions of structures and setbacks. In addition, the text of the zoning ordinance describes the purpose of each zoning district and related administrative and enforcement procedures.

To achieve specific objectives, some communities adopt overlay zones that apply restrictions to certain areas identified on a map in addition to the restrictions in the underlying base zoning districts. Figure 1 illustrates a zoning map that includes general zoning and shoreland overlay zoning.



**Figure 1:** Zoning map showing general zoning with shoreland overlay. (Map courtesy of Kevin Struck)



## Allowable Uses for each District

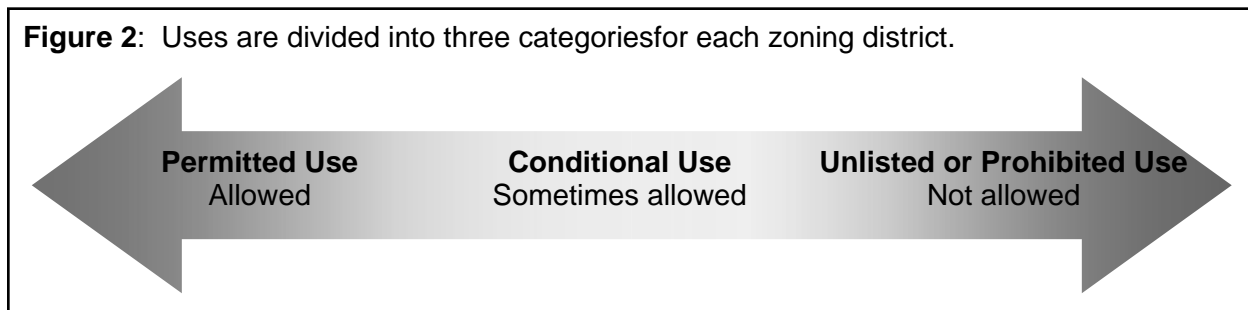
Generally, two categories of allowable uses are listed for each zoning district: permitted uses and conditional uses. **Permitted uses** are allowed as a matter of right in all locations in a zoning district and may be authorized by the zoning administrator or building inspector with a simple permit. Authorization is non-discretionary provided the project complies with general standards for the zoning district, any overlay district or design standards, and related building or construction codes. **Conditional uses** are listed in the zoning ordinance for each district but are subject to an additional layer of scrutiny.<sup>3</sup> Conditional uses are authorized on a discretionary basis, meaning they are only authorized if found to be compatible with neighboring land uses, if they can be tailored to meet the limitations of the site, and if they do not violate the objectives of the zoning ordinance. Conditions may be attached to the approval of a conditional use permit. Uses that are not listed in the zoning ordinance for a particular district or that are expressly prohibited are not allowed in the district, except on rare occasions by use variances.

**Permitted Use** - A use listed in the zoning ordinance that is allowed 'by right' at all locations in a zoning district.

**Conditional Use** - A use listed in the zoning ordinance that may be allowed if found to be compatible with neighboring uses, limitations of the site, and the purposes of the ordinance. Conditions may also be attached upon approval.

**Unlisted or Prohibited Use** - A use that is not allowed in a district because it is not expressly listed or is specifically prohibited by the zoning ordinance.

**Figure 2:** Uses are divided into three categories for each zoning district.



<sup>3</sup> In this chapter we use 'conditional uses' to mean both conditional uses and special exceptions. These two terms are discussed in detail in Chapters 2 and 14.

**Variance** - Allows a property to be used in a manner that is not permitted by the zoning ordinance.

**Administrative appeal** - A process to resolve disputes regarding ordinance interpretation or the reasonableness of a zoning decision.

## Relief from Strict Adherence to the Zoning Code

Recognizing the fact that zoning ordinances cannot be written to address every circumstance, zoning ordinances must specify procedures for seeking relief from strict adherence to the zoning code. A **zoning variance** authorizes a landowner to establish or maintain a use that is prohibited in the zoning ordinance. Requests for variances are not always granted. An **administrative appeal** is a process used to resolve disputes regarding ordinance interpretation or the reasonableness of a zoning decision. If applicants or neighboring landowners are unhappy with the decision of a zoning administrator, they may appeal that decision to the zoning board of adjustment or appeals.

## Map and Text Amendments

Both the zoning map and the text of the zoning ordinance may be updated and amended over time. Ordinance amendments may be initiated at the request of a landowner or by the governing body. The governing body creates, updates, and amends all zoning ordinances, typically with recommendations from the planning committee/commission.

## Additional Forms of Zoning

Though local communities may decide whether or not to adopt general zoning, state statutes require communities to administer certain types of zoning as described below:

- Shoreland zoning provides development standards near waterways to protect water quality, aquatic and wildlife habitat, shore cover and natural scenic beauty. Wisconsin statutes require counties to exercise shoreland zoning.<sup>4</sup>
- Shoreland-wetland zoning generally prohibits or severely restricts development in wetlands near waterways. It has the same objectives as shoreland zoning and is required of counties, cities and villages that have received wetland maps from the state.<sup>5</sup>

<sup>4</sup> Wis. Stat. § 59.692; Wis. Admin. Code ch. NR 115.

<sup>5</sup> Counties - Wis. Admin. Code ch. NR 115; Villages - Wis. Stat. § 61.351; Cities - Wis. Stat. § 62.231.

- Floodplain zoning provides location and development standards to protect human life, health and property from flooding. It is required of communities that have been issued maps designating flood prone areas.<sup>6</sup>

In addition, communities may opt to implement additional forms of zoning to protect specific community resources. Examples include exclusive agricultural zoning, stormwater management zoning, extraterritorial zoning, and overlay zoning.

## Zoning and the Comprehensive Plan

A comprehensive plan is a tool used by communities to study how various aspects of a community are working and to articulate how the community desires to develop in the future. A comprehensive plan is prepared by a planning commission or committee and is adopted by the governing body. The plan sets forth broad goals, objectives, policies and recommendations that may be implemented using a variety of tools. Zoning is one of many possible tools used to implement a plan. In Wisconsin, local land use actions and regulations such as zoning and land division regulations must be consistent with a locally adopted comprehensive plan by January 1, 2010.<sup>7</sup> If the zoning ordinance or related zoning decisions are not consistent with the plan, resulting actions may be subject to legal challenge.

Community or comprehensive planning is distinct from zoning in two important ways. First, planning is policy-oriented, whereas zoning is regulatory. Second, a planning process is designed to foster public input;. In other words, the plan should be a reflection of the community's desires. Zoning decisions, on the other hand, should be based on the decision criteria outlined in local ordinances, state statutes and case law as well as the individual facts of the case at hand. Decisions of a zoning administrator or the zoning board should not be unduly influenced by public opinion.

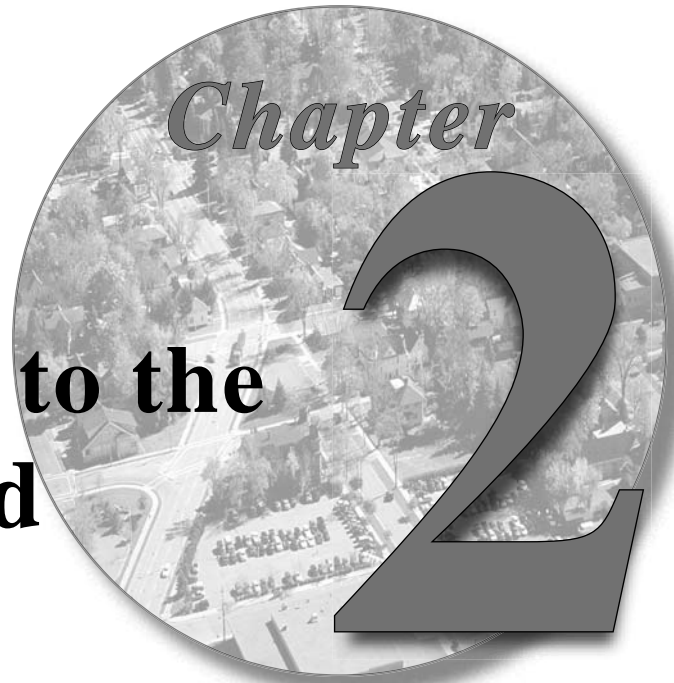
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<sup>6</sup> Wis. Stat. § 87.30(1).

<sup>7</sup> According to Wis. Stat. § 66.1001(3) beginning on January 1, 2010, if a local governmental unit engages in official mapping, subdivision regulation, state-mandated shoreland or shoreland-wetland zoning, or county, city, village or town zoning, these actions must be consistent with the local governmental unit's comprehensive plan. See also: *Step Now Citizens Group v. Town of Utica Planning & Zoning Comm.*, 2003 WI App 109, 264 Wis. 2d 662, 663 N.W.2d 833.

Chapter 1 – Introduction and Overview

# Introduction to the Zoning Board



## Role of the Zoning Board

Communities that have adopted a zoning ordinance are required to appoint a zoning board of adjustment or appeals. The primary role of a zoning board is to review and decide cases where there is an alleged error in a zoning decision or where a relaxation of the ordinance is sought. Zoning boards may be authorized to participate in three types of decision-making:<sup>8</sup>

- **Administrative appeal** - a legally contested order or decision of the zoning official (usually associated with a contested map or text interpretation).
- **Variance** – a relaxation of a dimensional or use standard specified in the zoning ordinance.
- **Special exception/conditional use** – a use or dimensional exception listed in the zoning ordinance that is not permitted by right but may be granted if certain conditions are met. (Zoning boards do not have this authority unless authorized by local ordinance.)

While it is tempting to think of zoning boards as providing flexibility in administration of zoning, flexibility is strictly limited by state and local

<sup>8</sup> County or town – Wis. Stat. § 59.694(7); City, village or town exercising village powers – Wis. Stat. § 62.23(7)(e)7.

### **A note on special exceptions and conditional uses**

Wisconsin Statutes authorize zoning boards to make **special exceptions** to the terms of a zoning ordinance when also authorized by local ordinance. Wisconsin court decisions utilize the terms special exception and conditional use interchangeably. Some Wisconsin communities use the terms interchangeably while others make a distinction.

**Special exceptions** generally refer to any exception made to the zoning ordinance including dimensional changes.

**Conditional uses**, in some ordinances, refer only to land *uses*.

Any exception to the zoning ordinance, whether dimensional or use in nature, must be specifically listed in the zoning ordinance. Throughout the remainder of the text we will consider these terms together and refer to them as conditional uses.

laws that determine the authority of zoning boards and provide criteria for decision-making. Local governing bodies and the public must look beyond the zoning board for added flexibility. Map and text amendments, performance standards, alternative design standards, standards for conditional uses and mitigation requirements that compensate for adverse effects of development all provide opportunities for flexibility that can be integrated into local ordinance provisions.

### **Zoning Board Authority**

Authority for zoning board decision-making is determined by Wisconsin Statutes. The primary role of the zoning board, as outlined in state statutes is to hear and decide administrative appeals and variances related to general zoning. In almost all cases, zoning boards also assume this role related to shoreland zoning, shoreland-wetland zoning, exclusive agricultural zoning, construction site erosion control and storm water management zoning. Unless provisions are adopted for county zoning boards under Wis. Stat. § 59.69, zoning boards do not have authority to hear and decide administrative appeals or variances related to subdivision ordinances. This authority is reserved for the governing body or plan commission.

In some but not all communities, zoning boards are authorized to hear and decide special exceptions/conditional use permits related to the types of zoning previously mentioned. A local ordinance must specifically authorize one of three bodies to perform this role: the governing body, the plan commission or the zoning board.

Statutory references for zoning board authority and exceptions are provided in Figure 3 and referenced in the footnotes.

**Figure 3: Statutory Authority of Zoning Boards**

	County	City	Village	Town
General zoning	59.694(7)	62.23(7)(e)7	61.35	60.62(1) and 60.65(3)&(5)
Shoreland zoning	59.692(4)(b)	62.23(7)(e)7	61.35	
Shoreland-wetland zoning	59.692(4)(b)	62.231(4)(a)	61.351(4)(a)	
Floodplain zoning	NR 116.19	NR 116.19	NR 116.19	No authority <sup>9</sup>
Construction site erosion control & storm water management zoning	59.693(4)(b)	62.234(4)(b)	61.354(4)(b)	60.627(4)(b)
Exclusive agricultural zoning	91.73(1) <sup>10</sup>			
Livestock facility siting	93.90 <sup>11</sup>			
Renewable energy systems	59.694(7)(d)	62.23(7)(c) <sup>12</sup>		
Public utility permits	No authority (unless adopted under 59.69) <sup>13</sup>	62.23(7)(e)7 <sup>14</sup>		
Solid waste management	No authority (unless adopted under 59.69) <sup>15</sup>	No authority <sup>16</sup>		
Subdivision/land division	No authority (unless adopted under 59.69) <sup>17</sup>	No authority <sup>18</sup>		
Uniform Dwelling Code	No authority <sup>19</sup>			
Well codes	No authority <sup>20</sup>			
Private sewage systems	No authority <sup>21</sup>			

<sup>9</sup> Wis. Admin. Code §§ NR 116.05 & 116.19 do not mention town authority to implement floodplain zoning.

<sup>10</sup> Wis. Stat. § 91.73(1) requires administration of local farmland preservation ordinances consistent with the general zoning authority for county, city, village, and town jurisdictions.

<sup>11</sup> Appeals of livestock facility siting decisions are taken directly by the Livestock Facility Siting Review Board within 30 days of the decision and are appealed to circuit court thereafter. Authority to decide conditional use permits required under general zoning or exclusive agricultural zoning reverts to the decision-maker authorized under those ordinances.

<sup>12</sup> Not explicit in statutes. Stated purposes of zoning include: “to provide adequate light and air, including access to sunlight for solar collectors and to wind for wind energy systems” [Wis. Stat. § 62.23(7)(c)]. Zoning board powers apply to all ordinances adopted pursuant to this chapter [Wis. Stat. § 62.23(7)(e)7].

<sup>13</sup> No express mention of authority for zoning board unless such an ordinance is adopted under Wis. Stat. § 59.69.

<sup>14</sup> Wis. Stat. § 62.23(7)(e)7 states “The board may permit... a building or premises to be erected or used for such public utility purposes in any location which is reasonably necessary for public convenience and welfare.”

<sup>15</sup> Under Wis. Stat. § 59.70(2h) counties may adopt ordinances necessary to conduct solid waste management activities, but there is no express authority for zoning board unless related ordinances are adopted under authority of Wis. Stat. § 59.69.

<sup>16</sup> There is no express authority for solid waste management activities by cities, villages or towns.

<sup>17</sup> Wis. Stat. §§ 236.10(1)&(3) delegate this authority to the governing body or a plan committee/commission unless provisions are adopted under Wis. Stat. § 59.69.

<sup>18</sup> Wis. Stat. §§ 236.10(1)&(3) delegate this authority to the governing body or a plan committee/commission.

<sup>19</sup> Wis. Admin. Code § Comm 20.02 requires strict conformity with Uniform Dwelling Code (UDC) provisions. Wis. Admin. Code § Comm 20.19 allows only the Department of Commerce to consider variances to UDC provisions.

<sup>20</sup> Under Wis. Stat. § 280.21 only counties are able to assume administration of the state well code, and requests for variances and interpretations are made to the DNR (Wis. Admin. Code § NR 845.06).

<sup>21</sup> Under Wis. Stat. § 145.24(1) the Dept. of Commerce considers variances to siting and design standards for privately owned wastewater treatment systems.

Section I – Zoning Board Basics





# Formation and Organization of the Zoning Board

## Composition of the Zoning Board

Legal requirements regarding membership, appointment and terms of zoning board members differ among counties, towns, cities and villages as specified in state statute. Generally, city, village and town zoning boards are called “zoning boards of appeal”. Counties, and the roughly 200 or so towns throughout the state that operate under town zoning (without village powers) are called “zoning boards of adjustment”. The composition of county and town boards of adjustment and city, village and town boards of appeal differ slightly and are summarized in the table in Figure 4.

<b>Figure 4: Composition of the Zoning Board</b>	
<b>County Zoning Board of Adjustment</b>	<ul style="list-style-type: none"> <li>• Three to five members<sup>22</sup> plus two additional alternates</li> <li>• Members must reside in the county but outside of incorporated area</li> <li>• No more than one member from each town</li> <li>• Appointed by the county executive or county administrator, if present, or the county board chair<sup>23</sup></li> <li>• Appointed for three-year staggered terms, beginning July 1</li> <li>• Appointment subject to approval of the governing body</li> </ul>
<b>Town Zoning Board of Adjustment<sup>24</sup></b>	<ul style="list-style-type: none"> <li>• Three members plus two additional alternates</li> <li>• Members must reside in the town</li> <li>• No more than one member from the town board</li> <li>• Appointed by the town board for three-year staggered terms</li> </ul>
<b>City, Village or Town<sup>25</sup> Zoning Board of Appeals</b>	<ul style="list-style-type: none"> <li>• Five members plus two additional alternates</li> <li>• Appointed by the city mayor, village president or town board chair for three-year staggered terms</li> <li>• Appointment subject to approval of the governing body</li> </ul>

<sup>22</sup> Three members for counties with population greater than 500,000. Up to five, but not less than three members for counties with population less than 500,000 as specified by county resolution.

<sup>23</sup> Wis. Stat. §§ 59.17(2)(c), 59.18(2)(c) & 59.694(2)(a)

<sup>24</sup> Applies to towns without village powers operating under Wis. Stat. § 60.65.

<sup>25</sup> Applies to towns exercising village powers under Wis. Stat. § 60.62.

## Recruitment of Members

The selection and appointment of zoning board members is an important decision. Selecting members with care often improves the quality, acceptability and defensibility of decisions made by the zoning board. Strong candidates should possess effective decision-making skills, the ability to remain open-minded and impartial, an ongoing commitment to continuing education and skill development, familiarity with zoning and land use concepts, an understanding of the unique role of the zoning board, and long-term dedication to the position. Suggested criteria for appointment of members include:<sup>26</sup>

- 1. Diversity of membership.** The zoning board should reflect the diversity and uniqueness of the community it represents. In order to provide broad familiarity with differing landscapes, development patterns and other community issues, members should be appointed to represent the different geographic areas and jurisdictions present in the community. In addition, consideration should be given to the age, gender, ethnicity and professional composition of the zoning board.
- 2. Land use expertise.** To ensure that zoning board members are capable of understanding development proposals and determining their impacts, individuals with academic or professional knowledge of land use law, zoning, natural resources or construction and development practices, and those who are able to read site plans and related maps should be considered for appointment.
- 3. Commitment to community service and continuing education.** Members who have demonstrated an interest in community service by serving as elected officials, citizen advisors or in some other capacity and who are willing to attend educational sessions provided for zoning board members should be appointed in order to provide stable membership and sound decision-making by the board.
- 4. Understanding and acceptance of the nonpartisan, quasi-judicial role of the zoning board.** Perhaps most important,

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<sup>26</sup> Additional guidance related to recruiting, selecting, and retaining dedicated and representative board or commission members is provided in the Center for Land Use Education bulletin, *Recruiting and Retaining Qualified Plan Commissioners*. Douglas Miskowiak and Chin-Chun Tang. September 2004. Center for Land Use Education. 20pp. Available: <http://www.uwsp.edu/cnr/landcenter/pubs.html>

prospective members must understand and accept that the zoning board is not a policy-making body and that it must apply the law to specific fact situations whether or not they agree with the law or regulation in question.

## Considerations for Appointment

In order to ensure the objectivity of zoning board decisions, the personal and professional interests of zoning board members must be carefully considered. Individuals who are selected for their land use or zoning expertise, such as developers or real estate professionals, may find themselves in a position where a zoning board decision involves a professional acquaintance, family member or personal interest. Occasional conflicts of interest are likely to occur and should be avoided by asking members to remove themselves from the decision-making process in these instances (*see statutory conflicts of interest in Chapter 6*). Such occurrences may also be reduced by selecting individuals for the zoning board that do not hold a direct financial interest in local land use decisions.

In all situations, it is necessary to balance the contribution of prospective zoning board members against the potential for conflicts of interest or litigation. We advise that members of the local governing body not be appointed to serve on the zoning board. It is difficult to separate the legislative and quasi-judicial roles associated with each position. Wide discussion of public policy issues (such as land use laws) and constituent representation may be encouraged in the legislative process, but they are strictly limited or prohibited by due process concerns of zoning board decisions (*see ex parte communication in Chapter 6*). Furthermore, it would be difficult for an individual in this position to maintain objectivity when interpreting or applying a zoning policy they had voted against as an elected official. The potential lack of objectivity or even *appearance* of such could lead to litigation.

## Appointment of Alternates

The appointment of two **alternate** members to the zoning board is required by law. By statute, the designated “first alternate” is required to act with full powers of the zoning board when a regular member cannot vote due to conflict of interest or absence. The

**Alternate** - a member of the zoning board required to act in the place of a regular zoning board member if a member is absent or has a conflict of interest.

## Section I – Zoning Board Basics

“second alternate” is required to act when the first alternate or multiple members of the zoning board are unable to vote.<sup>27</sup>

Appointing alternates helps to ensure that landowners and developers are provided with timely and unbiased decisions by minimizing the postponement of decisions due to absences, resignations, or conflicts of interest. Individual communities vary in their expectations of zoning board alternates. Some require that alternates attend all meetings and hearings including opportunities for continuing education, while others simply encourage that first and second alternates attend, or call in the case of known conflicts. The latter scenario presents problems as there may be last minute absences or unforeseeable conflicts of interest.

### **Filling Vacancies**

If a zoning board member or alternate cannot serve the full length of their term, the vacancy is filled for the remaining portion of the term. Though not required, zoning board alternates may serve as ideal candidates to fill these vacancies. After serving in an “apprentice” role and gaining familiarity with the day-to-day issues and operating procedures of the zoning board, these members may easily transition into a regular position.

### **Removal for Cause**

If necessary, zoning board members may be removed from their position, but only for cause after written charges and an opportunity for a public hearing.<sup>28</sup> There have been very few instances where such measures have been taken in Wisconsin.

### **Selection and Duties of Zoning Board Officers**

A county zoning board of adjustment chooses its own chair<sup>29</sup> and may choose a vice-chair and secretary. The chair of the city, village or town<sup>30</sup> governing body designates the zoning board of appeals chair subject to approval by the governing body.<sup>31</sup>

<sup>27</sup> Wis. Stat. §§ 59.694(2)(am) & 62.23(7)(e)2

<sup>28</sup> City, village and town board of appeals - Wis. Stat. § 62.23(7)(e)2

<sup>29</sup> Wis. Stat. § 59.694(2)(c)

<sup>30</sup> Authority for zoning boards in towns with village powers. Where a town has not adopted village powers, Wis. Stat. § 60.65 applies.

<sup>31</sup> Wis. Stat. §§ 62.23(7)(e)2 & 62.09(3)(e)

## Chapter 3 – Formation and Organization of the Zoning Board

The duties of the zoning board chairperson include:<sup>32</sup>

1. Determining dates and times of meetings and hearings, other than those set by the board as a whole.
2. Exercising responsibilities under the open meetings law (*see Chapter 5*).
3. Presiding at meetings and hearings.
4. Leading the board through agenda items and calls for votes.
5. Deciding points of order subject to reversal by majority vote of the board.
6. Administering oaths to witnesses and issuing subpoenas to compel their attendance.
7. Supervising work of the board secretary.

In the case of the chairperson's absence, the vice chair or acting chair assumes the responsibilities of the chairperson.

The zoning board may use zoning agency staff or retain its own staff for clerical functions as authorized by the governing body. However, the zoning administrator or other staff person who represents the municipality and presents testimony to the board should remain independent from the board and should not serve as board secretary.

The duties of the secretary include:

1. Performing record keeping and clerical duties.
2. Providing public notice of hearings and meetings (*see Chapter 5*).
3. Implementing compliance with the Wisconsin public records law.



**Figure 5:** Kenosha County Board of Adjustment (left to right) Secretary Dawn LaPoint, Senior Land Use Planner Andy M. Buehler, Chairman William Glembocki, Vice Chairman Emily Uhlenhake, Members Kay Goergen and Barbara Ford.

<sup>32</sup> Counties – Wis. Stat. § 59.694(3); Cities, Villages and Towns – Wis. Stat. § 62.23(7)(e)3.

Section I – Zoning Board Basics

# Section I – Review

## **Keywords**

- Zoning
- Police power
- Permitted use
- Conditional use
- Special exception
- Variance
- Administrative appeal
- Comprehensive plan
- Alternate
- Plan commission/committee
- Governing body

## **Test Your Knowledge** (answers on page 22)

### **Chapter 1 - Introduction to Zoning**

- 1) A zoning ordinance consists of two legally adopted parts. What are they?
- 2) In addition to general zoning, Wisconsin communities may be involved in shoreland zoning and other forms of special-purpose zoning. Which types of zoning is your zoning board involved with?
- 3) What is the relationship between zoning and the community's comprehensive plan?

### **Chapter 2 - Introduction to the Zoning Board**

- 4) What are the three types of decisions that zoning boards can be authorized to make? Which of these decisions does your zoning board make?
- 5) What is the difference between a zoning board of adjustment and a zoning board of appeals? What is the name for this body in your community?

### **Chapter 3 - Formation and Organization of the Zoning Board**

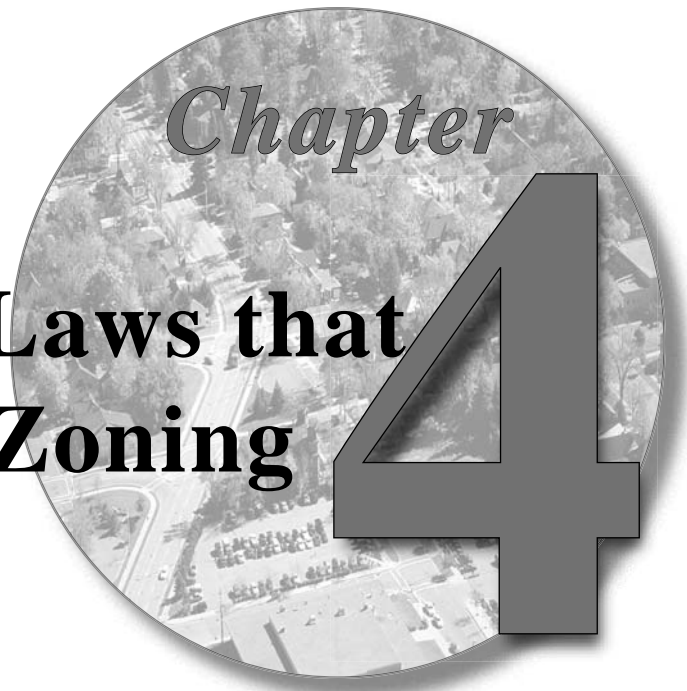
- 6) Describe four desired qualifications for zoning board members.

**Answers**

- 1)
  - a. Map – illustrates the boundaries of zoning districts
  - b. Text – describes the purpose of each zoning district, uses allowed in the district, dimensional or construction standards, and administrative and enforcement procedures.
- 2) Check with your local planning or zoning staff.
- 3) Zoning is one of many tools that may be used to implement a comprehensive plan. It must be consistent with a comprehensive plan by January 1, 2010 or may be subject to legal challenge.
- 4)
  - a. Conditional uses
  - b. Variances
  - c. Administrative appeals
- 5) Generally, cities, villages and towns have zoning boards of appeal. Counties and some towns have zoning boards of adjustment. Each body functions in much the same manner. Differences are pointed out throughout the handbook.
- 6)
  - a. Diversity of membership
  - b. Land use expertise.
  - c. Commitment to community service and continuing education.
  - d. Understanding and acceptance of the nonpartisan, quasi-judicial role of the zoning board.



# Overview of Laws that Apply to the Zoning Board

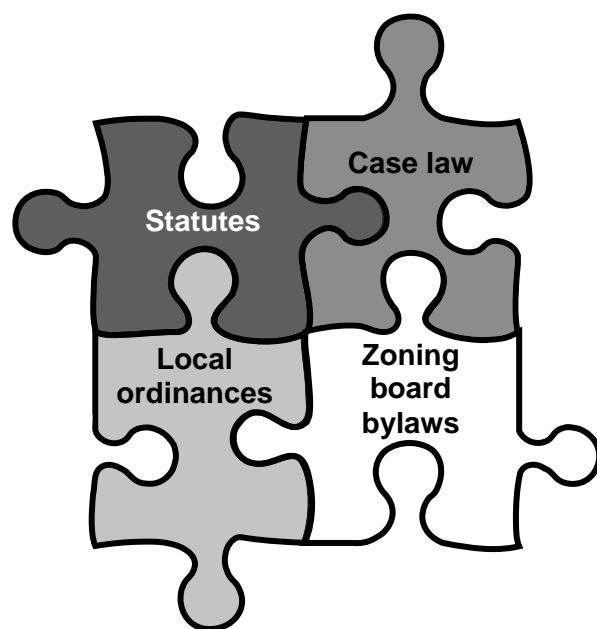


Zoning boards must look to several sources for guidance on proper procedures including: 1) state statutes, 2) local ordinances, 3) zoning board bylaws or operating rules, and 4) case law.

State statutes outline the authority of zoning boards (*see chapter 2*) and describe many procedural and ethical guidelines that zoning boards and other local government bodies must follow, such as the open meetings law, public records law and state ethics code (*see chapters 5 and 6*).

Local ordinances further define the authority and procedures to be followed by zoning boards. In addition, local ordinances provide specific details about the purpose and intent of zoning codes and criteria for making zoning decisions. *Chapter 13* and *Appendix B* provide guidance on accessing, reading and interpreting state statutes and local ordinances.

Day-to-day operational procedures of the zoning board that are not covered in state statutes or local ordinances should be addressed in zoning board bylaws or rules of procedure. These procedures

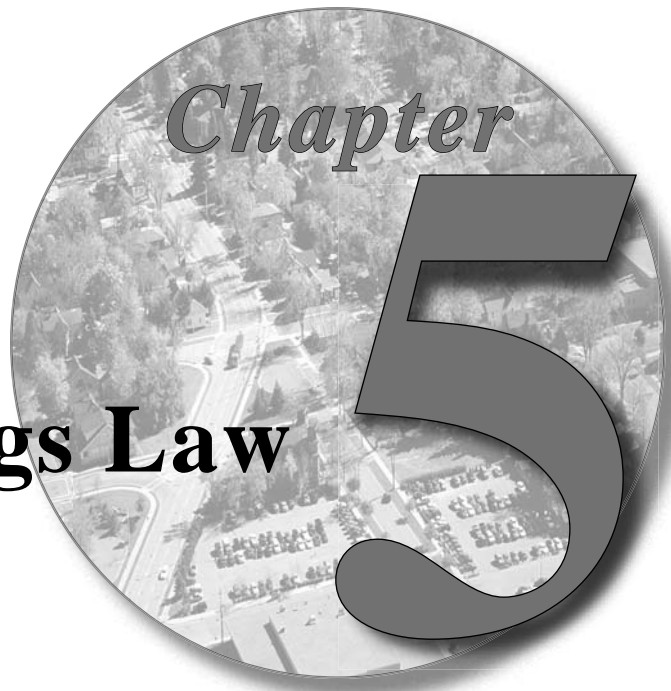


**Figure 6:** Rules that apply to the zoning board are derived from multiple sources.

should be created by the local governing body with input from the zoning board and staff (*see chapter 7*).

Many procedural and decision standards applicable to zoning boards are derived from case law. When locally contested decisions are appealed to and decided by the Wisconsin Supreme Court or courts of appeals, those decisions become precedent and are referred to as **case law**. References to these cases are included throughout the text and are cited in the footnotes. *Appendix B* provides guidance for looking up relevant court cases in Wisconsin.

To ensure that all of these rules are known and followed locally, we recommend that new zoning board members be provided with a packet containing all of these materials upon initial appointment, and that zoning staff provide regular updates to the zoning board when materials change. We also recommend providing a concise version of applicable rules, procedures, and decision-making standards to applicants along with blank application forms.



# Open Meetings Law

All zoning board meetings and hearings must comply with Wisconsin’s open meetings law.<sup>33</sup> The law is intended to give the public prior notice of meetings of governmental bodies and to assure that they are held in places that are open to the public and reasonably accessible to the public, including the disabled. Some meetings or portions of meetings are permitted to be held as closed sessions, but generally, discussion and decision-making at governmental meetings must be conducted in open session and motions and voting must be open and recorded.

## Open Meetings

Under the law, a meeting is a gathering of members of a governmental body for the purpose of exercising responsibilities and authority vested in the body. A meeting occurs when both a purpose test and a numbers test are met:

- **The Purpose Test** is met when discussion, information gathering, or decision-making take place on a matter within the jurisdiction of the governmental body. For zoning boards, that includes matters pertaining to conditional uses, variances, and

**Open Meeting** – a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times.

<sup>33</sup> Wis. Stat. §§ 19.81-19.98

administrative appeals as well as appeals of the zoning board’s decisions.

- **The Numbers Test** is met when enough members of the body are present to determine the outcome of an action. By statute, if a quorum is present (generally one-half of the members of the body), there is presumed to be a meeting unless the purpose test is not met. A lesser number of members may also meet the numbers test if sufficient numbers are present to block a decision (e.g., two members of a five-member city/village/town zoning board where four votes are required to carry an issue). This is known as a “negative quorum.”

**Quorum** – at least one-half of the members of a body; sufficient to decide most matters.

**Negative Quorum** – enough members of a body (generally less than quorum) to block a decision.

**Walking Quorum** – a series of meetings or discussions, each involving less than a quorum, intended to decide a matter.

Site inspections by the zoning board must comply with the open meetings law if the purpose and numbers tests are met. If board members travel to an inspection site together, they should refrain from discussing board business while in transit. Inspections in which no testimony is taken and no discussions are held constitute meetings if the numbers test is met since their intended purpose is to gather information relating to board business.

Phone conferences, chance and social gatherings, and conferences may also constitute a meeting if the numbers and purpose tests are met. Telephone calls to arrange meeting logistics and gatherings where no board business is discussed do not meet the open meetings test.

Local officials should be aware that a series of gatherings, telephone calls, faxes, or e-mails between zoning board members may constitute an illegal meeting. A series of meetings or discussions, each less than quorum size, to discuss board business (other than logistics) is known as a “walking quorum” and is illegal because it is not noticed and open to the public.

### Closed Sessions

#### *Permitted exemptions for closed sessions*

Unless specifically exempted by state statute, all meetings of governmental bodies must be open and reasonably accessible to the public. Recognizing that opportunities for zoning boards to go into closed session are extremely limited, statutory exemptions that may apply to zoning boards are listed below.<sup>34</sup>

<sup>34</sup> Wis. Stat. § 19.85(1)(a-j)

1. **Deliberation concerning a case** - Deliberation concerning a case that was the subject of a quasi-judicial hearing. The courts have determined a case to be an adversarial proceeding with opposing parties, not merely deciding whether to grant an administrative appeal, variance or conditional use permit. Neighbors or others testifying for or against the granting of an administrative appeal, variance or conditional use are not parties.<sup>35</sup>
2. **Conferring with legal counsel** - Conferring with legal counsel about strategy regarding current or likely litigation.
3. **Actions concerning public employees** - Consideration of dismissal, demotion, licensing or discipline of a public employee or licensee unless the employee or licensee requests that the meeting be held in open session. Consideration of employment, promotion, compensation or performance evaluation data of a public employee.
4. **Potentially damaging personal information** - Consideration of financial, medical, social or personal histories or disciplinary data about specific persons that would be likely to have a substantial adverse effect on the reputation of a person.
5. **Request to an ethics board** - Consideration of a request for confidential written advice from a local ethics board.
6. **Other narrow exemptions** - Specified deliberation regarding unemployment and workers compensation, burial sites and other narrow exemptions provided by statute.

**Closed Session** - a meeting where public attendance is not allowed; must be specifically authorized by state statute.

#### *Closed session procedures*

Statutes specify procedures that must be followed when convening and participating in a closed session:

- **To enter closed session** - The body must initially convene in open session. To move into a closed session, the presiding officer must announce the specific subject matter and statutory authority for closure. A motion and recorded individual vote by a majority of the body are required to convene in closed session.

<sup>35</sup> State ex rel. Hodge v. Turtle Lake, 180 Wis.2d 62, 508 N.W.2d 301 (1993)

- **Discussions, motions and decisions** - The body may consider only the matter(s) for which the session was closed. Motions and decisions must be recorded. If a decision made in closed session is appealed, the record must contain sufficient detail to show that the zoning board considered the proper legal standards and evidence presented. Where feasible, zoning boards should vote in open session.
- **To reconvene in open session** - Once a body convenes in closed session, it may not reconvene in open session for at least 12 hours, unless public notice of its intent to return to open session was given in the original notice of the meeting. Absent such notice, the body should amend its agenda to place any closed session at the end of the agenda.<sup>36</sup> When there is good cause, two-hour prior notice of a planned closed session and reopening can be provided to allow reopening a meeting, but this approach is rarely necessary.

#### *Attendance at closed sessions*

Only members of the zoning board and those essential to the business for which the session was closed may attend a closed session. Generally, members of the local governing body may not attend closed sessions of the zoning board. The statutory exemption which allows a parent body to attend closed meetings of its subunits does not apply because the board is not a subunit of the governing body since the governing body does not review board decisions. Additionally, the zoning administrator or staff person who presented testimony at the hearing and the municipal attorney (if he or she represented the zoning department at the hearing) should not attend closed sessions.

#### **Public Notification**

Notice of a public meeting is required and may be accomplished by posting in one or more public places likely to give notice to the public and those affected by the decision.<sup>37</sup> A minimum of three locations is recommended. Generally, the zoning board secretary or administrative staff of the zoning department perform meeting and hearing notification duties and provide evidence of compliance. However, board members must individually determine compliance with all aspects of the open meetings law

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<sup>36</sup> Wis. Stat. § 19.85(2)

<sup>37</sup> OAG 86-76, 65 Op. Att’y Gen. 250 (1976) & Wis. Stat. § 19.84(1)

in deciding whether to participate in a meeting. The following are minimum requirements of Wisconsin’s open meetings law:

- **24-hour prior notice.** Notice of a public meeting must be provided at least 24 hours prior to the meeting. Where such notification is impossible or impractical for good cause, notice may be provided not less than 2 hours prior to the meeting.
- **Notice to media.** Notice (written, phone, or fax) must be provided to the governmental unit’s official newspaper and to any media who have filed a written request. If there is no official newspaper, notice should be provided to a newspaper or other media likely to give notice in the affected area.<sup>38</sup>
- **Separate notices.** A separate notice is required for each meeting. A general notice at the beginning of the year is not sufficient.
- **Content of notice.** Notice must specify the time, date, place and subject matter of the meeting; any contemplated closed sessions; and intent to reconvene in open session within twelve hours after completion of a closed session.<sup>39</sup> The meeting agenda may also provide for a period of public comment and discussion. Though most meetings must be open to public attendance, the law does not require all meetings to provide a forum for public comment. Hearings, on the other hand, must include a period for public comment/ testimony.
- **Specificity of notice.** The public notice must describe agenda items in sufficient detail to allow anyone likely to be affected by a decision to identify those items on the agenda. General subject matter designations such as “miscellaneous business,” “agenda revisions,” or “other such matters as authorized by law” should be avoided.<sup>40</sup> Only issues described in sufficient detail in the public notice and agenda may be decided. If a discussion item or decision is continued or postponed for a later date that item should be fully described in the subsequent meeting notice.

In addition to the notice requirements of the open meetings law, all zoning board meetings and hearings must comply with notice

<sup>38</sup> Wis. Stat. §§ 985.03 & 985.05

<sup>39</sup> Wis. Stat. §§ 19.84(2) & 19.85(2)

<sup>40</sup> Memo from Peggy Lautenschlager, Attorney General to Mr. Charles Rude, Mayor, City of Lake Geneva, dated March 5, 2004.

requirements of:

- State statutes governing procedures for zoning boards,<sup>41</sup>
- DNR rules for shoreland, shoreland-wetland, and floodplain zoning matters,<sup>42</sup> and
- Other notice requirements imposed by local ordinance or bylaws.

Local notification procedures must be crafted to include all of these requirements. Paid, published notices are not required by the open meetings law. However, where other statutes require paid publication of a hearing or meeting notice, open meetings law requirements may be incorporated into the published notice. Public posting is recommended in addition to the published notice.

### **Public Notification of Hearings**

Zoning board hearings are subject to more stringent public notification requirements than working sessions or regular meetings subject to the open meetings law. The following table describes statutory notice requirements for county, city, village and town zoning board hearings and where they differ.

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<sup>41</sup> Wis. Stat. §§ 59.694(6) & 62.23(7)(e)6

<sup>42</sup> Wis. Admin. Code §§ NR 115.05(6)(h) & NR 116.20(2)(d)



Figure 7: Statutory Notice Requirements for Zoning Board Hearings			
County (population of 250,000 or more) <sup>43</sup>	County (population less than 250,000) <sup>44</sup>	City <sup>45</sup>	Village or Town <sup>46</sup>
<ul style="list-style-type: none"> <li>■ Class 2 notice required.</li> <li>■ Posting recommended.</li> </ul>	<ul style="list-style-type: none"> <li>■ Posting two weeks prior required.</li> <li>■ Class 2 notice recommended.</li> </ul>	<ul style="list-style-type: none"> <li>■ Class 1 notice required.</li> <li>■ Posting recommended.</li> </ul>	<ul style="list-style-type: none"> <li>■ Posting one week prior required.</li> </ul>

**Posting** – Display of a notice in at least 3 public places likely to give notice to the public and those affected by a decision.<sup>47</sup>

**Class 1 Notice** – One newspaper publication at least one week before the act or event.<sup>48</sup>

**Class 2 Notice** – Two newspaper publications, at least once each week for consecutive weeks,

<sup>43</sup> Wis. Stat. § 59.694(6) provides that notice of the hearing of an appeal must be given by publication of a class 2 notice under Wis. Stat. § 985. It is somewhat unclear whether class 2 publications should also be made for variances and special exceptions/conditional uses. Requirements for designation of an official newspaper for counties with population of 250,000 or more is found in Wis. Stat. § 985.065(2)(a).

<sup>44</sup> See previous footnote. Counties with a population less than 250,000 are not required to have an official newspaper and apparently may elect to satisfy the class 2 publication requirement by posting [Wis. Stat. § 985.05(1)]. However, newspaper publication is strongly recommended.

<sup>45</sup> Wis. Stat. § 62.23(7)(e)6 merely requires the city zoning board to give “public notice” of the hearing on the “appeal or other matter referred to it” (e.g. variance or special exception/conditional use). Wis. Stat. § 985 applies to publication of “legal notices,” which term includes “public hearings.” The hearing before the city zoning board is merely called a “hearing,” in contrast to a “public hearing” as in the case of zoning amendments under Wis. Stat. § 62.23(7)(d). Because members of the public are typically allowed to testify at zoning board hearings, the conservative interpretation is that § 985 applies. In § 985, a class 1 notice is required for cities because the hearing requirement in Wis. Stat. § 62.23(7)(e)6 predates the date specified in Wis. Stat. § 985.07.

<sup>46</sup> Wis. Stat. §§ 59.694(6) & 62.23(7)(e)6 refer to Wis. Stat. § 985. Under § 985, cities, but not villages or towns, must have official newspapers. Since villages and towns do not have official newspapers, the publication requirement may be satisfied by posting [Wis. Stat. §§ 985.02(2), 985.07 & 985.01(1)]

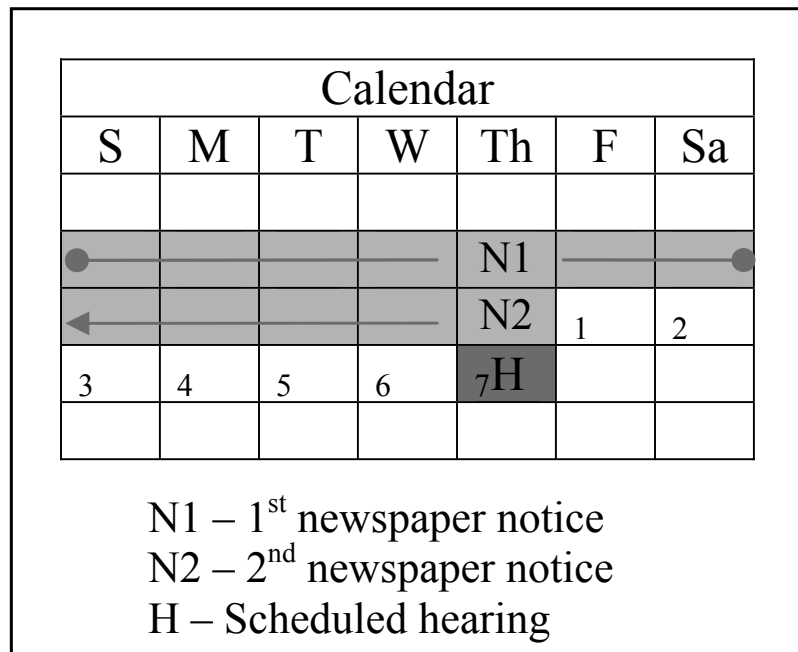
<sup>47</sup> Wis. Stat. § 985.065(2)(a) concerns requirements for an official newspaper; Wis. Stat. § 985.05(1) provides a posting option if there is no official newspaper; Wis. Stat. § 985.02(2) provides guidelines for posting & Wis. Stat. § 985.01(3) defines *municipality*.

<sup>48</sup> Wis. Stat. §§ 985.07 & 985.01(1)

<sup>49</sup> Wis. Stat. §§ 985.07 & 985.01(1)

The calendar in Figure 8 illustrates a sample timeframe for publishing a Class 2 notice for a zoning board hearing consistent with state law. Counting backward from the date of the scheduled hearing (highlighted in red) the second newspaper publication must occur at least one week prior to the hearing (not less than seven days prior). In computing the minimum time for publication, the first day of publication is excluded and the day of the meeting or event is included.<sup>50</sup> State statutes are silent on how far in advance the notice may occur. Therefore, the second notice may be published earlier than the dates noted, but not later. The first publication must appear the week prior to the second publication and may occur on any day of the week.<sup>51</sup> One court of appeals has interpreted the law as requiring insertions to be exactly one week apart; however, this is likely not binding precedent.<sup>52</sup> Working within statutory guidelines, local governments may wish to clarify by ordinance when zoning board hearing notices should be provided.

**Figure 8:** Class 2 Notice Calendar



<sup>50</sup> Wis. Stat. § 985.09

<sup>51</sup> Wis. Stat. § 985.01(1m) states that “any such notice that may, by law or the order of any court, be required to be published for any given number of weeks may be published on any day in each week of such term”.

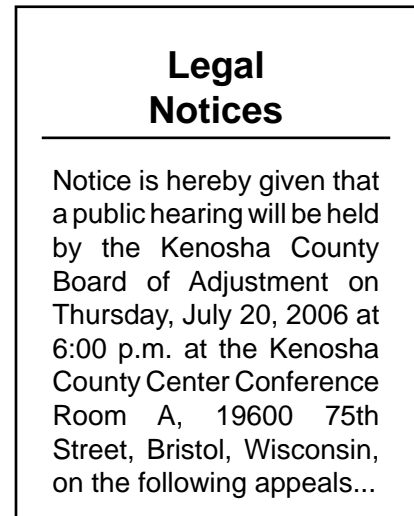
<sup>52</sup> A court of appeals interpreted the law as requiring Class 2 notice insertions to be exactly one week apart [*Gloudeman v. City of St. Francis*, 143 Wis.2d 780, 422 N.W.2d 864, 866 (Ct. App. 1988)]. However, this is likely *obiter dictum*, and thus not binding precedent [League of Wisconsin Municipalities, FAQ3, February 1997. Available: <http://www.lwm-info.org/legal.faz/faz3.html>].

***Content of hearing notice***

The following information should be included in the hearing notice:

- Name of the governmental body that will meet.
- Date, time and location of the hearing.
- Name of the applicant, appellant, or petitioner.
- Location of property involved.
- General description of the proposed project and nature of the request (variance, conditional use/special exception or appeal).
- Subject matter, statutory authority (recommended), and notice of any anticipated closed session and any intent to reconvene in open session within 12 hours after completion of a closed session.<sup>53</sup> (Review the exemptions and procedures for closed sessions.)
- A notice that interested persons may present testimony regarding matters on the agenda at the meeting/hearing or in writing to the board.
- Contact information for further information about the petition or application.

**Figure 9:** Public notice of hearings should be published in the official newspaper.



Sample notice from a public hearing held by the Jefferson County Board of Adjustment is included in *Appendix E*.

***Proof of hearing notice***

An affidavit of publication by a newspaper editor or his/her designee showing the name of the newspaper and dates of publication affixed to a copy of the published notice is presumptive evidence of publication.<sup>54</sup> A similar affidavit by a person posting legal notice showing the time, place and manner of posting serves the same function for posted notices.<sup>55</sup>

***Notification of hearing to interested parties***

Advanced notice of zoning board hearings must be provided to the following parties:

- **Media** - The information provided in a published or posted notice must be provided by phone, fax, or written copy to any media requesting it and to the community's official newspaper. If an official newspaper is not designated, notice must be given

<sup>53</sup> Wis. Stat. § 19.85(2)

<sup>54</sup> Wis. Stat. § 985.12

<sup>55</sup> Wis. Stat. § 985.02(2)(d)

to news media likely to give notice in the area.<sup>56</sup>

- **Interested Parties** - Notice must also be given by mail to parties in interest,<sup>57</sup> including:
  - The applicant/appellant/petitioner,
  - Any zoning officer whose decision is appealed, and
  - Adjacent/nearby property owners as specified by local ordinance. We recommend that zoning staff provide notice to people within a greater distance if the proposed use could affect people farther away (e.g., gravel pit, landfill).
  
- **Department of Natural Resources** - The appropriate local DNR office must be provided with 10-day prior notice of hearings on shoreland, shoreland-wetland, and floodplain zoning appeals, variances, and conditional uses/special exceptions and provided with copies of related decisions within 10 days.<sup>58</sup>
  
- **Department of Agriculture, Trade and Consumer Protection** - DATCP must be notified of any approval in the case of a conditional use/special exception or variance in an exclusive agricultural zoning district under the state farmland preservation program.<sup>59</sup>

## Violations of the Open Meetings Law

### *Suggested procedures to avoid violations*

Zoning board members must individually determine compliance with all aspects of the open meetings law. Prior to participating in a meeting or hearing, zoning board members should review the following procedures to determine whether they are in compliance with the open meetings law:

1. **Determine proper notice.** At the beginning of a meeting, each member of the zoning board should determine whether proper notice was provided. If compliance is questionable, the municipal attorney should be able to provide counsel on the matter.

<sup>56</sup> Wis. Stat. §§ 19.84(1)(b) & 985.065

<sup>57</sup> Wis. Stat. §§ 59.694(6) & 62.23(7)(e)6

<sup>58</sup> Wis. Admin. Code §§ NR 115.05(6)(h) & NR 116.20(2)(d); DNR notification is usually accomplished by providing a written copy of the notice.

<sup>59</sup> Wis. Stat. § 91.75(5). Forms for notifying DATCP are available by calling (608) 224-4648.

2. **Limit closed sessions.** Members should vote against convening closed sessions that are not authorized by specific exemptions of the open meetings law. They should also insist that proper procedures be used to close and reopen sessions. Members who vote against convening in closed session may participate in the closed session if it is held.
3. **Document proceedings.** A log or minutes documenting proper notice and recording motions, rationale and any votes on abbreviated notice, amended agendas or closed sessions is a useful defense against allegations of open meetings law violations (most often made by media or persons displeased by decisions).

#### ***Liability and voided decisions***

Zoning board members can be sued individually or as a group for alleged violations of the open meetings law. Forfeitures (\$25-\$300) can be levied against members who break the law. The municipality may not reimburse members for these forfeitures. Additionally, a court may void an action taken by a body at an illegal meeting if it finds that the public interest in enforcement of the open meetings law outweighs any public interest in sustaining the body's decision.





# Chapter 6

## Ethical and Procedural Considerations

### Zoning Boards Must Follow the Rules of Due Process

Due process is a basic concept of fairness in legal proceedings that has its roots in the decision making processes used by the Greeks and Romans<sup>60</sup> and is reiterated in the constitutions of the United States and Wisconsin.<sup>61</sup> These constitutional provisions guarantee two distinct forms of due process: substantive and procedural. Substantive due process is concerned with the reasonableness of government action and therefore, is focused on assessing the rationality of a government decision. Procedural due process, the focus of this chapter, is concerned with the means or process employed to make the government decision in question.<sup>62</sup>

Not all government actions require compliance with procedural due process principles. A rule or law that applies generally does not trigger due process guarantees.<sup>63</sup> Instead, procedural due process requirements are demanded of government only in cases

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<sup>60</sup> Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities. pp. 416-427. Available: <http://www.lwm-info.org/legal/2005/12december/comment.html>

<sup>61</sup> Fourteenth Amendment to the United States Constitution and Article I, Section I of the Wisconsin Constitution.

<sup>62</sup> Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities. pp. 416-427. Available: <http://www.lwm-info.org/legal/2005/12december/comment.html>

<sup>63</sup> *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372 (U.S. 1915) cited by Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities.

where the government makes an individualized determination affecting a specific individual or specific individuals or a limited identifiable class of people.<sup>64</sup>

Because zoning board decisions often affect specific individuals, zoning boards must follow the rules of due process to ensure that all parties involved in a hearing before the board are treated fairly.<sup>65</sup> Procedural rules of due process include:

- Providing adequate notice of a pending decision to affected persons,
- Ensuring that each decision maker is impartial and unbiased,
- Avoiding or disclosing any ex parte contacts,
- Providing an opportunity to present at hearings, and
- Basing decisions on clear, pre-existing standards and factual evidence in a record that is available for review.<sup>66</sup>

### **Zoning Board Members Must Be Impartial**

Wisconsin case law requires that zoning board members be impartial, that is, free of bias and conflicts of interest. Zoning decisions are particularly vulnerable to concerns about impartiality because decision-makers are local residents with numerous social and economic ties to their communities. However, it is important to point out that as a zoning board member your opinions about specific local regulations or zoning in general do not necessarily disqualify you from making decisions.<sup>67</sup> A personal opinion or stance, such as pro-growth or anti-growth, should not influence your decision. Bias related to applicants' ethnicity, gender, or religion is also inappropriate. Reviewing your voting record to determine whether any patterns are apparent may be an eye-opening experience.<sup>68</sup>

Here are two examples of how the courts determined that land use decision makers were not impartial:

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<sup>64</sup> *Londoner v. Denver*, 210 U.S. 373, 28 S. Ct. 708, 52 L. Ed. 1103 (U.S. 1908) cited by Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities.

<sup>65</sup> Easley, V. Gail and David A. Theriaque. *The Board of Adjustment*. 2005. Planners Press, p. 95.

<sup>66</sup> Blaesser, Brian W. et al. *Land Use and the Constitution: Principles for Planning Practice*. 1989. Planners Press. pp.42-43; Hunter, Ted and Jim Driscoll. "The Planning Commissioner as Judge." *The Commissioner*, Summer 1996; *Old Tuckaway Assocs. Ltd. Partnership v. City of Greenfield*, 180 Wis.2d 254, 509 N.W.2d 323 (Ct. App. 1993); Stephens, Otis and John Scheb. *American Constitutional Law*, 3ed. 2003. Belmont, CA: Wadsworth.

<sup>67</sup> *Marris v. Cedarburg*, 176 Wis. 2d 14, 498 N.W.2d 842 (1993)

<sup>68</sup> Dale, Gregory. "The Ethics of Bias." *Planning Commissioners Journal*, article #571.



- A zoning board member made negative comments about the applicant and her request, referring to it as a “loophole in need of closing.” The court determined the applicant was deprived of a fair hearing and required a rehearing without the participation of the member.<sup>69</sup>
- A county zoning committee member, who was also a town board chair, co-signed a letter as town board chair expressing his positive opinion of a gravel company. Within a few months, the gravel company applied to the county for a conditional use permit and included the town chair’s letter as part of their application. When the town board chair/county zoning committee member voted to grant this conditional use permit, the court determined he was an advocate who had demonstrated an impermissibly high risk of bias.<sup>70</sup>

### If You Are Not Impartial, Recuse Yourself

For each request before the zoning board, individual zoning board members must decide for themselves whether their relationships or interests could bias their judgment or give an appearance of bias causing them to be or appear partial. We recommend that zoning board members use the “sniff test” when determining whether they are biased or impartial: If it would smell fishy for you to vote on the matter at hand, **recuse** yourself. Another way to determine whether you are impartial and appear impartial is to think about whether you would be comfortable if the headline in your local newspaper described your background, your personal and professional relationships, and your participation or vote on the matter at hand. If you are unsure, you should discuss the matter with the zoning board’s legal counsel.

If, as a zoning board member, you do not feel you can be and appear impartial in a given decision, the best approach is to recuse yourself. To recuse yourself, do not vote and do not have any discussion or involvement in the matter in question. We recommend that you physically remove yourself from the table where the zoning board is seated while the matter is discussed to make it clear you are not serving as a member of the zoning board. The meeting minutes should reflect that you have recused yourself. If you have recused yourself on a matter, you may offer testimony

**Recuse** - to disqualify because of prejudice or conflict of interest on a matter.

**If you recuse yourself:**

- Do not vote AND
- Do not discuss the topic with the zoning board.

<sup>69</sup> *Marris v. Cedarburg*, 176 Wis. 2d 14, 498 N.W.2d 842 (1993)

<sup>70</sup> *Keen v. Dane County Bd. of Supervisors*, 2004 WI App 26, 269 Wis. 2d 488, 676 N.W.2d 154.

**Ex Parte** - without the other party being present.

as a member of the public.

### **Avoid Ex Parte Communication**

Zoning board members should not have conversations or receive correspondence regarding a variance, appeal or conditional use that is before the board or which may come before the board except during a noticed meeting or hearing. Such contacts outside a meeting or hearing are known as ex parte communication.

The reason for this requirement is fairly simple: an applicant who comes before the zoning board is entitled to know about and have an opportunity to rebut any information that decision makers rely on in making the decision. Discussion outside the meeting regarding procedural matters, such as scheduling a meeting or explaining how to file an application, are permissible. Ex parte communication is not a concern for legislative (ordinance or rule adoption) or ministerial matters (simple permits).

We recommend the following steps regarding ex parte communication:

- First, avoid ex parte communication by suggesting that members of the public who approach you outside of a meeting present information in open hearings or by written comment to the decision-making body.
- Second, if you are not able to avoid ex parte communication, disclose the communication at the hearing and make the information part of the record so that it can be considered in decision-making. The individual zoning board members will then determine its credibility and weight in deciding their vote on the matter.

### **Provide an Opportunity to Present at Hearings**

Typically the zoning board chair invites the applicant to present at a hearing, followed by all interested parties. A zoning board that set a 5-minute time limit per presenter and allowed additional time for the applicant to describe the proposal complied with due process.<sup>71</sup> To ensure that all interested parties have a chance to provide testimony, we recommend that after everyone interested in presenting appears to have done so, the chair ask if there is anyone

<sup>71</sup> *Roberts v. Manitowoc County Bd. of Adjustment*, 2005 WI App 2111

else who wants to testify about the proposal at hand.

### **Avoid Statutory Conflicts of Interest**

In addition to due process and impartiality, zoning board members are also subject to specific conflict of interest provisions found in Wisconsin Statutes:

- **Personal financial gain** - State laws<sup>72</sup> prohibit public officials from taking official actions that substantially affect a matter in which the official, an immediate family member, or an organization with which the official is associated has a substantial financial interest. Similarly, an official may not use public office for financial gain or to gain anything of substantial value for the official, an immediate family member, or an organization with which the official is associated. This statute is enforced by local district attorneys and the State Attorney General<sup>73</sup> with forfeitures up to \$1000 per violation.<sup>74</sup>
- **Misconduct in office** - State law prohibits an officer from intentionally performing, or failing to perform, certain acts including actions the officer knows are in excess of their lawful authority or are forbidden by law in their official capacity.<sup>75</sup>
- **Private interests in public contracts** - State laws also prohibit certain actions when an official bids for a contract, or has authority to exercise duties under a contract, if the official has a private financial interest in the contract, subject to a \$15,000 per year exception for total receipts and disbursements under the contracts.<sup>76</sup> In certain cases, recusal will not prevent a violation of the law,<sup>77</sup> and the official may have to choose between doing business with the governmental unit and serving as an officer. This may be an issue when the zoning board decides conditional use permits or retains consulting services in which members have an interest.

#### **In short:**

- Don't accept items or services offered to you because of your position.
- Don't participate in decisions which affect you financially.

<sup>72</sup> Wis. Stat. § 19.59(1)

<sup>73</sup> Local officials online tutorial, State of Wisconsin Ethics Board, available: <http://ethics.state.wi.us/LocalOfficials/LocalOfficial1.htm>

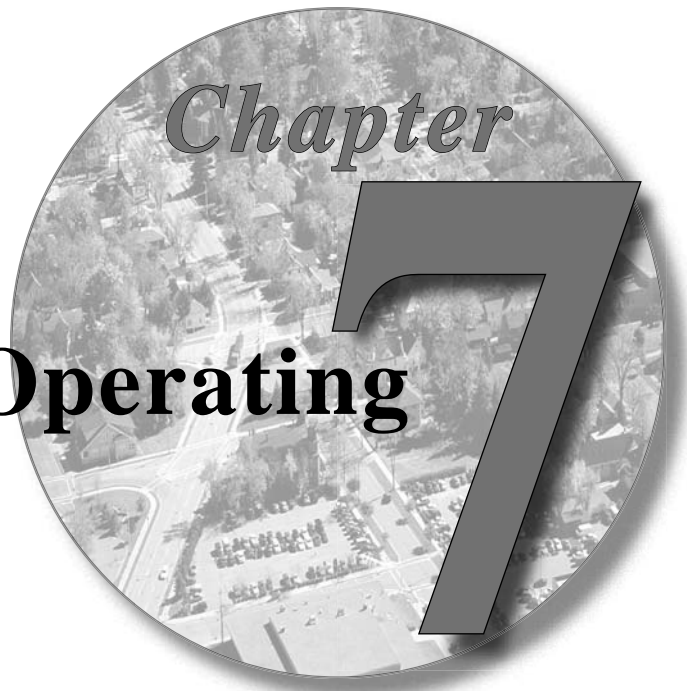
<sup>74</sup> Wis. Stat. § 19.59 (7)(a)

<sup>75</sup> Wis. Stat. § 946.12; *State v. Tronca*, 84 Wis.2d 68, 267 N.W.2d 216 (1978) states when 946.12(3) was created in 1953 the notes of the Judiciary Committee on the Criminal Code carried the following comment: “quasi-judicial functions call for the exercise of judgment, and if the officer acts honestly although with not the best of judgment, he is not guilty.”

<sup>76</sup> Wis. Stat. § 946.13

<sup>77</sup> Wis. Stat. § 946.13(1)(a)





# Adoption of Operating Rules

Many procedural issues essential for the conduct of zoning board business are not addressed in state statutes and must be determined either by ordinances adopted by the local governing body or by rules formally adopted by the zoning board itself. The table below describes authority of zoning boards to adopt such rules.

**Figure 10: Adoption of Zoning Board Rules**

<b>County or Town Zoning Board of Adjustment</b>	<b>City, Village, or Town Zoning Board of Appeals</b>
<ul style="list-style-type: none"> <li>• The county board must adopt rules for the zoning board.<sup>78</sup></li> <li>• The zoning board may adopt rules to implement the county board<sup>79</sup> or town board regulations.<sup>80</sup></li> <li>• The county board sets filing fees for appeals to the zoning board.<sup>81</sup></li> </ul>	<ul style="list-style-type: none"> <li>• The zoning board must adopt rules in accordance with any ordinance adopted under Wis. Stats. § 62.23.<sup>82</sup></li> </ul>

<sup>78</sup> Wis. Stat. § 59.694(3)

<sup>79</sup> Wis. Stat. § 59.694(3)

<sup>80</sup> Wis. Stat. § 60.65(4)

<sup>81</sup> Wis. Stat. §§ 59.696 & 59.697

<sup>82</sup> Wis. Stat. § 62.23(7)(e)3

## Content of Operating Rules

Many communities adopt *Robert's Rules of Order* to guide parliamentary procedures. In addition, communities may wish to adopt operating rules from the following list that are not addressed in ordinances, administrative rules or statutes:<sup>83</sup>

- A. General provisions
  - Applicability of state statutes, local ordinances, board rules, and case law
  - Requirements for familiarity with them
- B. Membership
  - General membership requirements (number, appointment, terms)
  - Desired qualifications and member education
  - Alternates (attendance requirements)
  - Conduct (ex parte communication, conflicts of interest, bias)
  - Compensation, travel, counsel, and other expenses
  - Vacancies, resignations (general and by absence), and removal
- C. Officers, duties, and staff assistance
- D. Powers and duties of the board
- E. Meetings
  - Procedural requirements (open meetings, public notice, public records)
  - Quorum (how many constitute quorum)
  - Order of business and agenda revision
  - Meeting conduct
- F. Appeal procedures
  - Filing procedures and fees
  - Time limits on appeal (\*time limits on appeal of administrative decisions are not specified in state statutes and should be included in local ordinance)
  - Stays on appeal
  - Contested case requests
  - Conduct of on-site inspections
  - Members to attend as group or individuals

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<sup>83</sup> For additional guidance and model rules, refer to Chapter 4: “Rules of the Board” in *The Zoning Board Manual*, 1984 by Frederick H. Bair, Jr.

### G. Hearings

- Witnesses to testify under oath (some zoning boards require applicants and other persons providing testimony to do so under oath, reminding them of the risks of perjury if they lie under oath)
- Order of business
- Recording
- Rules of evidence
- Continuances

### H. Decisions

- Voting requirements (\*state statutes specify that when a quorum is present, zoning boards may take action by a majority vote of the members present; local ordinances may set more stringent voting requirements)
- Timing when multiple decisions/authorities are required
- Findings, rationale, and form of decision
- Development conditions
- Filing and notice to the public and parties

### I. Refilings and rehearings

Keep in mind that when creating bylaws it is not necessary to restate all applicable state and local rules or case law that already apply to the zoning board. The bylaws should be a place to create rules for day-to-day conduct of the board and other issues that are not already addressed elsewhere. If you feel it is important to reiterate some of these rules in your local bylaws, it is best to do so by reference to the statute rather than a complete reprinting of those rules. That way, when rules are updated, it is not necessary to update the language of your bylaws. For example, when the state updated alternate and quorum requirements in August 2005, some zoning boards found they had to update the text of their bylaws, creating unnecessary work. However, where other applicable rules are permissive (i.e., using language such as “may” rather than “shall”) zoning boards may opt to include language that is more restrictive.

Options for addressing some of the topics outlined above are discussed in related sections of this manual. A number of counties and municipalities have adopted fairly comprehensive rules that may serve as examples.<sup>84</sup>

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<sup>84</sup> See, for example, bylaws from Oneida County, St. Croix County, and the City of Fitchburg.





# Section II – Review

## **Keywords**

- Open meeting
- Quorum
- Negative quorum
- Walking quorum
- Closed session
- Public notice
- Posting
- Class 1 notice
- Class 2 notice
- Recuse
- Ex parte communication
- Operating rules/bylaws

## **Test Your Knowledge** (answers on page 49)

### **Chapter 4 - Overview of Laws That Apply to the Zoning Board**

- 1) Name the four sources that zoning boards must look to for guidance on proper procedures.

### **Chapter 5 - Open Meetings Law**

- 2) What are the two tests to determine if a zoning board must comply with the open meetings law?
- 3) What is the difference between quorum, negative quorum, and walking quorum? Which is illegal?
- 4) What type of notice is required for local zoning board hearings in your community?
- 5) When are zoning boards able to enter closed session?
- 6) What are the procedures for going into closed session?
- 7) What are the three steps to follow to avoid violating the open meetings law?

**Chapter 6 - Ethical and Procedural Considerations**

- 8) Why should zoning boards follow due process of law?
- 9) Can a zoning board chair deem a member biased and make the member recuse him or herself?
- 10) If a neighbor talks to a zoning board member at the grocery store about an upcoming case before the board member can cut the neighbor off, what should the board member do at the hearing of this case?

**Chapter 7 - Adoption of Operating Rules**

- 11) Zoning boards may adopt local bylaws or operating procedures to guide zoning board actions not otherwise governed by state statute or local ordinance. Does your zoning board have such procedures?
- 12) How are these rules working for you? Are there any items not currently included in your operating rules that should be added?

**Answers**

- 1)
  - a. State statutes
  - b. Local ordinances
  - c. Zoning board bylaws or operating rules
  - d. Case law
  
- 2)
  - a. The purpose test
  - b. The numbers test
  
- 3)
  - a. See the definitions on page 22.
  - b. Walking quorum is illegal.
  
- 4)
  - a. Counties with population > 250,000 - Class 2 notice (posting recommended).
  - b. Counties with population < 250,000 - Posting two weeks prior (class 2 notice recommended).
  - c. Cities - Class 1 notice (posting recommended).
  - d. Villages and towns - Posting one week prior.
  
- 5)
  - a. To deliberate concerning a case.
  - b. To consider action concerning a public employee(s).
  - c. To consider potentially damaging personal information.
  - d. To confer with legal counsel.
  - e. To consider a request from an ethics board.
  - f. Other narrow exemptions.
  
- 6)
  - a. Convene in open session.
  - b. Cite statutory reason for entering closed session.
  - c. Vote to move into closed session.
  - d. Record motions and decisions.
  - e. Reconvene in open session only if specified in agenda.
  
- 7)
  - a. Determine proper notice.
  - b. Limit closed sessions to those specified by statute.
  - c. Document proceedings.
  
- 8) To ensure that all parties involved in a hearing before the board are treated fairly.

## Section II – Laws That Apply to the Zoning Board

- 9) No. This decision is up to the board member
- 10) Disclose the communication at the hearing and make the information part of the record so that it can be considered in decision-making
- 11) Answers may vary
- 12) Answers may vary



# Chapter 8

## Application Process

Both zoning board members and applicants benefit from a clear understanding of the application process for zoning board requests (variances, administrative appeals, and in some cases conditional uses) and the reasons for that process.

Typically persons (applicants) seeking zoning permits first contact the zoning staff to explain their development plans and obtain the necessary permit applications. Most applicants are able to get their permits directly from the zoning staff. If the applicant is seeking a conditional use permit, however, the governing body, planning commission/committee, or zoning board (as specified by local ordinance) makes the decision. If applicants want to do something that is not allowed by zoning ordinances, they may apply for a variance (which is decided by the zoning board) or a rezone (which is decided by the governing body). Applicants who disagree with the zoning staff's interpretation of the ordinance, may file an administrative appeal, which is decided by the zoning board.

In this chapter you will find legal and practical advice regarding the application process for variances, administrative appeals, and conditional uses. Specifically, we will address:

- Who completes the application?
- When do applications need to be complete and can subsequent

- changes be made?
- What is included in a complete application?
  - Who reviews the application?
  - Are zoning staff reports recommended and what do they contain?

### **Who completes the application to the zoning board?**

While statutes do not specify who completes the application, the same person who will represent the landowner at the zoning board hearing (typically the landowner, their attorney, or agent) commonly does it.<sup>85</sup> Zoning staff often explain the rationale behind the regulations, what application materials must be completed, and the type of information and level of detail that must be included in the application. Due to their experience with the ordinances and processes, the staff may also help the applicant fill out the application by providing technical information. However, the landowner or their representative is ultimately responsible for providing a complete and accurate application.

### **When do applications need to be complete? Can subsequent changes be made?**

The application for a conditional use permit must be completed by the first time notice is given for the final public hearing on the matter, unless an ordinance expressly allows later submission of information.<sup>86</sup> Although Wisconsin courts have expressly required this only for conditional uses,<sup>87</sup> we recommend applying this policy to all decisions made by the zoning board in order to:

- Avoid creating an incentive for permit seekers to withhold controversial information from their applications until during or after the public hearing.
- Provide ample time and opportunity for interested parties to review the complete application, digest the information, and develop their ideas prior to the hearing, so that they are prepared to discuss all of their concerns.

<sup>85</sup> Wis. Stat. §§ 59.694(6) & 62.23(7)(e)6

<sup>86</sup> *Weber v. Town of Saukville*, 209 Wis. 2d 214, 562 N.W.2d 412 (1997)

<sup>87</sup> LoisLaw search 3/22/05 revealed no similar standard for variances or administrative appeals.

A simple and straightforward way to ensure that applications are complete prior to notice being given is to require that the application be complete at the time of submittal. Waukesha County uses this approach, and if any changes from the original application are desired after the public notice has been sent, a new application and fee are required.<sup>88</sup>

### **What is included in a complete application?**

Standards for what must be included in an application to the zoning board vary widely and are decided locally. A balance must be struck between having sufficient information to make a good decision and avoiding unnecessary data that may lead to confusion or simple overload for the zoning board members. At the same time, requiring more information in the application can result in a better-informed discussion of the application and more efficient decision-making, with most applications being decided in one hearing. Regardless of the amount of information required, high quality information, such as an accurately scaled site plan, is necessary.

The following list of required application materials is compiled from multiple municipalities.<sup>89</sup> Compare it to your current application standards and add, modify or delete as appropriate based on your purposes and local issues. Rather than requiring a generic list of information for all applications you may want to tailor the standards based on the specific request for which the application is submitted. For instance, an application requesting to change only the use within a building probably doesn't need a soils report or topographic survey.

- A. A legal description covering the property for which the permit is sought
- B. Written description of and justification for the proposed permit, consisting of the petitioner's evaluation of the request against the standards in the ordinance

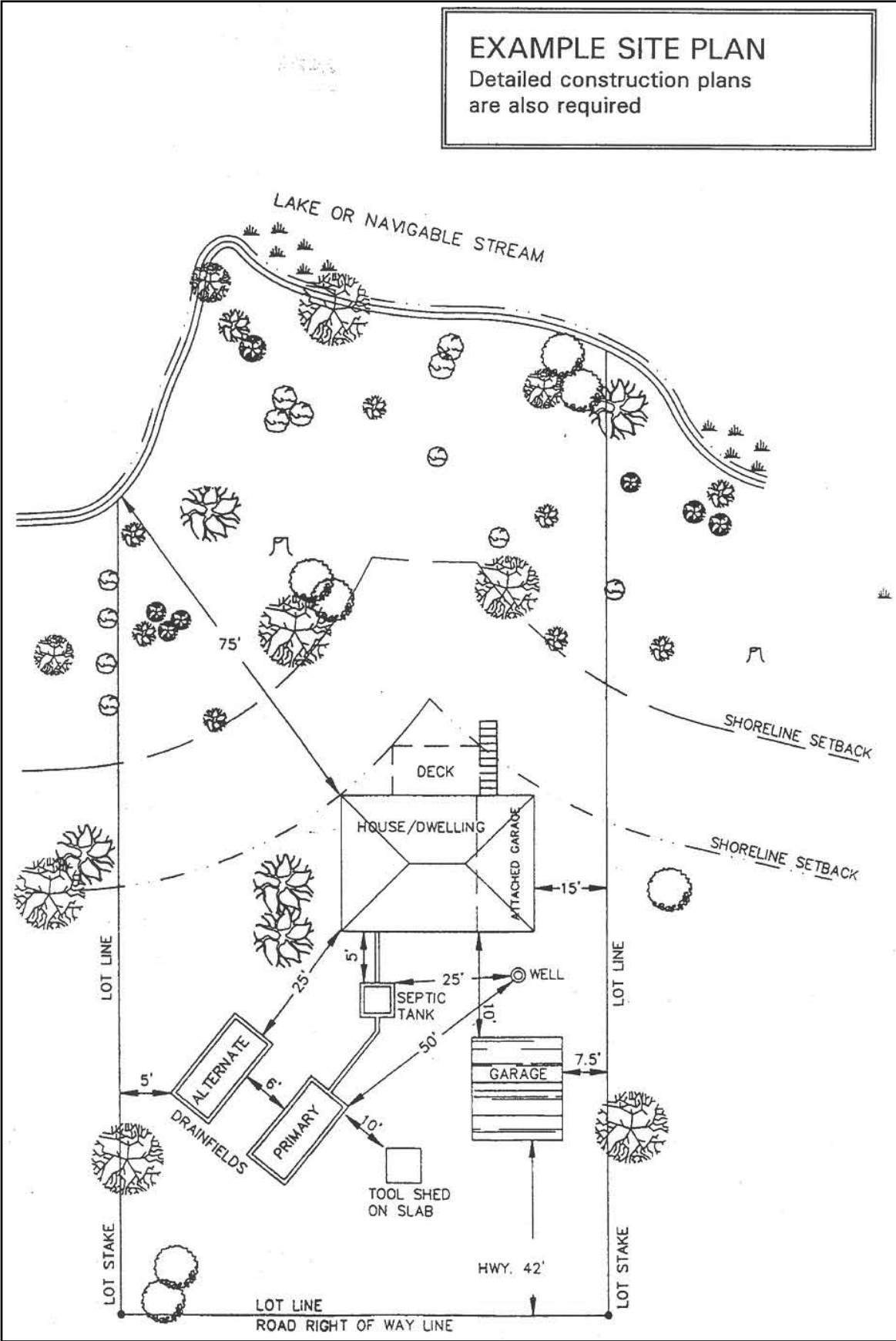
<sup>88</sup> Waukesha County Board of Adjustment variance and appeal form, available: [https://secure.waukeshacounty.gov/filelibrary/Files/Variance\\_and\\_Appeals.pdf](https://secure.waukeshacounty.gov/filelibrary/Files/Variance_and_Appeals.pdf)

<sup>89</sup> Lincoln County Zoning Ordinance, Section 17.8.30(2), available: <http://www.co.lincoln.wi.us/Zoning%20Ordinance%20Final%20clean%20-%20Dec%202004.pdf>; Waukesha County Board of Adjustment variance and appeal form, available: [https://secure.waukeshacounty.gov/filelibrary/Files/Variance\\_and\\_Appeals.pdf](https://secure.waukeshacounty.gov/filelibrary/Files/Variance_and_Appeals.pdf); and *Administering Township Zoning: A basic guide for citizens and elected officials, 2nd edition*, May 1996, Michigan State University Extension, Extension Bulletin E-1408, page 23.

- C. A specified number of copies of site plans, accurately drawn to a scale of not less than one inch to \_\_ feet, showing and labeling:
  - a. Landowner's name
  - b. Preparer, date of preparation and revisions
  - c. Scale and directional arrow
  - d. Boundaries and dimensions of property for which the permit is sought, and all other lands within a specified distance of the boundaries of the property
  - e. Location and dimensions of all existing and proposed structures on the property in question and adjacent properties, including:
    - i. Building elevations
    - ii. Dimensions, colors, and materials used on all exterior sides of buildings
    - iii. Distances between multiple structures
    - iv. Distance between structures and the ordinary high water mark
    - v. Distances between structures and lot lines
    - vi. Distances between structures and the centerlines of abutting streets and highways
  - f. Soils information
  - g. Topographical contour lines: \_\_ foot intervals
  - h. Wetlands, 100-year floodplain, shoreland zone and ordinary high water mark for any adjacent watercourses
  - i. Easement labels and locations
  - j. Adjacent public streets, centerlines, and rights-of-way
  - k. Auto ingress and egress
  - l. Visual clearance triangles
  - m. Parking and loading areas
  - n. Utilities: existing and proposed locations and types of private well and onsite waste treatment systems, or connections to public sanitary sewer, water, and/or storm sewer.
  - o. Grading and drainage plan, showing existing and proposed surface elevations
  - p. Proposed erosion control and stormwater management provisions
  - q. Any outdoor storage or dumpster areas
  - r. Existing and proposed landscaping on the site, including the location, species, size at time of planting, and mature size of all new plantings
  - s. Signs: location, height, dimensions, colors, materials, lighting, and copy area of all signage
  - t. Lighting: location, height, type, orientation, and power of all proposed exterior lighting



Figure 11: Example Site Plan from Langlade County



- D. Names and addresses of the owners of all lands within a specified distance of the property as they appear on the current records of the Register of Deeds, to be used to provide notice of the hearing
- E. Other pertinent information as requested by the zoning administrator to determine if the proposal complies with the ordinance
- F. The required review fee

An applicant has the burden of establishing the need for their relief from the zoning ordinance and the zoning board cannot guess or fill in the blanks of an incomplete application. Thus, an applicant fails to provide sufficiently detailed materials at his or her own peril. If the zoning board determines that it does not have sufficient information to make a decision on an application, it may postpone the decision until the applicant supplies the requested information and notice is provided for an additional hearing.

For examples of applications to the zoning board, staff reports, and zoning board decisions, see *Appendix D and E*.

### **Who reviews the applications?**

Initially, zoning staff members review the application to identify missing or problematic information. They may also ask other specialists, such as engineers or natural resource specialists, to assist in reviewing issues such as erosion control, stormwater management, delineation of ordinary high water marks, floodplains and wetlands, or restoration issues.

### **Are zoning staff reports recommended and what do they contain?**

While Wisconsin Statutes do not specifically address staff reports for the zoning board, the courts have not reacted negatively to staff providing recommendations to the zoning board.<sup>90</sup> Figures 12 and 13 show the results from a 2004 survey completed by 31 counties. Most zoning staff members prepare reports some or all of the time for zoning board members, summarizing the facts regarding applications. About half of the counties who responded

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<sup>90</sup> *Miswald v. Waukesha County Bd. of Adjustment*, 202 Wis.2d 401, 550 N.W.2d 434 (Ct. App. 1996)

said zoning staff always include recommendations about whether standards are met, whether to grant or deny the permit, and appropriate conditions if the permit is granted. When deciding whether to include recommendations in staff reports, consider preferences of the zoning board, staff and zoning board expertise, workload for staff and zoning board members, and political risk.

Staff reports commonly include the following components:

- Summary of applicant’s request
- Additional site information from staff visit and/or research
- Zoning history of the site, including previous permits requested and granted
- Relevant statements from comprehensive or land use plan
- Salient purpose statements and provisions from local ordinance
- Relevant statutes and case law
- Discussion of whether proposal meets standards
- Recommendation to approve, approve with conditions, or deny request

See Appendix E for an example of a staff report.

See Chapter 5 for information about who should be notified about zoning board applications and upcoming hearings.

Figure 12: Staff Reports

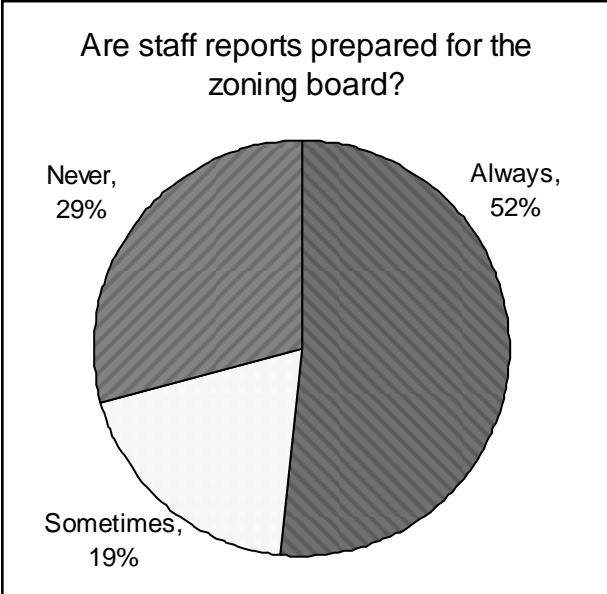
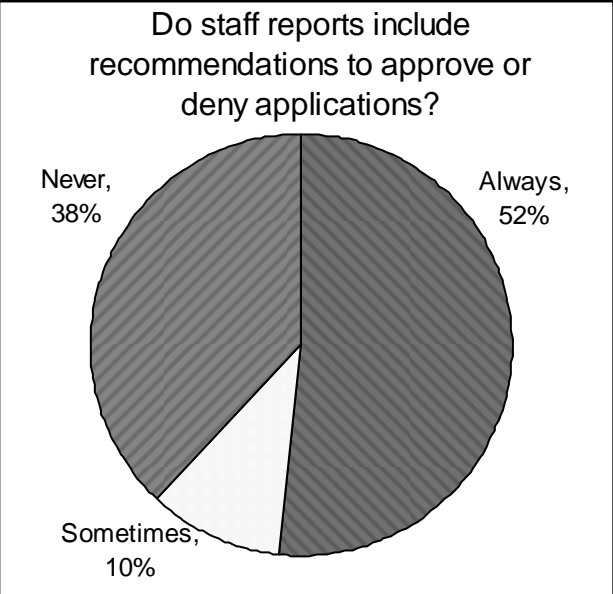


Figure 13: Staff Report Recommendations







# Site Visits

Zoning board members or staff regularly visit sites prior to making decisions in order to verify the accuracy of information submitted as part of a development proposal (rezoning, conditional use, variance or subdivision); to gather additional information; and to gain a hands-on understanding of the site in question and its context. Through a combination of field notes and photographs or video recordings, they use the site visit to record the uses of the site and surrounding areas, as well as the location and condition of site features such as topography, vegetation, buildings, surface waters, streets, utilities, parking, and circulation patterns. They can then use this information to identify potential conflicts between the proposed development and neighboring land uses or to identify limitations of the site requiring additional analyses or mitigation.

**Figure 14:** Zoning boards regularly conduct site visits to gain a better understanding of the physical limitations of a property and neighboring uses.

*Photo by Robert Korth, UW-Extension Lakes Program.*



### **What equipment is needed for a site inspection?**

When conducting a site visit, we recommend you wear appropriate clothing (boots, durable outerwear, and construction hat, as necessary) and carry:<sup>91</sup>

- Base maps and aerial photos of the site and surrounding area
- A measuring device (preferably on a wheel)
- A notepad and clipboard for taking field notes
- A still camera or video recorder
- Identification as a zoning/inspection staff member or member of a local government body

### **Must zoning boards comply with the open meetings law during site inspections?**

Zoning boards have several options for conducting site visits related to variances or conditional use permits in light of the open meetings law. If zoning board members visit the site as a group, they must comply with open meetings law requirements, including providing advance public notice of the meeting and allowing the public to access the site. (The purpose of a site visit is to gather information related to making a decision of a governmental body, so both the numbers and purpose test are met as outlined in *Chapter 5*). If zoning board members visit the site individually, they are not required to comply with the open meetings law. Some zoning boards do not visit the site at all, instead opting to have zoning staff conduct the site inspection. If staff inspect the site, they should take photographs or a video recording of the site and prepare a detailed staff report to share with the zoning board.

### **Who may access a property for a site inspection?**

If a site inspection is noticed as a public meeting, members of the public must be allowed to access the site. Before anyone (including zoning staff, zoning boards, or the public) may physically access a property for a site inspection, permission must be obtained in writing from the landowner. Many communities require this as a condition of submitting an application.

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<sup>91</sup> Meck, Stuart. "Site Visits: Purpose, Planning and Practice." *Zoning Practice*, 2.05. American Planning Association.



*Chapter*

# Meetings and Hearings

10

On the following pages, you will find information to guide the zoning board in conducting its meetings and hearings provided in two parts. The first is a checklist that the board chair and members may use to prepare for and conduct meetings and hearings. The second part may be read by the zoning board chair or secretary at the opening of meetings to help petitioners and the public understand the role of the board and the sequence of events at the meeting or hearing.

## ZONING BOARD HEARING CHECKLIST

- 1. Prior to a meeting/hearing** [board secretary or designated staff]
  - A. Arrange for alternates (due to anticipated absence or conflict of interest).
  - B. Send the agenda, any applications, and any staff reports to board members.
  - C. Comply with all open meeting law/public notice requirements.
  - D. Arrange for a tape recording (meeting minutes) or a court reporter.
  
- 2. Preliminary matters at meeting**
  - A. Distribute and collect the appearance slips (*see Appendix D*).
  - B. Call the meeting to order. [chair]
  - C. Take roll and confirm that a quorum is present. [secretary]
  - D. Confirm compliance with the open meeting law and public notice requirements. [members]
  - E. Read the agenda and amend it as necessary (to reorder hearings). [chair & members]
  - F. Inform the public in attendance of hearing procedures (see the script on page 63). [chair]
  
- 3. Public hearings**
  - A. Open the first public hearing. [chair]
  - B. Read the application or appeal. [secretary]
  - C. Report on any site inspection. [secretary]
  - D. Request a statement by the applicant. [chair with questions by board members]
  - E. Read the staff report. [zoning department with questions by board members]
  - F. Report on related correspondence. [secretary]
  - G. Disclose any ex parte communication. [board]
  - H. Request statements of witnesses (pro/con/information). [chair with questions by board]
  - I. Request a response by the applicant (or after each witness). [chair with questions by board]
  - J. Request a response by the zoning department. [chair with questions by board members]
  - K. Ask any final questions. [board members]
  - L. Close the record and the hearing. [chair]
  
- 4. Deliberation and decision**

Many zoning boards conduct all hearings before deliberating on decisions.

  - A. 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.
  - B. Conclusions of law
    - Specify applicable legal standards.
    - Determine which facts relate to the legal standards.
    - Determine whether the legal standards are met (agree on any permit conditions).
  - C. Order and Determination
    - Decide/vote on the case.
    - Direct the zoning administrator to take any necessary action.
  
- 5. Repeat steps 3 and 4 for other hearings.**
- 6. Other agenda items**
- 7. Adjourn meeting**



## ZONING BOARD ANNOUNCEMENT OF PROCEEDINGS

### **Role of the Board**

The (county/city/village/town) board of (adjustment/appeals) is an appellate board required by state law in any municipality that has adopted a zoning ordinance. The board does not have authority to amend or repeal any provision of the zoning ordinance. Its authority is limited to appeals regarding interpretations of ordinance provisions, consideration of variances, and (if assigned by ordinance) consideration of conditional use permits. The board functions like a court. Its purpose is to give a full and fair hearing to any person whose property interests are affected by these matters. Its job is to apply the zoning ordinance and appropriate legal standards to the facts of each case. The board meeting and public hearings are open to the public. A taped recording is being made of the proceedings (or a court reporter is recording the proceedings).

### **Expiration and Revocation of Permission to Develop**

Any permission to develop granted by a decision of the board must be authorized by obtaining the necessary building, zoning, and other permits. Construction must be substantially completed within \_\_ months of the date of the board's decision. This period will be extended if a court order or operation of law postpones the final decision and may be extended for other good cause.

Permission to develop may be revoked for violation of any of the conditions imposed by the board. The applicant will be given notice of the violation and an opportunity to be heard.

### **Appeal of Board Decisions**

A decision of the board may be appealed by commencing an action in the circuit court for this county within 30 days after the date of filing of the decision in the office of the board. An applicant who commences construction prior to expiration of the appeal period assumes the risk of having the board decision overturned.

### **Order of Events for Hearings**

Each hearing will be opened by reading the application or appeal. The board's site inspection report (if any) will then be read. The applicant/appellant's statement and the zoning department report (if any) will each be followed by related board questions. Witness testimony (from those who have submitted appearance slips and alternating among those in favor, those opposed, and those appearing to provide information) and related board questions are next, followed by responses from the applicant and zoning department and any remaining board questions. If the board has all of the necessary facts, it will close the record, deliberate, and decide the matter in open session before proceeding to the next hearing. Written decisions based on the discussion of the board and evidence in the record will be filed in the office of the board and mailed to the parties involved as soon as practicable. Minutes of board meetings and decisions are available in the Zoning Department.

## **ZONING BOARD ANNOUNCEMENT OF PROCEEDINGS (continued)**

### **Instructions for Witnesses**

Anyone wishing to speak should complete an appearance slip and deliver it to the board secretary. You must be recognized by the board chair in order to speak. When called upon as a witness, you will be put under oath (if required by board bylaws). Please address your comments and questions to the chair and state:

- Your name and place of residence,
- Whether you represent a group or association,
- Your qualifications to speak on this matter or the source of your information, and
- Whether you favor, oppose, or are only providing information in this matter and your concerns.

Please confine your testimony to facts related to the case at hand and avoid repetitive testimony. [Optional] You will be limited to \_\_ minutes.

### **Contested cases**

[Modify the announcement above for hearings conducted as contested cases.]

A contested case is a proceeding in which:

- Testimony is taken under oath,
- Parties have a right to review and object to evidence presented by other parties,
- Objections are entered in the record, and
- Parties may cross-examine witnesses who present testimony.

In contested cases, a party may object to the introduction of written materials or photographs as evidence unless they are given an opportunity to question the writer/photographer and to provide a written reply regarding the evidence. Contested cases usually include a complete written record of the proceedings (often by a court reporter).

# Voting and Recording Decisions



When voting and making decisions, zoning board members should keep in mind the ethical and procedural requirements discussed in *Chapters 5 and 6*, including following the open meetings law, ensuring decision makers are impartial, avoiding or disclosing ex parte communication, and avoiding using a zoning board position for personal gain. With very limited exceptions, decision-making and voting by the zoning board must be conducted in open session.<sup>92</sup>

## How does the zoning board reach a decision?

The board should consider all of the evidence in the record, including the application, evidence gathered on-site and during the hearing, staff reports, photos, sketches, letters, emails, and audio and video tapes. The board determines the credibility of each piece of evidence and decides whether the applicant(s) have shown that they meet all of the legal standards necessary to grant their request. Remember that applicants have the burden to prove to the zoning board that they should receive the requested relief under the applicable standard of law. If at the end of testimony for a given application, the zoning board is unsure what to do or unsure whether the applicant should be granted the requested permit, then

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<sup>92</sup> Wis. Stat. § 19.88(1)

the applicant has not met their burden of proof and the zoning board must deny the permit.

**To what extent must zoning board members explain their reasoning for approving or denying an application?**

A zoning board may not grant or deny an application by simply restating the statutory or ordinance language that was or was not met. Rather, the board must explain the “grounds” it relied upon to make its decisions: the specific evidence and reasons the application does or does not fit the legal criteria.

It’s not sufficient to say “based on the evidence, we feel that there is a hardship and therefore grant the variance.” Rather, the zoning board must refer to the specific evidence that either meets or does not meet each of the legal standards for the decision the zoning board is considering. For example, the zoning board might say “the applicant does not meet the ‘unique property limitations’ test for a variance because the applicant’s property is no smaller than two-thirds of the properties surrounding the lake.”

**Figure 15:** Tips to help zoning board decisions survive a court challenge

1. Ensure all evidence, including on-site observations, is included in the record.
2. If a project has been modified since findings for it were written, make sure that the modifications do not necessitate new or revised findings.
3. Use statutory and case law requirements as guidelines for your findings.
4. Make sure there is a clear logical link articulated between conditions and the impacts of the project.
5. Avoid findings that merely restate the law.
6. Put your findings in clear and understandable language.

Kovacic, Gary A. and Mary L. McMaster. “Drafting Land Use Findings,” *Planning Commissioners Journal*, article 598, no date.

**Figure 16:** Tips for recording zoning board decisions

1. Zoning boards must determine whether each statutory and ordinance standard is met.
2. Consider requiring applicants to submit proposed decisions or findings of fact as part of the application process or presentation.
3. Distribute decision forms to all zoning board members and ask them to write down whether they feel each standard is met and why (*see Appendix D*).
4. Individual zoning board members should describe their rationale to other members
5. After discussion, motions should be made and votes taken.

If a zoning board’s decision is appealed to circuit court, the judge will review the entire record and must be able to follow the reasoning of the board. While the board is not legally required to include reasons in the written decision, they must either be located there or clearly recorded in the transcript of the board proceedings.<sup>93</sup> We recommend using a decision form similar to the example provided in *Appendix D* to record the findings of fact, conclusions of law (including the board’s reasoning), an order stating what the board has decided, and a notice of appeal rights.

### How many zoning board members must vote to make a decision?

In 2005, the Wisconsin Legislature changed the voting requirements for zoning boards to try to ensure that landowners and developers are provided with timely and unbiased decisions. As a result, the current voting requirement is that when a **quorum** is present, a zoning board may take action by a majority vote of the members present.<sup>94</sup> Because the Legislature used the term “may” in this instance, the zoning board has the ability to adopt provisions in their bylaws requiring a vote by a greater number of members to take action. If the zoning board does not adopt any local provisions on this issue, then if only three members of a five-member zoning board are present, two concurring votes are sufficient to decide an issue such as granting a variance.

**Quorum** – a majority of the total zoning board.

<sup>93</sup> *Lamar Central Outdoor, Inc. v. Bd. of Zoning Appeals of Milwaukee*, 2005 WI 117, 284 Wis. 2d 1, 700 N.W.2d 87

<sup>94</sup> Wis. Stat. §§ 59.694(3m) & 62.23(7)(e)3m

### **Should a zoning board rehear or reconsider their decisions?**

Some people who are not satisfied with a decision from the zoning board will ask the board to hear their case multiple times hoping for the answer they desire. The courts provide zoning boards with guidance on this topic. In 1998, the court of appeals upheld a board of appeals rule that prohibits hearings, reconsiderations, and new applications seeking the same relief after a previous denial unless there has been a substantial change of conditions or circumstances since the decision. The court held that the rule served a legitimate purpose because it promotes finality of zoning board decisions and avoids the inefficiency that would result from revisiting the same issues when there has been no change of circumstances.<sup>95</sup> In an earlier case, the court observed that a zoning board should not reopen or reconsider a proceeding that has been terminated, although there are possible exceptions, such as a mistake, public necessity, or other good cause, such as a significant change in circumstances.<sup>96</sup>

### **What information needs to be in the record?**

Minutes of zoning board meetings and hearings must be kept recording motions, seconds, and how each member voted, including absences and abstentions. Hearings, discussion, and decision making by the zoning board should also be recorded by a tape recorder or stenographer and be understandable so they can be transcribed if a decision is appealed to court. These records need to be preserved and available to the public consistent with the Wisconsin Public Records Law.<sup>97</sup> In addition to the minutes and tape or transcript, the record for a zoning board hearing and decision should include the application; all evidence related to the application (including photos, sketches, letters, emails, audio tapes, and video tapes); minutes; the decision form; and any other information considered in making the decision.

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<sup>95</sup> *Tateoka v. City of Waukesha Bd. of Zoning Appeals*, 220 Wis. 2d 656, 583 N.W.2d 871 (Ct. App. 1998)

<sup>96</sup> *Goldberg v. Milwaukee Bd. of Zoning Appeals*, 115 Wis. 2d 517, 340 N.W.2d 558 (Ct. App. 1983)

<sup>97</sup> Wis. Stat. § 19.21

### **How long must records of the zoning board be kept?**

Zoning board records, including meeting minutes and supporting documents submitted to the board must be kept for at least seven years.<sup>98</sup>

### **Who enforces the decisions of the zoning board?**

While the zoning board decides whether to grant or deny specific zoning permits, they do not enforce their decisions.<sup>99</sup> Zoning decisions, including those made by the zoning board, are typically enforced by the zoning administrator or building inspector.<sup>100</sup> In addition, under county zoning an owner of real estate in the district who is affected by an ordinance violation may also sue to enforce the ordinance.<sup>101</sup> Similarly, under zoning by cities, villages, or towns with village powers, any adjacent or neighboring property owner who would be specially damaged may sue to enforce the ordinance.<sup>102</sup>

### **If the Supreme Court changes a legal decision standard after a zoning board decides a case and before that case is remanded back to the zoning board, what decision standard should the board use when reevaluating the case?**

The zoning board should reevaluate the facts under the more recent decision standard if it has previously applied an old standard.<sup>103</sup>

<sup>98</sup> Wis. Stat. § 19.21 requires town, city, village or county public records to be kept at least 7 years.

<sup>99</sup> *Forest County v. Goode*, 219 Wis. 2d 654, 579 N.W.2d 715 (1998)

<sup>100</sup> Other people who may enforce the ordinance include the secretary of the zoning agency, or another appropriate person. Wis. Stat. §§ 59.69(2)(bm), 59.69(10)(b), 59.698 & 62.23(8)

<sup>101</sup> Wis. Stat. § 59.69(11)

<sup>102</sup> Wis. Stat. § 62.23(8)

<sup>103</sup> *Lamar Central Outdoor, Inc. v. Bd. of Zoning Appeals of Milwaukee*, 2005 WI 117, 284 Wis. 2d 1, 700 N.W.2d 87





# Section III – Review

## **Keywords**

- Onsite inspection
- Meeting
- Hearing
- Contested case
- Quorum

## **Test your Knowledge** (answers on page 72)

### **Chapter 8 – Application Process**

- 1) Why is it recommended to have a complete zoning board application on file for all decisions by the first time that notice is given for the final public hearing on the application?
- 2) Name four items that may be required in a zoning board application.

### **Chapter 9 – Site Visits**

- 3) When conducting a site visit, what are the options for complying with the open meetings law?
- 4) Who may go on-site for a site inspection?

### **Chapter 10 – Meetings and Hearings**

- 5) Does your zoning board follow set procedures for conducting meetings and hearings?

### **Chapter 11 – Voting and Recording Decisions**

- 6) May a zoning board go into closed session to vote on a controversial variance application?
- 7) How much information and rationale needs to be in the record for a zoning board decision?
- 8) Should a zoning board rehear its past decisions?

### Answers

- 1)
  - a. To avoid creating an incentive for permit seekers to withhold controversial information from their application until during or after the public hearing.
  - b. To provide ample time and opportunity for interested parties to review the complete application, digest the information, and develop their ideas before the hearing, so that they are prepared to discuss all of their concerns.
- 2) See list on pages 53-56.
- 3)
  - a. Visit the site as a group and follow the public notice and accessibility requirements of the open meetings law.
  - b. Visit the site as individuals or send a staff representative and avoid the requirements of the open meetings law.
- 4) Generally the zoning board or zoning staff, and members of the public if noticed as an open meeting. These persons may access the site only after obtaining permission from the owner.
- 5) If not, consider the checklist and announcement of proceedings contained on pages 62-64.
- 6) No. This is not one of the exceptions to open meetings listed in section 19.88(1) of Wisconsin Statutes. Also see *State ex rel. Hodge v. Turtle Lake*, 180 Wis.2d 62 (1993) .
- 7) The board must refer to the specific evidence related to each legal standard for the decision so that if their decision is appealed, the circuit court judge can follow their reasoning.
- 8) Generally no. Only if they have made a mistake or if there has been a significant change in circumstances.



# Chapter 12

## Discretion Associated with Zoning Decisions

Zoning decisions are typically divided into three categories (administrative, quasi-judicial and legislative) depending on the type of decision made and the body making the decision. The rules and level of discretion (or flexibility) associated with making these types of decisions varies greatly. Routine ministerial duties, such as the decision to grant or deny a permit by a zoning administrator or building inspector are considered **administrative decisions**. Discretion associated with these decisions is very limited. For example, a zoning administrator is limited to minor ordinance interpretation essential for day-to-day administration, whereas more in-depth interpretation should be reserved for the zoning board in its role as a quasi-judicial decision-maker.

**Quasi-judicial decisions** involve the application of a set of rules or policies to a particular fact situation. These decisions involve the exercise of some discretion. For example, in deciding whether to grant a variance or conditional use permit, a zoning board has the power to investigate facts, hold hearings, weigh evidence, draw conclusions, and use this information as a basis for their official decisions.<sup>104</sup> Discretion of quasi-judicial decision-makers is strictly limited by local ordinance and related state laws. Zoning boards may only apply ordinances as they are written and may not

*If you're on the zoning board, your role is to apply the rules as written.*

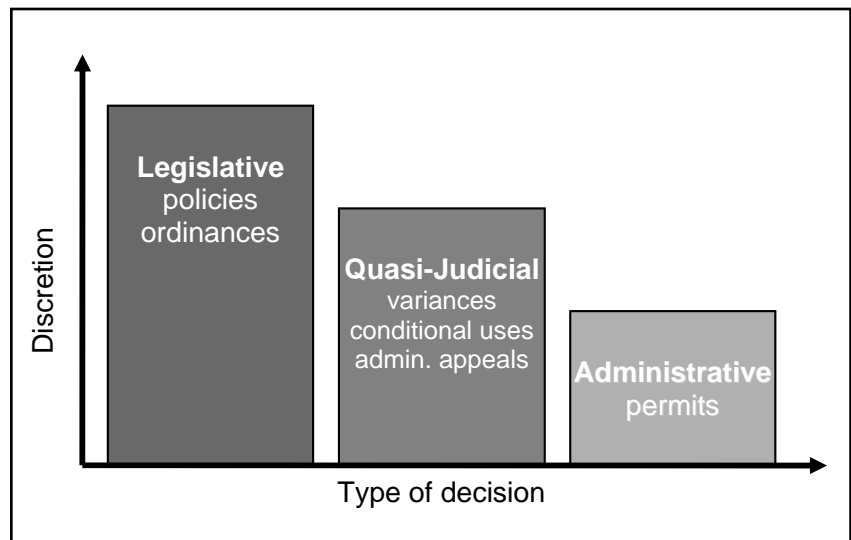
*If you want to make or change the rules, run for elected office.*

<sup>104</sup> *Universal Glossary of Land Use Terms and Phrases*. 1998. Land Use Law Center, Pace University School of Law. Available: <http://www.nymir.org/zoning/Glossary.html>

substitute their judgment for that of the elected local governing body.

Ordinance proposal, adoption and revision are **legislative decisions** reserved by state law for the planning committee/ commission (in an advisory capacity) and the local governing body following prescribed procedures.<sup>105</sup> These bodies enjoy greater latitude than administrative or quasi-judicial decision-makers. They may involve the public in helping to shape their decisions and are limited only by procedural and constitutional concerns.

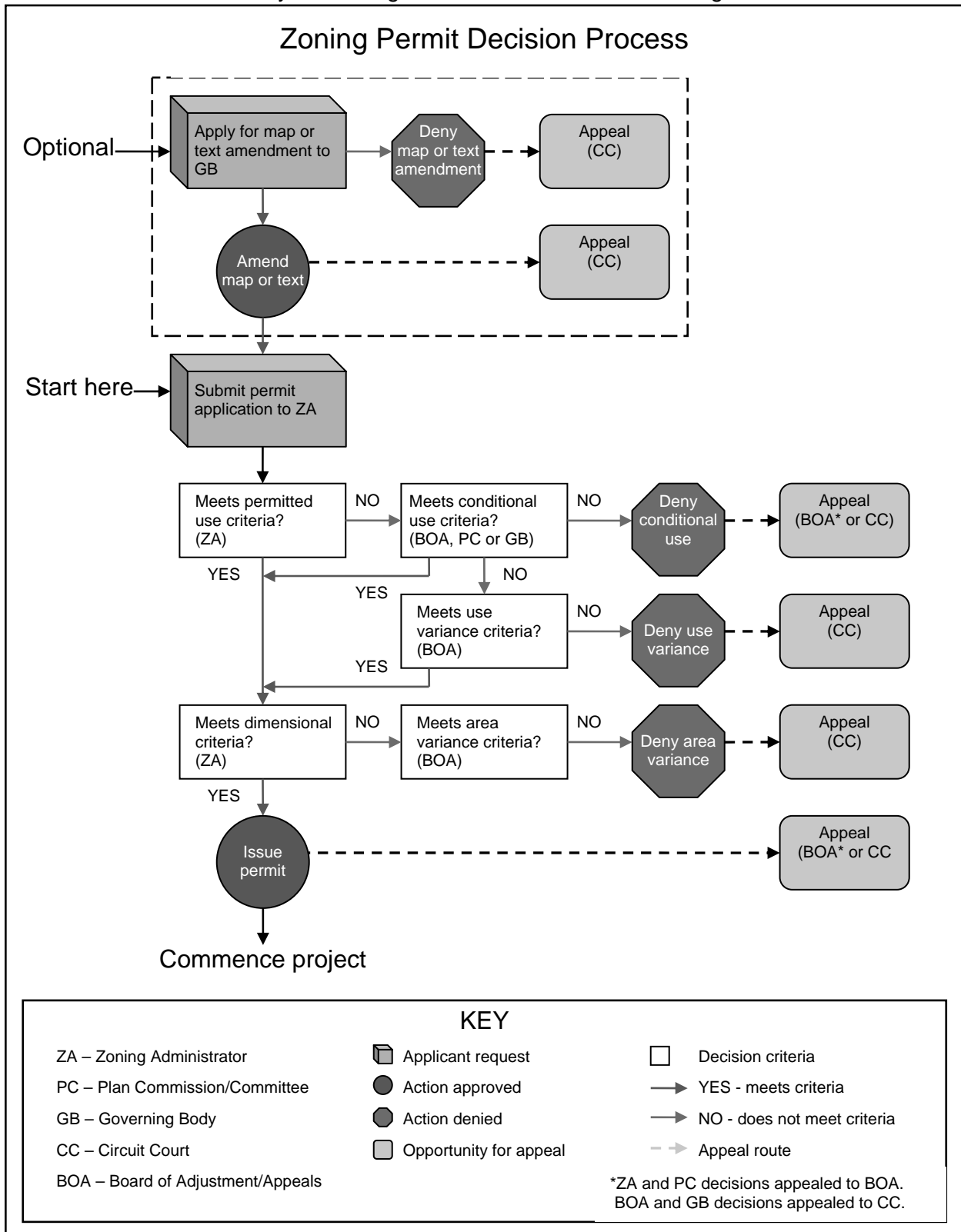
**Figure 17:** Discretion Associated with Zoning Decisions



<sup>105</sup> Counties are governed by Wis. Stat. § 59.69; cities by Wis. Stat. § 62.23(7); villages by Wis. Stat. § 61.35; and towns by Wis. Stat. § 60.61.

**Figure 18: Zoning Permit Decision Process**

The following diagram illustrates the zoning permit decision process. The key distinguishes between decisions made by the zoning board and those of other local government bodies.






 A circular graphic with an aerial photograph of a residential neighborhood. The word "Chapter" is written in a serif font at the top. Below it, the number "13" is written in a very large, bold, sans-serif font. To the left of the "13", the words "Administrative Appeals" are written in a bold, sans-serif font.
 

# Chapter 13 Administrative Appeals

An **administrative appeal** is a legal process provided to resolve disputes regarding ordinance interpretation or decisions made by administrative officials related to zoning. Administrative officials generally include the zoning administrator or building inspector. Additionally, if a conditional use decision is made by the planning commission/committee, that decision should be appealed to the zoning board as an administrative appeal. Zoning decisions that are appealed to circuit court are called *judicial appeals* and are discussed in chapter 17.

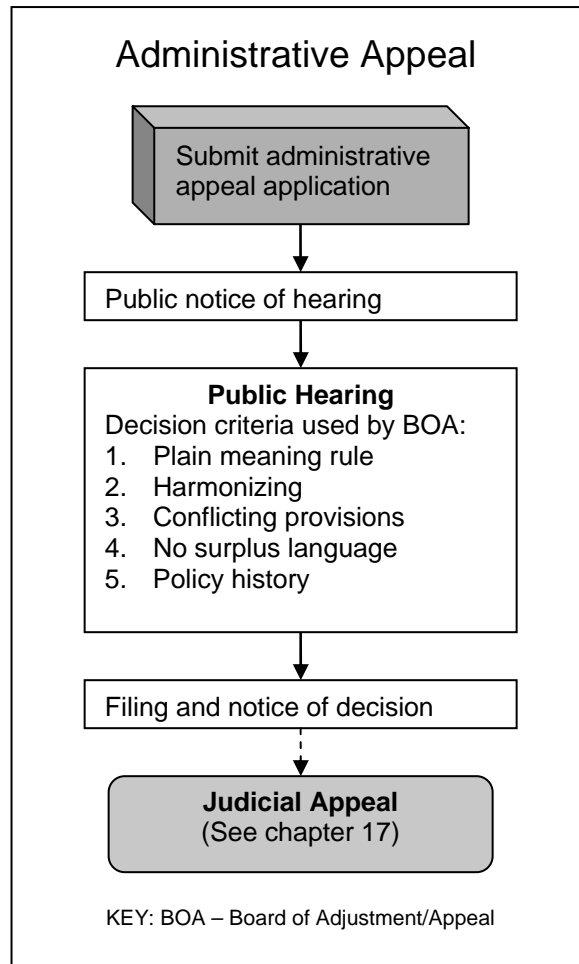
Appeals of zoning administrative decisions, such as the reasonableness or accuracy of measurements, conditions on development, issuance of permitted or conditional uses, or whether the administrative official had authority to make a decision, are generally heard by the zoning board.<sup>106</sup> When hearing an appeal, the zoning board should review the record of proceedings before it and may take new evidence.<sup>107</sup> The applicant has the burden of proof to demonstrate that the administrative decision is incorrect or unreasonable. We recommend that, when deciding administrative

<sup>106</sup> Wis. Stat. §§ 59.694(7)(a) & 62.23(7)(e)7. The exception is conditional use decisions originally heard by the zoning board which must be appealed to circuit court.

<sup>107</sup> Wis. Stat. § 59.694(8) states “board of adjustment may...make the order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.” Also see *Osterhues v. Bd. of Adjustment for Washburn County*, 2005 WI 92, 282 Wis. 2d 228; 698 N.W.2d 701

appeals, the zoning board follow the certiorari review criteria outlined in *Chapter 17* for appeal of judicial decisions. When making a decision, the zoning board has all of the powers of the decision-maker whose decision was appealed. The zoning board may reverse, confirm or modify the decision that was appealed.<sup>108</sup> For specific guidance related to appeals of conditional use permits, refer to *Chapter 14*.

**Figure 19: Administrative Appeal Process**



<sup>108</sup> Wis. Stat. §§ 59.694(8) & 62.23(7)(e)8



## What is the process for filing an administrative appeal?

### *Who may appeal*

Appeals are often initiated by disgruntled landowners, neighbors, and citizens groups, but may also be brought by the governing body or a state oversight agency such as the DNR. According to state statutes, any aggrieved person and any officer, department, board, or bureau of the municipality affected by an administrative decision of a zoning officer may appeal the decision to the zoning board.<sup>109</sup> A “person” includes partnerships, corporations, associations and governmental units.<sup>110</sup> A person is “aggrieved” when the decision has a direct effect on the person’s legally protected interests.<sup>111</sup> The aggrieved party is not required to have attended a previous hearing on the matter.<sup>112</sup>

### *How to appeal*

An appeal may be made by filing a notice of appeal (specifying the basis for the appeal) with the zoning board and the administrative official whose decision is being appealed.<sup>113</sup> Once this is filed, the administrative official forwards all records associated with the original decision to the zoning board (including permit application, site plan, photos, transcript or tape of hearing, etc.).

### *Stay on appeal*

Filing an appeal **stays** (puts on hold) the decision appealed. The stay is invalidated if the officer whose decision is appealed certifies to the zoning board that staying the decision would cause imminent peril to life or property. The officer must provide facts supporting that determination. The stay may be reinstated by the zoning board or a court. Reinstatement requires an application, notice to the administrative officer, and a determination that delaying the project would not cause imminent peril to life or property.<sup>114</sup>

**Stay:** To delay or stop the effect of an order, by legal action.

<sup>109</sup> Wis. Stat. §§ 59.694(4) & 62.23(7)(e)4

<sup>110</sup> Wis. Stat. § 990.01(26)

<sup>111</sup> *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*, 125 Wis. 2d 387, 390, 373 N.W.2d 450 (Ct. App. 1985), *aff’d*, 131 Wis. 2d 101, 122, 388 N.W.2d 593 (1986).

<sup>112</sup> *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*, 131 Wis. 2d 101, 122, 388 N.W.2d 593 (1986)

<sup>113</sup> Wis. Stat. §§ 59.694(4) & 62.23(7)(e)4

<sup>114</sup> Wis. Stat. §§ 59.694(5) & 62.23(7)(e)5

**Figure 20:** Posting at a Project Site



***Time limit on appeal***

A reasonable time limit within which an appeal must be initiated should be specified by board rules or in the local ordinance (e.g. *within 30 days after effective notice of a decision*).<sup>115</sup> If no such provisions are made, the appeal period begins when the aggrieved parties find out about the decision<sup>116</sup> or have notice of the decision.<sup>117</sup> Most jurisdictions require conspicuous posting of a building permit as one means of providing such notice to neighbors. Since a great number of administrative decisions are made each day, it is reasonable to require or encourage owners and developers to provide notice to potentially affected parties before they start construction. Some developers post a large sign at a project site to give additional notice, as shown in Figure 20.

**How are disputes regarding ordinance interpretations resolved?**

Appointed officials and staff who administer an ordinance interpret its provisions routinely and must apply them consistently. Where zoning ordinance language is unclear or contested, it must be interpreted in order to implement local land use policies. Interpretations should reflect the understanding of the planning committee/commission on the matter since these bodies are responsible for local land use policy administration. The committee/commission is, in turn, politically responsible to the local governing body for accurate interpretation of adopted policies. When a zoning ordinance interpretation or an administrative decision is formally contested, state statutes require local zoning boards to resolve the question. Their decisions may be appealed through the courts. Following are guidelines for ordinance interpretation.

***Local usage***

The primary source of information about ordinance interpretation is the language of the ordinance itself. Start by reviewing plan and ordinance statements of purpose or intent. Use these statements to guide interpretation. To familiarize yourself with the organization of the code and individual ordinances, look at the table of contents and index. Use the organizational system of an ordinance to identify provisions and to determine which provisions are modified

<sup>115</sup> Wis. Stat. §§ 59.694(4) & 62.23(7)(e)4

<sup>116</sup> *State ex rel. DNR v. Walworth County Bd. of Adjustment*, 170 Wis. 2d 406, 414, 489 N.W.2d 631 (Ct. App. 1992)

<sup>117</sup> *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*, 131 Wis. 2d 101, 117-18, 388 N.W.2d 593 (1986)

by preceding or subordinate provisions. In addition, look for definitions, rules of interpretation, and related charts or tables.

### ***Ordinance ambiguity and intent***

Ordinance interpretation has been described as a two-step process. First, the zoning board determines whether the ordinance language is ambiguous. If it is ambiguous, then the board applies the following rules to determine its intent:

- **Scope or jurisdiction** - Determine whether the geographic area and activity in question are subject to regulation by the provision.
- **Context** - Determine whether general provisions that apply throughout the ordinance or those located nearby modify the ambiguous language.
- **Subject matter** - Determine whether the topic is clearly defined or limited.

Based on a clear understanding of these issues, board members can proceed to examine the purpose and history of the language in question. If meaning remains unclear, compare similar provisions or organizational structure in the same ordinance to determine intent. In most cases, ordinance meaning can be determined by reading its text literally, i.e. *staying within its four corners*. Use the following guidelines to interpret ordinance text:

- **Plain meaning rule** - If a word is defined in the ordinance, use that meaning. If a word is not defined in the ordinance, use the plain, dictionary meaning of the word. Technical words should be used in their technical sense.
- **Harmonizing** - When a provision is ambiguous, it must be interpreted to give effect to the primary legislative intent or purpose of the ordinance. Unreasonable and unconstitutional interpretations must be avoided. See Figure 21 on the next page.
- **Conflicting provisions** - When two provisions conflict, they should be interpreted to give effect to the primary legislative intent or purpose of the ordinance and to their respective requirements to the extent reasonable.

- **No surplus language** - Ordinances must be interpreted to give effect to every provision. Interpretations that render part of an ordinance meaningless must be avoided whenever possible.
- **Value of testimony** - Members of the zoning board should carefully consider interpretations made by staff, legal counsel, and the parties to a proceeding but should remember that the zoning board is responsible for interpreting ordinances within their jurisdiction. The potential interests and motives of those presenting testimony in an appeal should be examined to establish the relative merit of their testimony.

**Figure 21: Example for Harmonizing Language**

While this example does not deal with zoning, it illustrates how two statutes are harmonized to determine the jurisdiction of a lake district.

Wis. Stat. § 33.21 reads:

*Public inland lake protection and rehabilitation districts may be created for the purpose of undertaking a program of lake protection and rehabilitation of a lake or parts thereof within the district.*

Wis. Stat. § 33.23 (1) reads:

*The governing body of a municipality may by resolution establish a district if the municipality encompasses within its boundaries all the frontage of the public inland lake within the state.*

The question argued was “to do lake rehabilitation, does the entire lake need to lie within the lake district or just a part of it?”

One view is that there is an apparent conflict between the two statutes. One can read Wis. Stat. § 33.21 to say that a district may be created for the purpose of rehabilitating a lake which lies within a district or any part of a lake which lies within a district. Because rehabilitating the portion of the lake within the district seems to be authorized by § 33.21, but forbidden by § 33.23, one may assert that the statutes are in conflict.

An alternate view is to read Wis. Stat. § 33.21 as if brackets were inserted as follows:

*Public inland lake protection and rehabilitation districts may be created for the purpose of undertaking a program of lake protection and rehabilitation [of a lake or parts thereof] within the district.*

By reading “or parts thereof” to modify “lake” rather than “district,” the court interpreted the statute to mean that a district may be created for the purpose of rehabilitating a lake or part of a lake. Construed in conjunction with § 33.23, the statute thus provides that a district may be created to rehabilitate a lake or part of a lake, as long as the *entire* lake lies within the district.

The court chose the latter interpretation because it harmonizes the two statutes and gives both full force and effect.

*Kaiser v. City of Mauston*, 99 Wis. 2d 345, 299 N.W.2d 259 (Ct. App. 1980)

***Evidence in the record***

When these guidelines do not provide sufficient guidance to interpret the ordinance, refer to evidence beyond the ordinance. The information must be objective and contained in a local government record. For example, a staff report produced at the time of an ordinance amendment explaining its rationale may be examined to determine ordinance intent, but the oral opinion of an elected official recalling the issue may not be relied upon by the zoning board in deciding an appeal.

***Ordinance amendments and record keeping***

If interpretation of an ordinance proves difficult, a clarifying ordinance amendment should be considered. If a satisfactory interpretation is reached, staff and other officials should record the interpretation and apply it consistently in future related administrative and quasi-judicial matters. Many jurisdictions adopt clean up amendments periodically to clarify ordinance language settled by appeals over a six or twelve-month period.

**How are disputes regarding boundary interpretations resolved?**

When a zoning map or boundary is formally contested, zoning boards may be asked to interpret. Sometimes, zoning maps are at a scale that makes it difficult to distinguish the location of a small parcel and determine which zoning district applies. Other times, landowners may contest where a district boundary is drawn (for example, at the centerline of a road or at the current property line). We recommend that local jurisdictions adopt rules for interpreting maps and boundary lines and for determining which zoning district subsequently applies. As with interpretations of the ordinance text, it is good practice to keep a record of map interpretations and incorporate them into future ordinance map or text revisions.

**May a zoning board decision of an administrative appeal be appealed to circuit court?**

A zoning board decision of an administrative appeal may be contested in circuit court by any aggrieved person, taxpayer, officer, department, board or bureau of the municipality within thirty days of filing of the decision in the office of the board.<sup>118</sup> (*See Chapter 17 Appeal of Zoning Board Decisions.*)

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<sup>118</sup> Wis. Stat. § 59.694(10)



# Chapter 14

## Conditional Uses and Special Exceptions

### What is a conditional use?

A **conditional use**, also known as a **special exception** in Wisconsin case law,<sup>119</sup> is any exception expressly listed in the zoning ordinance including land uses or dimensional changes. A conditional use is not suited to all locations in a zoning district, but may be allowed in some locations if it meets specific conditions set out in the zoning ordinance and is not contradictory to the ordinance's general purpose statement.<sup>120</sup> These conditions generally relate to site suitability and compatibility with neighboring land uses due to noise, odor, traffic, and other factors. In short, conditional uses must be custom tailored to a specific location. A conditional use must be listed as such in the zoning ordinance, along with the standards and conditions which it must meet.

**Conditional uses in exclusive agricultural districts** are limited to agricultural and other uses determined to be consistent with agricultural use and which require location in the district.<sup>121</sup>

**Conditional uses and special exceptions** are similar and considered together in this chapter. They must be expressly listed in the zoning ordinance.

**Special exceptions** generally refer to any exception made to the zoning ordinance including dimensional changes.

**Conditional uses**, in some ordinances, refer only to land uses.

<sup>119</sup> *State ex rel. Skelly Oil Co. v. City of Delafield*, 58 Wis. 2d 695, 207 N.W.2d 585 (1973)

<sup>120</sup> *Kraemer & Sons v. Sauk County Bd. of Adjustment*, 183 Wis. 2d 1, 515 N.W.2d 256 (1994) referencing Wis. Stat. § 59.694(1) which is parallel to Wis. Stat. § 62.23(7)(e)1 for cities, villages, and towns with village powers.

<sup>121</sup> Wis. Stat. §§ 91.75(5) & 91.77

### How are conditional uses decided?

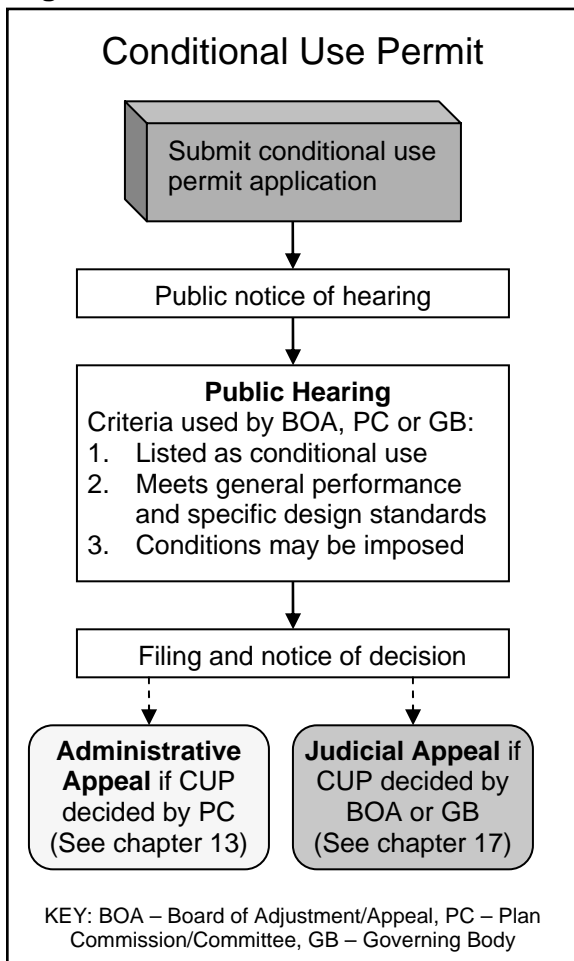
To allow a conditional use, a public notice and hearing are customary and may be required by ordinance (though not specifically required by state law). The application for a conditional use permit must be completed by the first time that notice is given for the final public hearing on the matter, unless the local ordinance provides otherwise.<sup>122</sup> This court ruling assures that citizens will have information necessary to evaluate a proposal and provide testimony at the hearing, and that controversial information will not be withheld until after the hearing.

The decision to grant or deny a conditional use permit is discretionary. In other words, a conditional use permit may be denied if the project cannot be tailored to a site to meet the specific conditional use standards and general purposes of the ordinance.

### Who decides whether to grant conditional uses?

The local governing body determines by ordinance whether the zoning board, the governing body, or the planning commission/committee will decide conditional use permits.<sup>123</sup> Once this is specified by local ordinance, a community may not alternate assignment of conditional uses among these bodies unless the ordinance is specifically amended to provide authority to a different body.<sup>124</sup> This avoids arbitrary or politically driven assignment of conditional use permits to different decision-making bodies.

**Figure 22: Conditional Use Process**



<sup>122</sup> *Weber v. Town of Saukville*, 209 Wis. 2d 214, 562 N.W.2d 412 (1997)

<sup>123</sup> Counties - Wis. Stat. § 59.694(1) & (7)(a); Cities, villages and towns with village powers - Wis. Stat. § 62.23(7)(e)1 & 7.

<sup>124</sup> *Magnolia Township v. Town of Magnolia*, 2005 WI App 119, 284 Wis. 2d 361, 701 N.W.2d 60



## What conditions may be attached to a conditional use permit?

### *Performance and design standards*

General performance standards and specific design standards for approval of conditional uses may be provided by local ordinance.<sup>125</sup> An applicant must demonstrate that the proposed project complies with each of the standards. The permit review body may impose additional conditions on development consistent with standards for approval and ordinance objectives. The review body may require an applicant to develop a project plan to accomplish specified performance standards (e.g., meet with land conservation department staff to develop an erosion control plan that contains all sediment on the site). Permit conditions that are routinely imposed for similar projects should be adopted by ordinance as minimum standards for approval of conditional uses. Incorporating standards in an ordinance allows permit applicants to anticipate and plan for design, location, and construction requirements.

**Figure 23:** Types of Development Standards

<b>Performance Standard</b>	
Example:	<i>Projects may not result in an increase in stormwater discharge which exceeds predevelopment conditions.</i>
Features:	<ul style="list-style-type: none"> <li>• The expected results are stated.</li> <li>• The project may be “custom tailored” to the site.</li> <li>• It requires more technical expertise to design and evaluate a proposal.</li> <li>• It involves more complex project monitoring and enforcement.</li> <li>• It provides an opportunity for optimal compliance/performance.</li> </ul>
<b>Design Standard</b>	
Example:	<i>Each lot shall provide 500 cubic feet of stormwater storage.</i>
Features:	<ul style="list-style-type: none"> <li>• Project specifications are stated.</li> <li>• It is easy to understand, administer, and enforce.</li> <li>• It provides little flexibility and so may result in many variance requests.</li> <li>• It may not achieve ordinance objectives in all cases.</li> </ul>

<sup>125</sup> *Kraemer & Sons v. Sauk County Bd. of Adjustment*, 183 Wis. 2d 1, 515 N.W.2d 256 (1994)

**Impact Fees -**

Conditions that require a developer to dedicate land or provide public improvements (or fees in lieu of) in order for a project to be approved. They are not unique to permitting of conditional uses.

***Legal limits on conditions***

All conditions on development are generally legal and acceptable provided they meet the following tests:

- **Essential Nexus Test** - The limitation must be designed to remedy a harm to public interests or to address a need for public services likely to result from the proposed development.<sup>126</sup>
- **Rough Proportionality Test** - The limitation must be commensurate with the extent of the resulting harm or need for services.<sup>127</sup>

***Impact fees***

Recent Wisconsin legislation prevents counties from imposing **impact fees**, which include contributions of land or interests in land. Cities, villages, and towns may impose impact fees for highways; facilities for treating sewage, storm waters, and surface waters; facilities for pumping, storing, and distributing water; parks, playgrounds, and athletic fields; fire protection, emergency medical, and law enforcement facilities; and libraries. In doing so, the municipalities are required to report the revenue and expenditure totals for each impact fee imposed by a municipality in the annual municipal budget summary.<sup>128</sup> Impact fees must also meet the essential nexus and rough proportionality tests.

For example, a developer could be required by a city, village or town to dedicate ten acres to parkland if the proposed development created a corresponding demand in the community. If there were a greater need for parkland, the new development should be charged only its proportional share. Impact fees are one type of condition and cannot be used to remedy existing deficiencies. A community must be able to document that an impact fee is reasonable and that local ordinances provide rationale and formulae for computing appropriate impact fees.

<sup>126</sup> *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (U.S. 1987)

<sup>127</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed.2d 304 (U.S. 1994)

<sup>128</sup> 2005 Act 477 amended Wis. Stat. § 66.0617 and others and was published June 13, 2006. For more information see: [http://www.legis.state.wi.us/2005/data/lc\\_act/act477-sb681.pdf](http://www.legis.state.wi.us/2005/data/lc_act/act477-sb681.pdf)

## Once granted, how long does a conditional use permit last?

### *Continuance of use*

Once a conditional use is granted, subsequent owners of a property are entitled to continue the conditional use subject to the limitations imposed in the original permit.<sup>129</sup> This is so because site conditions and potential conflicts with neighboring land uses, rather than the circumstances of the applicant, determine whether a conditional use can be permitted at a particular location.

### *Time limits*

Conditional uses may be granted for a limited term if the zoning board or other decision-making body can provide a legally defensible reason for the time limit. Periodic permit renewal to monitor compliance with development conditions is common and acceptable.<sup>130</sup> It is often required by ordinance for specified types of uses (e.g., quarry and mineral extraction operations).

### *Permit violations*

If an owner changes the use or violates permit conditions, the board may revoke a conditional use permit or modify conditions after notice and a hearing. Revoking a conditional use permit is not considered a taking without just compensation because a conditional use permit is a type of zoning designation that is not a property right.<sup>131</sup>

## Who decides appeals of conditional use decisions?

Appeals of conditional use decisions are handled differently depending on which local governing body makes the initial decision to grant or deny a permit. Conditional use decisions heard initially by the plan commission/committee must be appealed to the zoning board. Note that zoning boards do not have the authority to remand decisions back to the planning and zoning commission/committee.<sup>132</sup> Conditional use decisions made initially by the governing body or zoning board must be appealed directly to circuit court.

<sup>129</sup> See Rohan, *Zoning and Land Use Controls*, sec. 44.01[4], p. 44-18, and Anderson, *American Law of Zoning* 3d, vol. 3, sec. 21.32, p. 754-5.

<sup>130</sup> Anderson, *American Law of Zoning*, 3d, Vol. 3, S. 21.32, pp. 754-5.

<sup>131</sup> *Rainbow Springs Golf Co. v. Town of Mukwonago*, 2005 WI App 163; 284 Wis. 2d 519; 702 N.W.2d 40

<sup>132</sup> Wis. Stat. §§ 59.694(8) & 62.23(7)(e)8

### What standards apply when the zoning board hears an appeal of a conditional use decision?

If the local ordinance authorizes the plan commission/committee to decide conditional uses, their decisions may be appealed to the zoning board<sup>133</sup> by any aggrieved person or by an officer or body of the county, city, village, or town subject to time limits specified by local ordinance or rules.<sup>134</sup>

When reviewing a conditional use permit decision, the zoning board has authority to conduct a **de novo** review of the record and substitute its judgment for that of the plan commission/committee.<sup>135</sup> Consistent with a de novo review, the zoning board may take new evidence.

**De novo** – anew; collecting new information.

We recommend that the zoning board use the following standards when reviewing conditional use permit decisions originally made by the plan commission/committee:

- **Subject matter jurisdiction.** Does the ordinance assign conditional use permit decisions to the plan commission/committee? Is the conditional use in question listed in the ordinance for this location?
- **Proper procedures.** Were proper procedures followed?
- **Proper standards.** Were the proper standards from the ordinance used?
- **Evidence.** Is there evidence in the record supporting the decision of the plan commission/committee? Is there evidence that is new and relevant to ordinance standards? If so, the zoning board may take additional evidence.

Based on the evidence before it, the zoning board decides whether to grant the conditional use permit. The zoning board may reverse, affirm or modify a plan commission/committee decision, but does not have authority to remand a decision to the plan commission/committee.<sup>136</sup>

<sup>133</sup> *League of Women Voters v. Outagamie County*, 113 Wis. 2d 313, 334 N.W.2d 887 (1983) referencing Wis. Stat. § 59.694(7) & 69 OAG 146, 1980, which clarified that “administrative official” includes the planning and zoning committee. Though this case refers to the statute for counties, Wis. Stat. § 62.23(e)7 for cities, villages and towns has parallel wording. Therefore, the author concludes that the League decision also applies to cities, villages, and towns with village powers.

<sup>134</sup> Counties - Wis. Stat. § 59.694(4); Cities, villages and towns with village powers - Wis. Stat. § 62.23(7)(e)4.

<sup>135</sup> *Osterhues v. Bd. of Adjustment for Washburn County*, 2005 WI 92, 282 Wis. 2d 228; 698 N.W.2d 701

<sup>136</sup> Wis. Stat. §§ 59.694(8) & 62.23(7)(e)8

## **May a conditional use decision by the zoning board or governing body be appealed to circuit court?**

Yes. If conditional uses are decided by the zoning board, they may be appealed to circuit court by any aggrieved person, taxpayer, officer, or body of the municipality within 30 days of the filing of the decision in the office of the zoning board.<sup>137</sup>

If conditional uses are decided by the governing body, they may be appealed to circuit court.<sup>138</sup> Circuit courts use the *certiorari* review standards described in *Chapter 17* to review conditional use decisions.<sup>139</sup>

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<sup>137</sup> Wis. Stat. §§ 59.694(10) & 62.23(7)(e)10

<sup>138</sup> *Town of Hudson v. Hudson Town Bd. of Adjustment*, 158 Wis. 2d 263, 461 N.W.2d 827 (Ct. App. 1990) states there is no statutory authorization for zoning board review of the town board. Though this case refers to the statute for cities, villages, and towns, the zoning board statutes regarding conditional use permit decisions and appeals for counties have parallel wording. Therefore, the author concludes that the Hudson decision also applies to counties.

<sup>139</sup> *Town of Hudson v. Hudson Town Bd. of Adjustment*, 158 Wis. 2d 263, 461 N.W.2d 827 (Ct. App. 1990)



# Variations



Whereas permitted and conditional uses allow a property to be used in a way expressly listed in the ordinance, a variance allows a property to be used in a manner forbidden by the zoning ordinance.<sup>140</sup> Two types of zoning variations are generally recognized: **Area variations** provide an increment of relief (normally small) from a physical dimensional restriction such as a building height or setback.<sup>141</sup> **Use variations** permit a landowner to put a property to an otherwise prohibited use.<sup>142</sup> Though not specifically restricted by statute or case law,<sup>143</sup> use variations are problematic for reasons discussed on page 102. Variance decisions related to zoning are always heard by the zoning board of adjustment or appeals.

<sup>140</sup> *Fabyan v. Waukesha County Bd. of Adjustment*, 2001 WI App 162, 246 Wis. 2d 851, 632 N.W.2d 116

<sup>141</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401

<sup>142</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401

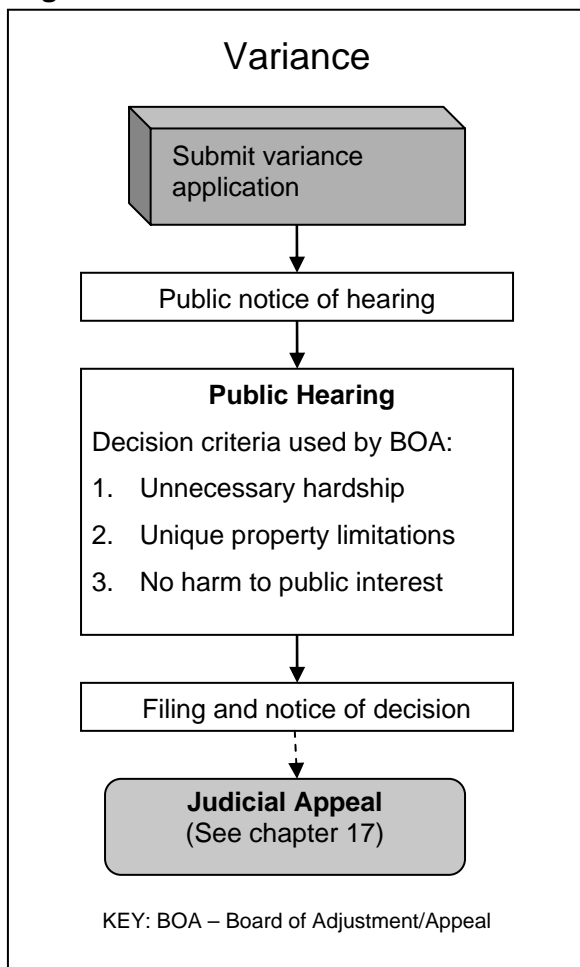
<sup>143</sup> In the past, it was doubtful that zoning boards of adjustment in Wisconsin had the authority to grant use variations [see *State ex rel. Markdale Corp. v. Bd. of Appeals of Milwaukee*, 27 Wis. 2d 154, 133 N.W.2d 795 (1965)]. Now, the Supreme Court has determined that boards of adjustment do have the authority to issue use variations [see *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401 and *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514].

### What are the criteria for granting a variance?

To qualify for a variance, an applicant has the burden of proof to demonstrate that all three criteria defined in state statutes and outlined below are met.<sup>144</sup>

- Unnecessary hardship
- Unique property limitations
- No harm to public interests

**Figure 24: Variance Process**



Local ordinances and case law may also specify additional requirements. The zoning department can assist a petitioner in identifying how these criteria are met by providing clear application materials that describe the process for requesting a variance and the standards for approval (see the sample application form in Appendix D).

#### 1. Unnecessary Hardship

The Wisconsin Supreme Court distinguishes between area and use variances when applying the unnecessary hardship test:

For a **use variance**, unnecessary hardship exists only if the property owner shows that they would have no reasonable use of the property without a variance.<sup>145</sup> What constitutes *reasonable use* of a property is a pivotal question that the board must answer on a case-by-case basis. If the property currently supports a reasonable use, the hardship test is not met and a variance may not be granted. If a variance is required to allow reasonable use of a property, only that variance which is essential to support reasonable use may be granted and no more. A proposed use may be reasonable when it:

<sup>144</sup> *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d at 420, 577 N.W.2d 813 (1998); *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d at 254, 469 N.W.2d 831 (1991).

<sup>145</sup> *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 413-414, 577 N.W.2d 813 (1998).



- does not conflict with uses on adjacent properties or in the neighborhood,
- does not alter the basic nature of the site (e.g., conversion of wetland to upland),
- does not result in harm to public interests, and
- does not require multiple or extreme variances.

For an **area variance**, unnecessary hardship exists when compliance would unreasonably prevent the owner from using the property for a permitted purpose (leaving the property owner without any use that is permitted for the property) or would render conformity with such restrictions “unnecessarily burdensome.”<sup>146</sup> To determine whether this standard is met, zoning boards should consider the purpose of the zoning ordinance in question (see the appendix for information about the purposes of shoreland and floodplain zoning), its effects on the property, and the short-term, long-term, and cumulative effects of granting the variance.<sup>147</sup>

Courts state that “unnecessarily burdensome” may be interpreted in different ways depending on the purposes of the zoning law from which the variance is being sought. For example, the purpose of a shoreland district to *protect water quality, fish, and wildlife habitat and natural scenic beauty for all navigable waters in Wisconsin* would be interpreted differently from the purpose of a residential district to *protect the character of established residential neighborhoods*. In light of increased focus on the purposes of a zoning restriction, zoning staff and zoning boards have a greater responsibility to explain and clarify the purposes behind dimensional zoning requirements.

## 2. Hardship Due to Unique Property Limitations

Unnecessary hardship must be due to unique physical limitations of the property, such as steep slopes or wetlands that prevent compliance with the ordinance.<sup>148</sup> The circumstances of an applicant (growing family, need for a larger garage, etc.) are not a factor in deciding variances.<sup>149</sup> Property limitations that prevent ordinance compliance and are common to a number of properties

<sup>146</sup> *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d at 475, 247 N.W.2d 98 (1976) (quoting 2 Rathkopf, *The Law of Zoning & Planning*, § 45-28, 3d ed. 1972).

<sup>147</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401

<sup>148</sup> *State ex rel. Spinner v. Kenosha County Bd. of Adjustment*, 223 Wis. 2d 99, 105-6, 588 N.W.2d 662 (Ct. App. 1998); *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 410, 577 N.W.2d 813 (1998); *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 255-56, 469 N.W.2d 831 (1991); *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 478, 247 N.W.2d 98 (1976)

<sup>149</sup> *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 478-79, 247 N.W.2d 98

should be addressed by amending the ordinance.<sup>150</sup> For example, an ordinance may, in some cases, be amended to provide reduced setbacks for a subdivision that predates the current ordinance and where lots are not deep enough to accommodate current standards.

### 3. No Harm to Public Interests

A variance may not be granted which results in harm to public interests.<sup>151</sup> In applying this test, the zoning board should review the purpose statement of the ordinance and related statutes in order to identify public interests. These interests are listed as objectives in the purpose statement of an ordinance and may include:

- Promoting and maintaining public health, safety, and welfare
- Protecting water quality
- Protecting fish and wildlife habitat
- Maintaining natural scenic beauty
- Minimizing property damages
- Ensuring efficient public facilities and utilities
- Requiring eventual compliance for nonconforming uses, structures, and lots
- Any other public interest issues

In light of public interests, zoning boards must consider the short-term and long-term impacts of the proposal and the cumulative impacts of similar projects on the interests of the neighbors, the community, and even the state.<sup>152</sup> Review should focus on the general public interest, rather than the narrow interests or impacts on neighbors, patrons or residents in the vicinity of the project.

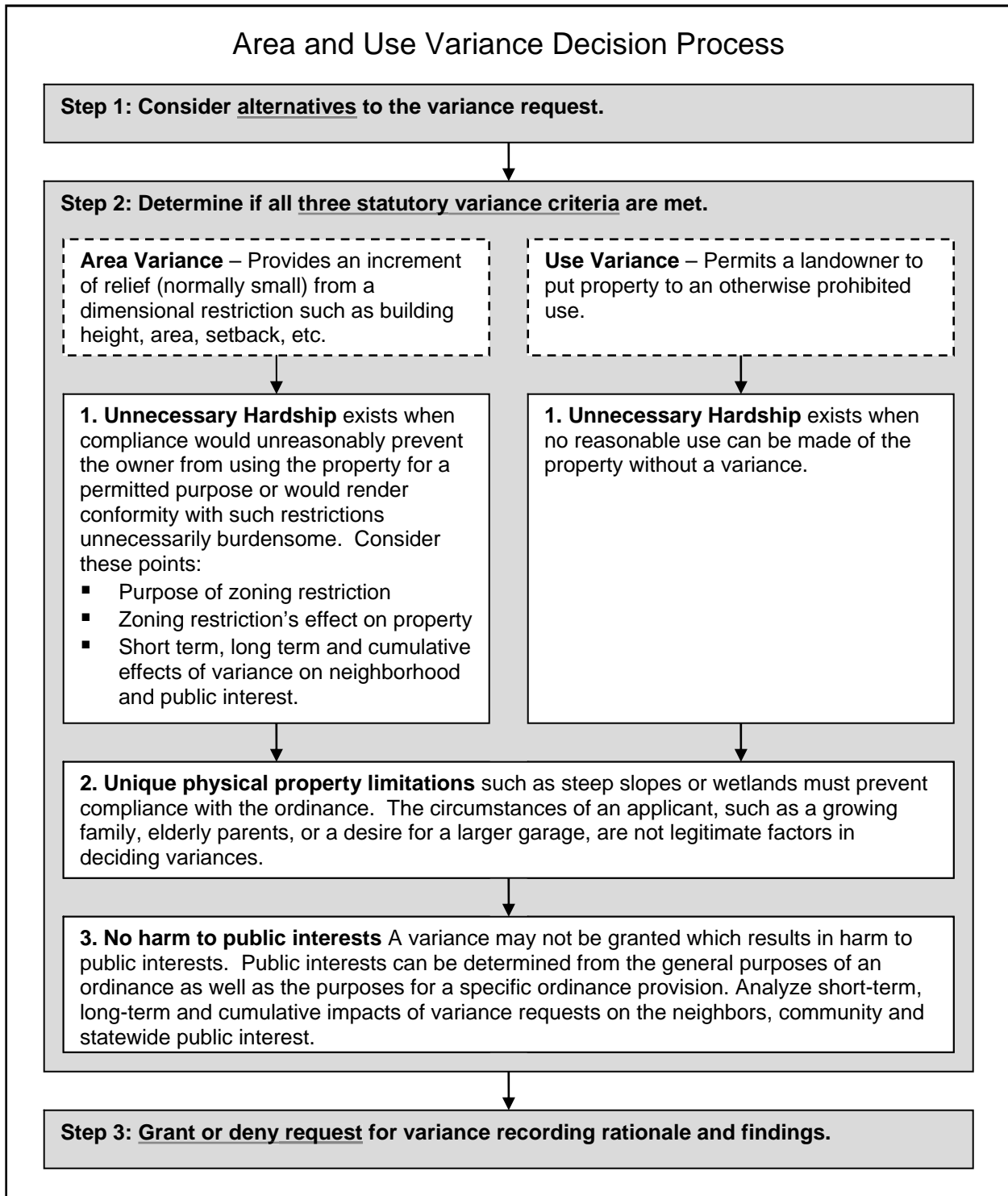
The flow chart in Figure 25 summarizes the standards for area variances and use variances. Application forms and decision forms reflecting these standards are included in *Appendix D*.

<sup>150</sup> *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 256, 469 N.W.2d 831 (1991); *State v. Winnebago County*, 196 Wis. 2d 836, 846, 540 N.W.2d 6 (Ct. App. 1995)

<sup>151</sup> *State v. Winnebago County*, 196 Wis. 2d 836, 846-47, 540 N.W.2d 6 (Ct. App. 1995); *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 407-8, 577 N.W.2d 813 (1998)

<sup>152</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401 and *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

**Figure 25:** Area and Use Variance Decision Process



### Additional Standards

Few areas of land use law are as extensively litigated as the standards necessary to qualify for a variance. The rich case law concerning variances provides these additional guiding principles that a zoning board should rely on in their decision-making. Published court decisions provide guidance for board members and are cited in the endnotes. Websites for accessing case law are provided in *Appendix B*.

- **Parcel-as-a-whole.** The entire parcel, not just a portion of the parcel, must be considered when applying the unnecessary hardship test.<sup>153</sup>
- **Self-imposed hardship.** An applicant may not claim hardship because of conditions which are self-imposed.<sup>154</sup> Examples include excavating a pond on a vacant lot and then arguing that there is no suitable location for a home; claiming hardship for a substandard lot after selling off portions that would have allowed building in compliance; and claiming hardship after starting construction without required permits or during a pending appeal.
- **Circumstances of applicant.** Circumstances of an applicant such as a growing family or desire for a larger garage are not a factor in deciding variances.<sup>155</sup>
- **Financial hardship.** Economic loss or financial hardship do not justify a variance.<sup>156</sup> The test is not whether a variance would maximize economic value of a property.
- **Nearby violations.** Nearby ordinance violations, even if similar to the requested variance, do not provide grounds for granting a variance.<sup>157</sup>
- **Objections from neighbors.** A lack of objections from neighbors does not provide a basis for granting a variance.<sup>158</sup>

<sup>153</sup> *State v. Winnebago County*, 196 Wis. 2d 836, 844-45 n.8, 540 N.W.2d 6 (Ct. App. 1995)

<sup>154</sup> *State ex rel. Markdale Corp. v. Bd. of Appeals of Milwaukee*, 27 Wis. 2d 154, 163, 133 N.W.2d 795 (1965); *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 479, 247 N.W.2d 98 (1976).

<sup>155</sup> *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 478-79, 247 N.W.2d 98 (1976)

<sup>156</sup> *State v. Winnebago County*, 196 Wis. 2d 836, 844-45, 540 N.W.2d 6 (Ct. App. 1995); *State v. Ozaukee County Bd. of Adjustment*, 152 Wis. 2d 552, 563, 449 N.W.2d 47 (Ct. App. 1989).

<sup>157</sup> *Von Elm v. Bd. of Appeals of Hempstead*, 258 A.D. 989, 17 N.Y.S.2d 548 (N.Y. App. Div. 1940)

<sup>158</sup> *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 254, 469 N.W.2d 831 (1991)

- **Variance to meet code.** Variances to allow a structure to be brought into compliance with building code requirements have been upheld by the courts.<sup>159</sup>

## Are there any limits on granting a variance?

### *Minimum variance allowed*

The board may grant only the minimum variance needed.<sup>160</sup> For a use variance, the minimum variance would allow reasonable use, whereas for an area variance, the minimum variance would relieve unnecessary burdens. For example, if a petitioner requests a variance of 30 feet from setback requirements, but the zoning board finds that a 10-foot setback reduction would not be unnecessarily burdensome, the board should only authorize a variance for the 10-foot setback reduction.

### *Conditions on development*

The board may impose conditions on development (mitigation measures) to eliminate or substantially reduce adverse impacts of a project under consideration for a variance. Conditions may relate to project design, construction activities, or operation of a facility<sup>161</sup> and must address and be commensurate with project impacts (*review the essential nexus and rough proportionality tests in Chapter 14*).

### *Specific relief granted*

A variance grants only the specific relief requested (as described in the application and plans for the project) and as modified by any conditions imposed by the zoning board. The variance applies only for the current project and not for any subsequent construction on the lot. Referring to Figure 26 on the next page, if the landowner has received a variance to build the garage, they may only build the screen porch if they receive an additional variance specifically for the screen porch.

### *Variances do not create nonconforming structures*

If a variance is granted to build or expand a structure, it does not give that structure nonconforming structure status. This relates to the previous point that variances only provide specific relief. In

**Nonconforming Structure** – A building or other structure, lawfully existing prior to the passage of a zoning ordinance or ordinance amendment, which fails to comply with current dimensional standards of the ordinances.

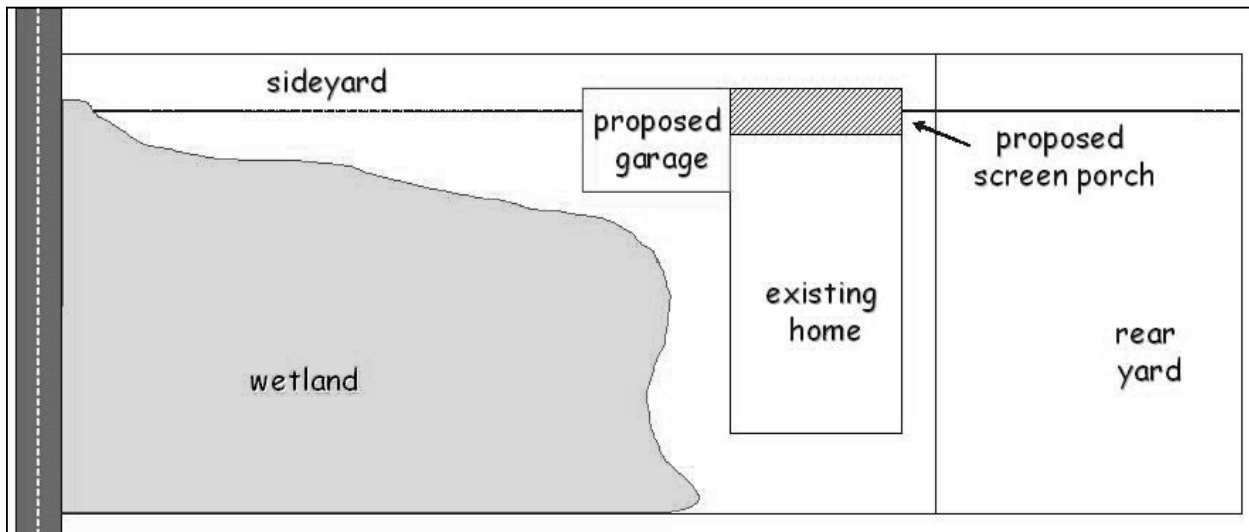
<sup>159</sup> *Thalhofer v. Patri*, 240 Wis. 404, 3 N.W.2d 761 (1942); see also *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 419-420, 577 N.W.2d 813 (1998).

<sup>160</sup> Anderson, Robert M. *American Law of Zoning* 3d, (1986) Vol. 3, s. 20.86, pp. 624-5

<sup>161</sup> Anderson, Robert M. *American Law of Zoning* 3d, (1986) Vol. 3, ss. 2070 and 20.71, pp. 587-95

**Figure 26: A Variance Grants Specific Relief**

If the landowner has received a variance to build the garage, they may only build the screen porch if they receive an additional variance specifically for the screen porch.



contrast, nonconforming structures may be assured a limited extent of future expansion in some ordinances.

***Variance transfers with the property***

Because a property rather than its owner must qualify for a variance to be granted (unique property limitations test), a variance transfers with the property to subsequent owners.<sup>162</sup>

**Are multiple variances allowed?**

***Multiple variances for a single project***

In some cases, a single project may require more than one variance to provide reasonable use of a property. The 3-step test should be applied to each variance request in determining whether relief can be granted by the zoning board.

***Sequential variances***

In other cases, original development of a property may have been authorized by variance(s). The owner later requests an additional variance. Generally, the later request should be denied since, in granting the original variance, the zoning board was required to determine that a variance was essential to provide reasonable use of the property or that not granting the (area) variance would have been unreasonably burdensome in light of the ordinance purpose. The board cannot subsequently find the opposite unless there

<sup>162</sup> *Goldberg v. Milwaukee Bd. of Zoning Appeals*, 115 Wis. 2d 517, 523-24, 340 N.W.2d 558 (Ct. App. 1983)

have been significant changes on the property or on neighboring properties. A later variance could also be granted if the written purpose of the zoning designation for which an area variance was sought significantly changed, thereby allowing the variance to qualify under the unreasonably burdensome standard.

### **What is the process for appealing a variance decision?**

A variance decision may be appealed to circuit court by any aggrieved person, taxpayer, officer or body of the municipality within 30 days of filing of the decision in the office of the board.<sup>163</sup> (See Chapter 17 *Judicial Appeal of Zoning Board Decisions*.)

### **Why are the standards for area variances different from those of use variances?**

The law treats area and use variances differently because they “serve distinct purposes,” “affect property rights in distinct ways,” and “affect public and private interests differently.” According to the *Ziervogel* decision, the adverse impacts of an area variance are thought to be less than those of a use variance. Furthermore, the “no reasonable use” standard associated with use variances leaves zoning boards “with almost no flexibility” and eliminates the statutory discretion of zoning boards to decide variances.

#### **Figure 27: Land Division Variances... Creatures of a Different Color**

So far our discussion has focused only on zoning variances. As zoning boards may be asked to decide land division variances (including subdivision ordinances), here are a few salient points:

- Subdivision variances are not the same as zoning variances.
- There is no Wisconsin law addressing land division variances.
- A local unit of government may allow variances to locally-determined land division standards. In this case they must determine the process and standards, and should include them in the land division or subdivision ordinance.
- Local units of government may choose to not allow land division variances.
- A local unit of government is not allowed to provide a variance to a state-mandated standard.
- Due process, including a hearing with public notice is required for land division variances.

<sup>163</sup> Wis. Stat. § 59.694 (10)

**AREA VARIANCES AND USE VARIANCES**

**What is the difference between an area variance and a use variance?**

It may not always be easy to determine if an applicant is seeking an area variance or a use variance. It is arguable that a large deviation from a dimensional standard, or multiple deviations from several dimensional standards on the same lot, may constitute a use variance instead of an area variance. For example, allowing significantly reduced setbacks could have the same effect as changing the zoning from one residential zoning district that requires significant setbacks and open space to a second residential zoning district that has minimal setbacks and open space.

Based on majority opinions of the Wisconsin Supreme Court,<sup>164</sup> it appears that, in order to draw the line between area variances and use variances, zoning boards should consider the degree of deviation from each dimensional standard for which a variance is sought in order to determine if the requested variance would “permit wholesale deviation from the way in which land in the [specific] zone is used.”

<sup>165</sup> A proactive community seeking to consistently differentiate between area variances and use variances could adopt an ordinance provision similar to the following:

Unless the board of adjustment finds that a property cannot be used for any permitted purpose, area variances shall not be granted that allow for greater than a \_\_\_% (or \_\_\_ foot) deviation in area, setback, height or density requirements specified in the ordinance.

**Why are use variances discouraged?**

Wisconsin Statutes do not specifically prohibit use variances. However, courts recognize that they are difficult to justify because they may undermine ordinance objectives and change the character of the neighborhood.<sup>166</sup> Some Wisconsin communities prohibit use variances in their ordinances. There are a number of practical reasons why they are not advisable:

- **Unnecessary hardship must be established in order to qualify for a variance.**  
This means that without the variance, none of the uses allowed as permitted or conditional uses in the current zoning district are feasible for the property. This circumstance is highly unlikely.
- **Many applications for use variances are in fact administrative appeals.**  
Often the zoning board is asked to determine whether a proposed use is included within the meaning of a particular permitted or conditional use or whether it is sufficiently distinct as to exclude it from the ordinance language. Such a decision is not a use variance but an appeal of the administrator’s interpretation of ordinance text.
- **Zoning amendments are a more comprehensive approach than use variances.**  
When making map or text amendments to the zoning ordinance, elected officials consider the larger land area to avoid piecemeal decisions that may lead to conflict between adjacent incompatible uses and may undermine neighborhoods and the goals established for them in land use plans and ordinances. Towns also have meaningful input (veto power) on zoning amendments to general zoning ordinances.

<sup>164</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401 and *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

<sup>165</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401

<sup>166</sup> *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 412 fn. 10, 577 N.W.2d 813 (1998); *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 473, 247 N.W.2d 98 (1976).





## Chapter

# Accommodations for the Disabled

The Americans with Disabilities Act (ADA) requires local governments to make “reasonable accommodations” (modifications or exceptions) to rules, policies, practices, or services when necessary to afford persons with disabilities equal access to public accommodations such as restaurants, retail establishments, or other businesses normally open to the public. Similarly, the federal Fair Housing Act, and more specifically, Wisconsin’s Fair Housing Law<sup>167</sup> requires local governments to make reasonable accommodations to provide equal access to housing for persons with disabilities. These laws must be considered when making local land use and zoning decisions, but do not specifically preempt or invalidate local zoning.

In many instances, local zoning regulations are designed to accomplish public health and safety goals and appear to be neutral, but may in fact adversely impact individuals with disabilities. Consider for example, the case of a zoning ordinance that requires homes to be set back twenty feet from the street to ensure the visibility and safety of passing vehicles and pedestrians. If an existing home is built to the setback line, installing a ramp to enable a person with a disability to enter their home would be impermissible without a modification or exception. In such

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<sup>167</sup> Wis. Stat. § 106.50 and Wis. Admin. Code § DWD 220

cases, local governments are required to make reasonable accommodations to prevent the discrimination of persons with disabilities.

### **What is a “reasonable accommodation”?**

What constitutes a reasonable accommodation must be made on a case-by-case basis and depends on the facts of the situation. A reasonable accommodation might entail modifications to existing ordinances, regulations or policies, or a waiver of such requirements for persons with disabilities. If a requested modification imposes an undue financial or administrative burden on a local government or if the modification fundamentally alters the local government’s land use or zoning scheme, it is not considered a “reasonable” accommodation and the local government is not required to meet that request.<sup>168</sup>

When considering the extent to which a modification is reasonable (for example, how much of setback reduction should be allowed), local governments may wish to refer to ADA standards. Although these requirements do not apply to housing, they may provide guidance in terms of how large of a ramp or other structure is generally necessary to afford accessibility.

### **What is the recommended approach for providing reasonable accommodations?**

Communities use a variety of approaches to provide reasonable accommodations for persons with disabilities—common tools include variances, conditional use permits, special exceptions, permitted uses and waivers of zoning regulations. Strengths and weaknesses associated with each of these tools are considered in turn.

#### ***Variance***

Granting a variance requires the finding of three conditions: unnecessary hardship, unique property limitations, and no harm to public interest. Applicants must satisfy all three requirements in order to be granted a variance, even in the case of persons with disabilities. While not illegal, we do not recommend the variance approach for several reasons. First, the physical limitations of a

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<sup>168</sup> Group Homes, Local Land Use, and the Fair Housing Act. Joint Statement of the Department of Justice and the Department of Housing and Urban Development. Available: [http://www.usdoj.gov/crt/housing/final8\\_1.htm](http://www.usdoj.gov/crt/housing/final8_1.htm). Retrieved 5-9-06.

disabled applicant do not substitute for the physical limitations of the property.<sup>169</sup> Second, a hardship cannot be self-created. Since the need for a variance arises from an applicant's physical disability it is often difficult to justify both the unnecessary hardship and unique property limitations tests. If the variance technique is considered, applicants should be encouraged to find a suitable site arrangement that does not necessitate the variance (for example, constructing a ramp to the side door rather than the front door).

### ***Conditional Use/Special Exception***

Granting a conditional use or special exception is also commonly used to accommodate persons with disabilities. In particular, communities utilize these tools frequently to allow group homes, which is an acceptable use of the technique.<sup>170</sup> In the case of physical or dimensional requests, additional consideration should be given to the use of this technique. First, many communities define conditional uses to include only uses of the property, not physical or dimensional requirements. Second, much like a variance, a conditional use “runs with the property,” meaning all subsequent property owners are entitled to continue the use or exception subject to any limitations specified at the time of granting. If the public purpose of enforcing the regulation is so great that the accommodation should be discontinued after the disabled person vacates the property, the zoning administrator may impose a condition to that effect or should consider using an altogether different technique.

### ***Permitted Use/Waiver of Zoning Restrictions***

A technique that many communities find works very well for granting reasonable accommodations is the use of an administrative permit or simple waiver of zoning restrictions made by the zoning administrator. Barron County includes the following language in their local zoning code to accomplish this purpose:<sup>171</sup>

<sup>169</sup> Sawyer County Zoning Bd. v. Wisconsin Dept. of Workforce Development, 231 Wis. 2d 534, 605 N.W.2d 627 (Ct. App., 1999) involves a request for a variance to accommodate a person with a disability. This case reiterates the unique property limitations standard found in State v. Kenosha County Bd. of Adj., 218 Wis. 2d 396, 413-14, 577 N.W.2d 813, 821-22 (1998).

<sup>170</sup> Many local governments allow group homes as a conditional use. This is a valid use of this procedure, assuming group homes are not discriminated against or treated less favorably than groups of non-disabled persons. For a case regarding conditional use permits see State ex rel. Bruskevitz v. City of Madison, 2001 WI App 233; 248 Wis. 2d 297; 635 N.W.2d 797.

<sup>171</sup> Barron County Code of Ordinances, Chapter 17: Zoning, Land Divisions, Sanitation 17.74(5)(h). Available: [http://www.co.barron.wi.us/forms/zoning\\_landuse\\_ord.pdf](http://www.co.barron.wi.us/forms/zoning_landuse_ord.pdf). Retrieved 5-10-06.

*The County Zoning Administrator will use a zoning permit that waives specified zoning ordinance requirements, if the administrator determines that both of the following conditions have been met.*

- a. *The requested accommodation (i.e., the requested waiver of zoning restrictions), or another less-extensive accommodation, is:*
  1. *Necessary to afford handicapped or disabled persons equal housing opportunity or equal access to public accommodations, and*
  2. *The minimum accommodations that will give the handicapped or disabled persons adequate relief.*
- b. *The accommodation will not unreasonably undermine the basic purposes the zoning ordinance seeks to achieve.*

#### ***Other Remedies***

If no procedure is specified for accommodating persons with disabilities, these persons may request a reasonable accommodation in some other way, and a local government is obligated to grant it if it meets the criteria outlined for reasonable accommodations.

#### **May local governments impose conditions on accommodations for the disabled?**

Local governments may require that modifications granted to accommodate disabilities be removed after no longer necessary. For example, when authorizing a building addition or structure (such as a ramp) to a home, the zoning administrator may require that the alteration be removed after the disabled person vacates the property. Barron County requires applicants to sign and record an affidavit with the local register of deeds outlining conditions and removal procedures associated with allowing accommodations for the disabled. In other circumstances, communities may wish to allow ramps and other structures that serve the disabled to remain for a specified time period (eg. six months) to encourage other handicapped individuals to inhabit the property while at the same time avoiding some of the time and expenses involved in constructing handicap accessible structures.

# Section IV – Review

## **Keywords**

- Administrative decision
- Quasi-judicial decision
- Judicial decision
- Legislative decision
- Stay
- Statute
- Administrative rule
- Local code
- Administrative appeal
- Judicial appeal
- Permitted use
- Conditional use
- Special exception
- Variance
- Area variance
- Use variance
- Reasonable accommodation

## **Test your Knowledge** (answers on page 109)

### **Chapter 12 – Discretion Associated with Zoning Decisions**

- 1) What are the three discretionary levels of decision-making?  
Provide examples of each.
- 2) Name four of the five major types of zoning decisions.
- 3) Which zoning decisions are typically made by the zoning board?

### **Chapter 13 – Administrative Appeals**

- 4) Name three guidelines for determining the intent of ambiguous ordinances.
- 5) Name five guidelines for interpreting the text of ordinances.

**Chapter 14 – Conditional Uses/Special Exceptions**

- 6) Who may decide a conditional use permit?
- 7) What is the difference between performance and design standards?
- 8) What are the tests for determining whether conditions are legally acceptable?

**Chapter 15 – Variances**

- 9) What is the difference between an area variance and a use variance?
- 10) What are the three standards for granting a variance?

**Chapter 16 – Accommodations for the Disabled**

- 11) What is the process for providing reasonable accommodations for the disabled?

**Answers**

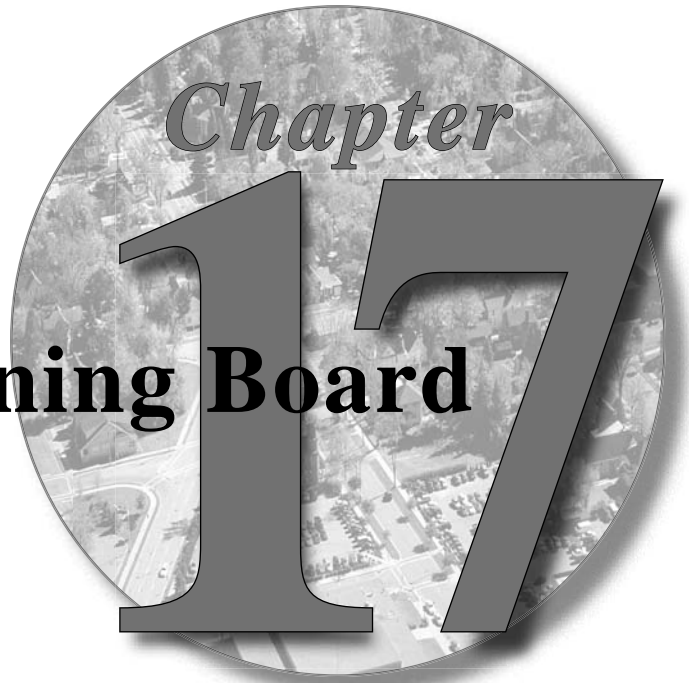
- 1)
  - a. Legislative decisions – most discretion (policies, ordinances)
  - b. Quasi-judicial decisions – (variances, conditional use permits, administrative appeals)
  - c. Administrative decisions – least discretion (simple permits)
  
- 2)
  - a. Permitted uses
  - b. Conditional uses
  - c. Variances (area or use)
  - d. Amendments (text or map)
  - e. Appeals (administrative or judicial)
  
- 3)
  - a. Administrative appeals
  - b. Variances
  - c. Conditional uses (if authorized by local ordinance)
  
- 4)
  - a. Scope or jurisdiction
  - b. Context
  - c. Subject matter
  
- 5)
  - a. Plain meaning rule
  - b. Harmonizing
  - c. Conflicting provisions
  - d. No surplus language
  - e. Value of testimony
  
- 6) The governing body, plan commission/committee, or zoning board as specified by local ordinance
  
- 7)
  - a. Performance standards state the expected results and allow landowners to use a variety of techniques custom-tailored to the site to achieve those results
  - b. Design standards state specific requirements (less flexible but easier to administer)
  
- 8)
  - a. Rough proportionality
  - b. Essential nexus

## Section IV – Decisions of the Zoning Board

- 9)
  - a. Area variances allow small deviations from dimensional requirements such as setbacks, heights, etc
  - b. Use variances allow uses that are prohibited in the zoning district
  
- 10)
  - a. Unnecessary hardship - defined as “no reasonable use” for use variances and “unnecessarily burdensome in light of ordinance purposes” for area variances
  - b. Unique property limitations
  - c. No harm to public interest
  
- 11) We recommend including language in your local zoning ordinance to grant reasonable accommodations through a simple permit or waiver of restrictions issued by the zoning administrator. Variances and conditional uses may also be appropriate in some cases.



# Appeal of Zoning Board Decisions



Zoning board decisions may be appealed to circuit court. When reviewing zoning board decisions on appeal, the circuit court generally reviews the record using certiorari standards. To minimize having their decisions overturned by the courts, zoning boards should understand and apply the certiorari standards to create an accurate and complete record for each of their decisions. When making decisions, zoning boards and the courts are governed by rules in local ordinances, state statutes, and the constitution.

## What is an appeal?

For the purposes of this chapter, an appeal is the submission of a decision made by a zoning board to a circuit court for review to determine whether the board erred and to affirm, reverse, or remand the decision.<sup>172</sup> *Chapter 13* discusses administrative appeals which occur when decisions made by zoning administrators or plan commissions are appealed to the zoning board.

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<sup>172</sup> *Black's Law Dictionary*, 2nd pocket edition, 2001, 38; Klein, Bobbie, Attorney and Laura Dulski, Attorney. "Filing an Appeal: A Citizen's Guide to Filing an Appeal in the Wisconsin Court of Appeals." June 1991 (Revised effective January 1, 2004). Available at <http://www.courts.state.wi.us/ca/citizens.pdf>

## Who may appeal zoning board decisions?

An aggrieved person, taxpayer, municipal officer, or municipal body may appeal a zoning board decision to circuit court.<sup>173</sup> A “person” includes partnerships, corporations, associations, and governmental units.<sup>174</sup> These people and bodies are said to have **standing** to appeal zoning board decisions. The test for standing has two parts:

**Standing** - the status required by law to allow a person or body to appeal a decision.

1. whether the decision of the agency directly causes injury to the interest of the petitioner, and
2. whether the interest asserted is recognized by law.<sup>175</sup>

The DNR, because of its role as trustee of the navigable waters of Wisconsin, has standing to appeal shoreland, wetland, and floodplain zoning decisions.<sup>176</sup> The DNR has standing to appeal decisions that violate the public trust and in fact, has a duty to appeal decisions that do not comply with shoreland zoning administrative rule standards.<sup>177</sup>

## How long does a person have to appeal a zoning board decision?

A person has 30 days after the filing of the decision in the office of the zoning board to appeal a decision.<sup>178</sup> In the absence of zoning board by-laws defining what it means to “file the decision,” the appeal period begins when the decision is physically filed in the office of the zoning board. The 30-day appeal period runs from the filing of the original decision and is not extended by filing a motion to reconsider unless the motion raises a new issue.<sup>179</sup> In

<sup>173</sup> Wis. Stat. §§ 59.694(10) & 62.23(7)(e)10. The municipal law and tax sections of the statutes are pretty clear in distinguishing between a resident (which can include a renter) and taxpayer (used in this context as a “taxpayer of the municipality,” which generally refers to a property taxpayer. While there may be an argument that a renter is a taxpayer in a county which collects a county sales tax, it’s questionable that the term taxpayer used in this section of the statute was intended to include renters--- but rather, a person who pays property taxes directly to the municipality. A renter may fit within the term “aggrieved person”, if the decision affects the property that they are renting; *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*, 131 Wis. 2d 101, 388 N.W.2d 593 (1986) states residents had appeal rights even though they did not appear at planning and zoning committee hearings because statutes provide that persons aggrieved, not parties, have a right to appeal.

<sup>174</sup> Wis. Stat. § 990.01(26)

<sup>175</sup> *Mendonca v. DNR*, 126 Wis. 2d 207, 376 N.W.2d 73 (Ct. App. 1985); *Kammes v. State, Mining Inv. & Local Impact Fund Bd.*, 115 Wis. 2d 144, 340 N.W.2d 206 (Ct. App. 1983).

<sup>176</sup> *State ex rel. DNR v. Walworth County Bd. of Adjustment*, 170 Wis. 2d 406, 489 N.W.2d 631 (Ct. App. 1992)

<sup>177</sup> Wis. Admin. Code ch. NR 115; *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761 (1972)

<sup>178</sup> Wis. Stat. §§ 59.694(10) & 62.23(7)(e)10

<sup>179</sup> *Bettendorf v. St. Croix County Bd. of Adjustment*, 188 Wis. 2d 311, 525 N.W.2d 89 (Ct. App. 1994)

one case in which a zoning board first issued a tentative decision<sup>180</sup> and after a subsequent public hearing on the case issued a more complete decision, the court determined the 30-day appeal period began after the final zoning board decision.<sup>181</sup>

### **What must be done within the 30 day time period to appeal a zoning board decision?**

A lawsuit must be filed in circuit court seeking **certiorari** review of the zoning board decision. In a certiorari lawsuit, the person or body with standing requests that the circuit court issue a **writ** requiring the zoning board to submit the record of their decision to the court. The request to the circuit court must identify which certiorari standards the decision did not meet, but does not need to make a full argument describing all of the reasons they feel the zoning board decision is insufficient.

**Certiorari** - A writ from a higher court to a lower court (or zoning board) requesting a transcript of the proceedings of a case for review.

### **If a certiorari lawsuit is filed, what is the zoning board required to do?**

The board must submit the transcript of the proceedings of the decision (the record) or certified or sworn copies of the record to the circuit court.<sup>182</sup>

**Writ** - A written order issued by a court requiring specific action.

### **When a zoning board decision is pending before the circuit court, what may the zoning administrator and zoning board do?**

When the zoning board decision is pending before the court, the court has exclusive jurisdiction over the dispute, and neither the zoning administrator nor the zoning board may reevaluate their decision until the court relinquishes that jurisdiction. To allow otherwise would encourage conflicting and competing decisions of courts and administrative agencies.<sup>183</sup>

<sup>180</sup> *Miswald v. Waukesha County Bd. of Adjustment*, 202 Wis.2d 401, 550 N.W.2d 434 (Ct. App. 1996); first decision stated that the zoning board's decision may be taken up at the next hearing and the decision may be subject to change and modification.

<sup>181</sup> *Miswald v. Waukesha County Bd. of Adjustment*, 202 Wis.2d 401, 550 N.W.2d 434 (Ct. App. 1996)

<sup>182</sup> Wis. Stat. §§ 59.694(10), 62.23(7)(e)10 & 781.03

<sup>183</sup> *Mills v. Vilas County Bd. of Adjustment*, 2003 WI App 66, 261 Wis.2d 598, 660 N.W.2d 705

## What happens to the construction project if the zoning board decision is appealed?

**Stay** - To delay or stop the effect of an order, by legal action.

A zoning board decision is not automatically **stayed** by filing an appeal with the court.<sup>184</sup> For instance, construction may go forward if authorized by a board decision. However, upon petition, the court may find cause to issue a **stay**.

## What decisions may a circuit court make on appeal?

Court review of a zoning board decision is highly deferential to the board,<sup>185</sup> with the court presuming the decision of the board is correct and valid when reviewing it by certiorari.<sup>186</sup> Even if the court would not have made the same decision, it will uphold the zoning board's decision if the decision is supported by any reasonable view of the evidence. However, the zoning board decision must be consistent with the law and based on evidence in the record, not on its attitude toward the applicant, the proposal or the zoning ordinance.<sup>187</sup>

Courts may interpret ordinance language de novo if the language is similar to that used in communities across the state.<sup>188</sup> For instance, after the Town of Saukville decided on a conditional use permit that included their interpretation of whether “mineral extraction operations” included “blasting and crushing,” the Wisconsin Supreme Court interpreted these terms de novo. The rationale for this decision is that one county agency's interpretation of the language in a single case should not be controlling or persuasive for the many other counties that have ordinances with the same or similar language.<sup>189</sup> Note that the court did not hear the entire conditional use permit anew.

**Remand** - to send a case back to a court or original decision-making body from which it came for

The court may wholly or partly affirm, reverse, or modify the decision appealed.<sup>190</sup> The court, in overturning a decision, will typically send the case back to the board, or **remand** it, for further proceedings consistent with the court's opinion. Courts may

<sup>184</sup> Wis. Stat. §§ 59.694(10) & 62.23(7)(e)10

<sup>185</sup> *Clark v. Waupaca County Bd. of Adjustment*, 186 Wis. 2d 300, 519 N.W.2d 782 (Ct. App. 1994)

<sup>186</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401; *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514; *Nielsen v. Waukesha County Bd. of Supervisors*, 178 Wis. 2d 498, 511, 504 N.W.2d 621 (Ct. App. 1993)

<sup>187</sup> *Schalow v. Waupaca County*, 139 Wis. 2d 284, 407 N.W.2d 316 (Ct. App. 1987)

<sup>188</sup> *Marris v. Cedarburg*, 176 Wis. 2d 14, 498 N.W.2d 842 (1993); *Weber v. Town of Saukville*, 209 Wis. 2d 214, 223-4, 562 N.W.2d 412 (1997)

<sup>189</sup> *Bd. of Regents v. Dane County Bd. of Adjustment*, 2000 WI App 211, 238 Wis. 2d 810, 618 N.W.2d 537

<sup>190</sup> Wis. Stat. § 59.694(10)

remand decisions to the zoning board for workload or process-related reasons, including:

1. If they did not, local zoning boards might be tempted to go along with public opinion on difficult or controversial decisions rather than applying the legal standards governing zoning boards, thereby leaving the unpopular decisions to the circuit court.
2. Circuit courts do not have the time to hear numerous local zoning appeals that are the responsibility of local zoning boards.
3. Local zoning boards learn correct procedure and decision making standards if they revisit decisions where the court disagreed and must decide them in ways consistent with the instructions that accompany a remand from circuit court.

There is wide variability in the detail and direction provided by the court when it remands decisions to the zoning board. It is very helpful when the court clarifies whether the zoning board is to conduct a de novo hearing or whether they are only allowed to address the issue the court decided on. Typically, a zoning board only collects additional evidence on remand when the court finds that the evidence in the record is insufficient to support their decision or if the decision standards have changed.

*Zoning boards should understand and apply the certiorari standards in all of their decisions to minimize having their decisions overturned by the courts.*

### **May the circuit court take additional evidence?**

While state law allows circuit courts to take evidence if necessary to properly decide a matter,<sup>191</sup> this seldom happens. Due to the three political and workload reasons described above, courts often remand decisions back to the zoning board with instructions if they do not provide sufficient evidence.

While there is not a complete list of circumstances that might justify the circuit court to take evidence, courts have concluded that a reviewing court may decide to take additional evidence in the following circumstances:

- When the record before the zoning board is incomplete because the aggrieved party was refused an opportunity to be fully heard or the board excluded relevant evidence.
- When good and sufficient cause is shown for the failure to have offered the evidence to the board.

<sup>191</sup> Wis. Stat. § 59.694(10)

- When the record presented to the circuit court does not contain all the evidence actually presented to the zoning board.
- When the zoning board’s record fails to present the hearing in sufficient scope to determine the merits of the appeal.
- When new evidence is discovered after the zoning board’s proceedings were closed, although the circuit court may remand to the board to consider the new evidence first.<sup>192</sup>

**If the circuit court does not take additional evidence, what standards does the court use in reviewing zoning board decisions?**

The circuit court reviews the record under the traditional standards of common law certiorari listed on page 117.<sup>193</sup> We recommend that zoning boards understand and apply the same certiorari standards in all of their decisions to minimize having their decisions overturned by the courts. The circuit court may not substitute their discretion for the discretion of the zoning board.<sup>194</sup>

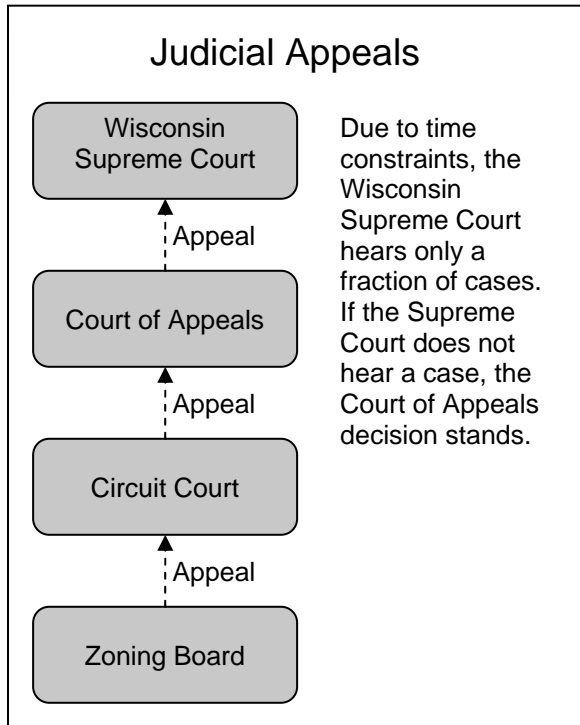
<sup>192</sup> *Klinger v. Oneida County*, 149 Wis.2d 838 , 440 N.W.2d 348 (1989) .

<sup>193</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401; *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514

<sup>194</sup> *Clark v. Waupaca County Bd. of Adjustment*, 186 Wis. 2d 300, 519 N.W.2d 782 (Ct. App. 1994); *Klinger v. Oneida County*, 149 Wis.2d 838, 440 N.W.2d 348 (1989)

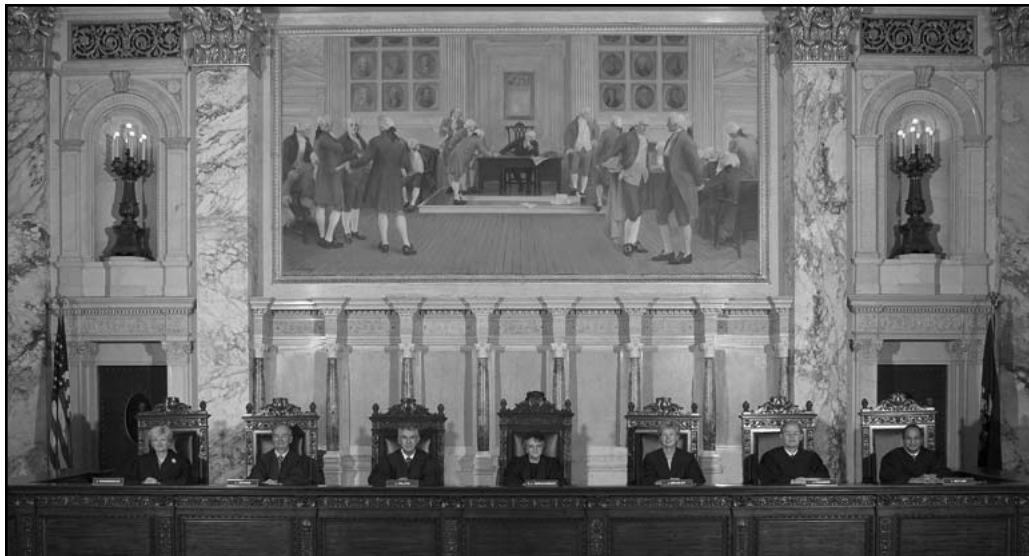
<b>Figure 28: Certiorari Review Standards</b>		
<b>Standard</b>	<b>Questions the court will ask when reviewing a BOA decision</b>	<b>Tips to help the zoning board comply with this standard</b>
1. Jurisdiction	Did the board have the authority to make this decision?	<ul style="list-style-type: none"> <li>■ For each hearing, ensure that the geographical location and type of decision are within the jurisdiction of the board.</li> </ul>
2. Proper procedures	Did the board follow proper legal procedures?	<ul style="list-style-type: none"> <li>■ Ensure that public notice and open meeting laws are followed as well as other procedures specified in local or state codes.</li> </ul>
3. Proper legal standards	Did the board follow the proper legal standards?	<ul style="list-style-type: none"> <li>■ Ensure that variance decisions are based on the 3-step statutory test.</li> <li>■ Ensure that conditional use decisions are based on ordinance standards.</li> </ul>
4. Unbiased decision-makers	Was the zoning board's action arbitrary, oppressive or unreasonable, and representative of its will and not its judgment?	<ul style="list-style-type: none"> <li>■ Ensure that board members are unbiased</li> </ul>
5. Substantial evidence	Could a fair and reasonable person have reached the same conclusion as the zoning board based on the facts in the record?	<ul style="list-style-type: none"> <li>■ Make sure that all evidence, including that from site inspections, is included in the record.</li> <li>■ Ensure that the decision explains the reasons why the board feels each decision standard was or was not met and specifies which evidence supports each part of their decision.</li> </ul>

**Figure 29:** Common Route for Appealing a Zoning Board Decision



**Can zoning board decisions be appealed beyond circuit court?**

Yes, there are multiple levels of appeal possible. In the most common route of appeal, the zoning board decision is first appealed to the circuit court. The circuit court decision can be appealed to the court of appeals, which must either take the case or ask the Wisconsin Supreme Court to take the case directly.<sup>195</sup> If the court of appeals issues a decision, its decision can be appealed to the Wisconsin Supreme Court, which hears only a small fraction of the cases sent to it.<sup>196</sup> For a full range of appeal routes, see the diagram on the Wisconsin Supreme Court webpage.<sup>197</sup>



Wisconsin Supreme Court. *Photo courtesy of Bob Rashid Photography.*

<sup>195</sup> Wisconsin Supreme Court website, <http://www.courts.state.wi.us/about/organization/moves.htm>

<sup>196</sup> The Wisconsin Supreme Court receives about 1,000 petitions for review each term, and agrees to hear about 100 of these cases. Wisconsin Supreme Court, 2000, <http://www.courts.state.wi.us/about/organization/moves.htm>

<sup>197</sup> <http://www.courts.state.wi.us/about/organization/moves.htm>



# Section V – Review

## Keywords

- Certiorari
- Writ
- Stay
- Remand

## **Test Your Knowledge** (answers on page 120)

### **Chapter 17 - Appeal of Zoning Board Decisions**

- 1) How long does a person have to appeal a decision made by the zoning board?
- 2) What are the five certiorari standards that zoning board decisions must meet to be upheld?
- 3) Do the circuit courts take additional testimony related to zoning board decisions?
- 4) When a court overturns a zoning board decision, why do they typically remand the decision to the zoning board?

## Answers

- 1) 30 days after the filing of the decision in the office of the board.
- 2)
  - a. Jurisdiction – geographic and subject matter
  - b. Proper procedures
  - c. Proper legal standards
  - d. Exercise of judgment
  - e. Substantial evidence test
- 3) While state law allows circuit courts to take evidence if necessary to properly decide a matter, this seldom happens
- 4)
  - a. If they did not, local zoning boards might be tempted to go along with public opinion on difficult or controversial decisions rather than applying the legal standards governing zoning boards, thereby leaving the unpopular decisions to the circuit court
  - b. Circuit courts do not have the time to hear numerous local zoning appeals that are the responsibility of local zoning boards
  - c. Local zoning boards learn correct procedure and decision making standards if they revisit decisions with which the court disagreed and must decide them in accordance with the instructions that accompany a remand from circuit court

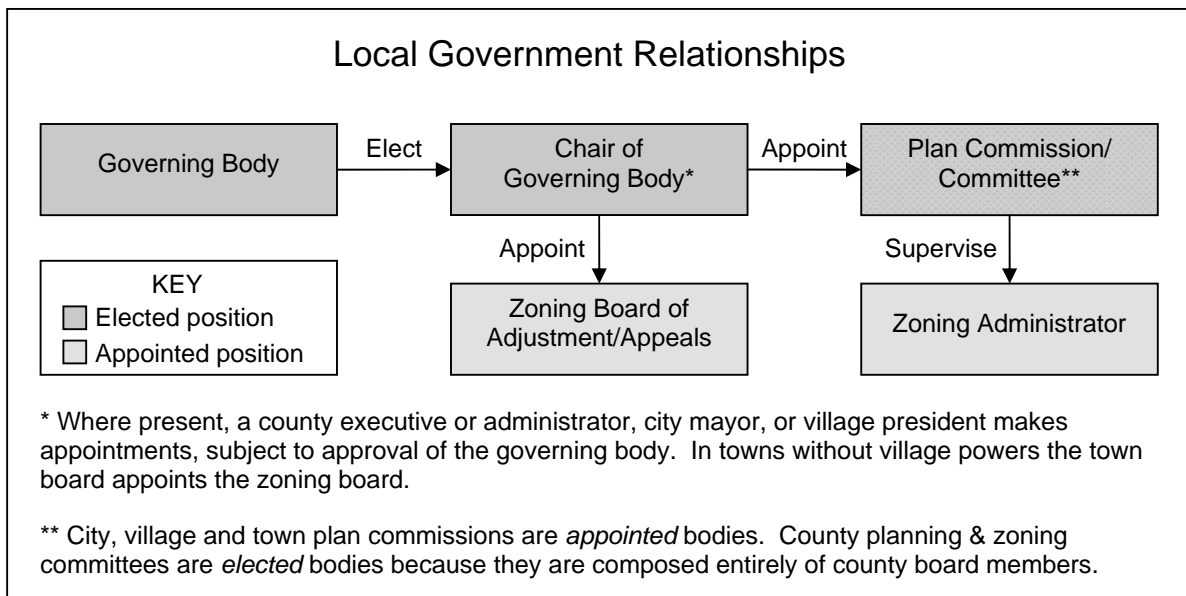
# Chapter

# 18

## Understanding Who the Zoning Board Works With

Zoning boards are most effective when they understand not only their own roles, but also the roles of the groups they work with on a regular basis. By understanding the roles and responsibilities of these groups, the zoning board becomes more effective in its work. Figure 30 illustrates the relationship between local government bodies that are involved in zoning, as defined in Wisconsin Statutes.

**Figure 30:** Organizational Structure of Bodies Involved in Zoning



Beyond the public sector, zoning boards also have important interactions with local residents, landowners, developers, realtors, builders, attorneys, news reporters, and UW-Extension educators.

### **Planning and Zoning Staff**

Planning and zoning staff are responsible for the day-to-day administration and enforcement of the zoning ordinance. They are responsible for granting permits for permitted uses and providing information to the public about applying for administrative appeals, variances and conditional uses. Zoning staff play a key role in helping the public understand the rationale behind the ordinances. Planning and zoning staff also work with the zoning board in multiple ways. They are often responsible for preparing staff reports for applications decided by the zoning board, scheduling hearings, providing public notice of hearings, and recording and taking minutes at the hearings.

To enhance the relationship between the zoning board and staff, we recommend that zoning board members consider the following tips:

- The role of staff is to provide support and assistance to help the board be more productive.
- Staff are not mind readers, so let them know what you need and by when.<sup>198</sup>
- When considering an appeal of an administrative decision, the zoning administrator or other staff member is an opposing party to the applicant. Therefore, consider staff presentations and evidence side-by-side with that of the applicant.

### **Planning and Zoning Committee/Commission**

The key role of the planning and zoning committee or plan commission is to prepare and recommend plans,<sup>199</sup> zoning ordinances, and other programs for implementing the plan to the governing body. The governing body is legally responsible for making final decisions. We recommend that the zoning board

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<sup>198</sup> Easley, V. Gail and David A Theriaque. The Board of Adjustment. 2005. Planners Press, pp. 18-19.

<sup>199</sup> Including developing: clear community vision and goals; sufficient public education and buy-in; and zoning that complements, and is complemented by, other community tools.

meet with the plan commission/committee<sup>200</sup> annually to discuss potential revisions to the zoning ordinance in order to improve provisions that are unclear, inadequate, overly restrictive, or otherwise problematic.

If assigned by the local zoning ordinance, the plan commission/committee also decides whether to grant conditional use permits. Additionally, they may be charged with overseeing the hiring, training, workload, and personnel matters of planning and zoning staff.

### **Governing Body (County Board, Town Board, Village Board, City Council)**

The governing body adopts and amends plans and zoning ordinances and appoints members to the zoning board. Specifically, the chair, administrator, or executive of the governing body appoints the zoning board subject to the approval of the governing body. Other responsibilities assigned to the governing body include approving the government budget (including a budget for the zoning board), and deciding conditional use permits if assigned by the local zoning ordinance.

To achieve community planning goals and adhere to legal standards, the zoning board must sometimes make unpopular decisions. The elected officials on the governing body will eventually hear about these decisions, making it important that they understand land use issues and the rationale of the zoning board. Land use planning initiatives, education about zoning and other plan implementation tools, and discussions about current land use topics can help the governing body gain a sense of confidence in the decisions that the board makes.

**Figure 31:** Cedarburg Town Board.  
*Photo courtesy of Town of Cedarburg*



<sup>200</sup> We use plan commission/committee in a generic fashion to refer to all of the following planning bodies: plan commissions for cities, villages and towns with village powers; planning committees for towns without village powers; and planning agencies (commonly referred to as planning and/or zoning committees) for counties.

## Local Residents

Local residents are valuable resources on the issues affecting their communities. Most residents are heard during public hearings when they appear to support—or more often object to—a proposed variance, conditional use or administrative appeal.<sup>201</sup> To optimize public input:

- Provide additional notification beyond the required legal notice about hearings by posting signs and sending letters or postcards to neighbors and other interested parties.
- Provide clear, straightforward application materials that are available to applicants and all local residents.
- Have zoning staff willing and able to explain the zoning procedures, standards, and rationale.
- Require applications to be completed and available to local residents through the zoning office well in advance of a public hearing. This provides time for the public to read, digest and perhaps further explore the information in the application prior to the hearing, often leading to more well-informed and thoughtful discussion.
- Describe the role of the zoning board at the beginning of each hearing or meeting.
- Make zoning board decisions consistent with the standards.

Through participation in public meetings residents offer a range of perspectives and knowledge that can be used to develop stronger decisions.

**Figure 32:** Residents attend a public hearing.

*Photo by Robert Korth, UW-Extension Lakes Program*



<sup>201</sup> Easley, V. Gail and David A Theriaque. *The Board of Adjustment*. 2005. Planners Press. p. 19.

## **Developers, Realtors, Builders, and Other Contractors**

Developers, realtors, builders and other contractors represent the private sector side of planning and development. These are the companies and individuals that design, build and sell subdivisions and other developments based on the codes and regulations that a community has in place. While developers and builders may complain about regulations, they appreciate a place where the process for obtaining permits is streamlined and transparent (there are no hidden costs or requirements), even though that place may be highly regulated.<sup>202</sup> Realtors, builders and other contractors often represent the landowner in applying for zoning permits.

## **Attorneys**

Zoning rests on legal principles, statutes and codes. While many zoning boards rely on a municipal attorney for legal representation, some zoning boards hire their own attorney who specializes in land use issues. This ensures that the zoning board is working with someone who is up to speed on zoning board issues, will spend adequate time on their current applications, and may provide personalized education for the board. While there is upfront cost for this, a talented land use attorney assisting the zoning board may save the municipality money by avoiding litigation costs.

Applicants who bring lawyers to zoning board meetings may have a different interpretation of statutes or local codes than the zoning board, but this does not mean that the zoning board is wrong. In fact, the Wisconsin Supreme Court has stated repeatedly that the courts may not disturb the decision of a zoning board if any reasonable view of the evidence sustains the decision.<sup>203</sup> Thus, by making decisions based on the law and keeping a complete record of hearings, zoning boards minimize the likelihood their decisions will be overturned.

## **News Reporters**

The media may attend controversial zoning board hearings. Recognizing that reporters are required to cover a very broad range

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<sup>202</sup> Senville, Wayne M. *Welcome to the Commission! A Guide for New Members*. 2000. Champlain Planning Press, Inc., Burlington, VT.

<sup>203</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401; *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

of issues and work under short timelines, it's best to help them understand the role of the zoning board before a controversial issue arises. Share some, or all, of this handbook with them or invite them to a zoning board training session. Additionally, zoning staff can help reporters understand the issues at hand by providing them with copies of staff reports and applicable ordinances, plans, statutes and case law, and by taking the time to explain these materials and answer questions. When working with the media, be sure to provide clear graphics and translate your technical language into lay terminology. Reporters will get information from somewhere, so it might as well be from you or your staff. Working as a team with reporters is the best approach for obtaining accurate press coverage.

### UW-Extension Educators

UW-Extension educators seek to improve the quality of local decisions by providing public, private and non-profit clients with information, targeted research results, and process support. The UW-Extension Center for Land Use Education offers educational workshops for zoning boards covering the roles and responsibilities of the zoning board and updates on recently adopted laws and court decisions. Upcoming zoning board workshops are listed at <http://www.uwsp.edu/cnr/landcenter/workshopszb.html>



**Figure 33:** St. Croix County planning director, David Fodroczi reviews a land use map with UW-Extension community development educator, Jim Janke.  
*Photo by Jim Gill, UW-Extension photo gallery*





Chapter

# Conducting an Annual Self-Audit

## Review Zoning Board Decisions

Zoning board members may be tempted to bend the rules to fit their view of proper zoning policy if they forget their quasi-judicial role in deciding variances, administrative appeals and conditional uses. One way to avoid this temptation is to provide an opportunity for the zoning board to become directly involved in local land use policy development. Because of its unique role, the board has special insight into circumstances in which flexible development standards may be required, where policies concerning nonconforming lots and structures may need reconsideration, or where enforcement or board related procedures require revision.

An annual summary of the number and type of board decisions and related development conditions imposed can guide the board in making recommendations for policy changes. An example of such a report is provided in *Appendix D*. Look for patterns in the report that suggest opportunities for improving ordinance language clarity, effectiveness of standards, and administrative efficiency.

### **Communicate with Plan Committee/Commission**

We recommend that the zoning board meet annually with zoning staff, the plan commission/committee, or the governing body to discuss concerns or make recommendations related to zoning. In addition, zoning boards may invite plan commission/committee members to attend zoning board meetings to gain an understanding and appreciation for the work of the zoning board. Similarly zoning board members may also consider attending plan commission/committee meetings and meetings of the governing body when zoning issues are on the agenda. You might choose one zoning board member to do this, or rotate the role through the zoning board members so everyone benefits from this experience. Provide a zoning board notice in accordance with the open meetings law if you will have multiple zoning board members at meetings of other bodies. Also ensure that zoning board members do not discuss any current cases.

### **Review Informational Materials and Forms**

Zoning boards rely heavily on written reports, forms and other materials to make well-informed decisions. Application materials and forms should prompt applicants to submit sufficient information to meet their burden of proof and may ultimately reduce the number of requests that come before a zoning board. Staff reports and decision forms should prompt zoning boards to follow appropriate legal standards and properly record their rationale for making decisions. We recommend that the zoning board work jointly with zoning staff to review and update these important materials on a regular basis:

- **Application materials** should clearly describe the zoning board hearing process, submittal requirements, and decision criteria. Together with guidance from zoning staff, these materials should also help applicants to identify alternative site locations or project designs that comply with ordinance standards.
- **Application forms** should prompt applicants to meet their legal burden of proof. Many jurisdictions supply an example site plan and a sample petition as part of a packet of application materials. The site plan is used to illustrate dimensional standards and other ordinance requirements. Many jurisdictions also require project site photos, which are

useful to the board in evaluating a proposal and later to the zoning department in monitoring project compliance.

- **Staff reports** should provide zoning boards with critical information regarding relevant plans, ordinances, restrictions, and site conditions on the property and neighboring properties. Zoning staff, together with zoning boards, should decide whether it is appropriate to prepare staff reports and what to include in them.
- **Decision forms** should prompt findings of fact and conclusions of law by the zoning board. They should also reflect appropriate legal standards (e.g. variance criteria) and specify appeal rights, a permit expiration date, and circumstances that might prompt the board to revisit its decision in the matter.

Examples of materials and forms are provided in *Appendices D and E*.

## **Review, Enforcement, and Appeals Procedures**

There are many procedural issues related to zoning administration and enforcement that are not specified in state statutes or case law. These may cause undue administrative burdens, frustrate landowners and other interested parties, and potentially provide opportunity for appeal of zoning decisions. We recommend that governing bodies, in consultation with zoning boards or staff, review and adopt necessary rules or ordinances that:

- Provide for adequate notice of decisions of administrative officials to affected parties,
- Limit the time period for appeal of administrative decisions to the zoning board,
- Specify how the filing date of a board decision is determined (which establishes the commencement of the 30-day appeal period),
- Specify circumstances allowing reconsideration of a decided matter, and
- Specify how after-the-fact applications will be treated.

## Review Rules for Conduct of Meetings and Hearings

To avoid similar issues related to zoning board meetings and hearings, we recommend that local communities adopt necessary rules, ordinances, or materials that:

- Provide proper notice for meetings, hearings and closed sessions,
- Describe how site inspections will comply with open meetings law requirements,
- Identify and address bias and conflicts of interest,
- Provide for appointment and education of alternate board members,
- Determine admissibility of written testimony, and
- Provide instructions for those providing testimony in order to promote hearings that are orderly, fair and efficient.

## Review Need for Counsel

Generally, the municipal attorney provides legal representation for the governing body of the local unit of government. However, as land use issues become increasingly complex, case loads increase, and applicants regularly hire their own attorneys, more zoning boards are opting to retain independent legal counsel with expertise in land use or zoning issues. These zoning boards find that it is worthwhile to spend money upfront in exchange for avoiding potential litigation—and the time, money and headaches associated with it! Many communities who opt for this approach retain an attorney from outside of the area to avoid someone who represents local property owners.

Since a zoning officer or the planning commission/committee may contest any zoning board decision, and a municipal attorney may not represent more than one body within a local government in the same case,<sup>204</sup> the zoning board should anticipate needing their own attorney and have this provided for in local rules, policies and budgets. We recommend that zoning boards meet with the appropriate standing committee or governing body to discuss issues such as when the zoning board may retain independent legal counsel and how counsel will be selected and compensated.

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<sup>204</sup> *Nova Services v. Village of Saukville*, 211 Wis.2d 691, 565 N.W.2d 283 (Ct. App. 1997)

## **Take Advantage of Opportunities for Continuing Education**

Zoning boards should regularly assess their needs for ongoing education. Local zoning staff may be able to provide zoning boards with updates to local ordinances, statutes, and case law. Training may also be provided by other groups such as the University of Wisconsin-Cooperative Extension. For example, the Center for Land Use Education regularly provides training for zoning boards, including updates to state statutes and case law. The Local Government Center provides training on topics such as Wisconsin’s open meeting law, public records law, and code of ethics. County-based Extension educators may also be available to assist with these or other topics.

Scheduling periodic educational or working sessions also provides a good opportunity for zoning boards to work through and discuss the impacts of development scenarios outside of the pressures of a formal decision-making process. (However, zoning boards must be careful not to discuss current or pending development decisions outside of an open meeting). These types of opportunities may also allow zoning board members to become more comfortable with fellow board members and staff.





*Chapter*

# Translating Zoning Board Decisions into Better Zoning Ordinances

Ordinances are not carved on stone tablets—and that’s not just because Wisconsin is the nation’s leading paper producer! Since it’s impossible to foresee all future changes and how the ordinance will apply to these situations, zoning ordinances should be working documents that are modified as needs arise. We recommend updating the zoning ordinance every few years to:

- Incorporate changes in standards or administration that improve ordinance clarity or efficiency based on the practical knowledge you’ve gained from working with the ordinance,
- Plan for or respond to new uses or development patterns, and
- Maintain consistency with any changes to your community comprehensive plan.

Through experience interpreting an ordinance and applying it to specific fact situations, zoning boards often develop useful ideas about improving the ordinance. We recommend they share these ideas with the plan commission as described below.

### **How can the zoning board and plan committee/ commission work together to improve the local zoning ordinance?**

Ultimately, the decision to amend a zoning ordinance is made by the local governing body, based on a recommendation from the plan commission. Following their annual self-audit, we recommend that the zoning board meet with the plan commission/ committee to discuss their experience applying the ordinance to specific situations and other findings. Specifically, the zoning board may suggest the plan commission/committee revise the zoning ordinance in the following ways:

- **Clarify terminology.** Definitions may need to be added or clarified. Clarify ordinance definitions and text based on recent administrative appeals.
- **Recommend effective design or performance standards.** See the discussion of the advantages and disadvantages of each in *Chapter 14*.
- **Recommend appropriate levels of permit review.** If the zoning board has developed a set of conditions that it applies routinely to specific conditional uses that result in effective control, the zoning board may recommend including these conditions in the ordinance as requirements of the conditional use. Conversely, if a certain type of permitted use is proving problematic, the board may recommend adding requirements to the ordinance or converting the permitted use to a conditional use, so that additional conditions may be applied to mitigate adverse impacts.
- **Ensure enforceability.** Provide clear directions about how measurements such as setbacks, heights, and floor areas are to be made and ensure adequate staffing and staff training. Encourage the planning commission/committee to adopt an enforcement policy if none exists.

If you want to change the law – get elected!

If zoning board members want to go beyond the points outlined above and change the zoning ordinance, we recommend they participate in an advisory group for ordinance revision or run for a position on the local governing body.



# Section VI – Review

## **Keywords**

- Self-audit

## **Test Your Knowledge** (answers on page 136)

### **Chapter 18 - Understanding Who the Zoning Board Works With**

- 1) Name five of the eight groups that zoning boards regularly work with.
- 2) Which local government body has the power to change the zoning ordinance?
- 3) Describe three ways that zoning staff can help the zoning board.
- 4) Describe two ways to optimize public participation at a zoning board hearing.

### **Chapter 19 – Conducting an Annual Self-Audit**

- 5) What should be included in an annual self-audit?
- 6) Who is available to provide continuing education for zoning boards?

### **Chapter 20 – Translating Zoning Board Decisions into Better Zoning Ordinances**

- 7) How often should zoning ordinances be updated?
- 8) Who has the authority to change or amend the zoning ordinance?
- 9) If a zoning board member wants to change the ordinance, what should they do?

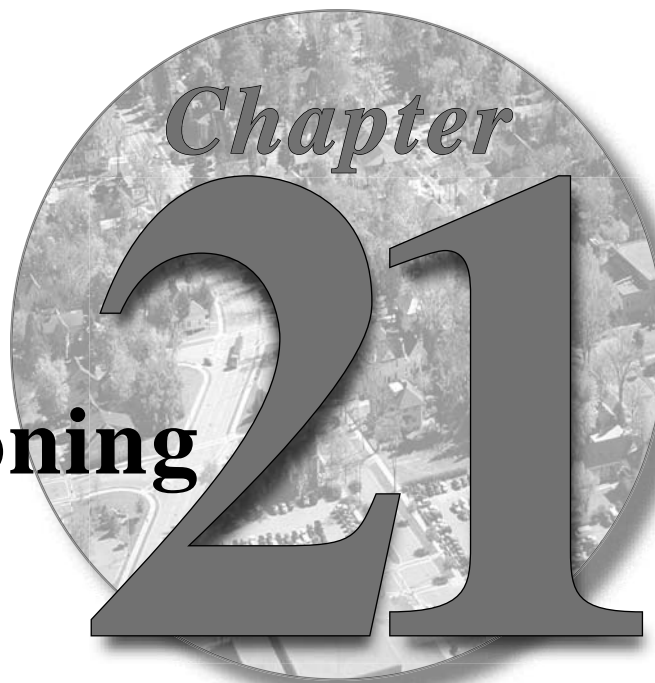
### Answers

- 1)
  - a. Planning and zoning staff
  - b. Plan commission/committee
  - c. Governing body
  - d. Residents
  - e. Development community
  - f. Attorneys
  - g. News reporters, and
  - h. UW-Extension
  
- 2) The governing body (county board, town board, village board, city council)
  
- 3)
  - a. By providing information about applying for administrative appeals, variances, and conditional uses
  - b. By helping the public understand the rationale behind the ordinances
  - c. By preparing staff reports for the applications decided by the zoning board
  - d. By scheduling hearings
  - e. By providing public notice of hearings
  - f. By recording and taking minutes at the hearings
  
- 4)
  - a. By providing public notice of hearings as required by state law
  - b. By providing clear, straight forward application materials that are available to applicants and all local residents
  - c. By encouraging zoning staff to explain zoning procedures, standards, and rationale
  - d. By requiring applications to be completed and available to local residents through the zoning office in advance of the public hearing
  - e. By describing the role of the zoning board at the beginning of each hearing or meeting
  - f. By make zoning board decisions consistent with the standards

- 5) Decisions, procedures, forms, rules of conduct, need for counsel, and opportunities for continuing education. Any issues or needs that arise should be clearly communicated with zoning staff, the plan commission/committee, and/or the governing body, as appropriate
- 6)
  - a. First, check with your local planning and zoning staff. They can often provide updates regarding local development issues, ordinances, and even relevant case law or statutory updates
  - b. Next, contact your local Extension office. They may be able to offer training or put you in contact with the Center for Land Use Education or Local Government Center, depending on your needs
- 7) Every few years
- 8) The governing body, with recommendations from the plan committee/commission
- 9) Meet with the plan committee/commission to discuss potential changes, participate in an advisory group for ordinance revision, or run for office on the governing body



# Shoreland Zoning

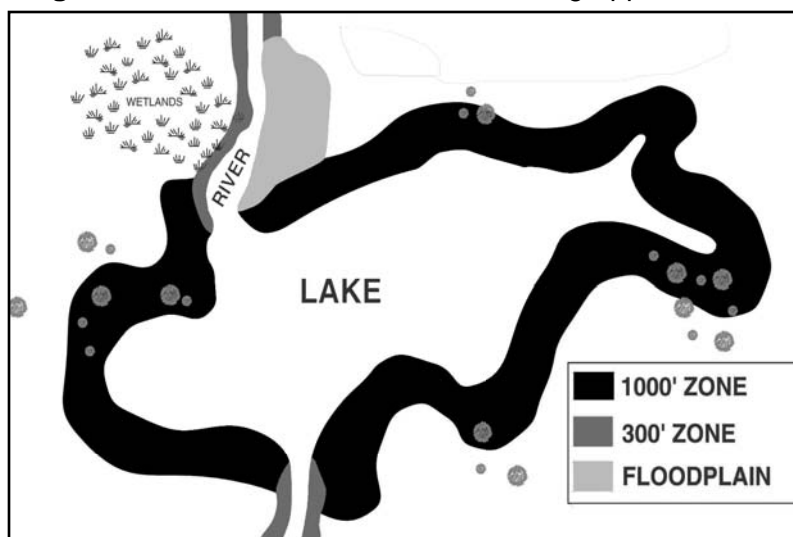


## Where does shoreland zoning apply?

Wisconsin statutes define shorelands as lands within 1,000 feet of the ordinary high-water mark (OHWM) of a navigable lake, pond, or flowage and lands within 300 feet or within the floodplain of a navigable river or stream, whichever distance is greater.

A state administrative rule (NR 115) sets minimum standards for local ordinances. The state requires counties to adopt and administer development standards for shorelands in unincorporated areas,<sup>205</sup> which are areas outside of cities and villages. Many counties have adopted standards that are more restrictive than state minimum standards. Towns may not opt out of county shoreland zoning, as they may general county zoning.<sup>206</sup> While cities and villages are not required to adopt

**Figure 34:** Areas Where Shoreland Zoning Applies



<sup>205</sup> Wis. Stat. § 59.692; Wis. Admin. Code § NR115.

<sup>206</sup> Wis. Stat. § 59.692(2)(a)

shoreland zoning, shorelands within their municipal boundaries may be subject to shoreland zoning in three cases:<sup>207</sup>

1. When official state maps describe wetlands within shoreland areas,
2. When a city or village has annexed unincorporated shorelands,<sup>208</sup> and
3. When cities or villages have voluntarily enacted their own shoreland zoning requirements.

### **What are the purposes of shoreland zoning?**

The specific purposes of a shoreland zoning ordinance should be considered when deciding whether to grant variances, conditional uses and administrative appeals for properties in the shoreland zone, just as with any other ordinance.

The purposes of shoreland zoning, as defined by the state, are to:

- Maintain safe and healthful conditions,
- Prevent and control water pollution,
- Protect spawning grounds, fish, and aquatic life,
- Control building sites, placement of structures, and uses, and
- Reserve shore cover and natural beauty.<sup>209</sup>

In addition, shoreland zoning protects the rights of all Wisconsin residents to access the water, fish, swim, boat, and enjoy the scenic beauty, which is also known as the public interest.

### **How do our shoreland decisions affect property values, water quality, fisheries and wildlife?**

Extensive research exists describing how land use along lakes and streams affects water quality, fisheries and wildlife. Here is a very brief summary of the research and a few references if you would like to learn more.

The quality of our lakes and streams is ultimately a reflection of how we take care of our land. Specifically, how our communities develop and redevelop the land around lakes and streams plays a

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<sup>207</sup> Kent, Paul G. and Tamara A. Dudiak. *Wisconsin Water Law: A Guide to Water Rights and Regulations*, 2nd Ed., 2001, p. 38.

<sup>208</sup> Wis. Stat. § 59.692(7)(a)

<sup>209</sup> Wis. Stat. § 281.31

large role in whether those lakes and streams remain healthy for generations to come or are degraded and become a detriment to the community.

**Property values**

A recent study of over 1,000 waterfront properties found that when all other factors were equal, properties on lakes with clearer water commanded significantly higher property prices. In other words, people prefer clean water and will pay more to live on lakes with better water quality.<sup>210</sup>

**Water quality, fisheries and wildlife**

Maintaining good water quality, fisheries and wildlife in lakes and streams depends on three steps:

**1. Curb pollutants**

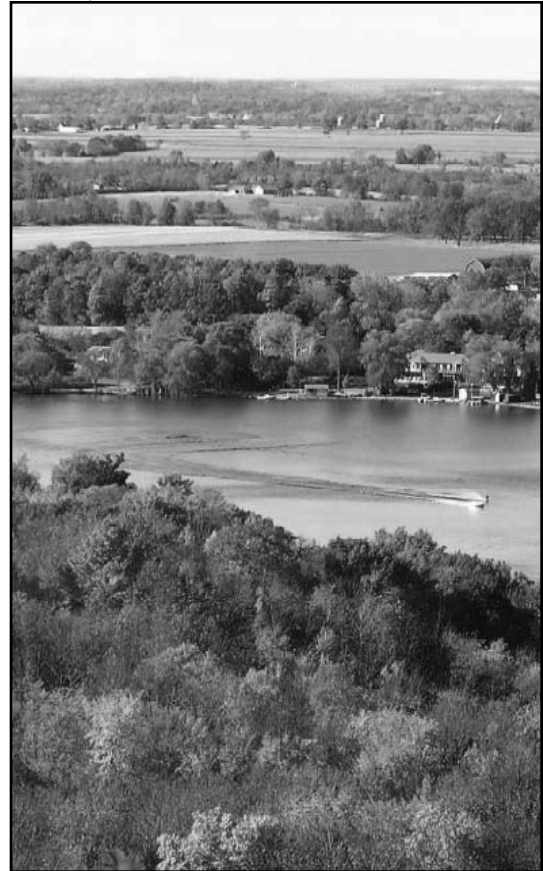
Curb pollutants at their source – fertilizers, eroding soils, malfunctioning septic systems, household toxins and agricultural runoff.

Phosphorus is an essential nutrient for plants. However, when too much phosphorus makes its way into our lakes and streams, it promotes the rapid growth of weeds and algae and decreases water clarity, often turning lakes green. Decaying algae also deplete oxygen in the water, so that fish can no longer thrive. Human activities contribute a great deal to the amount of phosphorus that enters a lake or stream.

Consider this – one pound of phosphorus in runoff can result in up to 500 pounds of algae growth! Phosphorus comes from soils and fertilizers, which are easily washed into lakes.

Since phosphorus is often bound to soil particles, one key to keeping phosphorus out of lakes and streams is to minimize the amount of land that is cleared or otherwise disturbed, so that soil erosion is minimized.

**Figure 35: Land Use Affects Water Quality**

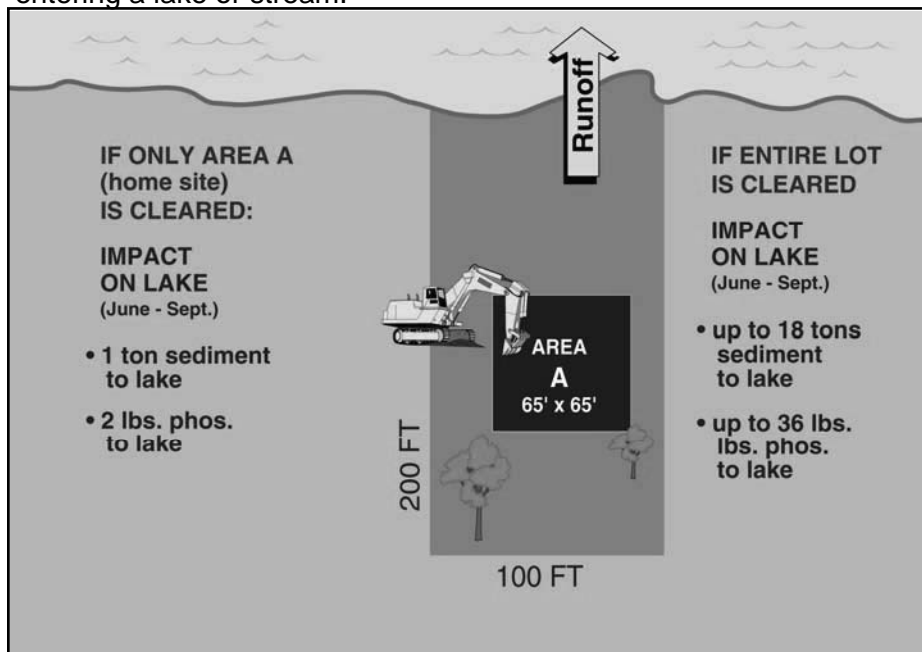


**Figure 36: Effects of Excessive Phosphorus** One pound of phosphorus can result in up to 500 pounds of algae growth.



<sup>210</sup> Krysel, Charles et al. *Lakeshore property values and water quality: Evidence from property sales in the Mississippi headwaters region*. June 2003. Mississippi Headwaters Board. Available: [www.mhbriverwatch.dst.mn.us/publications/lakeshore\\_property.pdf](http://www.mhbriverwatch.dst.mn.us/publications/lakeshore_property.pdf)

**Figure 37:** Less land clearing limits the amount of phosphorus entering a lake or stream.



Another approach is to attempt to capture the eroded soil before it enters the waterbody. As Figure 37 illustrates, completely clearing a half-acre lot can add up to 36 pounds of phosphorus to a lake or stream.

In addition to phosphorus, many other chemicals – from antifreeze to zylene – can pollute lakes and streams.

To curb pollutants, zoning board members may apply the following conditions. Land conservation employees or private licensed engineers may help create erosion control plans.

- Limit the area of grading and other disturbance and make the remainder of the parcel off-limits to heavy equipment.
- Maintain established trees and native plants with deep root systems to hold soil in place.
- Require a complete erosion control plan and inspection of erosion control measures prior to and during construction. Require bonding to repair damage if erosion control measures fail.
- Require a list of the chemicals and of the maximum quantities of them that will be used or stored in the shoreland zone. For instance, a nursery may use or store quantities of fertilizers and pesticides that could have a large impact on a nearby lake or stream. Gasoline and other toxic chemicals should also be considered. Use this information to decide whether the proposed use is reasonably suited for the location.
- To ensure that conditions are met, require self-reporting or independent inspections and use bonding or specific predetermined fines.

Keeping phosphorus or any other chemical 100% contained over a long timeframe is not feasible. Thus, the zoning board may decide that the potential for water pollution is too great on a site and deny the permit.



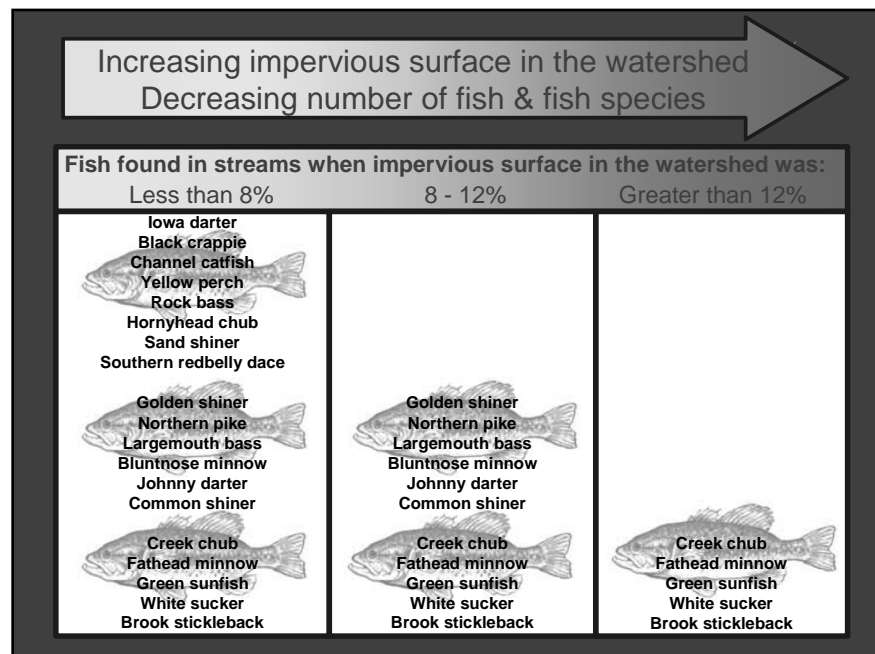
## 2. Cut runoff

Runoff is excess water that comes from hard surfaces like rooftops, driveways, parking areas, sidewalks, decks, and compacted soils. Gravel areas quickly become compacted and create nearly as much runoff as paved surfaces. Runoff water washes soil, fertilizer, car fluids and other pollutants into our lakes and streams. To reduce runoff, let water soak into the ground.

Lawns absorb little rainfall. In fact, a recent Wisconsin study found that lawns created much more runoff than wooded areas. As a consequence, the runoff from unfertilized lawns carried eight times more phosphorus to the lake than the runoff from similar sized wooded areas.<sup>211</sup>

Runoff also affects fisheries. Researchers studied 47 Wisconsin streams and found that fish and insect populations decline dramatically when more than 8-10% of the watershed is covered with hard surfaces such as rooftops, roads and driveway. Streams with more than 12% hard surfaces have consistently poor fish communities.<sup>212</sup> Not surprisingly, impervious surfaces closer to the water have a greater impact because there is less opportunity for the runoff from these areas to soak into the ground or be filtered before reaching the lake or stream.<sup>213</sup> Hard surfaces harm fisheries because:

**Figure 38:** Impervious surfaces greater than 8% of the watershed decrease fish in streams.



<sup>211</sup> Graczyk, David J. et al. *Hydrology, nutrient concentrations, and nutrient yields in nearshore areas of four lakes in northern Wisconsin, 1999-2001, 2003*. USGS Water Resources Investigation Report 03-4144, p.41. Available: <http://pubs.usgs.gov/wri/wri03-4144>

<sup>212</sup> Wang, L., J. Lyons, P. Kanehl, R. Bannerman, and E. Emmons 2000. "Watershed Urbanization and Changes in Fish Communities in Southeastern Wisconsin Streams." *Journal of the American Water Resources Association*. 36:5(1173-1187); Wang, L., J. Lyons, and P. Kanehl 2001. "Impacts of Urbanization on Stream Habitat and Fish across Multiple Spatial Scales." *Environmental Management*. 28(2):255-266.

<sup>213</sup> Wang, L., J. Lyons, and P. Kanehl 2001. "Impacts of Urbanization on Stream Habitat and Fish across Multiple Spatial Scales." *Environmental Management*. 28(2):255-266.

- Warm runoff from roads and other hard surfaces raises water temperatures and decreases oxygen levels, eliminating some fish species,
- Sediment carried in the runoff creates cloudy water, so fish that hunt by sight have a hard time finding dinner,
- Sediment covers spawning areas and clogs the gills of some fish, and
- Streams become ‘flashy’, meaning runoff occurs more quickly after a storm, peak flows become larger, and critical dry season flows decrease because less groundwater recharge is available.

To cut runoff, zoning board members may apply the following conditions. Land conservation employees or private engineers can help design or approve effective designs.

- Limit the area of impervious surfaces. This can be done by narrowing roads and driveways and building up rather than out or by replacing conventional hard surfaces with alternatives such as green roofs and pervious pavers.
- Locate impervious surfaces as far as possible from lakes and streams and in locations where their runoff will soak into the ground or at least be substantially filtered prior to entering the water body.
- Maintain established trees and native plants whose deep root systems hold soil in place and extend each year to create new pores in the soil that allow water to soak in.
- Limit the area of compacted soils that prevent water from soaking in. To do this, limit the area compacted by heavy equipment and other vehicles.
- Minimize grading that removes the natural divots where water naturally collects and has time to soak in.
- Consider requiring landowners to decompact soil after construction in areas where compaction is not necessary to support buildings, roads or driveways. A review of methods that are and are not effective is available from the Center for Land Use Education.
- To ensure that conditions are met, require self-reporting or independent inspections and use bonding or specific predetermined fines.
  - To impress upon a contractor that he was serious about not removing unmarked trees, a landowner having a motel built on his shoreland property included a fine of \$10,000 per unmarked tree that was damaged.

A proposal may create more runoff than can soak in on the lot. To avoid adversely affecting neighboring landowners, lakes or streams, the zoning board may decide to deny the permit.

### 3. Capture and cleanse

If pollutants are present and hard surfaces increase the amount of runoff carrying pollutants toward the lake, the last line of defense is to capture and cleanse the runoff before it reaches the waterway by using shoreland buffers, rain gardens, rain barrels or engineered approaches.

Natural shorelands contain a lush mixture of native grasses, flowers, shrubs and trees that help to filter polluted runoff and provide important habitat for animals in the water and on the land. Trees and branches that have fallen in the water provide another important component of wildlife habitat—natural fish cribs, basking areas for reptiles, and feeding sites. If a property has lawn to the water's edge, the best place to start planting to improve water quality is in the area where the most water runs off your property. Larger areas of natural shoreline provide more benefits.

A mature native buffer represents many years of nature at work and discourages undesirable, exotic plants and animals while attracting songbirds, butterflies, turtles and frogs.

**Figure 39:** Intact Shoreland Buffers Cleanse Runoff



To capture and cleanse runoff, zoning board members may apply the following conditions. Land conservation employees, professional licensed engineers and natural landscaping professionals may help create storm water management plans.

- Require a storm water management plan with a defined performance standard (e.g., no net increase in storm water runoff from a 50 year storm). Storm water practices may include green rooftops, pervious pavers, infiltration basins/raingardens, buffer strips, etc.
- Maintain established plants, including trees and native plants with stiff stems to slow down and filter runoff. The plants also provide essential food and habitat for wildlife.
- Require downspouts to be directed to lawn or landscaping, not onto hard surfaces.
- Require rain gardens that collect water during wet times and serve as beautiful gardens all the time. They are landscaped areas planted to wildflowers and other native vegetation to replace areas of lawn. The gardens fill with a few inches of water and allow the water to slowly filter into the ground. To determine the necessary size to capture runoff from hard surfaces, see the publication *Rain Gardens: A How-To Manual for Homeowners* (<http://clean-water.uwex.edu/pubs/pdf/home.rgmanual.pdf>).
- Require shoreline buffer restoration or expansion to filter runoff. See the publication *Protecting and Restoring Shorelands* at <http://clean-water.uwex.edu/pubs/pdf/shore.protect.pdf> to find out how large of a buffer is needed to achieve various benefits.
- To ensure that conditions are met, require self-reporting or independent inspections and use bonding or specific predetermined fines.

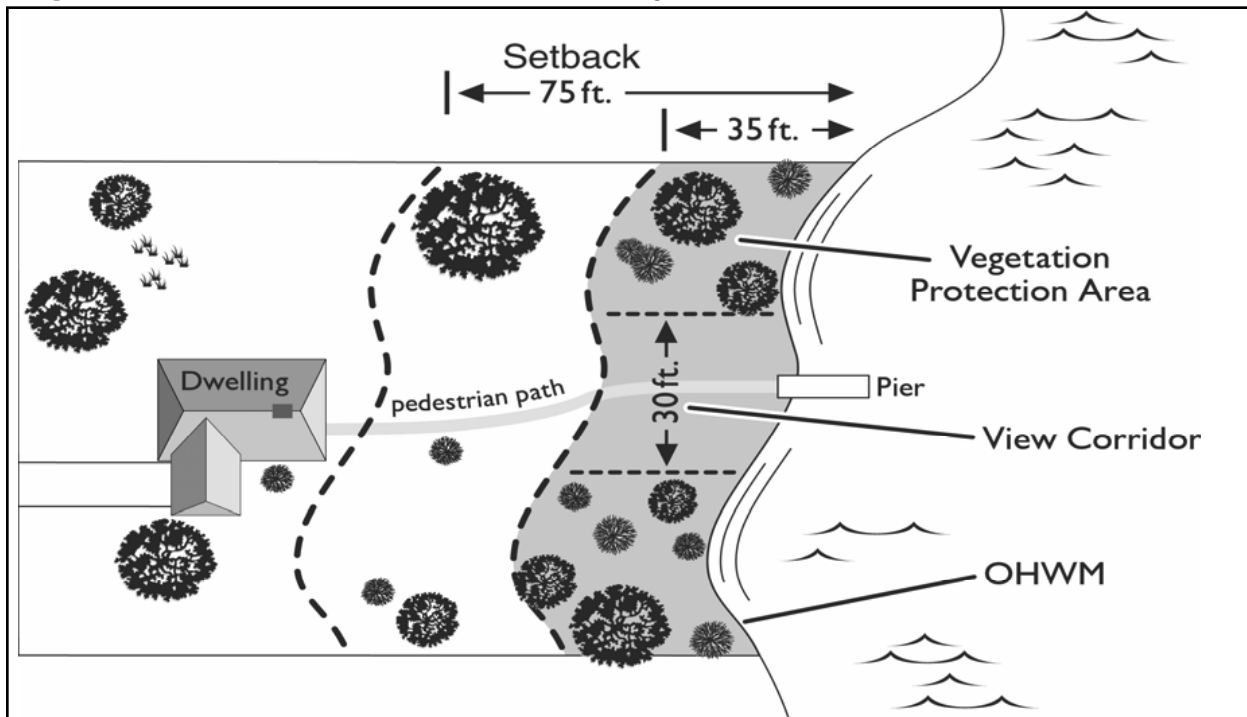
A proposal may create more runoff than can be captured and cleansed on the lot. To avoid adversely affecting neighboring landowners, lakes or streams the zoning board may decide to deny the permit.

### Minimum statewide shoreland zoning standards

To achieve the purposes of shoreland zoning, the state sets minimum building setbacks, restrictions on shoreline vegetation removal, and minimum lot sizes to limit the density of development. Many counties have adopted standards that are more restrictive than state minimum standards. The state minimum standards are described generally in *Figure 40*.<sup>214</sup>

Area variances in shoreland areas compromise water quality, fish and wildlife habitat, and natural scenic beauty. The effects

<sup>214</sup> Figure created by Jeffrey Strobel, Environmental Resources Center, for *Wisconsin Water Law: A Guide to Water Rights and Regulations*, 2nd Ed., 2001.

**Figure 40:** Minimum Statewide Shoreland Zoning Standards

**Limited removal of shoreline vegetation**—In the 35-foot strip adjacent to the ordinary high water mark, no more than 30 feet in any 100 feet may be clear cut.<sup>215</sup>

**Building setbacks**—Unless a development pattern exists, a setback of 75 feet from the ordinary high water mark is required for structures except piers, boat hoists and boathouses.<sup>216</sup> A limited exception is available for certain minor structures in exchange for shoreline revegetation.<sup>217</sup>

**Minimum lot sizes**—Unsewered lots must have a 100 foot minimum average width and 20,000 square feet. Sewered lots must have a 65 foot minimum average width and 10,000 square feet.<sup>218</sup>

of variances, though they may be imperceptible on an individual site, accumulate lot by lot throughout the shoreland. For instance, runoff from structures located too close to the shore quickly carries nutrients and sediment to a lake or stream with very little opportunity for a shoreland buffer to filter contaminants or infiltrate runoff. Consequently, many communities limit variances to minimize impacts on public waters.<sup>219</sup>

<sup>215</sup> Wis. Admin. Code § NR 115.05 (3)(c)

<sup>216</sup> Wis. Admin. Code § NR 115.05 (3)(b)

<sup>217</sup> Wis. Stat. § 59.692(1v)

<sup>218</sup> Wis. Admin. Code § NR 115.05 (3)(a)

<sup>219</sup> *Creating an Effective Shoreland Zoning Ordinance: A Summary of Wisconsin Shoreland Zoning Ordinances, 2000*, DNR publication #WT-542-00. See Appendix C for ordering information.

**For more information on how shoreland management affects lakes and streams, read—**

*Phosphorus in Lawns, Landscapes and Lakes.* 2004. Minnesota Department of Agriculture and partners. Phone: 651-296-6121 Available: [www.mda.state.mn.us/appd/ace/phosphorusguide.pdf](http://www.mda.state.mn.us/appd/ace/phosphorusguide.pdf)

*Protecting Your Waterfront Investment: 10 Simple Shoreland Stewardship Practices.* 2005. UWEX Publication GWQ044 and Wisconsin DNR (WT-821 2005). Available: [www.uwsp.edu/cnr/landcenter/Publications/waterfront.pdf](http://www.uwsp.edu/cnr/landcenter/Publications/waterfront.pdf)

*Shoreland Development Density and Impervious Surfaces.* (research summary) 2003. Center for Land Use Education. Available: [www.uwsp.edu/cnr/landcenter/pdffiles/Imp\\_Surf\\_Shoreland\\_Dev\\_Density.pdf](http://www.uwsp.edu/cnr/landcenter/pdffiles/Imp_Surf_Shoreland_Dev_Density.pdf)

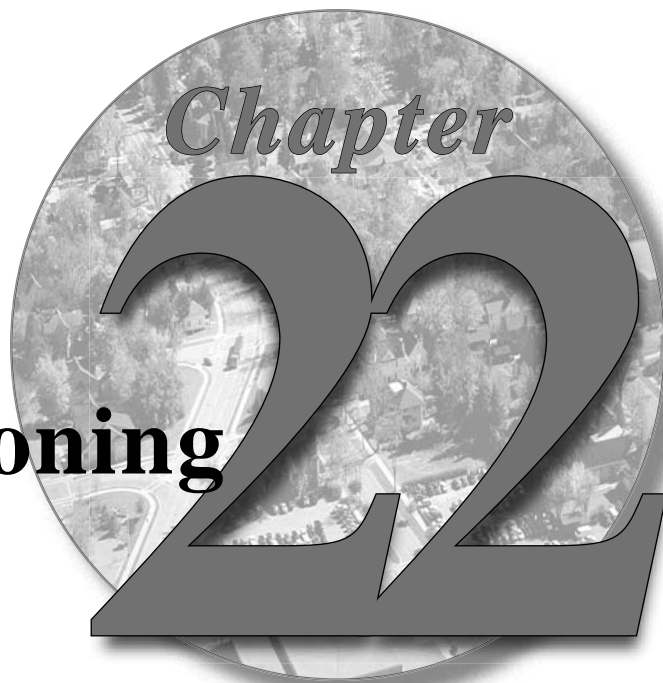
*Erosion Control for Homebuilders.* 1996. UW-Extension (GWQ001) and Wisconsin DNR (WT-457-96) Available: <http://clean-water.uwex.edu/pubs/pdf/storm.erosio.pdf>

*A Storm on the Horizon: An Educational Video on the Effects of Stormwater on Our Rivers.* 18 minute video by Trout Unlimited. Phone: 715-386-7568 or [andrewlamberson@hotmail.com](mailto:andrewlamberson@hotmail.com)

*Rain Gardens: A How-To Manual for Homeowners.* 2003. UW-Extension (GWQ037) and Wisconsin DNR (WT-776 2003) Phone: 608-267-7694 Available: <http://clean-water.uwex.edu/pubs/pdf/home.rgmanual.pdf>

*The Waters Edge: Helping Fish and Wildlife on Your Waterfront Property.* 2000. Wisconsin DNR (PUB-FH-428 00). Available: [www.dnr.state.wi.us/org/water/fhp/fish/pubs/thewatersedge.pdf](http://www.dnr.state.wi.us/org/water/fhp/fish/pubs/thewatersedge.pdf)

# Floodplain Zoning



## Where does floodplain zoning apply?

A community that has been issued official floodplain maps by the DNR must adopt and administer a floodplain zoning ordinance.<sup>220</sup> As a consequence, citizens in the community become eligible to apply for federal flood insurance. A state administrative rule (NR 116) sets minimum standards for local ordinances.

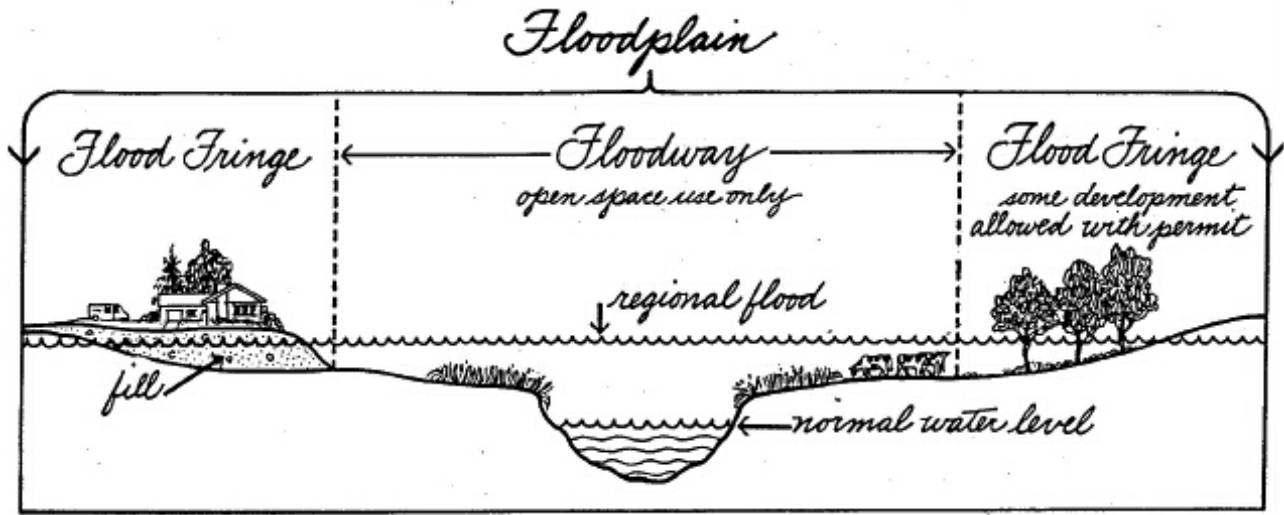
The **floodplain** consists of lands that are subject to flooding during the regional flood. The floodplain includes floodway and flood fringe zones. Regional flood elevations are calculated by hydraulic models that consider the size of a drainage basin, amount of precipitation and land characteristics. They are also based on evidence of previous flooding.

The **floodway** consists of the channel of a river or stream, and those portions of the floodplain adjoining the channel that are required to carry the regional flood discharge. The floodway is the most dangerous part of the floodplain. It is characterized by deeper moving water.

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<sup>220</sup> Wis. Stat. § 87.30(1)

Figure 41: Floodplain Illustration



The **flood fringe** is the portion of the floodplain landward of the floodway. It is generally associated with standing water rather than flowing water and with shallower depths.

### **What are the purposes of floodplain zoning?**

The purposes of floodplain zoning are to protect human life, health and to minimize property damages and economic losses.



# Section VII – Review

## **Keywords**

- Ordinary high water mark
- Floodplain
- Floodway
- Flood fringe

## **Test your Knowledge** (answers on page 152)

### **Chapter 21 – Shoreland Zoning**

- 1) Name the five statewide purposes of shoreland zoning.
- 2) Does your local shoreland zoning ordinance provide any additional purpose statements?
- 3) A recent study of waterfront properties found that one factor resulted in significantly higher property prices. What is that one factor?
- 4) Name three steps that zoning boards can take to maintain good water quality, fisheries and wildlife in lakes and streams.
- 5) When the impervious surfaces in a watershed exceed a certain level the number of fish and fish species decreases significantly. What percentage is this?

### **Chapter 22 – Floodplain Zoning**

- 6) Name the purposes of floodplain zoning.

**Answers**

- 1)
  - a. Maintain safe and healthful conditions
  - b. Prevent and control water pollution
  - c. Protect spawning grounds, fish, and aquatic life
  - d. Control building sites, placement of structures, and uses; and
  - e. Reserve shore cover and natural beauty
- 2) Answers may vary
- 3) Clearer water
- 4)
  - a. Curb pollutants
  - b. Cut runoff
  - c. Capture and cleanse
- 5) 8%
- 6)
  - a. Protect human life and health
  - b. Minimize property damage and economic losses

# Reference Materials



## **Zoning Boards of Adjustment and Appeals**

*Zoning Board Handbook for Zoning Boards of Adjustment/ Appeals*, 2nd edition. Lynn Markham and Rebecca Roberts. 2006, Published by Center for Land Use Education at 715-346-3783 or [www.uwsp.edu/cnr/landcenter/pubs.html](http://www.uwsp.edu/cnr/landcenter/pubs.html)

*Guide for County Boards of Adjustment*, 3rd edition. Robert Horowitz and Richard C. Yde. 2004. 41 pages. Addresses related topics in question and answer form with legal citations. Published by Wisconsin County Mutual Insurance Corporation at 608-224-5330.

*The Board of Adjustment*. V. Gail Easley and David A Theriaque. 2005. Available from APA Planners Press at 312-431-9100 or [www.planning.org/bookservice](http://www.planning.org/bookservice), libraries and bookstores.

*The Zoning Board Manual*. Frederick H. Bair, Jr. 1984. Available from APA Planners Press at 312-431-9100 or [www.planning.org/bookservice](http://www.planning.org/bookservice), libraries and bookstores.

## Zoning

*Zoning*. Adapted by Kevin Struck from Brian Ohm's Guide to Community Planning in Wisconsin. Available on the Center for Land Use Education website at <http://www.uwsp.edu/cnr/landcenter/pubs.html>

"The Zoning Ordinance." Chapter 16 in *The Small Town Planning Handbook*, 2nd edition. Thomas L. Daniels, John W. Keller and Mark B. Lapping. 1995. 305 pages. Available from APA Planners Press at 312-431-9100 or [www.planning.org/bookservice](http://www.planning.org/bookservice), libraries and bookstores.

*The Citizens Guide to Zoning*. Herbert H. Smith. 1983. 242 pages. Available from libraries and bookstores.

## Local Government

*Wisconsin Town Officer's Handbook*, 2nd edition. James H. Schneider and Richard Stadelman (editor). 2006. 292 pages. Published by the Wisconsin Towns Association at (715) 526-3157 or <http://www.wisctowns.com>

*Handbook for Wisconsin Municipal Officials*. 2002. Published by the League of Wisconsin Municipalities at 608-267-2380 or <http://www.lwm-info.org/>

*Wisconsin County Supervisor's Handbook*. 2004. 142 pages. Published by the Wisconsin Counties Association at 1-866-404-2700 or <http://www.wicounties.org/>

## Planning and Zoning Committees/Commissions

*Plan Commission Handbook*. 2002. 84 pages. Published by Center for Land Use Education at 715-346-3783 or [www.uwsp.edu/cnr/landcenter/pubs.html](http://www.uwsp.edu/cnr/landcenter/pubs.html)

*Job of the Planning Commissioner*. 3rd edition revised. Albert Solnit. 1987. 198 pages. Available from libraries and bookstores.

## **Open Meetings Law**

*Wisconsin Open Meetings Law: A Compliance Guide.* Peggy A. Lautenschlager, Attorney General, Wisconsin Department of Justice. 2005. 38 pages. Explains Wisconsin's Open Meetings Law and discusses significant cases that have an impact on the law's implementation. Available at: [www.doj.state.wi.us/AWP/OpenMeetings/2005-OML-GUIDE.pdf](http://www.doj.state.wi.us/AWP/OpenMeetings/2005-OML-GUIDE.pdf)

*Understanding Wisconsin's Open Meeting Law.* Burt P. Natkins and James H. Schneider. 1994. 145 pages. Describes application of the open meeting law, required notice, exemptions and more. Available from Local Government Services, Inc., 185 W. Netherwood St., Oregon, WI 53575-1153 or 608-835-7761.

## **Public Records Law**

*Wisconsin Public Records Law: Compliance Outline.* Peggy A. Lautenschlager, Attorney General, Wisconsin Department of Justice. 2005. 57 pages. Explains Wisconsin's Public Records Law and discusses significant cases that have an impact on the law's implementation. Available at: [www.doj.state.wi.us/dls/docs/publicrecords805.pdf](http://www.doj.state.wi.us/dls/docs/publicrecords805.pdf)

## **Water Law**

*Wisconsin Water Law: A Guide to Water Rights and Regulations,* 2nd edition. Paul G. Kent and Tamara A. Dudiak. 2001. Available from Cooperative Extension Publications at 608-262-3346.

## Newsletters

*Land Use Tracker.* Four issues per year covering Wisconsin land use issues, including zoning. Available on-line from the Center for Land Use Education at [www.uwsp.edu/cnr/landcenter/newsletters.html](http://www.uwsp.edu/cnr/landcenter/newsletters.html)

*Zoning Bulletin.* Monthly bulletins summarizing the most significant recent zoning lawsuits from throughout the United States. Available from 800-229-2084 or [www.qpgmunicipal.com/zo.shtml](http://www.qpgmunicipal.com/zo.shtml)

*Zoning News.* Monthly four-page newsletter monitors the latest trends in local land-use controls using case studies. Available at 312-431-9100 or [www.planning.org/ZoningNews/index.htm](http://www.planning.org/ZoningNews/index.htm)

*Plan Commissioners Journal.* Four issues per year, about 20 pages per issue, about planning and zoning issues. Available from 802-864-9083 or [www.plannersweb.com](http://www.plannersweb.com)

## Websites

UW-Extension Center for Land Use Education  
[www.uwsp.edu/cnr/landcenter](http://www.uwsp.edu/cnr/landcenter)

UW-Extension Local Government Center  
[www.uwex.edu/lgc/](http://www.uwex.edu/lgc/)

Wisconsin DNR shoreland zoning  
[www.dnr.state.wi.us/org/water/wm/dsfm/shore/title.htm](http://www.dnr.state.wi.us/org/water/wm/dsfm/shore/title.htm)

Wisconsin DNR floodplain zoning  
[www.dnr.state.wi.us/org/water/wm/dsfm/flood/rules.htm](http://www.dnr.state.wi.us/org/water/wm/dsfm/flood/rules.htm)

American Planning Association  
[www.planning.org](http://www.planning.org)

# Legal Resources



When legal writers make assertions about the law or quote or paraphrase published sources, they must support each statement with a reference to the original material. This legal citation or cite may be to a particular court opinion, a statute, an administrative opinion, a regulation, or a secondary authority such as a treatise or a law review article.<sup>221</sup> This appendix provides a primer on the organization and referencing systems used for locating state and local regulations and case law.

## State Regulations

The terms used to identify legislative acts can be confusing. The state legislature adopts laws called statutes (e.g., Wisconsin Statutes Chapter 59: Counties, or Wis. Stat. § 59). These laws often provide only general policies. State agencies hold public hearings and adopt administrative rules to provide the detailed regulations needed to implement general statutory policies. After review by the state legislature, administrative rules have the full force of law (e.g., Wisconsin Administrative Code ch. NR 115: Shoreland Management, or Wis. Admin. Code ch. NR 115).

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<sup>221</sup> Information excerpted from *Introduction to Legal Materials: A Manual for Non-Law Librarians in Wisconsin* by the Law Librarians Association of Wisconsin. Available at: <http://www.aallnet.org/chapter/llaw/paliguide/>.

### *Annotations*

Following each affected section of state statutes you will often find annotations that provide information on the history of the section, interpretative notes, related court decisions or attorney general opinions, and published articles.

State statutes and administrative rules are available at many libraries and on-line at: [www.legis.state.wi.us](http://www.legis.state.wi.us).

## **Local Ordinances**

Similar to state statutes and administrative rules, local ordinances are organized and referenced in the following manner.

### *Numbering systems*

Understanding the numbering system, terms and abbreviations used to identify specific provisions and to organize an ordinance or statute is essential to interpretation. The following example from Wisconsin Statutes illustrates an organizational scheme that must be mastered in order to determine a law's meaning. For example, "s. 8.31(2)(a)" in an ordinance refers to:

Chapter = ch. 8

Section = s. 8.31 (literally "section 31 of chapter 8" but common usage is "section 8 point 31")

Subsection = sub. (2)

Paragraph = par. (a)

### *Internal references*

The entire citation is often not used to refer to a provision within the same section. For example, in s. 8.31(2), "sub. (b)" refers to s. 8.31(2)(b).

## **Case Law**

Case law is the dynamic body of law containing legal principles derived from the application of law to individual court cases. Case law records the facts of controversy within a case, explains the judges' decisions, and in some cases provides judges' dissenting opinions. Following exhaustion of local relief remedies, zoning decisions may be appealed through several levels of court, starting with the circuit courts and preceding through the court of appeals, and in rare instances the Wisconsin Supreme Court or U.S. Supreme Court. When examining the findings of similar cases, higher court decisions take precedent over lower court decisions.

Citations to court decisions generally begin with the name of the case, which is usually in the form of Plaintiff v. Defendant. The first number to appear will be a reference to a volume number. Following the first number is an abbreviation for a court reporter. Lists of these abbreviations and the titles for which they stand are included as appendices in many legal research texts. Following the reporter abbreviation a series number may appear, such as 2d.





## Websites for Accessing Wisconsin Court Decisions

Wisconsin Supreme Court decisions released since September 1995

<http://www.courts.state.wi.us/opinions/sopinion.htm>

Wisconsin Court of Appeal decisions released since June 1995

<http://www.courts.state.wi.us/opinions/aopinion.htm>

Older Wisconsin Supreme Court and Court of Appeal decisions

[http://web.lexis-nexis.com/universe/form/academic/s\\_casecite.html](http://web.lexis-nexis.com/universe/form/academic/s_casecite.html)

DNR's *Zoning Case Law in Wisconsin*. Includes summaries of published decisions of the Wisconsin Supreme Court and Court of Appeals relevant to shoreland and floodplain zoning in Wisconsin. DNR Publication # WT-540, Revised October 2004.

<http://www.dnr.wi.gov/org/water/wm/dsfm/shore/documents/zoning-case-law-2004.pdf>

To request supplemental updates, contact:

WDNR Dam Safety/Floodplain/Shoreland Section

101 S. Webster St.

P.O. Box 7921

Madison, WI 53707-7921

Telephone: 608-266-8030

# Appendix

## Who Decides Whether to Grant Conditional Uses and Special Exceptions

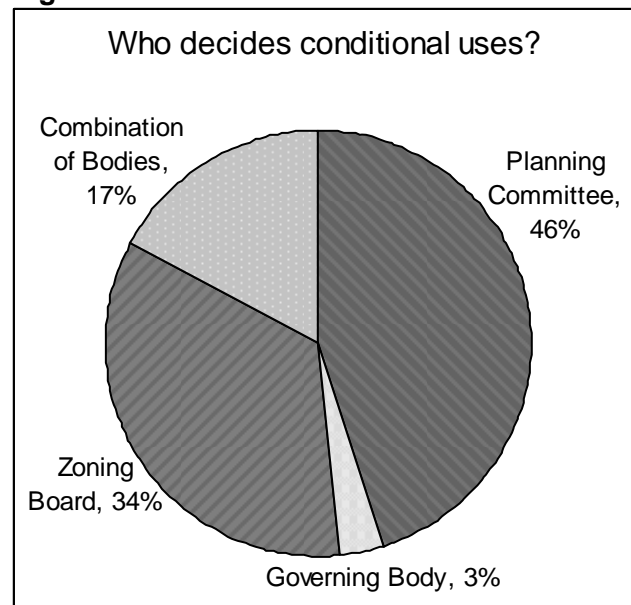
**Conditional use** is used in this appendix to mean both conditional uses and special exceptions.

The local governing body must determine by ordinance whether the zoning board, the governing body or the planning commission/committee will decide special exceptions and conditional use permits.<sup>223</sup> *Figure 44* shows who decides conditional uses for Wisconsin counties based on a 2004 survey completed by 31 counties.

When the local ordinance is written or amended to determine which body is best suited to decide conditional uses, consider the following factors:

- **Plan commission/committee** - This body commonly decides conditional use permits

**Figure 44:** Conditional Use Decision Makers



<sup>223</sup> Counties - Wis. Stat. § 59.694(7)(a); Cities, villages and towns with village powers - Wis. Stat. § 62.23(7)(e)1

because they are usually the most knowledgeable about the community plan and zoning ordinance, as well as relevant state statutes and case law. The plan commission/committee is continuously involved in the process of recommending legislative changes in the zoning ordinance and is therefore more apt to be conversant with the “purpose and intent” of the ordinance than the zoning board.<sup>224</sup> In some cases, the plan commission/committee makes recommendation on conditional use permits to the governing body.

There are drawbacks to the plan commission/committee deciding conditional use permits. Their biases about ordinance provisions may be on record from the time of ordinance adoption/amendment. In addition, there could be a conflict between the role of being an unbiased decision maker when deciding conditional use permits and the fact that some plan commission/committee members are elected and may be tempted to represent their constituents rather than make objective decisions based on applicable standards and evidence in the record.

- **Governing body** - The governing body typically does not know the ordinance as thoroughly as the plan commission/committee and often already has a full workload. Sometimes, the plan commission/committee makes a recommendation to the governing body on conditional use permits. The governing body has the same drawbacks as the plan commission/committee in deciding conditional use permits by having recorded biases and being elected officials. Additionally, the total amount of time invested in conditional use permit decisions will likely increase significantly if assigned to the governing body as it has many more members than either of the other two bodies.
- **Zoning board** - This body should be relatively familiar with the zoning ordinance due to its responsibilities for deciding variances and administrative appeals, yet may not consider community-wide planning issues to the same extent as the plan commission/committee. Because zoning board members are appointed rather than elected, they clearly do not represent a group of constituents and are less likely to be biased.

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<sup>224</sup> *State ex rel. Skelly Oil Co. v. City of Delafield*, 58 Wis. 2d 695, 207 N.W.2d 585 (1973)

# Sample Forms



The following sample forms provide information about the information necessary to make a decision, and the legal decision standards from Wisconsin law. Please tailor the forms to better suit your local situation. Specifically, you may want to:

- Require more or less factual information from the applicant, and
- Insert additional decision standards or procedural requirements from local ordinances or by-laws.

The forms are available on-line as Word documents for easy modification at [www.uwsp.edu/cnr/landcenter/pubs-documents.html](http://www.uwsp.edu/cnr/landcenter/pubs-documents.html)

1. Hearing Appearance Slip, page 164
2. Administrative Appeal Application, page 165
3. Conditional Use Application, page 166
4. Variance Application, page 167
5. Decision Form, page 174
6. Decision Self-Audit Form, page 177

*Hearing Appearance Slip*

Date:

\_\_\_\_\_

Hearing name/number:

\_\_\_\_\_

Regarding:

\_\_\_\_\_

Name:

\_\_\_\_\_

Address:

\_\_\_\_\_

Representing:

\_\_\_\_\_

- I wish to speak in favor of the appeal or application.
- I wish to speak in opposition of the appeal or application.
- I wish to speak for informational purposes only.

Comments:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Tear off this portion and deliver to the Board Chair)

**Instructions for witnesses:**

- Complete an appearance slip and deliver it to the Board chair.
- You will be recognized by the Board chair when you are to speak.
- Your testimony may be sworn if required by rules of the Board.
- Direct all comments, questions and replies to the chair.
- When asked to speak:
  1. State your name and place of residence.
  2. Indicate whether you represent a group or association.
  3. Indicate whether or not you favor the appeal or application or are speaking for informational purposes.
  4. Please state your qualifications to speak on this matter or the source of your information.
  5. Limit your testimony to facts relevant to the case at hand.
  6. Limit your comments to the time period specified by the chair.
  7. Avoid repetitive testimony.

\_\_\_\_\_ Zoning Board of Adjustment/Appeals

[address for correspondence with the zoning board]

### *Administrative Appeal Application*

\_\_\_\_\_ Zoning Board of Adjustment/Appeals

Petition # \_\_\_\_\_ Date filed \_\_\_\_\_  \$ \_\_\_\_\_ fee paid (payable to \_\_\_\_\_)

Name	
Address	
Phone	

Legal description: \_\_\_\_ 1/4, \_\_\_\_ 1/4, S \_\_\_\_, T \_\_\_\_ N, R \_\_\_\_ E  
 City/Village/Town of \_\_\_\_\_  
 Fire number \_\_\_\_\_ Tax parcel number \_\_\_\_\_  
 Lot area & dimensions: \_\_\_\_\_ sq. ft., \_\_\_\_\_ x \_\_\_\_\_ ft.  
 Zoning district \_\_\_\_\_  
 Current use & improvements \_\_\_\_\_

Nature & disposition of any prior petition for appeal, variance or conditional use \_\_\_\_\_

Description of all nonconforming structures & uses on the property \_\_\_\_\_

**Reason for Appeal** (Check the type of administrative decision appealed.)

Zoning district boundary dispute (location and districts involved) \_\_\_\_\_

Describe petitioner's boundary location criteria: \_\_\_\_\_

Describe petitioner's boundary determination: \_\_\_\_\_

Ordinance interpretation (include section number) \_\_\_\_\_

Describe petitioner's interpretation and rationale: \_\_\_\_\_

Administrative decision/measurement/order in dispute \_\_\_\_\_

I certify that the information I have provided in this application is true and accurate.

Signed: \_\_\_\_\_ Date: \_\_\_\_\_  
Petitioner

Remit to: [Zoning office address, phone & e-mail]

### *Conditional Use/Special Exception Application*

\_\_\_\_\_ (Governing Body/Committee/Commission/Zoning Board)

Date filed \_\_\_\_\_  \$\_\_\_\_\_ fee paid (payable to \_\_\_\_\_)

	Owner or agent	Contractor
Name		
Address		
Phone		

Legal description: \_\_\_\_ 1/4, \_\_\_\_ 1/4, S \_\_\_\_, T \_\_\_\_ N, R \_\_\_\_ E  
 City/Village/Town of \_\_\_\_\_  
 Fire number \_\_\_\_\_ Tax parcel number \_\_\_\_\_  
 Lot area & dimensions: \_\_\_\_\_ sq. ft., \_\_\_\_\_ x \_\_\_\_\_ ft.  
 Zoning district \_\_\_\_\_  
 Current use & improvements \_\_\_\_\_

Nature & disposition of any prior petition for appeal, variance or conditional use  
 \_\_\_\_\_

Description of all nonconforming structures & uses on the property \_\_\_\_\_  
 \_\_\_\_\_

Conditional use requested (ordinance section # & specific use):  
 \_\_\_\_\_

General standards for approval:  
 \_\_\_\_\_  
 \_\_\_\_\_

Specific (design) standards for approval:  
 \_\_\_\_\_  
 \_\_\_\_\_

Design/practices proposed to achieve standards:  
 \_\_\_\_\_  
 \_\_\_\_\_

Attach a plat or other map of your site and detailed construction plans.

I certify that the information I have provided in this application is true and accurate.

Signed: \_\_\_\_\_ Date: \_\_\_\_\_  
                     Applicant/Agent/Owner

Remit to: [Zoning office address, phone & e-mail]



## *Variance Application*

A variance is a relaxation of a standard in a land use ordinance. Variances are decided by the zoning board of adjustment/appeals. The zoning board is a quasi-judicial body because it functions almost like a court. The board's job is not to compromise ordinance provisions for a property owner's convenience but to apply legal criteria provided in state laws, court decisions and the local ordinance to a specific fact situation. Variances are meant to be an infrequent remedy where an ordinance imposes a unique and substantial burden.

### **Process**

At the time of application you will be asked to:

1. **Complete an application** form and submit a \$\_\_\_\_\_ fee;
2. **Provide detailed plans** describing your lot and project (location, dimensions and materials);
3. **Provide a written statement** of verifiable facts showing that your project meets the legal criteria for a variance (Three Step Test in Part 2); and
4. **Stake out lot corners or lines**, the proposed building footprint and all other features of your property related to your request so that the zoning board may inspect the site.

Following these steps, the zoning agency will publish notice of your request for a variance in the county's official newspaper noting the location and time of the required public hearing before the zoning board. Your neighbors and any affected state agency will also be notified. The burden will be on you as property owner to provide information upon which the board may base its decision. At the hearing, any party may appear in person or may be represented by an agent or attorney. You or your agent must convince the zoning board to make a ruling in your favor. The board must make its decision based only on the evidence submitted to it at the time of hearing. Unless you or your agent is present, the board may not have sufficient evidence to rule in your favor and must then deny your application.

## Variance Application

\_\_\_\_\_ Zoning Board of Adjustment/Appeals

**Part 1: General information and alternatives analysis**

*To be completed jointly by the applicant and zoning staff.*

Petition # \_\_\_\_\_ Date filed \_\_\_\_\_  \$\_\_\_\_\_ fee paid (payable to \_\_\_\_\_)

	Owner/agent	Contractor
Name		
Address		
Phone		

Legal description: \_\_\_\_ 1/4, \_\_\_\_ 1/4, S \_\_\_\_, T \_\_\_\_ N, R \_\_\_\_ E  
 City/Village/Town of \_\_\_\_\_  
 Fire number \_\_\_\_\_ Tax parcel number \_\_\_\_\_  
 Lot area & dimensions: \_\_\_\_\_ sq. ft., \_\_\_\_\_ x \_\_\_\_\_ ft.  
 Zoning district \_\_\_\_\_

Current use & improvements:

Description of any prior petition for appeal, variance or conditional use:

Description and location of all nonconforming structures & uses on the property:

Ordinance standard from which variance is being sought (section number and text):

Describe the variance requested:

Type of variance requested:

\_\_\_\_\_ **use variance** – permits a landowner to put a property to an otherwise prohibited use.

\_\_\_\_\_ **area variance** – provides an increment of relief (normally small) from a physical dimensional restriction such as a building height or setback.



**Part 2: Three-Step Test**

To qualify for a variance, the applicant must demonstrate that their property meets the following three requirements.

1) Unique property limitations *(To be completed by the applicant)*

Unique physical limitations of the property such as steep slopes or wetlands that are not generally shared by other properties must prevent compliance with ordinance requirements. The circumstances of an applicant (growing family, need for a larger garage, etc.) are not a factor in deciding variances. Nearby ordinance violations, prior variances or lack of objections from neighbors do not provide a basis for granting a variance. Property limitations that prevent ordinance compliance and are common to a number of properties should be addressed by amending the ordinance.

Do unique physical characteristics of your property prevent compliance with the ordinance?

€ Yes. Where are they located on your property? Please show the boundaries of these features on the site map that you used to describe alternatives you considered.

€ No. A variance cannot be granted.

2) No Harm to Public Interests *(To be completed by zoning staff)*

A variance may not be granted which results in harm to public interests. In applying this test, the zoning board must consider the impacts of the proposal and the cumulative impacts of similar projects on the interests of the neighbors, the entire community and the general public. These interests are listed as objectives in the purpose statement of an ordinance and may include:

- *Public health, safety and welfare*
- *Water quality*
- *Fish and wildlife habitat*
- *Natural scenic beauty*
- *Minimization of property damages*
- *Provision of efficient public facilities and utilities*
- *Achievement of eventual compliance for nonconforming uses, structures and lots*
- *Any other public interest issues*

Ordinance purpose:

Purpose(s) of standard from which variance is requested:

Analysis of impacts

Discuss impacts that would result if the variance was granted. For each impact, describe potential mitigation measures and the extent to which they reduce project impact (completely, somewhat, or minor). Mitigation measures must address each impact with reasonable assurance that it will be reduced to an insignificant level in the short term, long term and cumulatively.

Short term impacts: (through the completion of construction)

Impact:

Mitigation:

Extent to which mitigation reduces project impact:

Impact:

Mitigation:

Extent to which mitigation reduces project impact:

Long term impacts: (after construction is completed)

Impact:

Mitigation:

Extent to which mitigation reduces project impact:

Impact:

Mitigation:

Extent to which mitigation reduces project impact:

Cumulative impacts: (What would happen if a similar variance request was granted for many properties?)

Impact:

Mitigation:

Extent to which mitigation reduces project impact:

Impact:

Mitigation:

Extent to which mitigation reduces project impact:

Will granting the variance harm the public interest?

€ Yes. A variance cannot be granted.

€ No. Mitigation measures described above will be implemented to protect the public interest.

3) Unnecessary hardship (*To be completed by the applicant*)

An applicant may not claim unnecessary hardship because of conditions which are self-imposed or created by a prior owner (for example, excavating a pond on a vacant lot and then arguing that there is no suitable location for a home). Courts have also determined that economic or financial hardship does not justify a variance. When determining whether unnecessary hardship exists, the property as a whole is considered rather than a portion of the parcel. The property owner bears the burden of proving unnecessary hardship.

- For an area variance, unnecessary hardship exists when compliance would unreasonably prevent the owner from using the property for a permitted purpose (leaving the property owner without any use that is permitted for the property) or would render conformity with such restrictions unnecessarily burdensome. The board of adjustment must consider the purpose of the zoning restriction, the zoning restriction's effect on the property, and the short-term, long-term and cumulative effects of a variance on the neighborhood, the community and on the public interests. This standard reflects the new *Ziervogel* and *Waushara County* decisions.
- For a use variance, unnecessary hardship exists only if the property owner shows that they would have no reasonable use of the property without a variance.

**Note:** While Wisconsin Statutes do not specifically prohibit *use variances*, there are a number of practical reasons why they are not advisable:

- Unnecessary hardship must be established in order to qualify for a variance. This means that without the variance, no reasonable use can be made of the property.
- Many applications for use variances are in fact administrative appeals. Often the zoning board is asked to determine whether a proposed use is included within the meaning of a particular permitted or conditional use or whether it is sufficiently distinct as to exclude it from the ordinance language. Such a decision is not a *use variance* but an appeal of the administrator's interpretation of ordinance text.
- Zoning amendments are a more comprehensive approach than use variances. Elected officials consider the larger land area to avoid piecemeal decisions that may lead to conflict between adjacent incompatible uses or may undermine land use plan and ordinance objectives. Towns have meaningful input (veto power) for zoning amendments to general zoning ordinances.
  - Zoning map amendments can change zoning district boundaries so as to allow uses provided in other zoning districts.
  - Zoning text amendments can add (or delete) permitted or conditional uses allowed in each zoning district.

Is unnecessary hardship present?

- Yes. Describe:
  
- No. A variance cannot be granted.

**Part 3: Construction Plans**

*To be completed and submitted by the applicant.*

Attach construction plans detailing:

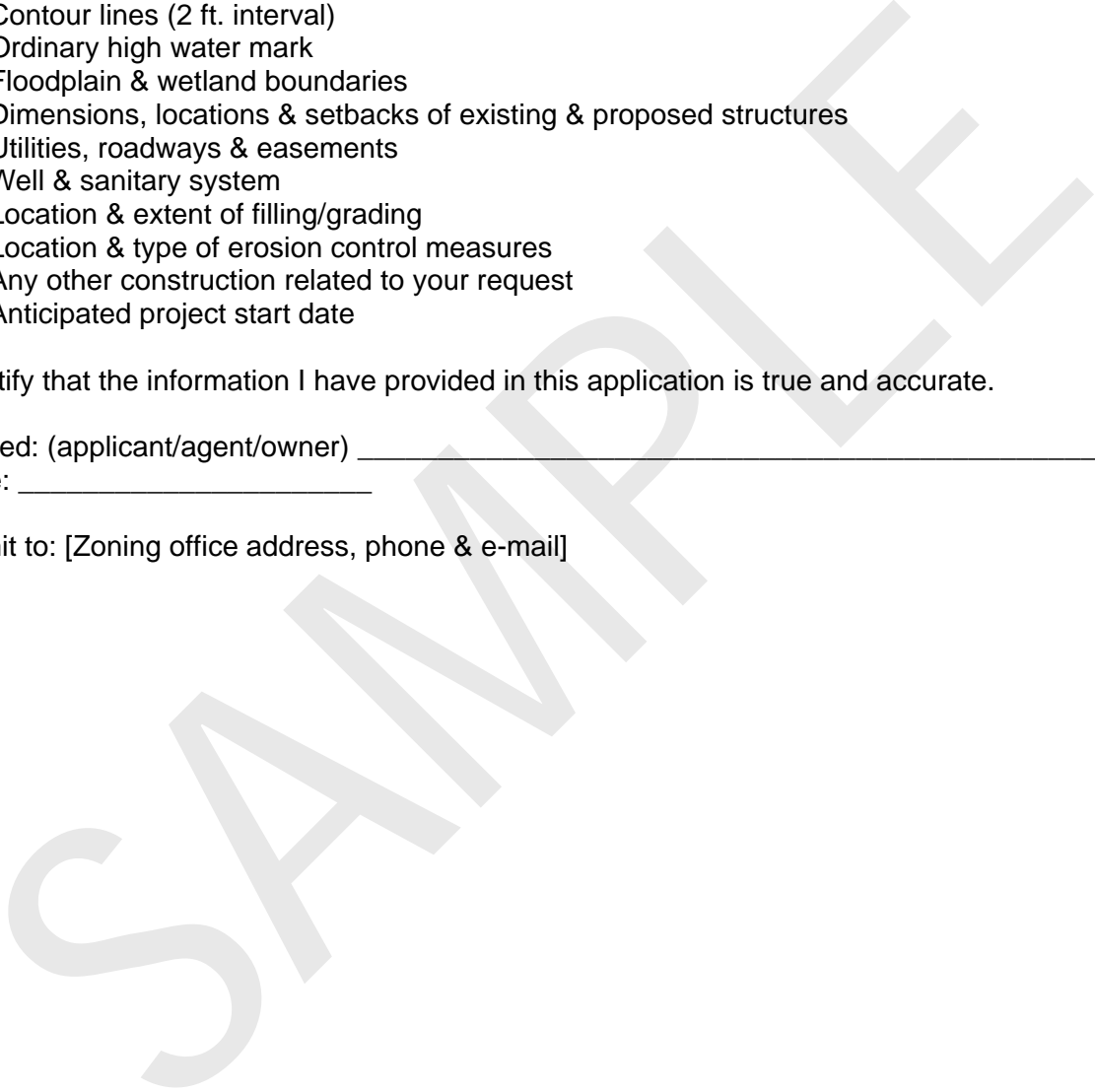
- Property lines
- Vegetation removal proposed
- Contour lines (2 ft. interval)
- Ordinary high water mark
- Floodplain & wetland boundaries
- Dimensions, locations & setbacks of existing & proposed structures
- Utilities, roadways & easements
- Well & sanitary system
- Location & extent of filling/grading
- Location & type of erosion control measures
- Any other construction related to your request
- Anticipated project start date

I certify that the information I have provided in this application is true and accurate.

Signed: (applicant/agent/owner) \_\_\_\_\_

Date: \_\_\_\_\_

Remit to: [Zoning office address, phone & e-mail]



*Decision Form*

\_\_\_\_\_ Zoning Board of Adjustment/Appeals

Application/petition # \_\_\_\_\_

**FINDINGS OF FACT**

Having heard the testimony and considered the evidence presented, the Board determines the facts of this case to be:

Filing Date: \_\_\_\_\_

Affidavit of publication/posting is on file.

Hearing Date: \_\_\_\_\_

A. The applicant or appellant is (name and address):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

B. The applicant or appellant is the owner/lessee/mortgagee of the following described property which is the subject of the application or appeal: \_\_\_\_\_ 1/4 of \_\_\_\_\_ 1/4, City/Village/Town of \_\_\_\_\_, \_\_\_\_\_ County known as (street address) \_\_\_\_\_

C. The property is presently in use for \_\_\_\_\_ and has been so used continuously since \_\_\_\_\_.

D. The property includes a nonconforming structure/use described as

\_\_\_\_\_  
\_\_\_\_\_

E. The property has been the subject of a prior appeal/variance/conditional use described as

\_\_\_\_\_  
\_\_\_\_\_

F. The applicant or appellant proposes (brief project description/attach plans):

G. The applicant or appellant requests:

- an appeal of the zoning administrator's determination
  - a conditional use/special exception
  - a use variance
  - an area variance
- under Section \_\_\_\_\_ of the ordinance.

The features of the proposed construction and property that relate to the grant or denial of the application or appeal are (refer to the language/standards of the ordinance):

\_\_\_\_\_  
\_\_\_\_\_



**CONCLUSIONS OF LAW**

Based on the above findings of fact the Board concludes that:

Appeal/Interpretation – The order of the zoning administrator (is/is not) in excess of his/her authority because (or)

The zoning administrator’s interpretation of Section \_\_\_\_\_ of the zoning code (is/is not) a correct interpretation because

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Variance – The variance (does/does not) meet all three of the following tests:

A. The hardship (is/is not) due to physical limitations of the property rather than the circumstances of the appellant because

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B. The variance (will/will not) harm the public interest because

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---



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C. Unnecessary hardship

- For an area variance, unnecessary hardship exists when compliance would unreasonably prevent the owner from using the property for a permitted purpose (leaving the property owner without any use that is permitted for the property) or would render conformity with such restrictions unnecessarily burdensome. The board of adjustment must consider the purpose of the zoning restriction, the zoning restriction's effect on the property, and the short-term, long-term and cumulative effects of a variance on the neighborhood, the community and on the public interests. This standard reflects the new *Ziervogel* and *Waushara County* decisions.
- For a use variance, unnecessary hardship exists only if there is no reasonable use of the property without the variance.

D. Unnecessary hardship (is/is not) present because

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Conditional Use – The application for a conditional use permit (does/does not) qualify under the criteria of Section \_\_\_\_\_ of the ordinance because

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**ORDER AND DETERMINATION**

On the basis of the above findings of fact, conclusions of law and the record in this matter the board orders:

Appeal/Interpretation – The zoning administrator’s order/interpretation of the zoning code or map is (affirmed/modified/reversed) and the administrator is ordered to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Variance/Conditional Use – The requested (variance/conditional use) is (denied/granted/granted-in-part) subject to the following conditions/mitigation:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_

The zoning administrator is directed to issue a zoning permit incorporating these conditions and certifying by the petitioner/applicant’s signature that he/she understands and accepts the conditions.

Expiration of permit. Any privilege granted by this decision must be exercised within \_\_\_\_\_ months of the date of this decision after obtaining the necessary building, zoning and other permits for the proposed construction. This period will be extended if this decision is stayed by the order of any court or operation of law.

Revocation. This order may be revoked by the Board after notice and opportunity to be heard for violation of any of the conditions imposed.

Appeals. This decision may be appealed by a person aggrieved by this decision or by any officer, department, board or bureau of the municipality by filing an action in certiorari in the circuit court for this county within 30 days after the date of filing of this decision. The municipality assumes no liability for and makes no warranty as to reliance on this decision if construction is commenced prior to expiration of this 30-day period.

\_\_\_\_\_ Zoning Board of Adjustment/Appeals

Signed \_\_\_\_\_ Attest \_\_\_\_\_  
Chairperson Secretary

Dated: \_\_\_\_\_

Filed: \_\_\_\_\_

### *Decision Self Audit Form*

Use an annual self-assessment of board activities to increase board efficiency and the effectiveness of ordinance standards:

1. Revise ordinance language to reflect interpretations of the board;
2. Adjust dimensional standards where similar limiting site conditions make current standards unworkable or ineffective (e.g. nonconforming lots); and
3. Convert conditional uses to permitted uses if appropriate location, design and use standards can be developed.

Track and assess disposition of individual petitions/applications or categories of similar requests. Discuss your findings with the planning committee/commission and cooperate to propose appropriate amendments to the local governing body.

### **EXAMPLES**

#### **Administrative Appeals**

Section & Subject	Decision/Interpretation	Recommendations
9.12 – Modification of nonconforming structures	Modifications requiring permit & subject to limitations: Construction beyond foundation footprint? Additional story or basement? Replacement of structural members? Foundation replacement included?	Revise ordinance to enumerate activities requiring permit.
3.4 – Minimum area requirement	Are screened porches included in “enclosed area” requirement?	Revise ordinance to better describe “enclosed areas.”
4.6 – Setback measurement	From what point on a structure and in what plane are setbacks measured?	Revise ordinance to state “setbacks are measured from nearest connected portion of a structure and in a horizontal plane.”

<b>Variations</b>				
Section & Subject	Relaxation requested	Granted/Denied	Conditions	Recommendations
3.2 – 75' Shore setback for new home	<5' 5-10' 11-20' 21-30' 31-50' >50'	5/4 6/3 3/12 2/22 1/5	Remove NC accessory bldg. (6) Plant/maintain screening vegetation (4) Restore 50' shore buffer (5)	Standardize conditions 1-3 as mitigation requirements in ordinance.

<b>Conditional Use Permits</b>				
Section & Subject	Granted/Denied	Conditions	Recommendations	
4.1 - Fill & grade	23/4	Avoid areas >15% slope (23) Divert runoff around site during construction & stabilization (23) Stabilize according to NRCS guidelines for site (23)	Convert to permitted use for areas <2,000 sq. ft. & <15% slope provided conditions 2 & 3 are implemented & pre-construction photo is submitted.	



# Examples from Wisconsin Communities

1. Agenda and Public Notice (adapted from Jefferson County), page 180
2. Zoning Board Staff Report (adapted from Green Lake County), page 181
3. Variance for reduced roadway setback for deck on tavern - Denied (Lincoln County), page 182
4. Variance for reduced roadway setback for garage - Granted (Lincoln County), page 191

**JEFFERSON COUNTY ZONING BOARD OF ADJUSTMENT**

*Lloyd Holterman, Chair; Janet Sayre Hoeft; Lloyd Zastrow; Donald Carroll, Alternate; Dale Weis, Alternate*

**BEGINNING AT \*\*\*\*\* ON THURSDAY, JULY 13, 2006  
 ROOMS 203 & 205, JEFFERSON COUNTY COURTHOUSE  
 320 S. MAIN ST., JEFFERSON, WI 53549**

1. **Call to Order-Room 203**
2. **Roll Call**
3. **Certification of Compliance with Open Meetings Law Requirements**
4. **Approval of Agenda**
5. **Approval of June 8, 2006 Meeting Minutes**
6. **Site Inspections – Beginning at \*\*\*\*\* and Leaving from Room 203**
7. **Public Hearing – Beginning at 1 p.m. in Room 205**

**NOTICE OF PUBLIC HEARING  
 JEFFERSON COUNTY ZONING BOARD OF ADJUSTMENT**

NOTICE IS HEREBY GIVEN that the Jefferson County Zoning Board of Adjustment will conduct a public hearing at 1 p.m. on Thursday, July 13, 2006 in Room 205 of the Jefferson County Courthouse, Jefferson, Wisconsin. Matters to be heard are applications for variance from terms of the Jefferson County Zoning Ordinance. No variance may be granted which would have the effect of allowing in any district a use not permitted in that district. No variance may be granted which would have the effect of allowing a use of land or property which would violate state laws or administrative rules. Subject to the above limitations, variances may be granted where strict enforcement of the terms of the ordinance results in an unnecessary hardship and where a variance in the standards will allow the spirit of the ordinance to be observed, substantial justice to be accomplished and the public interest not violated. Based upon the findings of fact, the Board of Adjustment must conclude that: 1) Unnecessary hardship is present in that a literal enforcement of the terms of the ordinance would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome; 2) The hardship is due to unique physical limitations of the property rather than circumstances of the applicant; 3) The variance will not be contrary to the public interest as expressed by the purpose and intent of the zoning ordinance. PETITIONERS, OR THEIR REPRESENTATIVES, SHALL BE PRESENT. There may be site inspections prior to public hearing; decisions shall be rendered after public hearing on the following:

**V1192-06 – George & Mary Presley:** Variance to allow a third accessory structure in a Residential R-2 zone. The site is at W6690 Oak Rd. in the Town of Watertown, on PIN 032-0815-0333-005 (3 Acres) in a Residential R-2 zone.

**V1193-06 – Howard Jacobs:** Allow building reconstruction at less than the required road setbacks. The site is at N8646 Jacobs Lane in the Town of Waterloo, on PIN 020-0973-1521-000 (35.124 Acres) in an Agricultural A-1 zone.

**V1194-06 – Stanley Johnson:** Variance to sanction garage construction at less than the required side yard setback in a Residential R-1 zone. The site is at N1030 Lake Rd. in the Town of Sumner, on PIN 029-0611-1835-036 (0.5 Acre).

**V1195-06 – Joseph Price/Mary Clark Property:** Reduce the minimum required frontage on and access to a public road for A-1 zoned property on Kroghville Road. The site is part of PIN 019-0828-1781-000 (40 Acres) in the Town of Lake Mills.

8. **Decisions on Above Petitions**
9. **Adjourn**

**JEFFERSON COUNTY ZONING BOARD OF ADJUSTMENT**  
 Lloyd Holterman, Chairman

## GREEN LAKE COUNTY STAFF REPORT

**REQUEST:** a variance to allow construction of four single-family dwellings on a single land area.

**EXISTING ZONING AND USES OF ADJACENT AREA:** The lot in question is zoned Recreational (RC), located within the shoreland jurisdiction of Green Lake, and occupied by a commercial restaurant and guest house. The lands surrounding this lot are zoned Single-Family Residential (R-1), located in the shoreland jurisdiction, and characterized by single-family dwellings and similar residential structures/uses.

**ADDITIONAL INFORMATION/ANALYSIS:** The owner/applicant is proposing to construct four single-family dwelling units under condominium style ownership. Section 350-13B of the County Zoning Ordinance clearly states there shall be no more than one principal residential structure per land area. There are no limiting factors to prevent compliance with the zoning ordinance. The plan submitted with this request is the desired outcome; not one conceived out of hardship.

**VARIANCE CRITERIA:** To qualify for a variance it must be demonstrated that the property meets the following three requirements:

**1. Unnecessary Hardship**

- For use variances – no reasonable use of the parcel as a whole
- For area variances – compliance with standards would unreasonably prevent landowner from using property for permitted purpose or be unnecessarily burdensome
- Hardship may not be self-created
- Economic or financial hardship is not justification

**2. Unique Property Limitations**

- Limitations such as steep slopes, wetland, shape or size prevent compliance with ordinance
- Limitations common to a number of properties is not justification
- Circumstances of the individual is not justification

**3. No Harm to Public Interest**

- Variance may not harm public interest; look to ordinance purpose and intent for guidance
- Short term, long term and cumulative impacts on neighborhood, community and general public

- Alternative designs and locations on the property have been investigated
- Only minimal relief may be granted for use of property
- May impose conditions on development to mitigate adverse impacts

**STAFF COMMENTS:** Staff has the following comments related to this variance request:

**1. Unnecessary Hardship**

- Compliance with the ordinance standards would limit use of the premises to one structure (having multiple units), not multiple structures as proposed
- The hardship of proposing to place four new structures on the property is self-created

**2. Unique Property Limitations**

- Property does not appear to have unique limiting factors that prevent compliance with ordinance
- Other lots in this area share similar site conditions

**3. No Harm to Public Interest**

- This request and the cumulative impact of this type of development pattern could change the density and character of the shoreland area, effecting the public interest

- Alternate designs that comply with the ordinance were not presented; a compliant design may exist
- Only minimal relief should be allowed; no relief is needed if code compliant project could occur
- If this request meets the three-part test, conditions should be attached as part of approval

Owner \_\_\_\_\_  
 Last Name \_\_\_\_\_  
 Property Desc \_\_\_\_\_  
 Tax Parcel # 06.13105.006.002.00 Town Caring  
 Block \_\_\_\_\_ Subdiv. \_\_\_\_\_  
 Hw 1/4, Sec. 13 T 3 N, R 05 E Lot \_\_\_\_\_

**PETITION FOR VARIANCE**

Variance # 17-04

Date filed Oct 04 Fee \$340.00 Receipt # 3227

Owner Information: Name \_\_\_\_\_

Mailing Address: \_\_\_\_\_

Daytime Telephone Number: \_\_\_\_\_

Legal description of the property: GL 1/4, 1/4, Sec .T. N, R. E

and/or Lot Number \_\_\_\_\_, Subdivision Name \_\_\_\_\_

Property Address W 7695 107264

Tax Parcel Number \_\_\_\_\_ PIN 00631051329597

Zoning district Aggriculture Lot size 1 acre

Current use and improvements Deck

Proposed use and improvements \_\_\_\_\_

Ordinance section relating to variance request 17.22(1)(a)(2)

Relief is requested to allow: less than 110 setback to 64+107

**Address each of the following criteria for granting a variance (please be specific).**

- 1) Unnecessary hardship is present because... People are stealing everything that we have outside (lawn chairs, Umbrellas, yard swing, Garden plants, work cart, yard Birds etc.
- 2) Unique features of this property prevent compliance with the terms of the ordinance; they include... The deck is built on the back of a garage over hang that was once a horse ~~roof~~ roof - There is no way that the public can get on to it - There for our yard stuff is safe
- 3) A variance will not be contrary to the public interest because... This deck was built and meant for our own private use to hold family get togethers only.

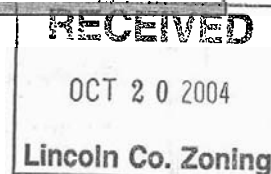
Names of adjoining property owners: None to this area

See reverse side for additional requirements and signature line



**A SCALE DRAWING MUST BE ATTACHED that accurately depicts the following:**

1. The location and size of the property including all lot line dimensions
2. Indicate north
3. Show the location and names of all surrounding roads / highways
4. Show the location of all area water bodies (lakes, rivers, streams, ponds, etc.)
5. Indicate all existing buildings and mark with "EB"
6. Indicate all wells and sanitary systems and mark as such
7. Include all directly abutting properties and structures, sanitary systems, etc.
8. Show the requested change or construction and include the following measurements:
  - a. Distance from the centerline of all roads
  - b. Distance from the right-of-way of all roads
  - c. Distance to all lots lines
  - d. Distance to all water bodies
  - e. Distance from sanitary system drainfield and tanks
  - f. Distance from well



*Application will be dismissed if a scale drawing is not received in the Zoning Department within 10 days of the application deadline.*

**Applicants are required to clearly mark on their property the location of:**

1. The proposed change or construction
2. All property lines
3. Sanitary system components (drain fields, tanks, etc.)
4. Wells
5. Other physical features pertinent to the decision

**These features should be marked with high visibility flags, tape, or stakes.**

*Additional information beyond what has been specifically requested in this application may be required by the Lincoln County Board of Adjustment before rendering a decision. Failure to provide all requested information could result in the dismissal or denial of your application. The Lincoln County Board of Adjustment is governed by Rules of Procedure. A copy of the Rules of Procedure are available to any interested party upon request.*

**To the Lincoln County Zoning Administrator / Lincoln County Board of Adjustment:** The undersigned hereby makes application for a PETITION FOR VARIANCE for work described and located as shown herein. The undersigned agrees that all work shall be done in accordance with the requirements of the Lincoln County Zoning Ordinance and with all other applicable County Ordinances and the laws and regulations of the State of Wisconsin. I declare that the information that I am supplying is true and accurate to the best of my knowledge and I acknowledge that this information will be relied upon for the issuance of this permit. By signing this application I am also granting permission to the zoning department staff to enter my property at any reasonable time for the purpose of inspection to assure compliance with the zoning laws relative to the issuance of this permit.

Signed: \_\_\_\_\_ Date: 10-20-04  
 property owner's signature(s) required

Signed: \_\_\_\_\_ Date: 10-20-04  
 property owner's signature(s) required

Co-Applicant information (other than owner)	
Name _____	_____
Address _____	_____
City, ST, Zip _____	_____
Phone # (    ) _____	_____

**IF GRANTED, NO CONSTRUCTION SHALL BEGIN UNTIL A LAND USE PERMIT HAS BEEN ISSUED**

Petition for Variance (rev 11/02)

***Variance Request Staff Report***

***Lincoln County Zoning***

Applicant: \_\_\_\_\_

Nature of Request: To grant an after-the-fact variance for a deck that was constructed onto a nonconforming garage that fails to meet the hwy setback.

**Results of Investigation**

**(A) Uses of the Property**

*What is the property currently being used for?* There is a tavern with living quarters, a beer garden, volleyball court and a private garage on the property.

*Is the use a permitted use?* The private living quarters and accessory structures are permitted uses in an Agriculture zoning district.

**(B) Property Features**

*Lot Features*

Zoning District: Agriculture

Size of Lot: 1 acre

Amount of Water Frontage: NA

Size and Dimensions of Buildable Area: 82' x 122' or about 10,000 sq. ft.

*Septic System*

Type of Septic System: Holding Tanks

Age of Septic System:

*Natural Features*

Slope Information: Steep adjacent to Hwy 64 and gentle to the south from the rear of the buildings.

Buffer Condition: NA

*Other Relevant Features:* The deck is purported to be used privately and for security of personal property. A locked building would offer more security for private property.

**(C) The Public Interest**

*Potential positive impacts (environmental, aesthetic, safety, etc.) of the applicant's request:*

*Potential negative impacts (environmental, aesthetic, safety, etc.) of the applicant's request:* It increases the nonconformity of an already grossly nonconforming building.

**Alternative Solutions**

*Are there alternatives to the request made by the applicants that would meet the requirements of the ordinance?* The applicants could build a garage or shed in the buildable area to secure their personal property.

*Zoning Department recommendation:* Based on the evidence available in the application, in our records, and by visiting the site, the Zoning Department recommends that the Board deny the request and order the removal of the deck on the basis that the property has a reasonable use already without the deck. By building the deck before obtaining a permit or a variance, the applicants have created a self imposed hardship.

*Other possible actions that the Board may take:* None, as staff feels that the request does not fulfill all three of the necessary elements for consideration of a variance (i.e. unnecessary hardship and public interest protection are not met).

### **Applicable Ordinance Sections**

#### **17.22 SETBACKS.** (Am. #326-98)

- (1) HIGHWAY SETBACKS.
  - (a) Class A Highways.
    - 1. All State and federal highways are hereby designated as Class A highways.
    - 2. The setback from a Class A highway shall be 110' from the centerline of the highway or 50' from the right-of-way line, whichever is greater.

#### **17.25 NONCONFORMING USES AND STRUCTURES ("GRANDFATHERING").** (Am. #326-98; #388-2002)

(1) GENERAL. These regulations apply to the modification of or addition to any structure and to the use of any structure or premises which was lawful before the passage of this code or any applicable amendment thereto. The existing lawful use of a property, structure, building or its accessory use which is not in conformity with the provisions of this chapter may continue subject to the following conditions:

- (e) No modifications or additions to a nonconforming use or structure that fails to meet side yard or highway setbacks shall be permitted unless they are made in conformity with the provisions of this chapter. For purposes of this chapter, the words "modification" and "addition" include, but are not limited to, any addition, modification, structural alteration, rebuilding or replacement of any such existing use, structure or accessory structure or use that results in an addition to the floor area or current measurable footprint of the structure. Ordinary maintenance repairs which include internal and external painting, decorating, paneling, interior remodeling and the replacement of doors, windows and other nonstructural components are allowed and not subject to review by a permit. Other structural alterations and repairs, such as replacement of roof trusses, rafters, foundational elements, and similar components are permitted but subject to review by a zoning permit under § 17.46(1)(a) provided no additions to floor area are created and the footprint of the structure is not expanded. This section further authorizes changes to the pitch of existing roofs, but it does not authorize the enclosure of decks or patios.

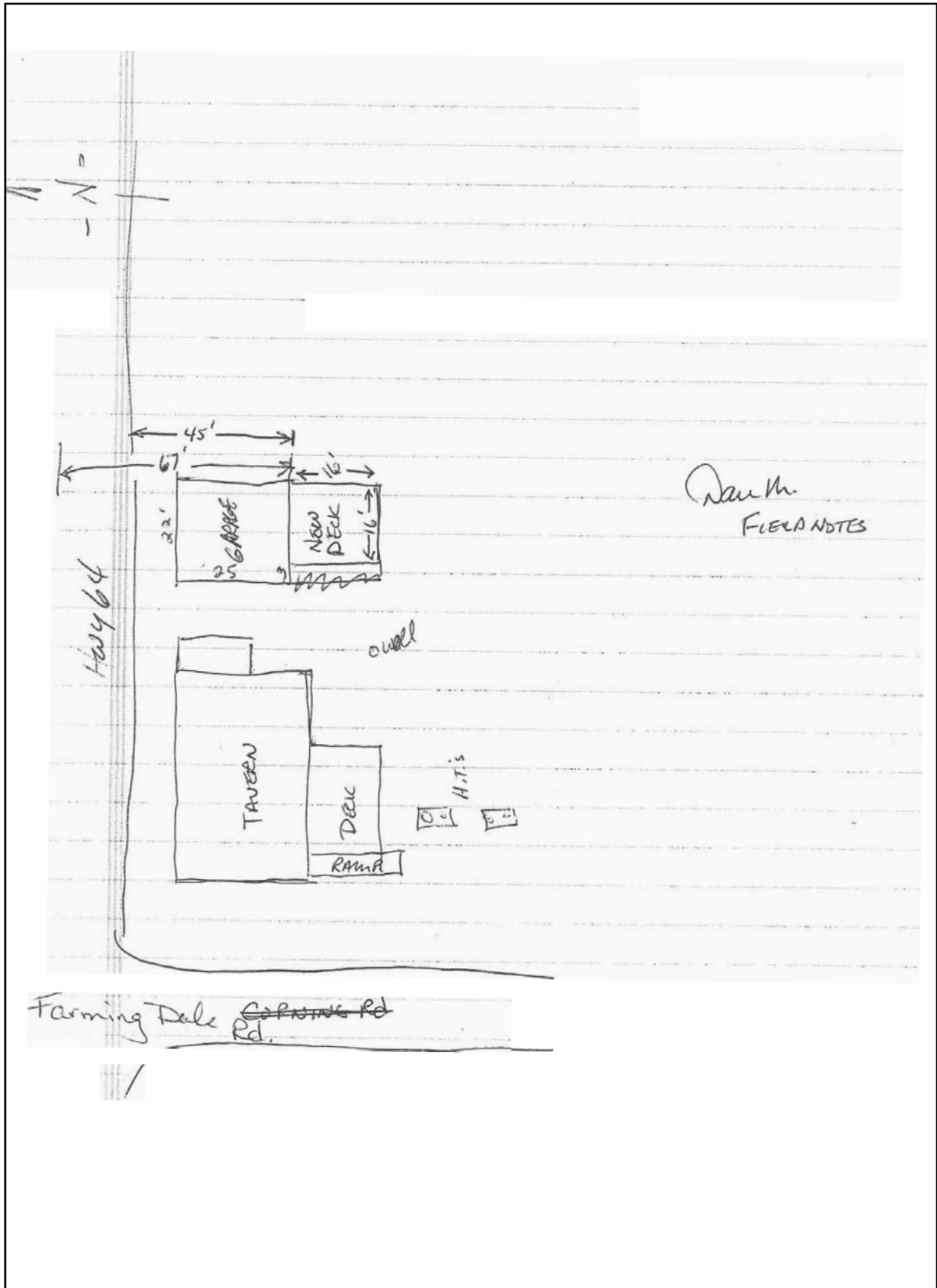
0801 08I	Land Records Browse	11/10/04 15:59:53 LZTMP1
LN 1006 3105 132 9997 Parcel 16 133105 006 002 00 00		Town of CORNING Status: <b>ACTIVE</b>
Adr 1 Own 1		

Parcel Descriptions:

1 Description(s) on File

Year	Acres	Front	Depth	Flood Line	Description
1994	1.000				
				1	SEC 13-31-05
				2	1 SQ ACRE IN THE NW COR OF
				3	THE NW 1/4 NW 1/4
				4	*C-13-6B

F1=Help F2=Assessment F3=Exit F7=Previous F8=Next F12=Cancel  
 F13=Select View F14=Municipal Views F15=Reports F24=More Keys  
 Positioning to Owner: +



**DECISION OF LINCOLN COUNTY  
ZONING BOARD OF ADJUSTMENT**

Application #: 17-04

Parcel #: 06.133105.006.002

Filing Date: 10/20/04

Hearing Date: 11/18/04

Notice Dates: 10/26/04 & 11/2/04

**ZONING VARIANCE**

**FINDINGS OF FACT**

Having heard the testimony and considered the evidence presented, the Board finds the following facts:

1. The applicant is: \_\_\_\_\_  
(provide name and address) \_\_\_\_\_  
\_\_\_\_\_

2. The applicant is the [owner] [lessee] of the following described property which is the subject of the application or appeal: NW 1/4 of the NW 1/4 (or Gov Lot \_\_\_\_\_), Section 13, T 31 N, R 05 E, Town of Corning, Lincoln County known as (rural address, CSM, or other description):  
\_\_\_\_\_

3. The property is presently being used as a Residence / Bar use and is a  permitted use in the zoning district ; or a \_\_\_\_\_ a legal non-conforming use in the zoning district in which it lies.

4. The existing structure \_\_\_\_\_ does; or  does not conform to current zoning standards. *→ Due to Road Setbacks*

5. The applicant proposes (brief description / attach plans):  
A deck, attached to the garage, setback 67 feet from the center of State Hwy 64 & 107.

6. The applicant requests a variance to the following section of the Lincoln County Zoning Ordinance (attached): 17.22 (1)(a)(2)

7. What specific departure from the ordinance is being proposed (refer to the standards of the ordinance):  
Reduce the ordinary 110' setback for state Hwy 64 & 107 to 67' from the centerline.

**CONCLUSIONS OF LAW**

Based on the above findings of fact, the Board draws the following conclusions:

A. Are the restrictions placed on the property unnecessarily burdensome, preventing the owner from using the property for a permitted purpose?

Yes    or, No X. If yes, why is it unnecessarily burdensome?

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B. Do physical limitations of the property prevent compliance with the ordinance standards?

Yes    or, No X. Why?

is a legal buildable area on the property

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C. Could the applicant's request have potential negative impacts to surrounding lands, their uses or the environment? Yes    or, No X. If yes, then how may the impacts be minimized or mitigated?

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**ORDER AND DETERMINATION**

On the basis of the above findings of fact, conclusions of law and the record in this matter the Board orders the requested variance is ~~[granted]~~ subject to the following conditions: ~~[denied]~~ or ~~[held over]~~ until \_\_\_\_\_ provided the following additional information is supplied:

*because the hardship is self imposed and not a result of the regulations or physical property features.*

The Zoning Administrator is directed to issue a zoning permit incorporating these conditions.

Any privilege granted by this decision must be exercised within 2 years of the date of the decision by obtaining necessary land use, sanitary and other permits for the proposed construction. If not exercised within the allowed time, the permit and/or other privilege shall be automatically null and void. Extension for exercise of the permit or privilege may be granted by the Board upon written request by the applicant.

This order may be revoked by the Board after notice and opportunity to be heard for violation of any of the conditions imposed.

This decision may be appealed by filing an action in certiorari in the Lincoln County Circuit Court within 30 days after the date of filing of this decision. Lincoln County assumes no liability for and makes no warranty as to reliance on this decision of construction is commenced prior to expiration of this 30 day period.

**ZONING BOARD OF ADJUSTMENT**

Signed *Laura Lamer*  
Chairperson

Attest *J.P. Lutz*  
Secretary

Dated: 11/18/04

Filed: 11/18/04



**PETITION FOR VARIANCE**

28

Variance # 16-04  
 Receipt # 3230

Date filed 10-10-04 Fee \$340.00

Owner Information: Name \_\_\_\_\_

Mailing Address: \_\_\_\_\_

Daytime Telephone Number: \_\_\_\_\_

Legal description of the property: GL 8 ¼, ¼, Sec \_\_\_\_\_, T. \_\_\_\_\_, N, R. \_\_\_\_\_ E  
 and/or Lot Number D0408855, Subdivision Name N/A

Property Address \_\_\_\_\_

Tax Parcel Number ~~012-3507-282-9997~~ PIN 012 28 380 7 005 009

Zoning district Recreation Lot size 0.750 ACRES

Current use and improvements Rental Prop. / Single Person

Proposed use and improvements Rental Prop. / New GA

Ordinance section relating to variance request Setback off Town Road <sup>17.22(1)(c)</sup>

Relief is requested to allow: Construction of Garage, Requesting setback footage, from Lincoln City Zoning.

**Address each of the following criteria for granting a variance (please be specific).**

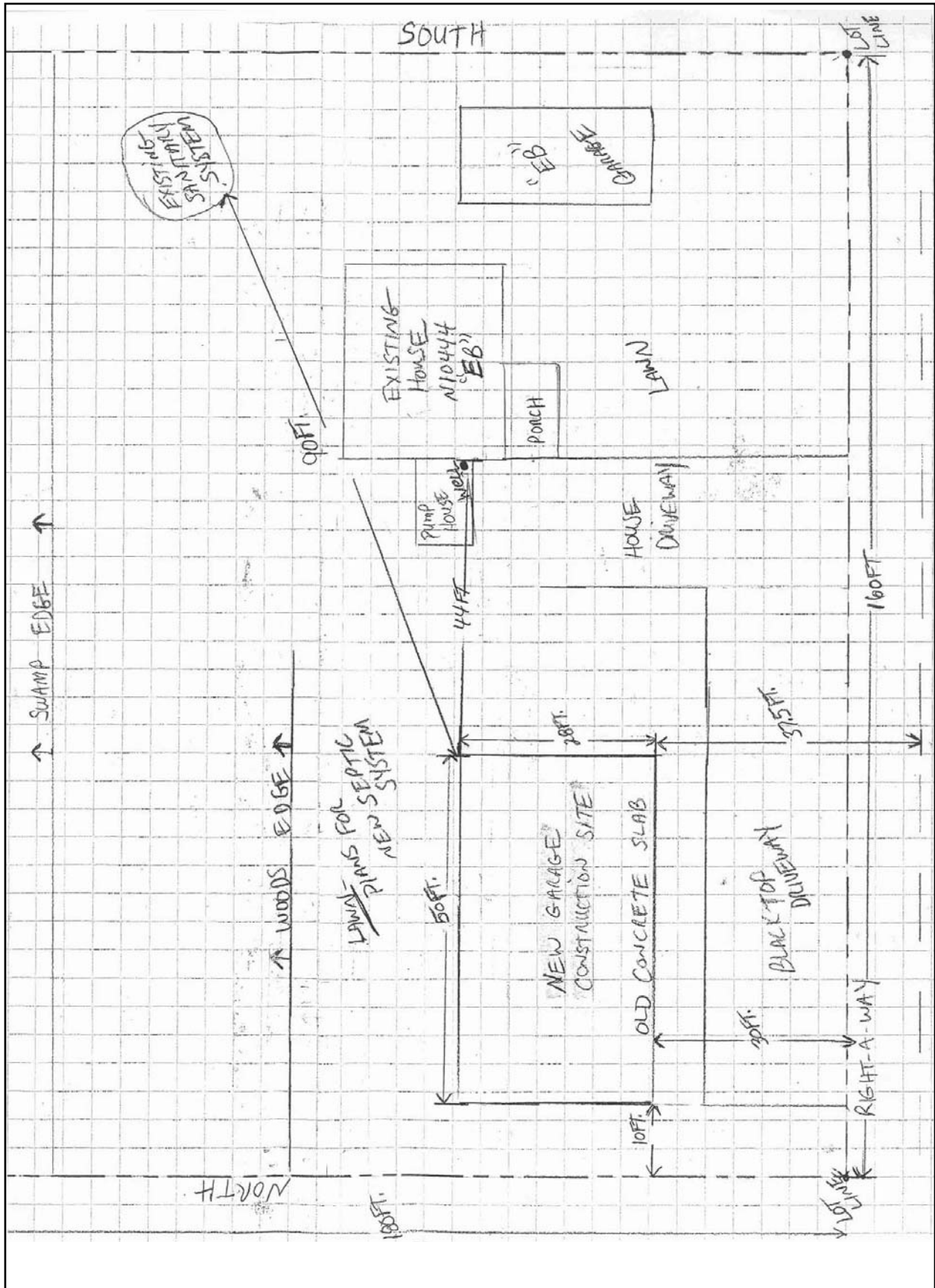
- 1) Unnecessary hardship is present because... I also own property immediately to South ps Rental but no room to add garage. Existing garage at 110444 could be utilized by other rental.
- 2) Unique features of this property prevent compliance with the terms of the ordinance; they include... To keep open area for upgrade of septic system upon failure of existing.
- 3) A variance will not be contrary to the public interest because... Neighboring existing dwellings are as close or closer than new garage and will enhance property.

Names of adjoining property owners: \_\_\_\_\_

See reverse side for additional requirements and signature line

12.283507.005.004.00  
 Tax Parcel # ~~012-3507-282-9997~~  
 Town Kiwy  
 Subdiv. \_\_\_\_\_  
 Block \_\_\_\_\_  
 Lot \_\_\_\_\_  
 E \_\_\_\_\_  
 N, R. \_\_\_\_\_  
 T. \_\_\_\_\_  
 ¼, Sec. \_\_\_\_\_  
 ¼  
 First Name \_\_\_\_\_  
 Last Name \_\_\_\_\_  
 Property Desc D0408855  
 Attached copy of taxes w/ description





***Variance Request Staff Report***

***Lincoln County Zoning***

Applicant: \_\_\_\_\_

Nature of Request: Reduce the 75' road setback to Horseshoe Road for construction of a garage

**Results of Investigation**

**(A) Uses of the Property**

*What is the property currently being used for?* Residential rental property.

*Is the use a permitted use?* Yes

**(B) Property Features**

*Lot Features*

Zoning District: Recreation

Size of Lot: .5 acres

Amount of Water Frontage: None

Size and Dimensions of Buildable Area: approximately 30' x 130' ; between the 75' road setback and wetland edge

*Septic System*

Type of Septic System: Unknown

Age of Septic System: Unknown

*Natural Features*

Slope Information: approximately 10 to 15 feet of moderate slope near the swamp edge

Buffer Condition: Not Applicable

*Other Relevant Features:* The wetland edge starts at approximately 100 to 110 feet from the centerline of the Horseshoe Road, providing for a small building envelope on the property. The area between the proposed garage and the wetland is likely the only available spot for a replacement septic system on the property. The proposed garage location would not likely be suitable for a septic system because of the existence of an old concrete slab. The applicant does have an existing garage and house on the property; these buildings occupy the majority of suitable building ground on the small lot.

**(C) The Public Interest**

*Potential positive impacts (environmental, aesthetic, safety, etc.) of the applicant's request:*

The granting of a variance in this instance for the garage could preserve another location on the property which would be best served by an onsite waste treatment system.

*Potential negative impacts (environmental, aesthetic, safety, etc.) of the applicant's request:*  
The allowance for a garage at a reduced setback to the road could create a safety hazard as vehicles would back out of the garage directly onto Horseshoe Road.

### **Alternative Solutions**

*Are there legal alternatives?*

The legal alternative location for another garage would be in the only remaining location for a potential on-site waste treatment system; 75 feet from the road near the wetland edge.

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*Zoning Department recommendation:* Based on the evidence available in the application, in our records, and by visiting the site, the Zoning Department recommends **Approval** with the following conditions:

1. The garage be constructed at a minimum setback of 40 feet from the centerline of Horseshoe Road.
2. A soil test be performed for the area between the proposed garage and wetland edge to prove that an onsite waste treatment would be suitable for that location. If the area is proven to be unsuitable for an onsite waste treatment system then the garage be constructed at a minimum setback of 65 feet from the centerline of Horseshoe Road.

*Other possible actions that the Board may take:* Deny the request.

### **Applicable Ordinance Sections**

#### **17.22 SETBACKS. (Am. #326-98)**

(1) HIGHWAY SETBACKS.

(c) Class C Highways.

1. All town roads, public streets and highways not otherwise classified are hereby designated Class C highways.
2. The setback from Class C highways shall be 75' from the centerline of such highway or 42' from the right-of-way line, whichever is greater.

DECISION OF LINCOLN COUNTY  
ZONING BOARD OF ADJUSTMENT

Application #: 16-04 Parcel #: 12.283507.005.009  
Filing Date: 10/21/04 Hearing Date: 11/18/04  
Notice Dates: 10/26/04 & 11/2/04 ZONING VARIANCE

FINDINGS OF FACT

Having heard the testimony and considered the evidence presented, the Board finds the following facts:

1. The applicant is: \_\_\_\_\_  
(provide name and address) \_\_\_\_\_  
\_\_\_\_\_

2. The applicant is the [owner] [lessee] of the following described property which is the subject of the application or appeal: NE 1/4 of the NW 1/4 (or Gov Lot \_\_\_\_\_), Section 28, T 35 N, R 07 E, Town of King, Lincoln County known as (rural address, CSM, or other description):  
\_\_\_\_\_

3. The property is presently being used as a Residential use and is a X permitted use in the zoning district; or a = a legal non-conforming use in the zoning district in which it lies.

4. The existing structure does; or does not conform to current zoning standards. N/A

5. The applicant proposes (brief description / attach plans):  
Proposes to build a garage setback less than 75 feet from the centerline of Horseshoe Road.

6. The applicant requests a variance to the following section of the Lincoln County Zoning Ordinance (attached): 17.22 (1) (c) (2)

7. What specific departure from the ordinance is being proposed (refer to the standards of the ordinance):  
Reduce the road setback less than 75 feet to the centerline of Horseshoe Road.

**CONCLUSIONS OF LAW**

Based on the above findings of fact, the Board draws the following conclusions:

- A. Are the restrictions placed on the property unnecessarily burdensome, preventing the owner from using the property for a permitted purpose?  
Yes X or, No =. If yes, why is it unnecessarily burdensome?

Setback restrictions prevent him from building a garage in a compliant location.

- B. Do physical limitations of the property prevent compliance with the ordinance standards?  
Yes X or, No =. Why?

Wetland and narrow dimension between the wetland and road.

- C. Could the applicant's request have potential negative impacts to surrounding lands, their uses or the environment? Yes X or, No =. If yes, then how may the impacts be minimized or mitigated?

Closeness to the road could create a hazard. Could move further back onto the property if the soil is deemed unsuitable for a sanitary system.

**ORDER AND DETERMINATION**

On the basis of the above findings of fact, conclusions of law and the record in this matter the Board orders the requested variance is **granted** subject to the following conditions: ~~[denied]~~, or ~~[held over]~~ until \_\_\_\_\_ provided the following additional information is ~~applied~~.

1. The garage be constructed no closer than 40 feet from the centerline of Horseshoe Road.

2. But first a soil test must be performed in the area between the proposed garage and wetland edge to prove that an onsite waste treatment system would be suitable in that location. If the area is proven to be unsuitable for an onsite waste treatment system then the garage must be constructed at a minimum setback

The Zoning Administrator is directed to issue a zoning permit incorporating these conditions. of 65 feet from the centerline of Horseshoe Road.

Any privilege granted by this decision must be exercised within 2 years of the date of the decision by obtaining necessary land use, sanitary and other permits for the proposed construction. If not exercised within the allowed time, the permit and/or other privilege shall be automatically null and void. Extension for exercise of the permit or privilege may be granted by the Board upon written request by the applicant.

This order may be revoked by the Board after notice and opportunity to be heard for violation of any of the conditions imposed.

This decision may be appealed by filing an action in certiorari in the Lincoln County Circuit Court within 30 days after the date of filing of this decision. Lincoln County assumes no liability for and makes no warranty as to reliance on this decision of construction is commenced prior to expiration of this 30 day period.

**ZONING BOARD OF ADJUSTMENT**

Signed Leann Lamer  
Chairperson

Attest [Signature]  
Secretary

Dated: 11/18/04

Filed: 11/19/04



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