SECTION IV: DECISIONS OF THE ZONING BOARD

12. Discretion Associated with Zoning Decisions

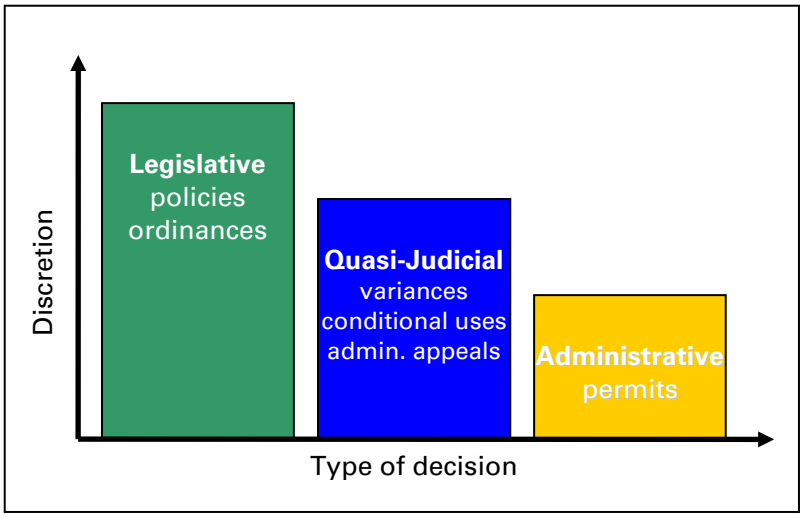
Zoning decisions are typically divided into three categories (administrative, quasi-judicial and legislative) depending on the type of decision made and the body making the decision. The rules and level of discretion (or flexibility) associated with making these types of decisions vary greatly. Routine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

If you're on the zoning board, your role is to apply the rules as written. If you want to make or change the rules, run for elected office.

Quasi-judicial decisions involve the application of a set of rules or policies to a particular fact situation. These decisions involve the exercise of some discretion. For example, in deciding whether to grant a variance or conditional use permit, a zoning board has the power to investigate facts, hold hearings, weigh evidence, draw conclusions, and use this information as a basis for their official decisions.[1] Discretion of quasi-judicial decision-makers is strictly limited by local ordinance and related state laws. Zoning boards may only apply ordinances as they are written and may not substitute their judgment for that of the elected local governing body.

Ordinance proposal, adoption and revision are **legislative decisions** reserved by state law for the planning committee/commission (in an advisory capacity) and the local governing body following prescribed procedures.[2] These bodies enjoy greater latitude than administrative or quasi-judicial decision-makers. They may involve the public in helping to shape their decisions and are limited only by procedural and constitutional concerns.

Figure 17: Discretion Associated with Zoning Decisions

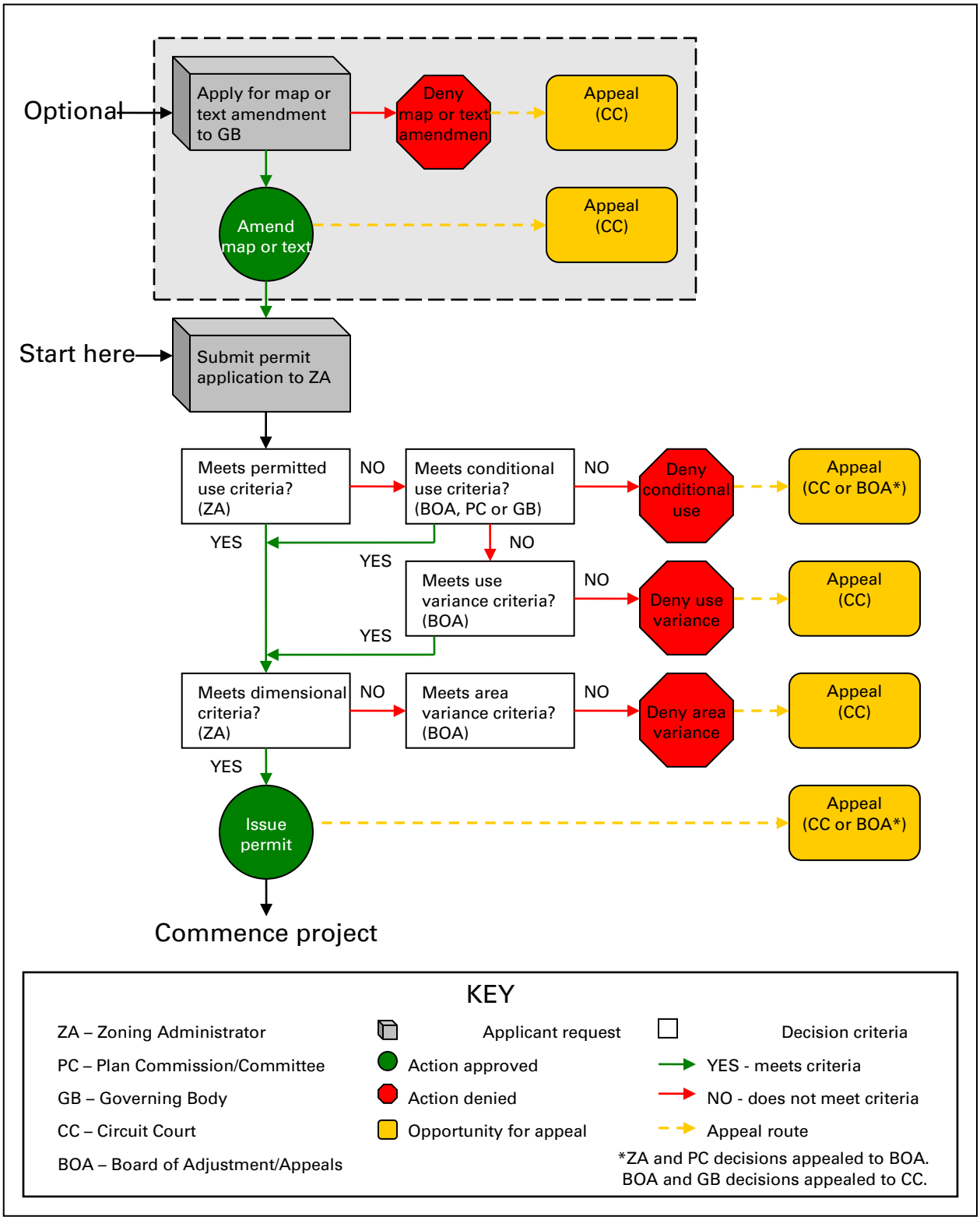


[1] *Universal Glossary of Land Use Terms and Phrases*. 1998. Land Use Law Center, Pace University School of Law. Available: http://www.nymir.org/zoning/Glossary.html

[2] Counties are governed by Wis. Stat. § 59.69; cities by Wis. Stat. § 62.23(7); villages by Wis. Stat. § 61.35; and towns by Wis. Stat. § 60.61.

Figure 18: Zoning Permit Decision Process

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

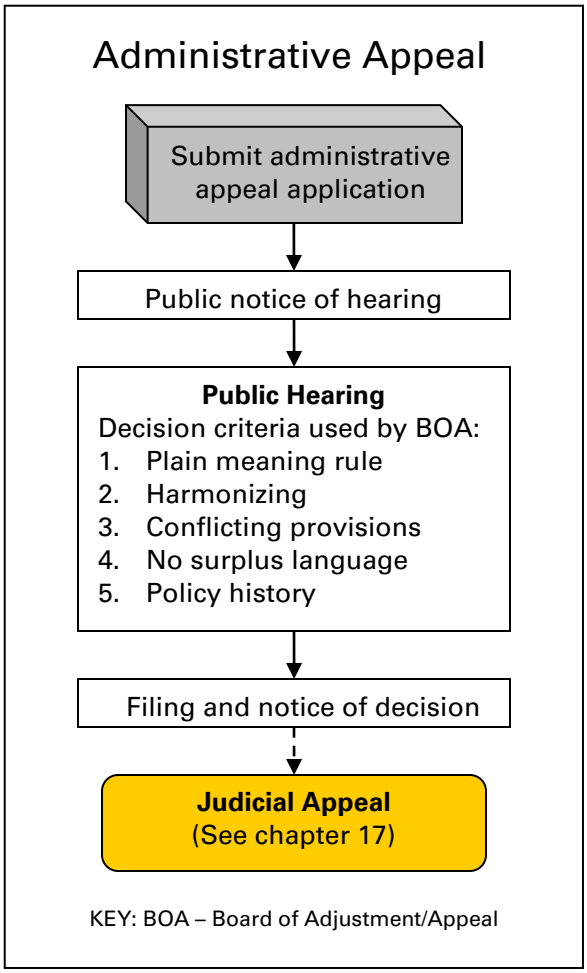


13. Administrative Appeals

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

Appeals of administrative decisions, such as the reasonableness or accuracy of measurements, conditions on development, issuance of permitted or conditional uses, or whether the administrative official had authority to make a decision, are generally heard by the zoning board.[3] When hearing an appeal, the zoning board should review the record of proceedings before it and may take new evidence.[4] The applicant has the burden of proof to demonstrate that the administrative decision is incorrect or unreasonable. We recommend that, when deciding administrative appeals, the zoning board follow the certiorari review criteria outlined in chapter 17 for appeal of judicial decisions. When making a decision, the zoning board has all of the powers of the decision-maker whose decision was appealed. The zoning board may reverse, confirm or modify the decision that was appealed.[5] For specific guidance related to appeals of conditional use permits, refer to Chapter 14.

Figure 19: Administrative Appeal Process



What is the process for filing an administrative appeal?

Who may appeal

Appeals are often initiated by disgruntled landowners, neighbors, and citizens groups, but may also be brought by the governing body or a state oversight agency such as the DNR. According to state statutes, any aggrieved person and any officer, department, board, or bureau of

[3] Wis. Stat. §§ 59.694(7)(a) & 62.23(7)(e)7. The exception is conditional use decisions originally heard by the zoning board which must be appealed to circuit court.

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

[5] Wis. Stat. §§ 59.694(8) & 62.23(7)(e)8

the municipality affected by an administrative decision of a zoning officer may appeal the decision to the zoning board.[6] A "person" includes partnerships, corporations, associations and governmental units.[7] A person is "aggrieved" when the decision has a direct effect on the person's legally protected interests.[8] The aggrieved party is not required to have attended a previous hearing on the matter.[9]

How to appeal

An appeal may be made by filing a notice of appeal (specifying the basis for the appeal) with the zoning board and the administrative official whose decision is being appealed.[10] Once this is filed, the administrative official forwards all records associated with the original decision to the zoning board (including permit application, site plan, photos, transcript or tape of hearing, etc.).

Stay on appeal

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

Filing an appeal **stays** (puts on hold) the decision appealed. The stay is invalidated if the officer whose decision is appealed certifies to the zoning board that staying the decision would cause imminent peril to life or property. The officer must provide facts supporting that determination. The stay may be reinstated by the zoning board or a court. Reinstatement requires an application, notice to the administrative officer, and a determination that delaying the project would not cause imminent peril to life or property.[11]

Time limit on appeal

A reasonable time limit within which an appeal must be initiated should be specified by board rules or in the local ordinance (e.g. *within 30 days after effective notice of a decision*).[12] If no such provisions are made, the appeal period begins when the aggrieved parties find out about the decision[13] or have notice of the decision.[14] Most jurisdictions require conspicuous posting of a building permit as one means of providing such notice to neighbors. Since a great number of administrative decisions are made each day, it is reasonable to require or encourage owners and developers to provide notice

Figure 20: Posting at a Project Site

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[6] Wis. Stat. §§ 59.694(4) & 62.23(7)(e)4
[7] Wis. Stat. § 990.01(26)
[8] *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*, 125 Wis. 2d 387, 390, 373 N.W.2d 450 (Ct. App. 1985), *aff'd*, 131 Wis. 2d 101, 122, 388 N.W.2d 593 (1986).
[9] *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*, 131 Wis. 2d 101, 122, 388 N.W.2d 593 (1986)
[10] Wis. Stat. §§ 59.694(4) & 62.23(7)(e)4
[11] Wis. Stat. §§ 59.694(5) & 62.23(7)(e)5
[12] Wis. Stat. §§ 59.694(4) & 62.23(7)(e)4
[13] *State ex rel. DNR v. Walworth County Bd. of Adjustment*, 170 Wis. 2d 406, 414, 489 N.W.2d 631 (Ct. App. 1992)
[14] *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*, 131 Wis. 2d 101, 117-18, 388 N.W.2d 593 (1986)

to potentially affected parties before they start construction. Some developers post a large sign at a project site to give additional notice.

How are disputes regarding ordinance interpretations resolved?

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

Local usage

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

Ordinance ambiguity and intent

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

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

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

- **Plain meaning rule -** If a word is defined in the ordinance, use that meaning. If a word is not defined in the ordinance, use the plain, dictionary meaning of words that are not defined in the ordinance. Technical words are used in their technical sense.

- **Harmonizing** - When a provision is ambiguous, it must be interpreted to give effect to the primary legislative intent or purpose of the ordinance. Unreasonable and unconstitutional interpretations must be avoided.
- **Conflicting provisions** - When two provisions conflict, they should be interpreted to give effect to the primary legislative intent or purpose of the ordinance and to their respective requirements to the extent reasonable.
- **No surplus language -** Ordinances must be interpreted to give effect to every provision. Interpretations that render part of an ordinance meaningless must be avoided whenever possible.
- **Value of testimony -** Members of the zoning board should carefully consider interpretations made by staff, legal counsel, and the parties to a proceeding but should remember that the zoning board is responsible for interpreting ordinances within their jurisdiction. The potential interests and motives of those presenting testimony in an appeal should be examined to establish the relative merit of their testimony.

Figure 21: Example for Harmonizing Language

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

Wis. Stat. § 33.21 reads:
Public inland lake protection and rehabilitation districts may be created for the purpose of undertaking a program of lake protection and rehabilitation of a lake or parts thereof within the district.

Wis. Stat. § 33.23 (1) reads:
The governing body of a municipality may by resolution establish a district if the municipality encompasses within its boundaries all the frontage of the public inland lake within the state.

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

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

An alternate view is to read Wis. Stat. § 33.21 as if brackets were inserted as follows:
Public inland lake protection and rehabilitation districts may be created for the purpose of undertaking a program of lake protection and rehabilitation [of a lake or parts thereof] within the district.

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

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

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

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

Ordinance amendments and record keeping
If interpretation of an ordinance proves difficult, a clarifying ordinance amendment should be considered. If a satisfactory interpretation is reached, staff and other officials should record the interpretation and apply it consistently in future related administrative and quasi-judicial matters.

Many jurisdictions adopt *clean up* amendments periodically to clarify ordinance language settled by appeals over a six or twelve-month period.

How are disputes regarding boundary interpretations resolved?

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

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

A zoning board decision of an administrative appeal may be contested in circuit court by any aggrieved person, *taxpayer*, officer, department, board or bureau of the municipality within thirty days of filing of the decision in the office of the board.[15] (See Chapter 17 Appeal of Zoning Board Decisions.)

[15] Wis. Stat. § 59.694(10)

14. Conditional Uses/Special Exceptions

Conditional uses and **special exceptions** are similar and considered together in this chapter.

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

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

What is a conditional use?

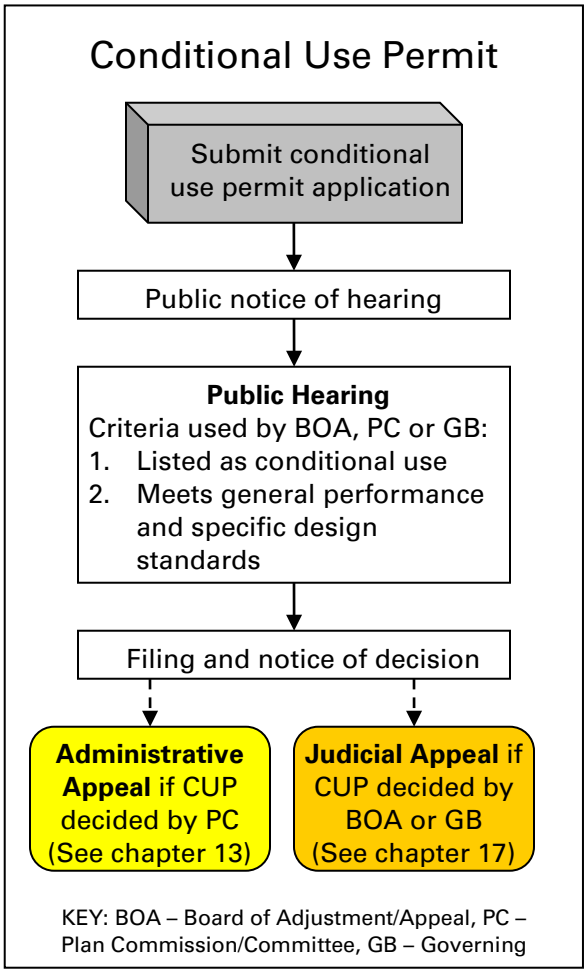
A *conditional use*, also known as a *special exception* in Wisconsin case law,[16] is any exception expressly listed in the zoning ordinance including land uses or dimensional changes. A conditional use is not suited to all locations in a zoning district, but may be allowed in some locations if it meets specific conditions set out in the zoning ordinance and is not contradictory to the ordinance's general purpose statement.[17] These conditions generally relate to site suitability and compatibility with neighboring land uses due to noise, odor, traffic, and other factors. In short, conditional uses must be custom tailored to a specific location. A conditional use must be listed as such in the zoning ordinance, along with the standards and conditions which it must meet.

Conditional uses in exclusive agricultural districts are limited to agricultural and other uses determined to be consistent with agricultural use and which require location in the district.[18]

How are conditional uses decided?

To allow a conditional use, a public notice and hearing are customary and may be required by ordinance (though not specifically required by state law). The application for a conditional use permit must be completed by the first time that notice is given for the final public hearing on the matter, unless the local ordinance provides otherwise.[19] This court ruling assures that citizens will have information necessary to evaluate a proposal and provide testimony at the hearing, and that controversial information will not be withheld until after the hearing.

Figure 22: Conditional Use Process



[16] *State ex rel. Skelly Oil Co. v. City of Delafield*, 58 Wis. 2d 695, 207 N.W.2d 585 (1973)
[17] *Kraemer & Sons v. Sauk County Bd. of Adjustment*, 183 Wis. 2d 1, 515 N.W.2d 256 (1994) referencing Wis. Stat. § 59.694(1) which is parallel to Wis. Stat. § 62.23(7)(e)1 for cities, villages, and towns with village powers.
[18] Wis. Stat. §§ 91.75(5) & 91.77
[19] *Weber v. Town of Saukville*, 209 Wis. 2d 214, 562 N.W.2d 412 (1997)

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

Who decides whether to grant conditional uses?

The local governing body determines by ordinance whether the zoning board, the governing body, or the planning commission/committee will decide conditional use permits.[20] Once this is specified by local ordinance, a community may not alternate assignment of conditional uses among these bodies unless the ordinance is specifically amended to provide authority to a different body.[21] This avoids arbitrary or politically driven assignment of conditional use permits to different decision-making bodies.

What conditions may be attached to a conditional use permit?

Performance and design standards

General performance standards and specific design standards for approval of conditional uses may be provided by local ordinance.[22] An applicant must demonstrate that the proposed project complies with each of the standards. The permit review body may impose additional conditions on development consistent with standards for approval and ordinance objectives. The review body may require an applicant to develop a project plan to accomplish specified performance standards (e.g., meet with land conservation department staff to develop an erosion control plan that contains all sediment on the site). Permit conditions that are routinely imposed for similar projects should be adopted by ordinance as minimum standards for approval of conditional uses. Incorporating standards in an ordinance allows permit applicants to anticipate and plan for design, location, and construction requirements.

Figure 23: Types of Development Standards

	Performance Standard
Example:	*Projects may not result in an increase in stormwater discharge which exceeds predevelopment conditions.*
Features:	▪ The expected results are stated. ▪ The project may be "custom tailored" to the site. ▪ It requires more technical expertise to design and evaluate a proposal. ▪ It involves more complex project monitoring and enforcement. ▪ It provides an opportunity for optimal compliance/performance.
	Design Standard
Example:	*Each lot shall provide 500 cubic feet of stormwater storage.*
Features:	▪ Project specifications are stated. ▪ It is easy to understand, administer, and enforce. ▪ It provides little flexibility and so may result in many variance requests. ▪ It may not achieve ordinance objectives in all cases.

[20] *Magnolia Township v. Town of Magnolia*, 2005 WI App 119, 284 Wis. 2d 561, 701 N.W.2d 60

[22] *Kraemer & Sons v. Sauk County Bd. of Adjustment*, 183 Wis. 2d 1, 515 N.W.2d 256 (1994)

Legal limits on conditions

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

- **Essential Nexus Test** - The limitation must be designed to remedy a harm to public interests or to address a need for public services likely to result from the proposed development. [23]
- **Rough Proportionality Test** - The limitation must be commensurate with the extent of the resulting harm or need for services.[24]

Impact fees

Recent Wisconsin legislation prevents counties from imposing impact fees, which include contributions of land or interests in land. Cities, villages, and towns may impose impact fees for highways; facilities for treating sewage, storm waters, and surface waters; facilities for pumping, storing, and distributing water; parks, playgrounds, and athletic fields; fire protection, emergency medical, and law enforcement facilities; and libraries. In doing so, the municipalities are required to report the revenue and expenditure totals for each impact fee imposed by a municipality in the annual municipal budget summary.[25] Impact fees must also meet the essential nexus and rough proportionality tests.

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

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

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

Continuance of use

Once a conditional use is granted, subsequent owners of a property are entitled to continue the conditional use subject to the limitations imposed in the original permit.[26] This is so because site conditions and potential conflicts with neighboring land uses, rather than the circumstances of the applicant, determine whether a conditional use can be permitted at a particular location.

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[23] *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (U.S. 1987)
[24] *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed.2d 304 (U.S. 1994)
[25] 2005 Act 477 amended Wis. Stat. § 66.0617 and others and was published June 13, 2006. For more information see: http://www.legis.state.wi.us/2005/data/lc_act/act477-sb681.pdf
[26] See Rohan, *Zoning and Land Use Controls*, sec. 44.01[4], p. 44-18, and Anderson, *American Law of Zoning* 3d, vol. 3, sec. 21.32, p. 754-5.

Time limits
Conditional uses may be granted for a limited term if the zoning board or other decision-making body can provide a legally defensible reason for the time limit. Periodic permit renewal to monitor compliance with development conditions is common and acceptable.[27] It is often required by ordinance for specified types of uses (e.g., quarry and mineral extraction operations).

Permit violations
If an owner changes the use or violates permit conditions, the board may revoke the permit or modify conditions after notice and a hearing. Revoking a conditional use permit is not considered a taking without just compensation because a conditional use permit is a type of zoning designation that is not a property right.[28]

Who decides appeals of conditional use decisions?

Appeals of conditional use decisions are handled differently depending on which local governing body makes the initial decision to grant or deny a permit. The following diagram shows the relationship between initial decision-makers and appropriate appeal bodies. Conditional use decisions heard initially by the plan commission/committee must be appealed to the zoning board. Note that zoning boards do not have the authority to remand decisions back to the planning and zoning commission/committee.[29] Conditional use decisions made initially by the governing body or zoning board must be appealed directly to circuit court.

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

If the local ordinance authorizes the plan commission/committee to decide conditional uses, their decisions may be appealed to the zoning board[30] by any aggrieved person or by an officer or body of the county, city, village, or town subject to time limits specified by local ordinance or rules.[31]

When reviewing a conditional use permit decision, the zoning board has authority to conduct a **de novo** review of the record and substitute its judgment for that of the plan commission/committee.[32] Consistent with a de novo review, the zoning board may take new evidence.

De novo – anew; collecting new information.

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

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[27] Anderson, *American Law of Zoning*, 3d, Vol. 3, S. 21.32, pp. 754-5.
[28] *Rainbow Springs Golf Co. v. Town of Mukwonago*, 2005 WI App 163; 284 Wis. 2d 519; 702 N.W.2d 40
[29] Wis. Stat. §§ 59.694(8) & 62.23(7)(e)8
[30] *League of Women Voters v. Outagamie County*, 113 Wis. 2d 313, 334 N.W.2d 887 (1983) referencing Wis. Stat. § 59.694(7) & 69 OAG 146, 1980, which clarified that "administrative official" includes the planning and zoning committee. Though this case refers to the statute for counties, Wis. Stat. § 62.23(e)7 for cities, villages and towns has parallel wording. Therefore, the author concludes that the *League* decision also applies to cities, villages, and towns with village powers.
[31] Counties - Wis. Stat. § 59.694(4); Cities, villages and towns with village powers - Wis. Stat. § 62.23(7)(e)4.
[32] *Osterhues v. Bd. of Adjustment for Washburn County*, 2005 WI 92, 282 Wis. 2d 228; 698 N.W.2d 701

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

Based on the evidence before it, the zoning board decides whether to grant the conditional use permit. The zoning board may reverse, affirm or modify a plan commission/committee decision, but does not have authority to remand a decision to the plan commission/committee.[33]

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

Yes. If conditional uses are decided by the zoning board, they may be appealed to circuit court by any aggrieved person, taxpayer, officer, or body of the municipality within 30 days of the filing of the decision in the office of the zoning board.[34]

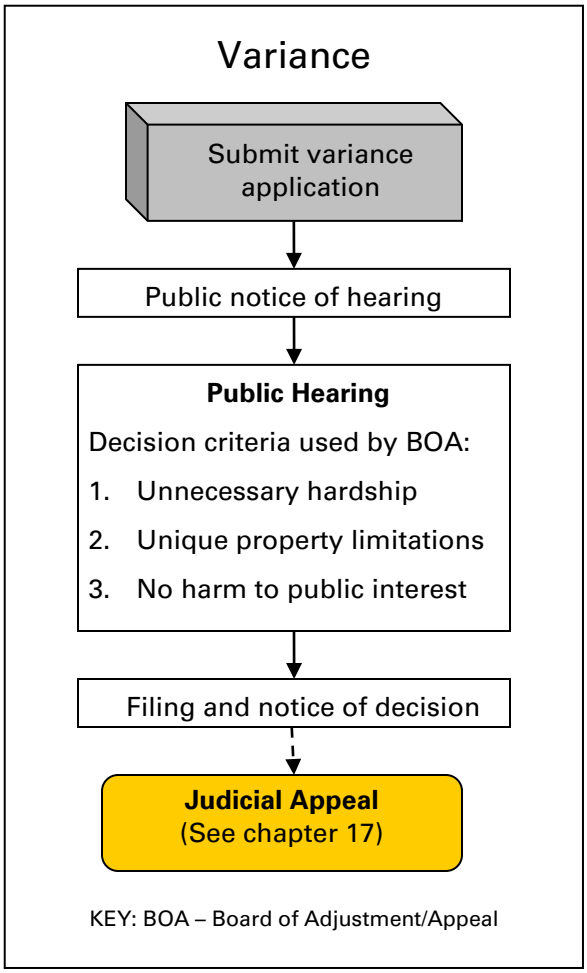
If conditional uses are decided by the governing body, they may be appealed to circuit court[35] Circuit courts use the **certiorari** review standards described in Chapter 17 to review conditional use decisions.[36]

[33] Wis. Stat. §§ 59.694(8) & 62.23(7)(e)8
[34] Wis. Stat. §§ 59.694(10) & 62.23(7)(e)10
[35] *Town of Hudson v. Hudson Town Bd. of Adjustment*, 158 Wis. 2d 263, 461 N.W.2d 827 (Ct. App. 1990) states there is no statutory authorization for zoning board review of the town board. Though this case refers to the statute for cities, villages, and towns, the zoning board statutes regarding conditional use permit decisions and appeals for counties have parallel wording. Therefore, the author concludes that the *Hudson* decision also applies to counties.
[36] *Town of Hudson v. Hudson Town Bd. of Adjustment*, 158 Wis. 2d 263, 461 N.W.2d 827 (Ct. App. 1990)

15. Variances

Whereas permitted and conditional uses allow a property to be used in a way expressly listed in the ordinance, a variance allows a property to be used in a manner forbidden by the zoning ordinance.[37] Two types of zoning variances are generally recognized: **Area variances** provide an increment of relief (normally small) from a physical dimensional restriction such as a building height or setback.[38] **Use variances** permit a landowner to put a property to an otherwise prohibited use.[39] Though not specifically restricted by statute or case law,[40] use variances are problematic for reasons discussed later (see page #). Variance decisions are always heard by the zoning board of adjustment or appeals.

Figure 24: Variance Process



What are the criteria for granting a variance?

To qualify for a variance, an applicant has the burden of proof to demonstrate that *all three* criteria of the three-part statutory test outlined below are met.[41]

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

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

1. Unnecessary Hardship

The Wisconsin Supreme Court distinguishes

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[37] *Fabyan v. Waukesha County Bd. of Adjustment*, 2001 WI App 162, 246 Wis. 2d 851, 632 N.W.2d 116

[38] *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401

[39] *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401

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

[41] *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d at 420, 577 N.W.2d 813 (1998); *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d at 254, 469 N.W.2d 831 (1991).

between area and use variances when applying the unnecessary hardship test:

For a **use variance**, unnecessary hardship exists only if the property owner shows that they would have no reasonable use of the property without a variance.[42] What constitutes *reasonable use* of a property is a pivotal question that the board must answer on a case-by-case basis. If the property currently supports a reasonable use, the hardship test is not met and a variance may not be granted. If a variance is required to allow reasonable use of a property, only that variance which is essential to support reasonable use may be granted and no more. A proposed use may be r*easonable* when it:

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

For an **area variance**, unnecessary hardship exists when compliance would unreasonably prevent the owner from using the property for a permitted purpose (leaving the property owner without any use that is permitted for the property) or would render conformity with such restrictions "unnecessarily burdensome."[43] To determine whether this standard is met, zoning boards should consider the purpose of the zoning ordinance in question (see the appendix for information about the purposes of shoreland and floodplain ordinances), its effects on the property, and the short-term, long-term, and cumulative effects of granting the variance.[44]

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

2. Hardship Due to Unique Property Limitations

Unnecessary hardship must be due to unique physical limitations of the property, such as steep slopes or wetlands that prevent compliance with the ordinance.[45] The circumstances of an applicant (growing family, need for a larger garage, etc.) are not a factor in deciding variances.[46] Property limitations that prevent ordinance compliance and are common to a number of

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[42] *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 413-414, 577 N.W.2d 813 (1998).
[43] *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d at 475, 247 N.W.2d 98 (1976) (quoting 2 Rathkopf, *The Law of Zoning & Planning*, § 45-28, 3d ed. 1972*)*.
[44] *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401
[45] *State ex rel. Spinner v. Kenosha County Bd. of Adjustment*, 223 Wis. 2d 99, 105-6, 588 N.W.2d 662 (Ct. App. 1998); *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 410, 577 N.W.2d 813 (1998); *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 255-56, 469 N.W.2d 831 (1991); *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 478, 247 N.W.2d 98 (1976)
[46] *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 478-79, 247 N.W.2d 98

properties should be addressed by amending the ordinance.[47] For example, an ordinance may, in some cases, be amended to provide reduced setbacks for a subdivision that predates the current ordinance and where lots are not deep enough to accommodate current standards.

3. No Harm to Public Interests
A variance may not be granted which results in harm to public interests.[48] In applying this test, the zoning board should review the purpose statement of the ordinance and related statutes in order to identify public interests. These interests are listed as objectives in the purpose statement of an ordinance and may include:

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

In light of public interests, zoning boards must consider the short-term and long-term impacts of the proposal and the cumulative impacts of similar projects on the interests of the neighbors, the community, and even the state.[49] Review should focus on the general public interest, rather than the narrow interests or impacts on neighbors, patrons, or residents in the vicinity of the project.

The flow chart on page # summarizes the standards for area variances and use variances. Application forms and decision forms reflecting these standards are included in the appendix.

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

- **Parcel-as-a-whole**. If a parcel as a whole (but not necessarily each portion of the parcel) provides some reasonable use for its owner, then the unnecessary hardship test is not met and a variance cannot be granted.[50]

- **Self-imposed hardship**. An applicant may not claim hardship because of conditions which are self-imposed.[51] Examples include excavating a pond on a vacant lot and then

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[47] *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 256,469 N.W.2d 831 (1991); *State v. Winnebago County*, 196 Wis. 2d 836, 846, 540 N.W.2d 6 (Ct. App. 1995)
[48] *State v. Winnebago County*, 196 Wis. 2d 836, 846-47, 540 N.W.2d 6 (Ct. App. 1995); *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 407-8, 577 N.W.2d 813 (1998)
[49] *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401 and *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.
[50] *State v. Winnebago County*, 196 Wis. 2d 836, 844-45 n.8, 540 N.W.2d 6 (Ct. App. 1995)

arguing that there is no suitable location for a home; claiming hardship for a substandard lot after selling off portions that would have allowed building in compliance; and claiming hardship after starting construction without required permits or during a pending appeal.

- **Circumstances of applicant**. Circumstances of an applicant such as a growing family or desire for a larger garage are not a factor in deciding variances.[52]
- **Financial hardship**. Economic loss or financial hardship do not justify a variance.[53] The test is *not* whether a variance would maximize economic value of a property.
- **Nearby violations**. Nearby ordinance violations, even if similar to the requested variance, do not provide grounds for granting a variance.[54]
- **Objections from neighbors**. A lack of objections from neighbors does not provide a basis for granting a variance.[55]
- **Variance to meet code**. Variances to allow a structure to be brought into compliance with building code requirements have been upheld by the courts.[56]

Figure 25: Land Division Variances… Creatures of a Different Color

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

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

Are there any limits on granting a variance?

Minimum variance allowed

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[51] *State ex rel. Markdale Corp. v. Bd. of Appeals of Milwaukee*, 27 Wis. 2d 154, 163, 133 N.W.2d 795 (1965); *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 479, 247 N.W.2d 98 (1976).
[52] *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 478-79, 247 N.W.2d 98 (1976)
[53] *State v. Winnebago County*, 196 Wis. 2d 836, 844-45, 540 N.W.2d 6 (Ct. App. 1995); *State v. Ozaukee County Bd. of Adjustment*, 152 Wis. 2d 552, 563, 449 N.W.2d 47 (Ct. App. 1989).
[54] *Von Elm v. Bd. of Appeals of Hempstead*, 258 A.D. 989, 17 N.Y.S.2d 548 (N.Y. App. Div. 1940)
[55] *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 254, 469 N.W.2d 831 (1991)
[56] *Thalhofer v. Patri*, 240 Wis. 404, 3 N.W.2d 761 (1942); see also *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 419-420, 577 N.W.2d 813 (1998).

The board may grant only the minimum variance needed.[57] For a use variance, the minimum variance would allow reasonable use, whereas for an area variance, the minimum variance would relieve unnecessary burdens. For example, if a petitioner requests a variance of 30 feet from setback requirements, but the zoning board finds that a 10-foot setback reduction would not be unnecessarily burdensome, the board should only authorize a variance for the 10-foot setback reduction.

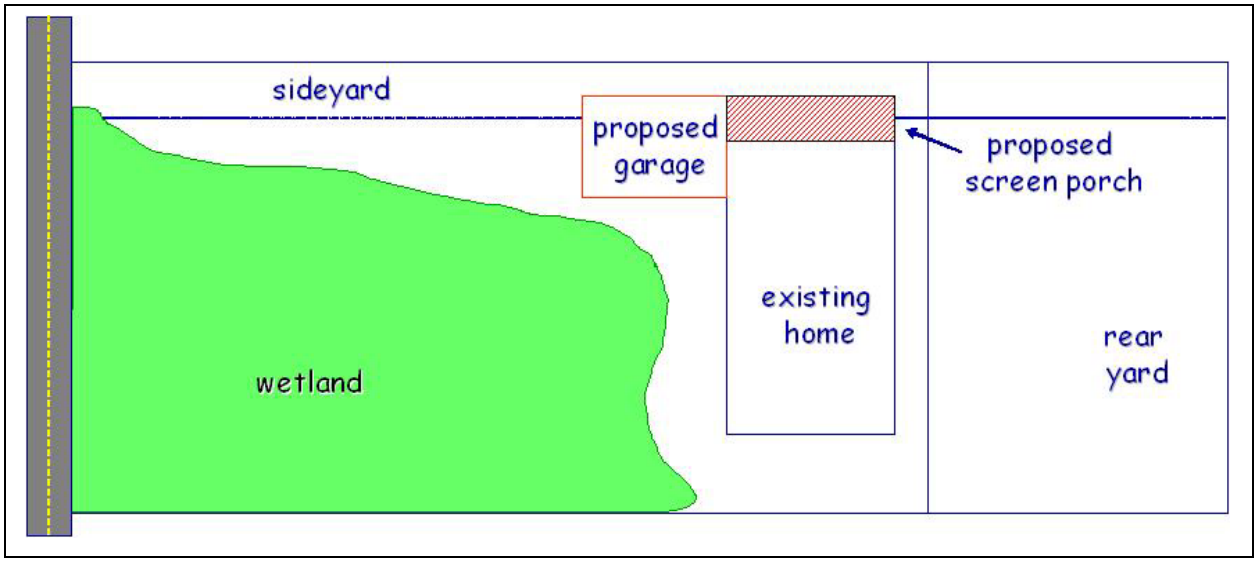
Conditions on development

The board may impose conditions on development (mitigation measures) to eliminate or substantially reduce adverse impacts of a project under consideration for a variance. Conditions may relate to project design, construction activities, or operation of a facility[58] and must address and be commensurate with project impacts (review the *essential nexus* and *rough proportionality* tests in Chapter 14).

Specific relief granted

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

Figure 26: A Variance Grants Specific Relief



Variances do not create nonconforming structures

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

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

[57] Anderson, *American Law of Zoning 3d*, (1986) Vol. 3, s. 20.8
[58] Anderson, *American Law of Zoning 3d*, (1986) Vol. 3, ss. 2070 and 20.71, pp. 587-95

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

Variance transfers with the property
Because a property rather than its owner must qualify for a variance to be granted (unique property limitations test), a variance transfers with the property to subsequent owners.[59]

Are multiple variances allowed?

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

Sequential variances
In other cases, original development of a property may have been authorized by variance(s). The owner later requests an additional variance. Generally, the later request should be denied since, in granting the original variance, the zoning board was required to determine that a variance was essential to provide reasonable use of the property or that not granting the (area) variance would have been unreasonably burdensome in light of the ordinance purpose. The board cannot subsequently find the opposite unless there have been significant changes on the property or on neighboring properties. A later variance could also be granted if the written purpose of the zoning designation for which an area variance was sought significantly changed, thereby allowing the variance to qualify under the unreasonably burdensome standard.

What is the process for appealing a variance decision?

A variance decision may be appealed to circuit court by any aggrieved person, *taxpayer*, officer or body of the municipality within 30 days of filing of the decision in the office of the board.[60] (See Chapter 17 Judicial Appeal of Zoning Board Decisions.)

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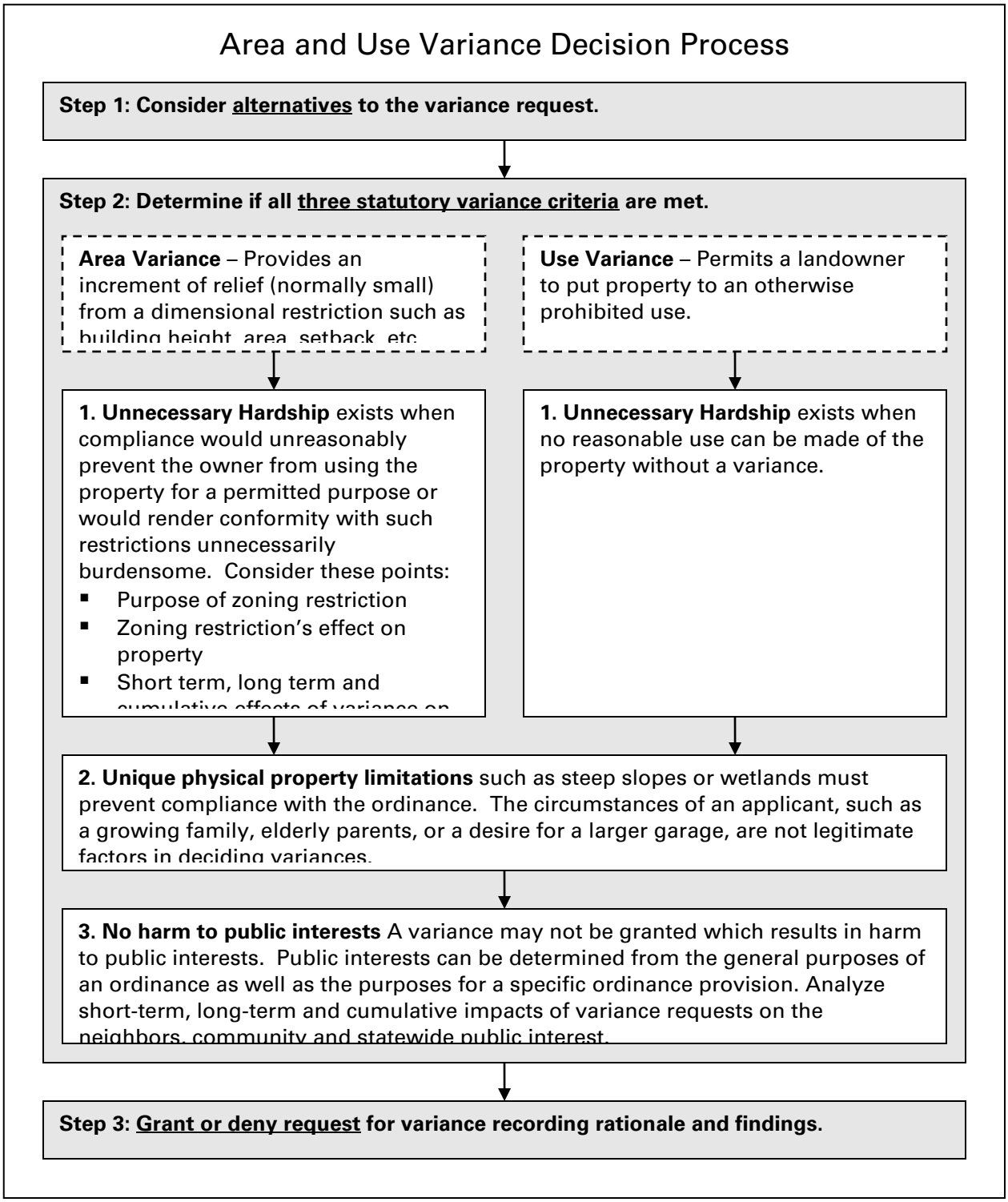
[59] *Goldberg v. Milwaukee Bd. of Zoning Appeals*, 115 Wis. 2d 517, 523-24, 340 N.W.2d 558 (Ct. App. 1983)
[60] Wis. Stat. § 59.694 (10)

Figure 27: Area and Use Variance Decision Process



AREA VARIANCES AND USE VARIANCES

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

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

Based on majority opinions of the Wisconsin Supreme Court,[61] it appears that, in order to draw the line between area variances and use variances, zoning boards should consider the degree of deviation from each dimensional standard for which a variance is sought in order to determine if the requested variance would "permit wholesale deviation from the way in which land in the [specific] zone is used."[62] A proactive community seeking to consistently differentiate between area variances and use variances could adopt an ordinance provision similar to the following:

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

Why are use variances discouraged?

Wisconsin Statutes do not specifically prohibit use variances. However, courts recognize that they are difficult to justify because they may undermine ordinance objectives and change the character of the neighborhood.[63] Some Wisconsin communities prohibit use variances in their ordinances. There are a number of practical reasons why they are not advisable:

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

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

[62] *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401

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

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

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

16. Accommodations for the Disabled

Federal and state anti-discrimination laws[64] require local governments to make "reasonable accommodations" (modifications or exceptions) to rules, policies, practices, or services when necessary to afford persons with disabilities equal access to housing or public accommodations such as restaurants, retail establishments, or other businesses normally open to the public. These laws must be considered within local land use and zoning practices but do not specifically preempt or invalidate local zoning.

Should disabled applicants be required to seek a variance or conditional use permit?

No. Granting a variance or conditional use is generally not the appropriate way to accommodate persons with disabilities[65] because:

- Even in cases involving persons with disabilities,[66] applicants must meet *all* of the standards, and this would be an unfair burden on those with disabilities.
- The decision to grant or deny these permits should be based (in part) on the physical conditions of the property, *not* the circumstances of the property owner. Once granted, these permits "run with the property," meaning all subsequent property owners are entitled to continue the use or dimensional allowance subject to limitations specified at the time of the permit.

What is the process for allowing reasonable accommodations?

The suggested procedure for allowing reasonable accommodations is through an administrative permit granted by the zoning administrator. Barron County includes the following language in their local zoning code to accomplish this purpose:[67]

> *The County Zoning Administrator will use a zoning permit that waives specified zoning ordinance requirements, if the administrator determines that both of the following conditions have been met.*
>
> *a. The requested accommodation (i.e., the requested waiver of zoning restrictions), or another less-extensive accommodation, is:*
>
> *1. Necessary to afford handicapped or disabled persons equal housing opportunity or equal access to public accommodations, and*

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[64] Wisconsin's Open Housing Law prohibits housing discrimination based on race, color, religion, national origin, ancestry, sex, age-18 and over, disability, lawful source of income, marital status, sexual orientation, and family status [Wis. Stat. § 106.50 and Wis. Admin. Code § DWD 220].

[65] Many local governments allow group homes as a conditional use. This is a valid use of this procedure, assuming group homes are not discriminated against or treated less favorably than groups of non-disabled persons.

[66] For a case regarding variances, see *Sawyer County Zoning Bd. v. Wisconsin Dept. of Workforce Development*, 231 Wis. 2d 534, 605 N.W.2d 627 (Ct. App., 1999). For a case regarding conditional use permits see *State ex rel. Bruskewitz v. City of Madison*, 2001 WI App 233; 248 Wis. 2d 297; 635 N.W.2d 797.

[67] *Barron County Code of Ordinances*, Chapter 17: Zoning, Land Divisions, Sanitation 17.74(5)(h). Available: http://www.co.barron.wi.us/forms/zoning_landuse_ord.pdf. Retrieved 5-10-06.

2. *The minimum accommodations that will give the handicapped or disabled persons adequate relief.*

b. *The accommodation will not unreasonably undermine the basic purposes the zoning ordinance seeks to achieve.*

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

What is a "reasonable" accommodation?

What constitutes a reasonable accommodation must be made on a case-by-case basis and depends on the facts of the situation. If a requested modification imposes an undue financial or administrative burden on a local government or if the modification fundamentally alters the local government's land use or zoning scheme, it is not considered a "reasonable" accommodation.[68] Local governments are not required to meet these requests.

May local governments impose conditions on accommodations for the disabled?

Local governments may require that modifications granted to accommodate disabilities be removed after no longer necessary. For example, when authorizing a building addition or structure (such as a ramp), the zoning administrator may require that the alteration be removed after the disabled person vacates the property. Barron County requires applicants to sign and record an affidavit with the local register of deeds outlining conditions and removal procedures associated with allowing accommodations for the disabled.

[68] *Group Homes, Local Land Use, and the Fair Housing Act*. Joint Statement of the Department of Justice and the Department of Housing and Urban Development. Available: http://www.usdoj.gov/crt/housing/final8_1.htm. Retrieved 5-9-06.

Section IV – Review

Keywords

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

Test your Knowledge

Chapter 12 – Discretion Associated with Zoning Decisions

1) What are the three discretionary levels of decision-making? Provide examples of each.
    a. Legislative decisions – most discretion (policies, ordinances)
    b. Quasi-judicial decisions – (variances, conditional use permits, administrative appeals)
    c. Administrative decisions – least discretion (simple permits)

2) Name four of the five major types of zoning decisions.
    a. Permitted uses
    b. Conditional uses
    c. Variances (area or use)
    d. Amendments (text or map)
    e. Appeals (administrative or judicial)

3) Which zoning decisions are typically made by the zoning board?
    a. Administrative appeals
    b. Variances
    c. Conditional uses (if authorized by local ordinance)

Appeal
(CC)

Chapter 13 – Administrative Appeals

4) Name three guidelines for determining the intent of ambiguous ordinances.
    a. Scope or jurisdiction
    b. Context
    c. Subject matter

5) Name five guidelines for interpreting the text of ordinances.
    a. Plain meaning rule
    b. Harmonizing
    c. Conflicting provisions
    d. No surplus language
    e. Value of testimony

Chapter 14 – Conditional Uses/Special Exceptions

6) Who may decide a conditional use permit?
    a. The governing body, plan commission/committee, or zoning board *as specified by local ordinance*.

7) What is the difference between performance and design standards?
    a. Performance standards state the expected results and allow landowners to use a variety of techniques custom-tailored to the site to achieve those results.
    b. Design standards state specific requirements (less flexible but easier to administer).

8) What are the tests for determining whether conditions are legally acceptable?
    a. Rough proportionality
    b. Essential nexus

Chapter 15 – Variances

9) What is the difference between an area variance and a use variance?
    a. Area variances allow small deviations from *dimensional* requirements such as setbacks, heights, etc.
    b. Use variances allow *uses* that are prohibited in the zoning district

10) What are the three standards for granting a variance?
    a. Unnecessary hardship - defined as “no reasonable use” for use variances and “unnecessarily burdensome in light of ordinance purposes” for area variances.
    b. Unique property limitations
    c. No harm to public interest

Chapter 16 – Accommodations for the Disabled

11) What is the process for providing reasonable accommodations for the disabled?
    a. We recommend including language in your local zoning ordinance to grant reasonable accommodations through a simple permit issued by the zoning administrator.