



THE LAND USE TRACKER

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The Wisconsin Planning Experience: Results From the Community Planning Survey

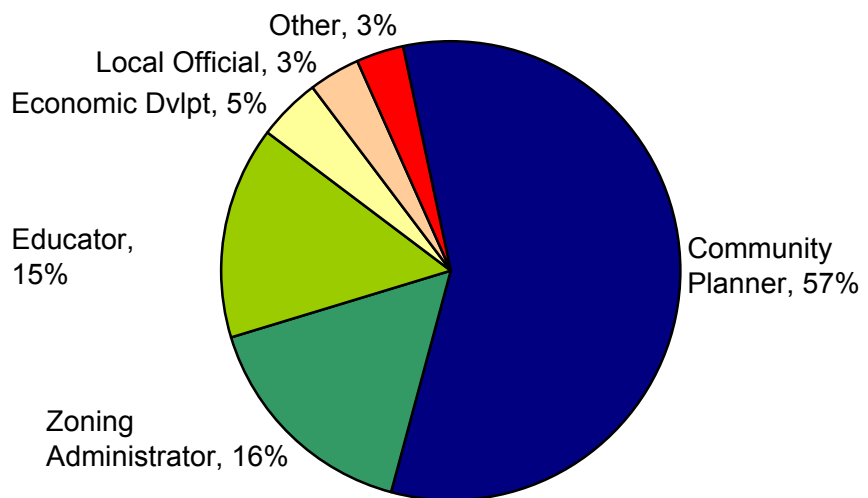
By Rebecca Roberts and Chin-Chun Tang, CLUE Project Specialists

In January 2004, the Center for Land Use Education initiated a state-wide online survey of planning professionals. We examined five major aspects of community planning, including the availability of funding for planning, planning activities typically included in local planning processes, challenges associated with those activities, methods to build and sustain public participation, and the role of external assistance providers. Highlights from the survey are provided below.

Survey Respondents

The majority of individuals who responded to the survey work as professional planners (see Figure 1). Most are employed by municipal governments. UW-Extension and private consulting firms also employ a large number of

Figure 1: Profession of Survey Respondents



(See Survey on page 4)

WisStat from the UW-Madison Applied Population Laboratory



<http://www.wisstat.wisc.edu/>

What's New at the Center

On the web: click on "What's New at the Center" on our homepage.

New E-mail Notification Lists Established

The Center has set up two web-based mailing lists. One list is to notify interested local, regional and state officials of the *Tracker* newsletter publication dates. You may sign up for this list on the newsletter web page at <http://www.uwsp.edu/cnr/landcenter/newsletters.html>. This list will be replacing the Yahoo group that the Center has been using. We encourage all members of the group to join the new list as the group will be deleted following the publication of the fall newsletter.

Another list has been established to notify board of adjustment and board of appeals members of BOA updates. You can join this list at <http://www.uwsp.edu/cnr/landcenter/newsletters.html>. ■

On The Calendar

Conference on the Small City and Regional Community

Governing the Small City: Managing Local Government in Times of Unrelenting Pressures

Thursday, September 30 – Friday, October 1, 2004

University Center, University of Wisconsin-Stevens Point

A biennial national conference that brings academics, small city elected officials and staff together to discuss the development, needs, and problems affecting small cities. For more information or to submit a paper, contact Bob.Wolensky@uwsp.edu or Edward.Miller@uwsp.edu or visit the Center website:

<http://www.uwsp.edu/polisci/smallcity/center.html>. ■

Free Comprehensive Planning Workshop!

Complying with Comprehensive Planning & State Agency Resources

Monday, June 21, 2004, 8:00am-4:30pm,

The Pyle Center, University of Wisconsin-Madison

A free workshop for all Wisconsin Communities involved in the development of comprehensive plans. Designed for grantees, elected officials, planners, planning consultants, RPC members and other interested individuals. Registration is required. There is no fee, but space is limited. To register, e-mail your name, title and affiliation to Joanna.Schumann@doa.state.wi.us. Visit our calendar on the web for the brochure and registration information. ■

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LEGISLATIVE UPDATE

Revisions to Wisconsin's Comprehensive Planning Law

Relaxation of the Consistency Requirement

On April 13, 2004, Governor Jim Doyle made several important changes to the State's Comprehensive Planning Law (1999 WI Act 9) by signing Assembly Bill 608 into law. The amendment seeks to clarify several controversial matters contained within the previous legislation, including actions that must be consistent with a comprehensive plan and the advisory role of plans produced by regional planning commissions.

Most significantly, the amendment simplifies the actions that must be consistent with a comprehensive plan. The original language required that: "[b]eginning on January 1, 2010, any program or action of a local governmental unit that affects land use shall be consistent with that local governmental unit's comprehensive plan..." The law contained a list of specific programs and actions that needed to be consistent with the plan, as well as a catch-all phrase that stated: "[a]ny other ordinance, plan or regulation of a local governmental unit that relates to land use". The new language eliminates this phrase and reduces the list of requirements to include official mapping, local subdivision regulations, county, city, village and town zoning ordinances, and state-mandated shoreland-wetland zoning.

Furthermore, the amendment clarifies that plans produced by regional planning commissions are advisory only in relationship to county, city, village and town comprehensive plans. This amendment addresses



concerns raised that regional planning commissions could impose their plans on local units of government.

What do these changes mean for local governments?

Narrowing the number of actions that must be consistent with a comprehensive plan reduces the number of local governments that are required by law to prepare a comprehensive plan prior to the 2010 deadline. There are several hundred towns throughout the State, as well as a few villages, that are not regulated by either local or county zoning and would therefore not be required to plan under the revised law. (To see if your community is zoned, visit the Wisconsin Department of Administration website <http://www.doa.state.wi.us> and type in keyword "zoning unincorporated"). The revised law can still be interpreted to mean that towns that exercise their veto power of county zoning are required to do so consistent with an adopted comprehensive plan¹.

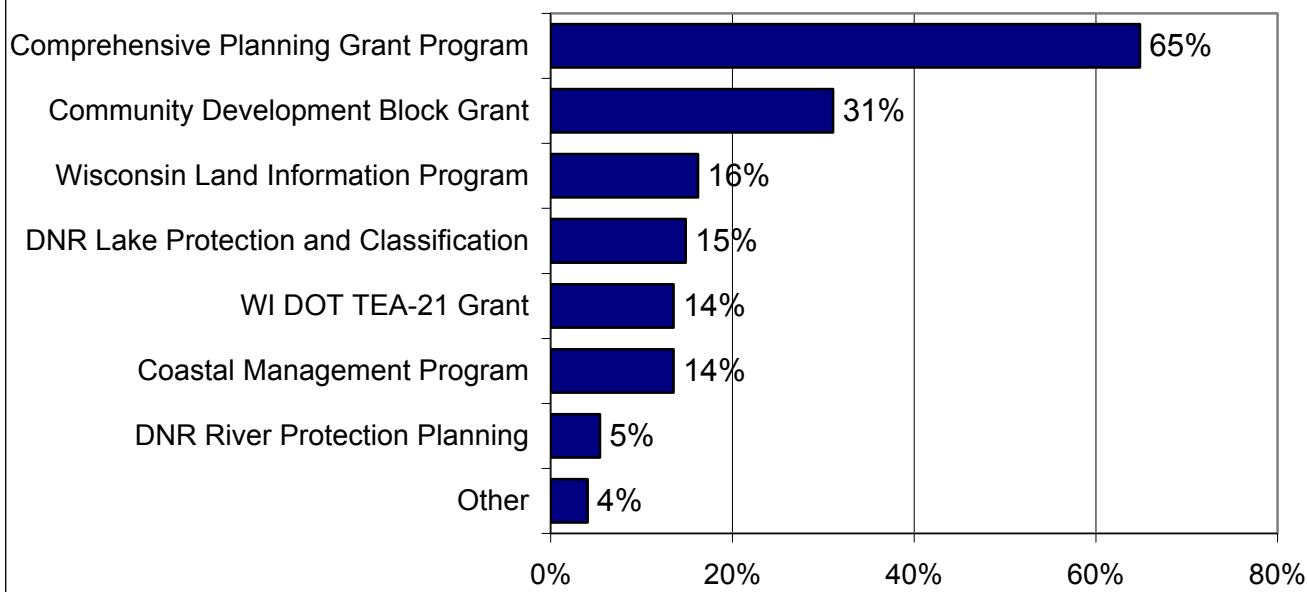
In light of the relaxed consistency requirement, many communities, especially towns, will be faced with the choice to plan or not to plan. It is increasingly important for local

leaders and community members to weigh the costs and benefits associated with planning in order to make an informed decision. Those communities still required to plan under the law should be encouraged to implement other programs beyond those required by law such as housing, economic development and transportation programs, consistent with their comprehensive plan.

Notification to Non-Metallic Mining Interests

On May 7, 2004, Wisconsin Act 307 took effect, further amending the Comprehensive Planning Law. The amendment attempts to integrate provisions of the State's nonmetallic mining reclamation law by requiring communities to consider non-metallic mineral resources within the natural resources element of their comprehensive plan "consistent with zoning limitations under s. 295.20 (2)". The amendment also requires communities to include provisions within their public participation plan to "distribute proposed, alternative or amended elements of a comprehensive plan" to non-metallic mining interests, and to provide written notification to those interests at least 30 days prior to the community's hearing to adopt the comprehensive plan. ■

¹ Ohm, Brian, *UW-Madison*, James Schneider, J.D., *Local Government Center*, and Michael Dresen, *Center for Land Use Education*. (Personal communication, April 13-15, 2004.)

Figure 2: Sources of External Funding

Survey (cont. from page 1)

respondents. Roughly half of these individuals characterize the community or communities they work with as rural. In the past five years, survey respondents worked on an average of five planning projects, of which comprehensive and land use planning projects were completed most frequently. Ninety percent were involved in at least one multi-jurisdictional planning project in the same time period. The majority of respondents reported positive or neutral experiences with planning.



Financial Resources

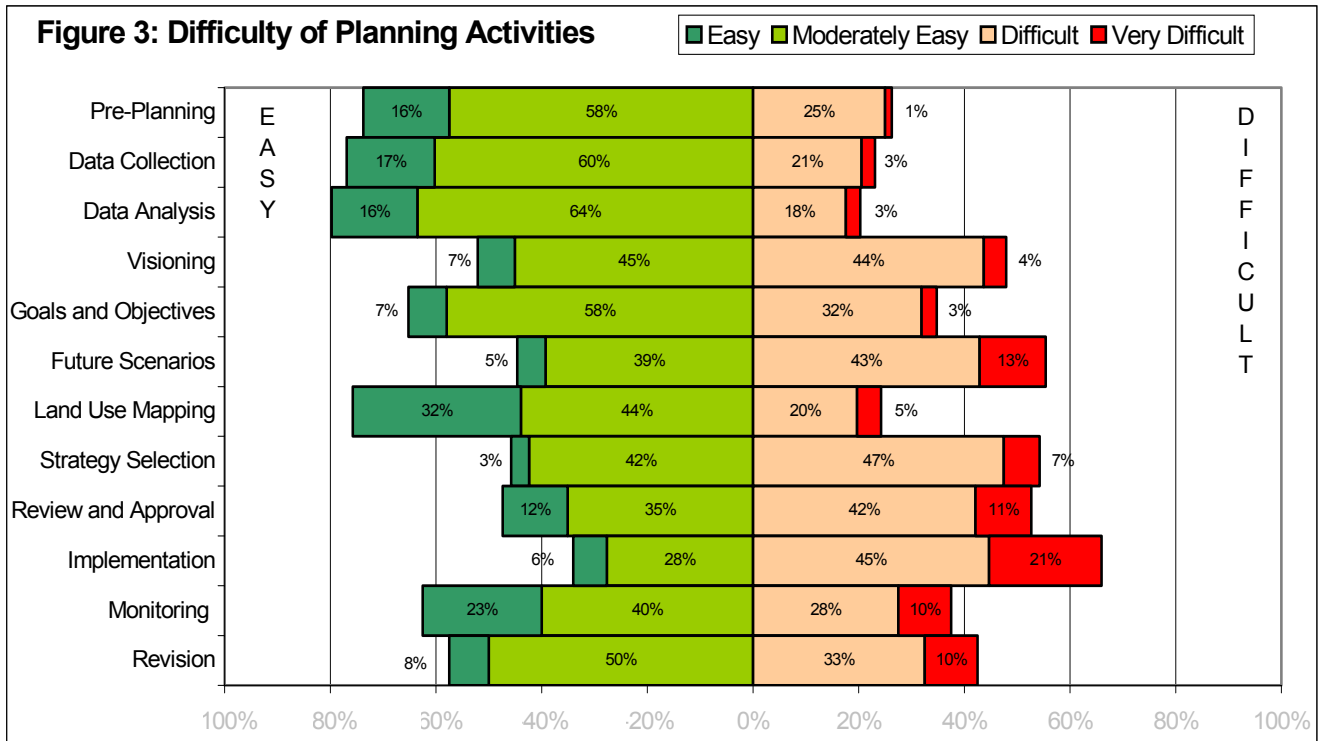
A lack of financial resources was repeatedly identified as a pressing challenge for many survey respondents. With an average annual operational budget of \$280,000 and the cost to complete a major comprehensive or land use plan creeping upwards of \$200,000, it is no surprise that communities are most concerned with funding when initiating or implementing new plans or projects. Financial concerns associated with data collection and land use mapping activities were also reported.

When asked to describe funding sources, respondents indicated that approximately two-thirds of funds are generated locally, such as through taxes, a quarter is derived externally through grants, and the remainder is provided through in-kind services. The State's comprehensive planning grant serves as the major source of outside funding for local planning efforts. Communities also identified other common funding programs as shown in Figure 2.

The Planning Process

At the time of completing this survey, ninety-nine percent of respondents had begun to prepare for a community planning process. When asked to describe the process used in their community, most respondents reported similar planning activities, including data collection, analysis, visioning, development of goals and objectives, and land use mapping. Slightly fewer communities reported scenario development or strategy selection activities. A decreasing number of respondents report involvement in plan implementation, monitoring, and revision activities, respectively.

Survey respondents were also asked to rate the difficulty of the activities included in their planning process. As shown in Figure 3 on the facing page, pre-planning, data collection, analysis, and land use mapping were considered some of the *least* difficult activities to complete. In comparison, plan implementation was ranked as the single most *difficult* activity. Visioning, future scenario development, strategy selection and



plan review and approval were also considered fairly difficult.

To understand why planning activities were rated as such, we asked respondents to identify specific challenges they experienced related to each activity. Top challenges overall include:

- Lack of financial resources,
- Time constraints,
- Limited skill and/or experience with a particular activity,
- Difficulty reaching consensus,
- Lack of public involvement or support, and
- Lack of political support.

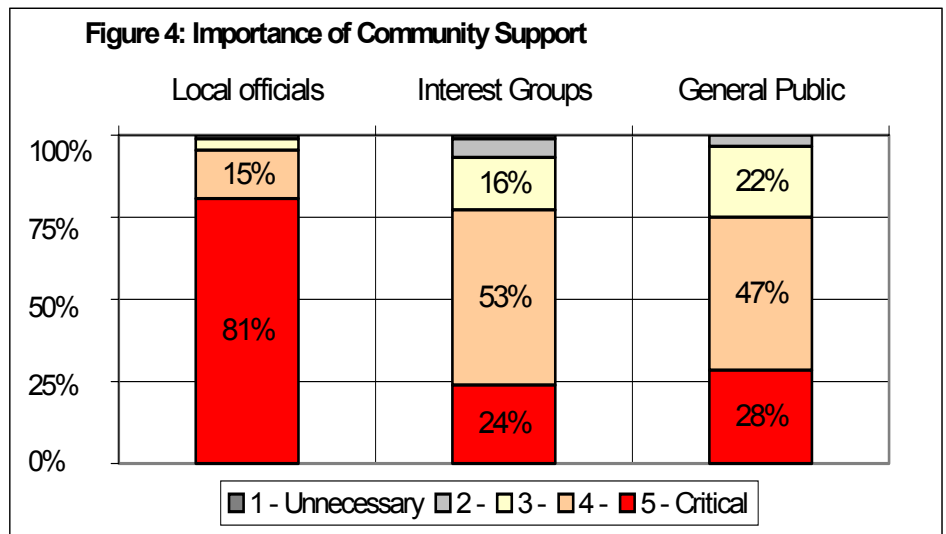
Community Involvement

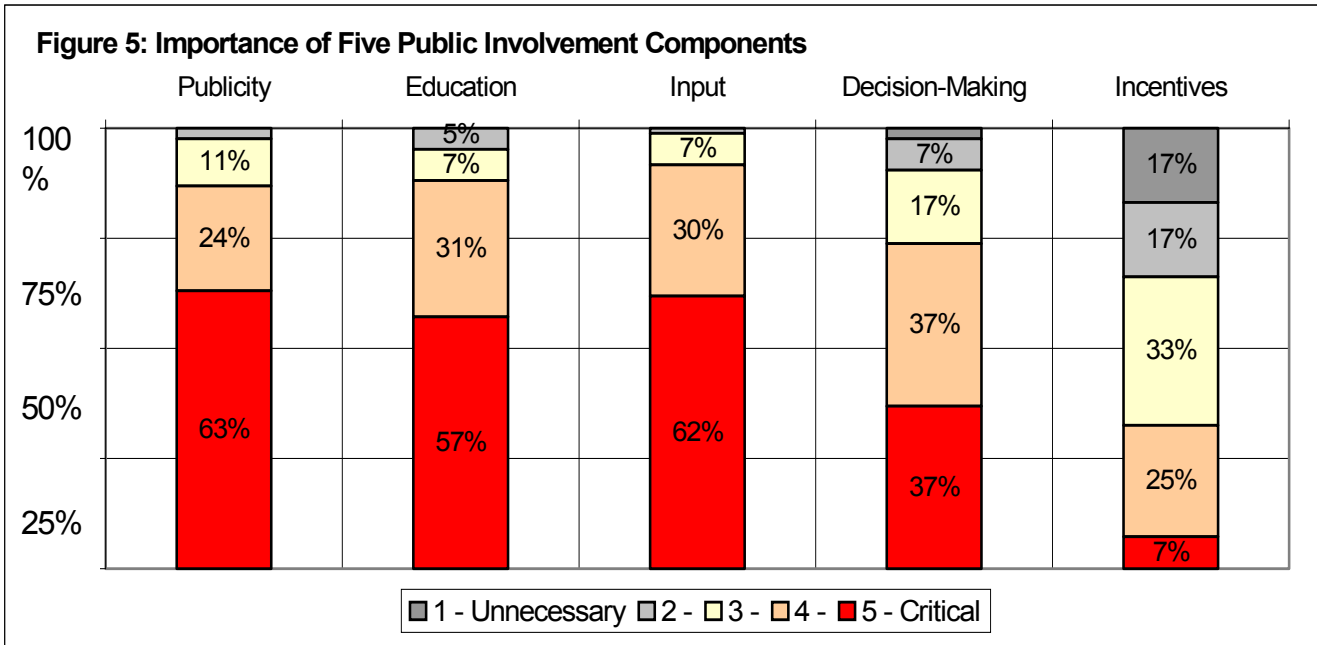
Community involvement and support for local planning processes has been known to contribute to the success or failure of local projects. When asked about the importance of support from various segments of the community, respondents overwhelmingly suggested that support from local

officials is critical to the success of local projects. As shown in Figure 4, they also felt that support from the general public and interest groups was important, but to a lesser degree. To build support among local officials and the public, respondents suggested involving these groups in the planning process, encouraging community members who support planning to build support among their peers, and involving opposition

groups early on in the planning process.

When asked about major challenges associated with involving the public, respondents most frequently cited misinformation, past negative experiences, mistrust of local government, and lack of awareness and/or leadership on the part of citizens. To involve the public, respondents felt strongly about





publicity, education and public input techniques (see Figure 5). They felt less strongly about direct decision-making techniques and incentives to encourage involvement.

Public Involvement Techniques

Publicity – to raise public awareness or build support

Education – to create an informed public

Public input – to gather public knowledge, opinions and feedback

Joint decision-making – to involve the public directly in decision-making

Incentives and rewards – to motivate the public to participate

Although respondents expressed hesitation about using outright incentives or rewards to encourage public involvement, many communities described techniques to make participation less intimidating, more convenient and more rewarding on a personal level. For example,

most communities use flexible meeting times to encourage attendance, refreshments and snacks during meetings, and formal invitations to participate. To encourage local units of government to participate in planning, respondents suggested highlighting opportunities for intergovernmental cooperation, issuing formal invitations to participate, and providing press coverage.

External Assistance

Among survey respondents who report receiving assistance related to natural resources planning or management, most report working with planning consultants. Consultants are generally involved to develop and draft the technical components of natural resources plans, including data, maps, goals, objectives and recommendations. A large number also report receiving education, training and assistance from UW-Extension related to public involvement and visioning. State agencies, including DNR and DOT, non-governmental organizations, county departments, and federal

agencies also actively provide assistance to Wisconsin communities.

Conclusion

This survey was designed to investigate and document the experiences of local communities and professionals involved in planning in Wisconsin. The experiences captured shed light on the environment in which planning takes place in Wisconsin and provide many valuable lessons for the Wisconsin planning practitioner. The full report contains extensive text and graphics illustrating the survey results, a discussion section describing implications for the practicing planner, and a description of the survey methodology used. To view the full report, please visit the following website: <http://www.uwsp.edu/cnr/landcenter/landproject/SurveyReportFinal.pdf>. ■

Board of Adjustment/Board of Appeals Workshops Offered

The Center for Land Use Education is currently scheduling Board of Adjustment/Board of Appeals Workshops throughout the State. Workshops are intended to provide information about the decisions made by the board of adjustment/board of appeals and the procedures and legal standards that apply. The latest round of workshops will also feature the new Supreme Court decisions highlighted in this edition of the *Tracker*.

Workshops are designed for new and continuing county board of adjustment members and city, village and town zoning board of appeals members. Planning and zoning committees, local government staff and other interested persons are also encouraged to attend.

Workshops are currently scheduled for:

June 29, 2004, 9:00 a.m. – 2:00 p.m.
Rusk County Courthouse
Ladysmith, WI

July 23, 2004, 9:00 a.m. – 2:00 p.m.
Oconto County Courthouse
Oconto, WI

If you are interested in scheduling a workshop for your region, please contact:

Lynn Markham
Center for Land Use Education
800 Reserve Street
Stevens Point, WI 54481
715-346-3879
Lynn.Markham@uwsp.edu

Visit our calendar on the web for the workshop brochure and registration information:

<http://www.uwsp.edu/cnr/landcenter/events.html>. ■

Standards of Review for Conditional Uses

As a follow up to the two-part article about conditional uses in the last *Tracker* newsletter, here is a case law update answering the following question:

When a conditional use decision of the zoning committee or plan commission is appealed to the board of adjustment, what standards of review apply?

In *Osterhues v. Board of Adjustment for Washburn County*, the Court of Appeals decided that the board of adjustment, when hearing an appeal of a zoning committee decision, does not have authority to review the case *de novo*.

The *Osterhues* decision is essentially an interpretation of the portion of Wisconsin Statutes listing the powers of the board of adjustment, which include §§ 59.694 (7) and (8). These subsections state that the board of adjustment has the power to:

- “hear and decide appeals where it is alleged there is error in an order” and
- reverse, affirm or modify the appealed decision, and “to that end shall have all of the powers of the officer from whom the appeal is taken.”

In interpreting §§ 59.694 (7) and (8) of Wisconsin Statutes, the Court of Appeals concluded:

- The use of the word “appeals” does not entitle an appellant to a *de novo* review.
- A *de novo* review is only permitted when state statutes specifically provide that authority, and Wisconsin Statutes do not specify any circumstances under which a board of adjustment may review a matter *de novo*.
- If the board of adjustment determines there is an error to be corrected then it may avoid remand of the decision by making a decision the zoning committee had the authority to make. ■

De novo review: to hear the matter anew as though it had not been heard before.

Other reviews are confined to consideration of the record with no new testimony taken or issues raised.

Wisconsin Supreme Court Distinguishes Between Area and Use Variances and Changes the Standard For Area Variances

By Lynn Markham, Land Use Specialist

This article summarizes two recent Wisconsin Supreme Court decisions regarding zoning variances, *State ex rel. Ziervogel v. Washington County Board of Adjustment*, 2004 WI 23 (filed March 19, 2004) and *State v. Waushara County Board of Adjustment*, 2004 WI 56 (filed May 18, 2004) and focuses on:

- 1) Distinguishing between area variances and use variances.
- 2) Redefining the meaning of “unnecessary hardship” for area variances.
- 3) Reviewing the three tests for deciding variance requests in light of the new Supreme Court decisions.

Distinguishing between area variances and use variances

Before these cases were decided by the Wisconsin Supreme Court, it was doubtful that zoning boards of adjustment in Wisconsin had the authority to grant use variances. See *State ex rel. Markdale v. Board of Appeals*, 27 Wis. 2d 154 (1965). Now, the Supreme Court has determined that boards of adjustment do have the authority to issue use variances, though they can be problematic for reasons described in a note at the end of this article. However, 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 the majority opinions in the *Waushara County* and *Ziervogel* cases, it appears that, in order to draw the

line between area variances and use variances, boards of adjustment should consider the degree of the deviation from each dimensional standard for which a variance is sought, to determine if the requested variance would “permit wholesale deviation from the way in which land in the [specific] zone is used.” *Ziervogel*, ¶ 23. A proactive county 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 the area, setback, height or density requirements specified in the ordinance.

Redefining the meaning of “unnecessary hardship” for area variances

To qualify for either an area or a use variance, the applicant must still demonstrate that their property meets each of the following three requirements:

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

In the *Ziervogel* and *Waushara* decisions, the Supreme Court redefines “unnecessary hardship” when applied to area variances as:

“whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.” *Snyder v. Waukesha County Zoning Board of Adjustment*, 1976, 74 Wis. 2d at 475 (quoting 2 Rathkopf, *The Law of Zoning & Planning*, § 45-28, 3d ed. 1972)

The *Ziervogel* decision defines the two types of variances as follows:

- Area variances “provide an increment of relief (normally small) from a physical dimensional restriction such as a building height, setback, and so forth.” *Ziervogel*, ¶ 23.
- Use variances “permit a landowner to put property to an otherwise prohibited use.” *Ziervogel*, ¶ 21.

In addition, the Court's majority opinions in *Ziervogel* and *Waushara County* clearly state that a board of adjustment should focus on the purposes of the zoning law at issue. "Unnecessarily burdensome" may be interpreted in different ways depending on the purpose of the zoning law from which a variance is being sought. For example, the purpose of dimensional zoning requirements vary widely from a neighborhood scale purpose of *promoting uniformity of development* to a much farther-reaching purpose of *protecting water quality, fish and wildlife habitat and natural scenic beauty for all navigable waters in Wisconsin*. As a result of the increased focus on the purpose of the zoning restriction, zoning staff and boards of adjustment have a greater responsibility to explain and clarify the purposes behind dimensional zoning requirements.

So what does "unnecessarily burdensome" mean in practice? The *Ziervogel* and *Waushara County* decisions both discussed variance requests to expand nonconforming structures that did not meet the shoreland setback, yet neither decided whether the variance should be granted under the "unnecessarily burdensome" standard. However, the 1976 *Snyder* decision that also used the term "unnecessarily burdensome" does provide guidance. In *Snyder*, a porch had been built that did not comply with the sideyard setback of a shoreland lot. The question was whether a variance should be granted for the porch because living without it would be "unnecessarily burdensome." The board of adjustment denied the variance and the Wisconsin Supreme Court affirmed its decision stating that the "difficulty or hardship relied upon for granting the variance" for the porch was either "self-created or no more than personal inconvenience." *Snyder v. Waukesha County Zoning Board of Adjustment*, 74 Wis. 2d at 479 (1976).

Reviewing the three tests for deciding variance requests in light of the new Supreme Court decisions

While the "unnecessary hardship" standard for area variances has changed, the other variance standards have remained the same. To qualify for a variance, the applicant must demonstrate that their property meets each of the following three requirements.

1) Unique property limitations

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.

2) No harm to public interests

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*

3) Unnecessary hardship

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.

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.

- 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.

The flow chart on the following page summarizes the standards for area variances and use variances. Application forms and decision forms for zoning variances are available on the Center for Land Use Education's website at <http://www.uwsp.edu/cnr/landcenter/zoningboards.html>

Other summaries

(UW-Extension does not necessarily endorse the viewpoints expressed in the articles below)

State ex. rel Ziervogel v. Washington County Board of Adjustment

From Wisconsin Law Journal's website:
www.wislawjournal.com/archive/2004/0324/variance-0324.html and www.wislawjournal.com/archive/2004/0324/variance-analysis-0324.html

From the Wisconsin Department of Natural Resources:
<http://dnr.wi.gov/org/water/wm/dsfm/shore/archive/decisions.htm>

From the League of Wisconsin Municipalities:
www.lwm-info.org/legal/2004/05may/comment.html

From the Wisconsin Chapter of the American Planning Association:
www.wisconsinplanners.org/law/March2004SpecialAlert.htm

From Boardman Law Firm:
www.boardmanlawfirm.com/muni_newsletter/muniMay04.pdf

From Michael, Best and Friedrich:
www.mbf-law.com/pubs/client/LR_alert_3_04.pdf

From Godfrey & Kahn Attorneys at Law:
www.gklaw.com/publication.cfm?publication_id=269

State v. Waushara County Board of Adjustment

From Wisconsin Law Journal's website:
www.wislawjournal.com/archive/2004/0526/02-2400.html

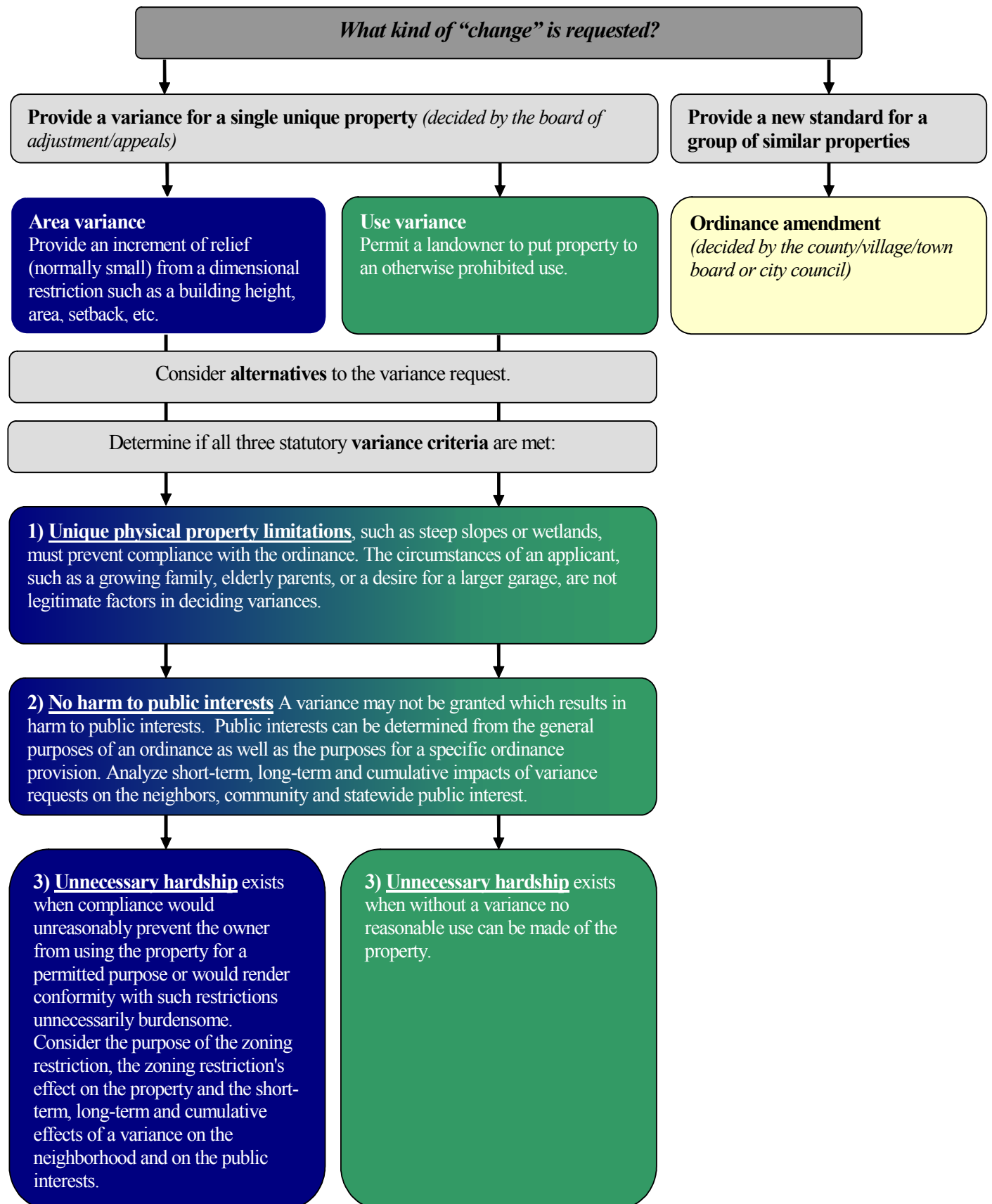
From the Wisconsin Department of Natural Resources:
<http://dnr.wi.gov/org/water/wm/dsfm/shore/archive/decisions.htm>

From the Wisconsin Realtors' Association:
www.wra.org/pdf/government/landuse/Waushara_Cty_Case.pdf

From Boardman Law Firm:
www.boardmanlawfirm.com/muni_newsletter/muniJun04.pdf

This article was reviewed for form and content by: Rebecca Roberts from the Center for Land Use Education; Linda Meyer from the Wisconsin Department of Natural Resources; Philip Peterson from the Wisconsin Department of Justice; and Daniel Olson from the Wisconsin League of Municipalities. Any errors, mistakes and omissions remain the responsibility of the author. ■

Area and Use Variance Decision-Making Process



SUBMIT ARTICLES!

Please submit an article to our newsletter.

It should be:

- ◆ 1000 words or less,
- ◆ Informative,
- ◆ Of state-wide concern,
- ◆ And address a land use issue.



The Managing Editor will review your submission and get back to you if any changes are necessary.

*Managing Editor:
Rebecca Roberts*

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