

Role of the Zoning Board –

July 10, 2024, 6:00-7:00 pm



Thank you for joining us! The webinar will begin at 6 pm.

Please mute your microphone and turn off your video camera.

We will reserve 10 minutes for questions at the end. Please submit questions using the Q&A.



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



Extension
UNIVERSITY OF WISCONSIN-MADISON

Key points

- Zoning board members act like judges; they must be neutral and base their decisions on the evidence and the current laws
- Variances allow a property owner to do something on their land prohibited by the ordinance
- The zoning board is only allowed to grant a variance if the applicant provides evidence that they meet all variance tests
- To create a legally defensible decision, zoning board members must explain the reasons why each variance test is or is not met



Poll 1



Webinar Outline

1. Introduction to zoning
2. Role of the zoning board
3. Variances: 3 legal standards
4. Would you grant this variance?





Zoning Board Handbook

For Wisconsin Zoning Boards of Adjustment and Appeals

2nd Edition
2006

Lynn Markham
and Rebecca Roberts
Center for Land Use
Education

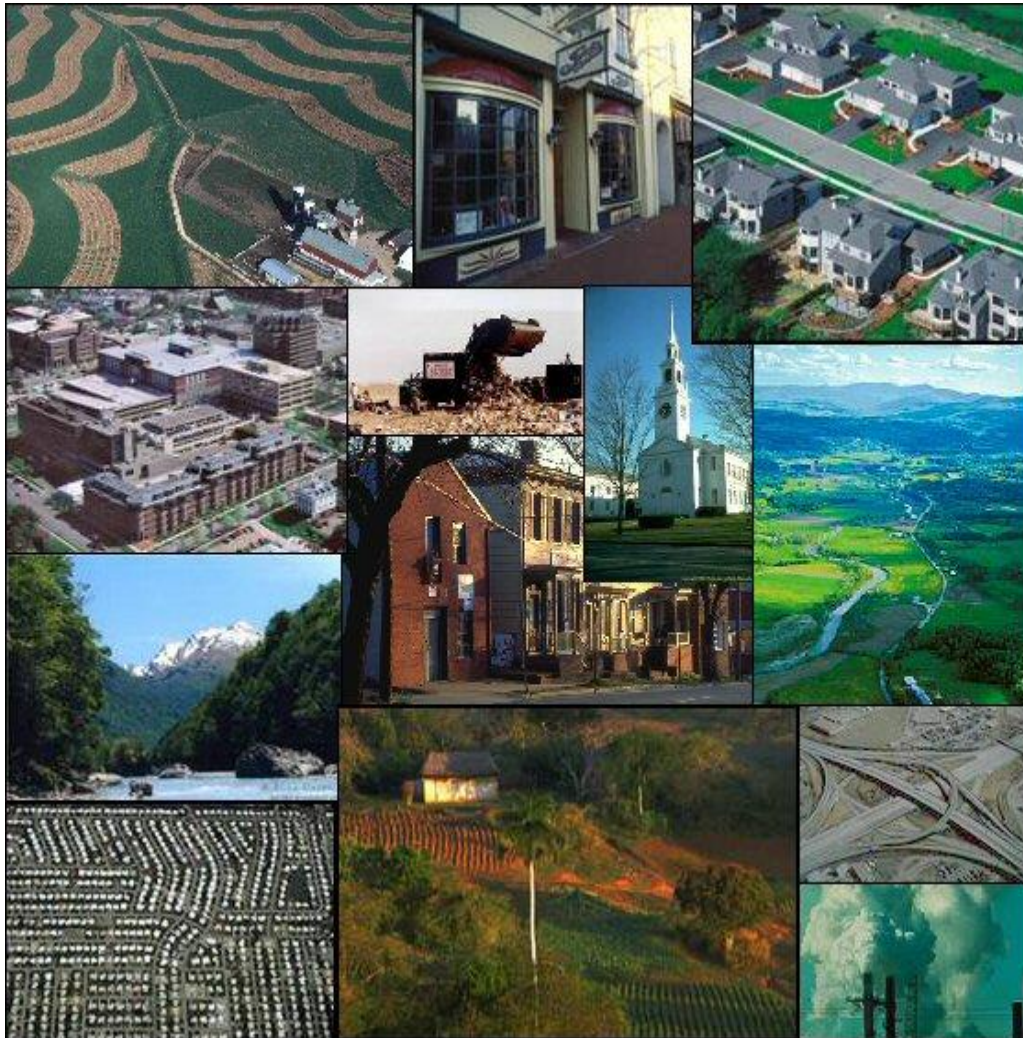


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- I. Zoning board basics
- II. Laws that apply
- III. Decision process
- IV. Decisions
- V. Appeal
- VI. Improving decisions
- VII. Shoreland and floodplain zoning

Purpose of Zoning

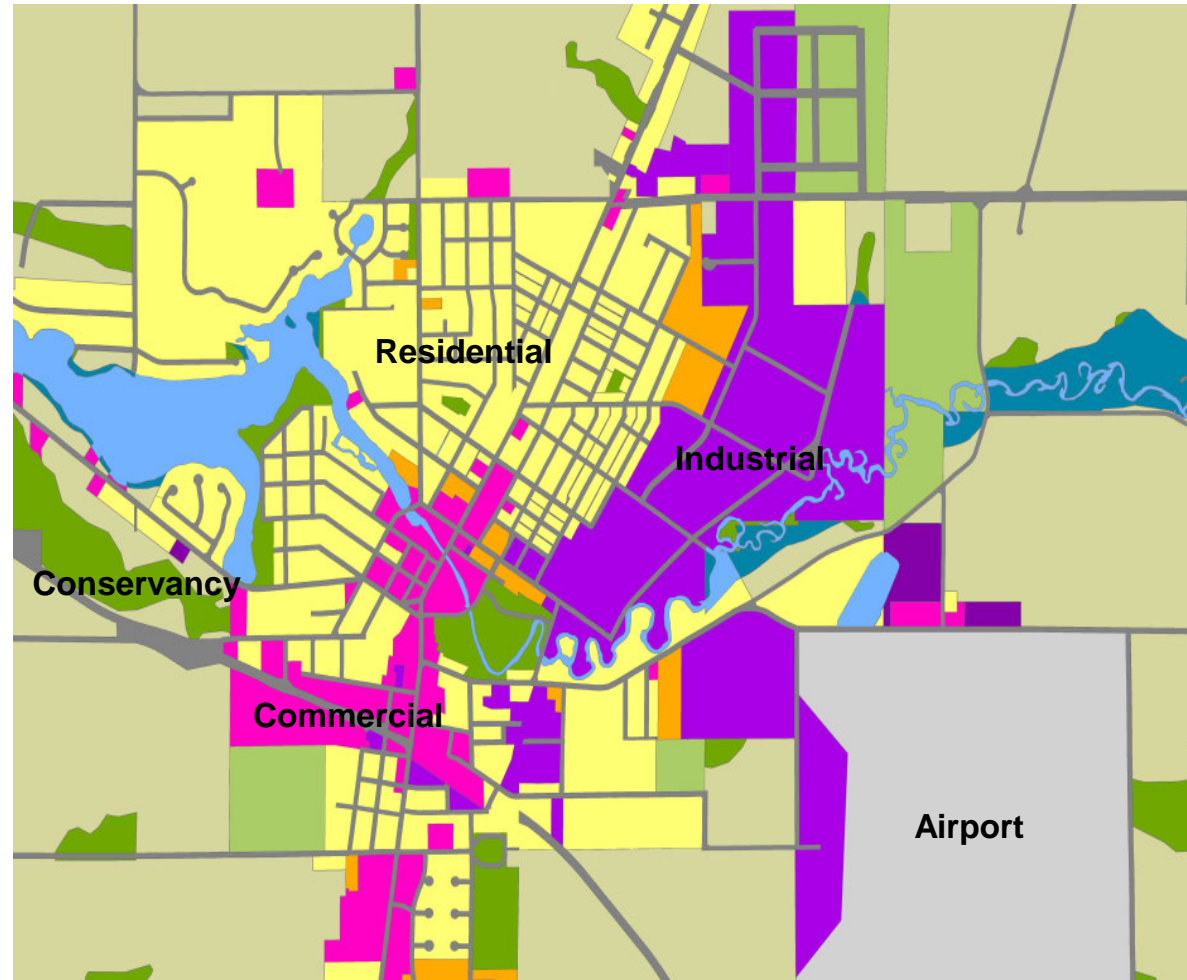


Zoning is one tool to achieve community goals such as:

- Public health, safety, and welfare
- Protect natural resources
- Community character and aesthetics
- Protect public and private investments

A zoning ordinance contains two parts:

Zoning Map
divides the
community
into districts



Uses for each zoning district:

Permitted Use

Use is listed and allowed by right in all parts of the zoning district

Granted by zoning administrator

Conditional Use

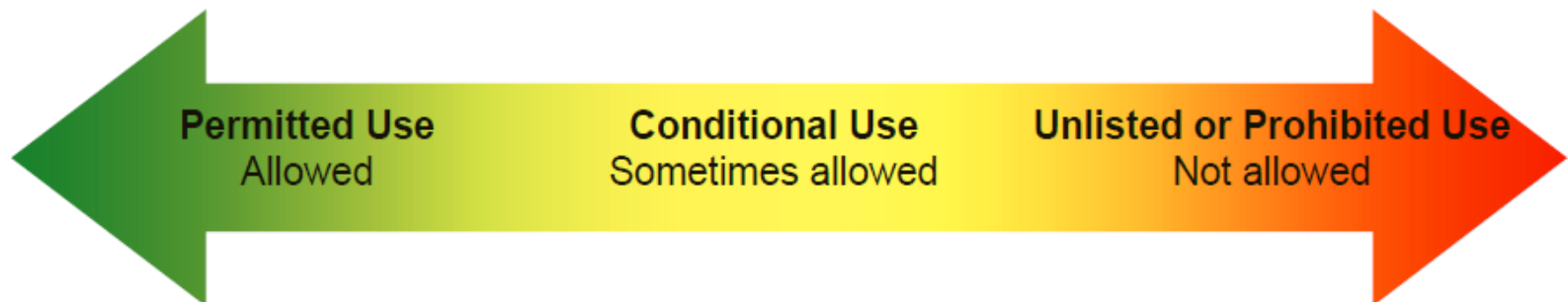
Use is listed for the district and may be allowed if suited to the location

Decided by zoning board, plan commission, or governing body

Prohibited Use

Use is not listed for the district or is expressly prohibited

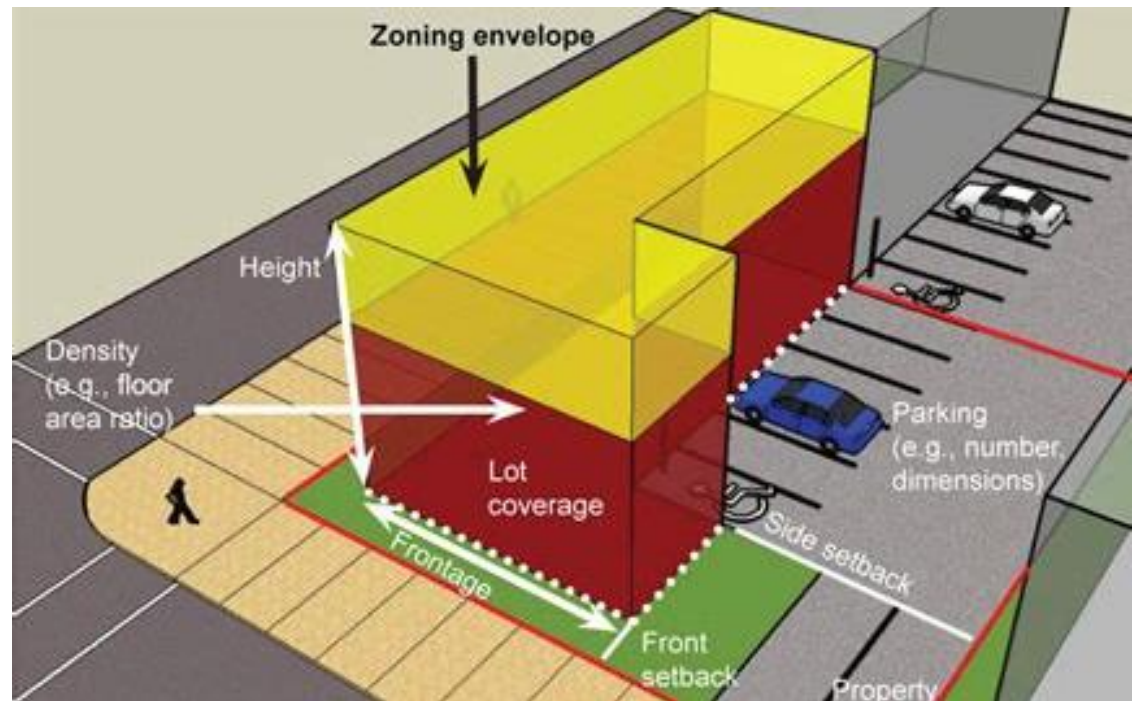
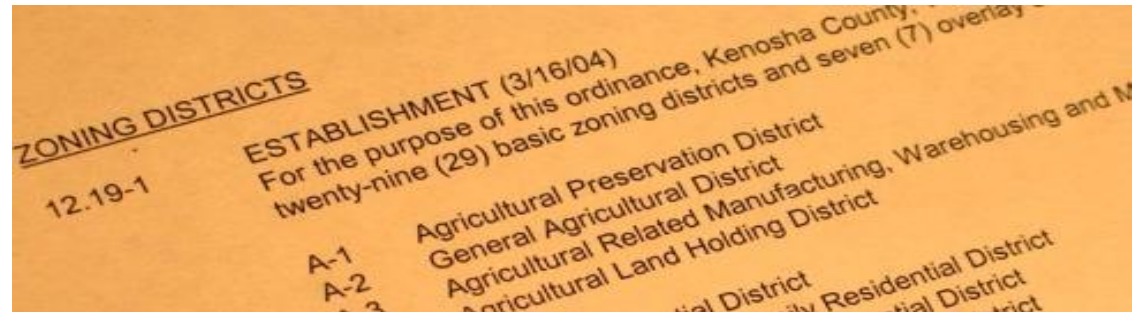
May apply for rezone or use variance, if allowed



A zoning ordinance contains two parts:

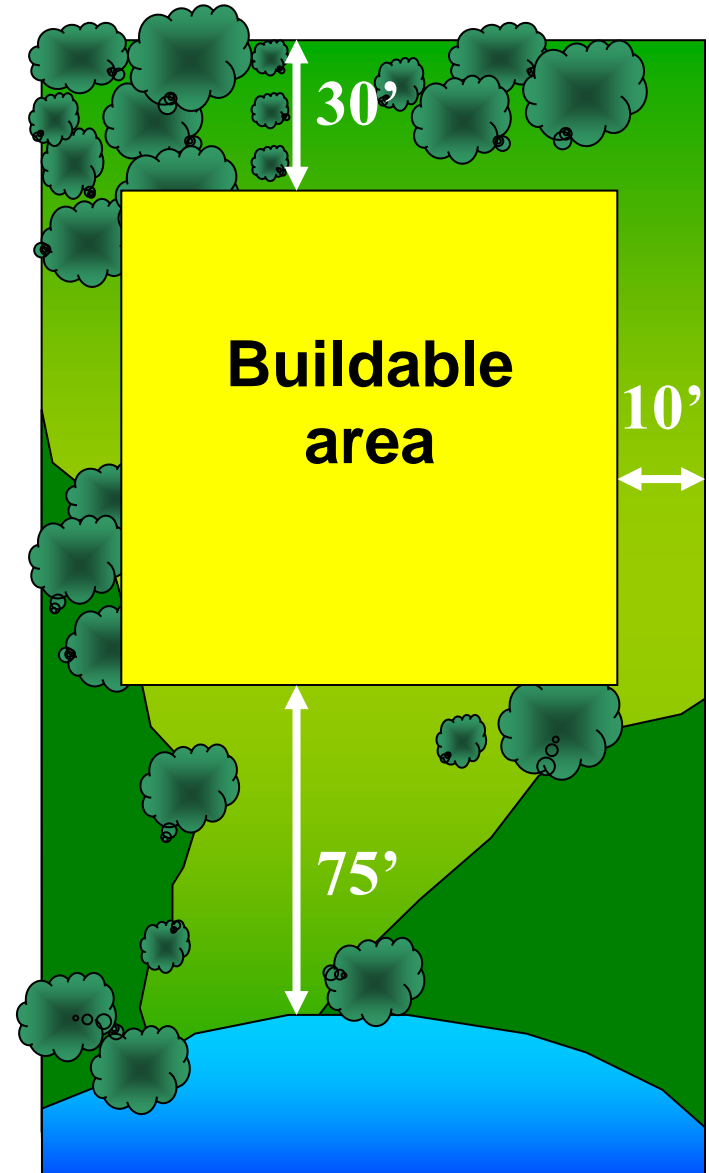
Zoning Text

- purposes
- uses allowed in each district
- dimensional standards i.e. lot size, density, setbacks, etc.
- requirements related to parking, signage, landscaping, etc.
- authority and procedures



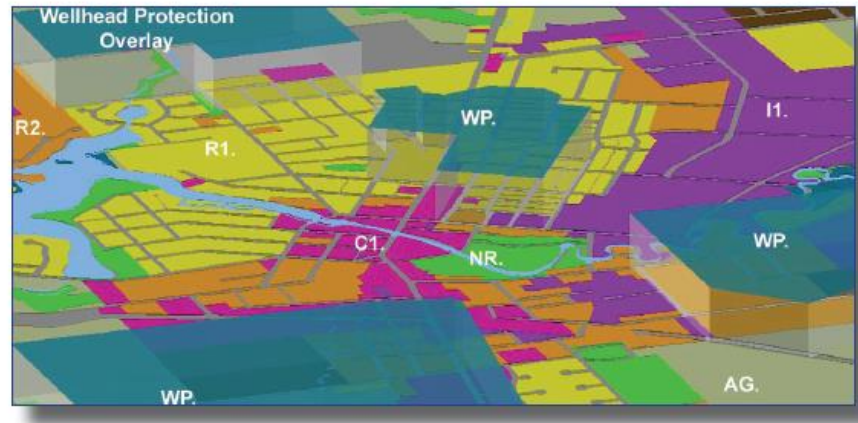
Dimensional standards:

- Lot size / density of development
- Size and location of buildings on parcel
 - Setbacks
 - Floor area ratios
 - Building height standards



Overlay zoning

- A special zoning district, placed over an existing base zone(s), which creates special provisions in addition to those in the underlying base zone to protect a specific resource
- Most restrictive standards apply
- Examples
 - Shoreland zoning
 - Floodplain zoning
 - Wellhead protection
 - Airport overlay
 - Bluff zoning
 - Historic overlay
 - Transit corridor



Terminology

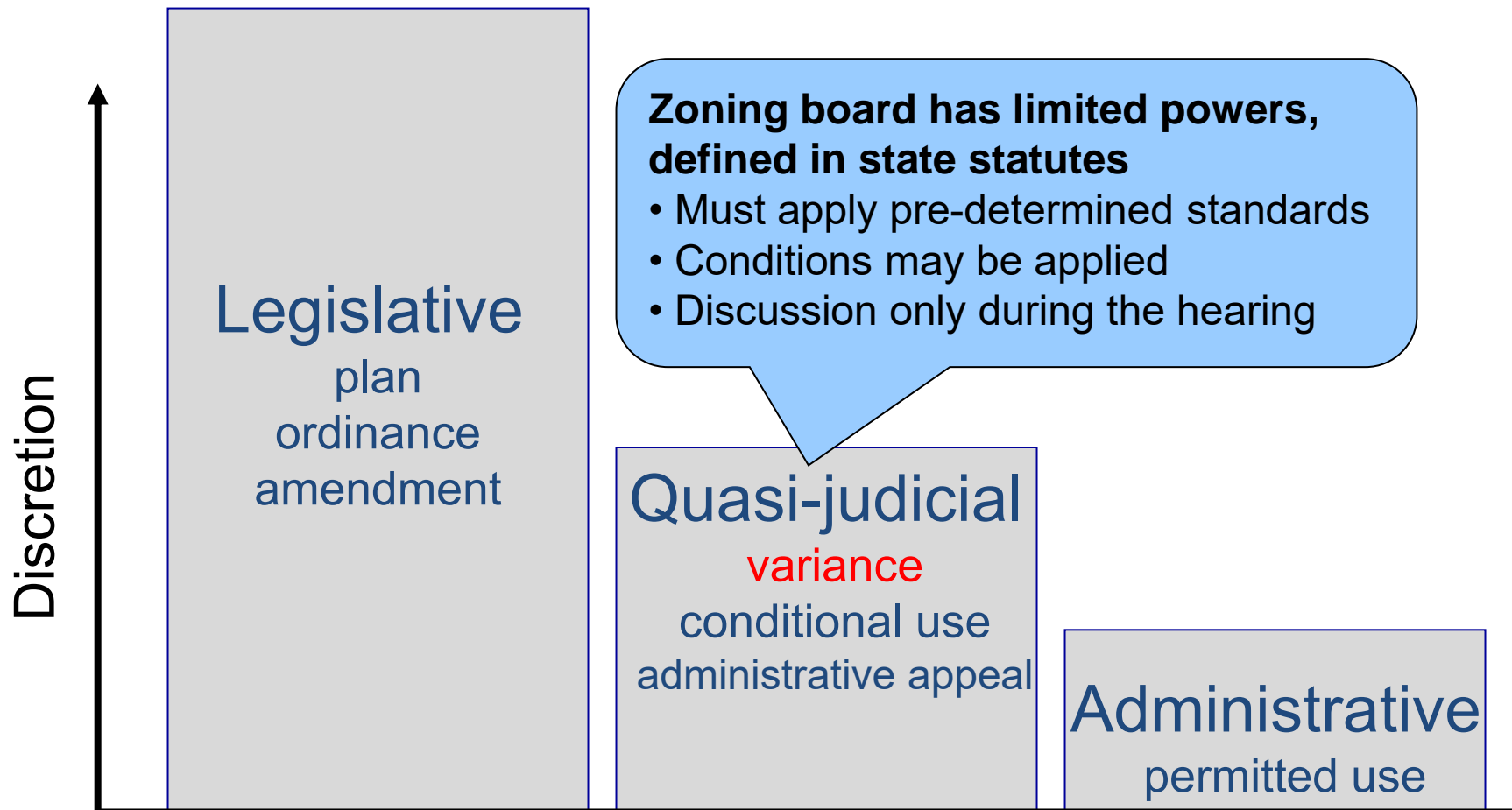
State statutes define:

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

Both are commonly referred to as:

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

3 Types of Decisions



Zoning roles



*Marathon County Board Members
April 19, 2018*

Elected officials adopt and amend the zoning ordinance

- Let applicants know the zoning board has limited powers and is required to follow the local ordinance and state laws
- Legally defensible decisions: The zoning board can only approve variances when the applicant has met the legal standards
- Only elected officials can change the law



Zoning board members act like judges and apply the ordinance and state laws

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.

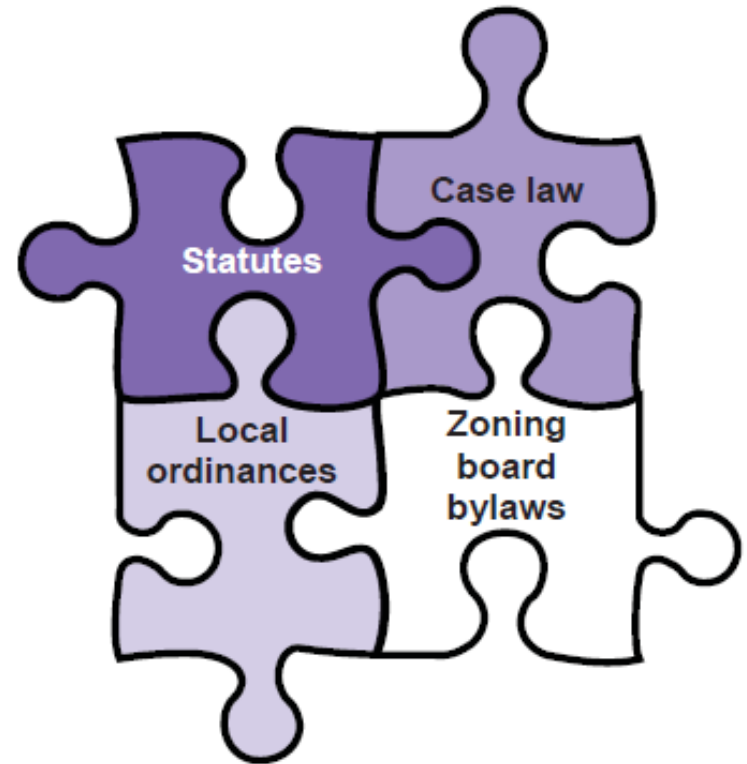
The zoning board may only grant a variance, special exception or administrative appeal if the applicant provides evidence showing that they meet all of the legal standards for that decision. The legal standards the zoning board will use to decide on each application have been provided to the applicant 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

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

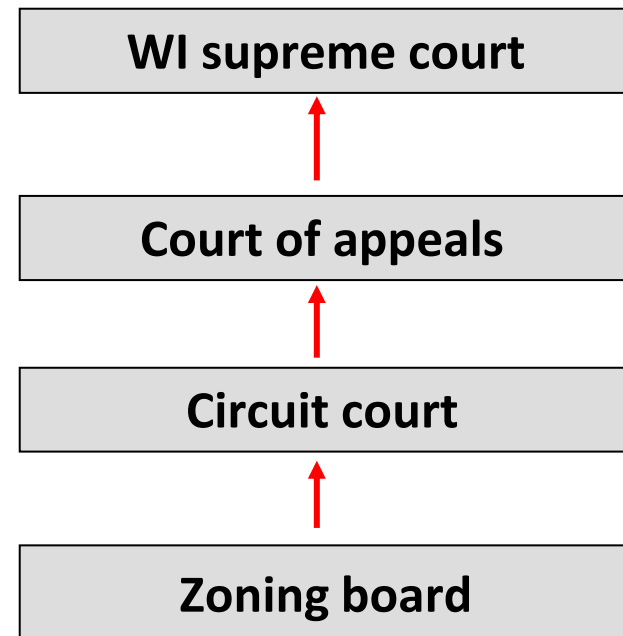


Zoning board members are neutral and weigh the evidence

If you want to change the ordinance, run for elected office

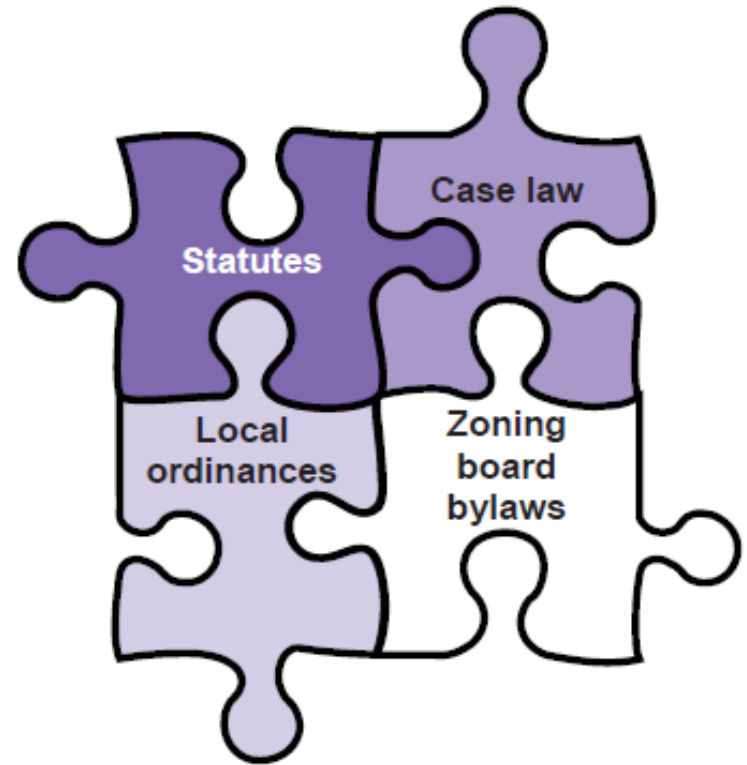
The zoning board functions like a court

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



The zoning board functions like a court

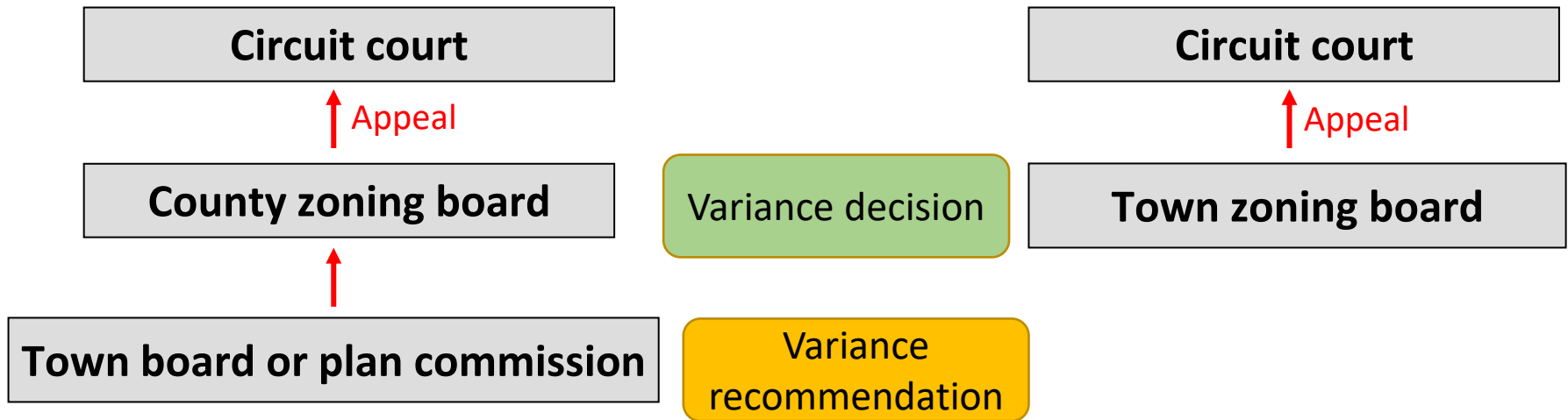
- If the zoning board follows state statutes, case law and their local zoning ordinance, their decisions will generally be upheld
- A solid legal record minimizes legal costs and zoning board reconsideration



How do towns interact with zoning boards?

County zoning & shoreland zoning

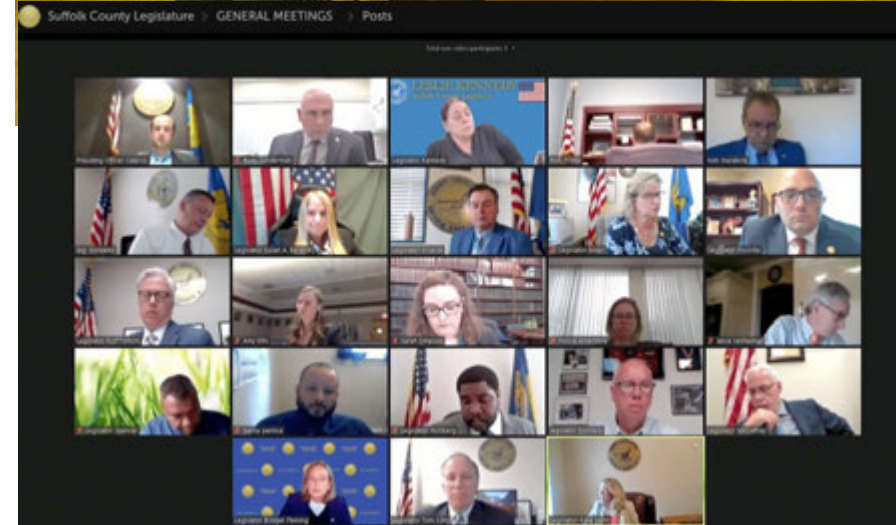
Town zoning



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 on a variance, conditional use or appeal may not be decided in closed session

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

Variances

Allow a landowner to do something prohibited by the zoning ordinance



- Variances provide relief in limited, unusual circumstances
- Variances are not meant to provide general flexibility in ordinances
- Elected officials may revise the zoning ordinance to incorporate the level of flexibility the community supports

For more information about variances,
see Chapter 15 of the *Zoning Board Handbook*

Why do variance 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.



Why do variance decisions matter?

General zoning



Purposes for roadway setbacks

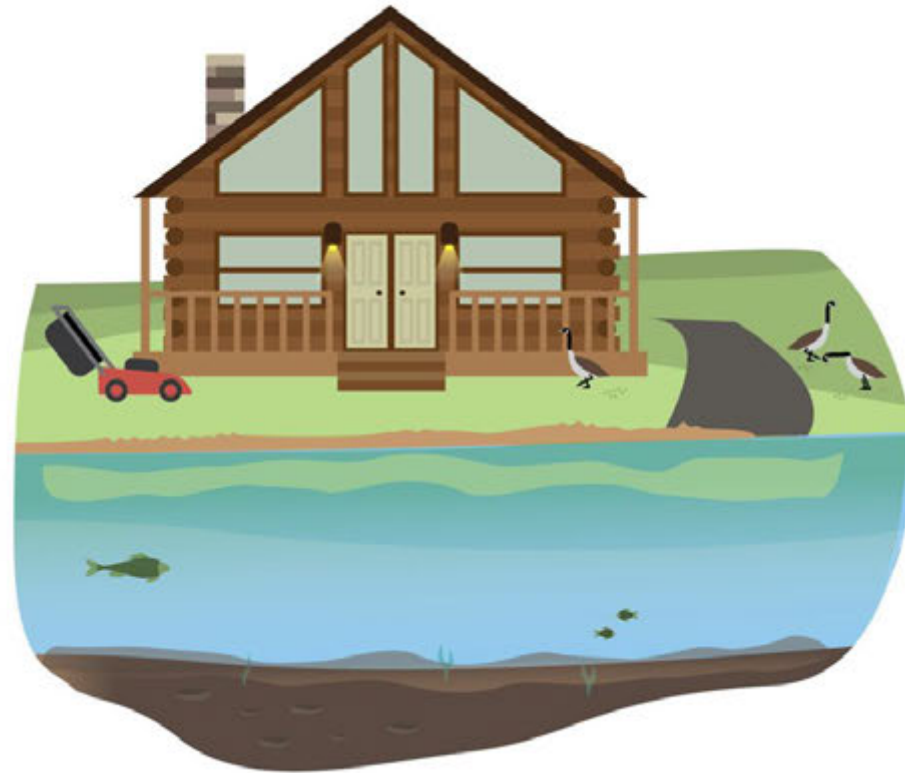
- Safety
- Accommodate road widening & utility replacement

Granting variances reduces these purposes

Shoreland Zoning



Variances or No Shoreland Zoning



Prevent water pollution
Protect spawning grounds
fish and aquatic life
Reserve shore cover &
natural beauty

When variances are
granted that don't meet
the legal standards



Why do variance decisions matter?

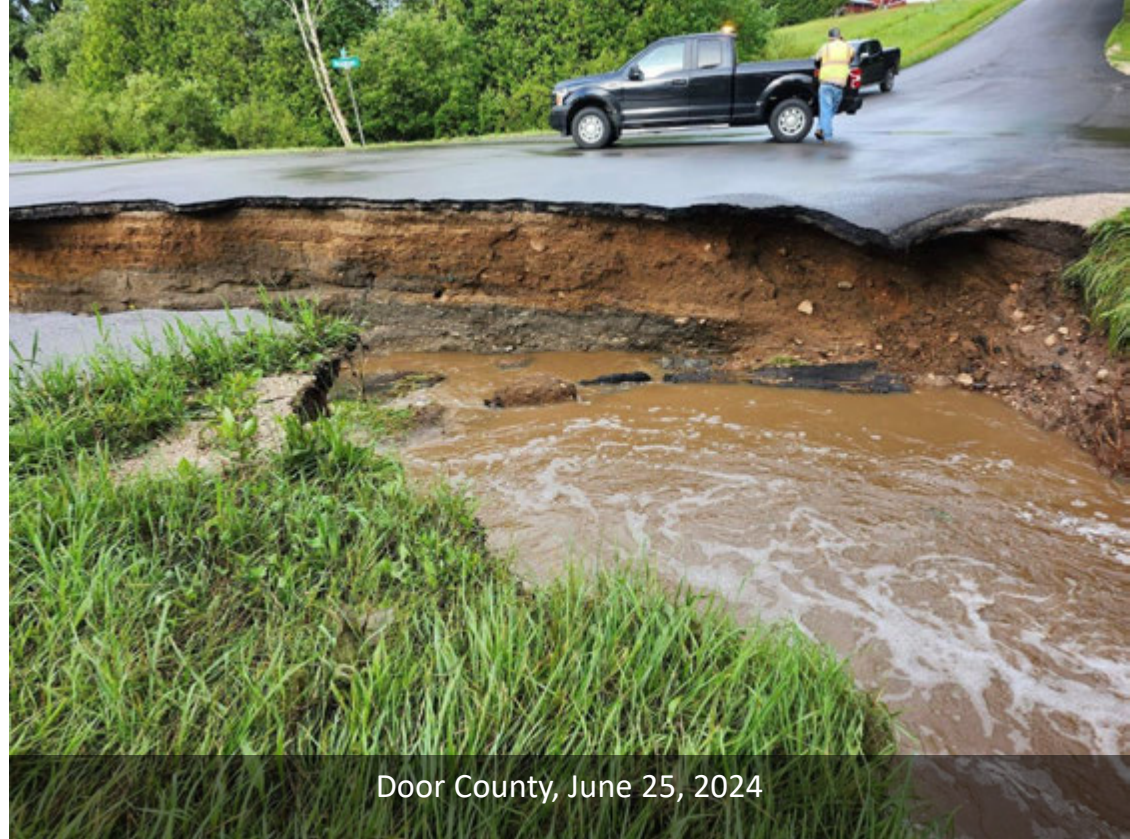
Floodplain zoning

To:

- Protect human life & health
- Minimize property damages & economic losses people

Granting variances reduces protection & increases economic losses





Door County, June 25, 2024

Flooding

In Wisconsin we're seeing

- more frequent and more intense heavy rainfalls
- a noticeable uptick in the number of flooding events

Poll 2: What types of variances are commonly requested in your community? (select all that apply)



Road setbacks



Rear or side yard setbacks



Shoreland setbacks or impervious limit



Floodplain



Two types of variances

A variance allows a property owner to do something prohibited by the ordinance

- **Use variance** authorizes the use of land for a purpose that it not allowed or is prohibited by the zoning ordinance. Can present problems.
- **Area variance** is a modification to a dimensional, physical, or locational requirement such as the setback, frontage, height, bulk, or density restriction for a structure
 - provides an increment of relief (normally small) from a physical dimensional restriction

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. No harm to public interest

These three standards apply to variances from all types of zoning

These tests should be clearly listed with space to respond on the variance application & the variance decision form

Variances Conditions unique to the property test

Lot setbacks

- Streets: 25'
- Shoreland: 30'

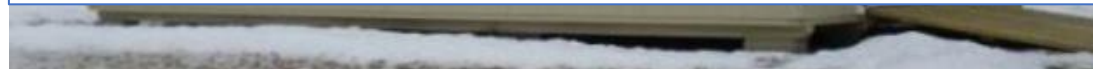
Owner says property is unique due to steep slope (4%), trees & shoreline

- Are these conditions unique to this property, and do they prevent building in a compliant location?
- If not, building shed in compliant location is a personal inconvenience, not an unnecessary hardship



Slope Suitability for Urban Development: Slopes Suitable for Development

Limitations	Suitability Rating	Residential
Slight	Optimum	0-6%
Moderate	Satisfactory	6-12%
Severe	Marginal	12-18%
Very Severe	Unsatisfactory	>18%



Variances

Conditions unique to the property test

- Circumstances of an applicant such as a growing family or need for a larger garage or boathouse, are not a factor in deciding variances



Variances

Public interest test



- A variance granted may not harm public interests
- “Public interests” are the purpose and intent of the ordinance that were adopted by the elected officials representing the community



Variances

Unnecessary hardship test for area variances

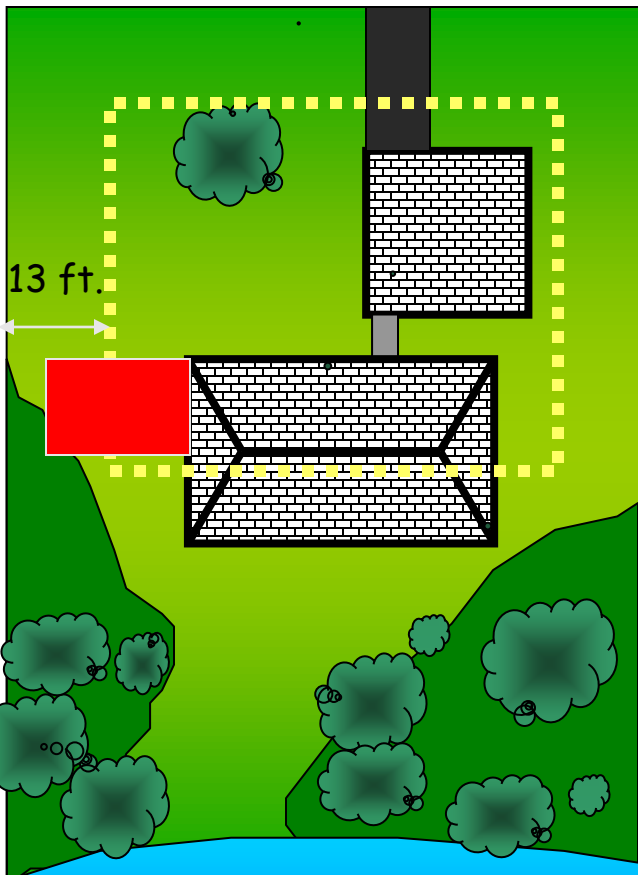
- Unnecessary hardship = when compliance with the ordinance would:
 - unreasonably prevent the owner from using the property for a permitted purpose, or
 - be unnecessarily burdensome in view of ordinance purposes



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

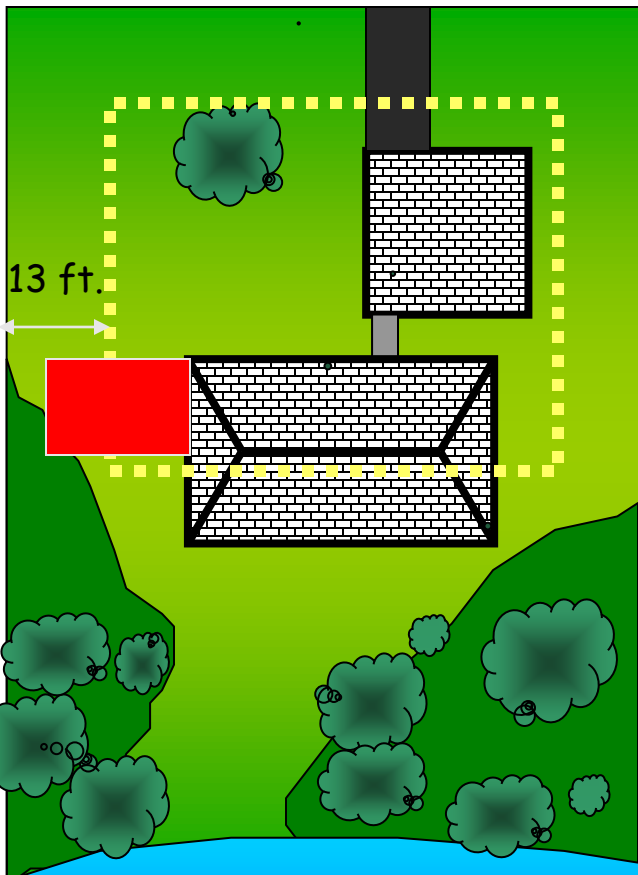
Do family rooms qualify for unnecessary hardship?

- Should an after-the-fact variance be granted for the family room (shown in red) because removing it would be an unnecessary hardship?
- The WI Supreme Court said NO because the “hardship was self-created and the porch no more than a personal convenience”.



Do family rooms qualify for unnecessary hardship?

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



Variance case law

- Self-created hardship: an applicant may not claim hardship because of conditions created by his or her actions
- Loss of profit or financial difficulty do not constitute hardship
- A zoning board may consider an error of local government staff when deciding whether to grant a variance
- Lack of objections from neighbors does not justify a variance
- Nor do nearby ordinance violations
- A variance runs with the property to all future property owners

Do family rooms qualify for unnecessary hardship?

Owner says not having a family room/porch will be an unnecessary hardship because:

1. the porch, substantially to be removed
2. the lot is substandard in
3. the porch could not be of the home
4. owner needs the porch his family including six
5. porch would add to the

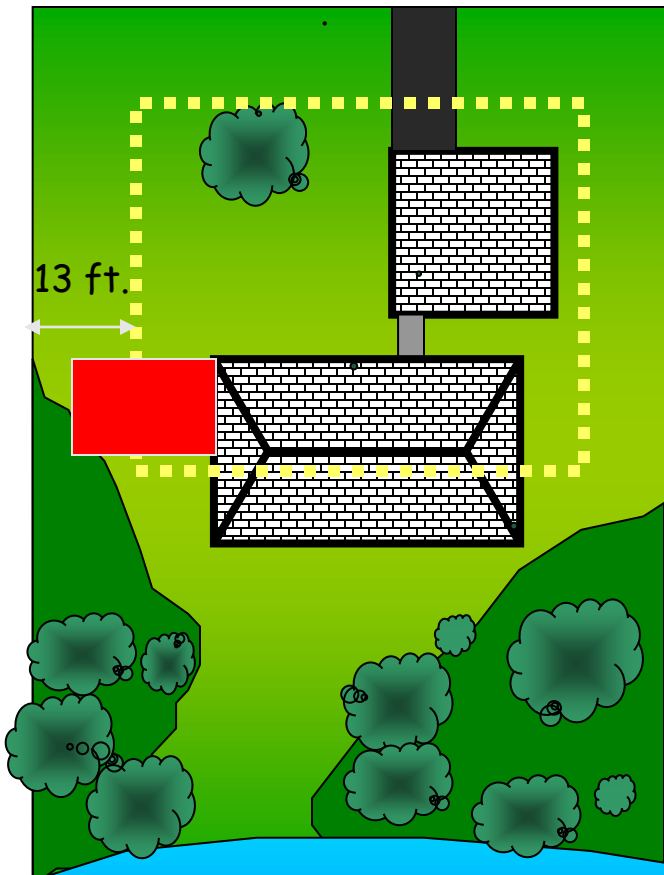
Self-created hardships don't count

Treated the same as other substandard lots

Porch may not be feasible at all on this property

Hardship is based on property, not applicant

Loss of profit is not hardship



Variiances

A variance can only be granted if the applicant has shown their property meets all three statutory tests:

1. unnecessary hardship
2. due to conditions unique to the property
3. No harm to public interest



Recommendations from towns to the county zoning board should provide reasons the 3 legal tests are or are not met because these are the decision standards the BOA is required to use.



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 regional flood elevation; 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.



Decision-Making

Complete application?

- Look at ordinance and application forms to see what's required for a variance application
- A complete application is needed to make an informed decision including complete forms and site plans with accurate lot lines and setback measurements
- If an incomplete application makes it to a hearing, the BOA should table it until they get a complete application

AREA VARIANCE DECISION FORM

Zoning Ordinance Purpose and Intent [Plug in local ordinance purpose.]

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

1. **Unnecessary hardship** is present when, ordinance standards that are strictly applied would unreasonably prevent a permitted use of a property, or render conformity with such standards unnecessarily burdensome. A property owner bears the burden of proving that the unnecessary hardship is based on conditions unique to the property, rather than considerations personal to the property owner, and that the unnecessary hardship was not created by the property owner. Circumstances of an applicant, such as a growing family or desire for a larger garage are not legitimate factors in deciding variances. A personal inconvenience is not sufficient to meet the unnecessary hardship standard.

The literal enforcement of the ordinance standard(s) (**will / will not**) result in an unnecessary hardship because...

2. **The hardship must be due to conditions unique to the property** such as steep slopes or wetlands that prevent compliance with the ordinance, and that are not shared by nearby properties. Further, the entire property must be considered, if a code-compliant location(s) exists, a hardship due to unique property limitations **does not exist**.

The hardship (**is / is not**) due to unique conditions of the property because...

- Zoning staff should present their staff report containing the facts relevant to each variance test
- Report may contain whether staff find each legal test is met

Zoning board members analyze and provide reasons the applicant meets or doesn't meet each variance test

Order and Determination: The BOA member shall decide / vote on the application and direct the zoning department accordingly. The BOA member must refer to specific evidence when rendering a decision.

The application (does / does not) meet all three of the above tests and therefore the variance should be (granted / denied).

The BOA is only allowed to grant a variance if the applicant provides evidence that they meet all three tests:

- 1) Ordinance standards will result in unnecessary hardship.
- 2) The hardship is due to unique conditions of the property.
- 3) The variance will not harm the public interests.

Decision

If the applicant has met all three tests, the BOA may apply conditions to the variance to ensure the public interests are not harmed.

Conditions that apply to this variance:

If all variance tests are met, decide on conditions

BOA Member Signature

_____ Date _____

Evidence

- The burden of proof is on the applicant seeking a variance, to provide evidence that they have met all of the legal tests
 - Documented (photos, study, verified data)
- Zoning board members have discretion in terms of how much weight they give to statements/evidence
- Decision must be based on facts; not opinions or speculation
- Source of facts
 - Professional in relevant field
 - Reviewed by professionals

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

Were you unbiased? Could a reasonable person reach the same conclusion?



Evidence

Do facts in the record support your decision?

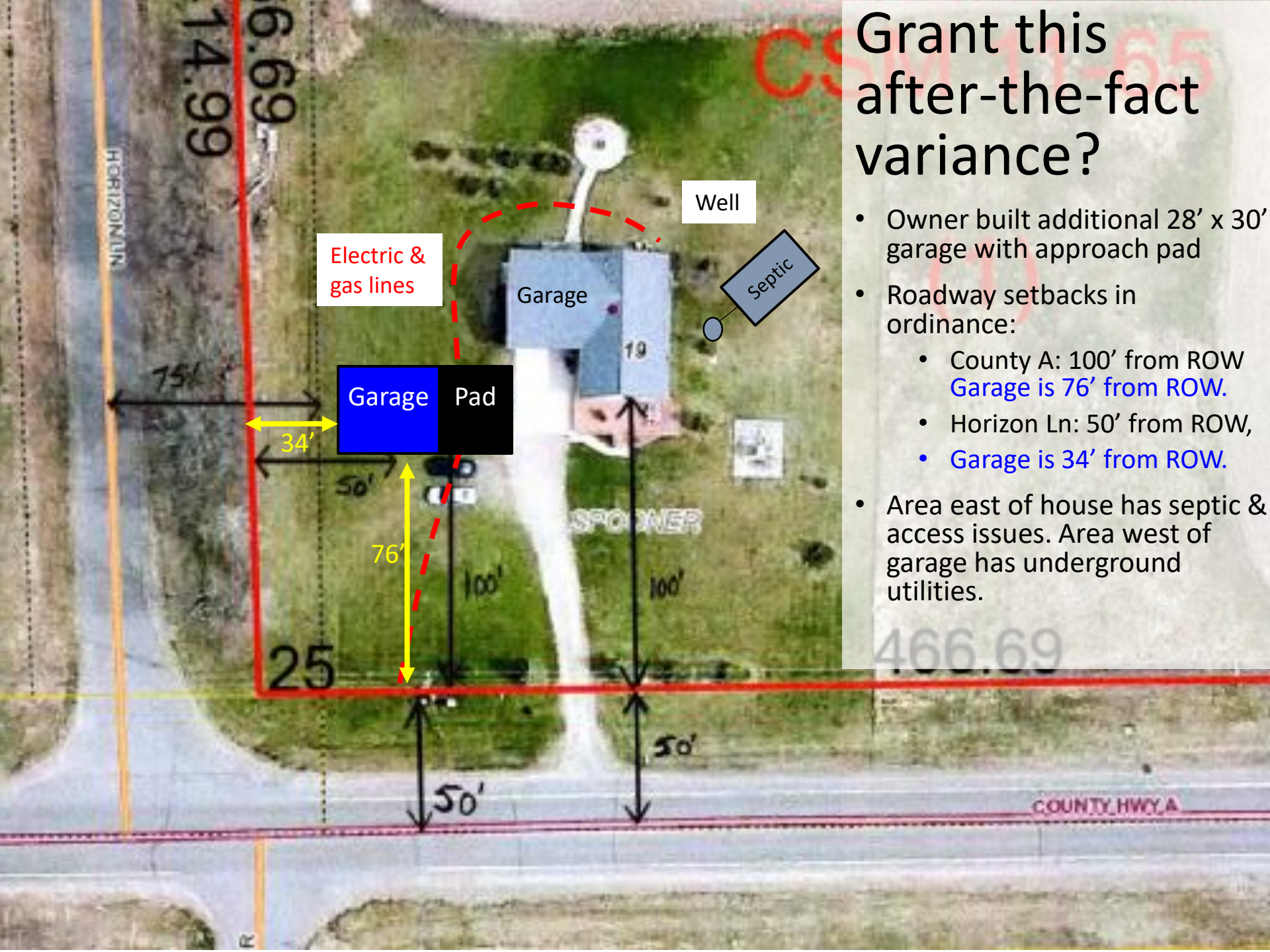
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Would you grant this variance?

Has the applicant provided facts showing that they meet all of the variance standards?

Grant this after-the-fact variance?

- Owner built additional 28' x 30' garage with approach pad
- Roadway setbacks in ordinance:
 - County A: 100' from ROW
Garage is 76' from ROW.
 - Horizon Ln: 50' from ROW,
 - Garage is 34' from ROW.
- Area east of house has septic & access issues. Area west of garage has underground utilities.



Is the unnecessary hardship test met?



Yes



No



Please type your answer and reasons in chat box

Is the unique property limitations test met?



Yes



No



Please type your answer and reasons in chat box

Is the no harm to the public interest test met?

Ordinance purpose and intent.

The purpose 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 the 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.



Yes



No

A shoreland or floodplain ordinance will have different “public interests” to think about when deciding variances



Please type your answer and reasons in chat box

Are all three variance tests met?

 Yes. Grant the variance.

 No. Deny the variance.

 Please type your answer in chat box

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Quick Review

Key points

- Zoning board members act like judges; they must be neutral and base their decisions on the evidence and the current laws
- Members must be unbiased: If biased or would appear biased, recuse from decision
- The zoning board is only allowed to grant a variance if the applicant provides evidence that they meet all variance tests
- To create a legally defensible decision, zoning board members must explain the reasons why each variance standard is or is not met
- Zoning board decisions can be appealed to the courts
- If the zoning board follows state laws and their local zoning ordinance, their decisions will generally be upheld



Poll 3: Do you plan to take any of these actions after attending the webinar? Select all that apply.



Focus more on legal tests when deciding on variances



Review and update our variance application materials



Review and update our variance decision forms



Share the webinar resources with my community

Thank you!

Questions??

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Demographics

Understanding the demographics of our participant helps us improve Extension programs and services. Asking for the following also helps us meet our institutional requirements for compliance with Federal non-discrimination policies. Providing us with this information is **voluntary**.

If you have questions about this survey or why Extension collects this information, please contact Kim Waldman, Compliance Coordinator & Equity Strategist, UW-Madison Division of Extension, (608) 263-2776, kim.waldman@wisc.edu



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