

SECTION I: ZONING BOARD BASICS

1. Introduction to Zoning

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

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

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

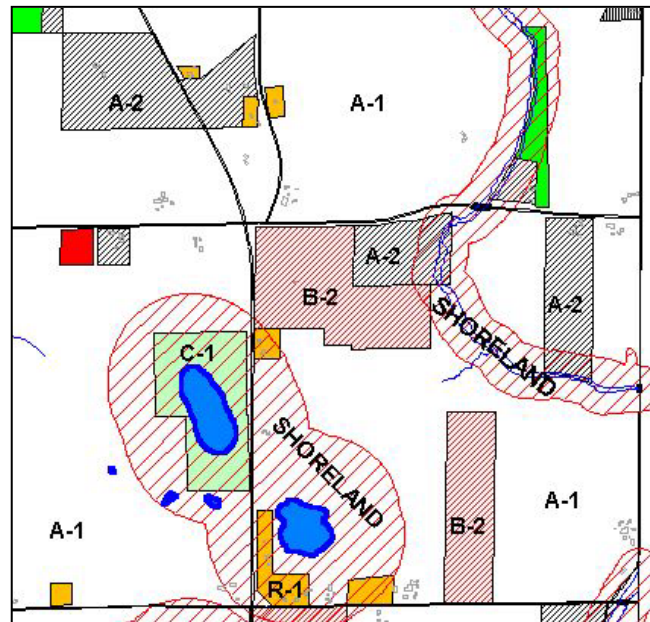
- Public health, safety and welfare,
- Natural resource protection,
- Protection of investments, or
- Aesthetics.

Elements of a Zoning Ordinance

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

General zoning works by dividing the community into districts or 'zones' designated for different uses, such as residential, commercial, industrial or agricultural use. Zoning districts are mapped based on land suitability, avoidance of conflict with nearby uses, protection of environmental features, economic factors such as efficient provision of public services and infrastructure, and other locally determined land use objectives articulated in a community plan. Each zone contains a different set of land use rules that is articulated in the text of the zoning ordinance. These rules specify: 1) the use of

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



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

² Some other types of zoning are required by the state as described under Additional Forms of Zoning.

the land, 2) the density of structural development, and 3) the dimensions of structures and setbacks. In addition, the text of the zoning ordinance describes the purpose of each zoning district and related administrative and enforcement procedures.

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

Allowable Uses for each District

Generally, two categories of allowable uses are listed for each zoning district: permitted uses and conditional uses.

Permitted uses are allowed as a matter of right in all locations in a zoning district and may be authorized by the zoning administrator or building inspector with a simple permit. Authorization is non-discretionary provided the project complies with general standards for the zoning district, any overlay district or design standards, and related building or construction codes.

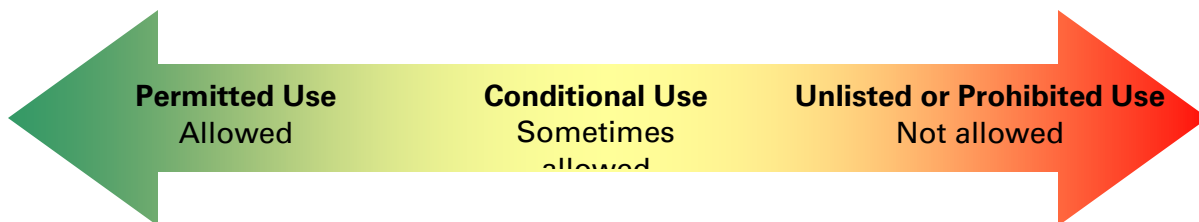
Conditional uses are listed in the zoning ordinance for each district but are subject to an additional layer of scrutiny.³ Conditional uses are authorized on a discretionary basis, meaning they are only authorized if found to be compatible with neighboring land uses, if they can be tailored to meet the limitations of the site, and if they do not violate the objectives of the zoning ordinance. Conditions may be attached to the approval of a conditional use permit. Uses that are not listed in the zoning ordinance for a particular district or that are expressly prohibited are not allowed in the district, except on rare occasions by use variances.

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

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

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

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



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

Relief from Strict Adherence to the Zoning Code

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

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

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

For additional information on conditional uses, variances and administrative appeals please refer to Section IV.

Map and Text Amendments

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

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

Additional Forms of Zoning

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

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

⁴ Wis. Stat. § 59.692; Wis. Admin. Code ch. NR 115.

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

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

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

For additional information on shoreland, shoreland-wetland and floodplain zoning please refer to Section VII.

Zoning and the Comprehensive Plan

A comprehensive plan is a tool used by communities to study how various aspects of a community are working and to articulate how the community desires to develop in the future. A comprehensive plan is prepared by a planning commission or committee and is adopted by the governing body. The plan sets forth broad goals, objectives, policies and recommendations that may be implemented using a variety of tools. Zoning is one of many possible tools used to implement a plan. In Wisconsin, local land use actions and regulations such as zoning and land division regulations must be consistent with a locally adopted comprehensive plan by January 1, 2010.⁷ If the zoning ordinance or related zoning decisions are not consistent with the plan, resulting actions may be subject to legal challenge.

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

⁶ Wis. Stat. § 87.30(1)

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

2. Introduction to the Zoning Board

Role of the Zoning Board

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

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

While it is tempting to think of zoning boards as providing flexibility in administration of zoning, flexibility is strictly limited by state and local laws that determine the authority of zoning boards and provide criteria for decision-making. Local governing bodies and the public must look beyond the zoning board for added flexibility. Map and text amendments, performance standards, alternative design standards, standards for conditional uses and mitigation requirements that compensate for adverse effects of development all provide opportunities for flexibility that can be integrated into local ordinance provisions.

Zoning Board Authority

Authority for zoning board decision-making is determined by Wisconsin Statutes. The primary role of the zoning board, as outlined in state statutes is to hear and decide administrative appeals and variances related to general zoning. In almost all cases, zoning boards also assume this role

A note on special exceptions and conditional uses

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

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

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

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

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

related to shoreland zoning, shoreland-wetland zoning, exclusive agricultural zoning, construction site erosion control and storm water management zoning. Unless provisions are adopted for county zoning boards under Wis. Stat. § 59.69, zoning boards do not have authority to hear and decide administrative appeals or variances related to subdivision ordinances. This authority is reserved for the governing body or plan commission.

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

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

Figure 3: Statutory Authority of Zoning Boards				
	County	City	Village	Town
General zoning	59.694(7)	62.23(7)(e)7	61.35	60.62(1) and 60.65(3)&(5)
Shoreland zoning	59.692(4)(b)	62.23(7)(e)7	61.35	
Shoreland-wetland zoning	59.692(4)(b)	62.231(4)(a)	61.351(4)(a)	

Floodplain zoning	NR 116.19	NR 116.19	NR 116.19	No authority ⁹
Construction site erosion control & storm water management zoning	59.693(4)(b)	62.234(4)(b)	61.354(4)(b)	60.627(4)(b)
Exclusive agricultural zoning	91.73(1) ¹⁰			
Livestock facility siting	93.90 ¹¹			
Renewable energy systems	59.694(7)(d)	62.23(7)(c) ¹²		
Public utility permits	No authority (unless adopted under 59.69) ¹³	62.23(7)(e)7 ¹⁴		
Solid waste management	No authority (unless adopted under 59.69) ¹⁵	No authority ¹⁶		
Subdivision/land division	No authority (unless adopted under 59.69) ¹⁷	No authority ¹⁸		
Uniform Dwelling Code	No authority ¹⁹			
Well codes	No authority ²⁰			
Private sewage systems	No authority ²¹			

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Formation and Organization of the Zoning Board

Composition of the Zoning Board

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

Figure 4: Composition of the Zoning Board
<p>County Zoning Board of Adjustment</p> <ul style="list-style-type: none">▪ Three to five members²² plus two additional alternates▪ Members must reside in the county but outside of incorporated area▪ No more than one member from each town▪ Appointed by the county executive or county administrator, if present, or the county board chair²³▪ Appointed for three-year staggered terms, beginning July 1▪ Appointment subject to approval of the governing body
<p>Town Zoning Board of Adjustment²⁴</p> <ul style="list-style-type: none">▪ Three members plus two additional alternates▪ Members must reside in the town▪ No more than one member from the town board▪ Appointed by the town board for three-year staggered terms
<p>City, Village or Town²⁵ Zoning Board of Appeals</p> <ul style="list-style-type: none">▪ Five members plus two additional alternates▪ Appointed by the city mayor, village president or town board chair for three-year staggered terms▪ Appointment subject to approval of the governing body

Recruitment of Members

The selection and appointment of zoning board members is an important decision. Selecting members with care often improves the quality, acceptability and defensibility of decisions made by the zoning board. Strong candidates should possess effective decision-making skills, the ability to remain open-minded and impartial, an ongoing commitment to continuing education

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

²³ Wis. Stat. §§ 59.17(2)(c), 59.18(2)(c) & 59.694(2)(a)

²⁴ Applies to towns without village powers operating under Wis. Stat. § 60.65.

²⁵ Applies to towns exercising village powers under Wis. Stat. § 60.62.

and skill development, familiarity with zoning and land use concepts, an understanding of the unique role of the zoning board, and long-term dedication to the position. Suggested criteria for appointment of members include:²⁶

1. **Diversity of membership.** The zoning board should reflect the diversity and uniqueness of the community it represents. In order to provide broad familiarity with differing landscapes, development patterns and other community issues, members should be appointed to represent the different geographic areas and jurisdictions present in the community. In addition, consideration should be given to the age, gender, ethnicity and professional composition of the zoning board.
2. **Land use expertise.** To ensure that zoning board members are capable of understanding development proposals and determining their impacts, individuals with academic or professional knowledge of land use law, zoning, natural resources or construction and development practices, and those who are able to read site plans and related maps should be considered for appointment.
3. **Commitment to community service and continuing education.** Members who have demonstrated an interest in community service by serving as elected officials, citizen advisors or in some other capacity and who are willing to attend educational sessions provided for zoning board members should be appointed in order to provide stable membership and sound decision-making by the board.
4. **Understanding and acceptance of the nonpartisan, quasi-judicial role of the zoning board.** Perhaps most important, prospective members must understand and accept that the zoning board is not a policy-making body and that it must apply the law to specific fact situations whether or not they agree with the law or regulation in question.

Considerations for Appointment

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

In all situations, it is necessary to balance the contribution of prospective zoning board members against the potential for conflicts of interest or litigation. We advise that members of the local governing body not be appointed to serve on the zoning board. It is difficult to separate the

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

legislative and quasi-judicial roles associated with each position. Wide discussion of public policy issues (such as land use laws) and constituent representation may be encouraged in the legislative process, but they are strictly limited or prohibited by due process concerns of zoning board decisions (see *ex parte* communication in Chapter 6). Furthermore, it would be difficult for an individual in this position to maintain objectivity when interpreting or applying a zoning policy they had voted against as an elected official. The potential lack of objectivity or even *appearance* of such could lead to litigation.

Appointment of Alternates

The appointment of two alternate members to the zoning board is required by law. By statute, the designated “first alternate” is required to act with full powers of the zoning board when a regular member cannot vote due to conflict of interest or absence. The “second alternate” is required to act when the first alternate or multiple members of the zoning board are unable to vote.²⁷

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

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

Filling Vacancies

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

Removal for Cause

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

Selection and Duties of Zoning Board Officers

²⁷ Wis. Stat. §§ 59.694(2)(am) & 62.23(7)(e)2

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

A county zoning board of adjustment chooses its own chair²⁹ and may choose a vice-chair and secretary. The chair of the city, village or town³⁰ governing body designates the zoning board of appeals chair subject to approval by the governing body.³¹

The duties of the zoning board chairperson include:³²

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

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

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

The duties of the secretary include:

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



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

²⁹ Wis. Stat. § 59.694(2)(c)

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

³¹ Wis. Stat. §§ 62.23(7)(e)2 & 62.09(3)(e)

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

Section I – Review

Keywords

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

Test Your Knowledge

Chapter 1 - Introduction to Zoning

- 1) A zoning ordinance consists of two legally adopted parts. What are they?
 - a. Map – illustrates the boundaries of zoning districts.
 - b. Text – describes the purpose of each zoning district, uses allowed in the district, dimensional or construction standards, and administrative and enforcement procedures.
- 2) In addition to general zoning, Wisconsin communities may be involved in shoreland zoning and other forms of special-purpose zoning. Which types of zoning is your zoning board involved with?
- 3) What is the relationship between zoning and the community's comprehensive plan?
 - a. Zoning is one of many tools that may be used to implement a comprehensive plan. It must be consistent with a comprehensive plan by January 1, 2010 or may be subject to legal challenge.

Chapter 2 - Introduction to the Zoning Board

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

Chapter 3 - Formation and Organization of the Zoning Board

- 6) Describe four desired qualifications for zoning board members.
 - a. Diversity of membership.
 - b. Land use expertise.
 - c. Commitment to community service and continuing education.
 - d. Understanding and acceptance of the nonpartisan, quasi-judicial role of the zoning board.