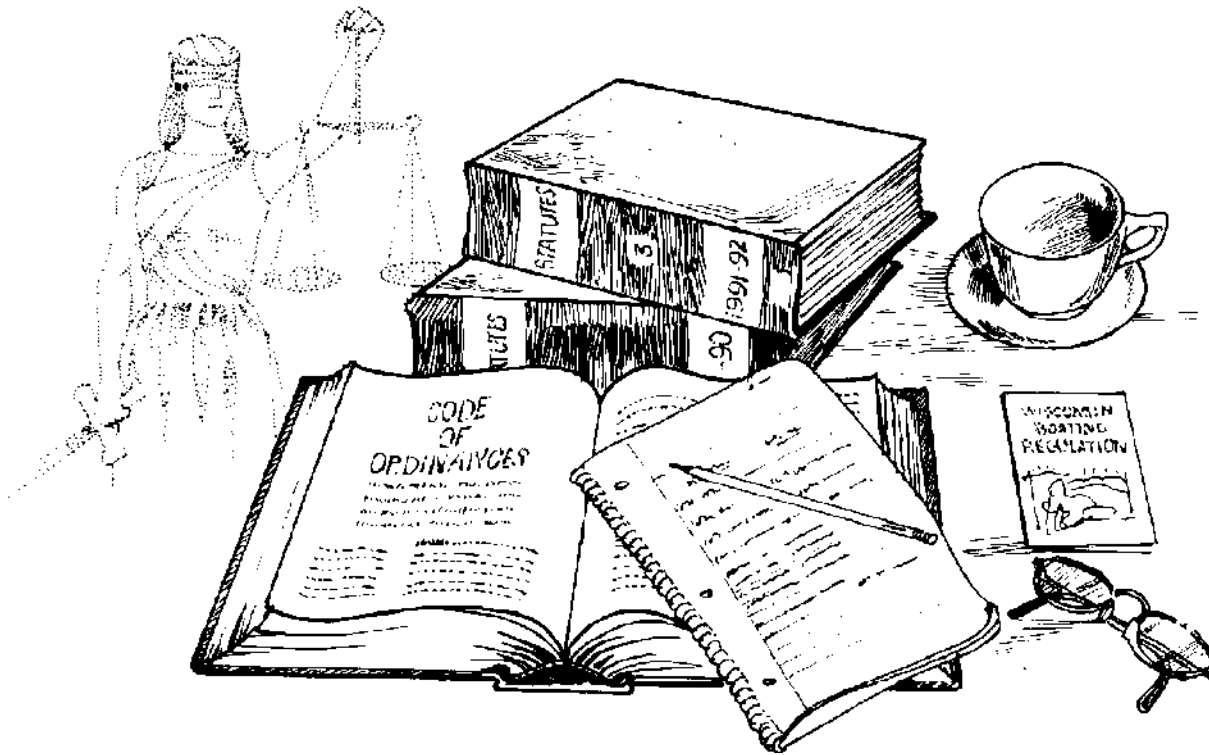


Role of the Zoning Board



August 20
3:00-4:00 pm

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



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



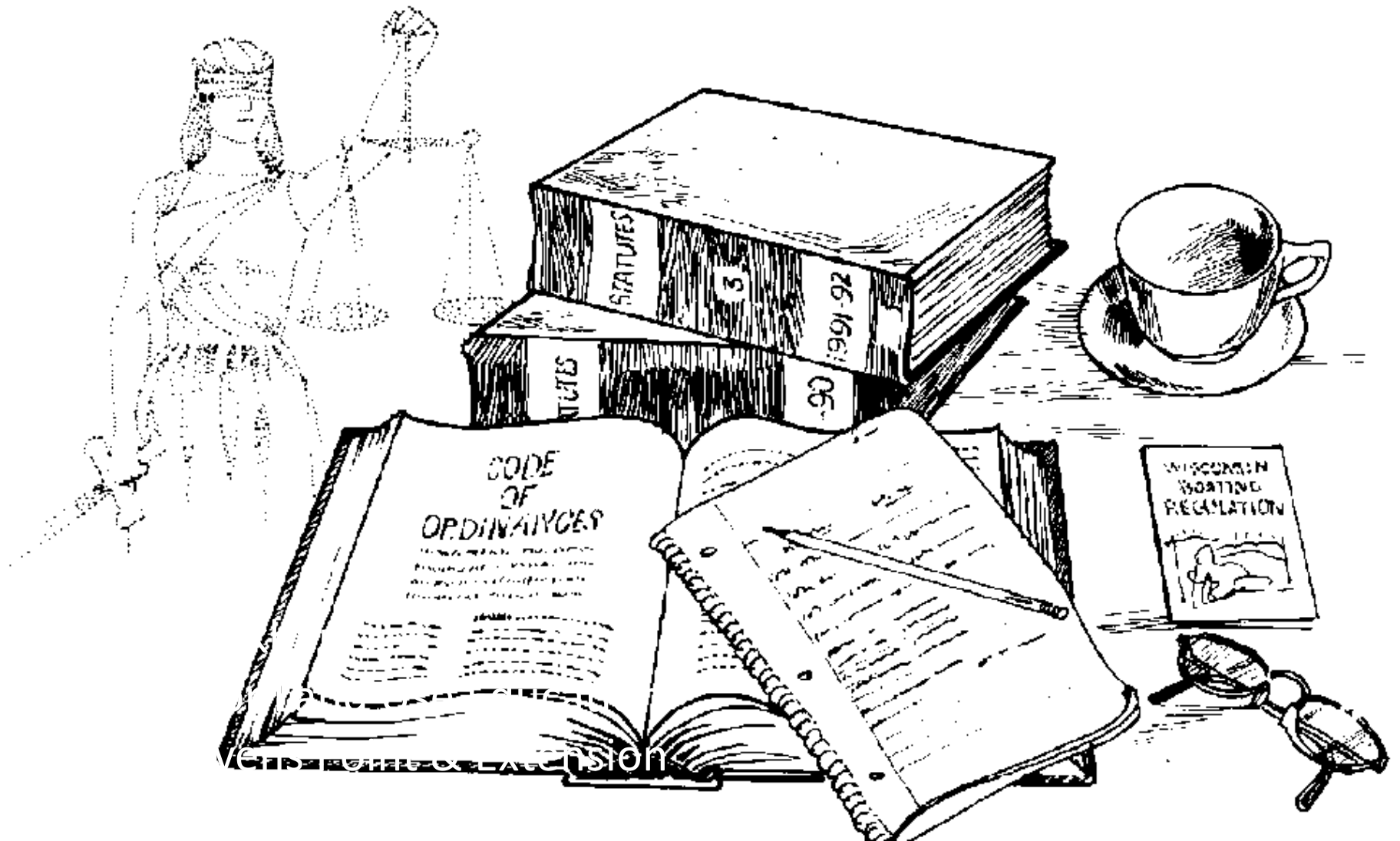
Extension
UNIVERSITY OF WISCONSIN-MADISON

Upcoming webinars

Designed for planning and zoning staff, experienced officials, and individuals who have completed introductory training.

- ***Tuesday, September 29, 2020, 10-11 am*** – New Rules for Conditional Uses
- ***Thursday, October 29, 2020, 10-11 am*** – Variances
- ***Monday, November 30, 2020, 10-11 am*** – Refreshing Your Zoning Ordinance

Role of the Zoning Board



Terminology

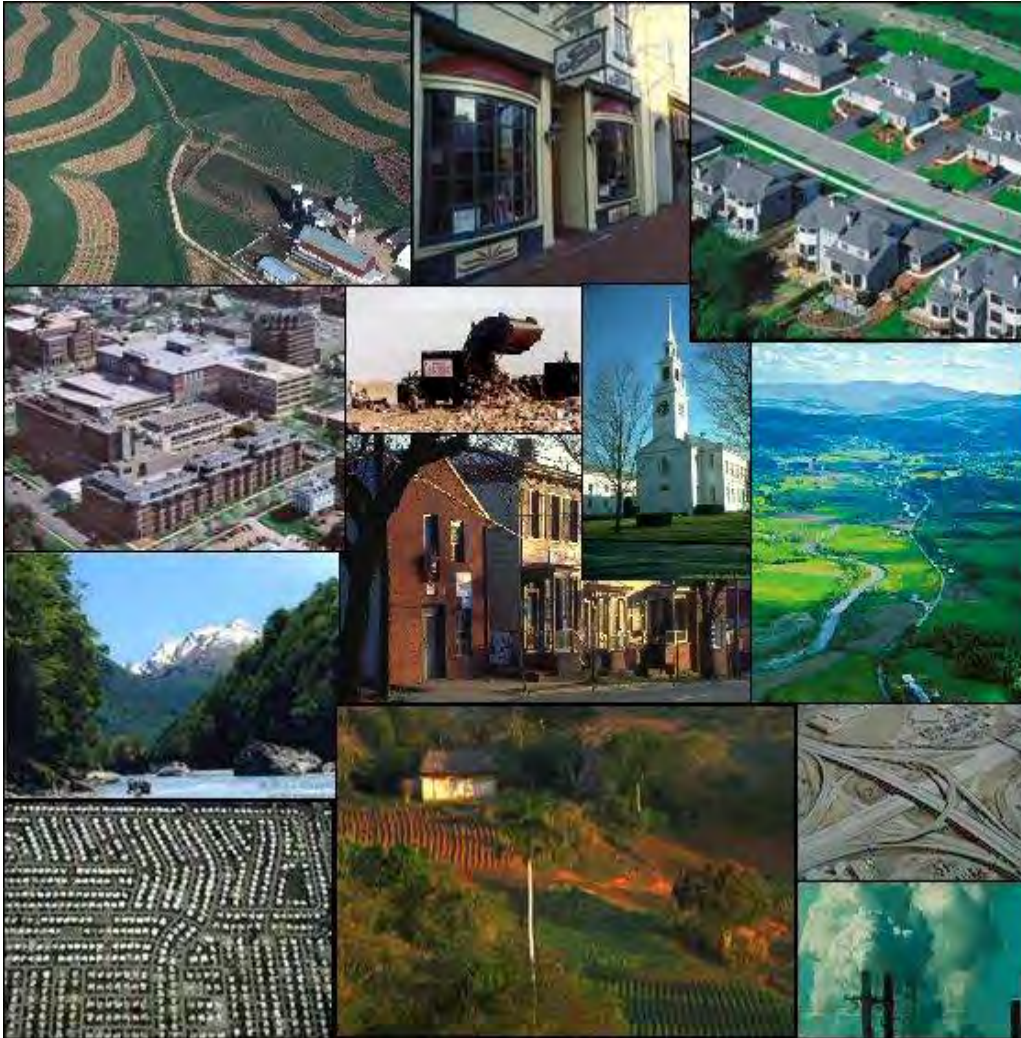
Wisconsin statutes define:

- 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
- Different from the 'zoning committee'

Purpose of Zoning



Zoning is one tool to achieve community goals such as:

- Public health, safety, and welfare
- Natural resource protection
- Community character and aesthetics
- Protection of public and private investments

Zoning

Counties

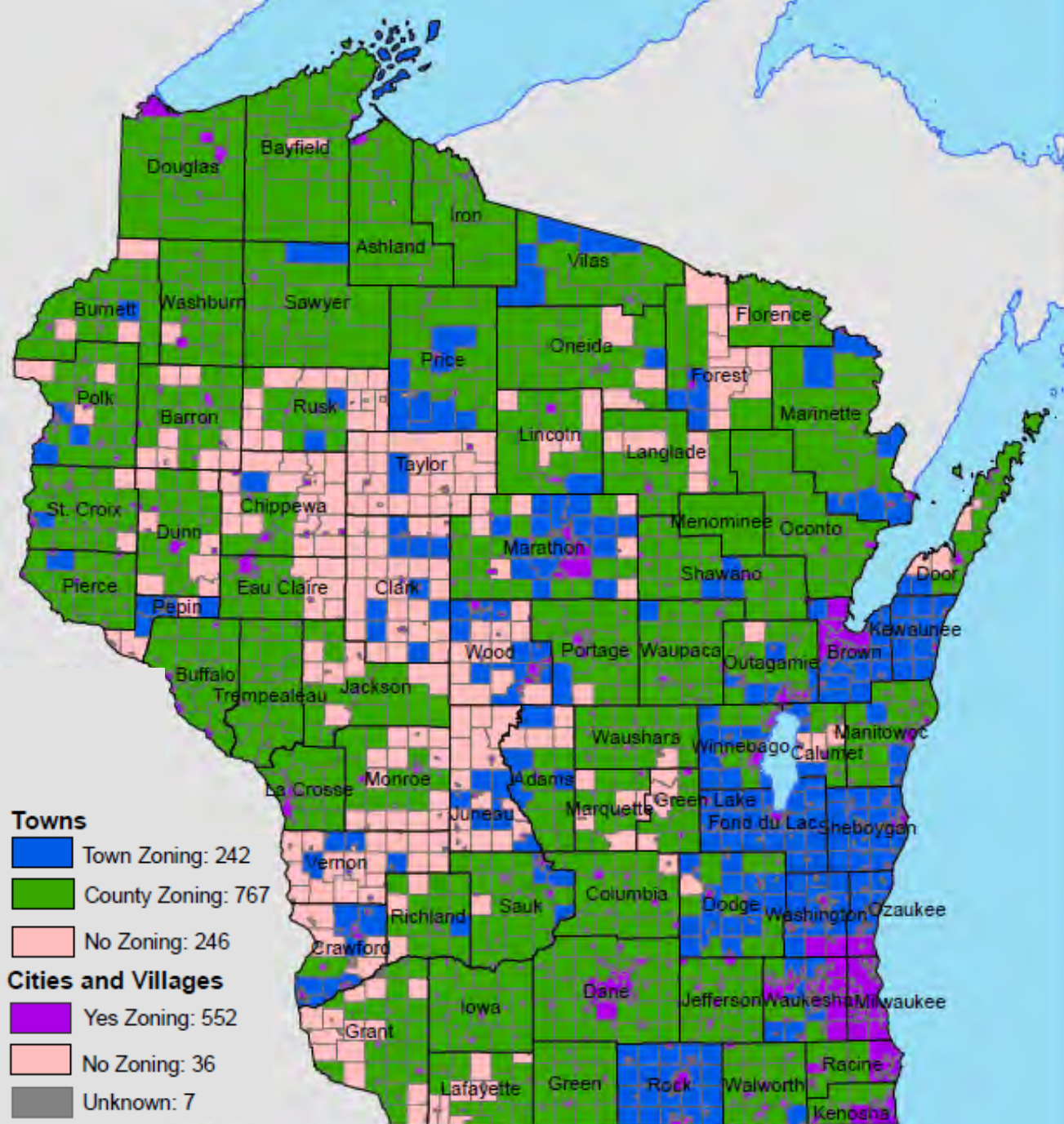
- May adopt general zoning in unincorporated areas
- Required to administer shoreland/wetland zoning

Towns

- May adopt general zoning (if no county zoning or with county approval following adoption of village powers)

Cities/Villages

- May adopt general zoning
- May adopt extra-territorial zoning extending 1.5-3 miles beyond boundaries
- May have shoreland or floodplain zoning - required in some circumstances

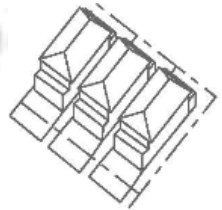


Zoning Ordinance



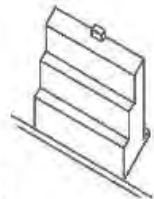
R2 - SINGLE FAMILY DETACHED HOMES (FAR: 0.5)

- Development limited exclusively to single-family detached houses
- Typically up to 11 houses per acre.
- Open space ratio (OSR): 150.0



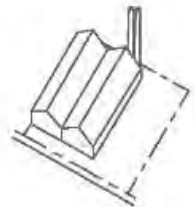
M1 - LIGHT INDUSTRIAL (FAR: 1.0-12.0)

- Woodworking shops, auto storage and repair shops, etc.
- Often a buffer to adjacent residential or commercial districts
- Offices and most retail uses are also permitted



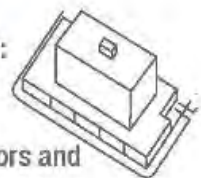
M3 - HEAVY INDUSTRIAL (FAR: 2.0)

- Power plants, solid waste transfer facilities and recycling plants, and fuel supply depots.
- Heavy industries that generate noise, traffic or pollutants, usu. located near the waterfront and buffered from residential areas



C2 - C1 WITH RESIDENTIAL (FAR: 1.0 - 2.0)

- Permits slightly wider range of uses than C1: funeral homes and repair services
- In mixed residential/commercial buildings, commercial uses are limited to one or two floors and must always be located below the residential use



Zoning Ordinance

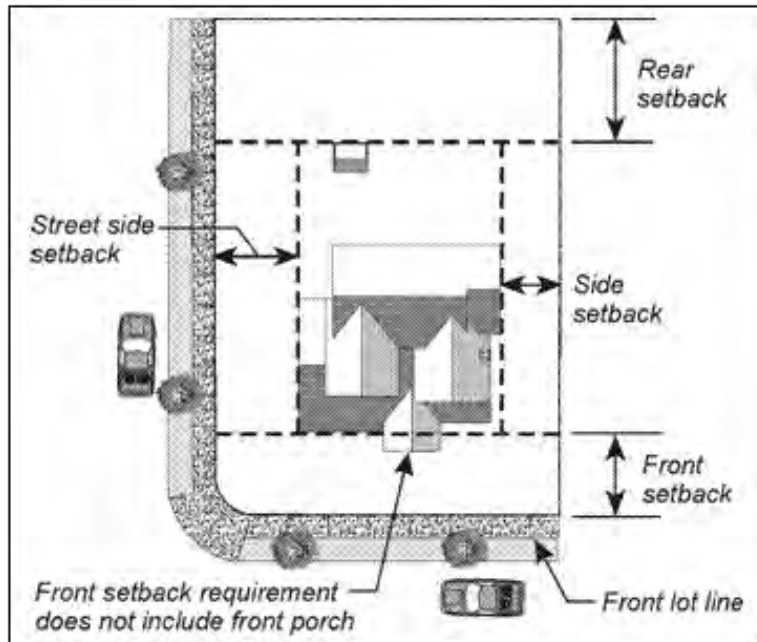


Figure 4-6 – Location and measurement of setbacks

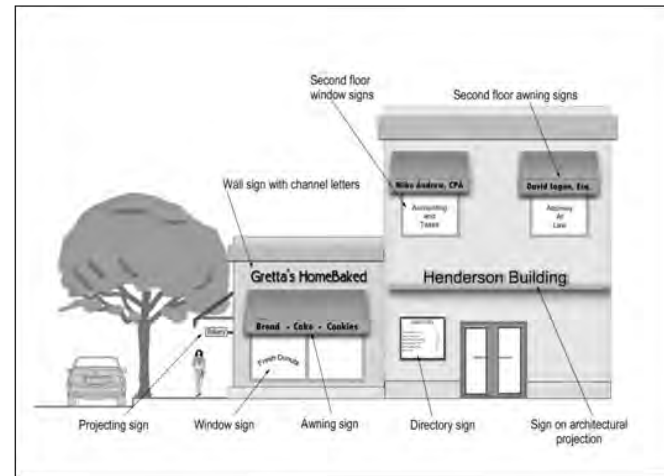
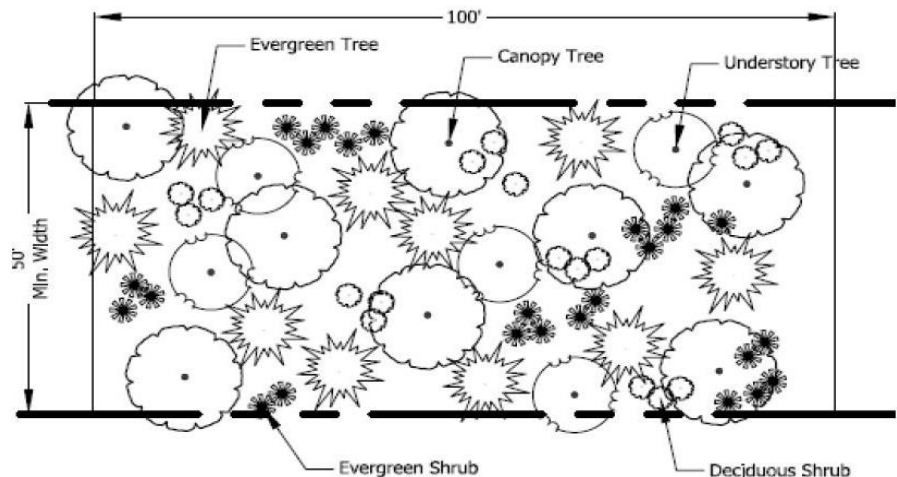


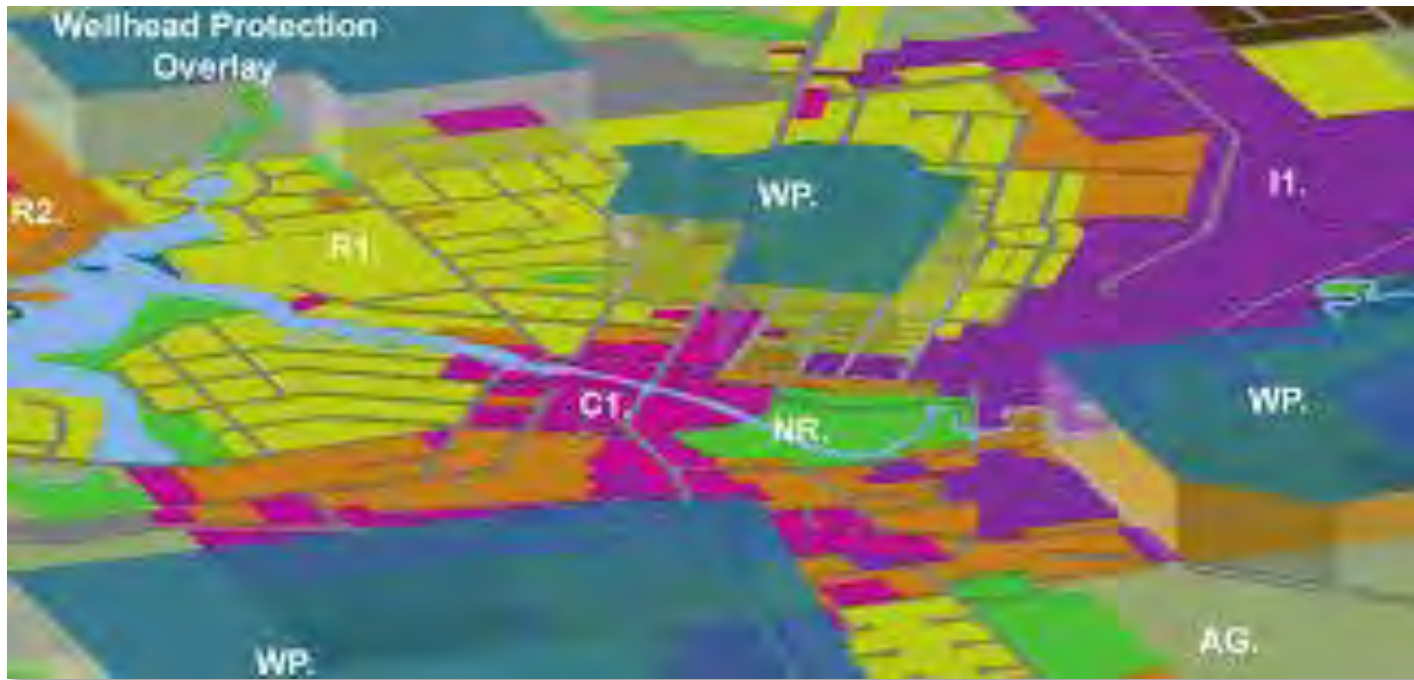
Figure 4-7 – Types of signs

STANDARD D BUFFER YARD

50 FEET minimum width
 8 Canopy trees
 5 Understory trees
 10 Evergreen trees
 25 Evergreen shrubs
 15 Deciduous shrubs

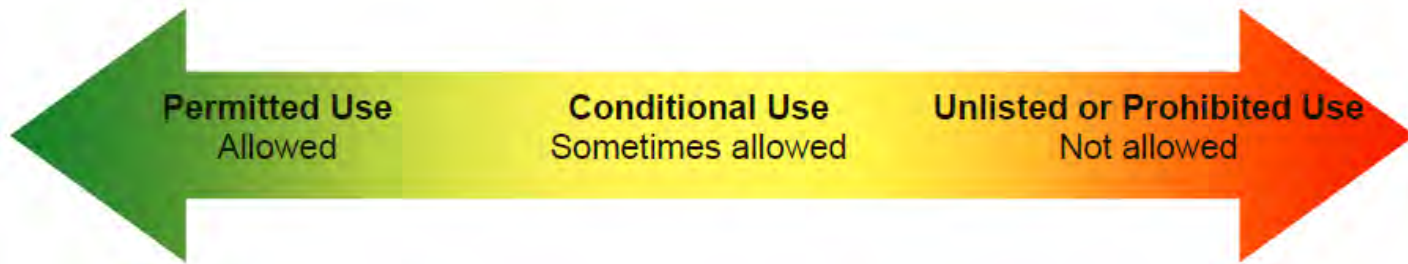


Overlay Zoning Districts




- Special district that applies in addition to base zoning district
- Must follow requirements from both districts
- Examples – shoreland, wellhead protection, floodplain, airport overlay, historic preservation, etc.

Zoning – Allowable Uses



1. **Permitted Use** – use is listed and allowed by right in all parts of a zoning district
2. **Conditional Use / Special Exception** – use is listed for a district and may be allowed if it meets the requirements listed in the zoning ordinance
3. **Prohibited or Unlisted Use** – use that is expressly prohibited or not listed for the district is not allowed



**What is the role of a
zoning board?**

Zoning roles



Elected officials adopt the zoning ordinance



BOA members act like judges and apply the ordinance and state laws as written

- It's not easy to say "no" to neighbors who want an exception to the zoning ordinance. Let applicants know the BOA is required to follow the local ordinance and state laws. Only elected officials can change the law.

Poll: Which laws do you think zoning board members have to follow?



Wisconsin Statutes



Advice from local elected officials



Local zoning ordinances



Court cases

The zoning board functions like a court

- 1) Zoning boards must follow:
 - state statutes
 - case law
 - local zoning ordinances
- 2) Zoning boards apply 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 court decisions, zoning board decisions can be appealed to higher courts



WI supreme court



Court of appeals



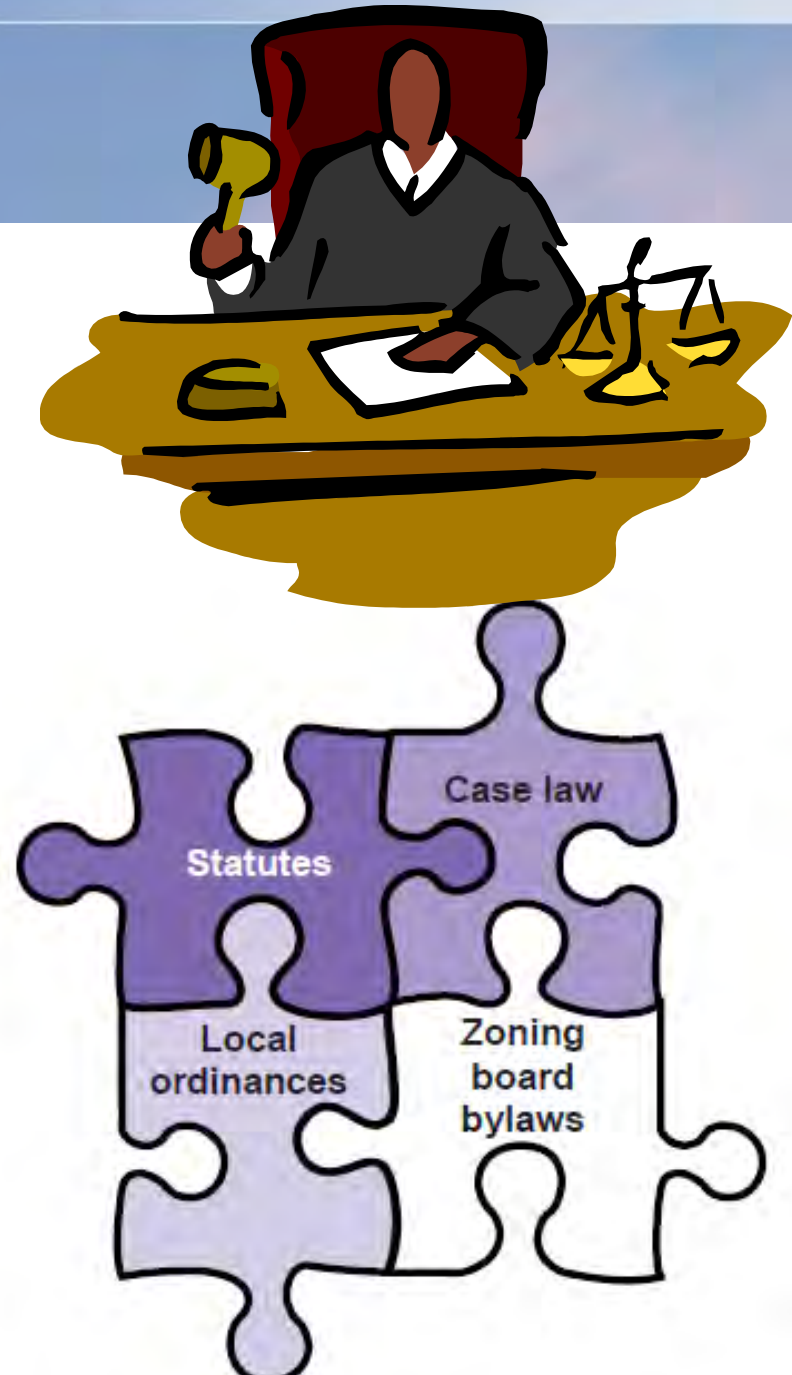
Circuit court



Zoning board

The zoning board functions like a court

- If the zoning board follows state statutes, case law and their local zoning ordinance, their decisions will generally be upheld
- A solid legal record minimizes legal costs and zoning board reconsideration



Zoning Board Announcement of Proceedings

This script is meant to be read at the beginning of zoning board of adjustment/appeals meetings so that members of the public who are not familiar with zoning boards learn 1) what a zoning board is 2) what Wisconsin laws require that zoning boards base their decisions on and 3) what to expect during a zoning board hearing.

The zoning board of adjustment/appeals functions like a court, and must follow state laws and local zoning ordinances. The zoning board cannot change or ignore any part of the zoning ordinance or state laws, but must apply the laws as written.

The zoning board may only grant a variance, special exception or administrative appeal if the applicant provides evidence showing that they meet all of the legal standards for that decision. The legal standards the zoning board will use to decide on each application have been provided to the applicant and will be described at this meeting by the zoning board or staff. [Consider adding the highlighted sentences to your variance application form too.]

Each hearing will be opened by reading the application or appeal. The zoning department report will be read, including evidence from the on-site inspection. The applicant will be sworn in and then present the reasons and evidence to support why they think they meet the legal standards for the variance or special exception. The board may ask questions of the zoning staff and applicant. Witnesses will be sworn in and allowed to give testimony related to why the legal standards are or are not met. Once the board has all of the necessary facts, the chair will close the hearing and the board will deliberate and decide in front of the public whether the applicant has met the legal standards. The board will then proceed to the next hearing.

Written decisions based on the evidence at the hearing and whether the zoning board

Zoning Board Decisions

1. **Variances** – allow landowners to do things prohibited by the zoning ordinance.
2. **Conditional uses/Special exceptions** – land uses allowed under a conditional use or special exception permit, not including variances.
3. **Administrative appeals** – contested decisions of administrative officials.



Zoning – Variances

Use variance permits a landowner to put property to an otherwise prohibited use

Area variance allows modification of a physical, dimensional or locational requirement such as setback, frontage, height, bulk or density

Use variances

Use variances present problems:

- Requests seldom qualify under the *unnecessary hardship* test, which is **no reasonable use of the property** if the use variance is not granted
- Allow the zoning board (appointed officials) to essentially rezone a property e.g. allow an industry to locate in a residential zoning district in one meeting
- **Many communities do not allow use variances**

Zoning – Variances

The 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. not contrary to public interest

These three standards apply for variances from all types of zoning

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

Variances

Conditions unique to the property test

Conditions unique to the property such as steep slopes or wetlands, that prevent compliance with the ordinance

These properties all have steep slopes, so it would not be unique



Variances

Public interest test

- A variance granted may not harm public interests
- “Public interests” are the purpose and intent of the ordinance that were agreed upon by the governing body, representing the community





Additional standards that an applicant must meet to grant a floodplain variance:



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

Conditional Uses

- Conditional uses must be listed for the zoning district
- Discretionary decision – BOA may grant or deny based on requirements listed in the ordinance
- Conditions may be attached

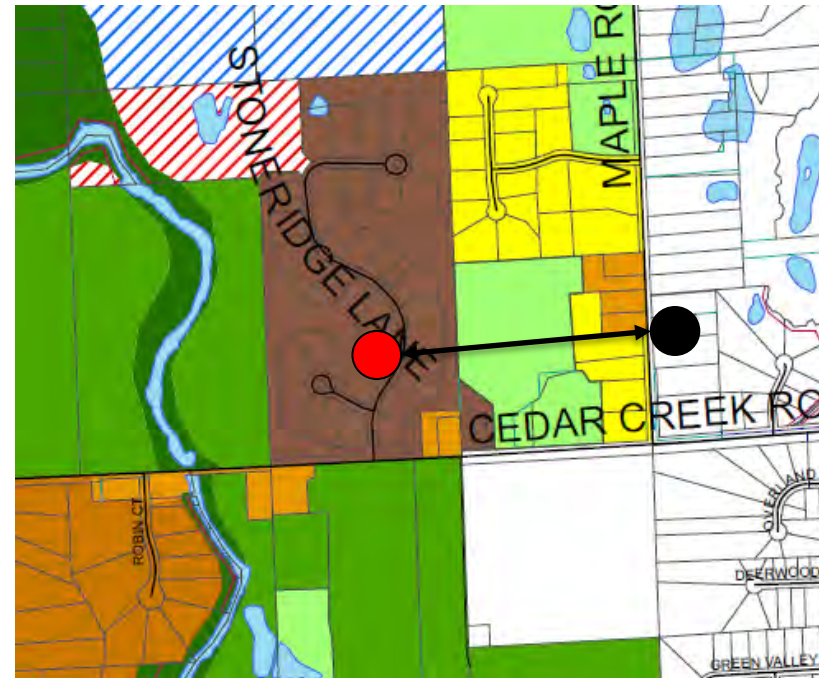
Confirmed in *AllEnergy Corporation v. Trempealeau County*, WI Supreme Court, 2017



Conditional uses

“Substantial evidence” means:

- facts and information, other than merely personal preferences or speculation
- directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit
- that reasonable persons would accept in support of a conclusion.



Conditional uses

Where substantial evidence applies:

- The requirements and conditions specified in the ordinance or imposed by the zoning board must be reasonable, and to the extent practicable, measurable.
- Any condition imposed must relate to the purpose of the ordinance and be based on substantial evidence. Conditions may limit permit duration, transfer, or renewal.

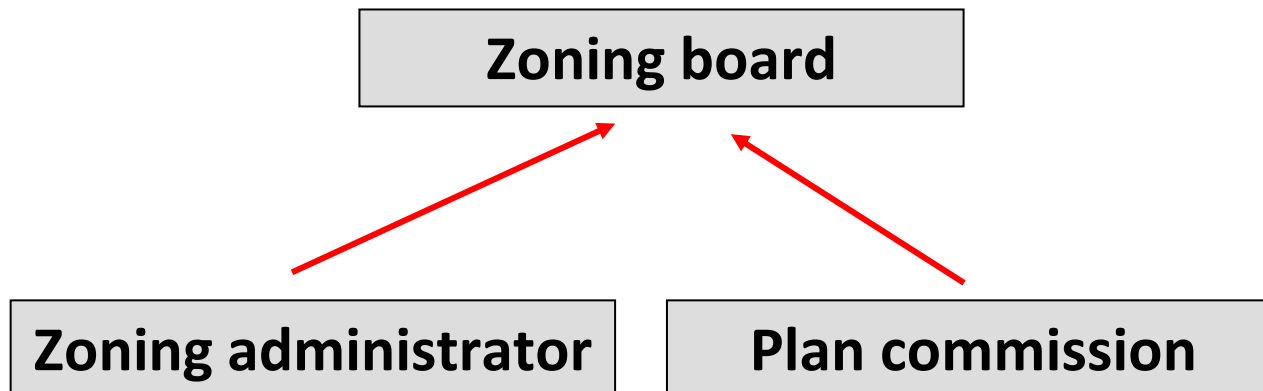


Conditional uses

- The applicant for the CUP must provide substantial evidence that all requirements and conditions established by the local government relating to the conditional use are or shall be satisfied
- If an applicant does not meet one or more of the requirements or conditions imposed by the zoning board, the local government can deny the CUP
- Local government decisions to approve or deny a conditional use must be supported by substantial evidence

Administrative Appeals

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



Decision making process

Open Meetings

Zoning boards must comply with Wisconsin's Open Meetings Law:

- meetings are open & accessible to the public, including the disabled
- the public is provided with advanced notice of meetings



Open Meetings



Closed sessions are limited by statute:

- Personnel matters including employee performance, compensation, discipline, etc.
- Damaging personal information
- Legal consultation for current/likely litigation
- Others listed at Wis. Stat. §19.85

Decisions to grant or deny a variance, conditional use or appeal may not be decided in closed session

(State ex rel. Hodge v. Town of Turtle Lake, 1993)

Ex parte communication

- Discussion regarding a pending matter without the other party present; not included in the public record.
- Zoning 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

Ex parte communication is prohibited



Ex parte communication is prohibited



- Maintain fairness
- Avoid real or perceived influence
- Can invalidate a BOA decision

Is it OK for zoning board members to whisper or talk quietly?



Poll: What actions should a BOA member take if a neighbor of a variance applicant calls them at home?



Listen politely



Suggest they talk with zoning staff



Suggest they come to the variance hearing



Suggest they poll all of the neighbors on whether they approve of the variance

Bias

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

If you are biased, you should recuse yourself

Keen v. Dane County, 2004 WI App 26



Voting Requirements

- If a quorum is present, the BOA may take action by majority vote of the members present

2005 Wisconsin Act 34

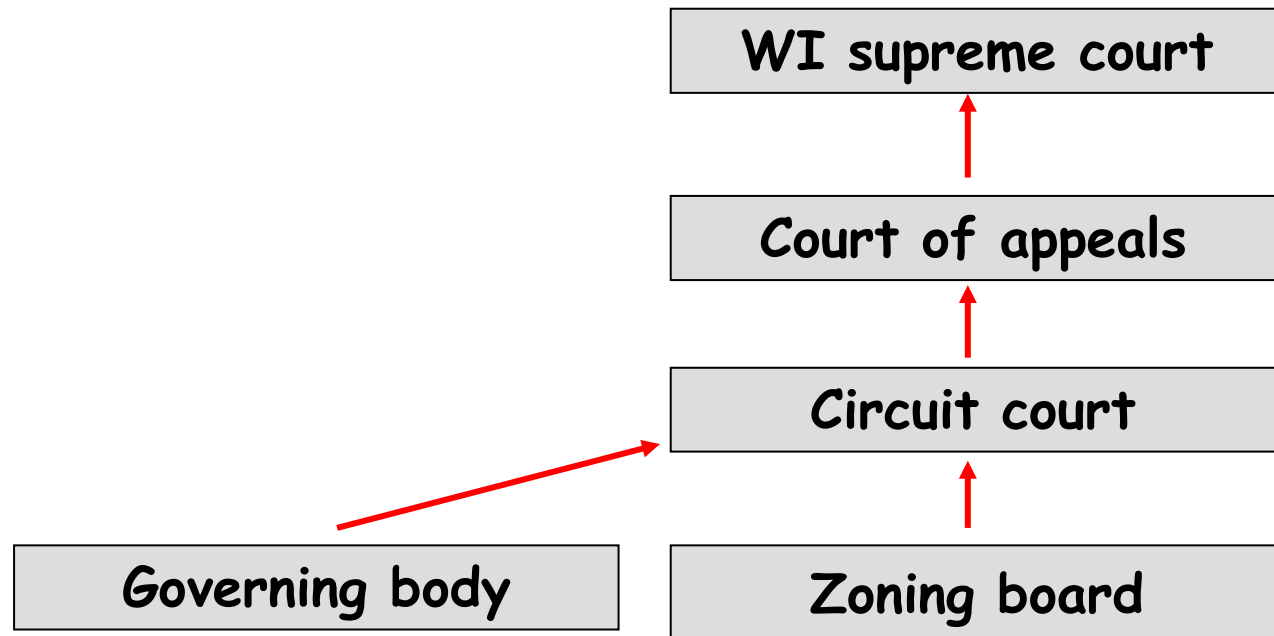
- Can be more restrictive
 - i.e. 4 of 5 members

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

The zoning board functions like a court

- Like court decisions, zoning board decisions can be appealed to higher courts



Legally defensible decisions

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



Authority

Are you empowered by statute or ordinance to act on the matter?



Proper procedures

Did you follow proper procedures?
(notice, open meeting, public hearing)



Proper standards

Did you apply the proper standards?
(ordinance, state statute, case law)



Rational basis

Could a reasonable person reach the same conclusion?



Evidence

Do facts in the record support your decision?

Why do zoning board decisions matter?



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

Where do you find ordinance purposes?

BOARD OF ADJUSTMENT

VARIANCE DECISION FORM – GENERAL ZONING *All BOA Members Must Complete Individually*

Washburn County Sec. 38-311. - Purpose and intent.

The purpose of this article is to promote and to protect the public health, morals, safety, and general welfare of the county. It is intended to encourage the use of lands and natural resources in Washburn County in accordance with their character and adaptability; to promote orderly development; to secure safety to health, life and property; to prevent highways from economic suffocation by encroaching uses; to preserve land values and insure a quality environment for future generations.

The BOA may only grant a variance if the applicant provides evidence that they meet all three legal standards below.

1. Unnecessary hardship (check area variance or use variance)

☐ **For an area variance**, unnecessary hardship exists when, ordinance standards that are strictly applied would unreasonably prevent a permitted use of a property, or



Why do zoning board decisions matter?

General zoning



Purposes for roadway setbacks

- **Safety**
- Accommodate road widening & utility replacement

Granting variances reduces these purposes



Why do zoning board decisions matter?

Shoreland zoning

Purposes for lake setbacks

- Reserve shoreline trees
- Prevent water pollution
- **Protect fish** and spawning grounds



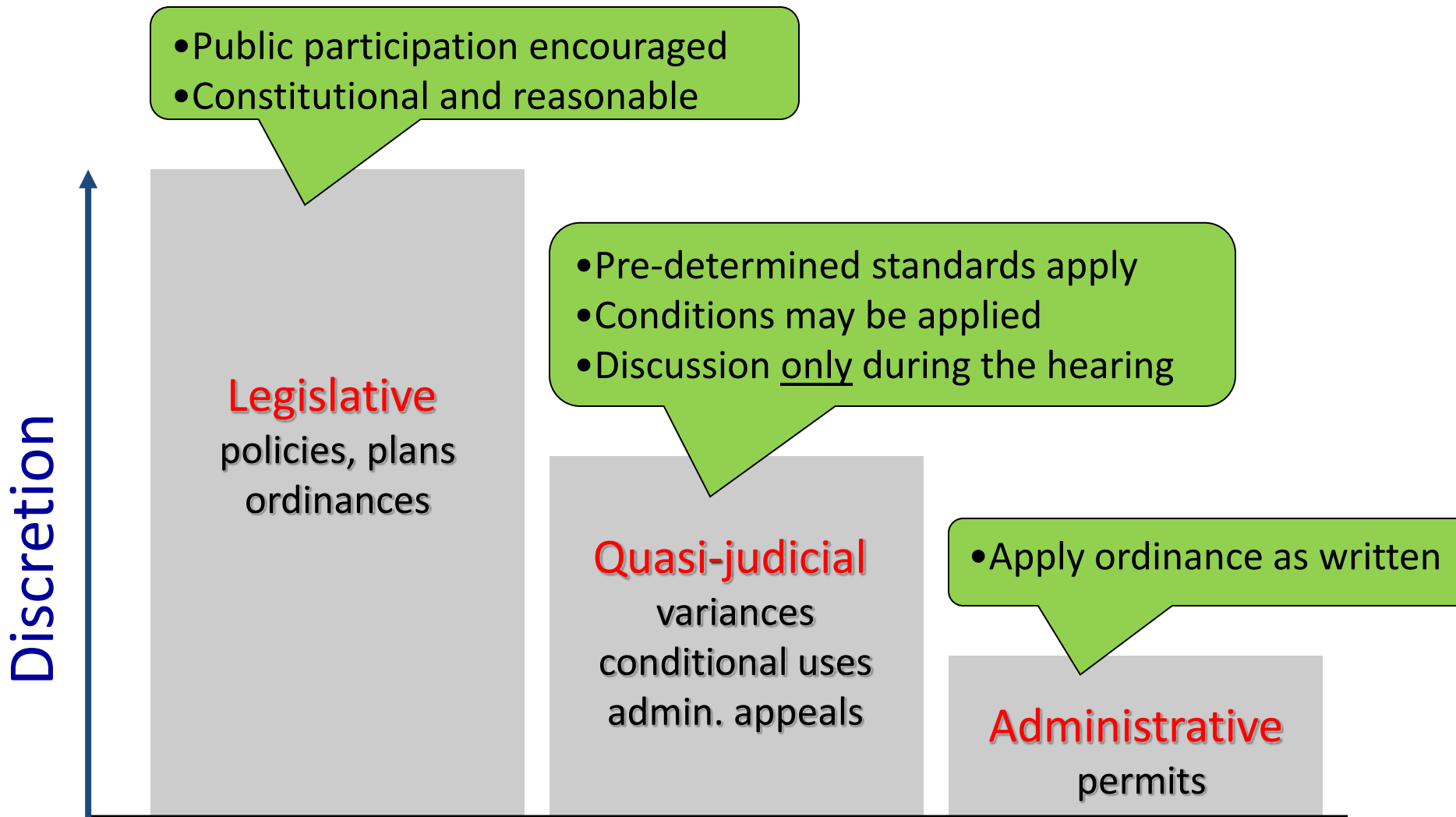
Walleye

Photo by Eric Engbretson

Granting variances reduces protection of lakes and streams

Discretion...

Flexibility in decision-making



Zoning roles



Elected officials adopt the
zoning ordinance



BOA members act like judges and
apply the ordinance and state laws as
written

Joe wants to build his home 20 feet from the lake. This is not allowed, so he applies for a variance. Twenty people attend the hearing saying they are fine with Joe's variance, and would also like to build close to the lake.

How should the zoning board react to this information?

Hint: What would a judge do?

Please type your answer in the chat



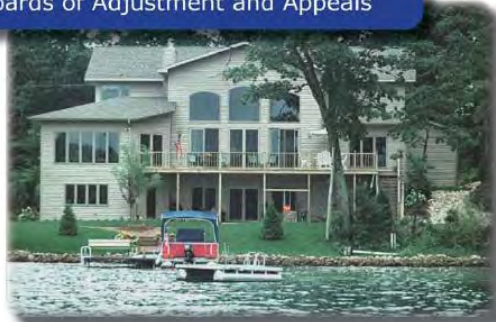


Zoning Board Handbook

For Wisconsin Zoning Boards of Adjustment and Appeals

**2nd Edition
2006**

**Lynn Markham
and Rebecca Roberts**
Center for Land Use
Education



- I. Zoning board basics
- II. Laws that apply
- III. Decision process
- IV. Decisions
- V. Appeal
- VI. Improving decisions
- VII. Shoreland and floodplain zoning

Land Use Training & Resources



Land Use Training & Resources

Division of Extension

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Preparing for a Digital Future

Information and community examples to assist in improving digital communication through your municipal website. Drive citizens to important information, hold remote meetings and conduct online training.



Plan Commission Training

Plan Commission Training is designed to orient new members and interested citizens to the roles and responsibilities of the plan commission and to serve as a refresher for veteran members of the commission.



Resource section includes decision forms

Zoning Board Training

Zoning Board Training is designed to provide an introduction for new zoning board members and staff to zoning board roles, procedures and standards

<https://fyi.extension.wisc.edu/landusetraining/>

Poll: Do you plan to take any of these actions after attending the webinar? (select all that apply)



Avoid ex parte communication



Focus more on legal standards in decision-making



Share the webinar resources with my zoning board



Sign up for advanced zoning webinar(s)

Thank you Questions??

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