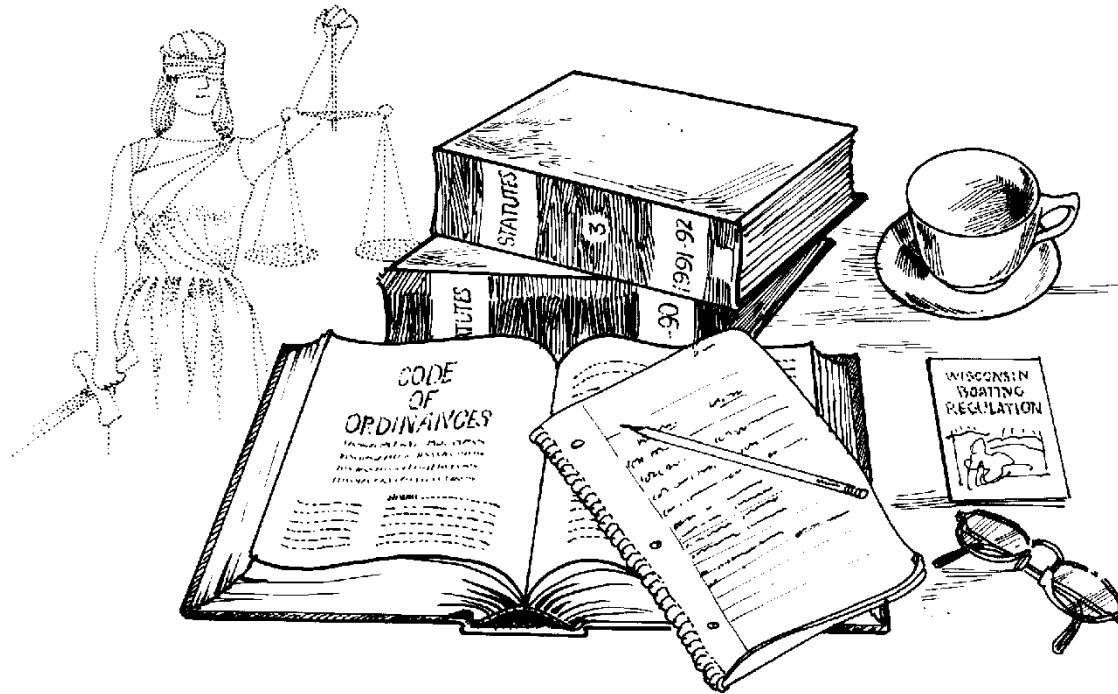


# Zoning Board Workshop



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

**UW**  
**Extension**  
University of Wisconsin-Extension

Dunn, Polk and St. Croix Counties  
May 7, 2015

Lynn Markham  
Center for Land Use Education

# Who is here today?

- Zoning board of adjustment or board of appeals members?
- Zoning committee members?
- People who appoint zoning board members?



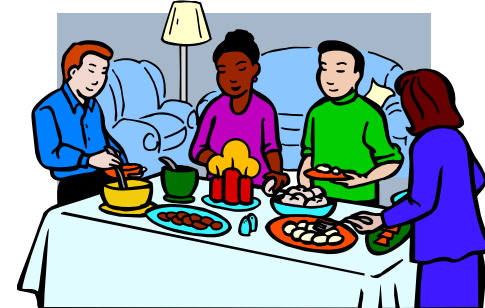
Do you have specific questions about zoning boards that you want us to cover today?

# Workshop Outline

1. Introduction
2. Role of the zoning board
3. Zoning board hearing, decision-making process and creating the legal record
4. Variances

## Lunch

5. Shoreland zoning basics
6. Variance exercise
7. Conditional uses and administrative appeals



# Terminology

## State statutes define:

- Counties (and towns) have boards of adjustment  
Wis. Stat. s. 59.694, stats. for counties, s. 60.65 for towns
- Cities, villages (and towns) have boards of appeal  
Wis. Stat. s. 62.23(7)(e), stats. for cities, s. 61.35 for villages,  
s. 60.62 for towns with village powers

## Both are commonly referred to as:

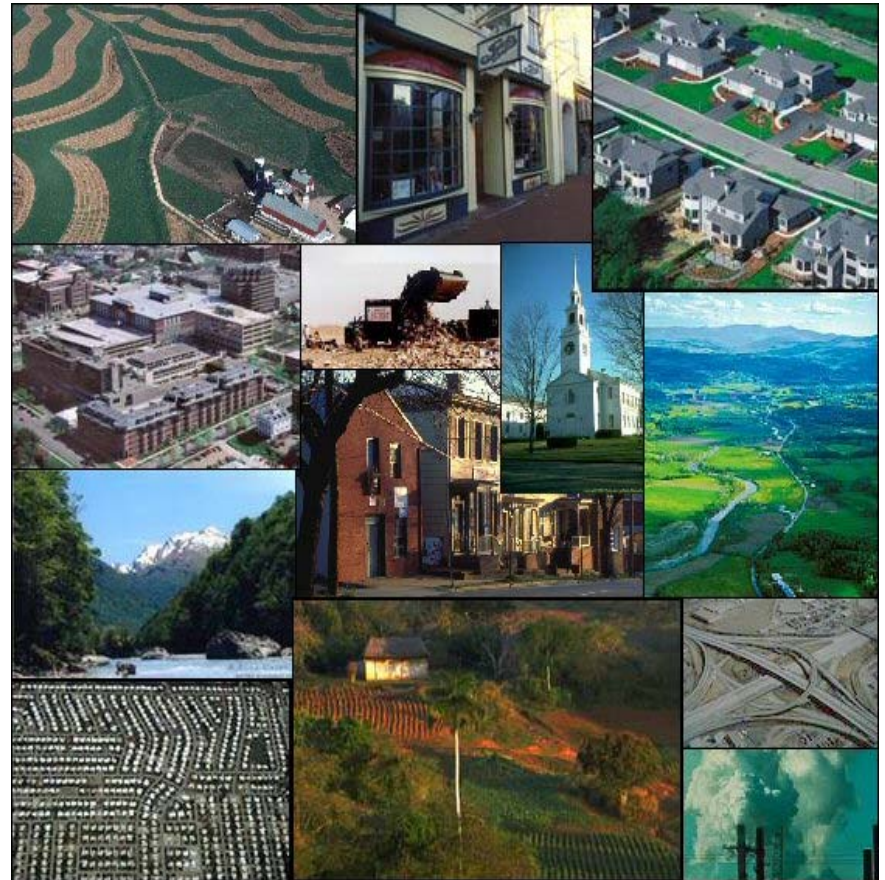
- Zoning Board
- BOA, ZBA
- Different from the 'zoning committee'



# Why do we have zoning?

It is one tool to achieve community goals such as:

- Public health, safety & welfare
- Natural resource protection
- Protection of investments
- Aesthetics
- Controlling costs of local government infrastructure and services?



# Who has zoning?

## Counties

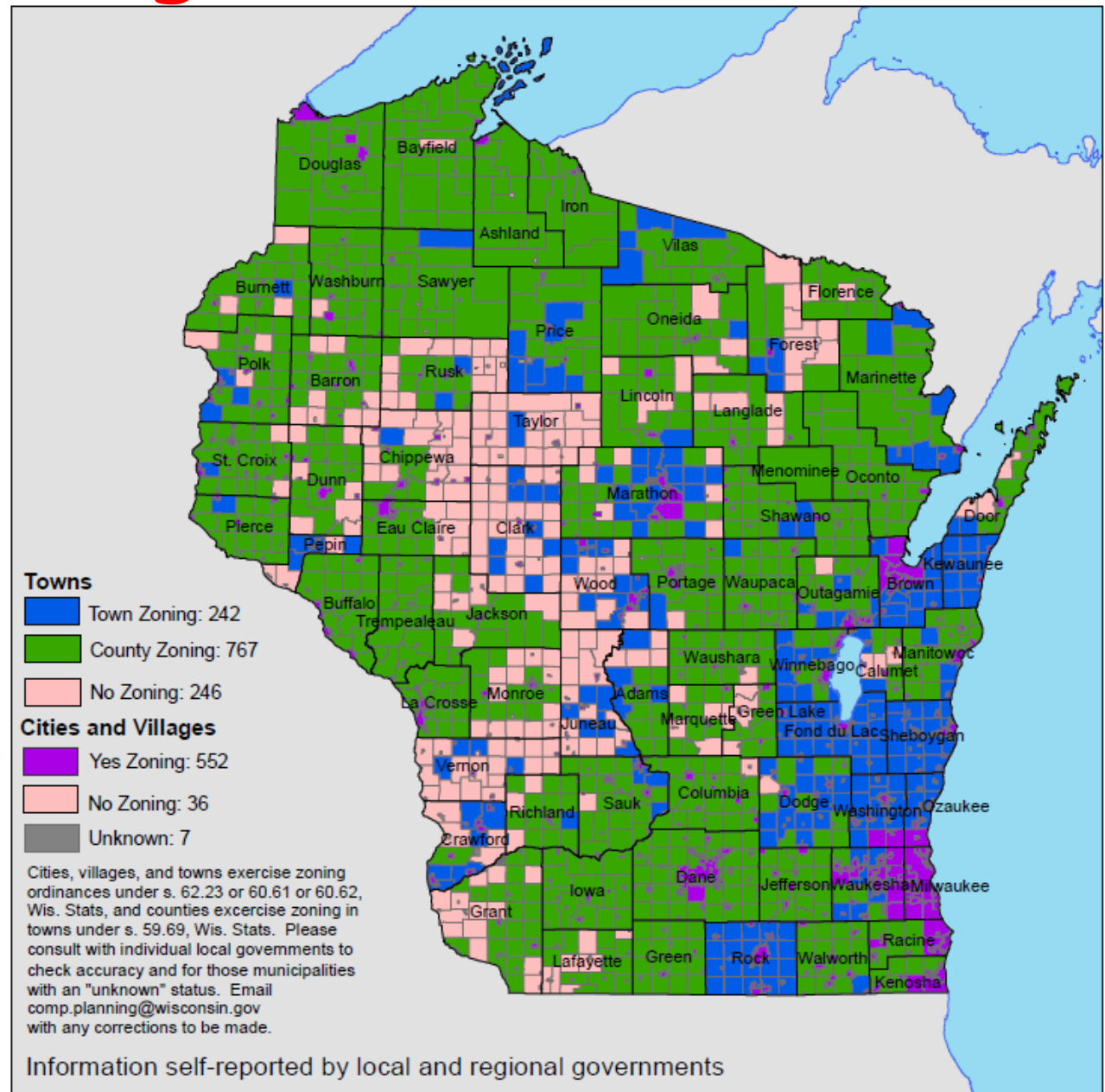
- Required to administer shoreland/wetland zoning
- May adopt general zoning in unincorporated areas

## Towns

- May adopt general zoning if no county zoning or after adoption of village powers
- May adopt shoreland zoning if more restrictive than the county

## Cities/Villages

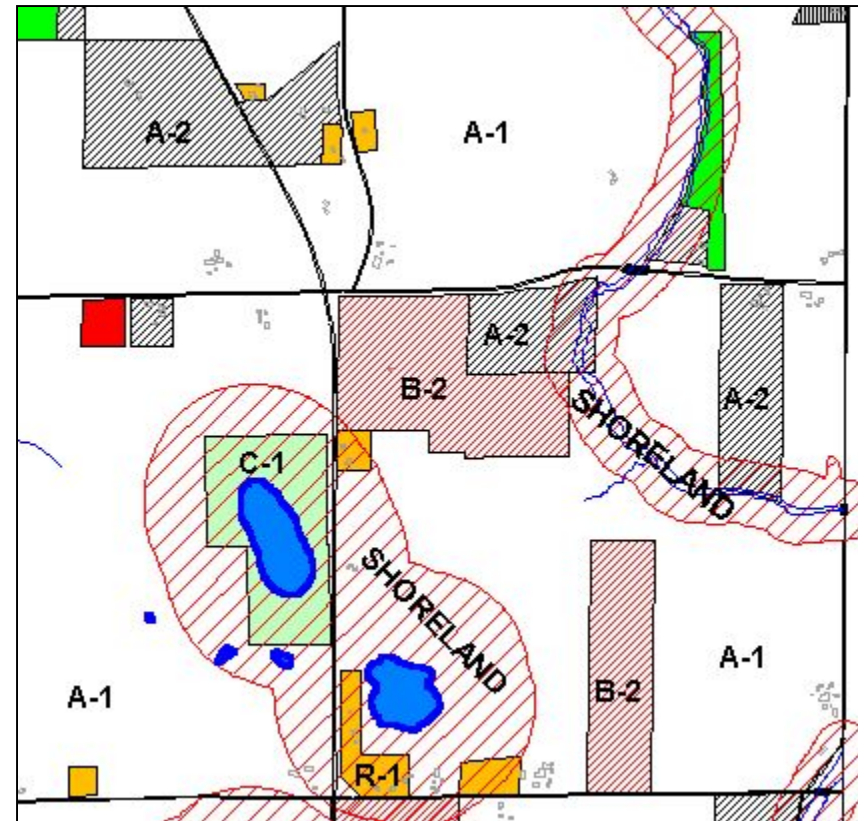
- May adopt general zoning and extra-territorial zoning (applies 1.5-3 miles outside of boundaries)
- May have shoreland or floodplain zoning (required in some circumstances)



# Zoning operates on 2 scales

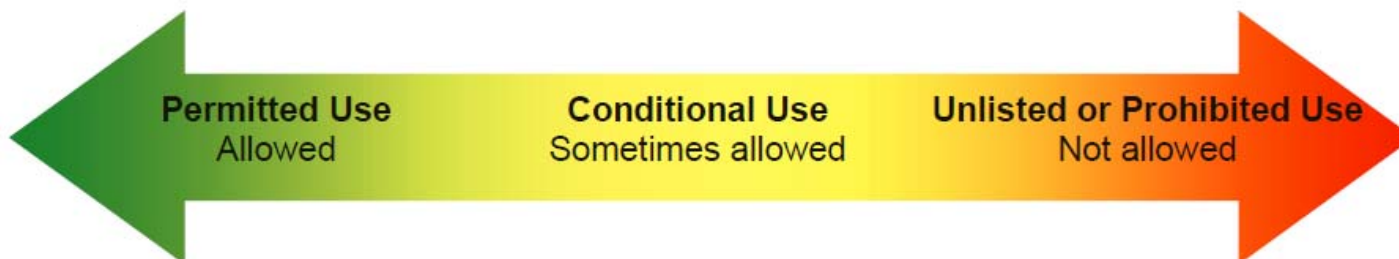
## Landscape scale:

- Zoning map divides the community into districts
- Minimizes conflicts between incompatible land uses
- Encourages mix of compatible uses



# Zoning - Allowable Uses

1. **Permitted Use** - a use that is listed and allowed by right in all parts of a zoning district (granted by zoning administrator)
2. **Conditional Use** - a use that is listed for a district and may be allowed if suited to the location (decided by plan commission, zoning board or governing body)
3. **Unlisted or Prohibited Use** - a use that is expressly prohibited or not listed for the district is not allowed

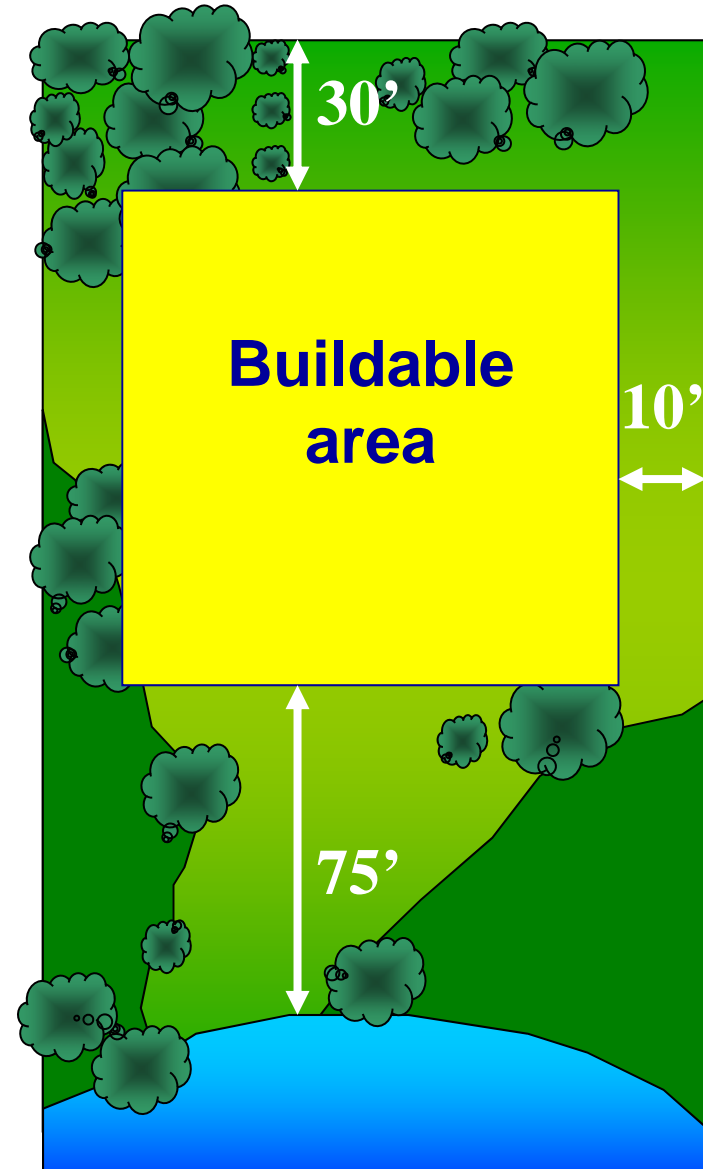




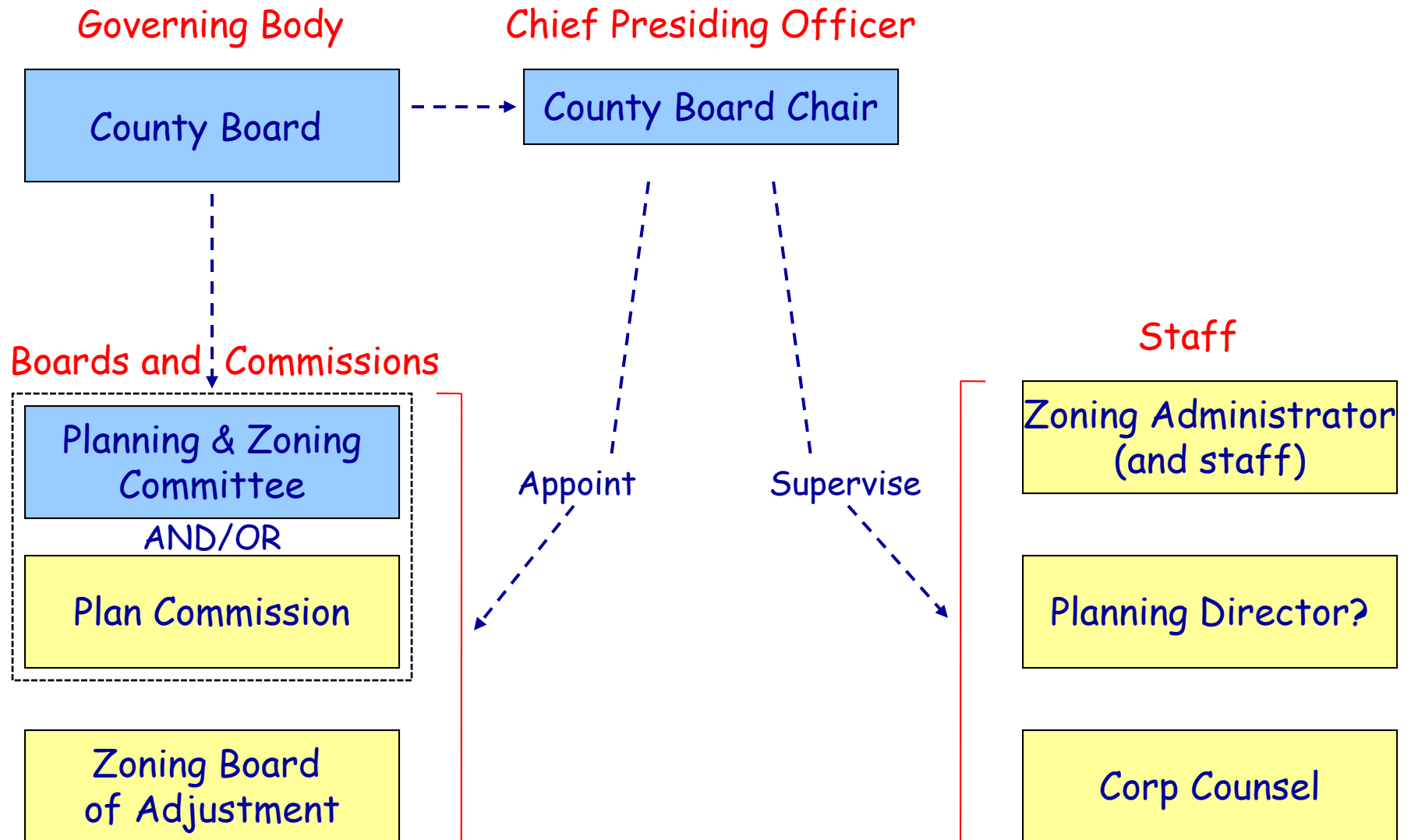
# Zoning operates on 2 scales

## Parcel scale:

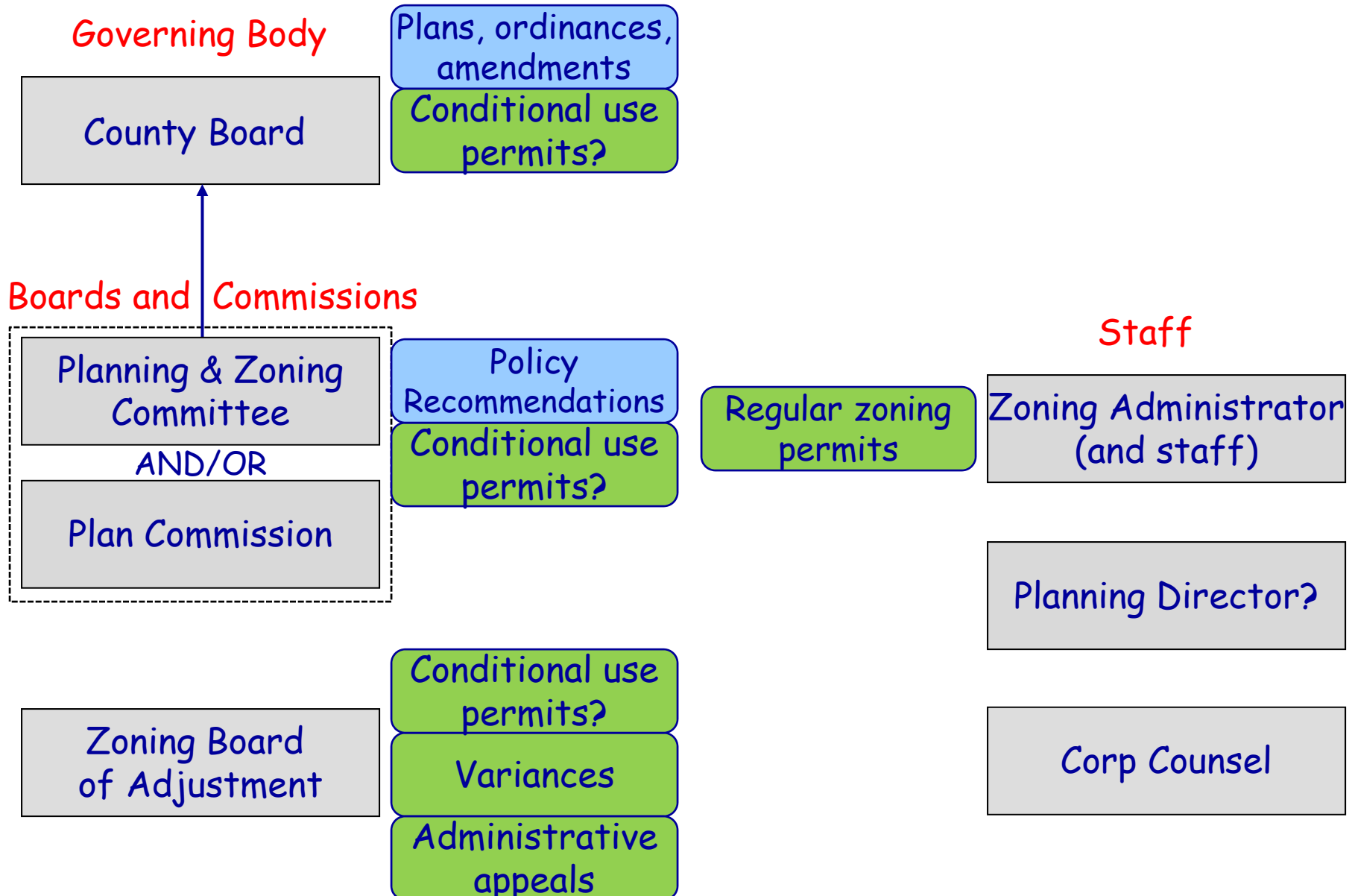
- Regulate intensity of development on a parcel
  - Lot size
  - Density
- Regulate size and location of buildings on parcel
  - Setbacks
  - Floor area ratios
  - Building height standards



# Local Government Structure



# Local Government Structure



# Zoning Board roles & responsibilities



# The zoning board functions like a court



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

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

# The zoning board functions like a court



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

# Standards on judicial review

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

1) Subject matter jurisdiction

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

2) Proper procedures

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

3) Proper standards

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

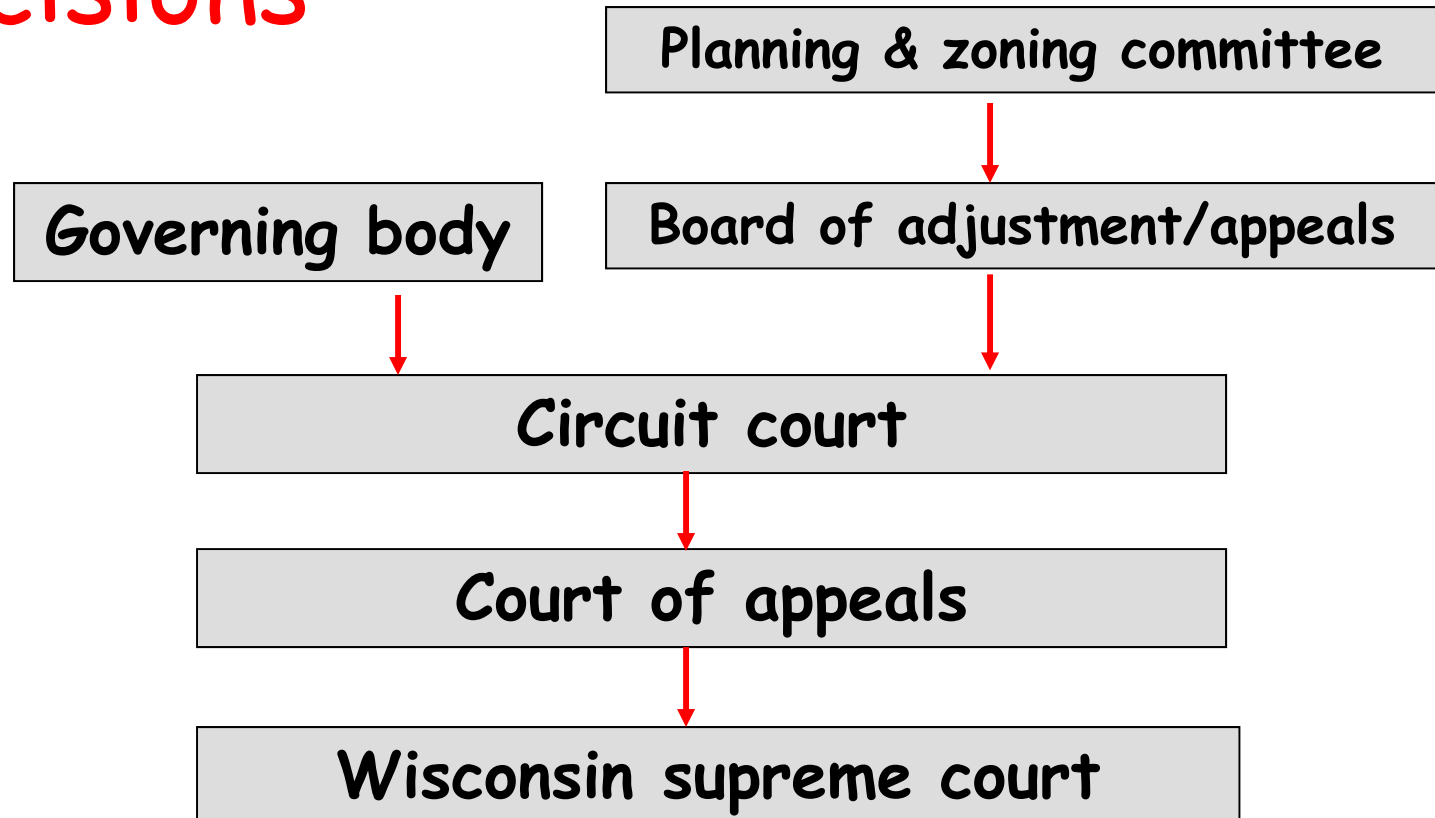
4) Rational basis for the decision

Could a *reasonable person* have reached this conclusion?

5) Evidence in the record

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

# Appeal of zoning decisions

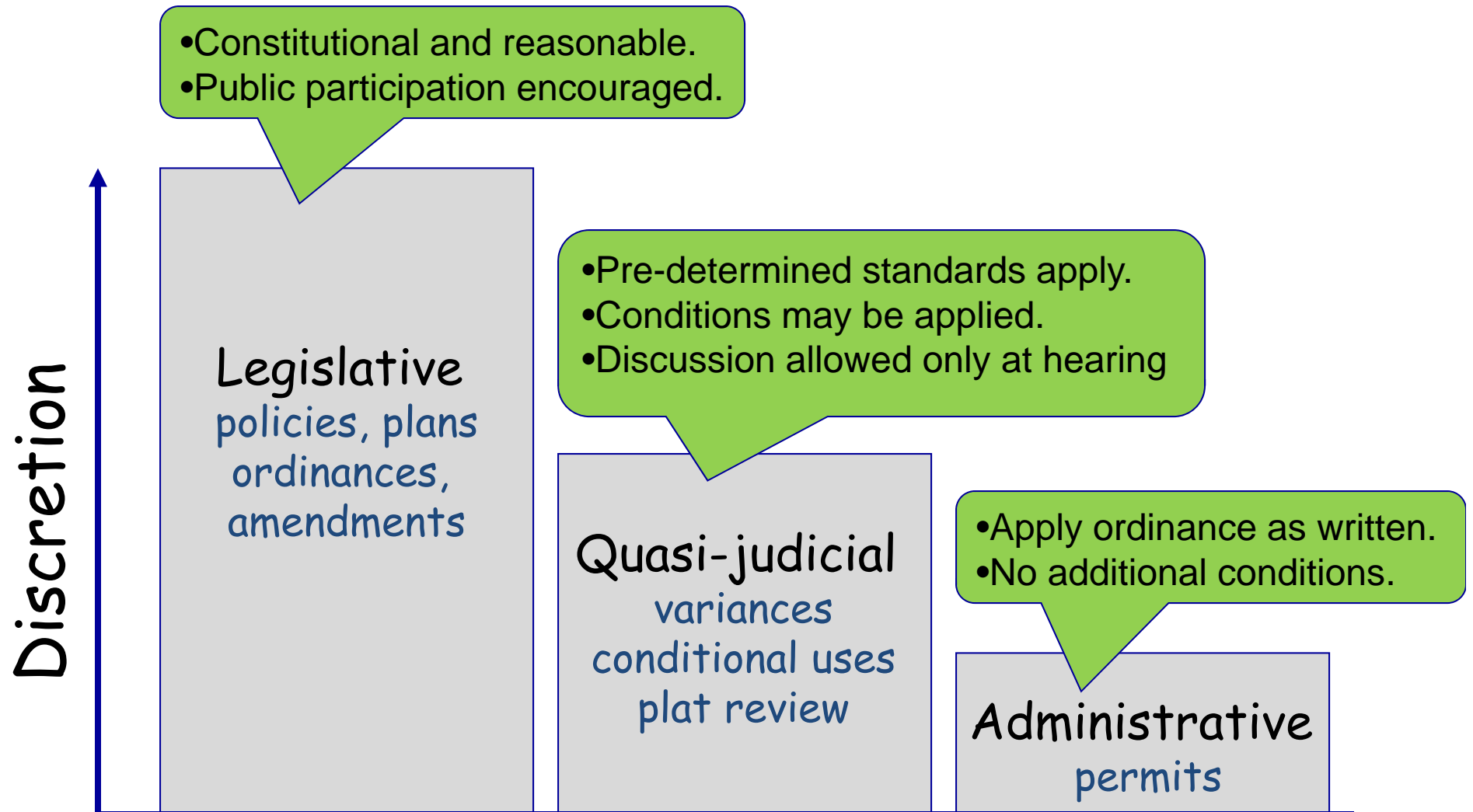


# Leaky bucket



If the purposes of a zoning ordinance are held in a bucket, and variances (leaks) are granted that compromise ordinance purposes, then over time the purposes of the ordinance are lost. BOA can recommend ordinance changes.

# Rules for Decision-Making



# May a zoning board member talk with the applicant or neighbor outside of the hearing?

- "Ex parte" communication = discussion without the other party, regarding a pending matter not included in the public record
- Board members should...
  - avoid it,
  - disclose it &
  - encourage citizens to make important information part of the record



See Chapter 6 of Zoning Board Handbook for more details

# BOA roles

- BOA members act like judges and apply the ordinance and state laws as written
- According to Wisconsin law, variances may only be granted if all of the legal standards are met
- It's hard to say "no" to neighbors. Leaning on the state and local laws makes it easier.



# Zoning Board Organization

**County Board of Adjustment:** 3-5 members

- Members must reside in an unincorporated area of the county
- No more than 1 member from each town

**Town Board of Adjustment:** 3 members

- Members must reside in the town
- No more than 1 town board member

**City, Village or Town Board of Appeal:** 5 members

See Chapter 3 of the Zoning Board Handbook for more details

# Zoning Board Organization

- Counties, cities, villages and towns with village powers shall appoint 2 alternate members to the BOA - *2005 Wisconsin Act 34*
  - **1<sup>st</sup> Alternate** shall act with full power when a member cannot vote due to conflict of interest or absence
  - **2<sup>nd</sup> Alternate** only acts when 1<sup>st</sup> alternate or multiple BOA members cannot vote

# Zoning Board Organization

- Members serve staggered 3-year terms
- Vacancies filled for the remainder of a term
- We recommend that members of the governing body not serve on the BOA
  - Difficult to perform both legislative and quasi-judicial role

# Duties of Members

- Zoning Board Members
  - Be familiar with the material -- don't open your packet at the meeting
  - Have a public discussion -- don't pass notes or whisper
  - Explain yourself -- why are you voting this way?
  - Make sure your input is meaningful

# Conflicts of Interest

- Guidance from *Wis. Stat. s 19.59 and s. 946.13*
- A local official cannot use a public position for the private benefit or financial gain of:
  - the individual
  - immediate family members
  - organizations they are associated with

See Chapter 6 of Zoning Board Handbook for more details

## Case law

# Bias of local officials

- Payne & Dolan applied for a conditional use permit (CUP) for a gravel pit
- CUP was granted over the protests of neighbors
- Neighbors appealed



*Keen v. Dane County, 2004 WI App 26*

# Case law

## Biased?

### Decision maker #1

- In a letter submitted as part of the CUP application:  
"Payne and Dolan has always stood out above the rest in their efforts and success in being a good corporate citizen and caretaker of the land."

Advocate  
Risk of bias too high

### Decision maker #2

- Had previously leased his land to Payne and Dolan for the operation of a gravel pit.

Prior, independent  
business transaction

## Bias of local officials

- Local officials deciding on variances, CUPs and administrative appeals must not harbor bias, or an impermissibly high risk of bias, or prejudge the application



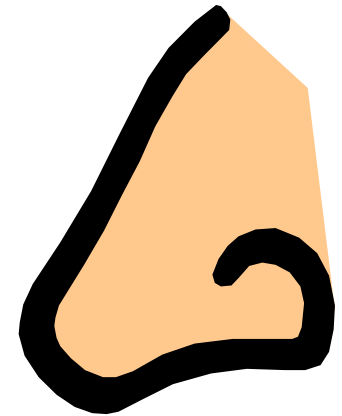
# Avoiding bias

- "Recuse" yourself from decisions that present a conflict of interest or bias
  - Not the same as abstaining (not voting)
  - Do not participate in decision or discussion leading up to decision
  - Physically separate yourself from the board
  - If you need to provide testimony, do so as a member of the audience

See Chapter 6 of Zoning Board Handbook for more details

# When to vote and when to recuse yourself

- BOA member should recuse themselves when they cannot be impartial decision-makers
  - it's up to each member to make this decision
- Ask yourself whether the nature of your relationship or dealings with a person or organization could bias your judgment
  - avoid the appearance of bias as well
- BOA members are not required to state their reasons for recusal, but it's a good idea to be upfront with the public



Sniff test

# When to vote and when to recuse yourself

- Recusal too often may lead to a BOA without enough members to vote
- It should not be used as a way to avoid making tough decisions; that's your job as a BOA member
- Consider strengthening local ordinances, rules and by-laws
- Consult with zoning board attorney if you have questions



How to conduct a meeting

# Open Meetings

# Open Meetings

Wisconsin's **Open Meetings Law** requires:

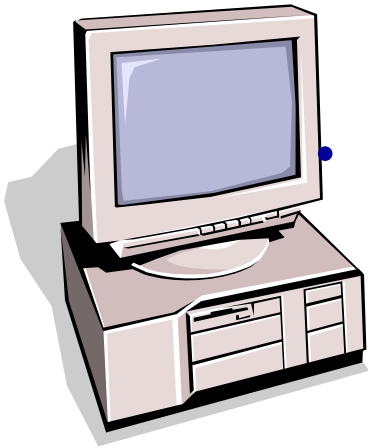
- meetings are open & accessible to the public, including the disabled.
- the public is provided with advanced notice of meetings.
- closed sessions are limited to specified circumstances & procedures.

# Open Meetings

- 1) **Purpose test** = discussion, information gathering or decision-making on a matter within the jurisdiction of the body.
- 2) **Numbers test** = enough members of a body are present to determine the outcome of an action.
  - By statute, if one-half of the members of a body are present, there is a meeting unless the purpose test is not met.
  - A lesser number of members may meet the numbers test if they can block a decision.

# Open Meetings

- Phone conferences, letters, e-mails or faxes between board members may constitute a meeting if the numbers & purpose tests are met.
- A series of phone calls or conversations to “line up votes” or conduct other business violates the law.
- Discussion of meeting scheduling & logistics is OK.





# Open Meetings



- Closed sessions are limited by statute:
  - Personnel matters including employee performance, compensation, discipline, etc.
  - Damaging personal information
  - Deliberations regarding property acquisition and other bargaining issues
  - Deliberations concerning a judicial or quasi-judicial "case" with opposing parties
  - Legal consultation for current/likely litigation
  - Others listed at Wisc. Stat. §19.85

# Conduct of closed sessions

- Record individual votes to convene in closed session. Those who vote against may participate without liability.
- Attendance limited to body and parent body
  - Legal counsel and others essential to closed session may attend
- Consider only matters for which the session was closed.
- Motions & decisions must be recorded.

# Decision-Making

- How do you keep the BOA, applicants and others focused on the decision standards?
- Is it appropriate to ask applicants about their family, friends, house guests?
- Once testimony is collected, how does the zoning board deliberate?
- Do all zoning board members explain the reasons that they feel the legal standards for a variance are or are not met?
- Who fills out the zoning board decision form?

# Application Forms

Application forms should prompt:

- Contact information
- Property description
- Current conditions
- Maps, photos, scale drawings
- Does proposed project meet variance/conditional use standards?

# Decision Forms

Decision forms should prompt:

- Facts of the case
- Does proposed project meet variance/conditional use standards?
- Decision
- Related conditions or limitations

# Meeting Packet

Meeting packet may include:

- Agenda
- Minutes from previous meeting
- Completed application forms
- Background materials
- Staff summary ± recommendations

# Suggested Procedures

see page 62 of zoning board handbook

## Before the meeting:

- Make logistical arrangements
  - Room, refreshments, seating arrangements, etc.
- Provide advance notice of meetings
- Distribute agenda and meeting materials
- Review application packet or other background materials
- Conduct **site inspection**, if necessary
- Arrange for alternates, if necessary

# Site Inspections

- Should decision-makers view the site as individuals? As a group?

Either. Must have inspection authorization, which may be included on application. Group visits must be noticed as an open meeting.

- Can the public go on-site?

If the board/commission goes on-site as a group, the inspection is an open meeting and must include the public. Otherwise members of the public must obtain owner's permission.



# Site Inspections

- Can decision-makers question the property owner on-site? How about staff?

You can ask technical questions or clarifications. All other questioning and discussion should be saved for the hearing.

- Who can decision-makers talk with during the ride from the site to the meeting?

They can talk to anyone, just not about zoning board issues.

# Site Inspections

- 1) Comply with notice & public accessibility requirements of open meeting law
- 2) Information gathered during a site inspection must be included in the hearing record to be considered
- 3) Consider limitations on public discussion (observation only)

# Suggested Procedures

## Preliminary matters at meeting

1. Distribute and collect the appearance slips
2. Call the meeting to order. [chair]
3. Take roll and confirm that a quorum is present. [secretary]
4. Confirm compliance with the open meeting law and public notice requirements. [members]
5. Read the agenda and amend it as necessary (to reorder hearings). [chair & members]
6. Inform the public in attendance of **role of BOA, hearing procedures**, including **ground rules**. [chair]

# Role of BOA and hearing procedures

- Many people coming to zoning board meetings will be doing so for the first time
- Describe the role of the zoning board and what will happen at the meeting, so they know what to expect

How would you describe what the BOA does to the public?

- Help applicant get variance?
- Always say “no”?

# Role of BOA and hearing procedures

- Example announcement of proceedings available in folder

Do you use something like this now?  
Suggestions to make this script fit for  
your BOA?

# Ground rules example

- Anyone present may speak during the public comment period providing they identify themselves.
- Testify under oath?
- Nobody can interfere with or interject comments while another person has the floor.
- The committee is interested in hearing all pertinent opinions and evidence, however, the Chair reserves the right to rule on relevancy.

# Ground rules example

- The Chair may impose a time limit on individual comments.
- Repetition of comments should be avoided and remarks should be limited to the subject matter being considered.
- Personal attacks or abusive testimony or gross hearsay, rumor, or gossip will be ruled out-of-order by the Chair.

# Suggested Procedures

## Public hearings

1. Open the first public hearing. [chair]
2. Read the application or appeal. [secretary]
3. Report on any site inspection. [secretary]
4. Request a statement by the applicant. [chair with questions by board members]
5. Read the staff report. [ zoning department with questions by board members]
6. Report on related correspondence. [secretary]
7. Disclose any ex parte communication. [board]



# Suggested Procedures

## Public hearings continued

8. Request statements of witnesses (pro/con/information). [chair with questions by board]
9. Request a response by the applicant (or after each witness). [chair with questions by board]
10. Request a response by the zoning department. [chair with questions by board members]
11. Ask any final questions. [board members]
12. Close the record and the hearing. [chair]

# Suggested Procedures

## Deliberation and decision

- We'll discuss this when talking about voting and decisions.

Repeat for other hearings.

# Suggested Procedures

At the conclusion of the meeting:

- Set time, date, location, agenda for next meeting
- Adjourn meeting
- Prepare and distribute meeting minutes
- Notify applicant of decision and appeal rights

# Decision making process and creating the record

(which is usually the only source of info the judge has if BOA decision is appealed)

# Voting Requirements

- Avoid bias
- If a quorum is present, the BOA may take action by majority vote of the members present. - *2005 Wisconsin Act 34*
- Can be more restrictive - (i.e. 4 of 5 members or 3 of 5 members even in the case of an absence)
  - Tip: Use local by-laws or ordinance to clarify how many BOA members must vote to take action.

See Chapter 11 of Zoning Board Handbook for more details

## Case law

# Recording Decisions

- Lamar applied for a variance to raise a billboard above the City's max sign height
- BOA denied variance stating that the variance criteria were not met



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

# Recording Decisions

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

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

# Suggested process

1. Listen and take notes during hearing. Think about whether the applicant has provided evidence to meet the 3 legal standards
2. After hearing, each BOA member fills out decision form individually, providing reasons that each legal standard is or is not met
3. BOA members come together and each member reads their form to the others, including reasons
4. BOA members may ask questions of each other and revise their forms
5. Motion and vote. Motion to grant a variance can only be made if applicant has met all 3 legal standards.
6. All BOA members turn in their decision forms. BOA chair/secretary or zoning staff copy reasons from BOA members' forms to the final decision form.



Thoughts  
from  
judges...



# Decision must include

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

# Decision must include

## 2. Conclusions of law

- Specify applicable legal standards
- Determine which facts relate to the legal standards
- Determine whether all of the legal standards are met by the applicant

## 3. Order and Determination

- Decide/ vote on the case. Vote to grant if applicant has met all legal standards. If granted, agree on any permit conditions.
- Direct the zoning administrator to take any necessary action

# Do zoning board decisions set a precedent

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



*Variances*

# Variances

**Purpose:** to preserve local regulatory standards, prevent regulatory *takings*, and avoid unnecessary burdens on property owners.



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

# Variances

**Use variances** "permit a landowner to put property to an otherwise prohibited use."

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

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

# Variances

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

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

# Variances

Conditions unique to the property  
test

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



To avoid  
unbuildable lots,  
Bayfield County  
now requires 3000  
sf of buildable area  
to create a  
shoreland lot

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



# Variances

## Conditions unique to the property test

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



# Variances

## Public interest test

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

What does unnecessary  
hardship mean for area  
variances?

## Case law

# Unnecessary hardship test for area variances...

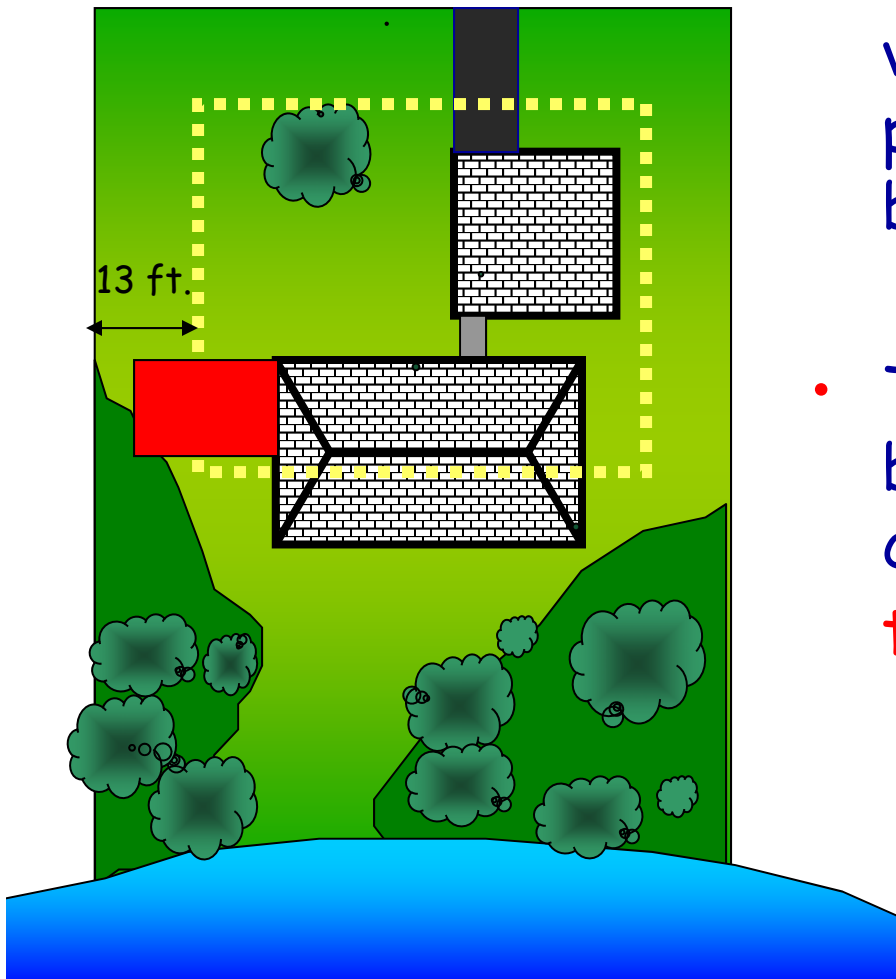
- Unnecessary hardship = when compliance with the ordinance would:
  - unreasonably prevent the owner from using the property for a permitted purpose, or
  - be unnecessarily burdensome in view of ordinance purposes

What weight do you give testimony that the neighborhood/area should have large houses, pink houses, rural character?

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

# What does "unnecessarily burdensome" mean??

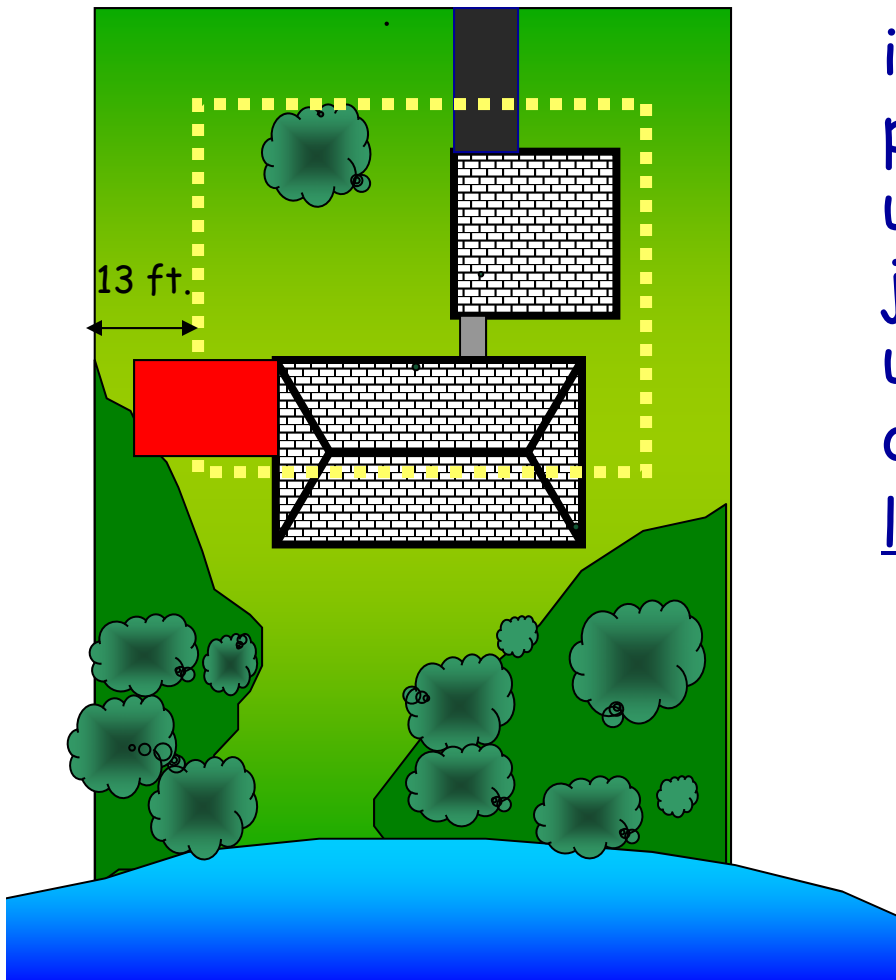
- Should an after-the-fact variance be granted for the red porch because its removal would be "unnecessarily burdensome"?
- The WI Supreme Court said NO because the "hardship was self-created and the porch **no more than a personal convenience**".



*Snyder v. Waukesha County Zoning Board, 1976*

# What constitutes an unnecessary hardship?

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



*Snyder v. Waukesha County Zoning Board, 1976*

## New case law

# Unnecessary hardship

- For all variances: Hardship cannot be self-created or created by a prior owner
- Building inspector missed a setback violation for 2 duplexes
- The duplexes were built and the developer then applied for an after-the-fact variance, which the zoning board granted.
- The court noted there was ample evidence of external causes of the hardship and affirmed BOA's grant of a variance because the hardship of removing the duplexes was not solely self-created
- A zoning board may consider an error of local government staff when deciding whether to grant a variance.

*Accent Developers, LLC v. City of Menomonie BOA and Timber Ridge Homes LLC, 2007 WI Court of Appeals*

# Is the hardship...

A personal inconvenience?

A hardship that is necessary to achieve ordinance purposes?

If yes to either question, deny variance.



A hardship that is not necessary to achieve ordinance purposes?

If yes and other 2 variance standards are met, then grant variance.



# *Variances...*

- Loss of profit or financial difficulty do not constitute hardship
- A variance runs with the property
- A variance does not create a nonconforming structure
- A zoning board may consider an error of local government staff when deciding whether to grant a variance
- Lack of objections from neighbors does not justify a variance

# Variations

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

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

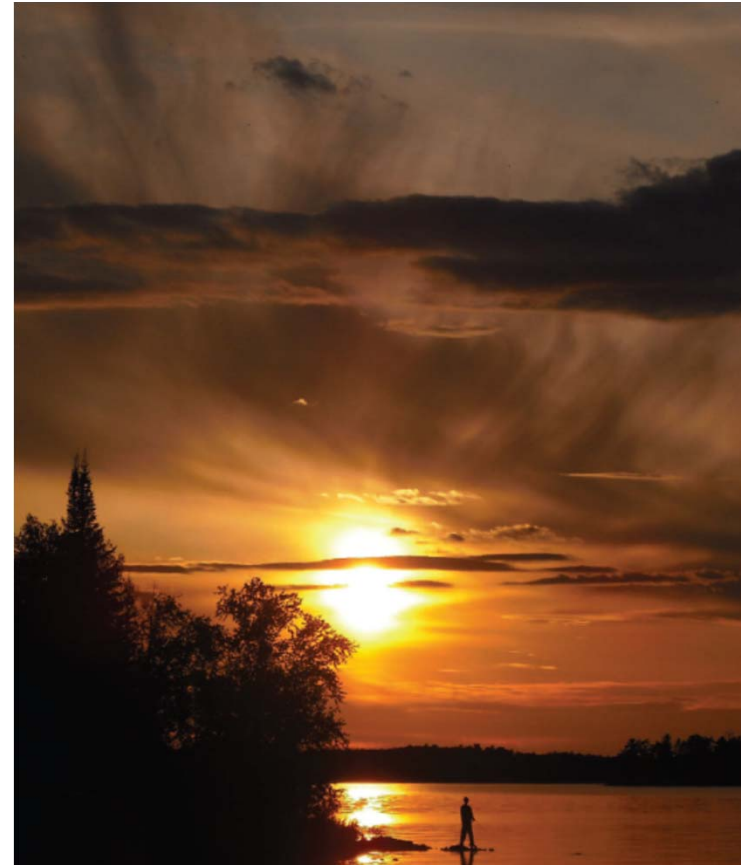
# How do changes on waterfront properties affect lakes and streams?

Shoreland zoning basics & the science behind them

See Chapter 21 in the Zoning Board Handbook and impervious surface handout



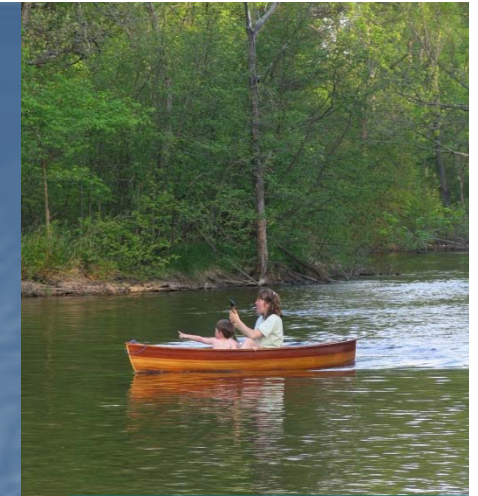
Healthy fish, abundant wildlife and clear water all depend on how waterfront properties are developed





# The Public Trust Doctrine

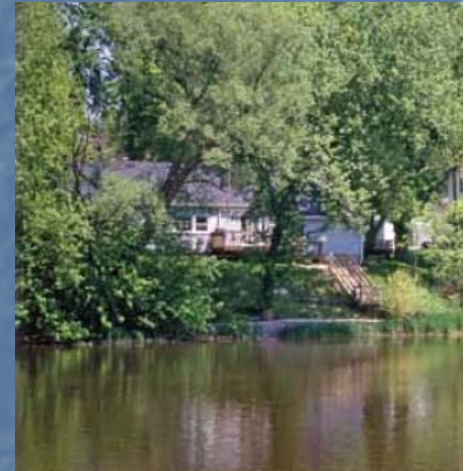
- Wisconsin's waters belong to everyone
- State has obligation to protect public rights in all navigable waters
  - Derived from clause in Northwest Ordinance (1787) and in WI Constitution (1848)
  - Wisconsin's navigable waters are "common highways and forever free" and are held in trust by the Department of Natural Resource
  - **Public rights:** navigation, boating, fishing, swimming, hunting and scenic beauty
    - Rights include protecting spawning grounds, wildlife, and vegetation
    - State shall intervene to protect these public rights



Held in trust?  
Property is held by  
one party for the  
benefit of another

# The Public Trust Doctrine

- Riparian owners hold rights in the water adjacent to their property
  - Use of the shoreline
  - Right to access the water
  - Reasonable use of the water
- WI Supreme Court has ruled that when conflicts between riparian rights and public rights exist, the public's rights are primary, and riparian rights are secondary, **again confirming that the waters belong to all of us**
- The purposes of shoreland zoning stems from this doctrine established under Wis. Stats. ss. 281.31, 59.692, 62.231, 61.351
- **"Champions of the Public Trust" videos**





# Purposes of shoreland zoning include...

- Prevent and control water pollution
- Protect spawning grounds, fish and aquatic life
- Reserve shore cover and natural beauty

s. 281.31 Wis. Stats.





# Water quality & economics

## Is there a connection?



“More polluted lakes have less valuable property than do cleaner lakes.”

E.L. David, *Water Resources Research*, 1968



# Water quality & economics

- A study of over 1200 waterfront properties in Minnesota found when water clarity changed by 3 feet changes in property prices for these lakes are tens of thousands to millions of dollars.

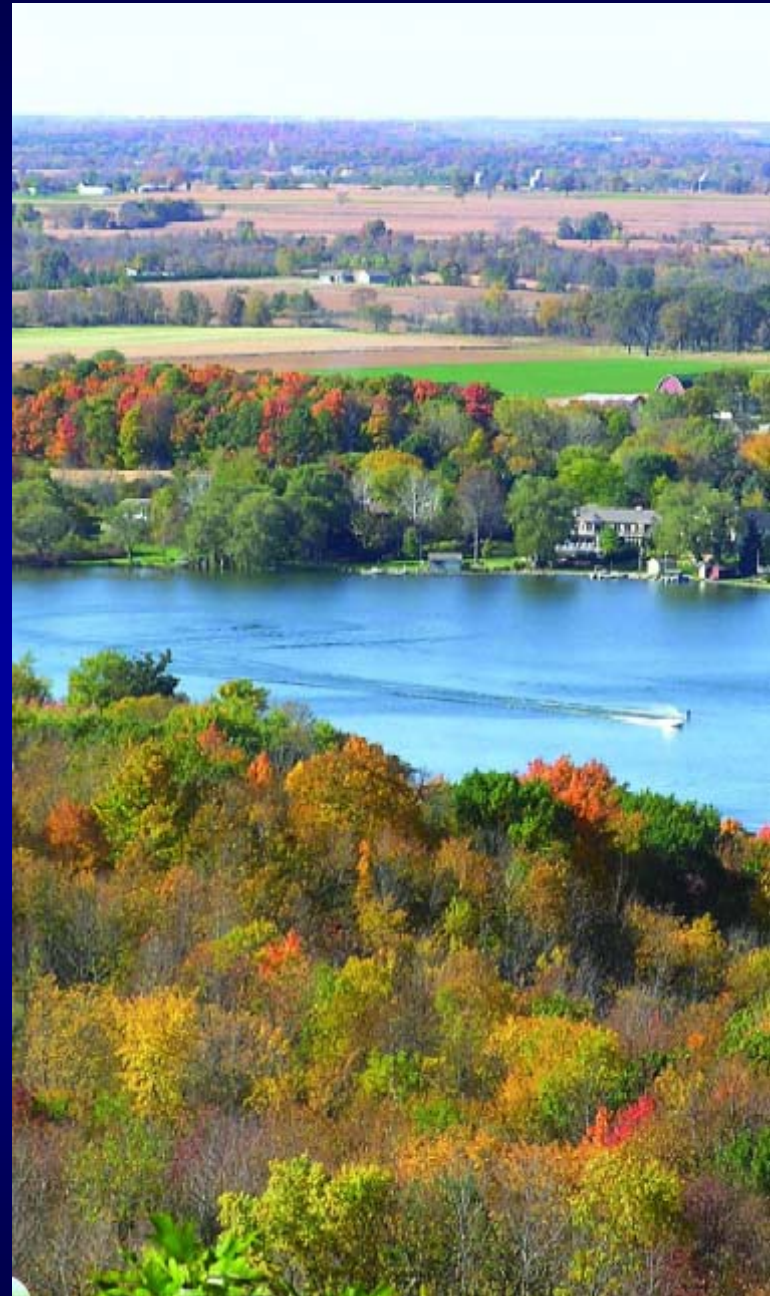
Krysel et al, 2003.



# Healthy watersheds make healthy lakes & higher property values

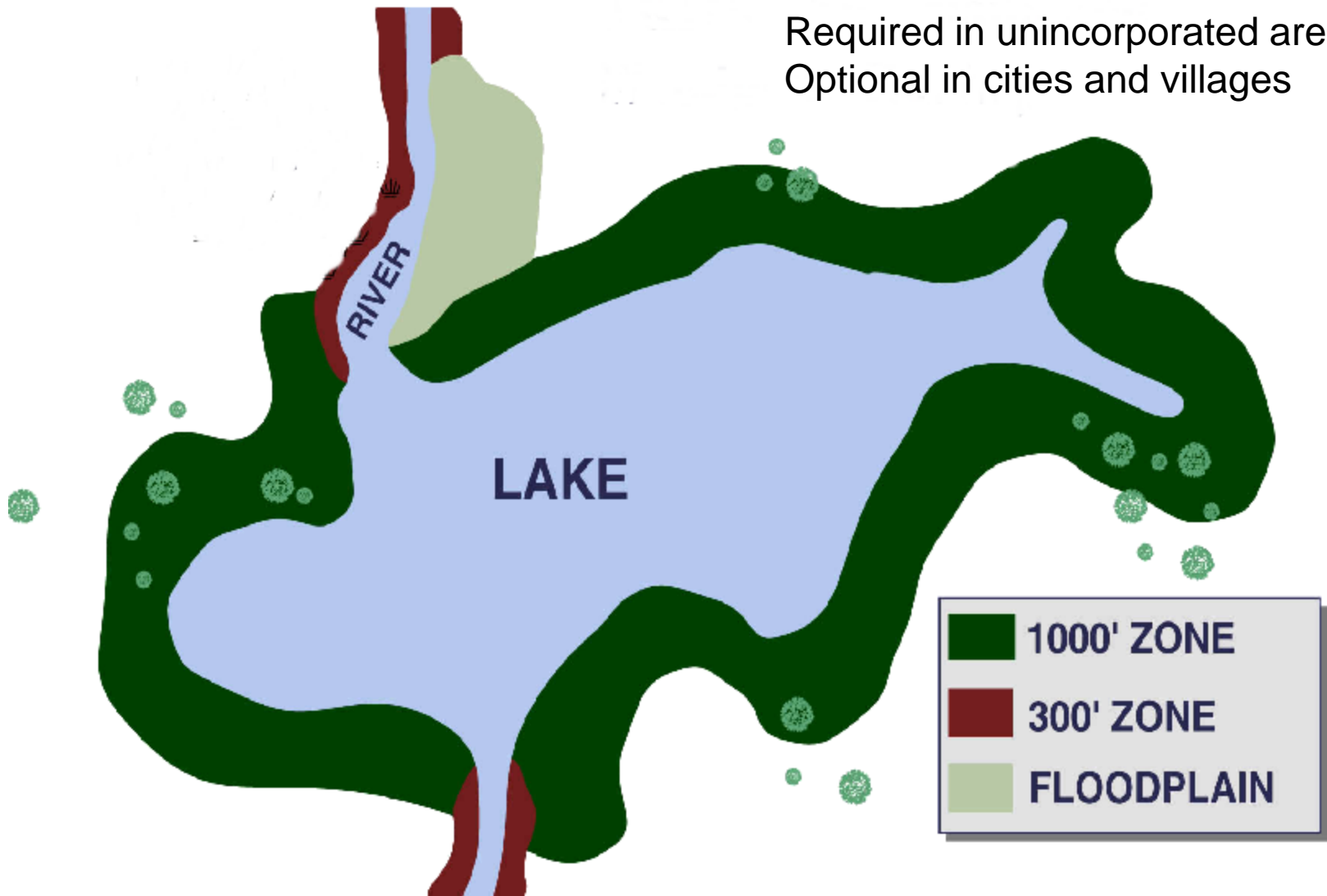
---

- If water quality erodes, then the tax base around lakes erodes too
- *If waterfront property values and property taxes go down, whose taxes will go up to maintain county services?*



# Shoreland zoning applies near lakes & rivers

Required in unincorporated areas  
Optional in cities and villages





**SHORELAND ZONING** is in place to protect our lakes and rivers

- Wisconsin Administrative Code **NR 115** provides minimum standards for shoreland zoning

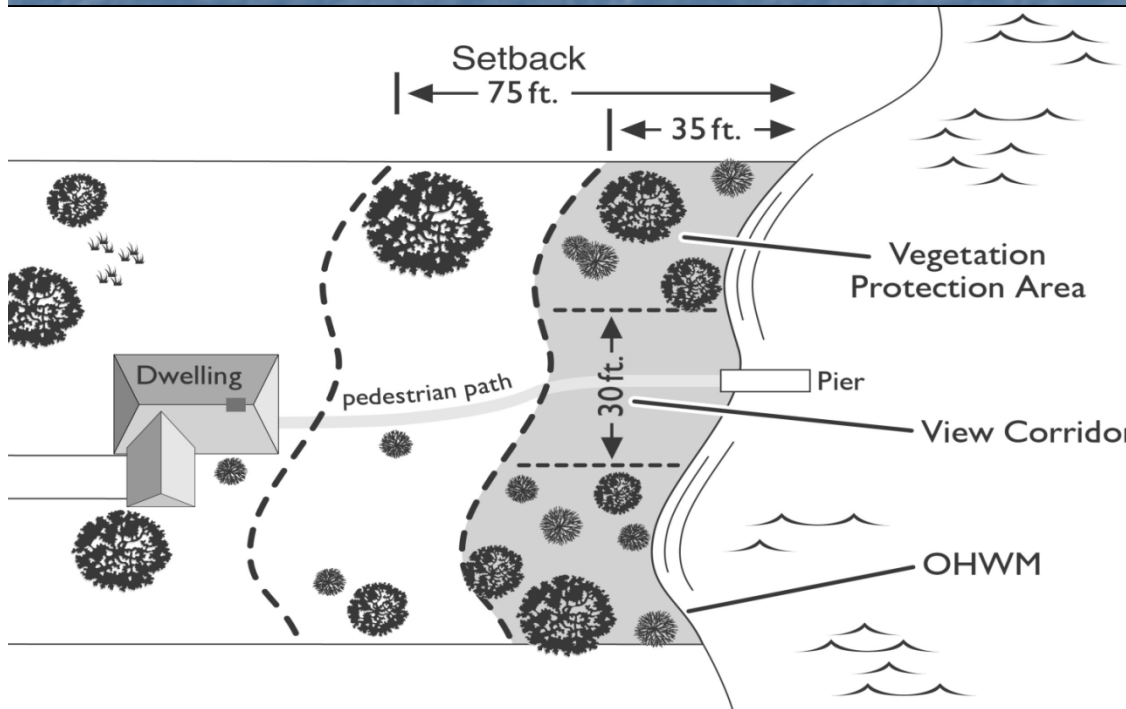


With shoreland zoning



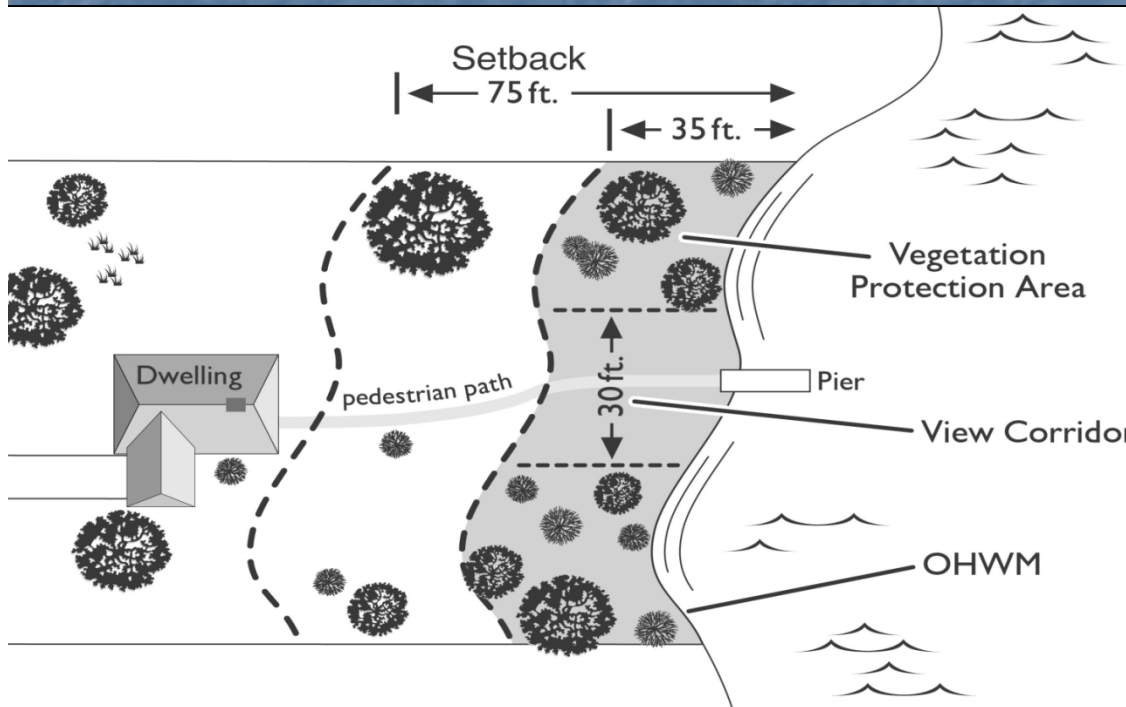
Without shoreland zoning

# Minimum WI shoreland standards (NR 115)



- Adopted in 1966
- Lot size
- Vegetation protection area (buffer)
- Shoreline setback

# How do shoreland standards prevent and control water pollution?



1. **Curb pollutants at their source** such as eroding soils
2. **Cut runoff** that carries pollutants to the waterway by minimizing **impervious surfaces**
3. **Capture and cleanse** pollutant-carrying runoff with **shoreland buffers or rain gardens**



# Does shoreland zoning work?

## Statewide standards (Maine)

Maine requires that towns adopt a shoreland zoning ordinance at least as restrictive as the model ordinance developed by lake scientists with the State of Maine. This model ordinance includes: a 100 foot setback for buildings, and keeping trees and low growing plants and shrubs in place between buildings and the lake.



Developed site in Maine


## No statewide standards (Vermont)

Vermont has no minimum shoreland standards, leaving the responsibility to craft an ordinance to town officials. Often all of the trees, shrubs and groundcover is removed near the water's edge, the lot is leveled, and buildings, driveways, and patios are built close to the shoreline. Seawalls are sometimes installed to stabilize the banks that were destabilized by the removal of the natural trees and shrubs.



Developed site in Vermont

# Can we develop a lakeshore and protect the lake?



9 measures of lake health	Statewide shoreland zoning standards (Maine)	No statewide shoreland zoning standards (Vermont)	Why are these measures important?
Shoreline trees	✓		Trees, shrubs and ground cover near the shoreline provide: <ul style="list-style-type: none"> <li>• Erosion control</li> <li>• Shade in water near shore</li> <li>• Food for deer and other wildlife</li> </ul>
Large woody structure	✓		Fallen trees in the water (woody structure) provide: <ul style="list-style-type: none"> <li>• Cover for fish to hide from birds and bigger fish</li> <li>• Places for turtles to bask in the sun to digest their food</li> <li>• Structure where frogs attach their eggs</li> </ul>
Medium woody structure	✓		
Small woody structure	✓		
Leaves in the water	✓		Leaves in the water feed water insects (fish food)
Variety of lake bottom types, not covered in sand	✓		Lake bottoms not covered in sand & sediment provide: <ul style="list-style-type: none"> <li>• Valuable nesting sites for fish, where their eggs aren't buried</li> <li>• Habitat for water insects (fish food)</li> </ul>
Structure not covered in sediment	✓		
Small animals and plants growing on structures	✓		Small animals and plants growing on rocks and other structure provide food for fish, snails and other animals
Dragonflies & damselflies			Dragonflies & damselflies rely on healthy shorelines & lakes and are voracious predators of mosquitoes

Full report: Determining if Maine's Mandatory Shoreland Zoning Act Standards are Effective at Protecting Aquatic Habitat, March 14, 2013 by the Vermont Department of Environmental Conservation. [www.anr.state.vt.us/dec/waterq/lakes/docs/lp\\_mainezoning.pdf](http://www.anr.state.vt.us/dec/waterq/lakes/docs/lp_mainezoning.pdf)

\*In the table, a checked box means there was no significant difference ( $\alpha = 0.05$ ) between the developed and reference (undeveloped) lake sites, while an unchecked box means there was a significant difference between the developed and reference (undeveloped) lake sites.



# Can we develop a lakeshore and protect the lake?

- In Vermont, lakefront sites developed without statewide shoreland zoning standards harmed the lakes in nine ways, as shown in the table
- In Maine, statewide shoreland standards make it possible to both develop a lakeshore and protect the lake

# Shoreline Buffers & Setbacks

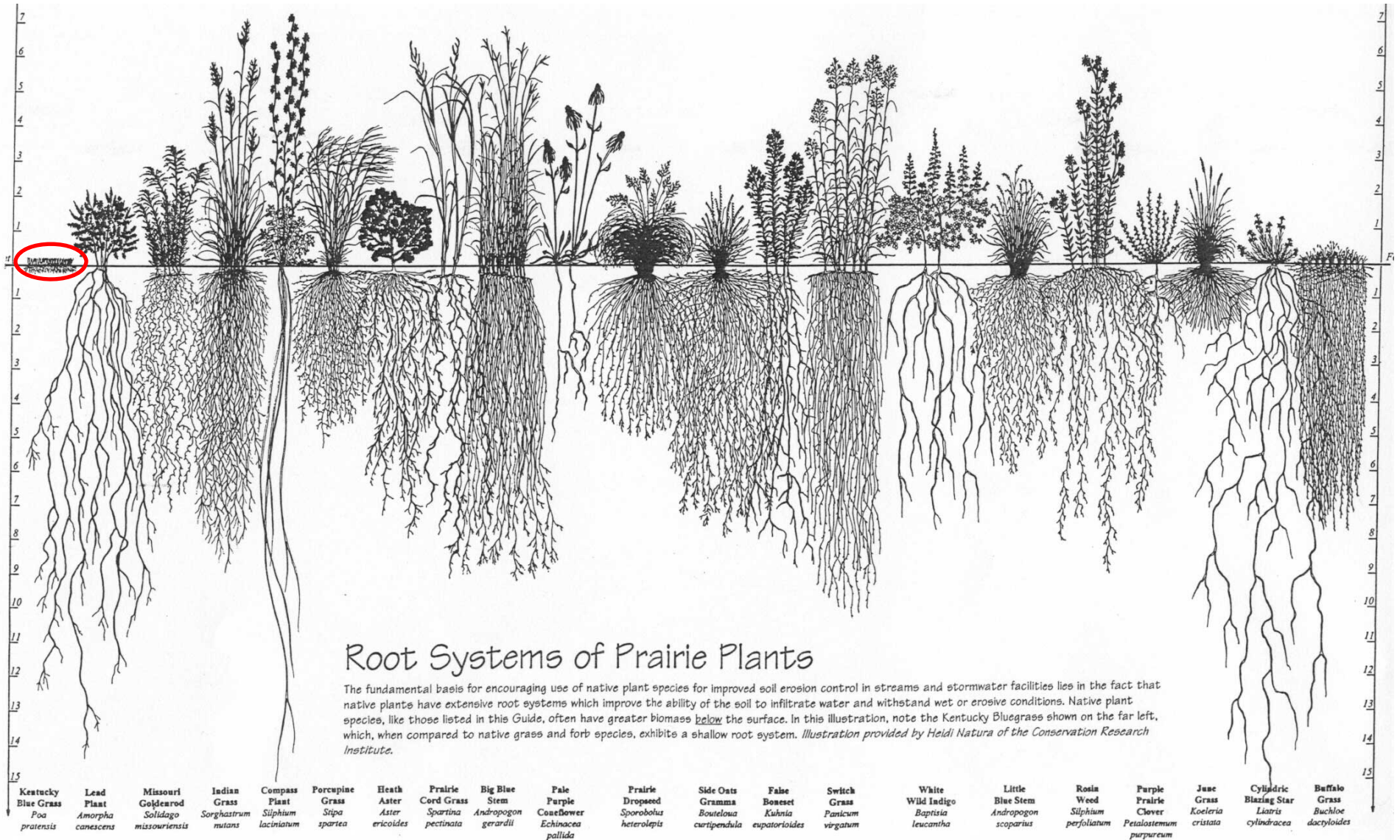


- Areas of undisturbed soils and vegetation
- Essential to protect water quality, wildlife habitat & natural scenic beauty



# How do buffers work?

## Native Plants -vs- Turf Grass



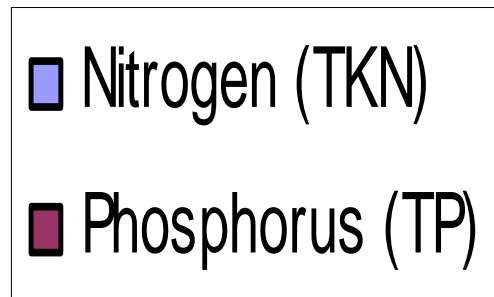
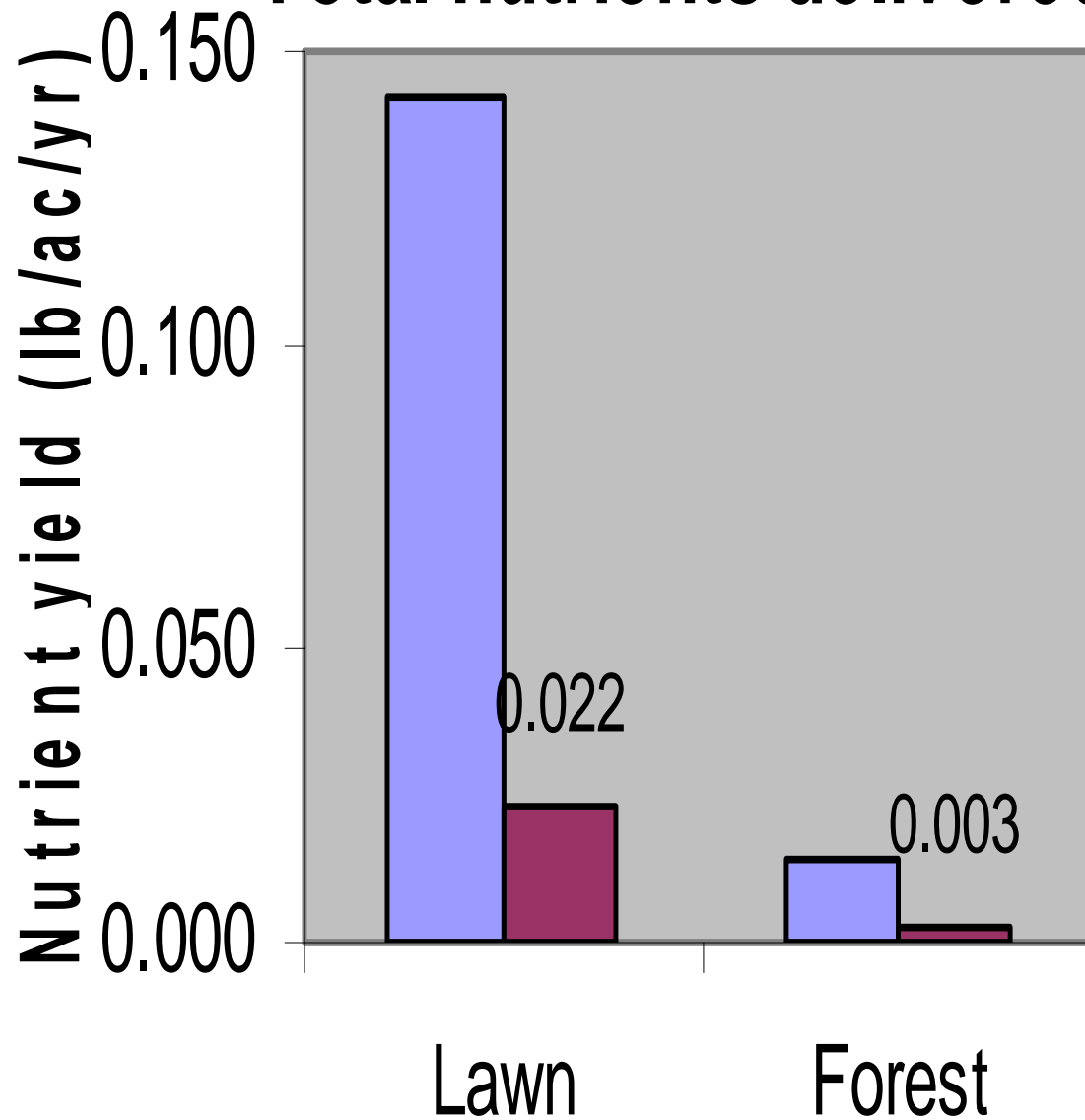
# How does a change from forest to lawn affect nutrients?

- USGS study in Vilas & Forest counties
- 8 lakefront sites monitored in 2000 & 2001



Lawn site at Butternut Lake

# Total nutrients delivered to lakes



Graczyk & Greb  
USGS, 2002



# Shoreline buffers decrease erosion





# Shoreline buffers protect water quality



# Shoreline buffers provide wildlife habitat

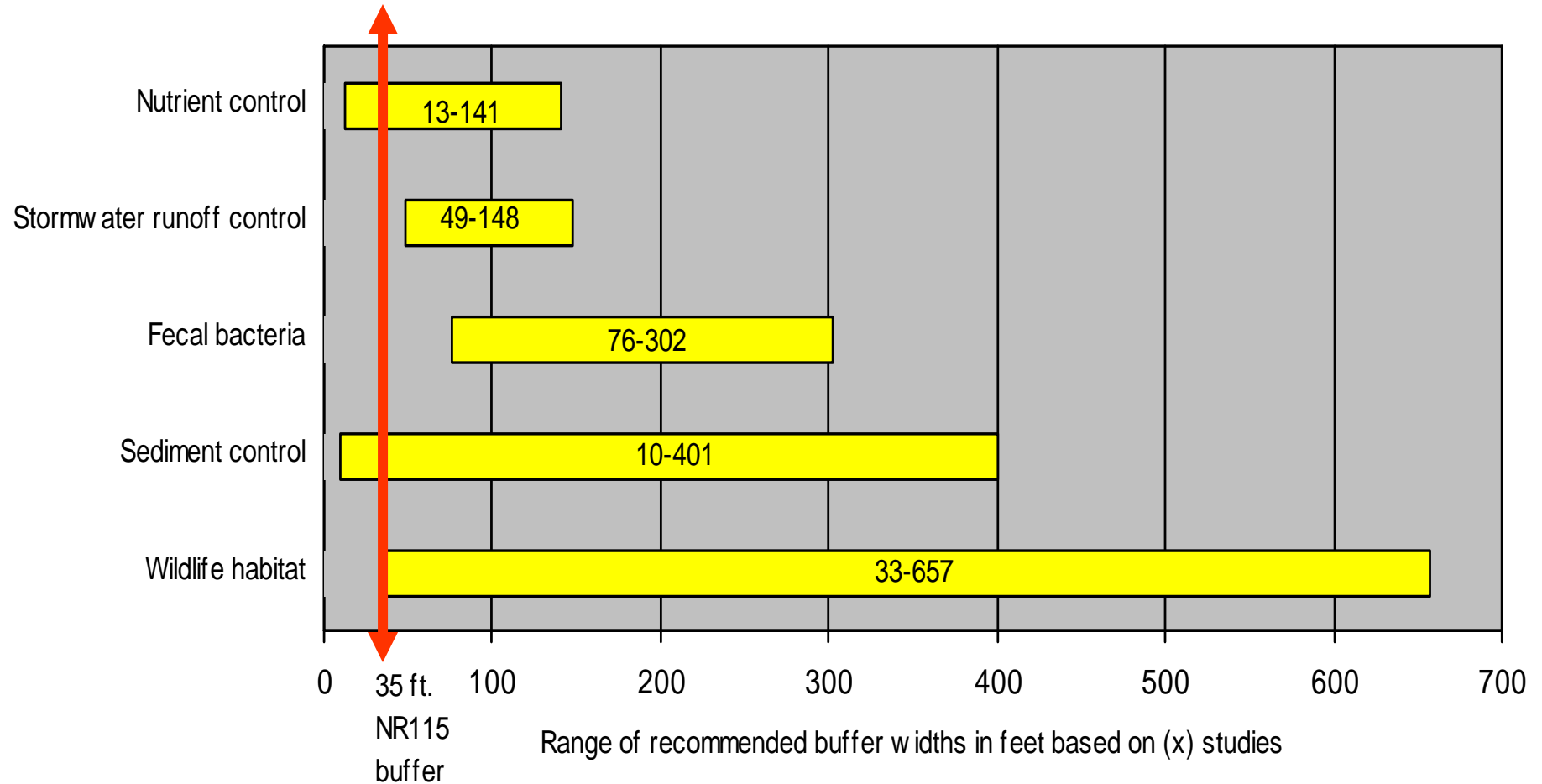


- Loons nest at the water's edge where they share incubation duties for 30 days. The presence of a safe, secure, undisturbed location to nest along the lake shoreline is a critical requirement for breeding loons in Wisconsin.
- Loons have been pushed northward, in part due to the effects of shoreland development.



# Recommended Shoreline Buffer Widths

## Research Summary



Review of 52 U.S. studies by Aquatic Resource Consultants, Seattle WA

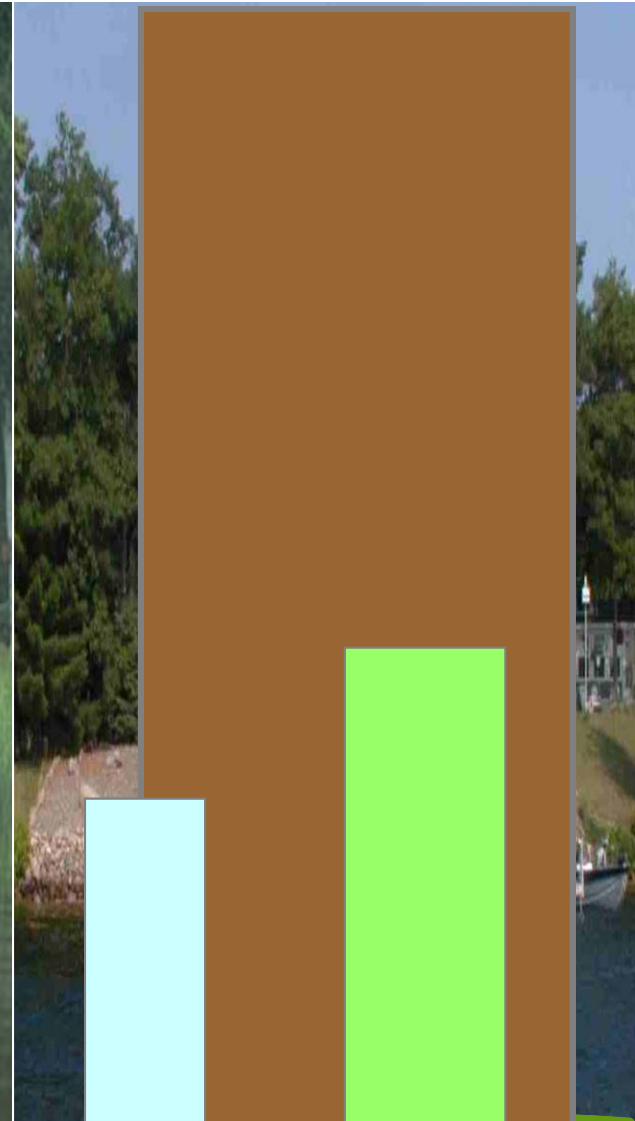
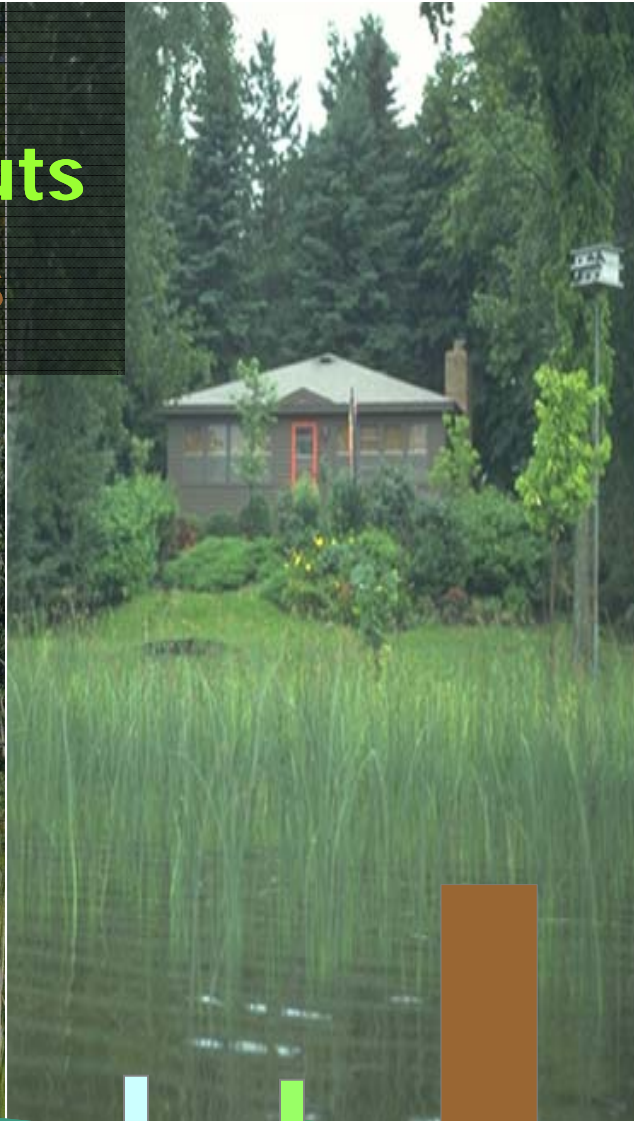
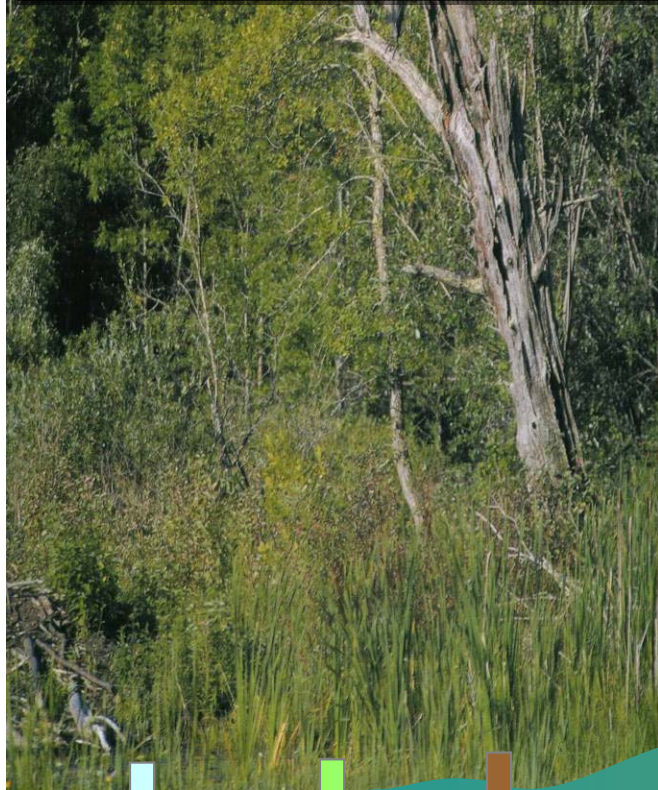


**Impervious  
surfaces  
impact...**





**Runoff Volume**  
**Phosphorus Inputs**  
**Sediment Inputs**



Adapted From: Wisconsin DNR

# More Impervious Surface = Less Fish

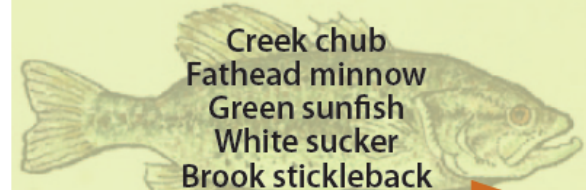
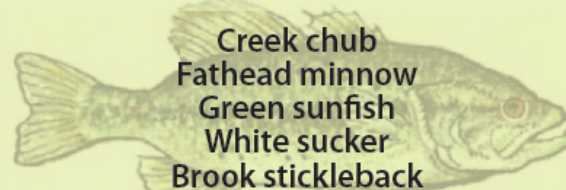
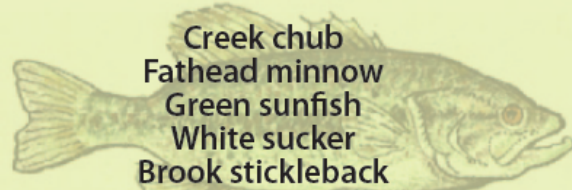
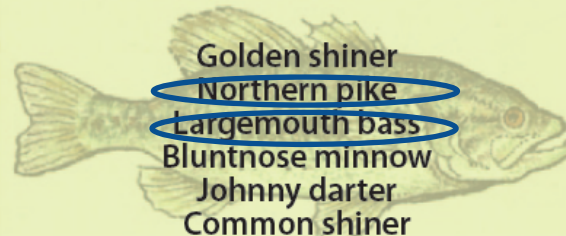
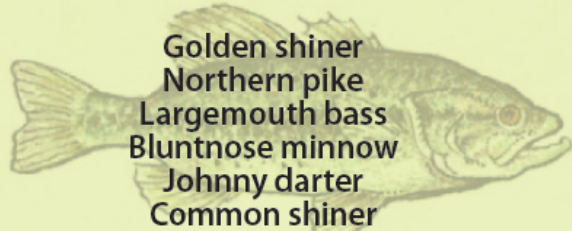
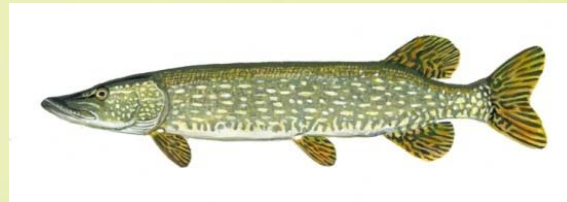
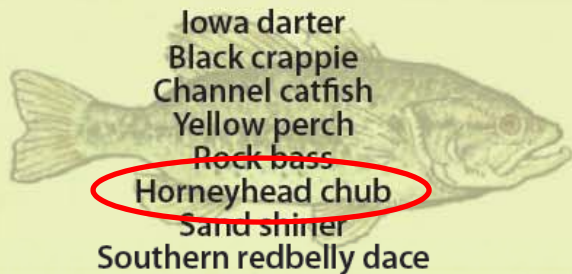
Fish found in streams when impervious surface in the watershed was:

*Less than 8%*

*8 - 12%*

*Greater than 12%*

**More Impervious Surfaces in Watershed** 



2008 study  
of 164 WI  
lakes found  
the same  
trend

**Fewer species of fish** 



12% impervious on a half-acre lot = 2,600 square feet



# More Impervious Surface = Less Fish

More impervious surface causes



- **Larger and more frequent floods**

- **Less groundwater** leads to lower stream flows & warmer water temperatures during dry periods

# More Impervious Surface = Less Fish

- **More runoff** from hot pavement and shingles makes the water hotter
- **More nutrients** from soil and fertilizers result in less oxygen in the water, which fish need to survive



**Trout are gone above 11% impervious**  
**Northern pike are gone above 12% impervious**



## More Impervious Surface = Less Fish

- **More sediments** and algae growth make it difficult for some predator species that hunt by sight to find their food
- **More sediments** cover spawning beds of fish such as walleye and smallmouth bass, depriving eggs of oxygen





## ***Brook Trout and Brown Trout***

- Require cold, clean, high-oxygen water to survive
- Sensitive to pollution and low oxygen conditions
- Part of their diet consists of aquatic insects and small fish, whose populations decrease with increased runoff and sedimentation

Trout are eliminated from streams when impervious surfaces cover more than 11% of a watershed



# Walleye

- Walleye typically spawn between mid-April and early May in WI when spring runoff is highest. Rock- and gravel-covered bottoms are their preferred spawning grounds.
- Impervious surfaces can cause soil erosion which leads to sedimentation. When the spaces between the rocks and gravel become blanketed with silt, walleye eggs can die quickly due to lack of oxygen.
- Adult walleyes are often able to cope under these conditions, but harming the success of eggs puts the survival of a healthy walleye population at risk.



# Wisconsin Loons More Likely Found on Lakes with Clearer Water

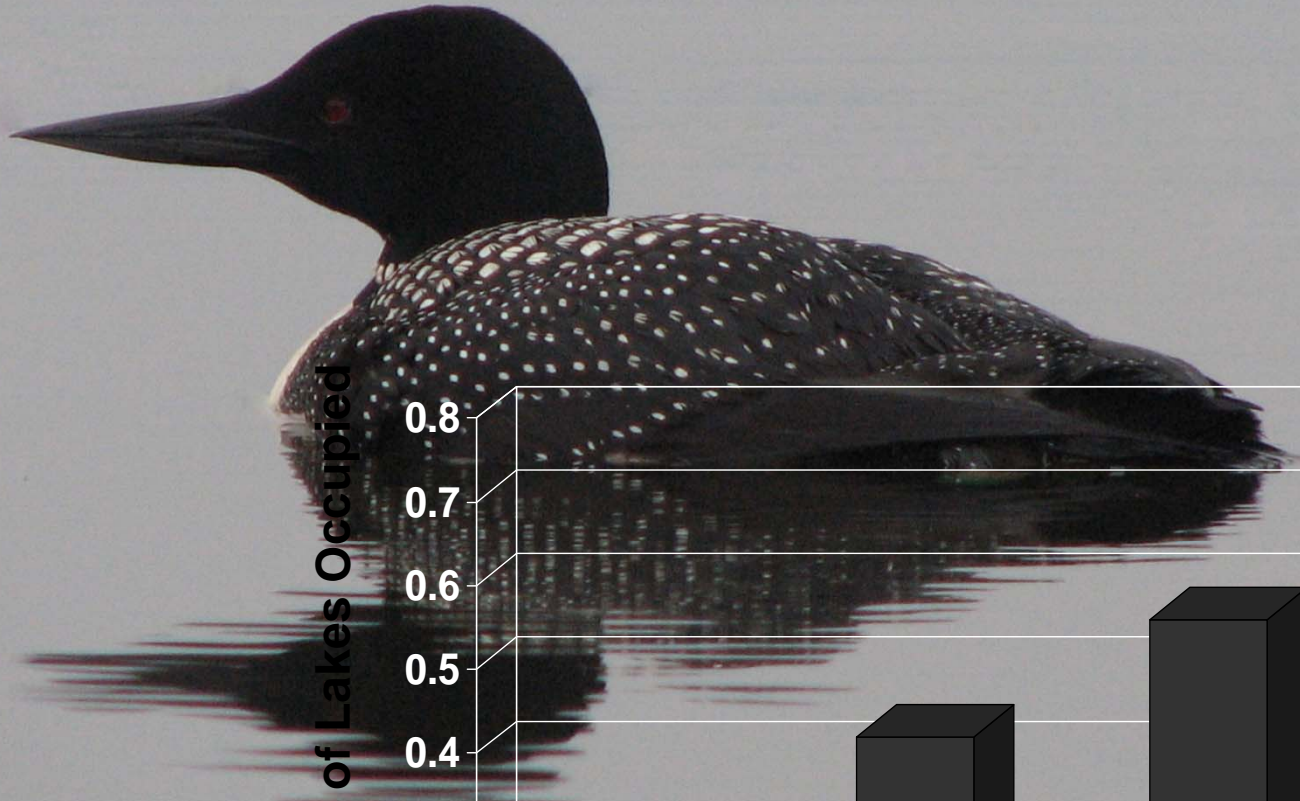
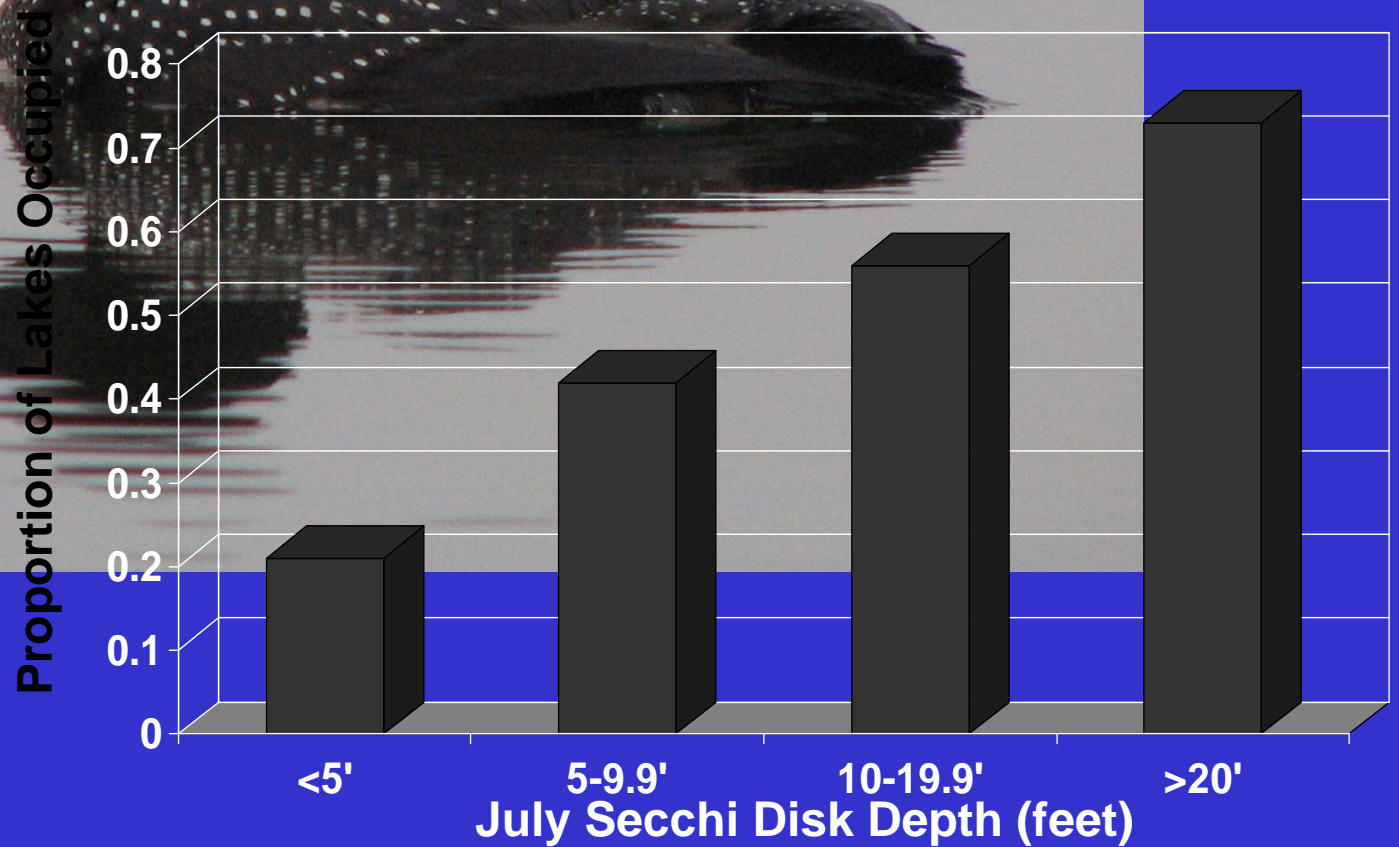


Photo credit  
Doug Killian







## Impervious surfaces impact:

1. Water quality and property values

2. Fish

- When water runs over asphalt or shingles and into a lake or stream, it gets warm. Some fish can't take the heat.
- Northern pike & largemouth bass are gone above 12% impervious
- Trout are gone above 11% impervious

3. Wildlife

# Permeable Pavement - Definition

A pavement system designed to achieve water quality and quantity benefits by allowing movement of stormwater through the pavement surface and into a base/subbase reservoir. Examples include *pervious concrete (cast-in-place or precast)*, *porous asphalt* and *permeable pavers/blocks*.



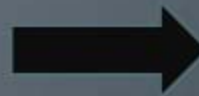
# Permeable Pavement System





## Surface Cleaning Requirements (1008)

- Clean the pavement surface **using industry recommended methods**, such as regenerative air or vacuum sweeping, at least twice per year.
- If water ponding persists on the pavement surface after a storm event, clean the pavement surface to mitigate clogging.



# Pressure Washing with Vacuum



N. Passini - Spancrete



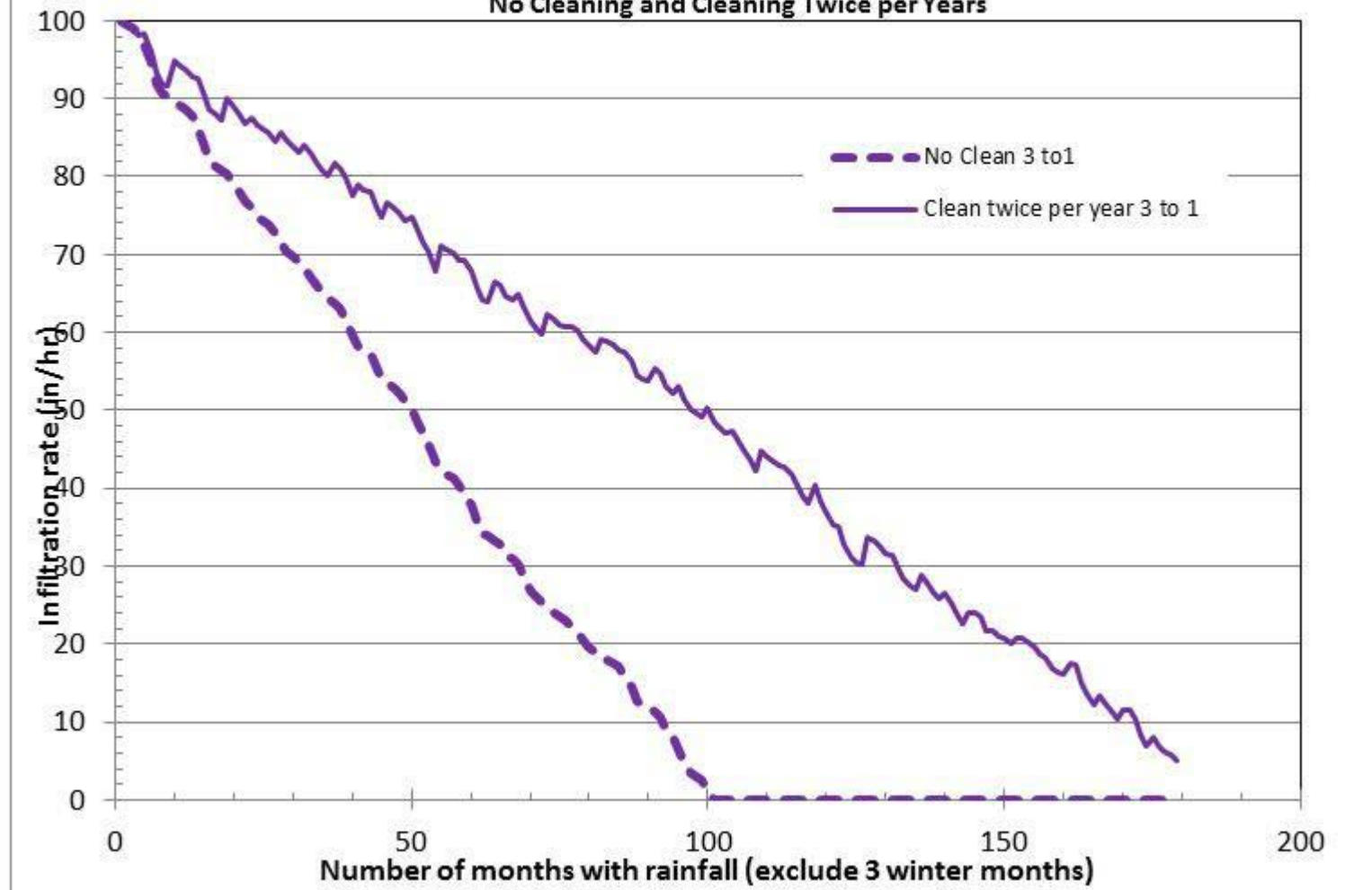
Credit: TCA

This vacuum-excavator combines pressure washing and vacuuming to provide deep cleaning of clogged pervious pavements.



N. Passini - Spancrete

Average monthly infiltration rate on 3:1 ratio of  
Permeable Pavement when Loading Rate is 0.6 lb/sq-ft  
No Cleaning and Cleaning Twice per Years



Would you grant the  
variance?



## 3-step variance test

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

# Suggested process for deciding variances

1. Listen and take notes during hearing. Think about whether the applicant has provided evidence to meet the 3 legal standards
2. After hearing, each BOA member fills out decision form individually, providing reasons that each legal standard is or is not met
3. BOA members come together and each member reads their form to the others, including reasons
4. BOA members may ask questions of each other and revise their forms
5. Motion and vote. Motion to grant a variance can only be made if applicant has met all 3 legal standards.
6. All BOA members turn in their decision forms. BOA chair/secretary or zoning staff copy reasons from BOA members' forms to the final decision form.

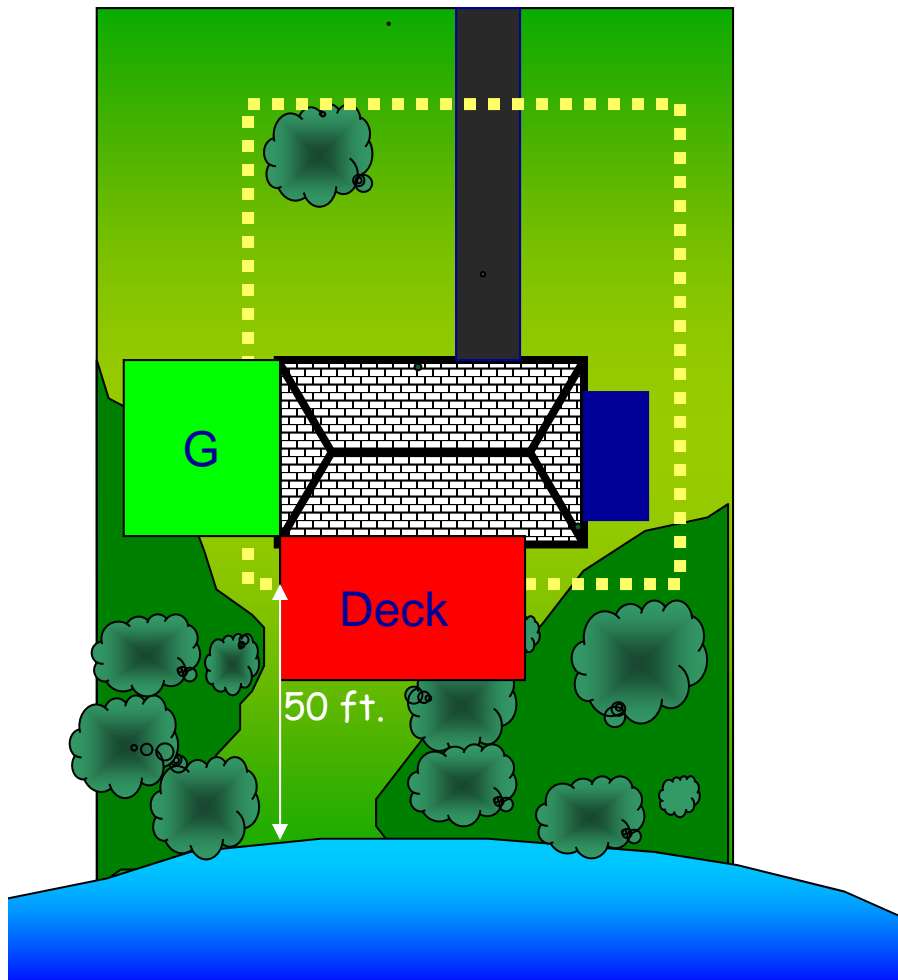


Thoughts  
from  
judges...



## Case law

Would you grant a variance for the red addition?



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

*Block v. Waupaca County Zoning Board, July 2007*

# Administrative Appeals

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

# Administrative Appeals

## Who can file an appeal?

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

# Administrative Appeals

When can an appeal be filed?

- Whenever there is an *alleged* error (procedural, substantive or equitable)

# Administrative Appeals

## Time limits on appeal:

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

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



# Administrative Appeals

- Role of BOA:
  - The board functions like a court
  - Its job is to apply the zoning ordinance and appropriate legal standards to the facts of each case
  - The board does not have authority to amend or repeal any provision of the zoning ordinance. You cannot apply what you wish the ordinance said.

# Administrative Appeals

Interpret the ordinance:

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

# Administrative Appeals

Interpreting evidence beyond ordinance:

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

Keep records of interpretations & recommend clarifying ordinance amendments

## Case law

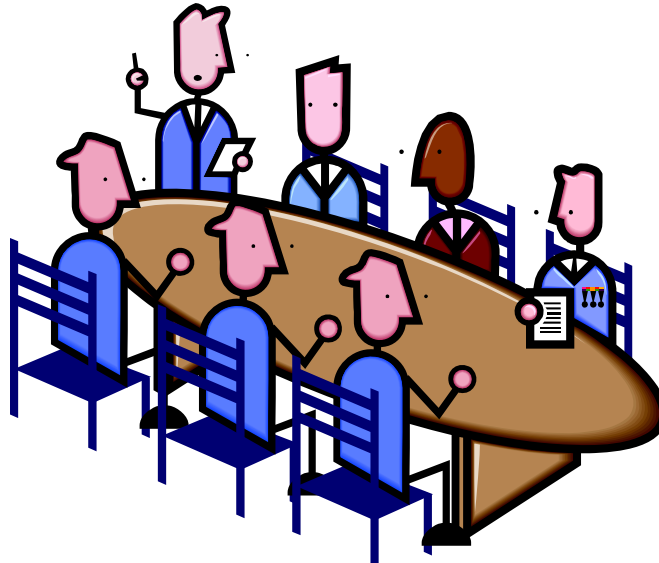
- Washburn County applied for a CUP to operate a gravel pit
- County zoning committee granted the permit over the opposition of neighbors
- Osterhues appealed to BOA



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

## Case law

# How should the BOA proceed?



Review the record  
looking for errors?

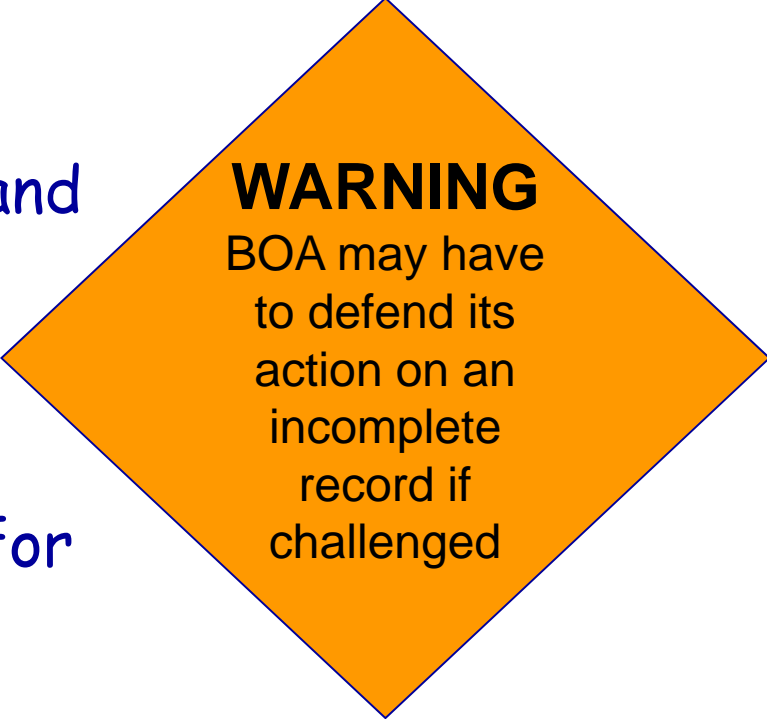
Fact finding hearing to  
collect more evidence?

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

## Case law

When BOAs hear appeals, they have the authority to:

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



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

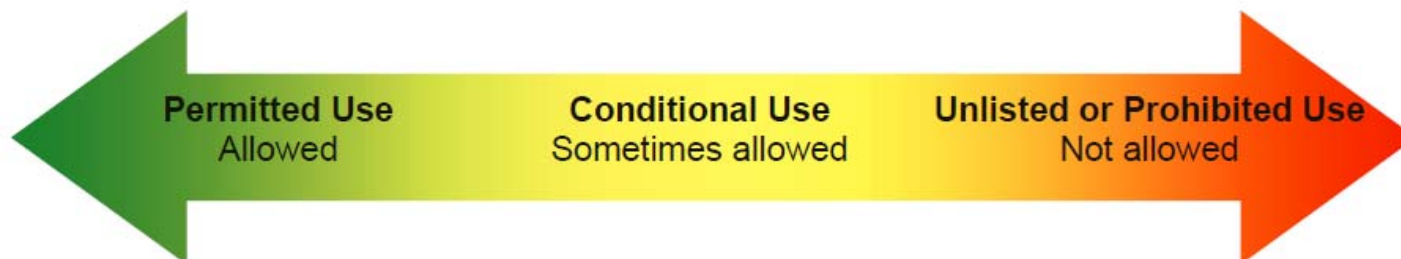
*Osterhues v. Board of Adjustment for Washburn County, 2005 WI Supreme Ct.*



Conditional uses  
or  
Special exceptions

# Zoning - Allowable Uses

1. **Permitted Use** - a use that is listed and allowed by right in all parts of a zoning district (granted by zoning administrator)
2. **Conditional Use** - a use that is listed for a district and may be allowed if suited to the location (decided by plan commission, zoning board or governing body)
3. **Unlisted or Prohibited Use** - a use that is expressly prohibited or not listed for the district is not allowed



# Conditional Uses

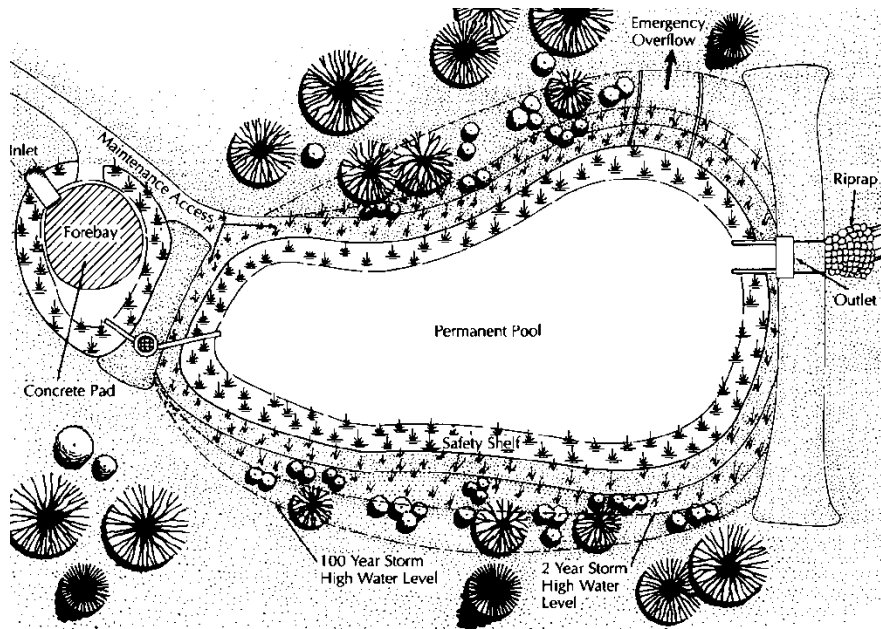
- Discretionary decision - may be granted or denied
- Must be listed for the zoning district
- Decision criteria also listed in the ordinance
- Conditions may be attached

# Conditional Uses

- Permit generally assigned to property, not owner
- Conditions cannot be changed unless permit is revoked or expires
  - Permit may be revoked due to non-compliance
  - Expiration date appropriate for temporary uses such as gravel pit
- In the case of a zoning change, property becomes nonconforming and conditions cannot be enforced

*Hussein v. Germantown BOA, 2011 WI Court of Appeals*

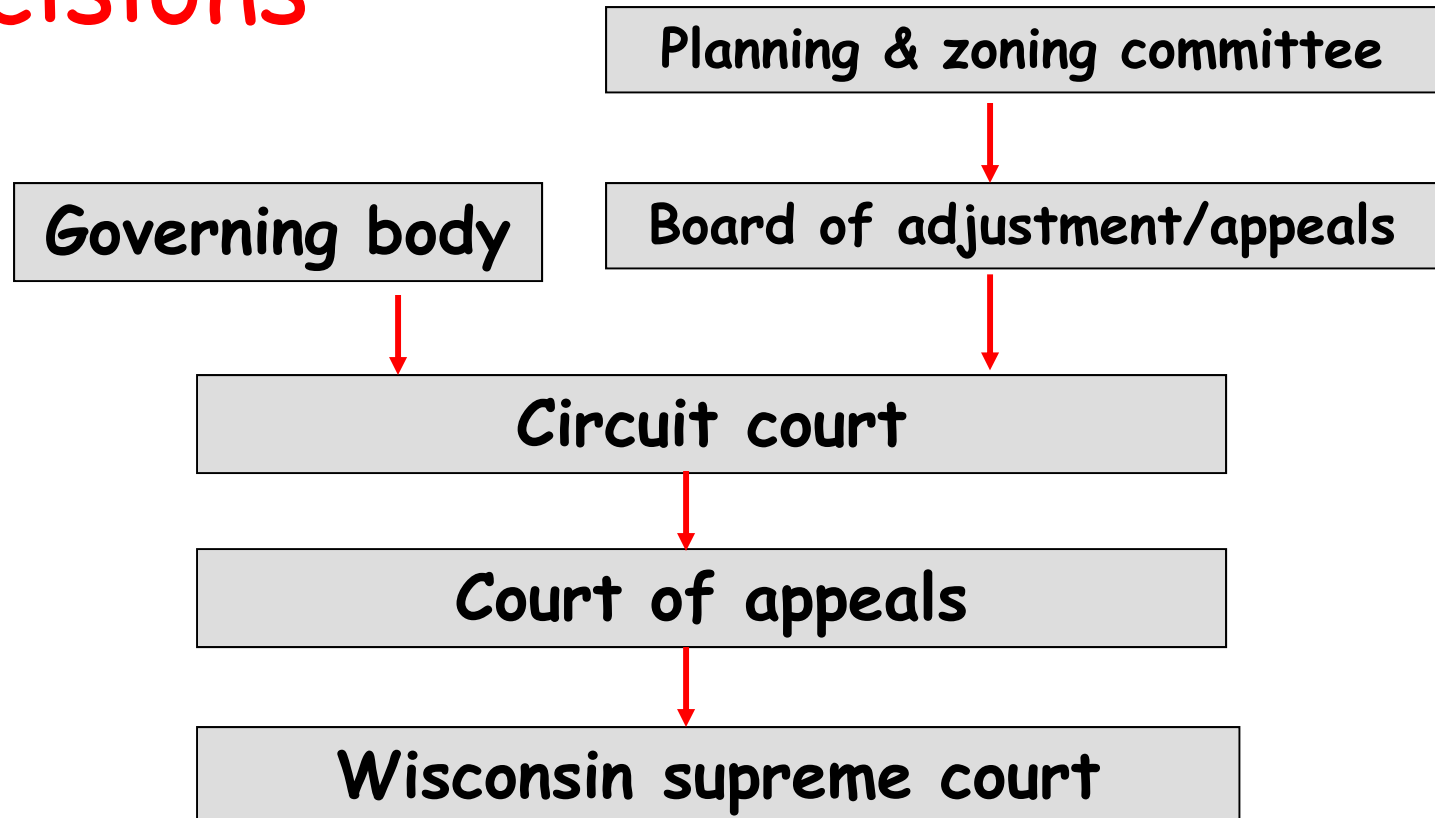
# Conditional uses



Conditions must meet 2 tests:

- 1) **Essential nexus** - address expected harmful project impacts
- 2) **Rough proportionality** - be proportional to the extent of those impacts

# Appeal of zoning decisions





# *Standards on judicial review...*

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

1) Subject matter jurisdiction

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

2) Proper procedures

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

3) Proper standards

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

4) Rational basis for the decision

Could a *reasonable person* have reached this conclusion?

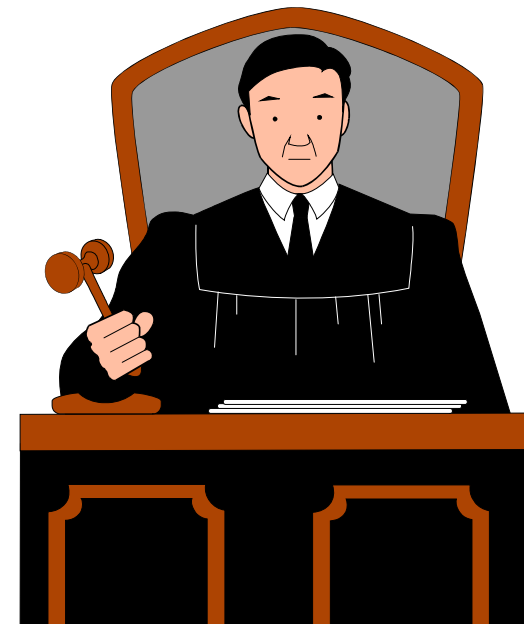
5) Evidence in the record

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

# *Judicial decisions...*

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

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



# Open Discussion



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

**UW**  
**Extension**  
University of Wisconsin-Extension

Lynn Markham  
lmarkham@uwsp.edu  
715.346.3879