It is expected that a Quorum of the Personnel Committee, Board of Public Works, and Common Council will be attending this meeting: (although it is not expected that any official action of any of those bodies will be taken)

CITY OF MENASHA
BOARD OF APPEALS
1st Floor Conference Rooms
100 Main Street
Tuesday, October 25, 2022
3:00 PM
AGENDA

A. CALL TO ORDER

B. ROLL CALL

C. PUBLIC HEARING
   1. Appeal Request – Replace an Existing Legal Nonconforming Off-Premise Billboard Sign – Lamar Central Outdoors LLC – 923 Valley Road, Menasha

D. MINUTES TO APPROVE
   1. Board of Appeals, 3/9/22

E. ACTION/DISCUSSION ITEMS
   1. Review of Zoning Board of Appeals Duties (UW Extension Handbook, Chapters 13; Menasha Municipal Code Article L)
   2. Appeal Request – Replace an Existing Legal Nonconforming Off-Premise Billboard Sign – Lamar Central Outdoors LLC – 923 Valley Road, Menasha

F. ADJOURNMENT

"Menasha is committed to its diverse population. Our Non-English speaking population and those with disabilities are invited to contact the Menasha City Clerk at 967-3603 24-hours in advance of the meeting for the City to arrange special accommodations."

City of Menasha
Board of Zoning Appeals
Public Hearing

NOTICE IS HERBY GIVEN that a public hearing will be held by the Board of Zoning Appeals in consideration of an appeal of the City Sign Code, Article F of Title 13 of the Code of Ordinances of the City of Menasha by Menn Law Firm, Ltd. on behalf of Lamar Central Outdoors, LLC. The City of Menasha denied the recent sign permit by Lamar Central Outdoors, LLC to replace an existing legal nonconforming off-premise billboard sign with a new structure including back-to-back digital faces located on an easement at 923 Valley Road, Menasha, WI on the grounds the proposed modifications would cause the loss of legal nonconforming status above permitted modifications following Section 13-1-68 of the City Sign Code.

The Board of Zoning Appeals will hold its public hearing on Tuesday, October 25, 2022 at 3:00 p.m. in the first floor conference room of the Menasha City Center located at 100 Main Street, Menasha, WI. Persons interested in this matter either objecting or in support will be given an opportunity to comment and ask questions about the proposed appeal.

Haley Krautkramer
City Clerk

Publish: October 17, 2022

CITY OF MENASHA
BOARD OF APPEALS
100 MAIN STREET
MARCH 9, 2022
MINUTES

A. CALL TO ORDER
Meeting called to order by Chairman Galeazzi 1:01 p.m.

B. ROLL CALL
PRESENT: Chairman Galeazzi, Trustee Rae-Othrow and Maxymek
ALSO PRESENT: CDD Schroeder, CDC Heim, AP Yang, Clerk Krautkramer, Mike Johnson | Graphic House

C. PUBLIC HEARING
1. Variance Request – Monument and Electronic Message Center Sign – CoVantage Credit Union – 1305 Oneida Street, Menasha

Sandra DaBill Taylor, 545 Broad Street, Menasha; commented on the Board of Appeals meeting time, following staff's recommendation to deny of the variance request, the sign height, multiple signs, and the City of Menasha's sign code.

Jeff Perigo, 1308 Oneida Street, Menasha (comments submitted via email); commented on the variance request for CoVantage Credit Union, commercial properties in the area, light emission from the sign, color of the sign, local sign examples, and the City of Menasha's sign code.

D. MINUTES TO APPROVE
1. Board of Appeals, 11/12/20

Moved by Chairman Galeazzi seconded by Trustee Rae-Othrow to approve the minutes. Motion carried on voice vote.

E. ACTION/DISCUSSION ITEMS
1. Review of Variance Requirements per UW Extension

Staff provided an overview of the variance process as outlined by UW-Extension.

General discussion ensued on the variance process outlined by UW-Extension.

2. Variance Request – Monument and Electronic Message Center Sign – CoVantage Credit Union – 1305 Oneida Street, Menasha

Staff gave an overview of the variance request for monument and electronic message center sign for CoVantage Credit Union located at 1305 Oneida Street, Menasha and commented on the regulations for granting a variance, hardship to the property owner, unique property conditions, the property value, impact on the neighborhood, and the City of Menasha's municipal code pertaining to the request.

Mike Johnson | Graphic House gave an overview of the variance request variance request for monument and electronic message center sign for CoVantage Credit Union located at 1305 Oneida Street, Menasha and commented on neighborhood concerns, multiple signs, the creation of a new sign rather than use an existing sign, hardship to the property owner, the sign height, electronic message center dimensions, the background color on the sign, and the lettering color.

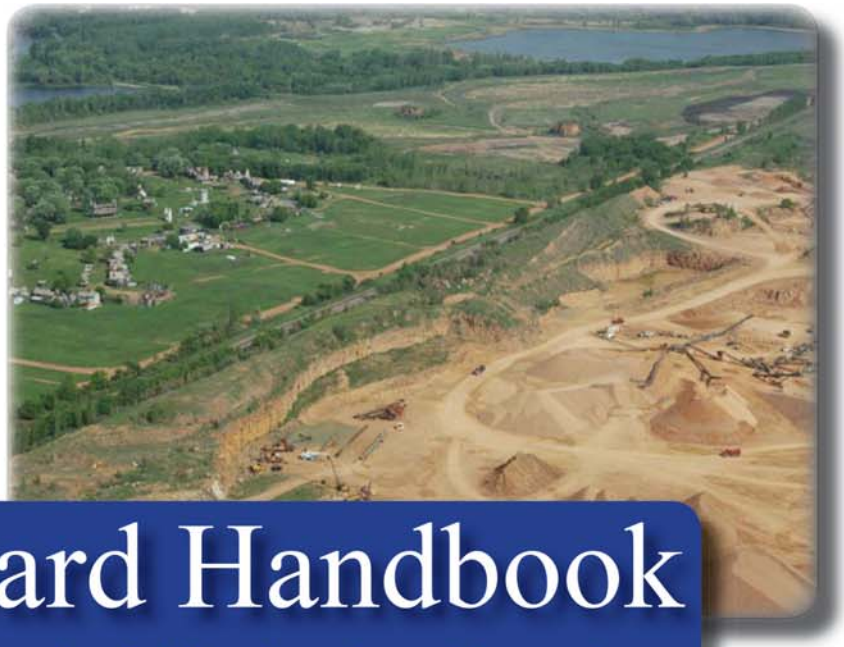
General discussion ensued on:

- Other local CoVantage signs
- Signs at other CoVantage braches in the area and across the state
- Sign programming
- Sign dimming
- Sign dimensions
- Multiple signs
- City of Menasha municipal code requirements
- Illumination of the sign face
- Lettering on the sign
- Electronic message centers
- Background color of the sign
- Variance requirements
- Sign considerations

Moved by Chairman Galeazzi seconded by Trustee Rae-Othrow to deny the variance request of CoVantage Credit Union located 1305 Oneida Street, Menasha as requested by Graphic House for the monument and electronic message center sign based on the requirements of the City of Menasha's code of ordinances.
Motion carried on roll call 3-0.

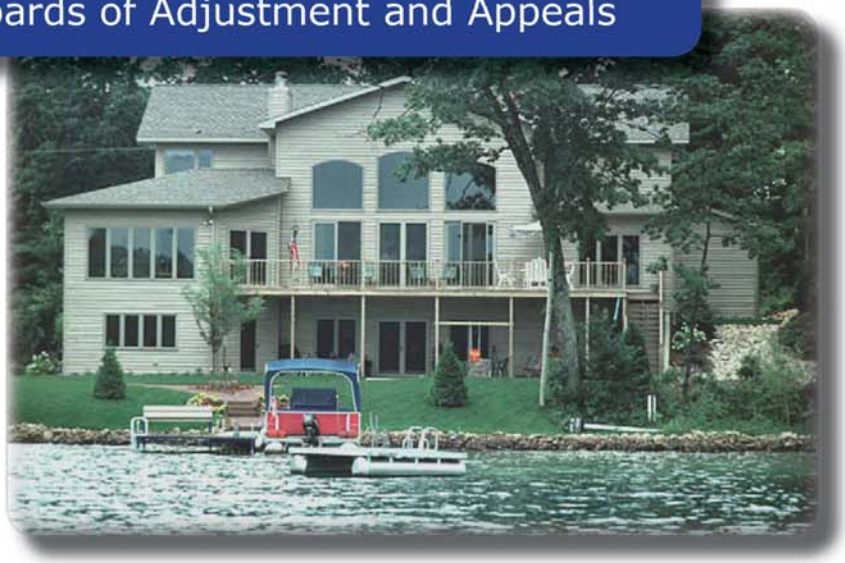
F. ADJOURNMENT
Moved by Trustee Rae-Othrow seconded by Trustee Maxymek to adjourn at 1:50 p.m.
Motion carried on voice vote.

Haley Krautkramer
City Clerk



Zoning Board Handbook

For Wisconsin Zoning Boards of Adjustment and Appeals



2nd Edition
2006

Lynn Markham
and Rebecca Roberts
Center for Land Use
Education

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

UW Extension
University of Wisconsin–Extension

ZONING BOARD HANDBOOK

For Wisconsin Zoning Boards of Adjustment and Appeals
2nd Edition

2006

Lynn Markham and Rebecca Roberts

Cover photos:
Top: Potential land use conflict between gravel pit and adjacent housing. *Photo © Regents of the University of Minnesota. Used with the permission of Metropolitan Design Center.*
Center: Waterfront home in Oneida County lacking shoreland buffer. *Photo courtesy of Robert Korth, UW-Extension Lakes Partnership.*
Bottom: Potential land use conflict between industrial and residential land uses. *Photo © Regents of the University of Minnesota. Used with the permission of Metropolitan Design Center.*

ACKNOWLEDGEMENTS

We gratefully acknowledge the funding provided for this undertaking by the Wisconsin Department of Natural Resources and the University of Wisconsin Extension. We would also like to thank Robert Newby at the Center for Land Use Education for coordinating the layout and design of this handbook.

This is the second edition of the Zoning Board Handbook. The first edition by Michael D. Dresen and Lynn Markham was published in 2001. Both editions are based on educational materials developed by James H. Schneider, Attorney and Local Government Specialist at the UW-Extension Local Government Center.

We would also like to acknowledge those individuals that have reviewed portions of the text or provided examples including Fred Anderson; Jeff Bluske, La Crosse County Zoning and Land Information Department; Dan Bowers, Lincoln County Planning and Zoning Department; Gregg Breese, Wisconsin Department of Natural Resources; Andy Buehler, Kenosha County Department of Planning and Development; James Burgener, Marathon County Conservation, Planning and Zoning Department; Earl Cook; Mike Dresen; JoAnne Kloppenberg, Wisconsin Department of Justice; Pam LaBine, Forest County Zoning Department; Brian Ohm, Department of Urban and Regional Planning, UW-Madison/UW-Extension; Marcia Penner, Wisconsin Department of Natural Resources; Dean Richards, Waukesha office of Reinhart Boerner Van Deuren S.C.; Michelle Staff, Jefferson County Zoning, Sanitation and Solid Waste Department; and Tom Steidl, Wisconsin Department of Natural Resources. While we are grateful for their suggestions and comments, any errors in this edition are the full responsibility of the authors.

ABOUT THE AUTHORS

Lynn Markham is a Land Use Specialist with UW-Extension at the Center for Land Use Education at the University of Wisconsin–Stevens Point. She provides workshops for zoning board members. In addition, she assists communities who want to protect their drinking water, lakes and streams by providing them with research-based information and policy options. She received a Bachelor of Science degree in chemistry from Ripon College and a Master of Science degree in biochemistry from the University of Oregon. She is co-author of Zoning Nonconformities and Protecting Your Waterfront Investment: 10 Simple Shoreland Stewardship Steps.

Rebecca Roberts is a Land Use Specialist with UW-Extension at the Center for Land Use Education at the University of Wisconsin–Stevens Point. In partnership with local educators, she provides workshops for zoning board members, plan commissioners and other local government officials. In addition, she assists communities with comprehensive planning, public participation and the fiscal impacts of land use decisions. She received a Bachelor of Arts in biology and environmental studies from Augustana College and a Master of Urban Planning from the University of Illinois. She is managing editor of the Land Use Tracker newsletter and a contributing author to the Land Use Resource Guide and Land Use Megatrends series.

Table of Contents

Introduction

At different points in their lives, people sometimes want more rules and at other times they want fewer rules. They want more rules when the rules apply to what their neighbors can do. And they want fewer rules when the rules apply to what they can do on their own property.
-- A long-time politician from northeast Wisconsin

Many communities use zoning to help them protect the aspects of life that they cherish–from strong communities and scenic vistas to safe drinking water and high quality lakes and streams. Zoning ordinances implement local land use plans that affect many economic and quality of life issues in communities throughout Wisconsin. It takes many groups of people working together to implement zoning effectively and to keep it up-to-date. In this endeavor, zoning boards are essential to the fair and effective administration of these laws as they act like judges to interpret ordinances and uphold the legal standards that were developed to help the community achieve its goals.

This handbook is intended to assist zoning board members with their responsibilities and to aid local government officials and the public in understanding the role of the zoning board and the procedures and standards with which their decisions must comply.

Zoning boards are known by a number of names: boards of adjustment for counties; boards of appeals for cities, villages and towns; or sometimes just the BOA. We will generally refer to them as *zoning boards* in this handbook. 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.

Zoning board members should consult their municipal attorney or corporation counsel for advice. In some cases the Wisconsin Department of Justice or a state agency with local program oversight responsibilities may be able to provide information.

Inside the Handbook

The Zoning Board Handbook is organized into the following sections:

- **Section I: Zoning Board Basics** – introduction to zoning and the duties and organization of the zoning board.
- **Section II: Laws that Apply to the Zoning Board** – open meetings law, ethics and operating procedures.
- **Section III: Zoning Board Decision Process** – applications, meetings and decision-making.
- **Section IV: Decisions of the Zoning Board** – legal standards for administrative appeals, conditional uses and variances, plus accommodations for the disabled.
- **Section V: Appeal of Zoning Board Decisions** – procedures and standards used by the circuit court when reviewing zoning board decisions.
- **Section VI: Improving Zoning Board Decisions** – who the zoning board works with, self-audits and improving the zoning ordinance.
- **Section VII: Shoreland and Floodplain Zoning** – purposes, legal standards and management strategies for shoreland and floodplain areas.
- **Appendix** – resources, forms and examples.

At the end of each section there is a list of ***key words*** and ***questions*** you should have mastered after reading the section. Use these resources as a checklist to assess your knowledge of zoning boards.

The footnotes provide references to relevant court decisions and other references. In addition, Appendix B provides websites to access the full text of the decisions and summaries of zoning-related court decisions written by the Wisconsin Department of Natural Resources.

Handbook Updates

The Zoning Board Handbook is an evolving document. Please help us keep the handbook up-to-date by letting us know about:

- Errors or omissions
- Unclear language
- Additional topics or questions you would like addressed
- Local examples or case law to illustrate concepts in the handbook

Additional Resources

The following resources are available to supplement the Zoning Board Handbook:

- **Workshops**: The Center for Land Use Education offers zoning board workshops upon request serving multi-county areas of Wisconsin.

- **Videos**: DVD recordings of past zoning board workshops are available from the Center for Land Use Education.

- **Website and Electronic Mailing List**: Updates on recent court decisions and other topics relevant to the zoning board are available on the Center for Land Use Education website: www.uwsp.edu/cnr/landcenter/workshopsdocs.html. You may also sign up by email to receive information about upcoming workshops, revisions to important statutes and case law, and updates to the handbook. Visit our Newsletter web page (www.uwsp.edu/cnr/landcenter/newsletters.html) to subscribe to our electronic mailing list.

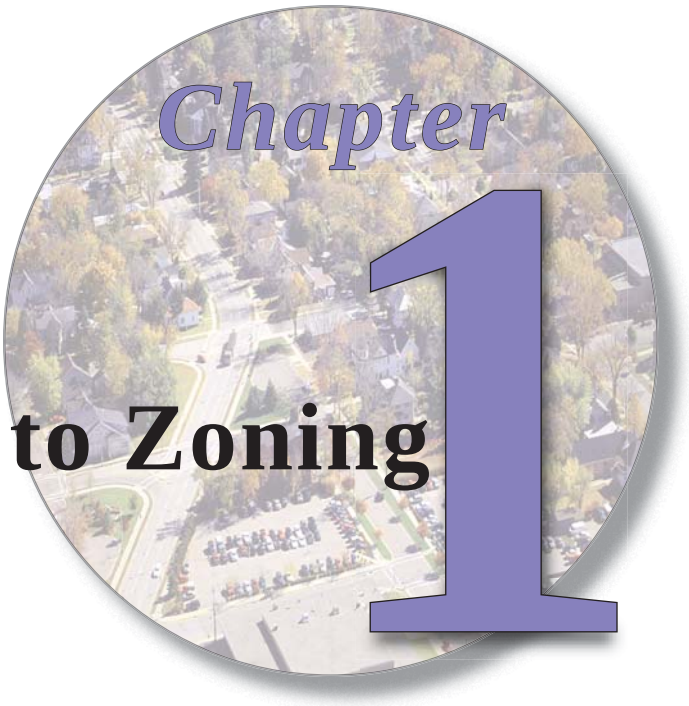
Contact Information

If you would like more information or to request additional copies of this handbook, please contact as at:

Center for Land Use Education
University of Wisconsin – Stevens Point
800 Reserve Street
Stevens Point, WI 54481

Phone (715) 346-3783
Fax (715) 346-4038

landcenter@uwsp.edu
www.uwsp.edu/cnr/landcenter/



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.

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, and
- Aesthetics.

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.

[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*.

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 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.

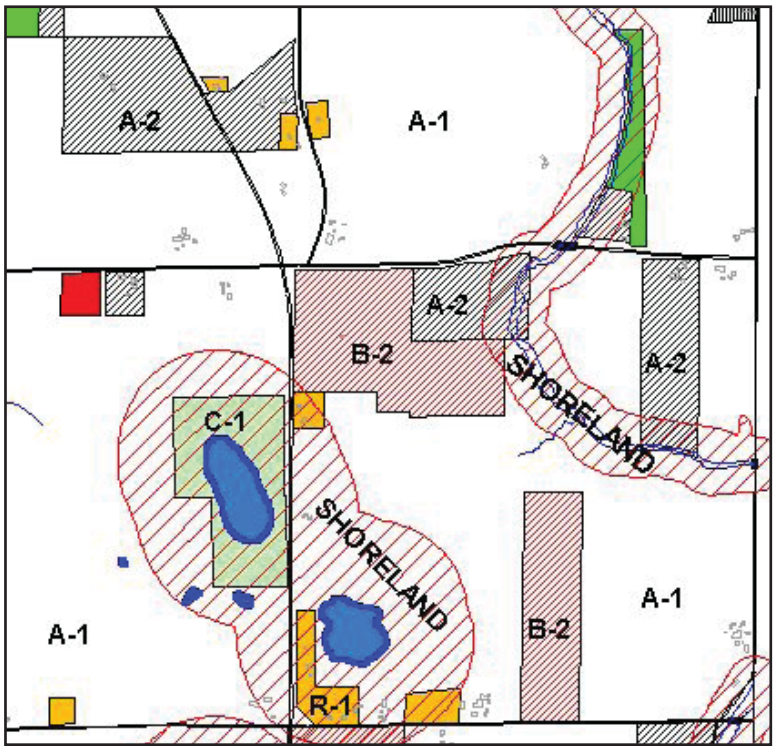


Figure 1: Zoning map showing general zoning with shoreland overlay. *(Map courtesy of Kevin Struck)*

Allowable Uses for each District

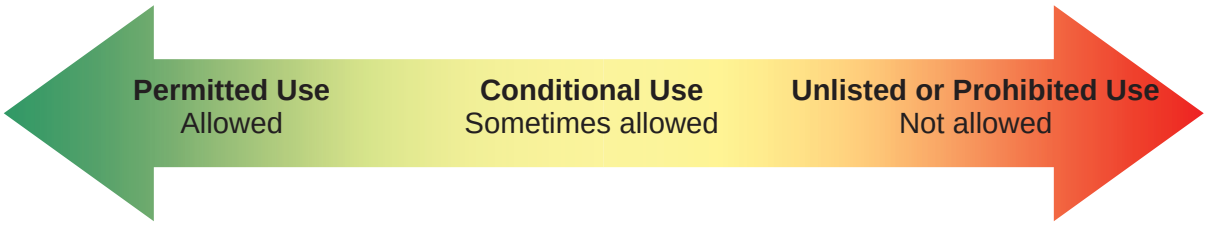
Generally, two categories of allowable uses are listed for each zoning district: permitted uses and conditional uses. **Permitted uses** are allowed as a matter of right in all locations in a zoning district and may be authorized by the zoning administrator or building inspector with a simple permit. 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 categoriesfor 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

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.

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.

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.

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.

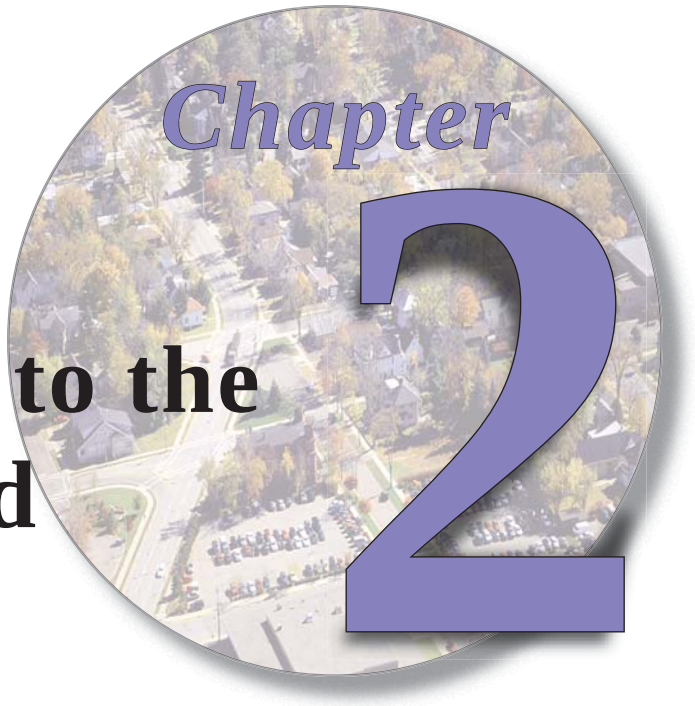
Zoning and the Comprehensive Plan

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;. In other words, 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.



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 types 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 authorized 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

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

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 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.

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.

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.

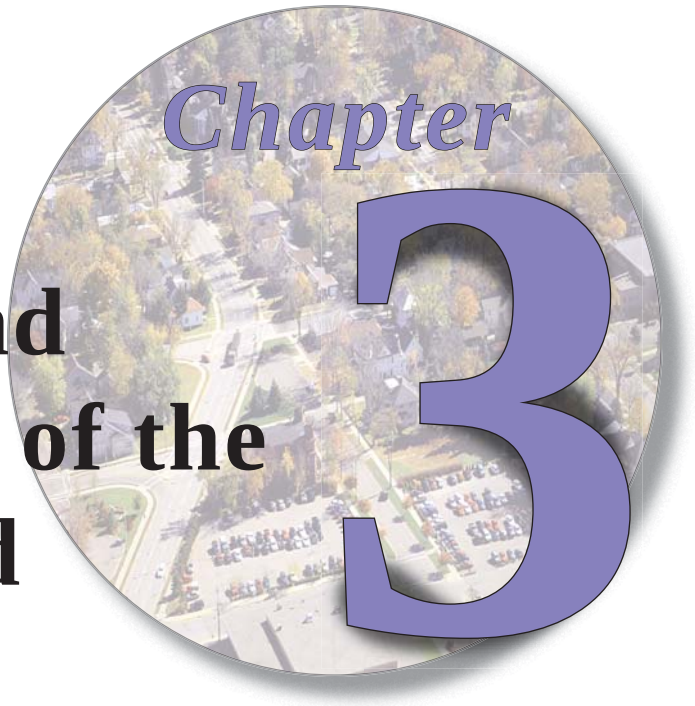
[17] Wis. Stat. §§ 236.10(1)&(3) delegate this authority to the governing body or a plan committee/commission unless provisions are adopted under Wis. Stat. § 59.69.

[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.



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 in the table in Figure 4.

Figure 4: Composition of the Zoning Board

County Zoning Board of Adjustment
- Three to five members[22] 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 chair[23]
- Appointed for three-year staggered terms, beginning July 1
- Appointment subject to approval of the governing body

Town Zoning Board of Adjustment[24]
- 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

City, Village or Town[25] **Zoning Board of Appeals**
- 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

[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.

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 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,

[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

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 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

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.

"second alternate" is required to act when the first alternate or multiple members of the zoning board are unable to vote.[27]

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

A county zoning board of adjustment chooses its own chair[29] and may choose a vice-chair and secretary. The chair of the city, village or town[30] governing body designates the zoning board of appeals chair subject to approval by the governing body.[31]

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[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

[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)

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, Members Kay Goergen and Barbara Ford.

[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 (answers on page 22)

Chapter 1 - Introduction to Zoning

1) A zoning ordinance consists of two legally adopted parts. What are they?

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?

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?

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.

Answers

1) 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.

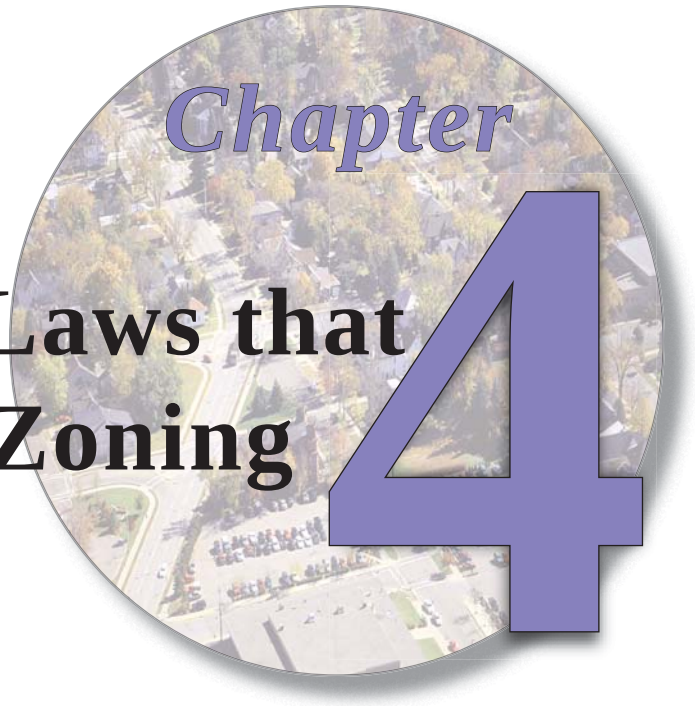
2) Check with your local planning or zoning staff.

3) 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.

4) a. Conditional uses
   b. Variances
   c. Administrative appeals

5) Generally, cities, villages and towns have zoning boards of appeal. Counties and some towns have zoning boards of adjustment. Each body functions in much the same manner. Differences are pointed out throughout the handbook.

6) 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.



Overview of Laws that Apply to the Zoning Board

Zoning boards must look to several sources for guidance on proper procedures including: 1) state statutes, 2) local ordinances, 3) zoning board bylaws or operating rules, and 4) case law.

State statutes outline the authority of zoning boards (*see chapter 2*) and describe many procedural and ethical guidelines that zoning boards and other local government bodies must follow, such as the open meetings law, public records law and state ethics code (*see chapters 5 and 6*).

Local ordinances further define the authority and procedures to be followed by zoning boards. In addition, local ordinances provide specific details about the purpose and intent of zoning codes and criteria for making zoning decisions. *Chapter 13* and *Appendix B* provide guidance on accessing, reading and interpreting state statutes and local ordinances.

Day-to-day operational procedures of the zoning board that are not covered in state statutes or local ordinances should be addressed in zoning board bylaws or rules of procedure. These procedures

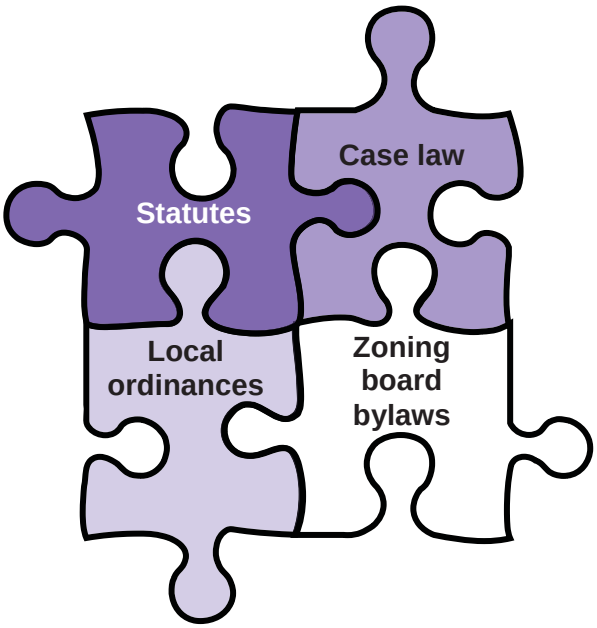
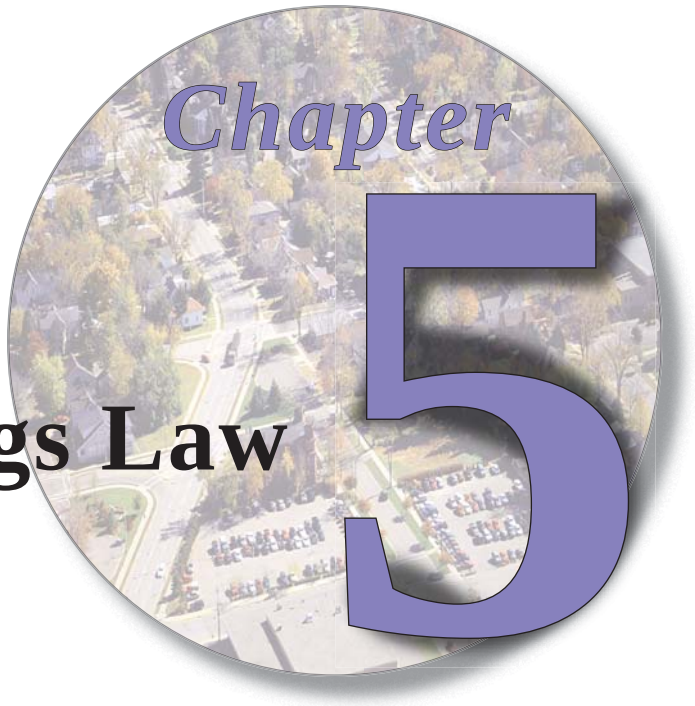


Figure 6: Rules that apply to the zoning board are derived from multiple sources.

should be created by the local governing body with input from the zoning board and staff (*see chapter 7*).

Many procedural and decision standards applicable to zoning boards are derived from case law. When locally contested decisions are appealed to and decided by the Wisconsin Supreme Court or courts of appeals, those decisions become precedent and are referred to as **case law**. References to these cases are included throughout the text and are cited in the footnotes. *Appendix B* provides guidance for looking up relevant court cases in Wisconsin.

To ensure that all of these rules are known and followed locally, we recommend that new zoning board members be provided with a packet containing all of these materials upon initial appointment, and that zoning staff provide regular updates to the zoning board when materials change. We also recommend providing a concise version of applicable rules, procedures, and decision-making standards to applicants along with blank application forms.



Open Meetings Law

All zoning board meetings and hearings must comply with Wisconsin's open meetings law.[33] The law is intended to give the public prior notice of meetings of governmental bodies and to assure that they are held in places that are open to the public and reasonably accessible to the public, including the disabled. Some meetings or portions of meetings are permitted to be held as closed sessions, but generally, discussion and decision-making at governmental meetings must be conducted in open session and motions and voting must be open and recorded.

Open Meetings

Under the law, a meeting is a gathering of members of a governmental body for the purpose of exercising responsibilities and authority vested in the body. A meeting occurs when both a purpose test and a numbers test are met:

- **The Purpose Test** is met when discussion, information gathering, or decision-making take place on a matter within the jurisdiction of the governmental body. For zoning boards, that includes matters pertaining to conditional uses, variances, and

Open Meeting – a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times.

[33] Wis. Stat. §§ 19.81-19.98

administrative appeals as well as appeals of the zoning board's decisions.

- **The Numbers Test** is met when enough members of the body are present to determine the outcome of an action. By statute, if a quorum is present (generally one-half of the members of the body), there is presumed to be a meeting unless the purpose test is not met. A lesser number of members may also meet the numbers test if sufficient numbers are present to block a decision (e.g., two members of a five-member city/village/town zoning board where four votes are required to carry an issue). This is known as a "negative quorum."

Quorum – at least one-half of the members of a body; sufficient to decide most matters.

Negative Quorum – enough members of a body (generally less than quorum) to block a decision.

Walking Quorum – a series of meetings or discussions, each involving less than a quorum, intended to decide a matter.

Site inspections by the zoning board must comply with the open meetings law if the purpose and numbers tests are met. If board members travel to an inspection site together, they should refrain from discussing board business while in transit. Inspections in which no testimony is taken and no discussions are held constitute meetings if the numbers test is met since their intended purpose is to gather information relating to board business.

Phone conferences, chance and social gatherings, and conferences may also constitute a meeting if the numbers and purpose tests are met. Telephone calls to arrange meeting logistics and gatherings where no board business is discussed do not meet the open meetings test.

Local officials should be aware that a series of gatherings, telephone calls, faxes, or e-mails between zoning board members may constitute an illegal meeting. A series of meetings or discussions, each less than quorum size, to discuss board business (other than logistics) is known as a "walking quorum" and is illegal because it is not noticed and open to the public.

Closed Sessions

Permitted exemptions for closed sessions

Unless specifically exempted by state statute, all meetings of governmental bodies must be open and reasonably accessible to the public. Recognizing that opportunities for zoning boards to go into closed session are extremely limited, statutory exemptions that may apply to zoning boards are listed below:[34]

[34] Wis. Stat. § 19.85(1)(a-j)

1. **Deliberation concerning a case** - Deliberation concerning a case that was the subject of a quasi-judicial hearing. The courts have determined a case to be an adversarial proceeding with opposing parties, not merely deciding whether to grant an administrative appeal, variance or conditional use permit. Neighbors or others testifying for or against the granting of an administrative appeal, variance or conditional use are not parties.[35]

2. **Conferring with legal counsel** - Conferring with legal counsel about strategy regarding current or likely litigation.

3. **Actions concerning public employees** - Consideration of dismissal, demotion, licensing or discipline of a public employee or licensee unless the employee or licensee requests that the meeting be held in open session. Consideration of employment, promotion, compensation or performance evaluation data of a public employee.

4. **Potentially damaging personal information** - Consideration of financial, medical, social or personal histories or disciplinary data about specific persons that would be likely to have a substantial adverse effect on the reputation of a person.

5. **Request to an ethics board** - Consideration of a request for confidential written advice from a local ethics board.

6. **Other narrow exemptions** - Specified deliberation regarding unemployment and workers compensation, burial sites and other narrow exemptions provided by statute.

Closed Session - a meeting where public attendance is not allowed; must be specifically authorized by state statute.

Closed session procedures

Statutes specify procedures that must be followed when convening and participating in a closed session:

- **To enter closed session** - The body must initially convene in open session. To move into a closed session, the presiding officer must announce the specific subject matter and statutory authority for closure. A motion and recorded individual vote by a majority of the body are required to convene in closed session.

[35] State ex rel. Hodge v. Turtle Lake, 180 Wis.2d 62, 508 N.W.2d 301 (1993)

- **Discussions, motions and decisions** - The body may consider only the matter(s) for which the session was closed. Motions and decisions must be recorded. If a decision made in closed session is appealed, the record must contain sufficient detail to show that the zoning board considered the proper legal standards and evidence presented. Where feasible, zoning boards should vote in open session.

- **To reconvene in open session** - Once a body convenes in closed session, it may not reconvene in open session for at least 12 hours, unless public notice of its intent to return to open session was given in the original notice of the meeting. Absent such notice, the body should amend its agenda to place any closed session at the end of the agenda.[36] When there is good cause, two-hour prior notice of a planned closed session and reopening can be provided to allow reopening a meeting, but this approach is rarely necessary.

Attendance at closed sessions

Only members of the zoning board and those essential to the business for which the session was closed may attend a closed session. Generally, members of the local governing body may not attend closed sessions of the zoning board. The statutory exemption which allows a parent body to attend closed meetings of its subunits does not apply because the board is not a subunit of the governing body since the governing body does not review board decisions. Additionally, the zoning administrator or staff person who presented testimony at the hearing and the municipal attorney (if he or she represented the zoning department at the hearing) should not attend closed sessions.

Public Notification

Notice of a public meeting is required and may be accomplished by posting in one or more public places likely to give notice to the public and those affected by the decision.[37] A minimum of three locations is recommended. Generally, the zoning board secretary or administrative staff of the zoning department perform meeting and hearing notification duties and provide evidence of compliance. However, board members must individually determine compliance with all aspects of the open meetings law

[36] Wis. Stat. § 19.85(2)
[37] OAG 86-76, 65 Op. Att'y Gen. 250 (1976) & Wis. Stat. § 19.84(1)

in deciding whether to participate in a meeting. The following are minimum requirements of Wisconsin's open meetings law:

- **24-hour prior notice**. Notice of a public meeting must be provided at least 24 hours prior to the meeting. Where such notification is impossible or impractical for good cause, notice may be provided not less than 2 hours prior to the meeting.

- **Notice to media**. Notice (written, phone, or fax) must be provided to the governmental unit's official newspaper and to any media who have filed a written request. If there is no official newspaper, notice should be provided to a newspaper or other media likely to give notice in the affected area.[38]

- **Separate notices**. A separate notice is required for each meeting. A general notice at the beginning of the year is not sufficient.

- **Content of notice**. Notice must specify the time, date, place and subject matter of the meeting; any contemplated closed sessions; and intent to reconvene in open session within twelve hours after completion of a closed session.[39] The meeting agenda may also provide for a period of public comment and discussion. Though most meetings must be open to public attendance, the law does not require all meetings to provide a forum for public comment. Hearings, on the other hand, must include a period for public comment/ testimony.

- **Specificity of notice**. The public notice must describe agenda items in sufficient detail to allow anyone likely to be affected by a decision to identify those items on the agenda. General subject matter designations such as "miscellaneous business," "agenda revisions," or "other such matters as authorized by law" should be avoided.[40] Only issues described in sufficient detail in the public notice and agenda may be decided. If a discussion item or decision is continued or postponed for a later date that item should be fully described in the subsequent meeting notice.

In addition to the notice requirements of the open meetings law, all zoning board meetings and hearings must comply with notice

[38] Wis. Stat. §§ 985.03 & 985.05
[39] Wis. Stat. §§ 19.84(2) & 19.85(2)
[40] Memo from Peggy Lautenschlager, Attorney General to Mr. Charles Rude, Mayor, City of Lake Geneva, dated March 5, 2004.

requirements of:

- State statutes governing procedures for zoning boards,[41]
- DNR rules for shoreland, shoreland-wetland, and floodplain zoning matters,[42] and
- Other notice requirements imposed by local ordinance or bylaws.

Local notification procedures must be crafted to include all of these requirements. Paid, published notices are not required by the open meetings law. However, where other statutes require paid publication of a hearing or meeting notice, open meetings law requirements may be incorporated into the published notice. Public posting is recommended in addition to the published notice.

Public Notification of Hearings

Zoning board hearings are subject to more stringent public notification requirements than working sessions or regular meetings subject to the open meetings law. The following table describes statutory notice requirements for county, city, village and town zoning board hearings and where they differ.

[41] Wis. Stat. §§ 59.694(6) & 62.23(7)(e)6
[42] Wis. Admin. Code §§ NR 115.05(6)(h) & NR 116.20(2)(d)

Figure 7: Statutory Notice Requirements for Zoning Board Hearings			
County (population of 250,000 or more)[43]	**County** (population less than 250,000)[44]	**City**[45]	**Village or Town**[46]
■ Class 2 notice required. ■ Posting recommended.	■ Posting two weeks prior required. ■ Class 2 notice recommended.	■ Class 1 notice required. ■ Posting recommended.	■ Posting one week prior required.

Posting – Display of a notice in at least 3 public places likely to give notice to the public and those affected by a decision.[47]

Class 1 Notice – One newspaper publication at least one week before the act or event.[48]

Class 2 Notice – Two newspaper publications, at least once each week for consecutive weeks,

[43] Wis. Stat. § 59.694(6) provides that notice of the hearing of an appeal must be given by publication of a class 2 notice under Wis. Stat. § 985. It is somewhat unclear whether class 2 publications should also be made for variances and special exceptions/ conditional uses. Requirements for designation of an official newspaper for counties with population of 250,000 or more is found in Wis. Stat. § 985.065(2)(a).

[44] See previous footnote. Counties with a population less than 250,000 are not required to have an official newspaper and apparently may elect to satisfy the class 2 publication requirement by posting [Wis. Stat. § 985.05(1)]. However, newspaper publication is strongly recommended.

[45] Wis. Stat. § 62.23(7)(e)6 merely requires the city zoning board to give "public notice" of the hearing on the "appeal or other matter referred to it" (e.g. variance or special exception/conditional use). Wis. Stat. § 985 applies to publication of "legal notices," which term includes "public hearings." The hearing before the city zoning board is merely called a "hearing," in contrast to a "public hearing" as in the case of zoning amendments under Wis. Stat. § 62.23(7)(d). Because members of the public are typically allowed to testify at zoning board hearings, the conservative interpretation is that § 985 applies. In § 985, a class 1 notice is required for cities because the hearing requirement in Wis. Stat. § 62.23(7)(e)6 predates the date specified in Wis. Stat. § 985.07.

[46] Wis. Stat. §§ 59.694(6) & 62.23(7)(e)6 refer to Wis. Stat. § 985. Under § 985, cities, but not villages or towns, must have official newspapers. Since villages and towns do not have official newspapers, the publication requirement may be satisfied by posting [Wis. Stat. §§ 985.02(2), 985.07 & 985.01(1)]

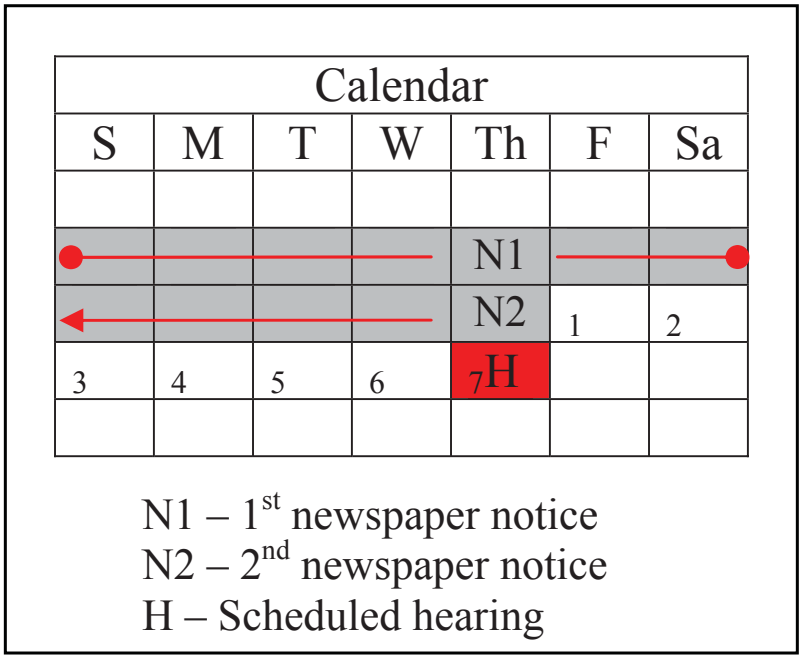
[47] Wis. Stat. § 985.065(2)(a) concerns requirements for an official newspaper; Wis. Stat. § 985.05(1) provides a posting option if there is no official newspaper; Wis. Stat. § 985.02(2) provides guidelines for posting & Wis. Stat. § 985.01(3) defines *municipality*.

[48] Wis. Stat. §§ 985.07 & 985.01(1)

[49] Wis. Stat. §§ 985.07 & 985.01(1)

The calendar in Figure 8 illustrates a sample timeframe for publishing a Class 2 notice for a zoning board hearing consistent with state law. Counting backward from the date of the scheduled hearing (highlighted in red) the second newspaper publication must occur at least one week prior to the hearing (not less than seven days prior). In computing the minimum time for publication, the first day of publication is excluded and the day of the meeting or event is included.[50] State statutes are silent on how far in advance the notice may occur. Therefore, the second notice may be published earlier than the dates noted, but not later. The first publication must appear the week prior to the second publication and may occur on any day of the week.[51] One court of appeals has interpreted the law as requiring insertions to be exactly one week apart; however, this is likely not binding precedent.[52] Working within statutory guidelines, local governments may wish to clarify by ordinance when zoning board hearing notices should be provided.

Figure 8: Class 2 Notice Calendar



[50] Wis. Stat. § 985.09

[51] Wis. Stat. § 985.01(1m) states that "any such notice that may, by law or the order of any court, be required to be published for any given number of weeks may be published on any day in each week of such term".

[52] A court of appeals interpreted the law as requiring Class 2 notice insertions to be exactly one week apart [*Gloudeman v. City of St. Francis*, 143 Wis.2d 780, 422 N.W.2d 864, 866 (Ct. App. 1988)]. However, this is likely *obiter dictum*, and thus not binding precedent [League of Wisconsin Municipalities, FAQ3, February 1997. Available: http://www.lwm-info.org/legal.faz/faz3.html].

Content of hearing notice

The following information should be included in the hearing notice:

- Name of the governmental body that will meet.
- Date, time and location of the hearing.
- Name of the applicant, appellant, or petitioner.
- Location of property involved.
- General description of the proposed project and nature of the request (variance, conditional use/special exception or appeal).
- Subject matter, statutory authority (recommended), and notice of any anticipated closed session and any intent to reconvene in open session within 12 hours after completion of a closed session.[53] (Review the exemptions and procedures for closed sessions.)
- A notice that interested persons may present testimony regarding matters on the agenda at the meeting/hearing or in writing to the board.
- Contact information for further information about the petition or application.

Figure 9: Public notice of hearings should be published in the official newspaper.

Legal Notices

Notice is hereby given that a public hearing will be held by the Kenosha County Board of Adjustment on Thursday, July 20, 2006 at 6:00 p.m. at the Kenosha County Center Conference Room A, 19600 75th Street, Bristol, Wisconsin, on the following appeals...

Sample notice from a public hearing held by the Jefferson County Board of Adjustment is included in *Appendix E*.

Proof of hearing notice

An affidavit of publication by a newspaper editor or his/her designee showing the name of the newspaper and dates of publication affixed to a copy of the published notice is presumptive evidence of publication.[54] A similar affidavit by a person posting legal notice showing the time, place and manner of posting serves the same function for posted notices.[55]

Notification of hearing to interested parties

Advanced notice of zoning board hearings must be provided to the following parties:

- **Media** - The information provided in a published or posted notice must be provided by phone, fax, or written copy to any media requesting it and to the community's official newspaper. If an official newspaper is not designated, notice must be given

[53] Wis. Stat. § 19.85(2)
[54] Wis. Stat. § 985.12
[55] Wis. Stat. § 985.02(2)(d)

to news media likely to give notice in the area.[56]

- **Interested Parties** - Notice must also be given by mail to parties in interest,[57] including:
  - The applicant/appellant/petitioner,
  - Any zoning officer whose decision is appealed, and
  - Adjacent/nearby property owners as specified by local ordinance. We recommend that zoning staff provide notice to people within a greater distance if the proposed use could affect people farther away (e.g., gravel pit, landfill).

- **Department of Natural Resources** - The appropriate local DNR office must be provided with 10-day prior notice of hearings on shoreland, shoreland-wetland, and floodplain zoning appeals, variances, and conditional uses/special exceptions and provided with copies of related decisions within 10 days.[58]

- **Department of Agriculture, Trade and Consumer Protection** - DATCP must be notified of any approval in the case of a conditional use/special exception or variance in an exclusive agricultural zoning district under the state farmland preservation program.[59]

Violations of the Open Meetings Law

Suggested procedures to avoid violations

Zoning board members must individually determine compliance with all aspects of the open meetings law. Prior to participating in a meeting or hearing, zoning board members should review the following procedures to determine whether they are in compliance with the open meetings law:

1. **Determine proper notice**. At the beginning of a meeting, each member of the zoning board should determine whether proper notice was provided. If compliance is questionable, the municipal attorney should be able to provide counsel on the matter.

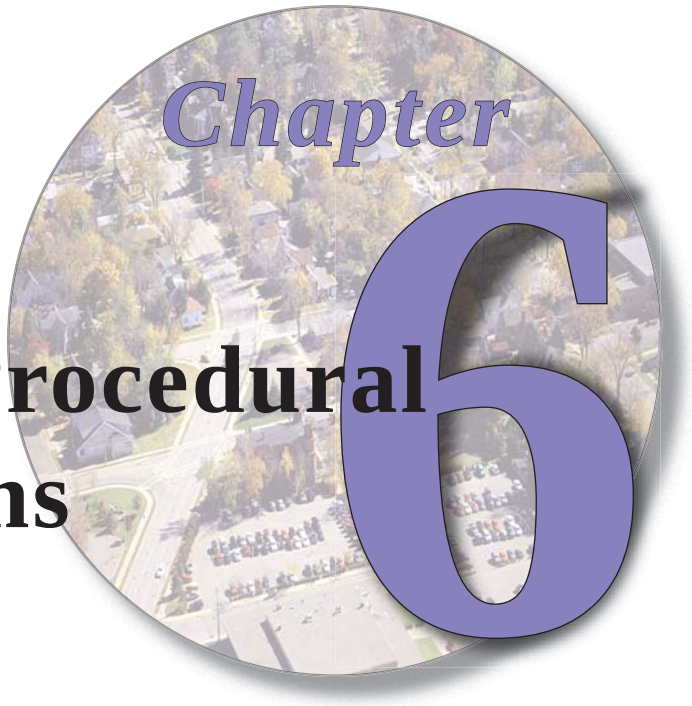
[56] Wis. Stat. §§ 19.84(1)(b) & 985.065
[57] Wis. Stat. §§ 59.694(6) & 62.23(7)(e)6
[58] Wis. Admin. Code §§ NR 115.05(6)(h) & NR 116.20(2)(d); DNR notification is usually accomplished by providing a written copy of the notice.
[59] Wis. Stat. § 91.75(5). Forms for notifying DATCP are available by calling (608) 224-4648.

2. **Limit closed sessions**. Members should vote against convening closed sessions that are not authorized by specific exemptions of the open meetings law. They should also insist that proper procedures be used to close and reopen sessions. Members who vote against convening in closed session may participate in the closed session if it is held.

3. **Document proceedings**. A log or minutes documenting proper notice and recording motions, rationale and any votes on abbreviated notice, amended agendas or closed sessions is a useful defense against allegations of open meetings law violations (most often made by media or persons displeased by decisions).

Liability and voided decisions

Zoning board members can be sued individually or as a group for alleged violations of the open meetings law. Forfeitures ($25-$300) can be levied against members who break the law. The municipality may not reimburse members for these forfeitures. Additionally, a court may void an action taken by a body at an illegal meeting if it finds that the public interest in enforcement of the open meetings law outweighs any public interest in sustaining the body's decision.



Ethical and Procedural Considerations

Zoning Boards Must Follow the Rules of Due Process

Due process is a basic concept of fairness in legal proceedings that has its roots in the decision making processes used by the Greeks and Romans[60] and is reiterated in the constitutions of the United States and Wisconsin.[61] These constitutional provisions guarantee two distinct forms of due process: substantive and procedural. Substantive due process is concerned with the reasonableness of government action and therefore, is focused on assessing the rationality of a government decision. Procedural due process, the focus of this chapter, is concerned with the means or process employed to make the government decision in question.[62]

Not all government actions require compliance with procedural due process principles. A rule or law that applies generally does not trigger due process guarantees.[63] Instead, procedural due process requirements are demanded of government only in cases

[60] Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities. pp. 416-427. Available: http://www.lwm-info.org/legal/2005/12december/comment.html

[61] Fourteenth Amendment to the United States Constitution and Article I, Section I of the Wisconsin Constitution.

[62] Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities. pp. 416-427. Available: http://www.lwm-info.org/legal/2005/12december/comment.html

[63] *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372 (U.S. 1915) cited by Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities.

where the government makes an individualized determination affecting a specific individual or specific individuals or a limited identifiable class of people.[64]

Because zoning board decisions often affect specific individuals, zoning boards must follow the rules of due process to ensure that all parties involved in a hearing before the board are treated fairly.[65] Procedural rules of due process include:

- Providing adequate notice of a pending decision to affected persons,
- Ensuring that each decision maker is impartial and unbiased,
- Avoiding or disclosing any ex parte contacts,
- Providing an opportunity to present at hearings, and
- Basing decisions on clear, pre-existing standards and factual evidence in a record that is available for review.[66]

Zoning Board Members Must Be Impartial

Wisconsin case law requires that zoning board members be impartial, that is, free of bias and conflicts of interest. Zoning decisions are particularly vulnerable to concerns about impartiality because decision-makers are local residents with numerous social and economic ties to their communities. However, it is important to point out that as a zoning board member your opinions about specific local regulations or zoning in general do not necessarily disqualify you from making decisions.[67] A personal opinion or stance, such as pro-growth or anti-growth, should not influence your decision. Bias related to applicants' ethnicity, gender, or religion is also inappropriate. Reviewing your voting record to determine whether any patterns are apparent may be an eye-opening experience.[68]

Here are two examples of how the courts determined that land use decision makers were not impartial:

[64] *Londoner v. Denver*, 210 U.S. 373, 28 S. Ct. 708, 52 L. Ed. 1103 (U.S. 1908) cited by Olson, Daniel M. "Procedural Due Process: The Basics Plus Town of Castle Rock." *The Municipality*. December 2005. League of Wisconsin Municipalities.

[65] Easley, V. Gail and David A. Theriaque. *The Board of Adjustment*. 2005. Planners Press, p. 95.

[66] Blaesser, Brian W. et al. *Land Use and the Constitution: Principles for Planning Practice*. 1989. Planners Press. pp.42-43; Hunter, Ted and Jim Driscoll. "The Planning Commissioner as Judge." *The Commissioner*, Summer 1996; *Old Tuckaway Assocs. Ltd. Partnership v. City of Greenfield*, 180 Wis.2d 254, 509 N.W.2d 323 (Ct. App. 1993); Stephens, Otis and John Scheb. *American Constitutional Law, 3ed*. 2003. Belmont, CA: Wadsworth.

[67] *Marris v. Cedarburg*, 176 Wis. 2d 14, 498 N.W.2d 842 (1993)

[68] Dale, Gregory. "The Ethics of Bias." *Planning Comissioners Journal*, article #571.

- A zoning board member made negative comments about the applicant and her request, referring to it as a "loophole in need of closing." The court determined the applicant was deprived of a fair hearing and required a rehearing without the participation of the member.[69]

- A county zoning committee member, who was also a town board chair, co-signed a letter as town board chair expressing his positive opinion of a gravel company. Within a few months, the gravel company applied to the county for a conditional use permit and included the town chair's letter as part of their application. When the town board chair/county zoning committee member voted to grant this conditional use permit, the court determined he was an advocate who had demonstrated an impermissibly high risk of bias.[70]

If You Are Not Impartial, Recuse Yourself

For each request before the zoning board, individual zoning board members must decide for themselves whether their relationships or interests could bias their judgment or give an appearance of bias causing them to be or appear partial. We recommend that zoning board members use the "sniff test" when determining whether they are biased or impartial: If it would smell fishy for you to vote on the matter at hand, **recuse** yourself. Another way to determine whether you are impartial and appear impartial is to think about whether you would be comfortable if the headline in your local newspaper described your background, your personal and professional relationships, and your participation or vote on the matter at hand. If you are unsure, you should discuss the matter with the zoning board's legal counsel.

Recuse - to disqualify because of prejudice or conflict of interest on a matter.

If you recuse yourself:
- Do not vote AND
- Do not discuss the topic with the zoning board.

If, as a zoning board member, you do not feel you can be and appear impartial in a given decision, the best approach is to recuse yourself. To recuse yourself, do not vote and do not have any discussion or involvement in the matter in question. We recommend that you physically remove yourself from the table where the zoning board is seated while the matter is discussed to make it clear you are not serving as a member of the zoning board. The meeting minutes should reflect that you have recused yourself. If you have recused yourself on a matter, you may offer testimony

[69] *Marris v. Cedarburg*, 176 Wis. 2d 14, 498 N.W.2d 842 (1993)
[70] *Keen v. Dane County Bd. of Supervisors*, 2004 WI App 26, 269 Wis. 2d 488, 676 N.W.2d 154.

as a member of the public.

Avoid Ex Parte Communication

Ex Parte - without the other party being present.

Zoning board members should not have conversations or receive correspondence regarding a variance, appeal or conditional use that is before the board or which may come before the board except during a noticed meeting or hearing. Such contacts outside a meeting or hearing are known as ex parte communication.

The reason for this requirement is fairly simple: an applicant who comes before the zoning board is entitled to know about and have an opportunity to rebut any information that decision makers rely on in making the decision. Discussion outside the meeting regarding procedural matters, such as scheduling a meeting or explaining how to file an application, are permissible. Ex parte communication is not a concern for legislative (ordinance or rule adoption) or ministerial matters (simple permits).

We recommend the following steps regarding ex parte communication:

- First, avoid ex parte communication by suggesting that members of the public who approach you outside of a meeting present information in open hearings or by written comment to the decision-making body.

- Second, if you are not able to avoid ex parte communication, disclose the communication at the hearing and make the information part of the record so that it can be considered in decision-making. The individual zoning board members will then determine its credibility and weight in deciding their vote on the matter.

Provide an Opportunity to Present at Hearings

Typically the zoning board chair invites the applicant to present at a hearing, followed by all interested parties. A zoning board that set a 5-minute time limit per presenter and allowed additional time for the applicant to describe the proposal complied with due process.[71] To ensure that all interested parties have a chance to provide testimony, we recommend that after everyone interested in presenting appears to have done so, the chair ask if there is anyone

[71] *Roberts v. Manitowoc County Bd. of Adjustment*, 2005 WI App 2111

else who wants to testify about the proposal at hand.

Avoid Statutory Conflicts of Interest

In addition to due process and impartiality, zoning board members are also subject to specific conflict of interest provisions found in Wisconsin Statutes:

- **Personal financial gain** - State laws[72] prohibit public officials from taking official actions that substantially affect a matter in which the official, an immediate family member, or an organization with which the official is associated has a substantial financial interest. Similarly, an official may not use public office for financial gain or to gain anything of substantial value for the official, an immediate family member, or an organization with which the official is associated. This statute is enforced by local district attorneys and the State Attorney General[73] with forfeitures up to $1000 per violation.[74]

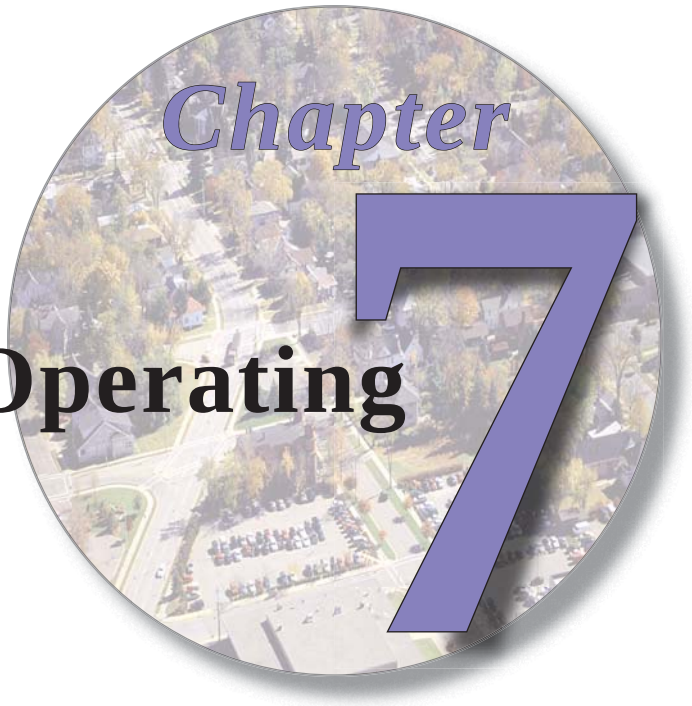
- **Misconduct in office** - State law prohibits an officer from intentionally performing, or failing to perform, certain acts including actions the officer knows are in excess of their lawful authority or are forbidden by law in their official capacity.[75]

- **Private interests in public contracts** - State laws also prohibit certain actions when an official bids for a contract, or has authority to exercise duties under a contract, if the official has a private financial interest in the contract, subject to a $15,000 per year exception for total receipts and disbursements under the contracts.[76] In certain cases, recusal will not prevent a violation of the law,[77] and the official may have to choose between doing business with the governmental unit and serving as an officer. This may be an issue when the zoning board decides conditional use permits or retains consulting services in which members have an interest.

In short:

- Don't accept items or services offered to you because of your position.
- Don't participate in decisions which affect you financially.

[72] Wis. Stat. § 19.59(1)
[73] Local officials online tutorial, State of Wisconsin Ethics Board, available: http://ethics.state.wi.us/LocalOfficials/LocalOfficial1.htm
[74] Wis. Stat. § 19.59 (7)(a)
[75] Wis. Stat. § 946.12; *State v. Tronca*, 84 Wis.2d 68, 267 N.W.2d 216 (1978) states when 946.12(3) was created in 1953 the notes of the Judiciary Committee on the Criminal Code carried the following comment: "quasi-judicial functions call for the exercise of judgment, and if the officer acts honestly although with not the best of judgment, he is not guilty."
[76] Wis. Stat. § 946.13
[77] Wis. Stat. § 946.13(1)(a)



Adoption of Operating Rules

Many procedural issues essential for the conduct of zoning board business are not addressed in state statutes and must be determined either by ordinances adopted by the local governing body or by rules formally adopted by the zoning board itself. The table below describes authority of zoning boards to adopt such rules.

Figure 10: Adoption of Zoning Board Rules

County or Town Zoning Board of Adjustment	City, Village, or Town Zoning Board of Appeals
• The county board must adopt rules for the zoning board.[78] • The zoning board may adopt rules to implement the county board[79] or town board regulations.[80] • The county board sets filing fees for appeals to the zoning board.[81]	• The zoning board must adopt rules in accordance with any ordinance adopted under Wis. Stats. § 62.23.[82]

[78] Wis. Stat. § 59.694(3)
[79] Wis. Stat. § 59.694(3)
[80] Wis. Stat. § 60.65(4)
[81] Wis. Stat. §§ 59.696 & 59.697
[82] Wis. Stat. § 62.23(7)(e)3

Content of Operating Rules

Many communities adopt *Robert's Rules of Order* to guide parliamentary procedures. In addition, communities may wish to adopt operating rules from the following list that are not addressed in ordinances, administrative rules or statutes:[83]

A. General provisions
   - Applicability of state statutes, local ordinances, board rules, and case law
   - Requirements for familiarity with them

B. Membership
   - General membership requirements (number, appointment, terms)
   - Desired qualifications and member education
   - Alternates (attendance requirements)
   - Conduct (ex parte communication, conflicts of interest, bias)
   - Compensation, travel, counsel, and other expenses
   - Vacancies, resignations (general and by absence), and removal

C. Officers, duties, and staff assistance

D. Powers and duties of the board

E. Meetings
   - Procedural requirements (open meetings, public notice, public records)
   - Quorum (how many constitute quorum)
   - Order of business and agenda revision
   - Meeting conduct

F. Appeal procedures
   - Filing procedures and fees
   - Time limits on appeal (*time limits on appeal of administrative decisions are not specified in state statutes and should be included in local ordinance)
   - Stays on appeal
   - Contested case requests
   - Conduct of on-site inspections
   - Members to attend as group or individuals

[83] For additional guidance and model rules, refer to Chapter 4: "Rules of the Board" in *The Zoning Board Manual*, 1984 by Frederick H. Bair, Jr.

G. Hearings
- Witnesses to testify under oath (some zoning boards require applicants and other persons providing testimony to do so under oath, reminding them of the risks of perjury if they lie under oath)
- Order of business
- Recording
- Rules of evidence
- Continuances

H. Decisions
- Voting requirements (*state statutes specify that when a quorum is present, zoning boards may take action by a majority vote of the members present; local ordinances may set more stringent voting requirements)
- Timing when multiple decisions/authorities are required
- Findings, rationale, and form of decision
- Development conditions
- Filing and notice to the public and parties

I. Refilings and rehearings

Keep in mind that when creating bylaws it is not necessary to restate all applicable state and local rules or case law that already apply to the zoning board. The bylaws should be a place to create rules for day-to-day conduct of the board and other issues that are not already addressed elsewhere. If you feel it is important to reiterate some of these rules in your local bylaws, it is best to do so by reference to the statute rather than a complete reprinting of those rules. That way, when rules are updated, it is not necessary to update the language of your bylaws. For example, when the state updated alternate and quorum requirements in August 2005, some zoning boards found they had to update the text of their bylaws, creating unnecessary work. However, where other applicable rules are permissive (i.e., using language such as "may" rather than "shall") zoning boards may opt to include language that is more restrictive.

Options for addressing some of the topics outlined above are discussed in related sections of this manual. A number of counties and municipalities have adopted fairly comprehensive rules that may serve as examples.[84]

[84] See, for example, bylaws from Oneida County, St. Croix County, and the City of Fitchburg.

Section II – Review

Keywords

- Open meeting
- Quorum
- Negative quorum
- Walking quorum
- Closed session
- Public notice
- Posting
- Class 1 notice
- Class 2 notice
- Recuse
- Ex parte communication
- Operating rules/bylaws

Test Your Knowledge (answers on page 49)

Chapter 4 - Overview of Laws That Apply to the Zoning Board

1) Name the four sources that zoning boards must look to for guidance on proper procedures.

Chapter 5 - Open Meetings Law

2) What are the two tests to determine if a zoning board must comply with the open meetings law?

3) What is the difference between quorum, negative quorum, and walking quorum? Which is illegal?

4) What type of notice is required for local zoning board hearings in your community?

5) When are zoning boards able to enter closed session?

6) What are the procedures for going into closed session?

7) What are the three steps to follow to avoid violating the open meetings law?

Chapter 6 - Ethical and Procedural Considerations

8) Why should zoning boards follow due process of law?

9) Can a zoning board chair deem a member biased and make the member recuse him or herself?

10) If a neighbor talks to a zoning board member at the grocery store about an upcoming case before the board member can cut the neighbor off, what should the board member do at the hearing of this case?

Chapter 7 - Adoption of Operating Rules

11) Zoning boards may adopt local bylaws or operating procedures to guide zoning board actions not otherwise governed by state statute or local ordinance. Does your zoning board have such procedures?

12) How are these rules working for you? Are there any items not currently included in your operating rules that should be added?

Answers

1) a. State statutes
   b. Local ordinances
   c. Zoning board bylaws or operating rules
   d. Case law

2) a. The purpose test
   b. The numbers test

3) a. See the definitions on page 22.
   b. Walking quorum is illegal.

4) a. Counties with population > 250,000 - Class 2 notice (posting recommended).
   b. Counties with population < 250,000 - Posting two weeks prior (class 2 notice recommended).
   c. Cities - Class 1 notice (posting recommended).
   d. Villages and towns - Posting one week prior.

5) a. To deliberate concerning a case.
   b. To consider action concerning a public employee(s).
   c. To consider potentially damaging personal information.
   d. To confer with legal counsel.
   e. To consider a request from an ethics board.
   f. Other narrow exemptions.

6) a. Convene in open session.
   b. Cite statutory reason for entering closed session.
   c. Vote to move into closed session.
   d. Record motions and decisions.
   e. Reconvene in open session only if specified in agenda.

7) a. Determine proper notice.
   b. Limit closed sessions to those specified by statute.
   c. Document proceedings.

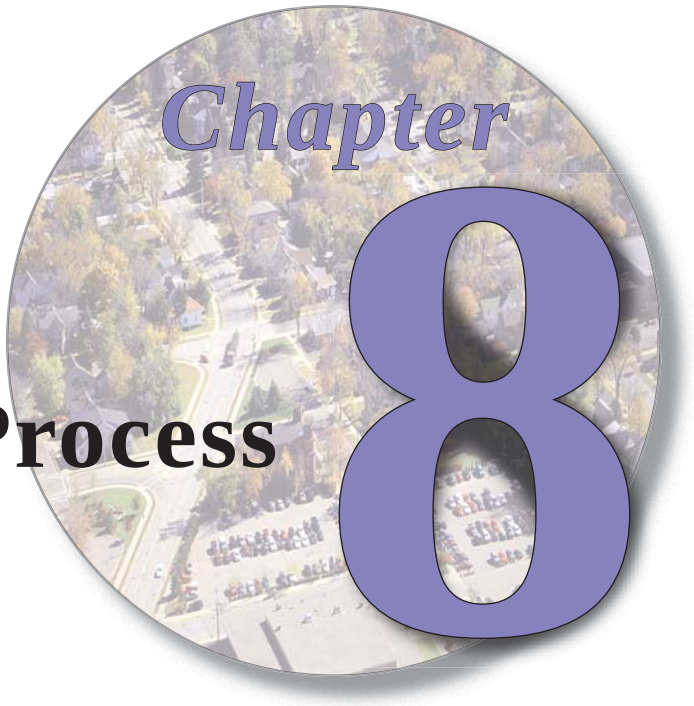
8) To ensure that all parties involved in a hearing before the board are treated fairly.

9) No. This decision is up to the board member

10) Disclose the communication at the hearing and make the information part of the record so that it can be considered in decision-making

11) Answers may vary

12) Answers may vary



Application Process

Both zoning board members and applicants benefit from a clear understanding of the application process for zoning board requests (variances, administrative appeals, and in some cases conditional uses) and the reasons for that process.

Typically persons (applicants) seeking zoning permits first contact the zoning staff to explain their development plans and obtain the necessary permit applications. Most applicants are able to get their permits directly from the zoning staff. If the applicant is seeking a conditional use permit, however, the governing body, planning commission/committee, or zoning board (as specified by local ordinance) makes the decision. If applicants want to do something that is not allowed by zoning ordinances, they may apply for a variance (which is decided by the zoning board) or a rezone (which is decided by the governing body). Applicants who disagree with the zoning staff's interpretation of the ordinance, may file an administrative appeal, which is decided by the zoning board.

In this chapter you will find legal and practical advice regarding the application process for variances, administrative appeals, and conditional uses. Specifically, we will address:

- Who completes the application?
- When do applications need to be complete and can subsequent

changes be made?
- What is included in a complete application?
- Who reviews the application?
- Are zoning staff reports recommended and what do they contain?

Who completes the application to the zoning board?

While statutes do not specify who completes the application, the same person who will represent the landowner at the zoning board hearing (typically the landowner, their attorney, or agent) commonly does it.[85] Zoning staff often explain the rationale behind the regulations, what application materials must be completed, and the type of information and level of detail that must be included in the application. Due to their experience with the ordinances and processes, the staff may also help the applicant fill out the application by providing technical information. However, the landowner or their representative is ultimately responsible for providing a complete and accurate application.

When do applications need to be complete? Can subsequent changes be made?

The application for a conditional use permit must be completed by the first time notice is given for the final public hearing on the matter, unless an ordinance expressly allows later submission of information.[86] Although Wisconsin courts have expressly required this only for conditional uses,[87] we recommend applying this policy to all decisions made by the zoning board in order to:

- Avoid creating an incentive for permit seekers to withhold controversial information from their applications until during or after the public hearing.

- Provide ample time and opportunity for interested parties to review the complete application, digest the information, and develop their ideas prior to the hearing, so that they are prepared to discuss all of their concerns.

[85] Wis. Stat. §§ 59.694(6) & 62.23(7)(e)6
[86] *Weber v. Town of Saukville*, 209 Wis. 2d 214, 562 N.W.2d 412 (1997)
[87] LoisLaw search 3/22/05 revealed no similar standard for variances or administrative appeals.

A simple and straightforward way to ensure that applications are complete prior to notice being given is to require that the application be complete at the time of submittal. Waukesha County uses this approach, and if any changes from the original application are desired after the public notice has been sent, a new application and fee are required.[88]

What is included in a complete application?

Standards for what must be included in an application to the zoning board vary widely and are decided locally. A balance must be struck between having sufficient information to make a good decision and avoiding unnecessary data that may lead to confusion or simple overload for the zoning board members. At the same time, requiring more information in the application can result in a better-informed discussion of the application and more efficient decision-making, with most applications being decided in one hearing. Regardless of the amount of information required, high quality information, such as an accurately scaled site plan, is necessary.

The following list of required application materials is compiled from multiple municipalities.[89] Compare it to your current application standards and add, modify or delete as appropriate based on your purposes and local issues. Rather than requiring a generic list of information for all applications you may want to tailor the standrds based on the specific request for which the application is submitted, . For instance, an application requesting to change only the use within a building probably doesn't need a soils report or topographic survey.

A. A legal description covering the property for which the permit is sought

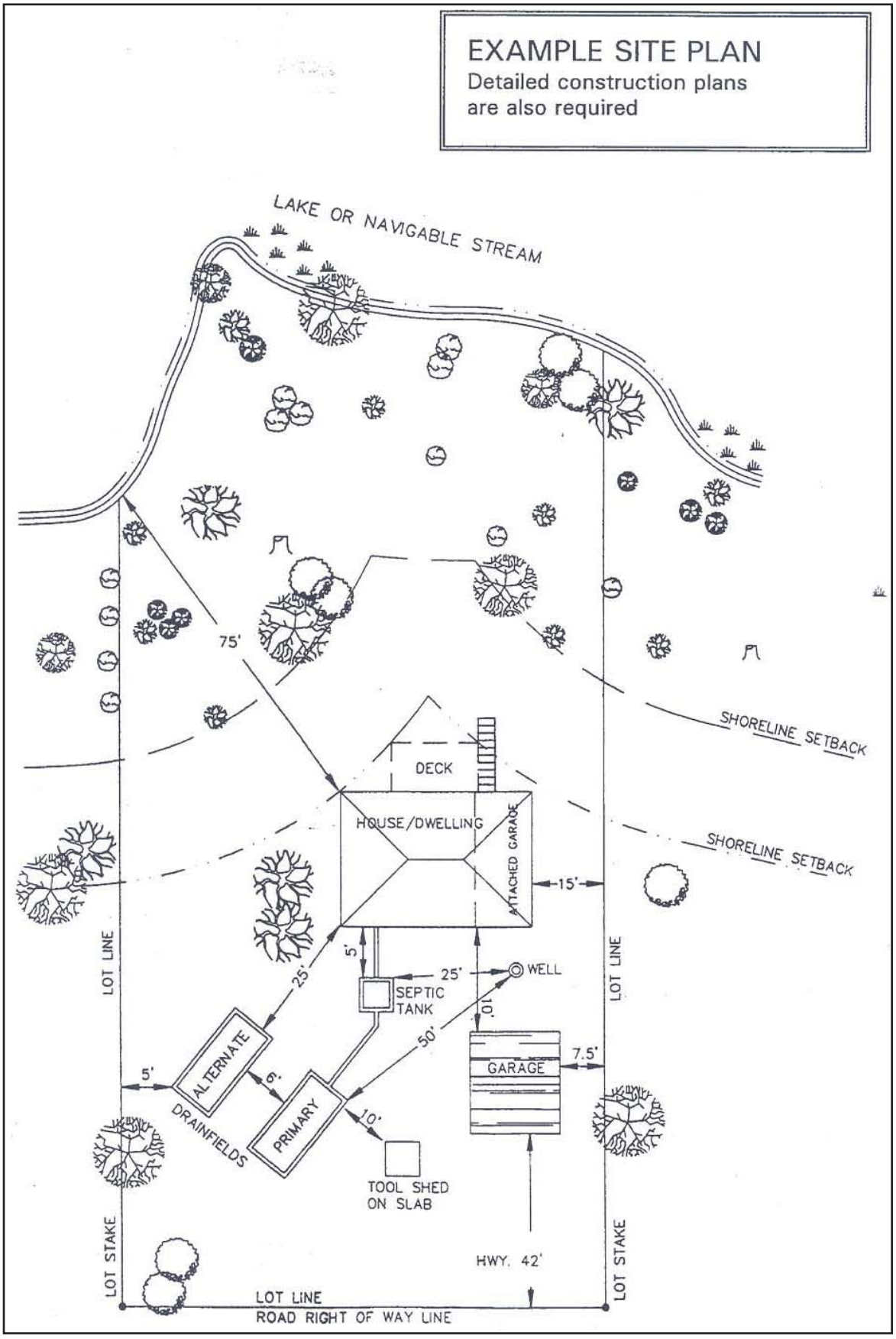
B. Written description of and justification for the proposed permit, consisting of the petitioner's evaluation of the request against the standards in the ordinance

[88] Waukesha County Board of Adjustment variance and appeal form, available: https://secure.waukeshacounty.gov/filelibrary/Files/Variance_and_Appeals.pdf

[89] Lincoln County Zoning Ordinance, Section 17.8.30(2), available: http://www.co.lincoln.wi.us/Zoning%20Ordinance%20Final%20clean%20-%20Dec%202004.pdf; Waukesha County Board of Adjustment variance and appeal form, available: https://secure.waukeshacounty.gov/filelibrary/Files/Variance_and_Appeals.pdf; and *Administering Township Zoning: A basic guide for citizens and elected officials, 2nd edition*, May 1996, Michigan State University Extension, Extension Bulletin E-1408, page 23.

C. A specified number of copies of site plans, accurately drawn to a scale of not less than one inch to __ feet, showing and labeling:
   a. Landowner's name
   b. Preparer, date of preparation and revisions
   c. Scale and directional arrow
   d. Boundaries and dimensions of property for which the permit is sought, and all other lands within a specified distance of the boundaries of the property
   e. Location and dimensions of all existing and proposed structures on the property in question and adjacent properties, including:
      i. Building elevations
      ii. Dimensions, colors, and materials used on all exterior sides of buildings
      iii. Distances between multiple structures
      iv. Distance between structures and the ordinary high water mark
      v. Distances between structures and lot lines
      vi. Distances between structures and the centerlines of abutting streets and highways
   f. Soils information
   g. Topographical contour lines: __ foot intervals
   h. Wetlands, 100-year floodplain, shoreland zone and ordinary high water mark for any adjacent watercourses
   i. Easement labels and locations
   j. Adjacent public streets, centerlines, and rights-of-way
   k. Auto ingress and egress
   l. Visual clearance triangles
   m. Parking and loading areas
   n. Utilities: existing and proposed locations and types of private well and onsite waste treatment systems, or connections to public sanitary sewer, water, and/or storm sewer.
   o. Grading and drainage plan, showing existing and proposed surface elevations
   p. Proposed erosion control and stormwater management provisions
   q. Any outdoor storage or dumpster areas
   r. Existing and proposed landscaping on the site, including the location, species, size at time of planting, and mature size of all new plantings
   s. Signs: location, height, dimensions, colors, materials, lighting, and copy area of all signage
   t. Lighting: location, height, type, orientation, and power of all proposed exterior lighting

Figure 11: Example Site Plan from Langlade County



D. Names and addresses of the owners of all lands within a specified distance of the property as they appear on the current records of the Register of Deeds, to be used to provide notice of the hearing

E. Other pertinent information as requested by the zoning administrator to determine if the proposal complies with the ordinance

F. The required review fee

An applicant has the burden of establishing the need for their relief from the zoning ordinance and the zoning board cannot guess or fill in the blanks of an incomplete application. Thus, an applicant fails to provide sufficiently detailed materials at his or her own peril. If the zoning board determines that it does not have sufficient information to make a decision on an application, it may postpone the decision until the applicant supplies the requested information and notice is provided for an additional hearing.

For examples of applications to the zoning board, staff reports, and zoning board decisions, see *Appendix D and E*.

Who reviews the applications?

Initially, zoning staff members review the application to identify missing or problematic information. They may also ask other specialists, such as engineers or natural resource specialists, to assist in reviewing issues such as erosion control, stormwater management, delineation of ordinary high water marks, floodplains and wetlands, or restoration issues.

Are zoning staff reports recommended and what do they contain?

While Wisconsin Statutes do not specifically address staff reports for the zoning board, the courts have not reacted negatively to staff providing recommendations to the zoning board.[90] Figures 12 and 13 show the results from a 2004 survey completed by 31 counties. Most zoning staff members prepare reports some or all of the time for zoning board members, summarizing the facts regarding applications. About half of the counties who responded

[90] *Miswald v. Waukesha County Bd. of Adjustment*, 202 Wis.2d 401, 550 N.W.2d 434 (Ct. App. 1996)

said zoning staff always include recommendations about whether standards are met, whether to grant or deny the permit, and appropriate conditions if the permit is granted. When deciding whether to include recommendations in staff reports, consider preferences of the zoning board, staff and zoning board expertise, workload for staff and zoning board members, and political risk.

Staff reports commonly include the following components:

- Summary of applicant's request
- Additional site information from staff visit and/or research
- Zoning history of the site, including previous permits requested and granted
- Relevant statements from comprehensive or land use plan
- Salient purpose statements and provisions from local ordinance
- Relevant statutes and case law
- Discussion of whether proposal meets standards
- Recommendation to approve, approve with conditions, or deny request

See Appendix E for an example of a staff report.

See Chapter 5 for information about who should be notified about zoning board applications and upcoming hearings.

Figure 12: Staff Reports

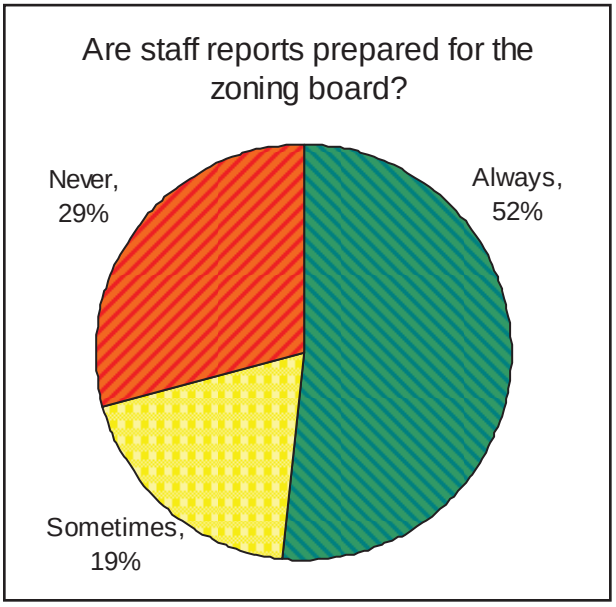
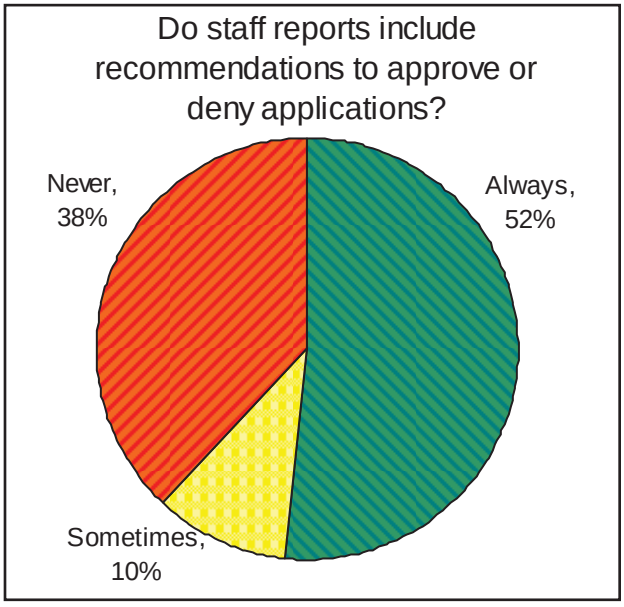
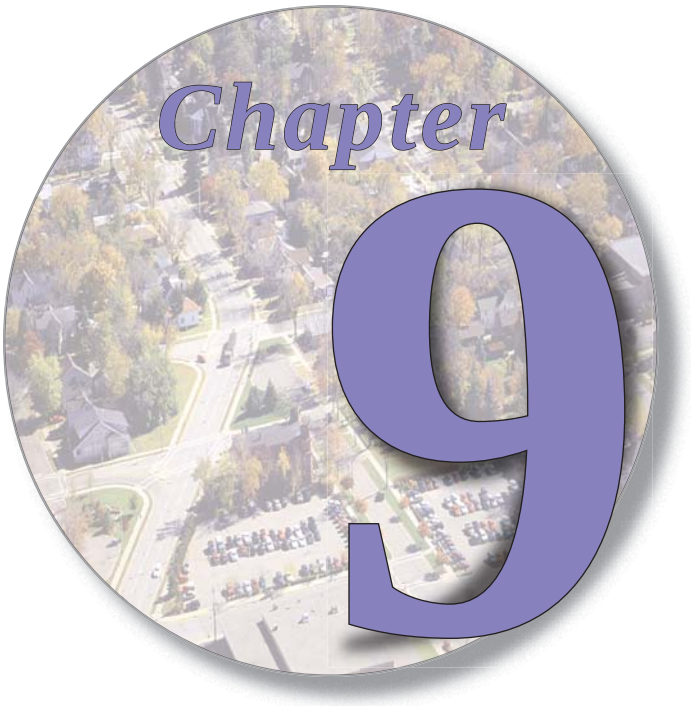


Figure 13: Staff Report Recommendations





Site Visits

Zoning board members or staff regularly visit sites prior to making decisions in order to verify the accuracy of information submitted as part of a development proposal (rezoning, conditional use, variance or subdivision); to gather additional information; and to gain a hands-on understanding of the site in question and its context. Through a combination of field notes and photographs or video recordings, they use the site visit to record the uses of the site and surrounding areas, as well as the location and condition of site features such as topography, vegetation, buildings, surface waters, streets, utilities, parking, and circulation patterns. They can then use this information to identify potential conflicts between the proposed development and neighboring land uses or to identify limitations of the site requiring additional analyses or mitigation.

Figure 14: Zoning boards regularly conduct site visits to gain a better understanding of the physical limitations of a property and neighboring uses.
Photo by Robert Korth, UW-Extension Lakes Program.

What equipment is needed for a site inspection?

When conducting a site visit, we recommend you wear appropriate clothing (boots, durable outerwear, and construction hat, as necessary) and carry:[91]

- Base maps and aerial photos of the site and surrounding area
- A measuring device (preferably on a wheel)
- A notepad and clipboard for taking field notes
- A still camera or video recorder
- Identification as a zoning/inspection staff member or member of a local government body

Must zoning boards comply with the open meetings law during site inspections?

Zoning boards have several options for conducting site visits related to variances or conditional use permits in light of the open meetings law. If zoning board members visit the site as a group, they must comply with open meetings law requirements, including providing advance public notice of the meeting and allowing the public to access the site. (The purpose of a site visit is to gather information related to making a decision of a governmental body, so both the numbers and purpose test are met as outlined in *Chapter 5*). If zoning board members visit the site individually, they are not required to comply with the open meetings law. Some zoning boards do not visit the site at all, instead opting to have zoning staff conduct the site inspection. If staff inspect the site, they should take photographs or a video recording of the site and prepare a detailed staff report to share with the zoning board.

Who may access a property for a site inspection?

If a site inspection is noticed as a public meeting, members of the public must be allowed to access the site. Before anyone (including zoning staff, zoning boards, or the public) may physically access a property for a site inspection, permission must be obtained in writing from the landowner. Many communities require this as a condition of submitting an application.

[91] Meck, Stuart. "Site Visits: Purpose, Planning and Practice." *Zoning Practice*, 2.05. American Planning Association.

Meetings and Hearings

On the following pages, you will find information to guide the zoning board in conducting its meetings and hearings provided in two parts. The first is a checklist that the board chair and members may use to prepare for and conduct meetings and hearings. The second part may be read by the zoning board chair or secretary at the opening of meetings to help petitioners and the public understand the role of the board and the sequence of events at the meeting or hearing.

ZONING BOARD HEARING CHECKLIST

1. Prior to a meeting/hearing [board secretary or designated staff]
- A. Arrange for alternates (due to anticipated absence or conflict of interest).
- B. Send the agenda, any applications, and any staff reports to board members.
- C. Comply with all open meeting law/public notice requirements.
- D. Arrange for a tape recording (meeting minutes) or a court reporter.

2. Preliminary matters at meeting
- A. Distribute and collect the appearance slips (*see Appendix D*).
- B. Call the meeting to order. [chair]
- C. Take roll and confirm that a quorum is present. [secretary]
- D. Confirm compliance with the open meeting law and public notice requirements. [members]
- E. Read the agenda and amend it as necessary (to reorder hearings). [chair & members]
- F. Inform the public in attendance of hearing procedures (see the script on page 63). [chair]

3. Public hearings
- A. Open the first public hearing. [chair]
- B. Read the application or appeal. [secretary]
- C. Report on any site inspection. [secretary]
- D. Request a statement by the applicant. [chair with questions by board members]
- E. Read the staff report. [zoning department with questions by board members]
- F. Report on related correspondence. [secretary]
- G. Disclose any ex parte communication. [board]
- H. Request statements of witnesses (pro/con/information). [chair with questions by board]
- I. Request a response by the applicant (or after each witness). [chair with questions by board]
- J. Request a response by the zoning department. [chair with questions by board members]
- K. Ask any final questions. [board members]
- L. Close the record and the hearing. [chair]

4. Deliberation and decision

Many zoning boards conduct all hearings before deliberating on decisions.
- A. Findings of fact (based on ordinance jurisdiction and standards)
  - Determine whether the application contains the information necessary to make a decision.
  - Determine whether the board has the authority to make a decision.
  - Record pertinent facts from the record/hearing on the decision form.
- B. Conclusions of law
  - Specify applicable legal standards.
  - Determine which facts relate to the legal standards.
  - Determine whether the legal standards are met (agree on any permit conditions).
- C. Order and Determination
  - Decide/vote on the case.
  - Direct the zoning administrator to take any necessary action.

5. Repeat steps 3 and 4 for other hearings.
6. Other agenda items
7. Adjourn meeting

ZONING BOARD ANNOUNCEMENT OF PROCEEDINGS

Role of the Board
The (county/city/village/town) board of (adjustment/appeals) is an appellate board required by state law in any municipality that has adopted a zoning ordinance. The board does not have authority to amend or repeal any provision of the zoning ordinance. Its authority is limited to appeals regarding interpretations of ordinance provisions, consideration of variances, and (if assigned by ordinance) consideration of conditional use permits. The board functions like a court. Its purpose is to give a full and fair hearing to any person whose property interests are affected by these matters. Its job is to apply the zoning ordinance and appropriate legal standards to the facts of each case. The board meeting and public hearings are open to the public. A taped recording is being made of the proceedings (or a court reporter is recording the proceedings).

Expiration and Revocation of Permission to Develop
Any permission to develop granted by a decision of the board must be authorized by obtaining the necessary building, zoning, and other permits. Construction must be substantially completed within __ months of the date of the board's decision. This period will be extended if a court order or operation of law postpones the final decision and may be extended for other good cause.

Permission to develop may be revoked for violation of any of the conditions imposed by the board. The applicant will be given notice of the violation and an opportunity to be heard.

Appeal of Board Decisions
A decision of the board may be appealed by commencing an action in the circuit court for this county within 30 days after the date of filing of the decision in the office of the board. An applicant who commences construction prior to expiration of the appeal period assumes the risk of having the board decision overturned.

Order of Events for Hearings
Each hearing will be opened by reading the application or appeal. The board's site inspection report (if any) will then be read. The applicant/appellant's statement and the zoning department report (if any) will each be followed by related board questions. Witness testimony (from those who have submitted appearance slips and alternating among those in favor, those opposed, and those appearing to provide information) and related board questions are next, followed by responses from the applicant and zoning department and any remaining board questions. If the board has all of the necessary facts, it will close the record, deliberate, and decide the matter in open session before proceeding to the next hearing. Written decisions based on the discussion of the board and evidence in the record will be filed in the office of the board and mailed to the parties involved as soon as practicable. Minutes of board meetings and decisions are available in the Zoning Department.

ZONING BOARD ANNOUNCEMENT OF PROCEEDINGS (continued)

Instructions for Witnesses

Anyone wishing to speak should complete an appearance slip and deliver it to the board secretary. You must be recognized by the board chair in order to speak. When called upon as a witness, you will be put under oath (if required by board bylaws). Please address your comments and questions to the chair and state:

- Your name and place of residence,
- Whether you represent a group or association,
- Your qualifications to speak on this matter or the source of your information, and
- Whether you favor, oppose, or are only providing information in this matter and your concerns.

Please confine your testimony to facts related to the case at hand and avoid repetitive testimony. [Optional] You will be limited to __ minutes.

Contested cases

[Modify the announcement above for hearings conducted as contested cases.]

A contested case is a proceeding in which:

- Testimony is taken under oath,
- Parties have a right to review and object to evidence presented by other parties,
- Objections are entered in the record, and
- Parties may cross-examine witnesses who present testimony.

In contested cases, a party may object to the introduction of written materials or photographs as evidence unless they are given an opportunity to question the writer/photographer and to provide a written reply regarding the evidence. Contested cases usually include a complete written record of the proceedings (often by a court reporter).

Voting and Recording Decisions

When voting and making decisions, zoning board members should keep in mind the ethical and procedural requirements discussed in *Chapters 5 and 6*, including following the open meetings law, ensuring decision makers are impartial, avoiding or disclosing ex parte communication, and avoiding using a zoning board position for personal gain. With very limited exceptions, decision-making and voting by the zoning board must be conducted in open session.[92]

How does the zoning board reach a decision?

The board should consider all of the evidence in the record, including the application, evidence gathered on-site and during the hearing, staff reports, photos, sketches, letters, emails, and audio and video tapes. The board determines the credibility of each piece of evidence and decides whether the applicant(s) have shown that they meet all of the legal standards necessary to grant their request. Remember that applicants have the burden to prove to the zoning board that they should receive the requested relief under the applicable standard of law. If at the end of testimony for a given application, the zoning board is unsure what to do or unsure whether the applicant should be granted the requested permit, then

[92] Wis. Stat. § 19.88(1)

the applicant has not met their burden of proof and the zoning board must deny the permit.

To what extent must zoning board members explain their reasoning for approving or denying an application?

A zoning board may not grant or deny an application by simply restating the statutory or ordinance language that was or was not met. Rather, the board must explain the "grounds" it relied upon to make its decisions: the specific evidence and reasons the application does or does not fit the legal criteria.

It's not sufficient to say "based on the evidence, we feel that there is a hardship and therefore grant the variance." Rather, the zoning board must refer to the specific evidence that either meets or does not meet each of the legal standards for the decision the zoning board is considering. For example, the zoning board might say "the applicant does not meet the 'unique property limitations' test for a variance because the applicant's property is no smaller than two-thirds of the properties surrounding the lake."

Figure 15: Tips to help zoning board decisions survive a court challenge

1. Ensure all evidence, including on-site observations, is included in the record.
2. If a project has been modified since findings for it were written, make sure that the modifications do not necessitate new or revised findings.
3. Use statutory and case law requirements as guidelines for your findings.
4. Make sure there is a clear logical link articulated between conditions and the impacts of the project.
5. Avoid findings that merely restate the law.
6. Put your findings in clear and understandable language.

Kovacic, Gary A. and Mary L. McMaster. "Drafting Land Use Findings," *Planning Commissioners Journal*, article 598, no date.

Figure 16: Tips for recording zoning board decisions

1. Zoning boards must determine whether each statutory and ordinance standard is met.
2. Consider requiring applicants to submit proposed decisions or findings of fact as part of the application process or presentation.
3. Distribute decision forms to all zoning board members and ask them to write down whether they feel each standard is met and why (*see Appendix D*).
4. Individual zoning board members should describe their rationale to other members
5. After discussion, motions should be made and votes taken.

If a zoning board's decision is appealed to circuit court, the judge will review the entire record and must be able to follow the reasoning of the board. While the board is not legally required to include reasons in the written decision, they must either be located there or clearly recorded in the transcript of the board proceedings.[93] We recommend using a decision form similar to the example provided in *Appendix D* to record the findings of fact, conclusions of law (including the board's reasoning), an order stating what the board has decided, and a notice of appeal rights.

How many zoning board members must vote to make a decision?

Quorum – a majority of the total zoning board.

In 2005, the Wisconsin Legislature changed the voting requirements for zoning boards to try to ensure that landowners and developers are provided with timely and unbiased decisions. As a result, the current voting requirement is that when a **quorum** is present, a zoning board may take action by a majority vote of the members present.[94] Because the Legislature used the term "may" in this instance, the zoning board has the ability to adopt provisions in their bylaws requiring a vote by a greater number of members to take action. If the zoning board does not adopt any local provisions on this issue, then if only three members of a five-member zoning board are present, two concurring votes are sufficient to decide an issue such as granting a variance.

[93] *Lamar Central Outdoor, Inc. v. Bd. of Zoning Appeals of Milwaukee*, 2005 WI 117, 284 Wis. 2d 1, 700 N.W.2d 87
[94] Wis. Stat. §§ 59.694(3m) & 62.23(7)(e)3m

Should a zoning board rehear or reconsider their decisions?

Some people who are not satisfied with a decision from the zoning board will ask the board to hear their case multiple times hoping for the answer they desire. The courts provide zoning boards with guidance on this topic. In 1998, the court of appeals upheld a board of appeals rule that prohibits hearings, reconsiderations, and new applications seeking the same relief after a previous denial unless there has been a substantial change of conditions or circumstances since the decision. The court held that the rule served a legitimate purpose because it promotes finality of zoning board decisions and avoids the inefficiency that would result from revisiting the same issues when there has been no change of circumstances.[95] In an earlier case, the court observed that a zoning board should not reopen or reconsider a proceeding that has been terminated, although there are possible exceptions, such as a mistake, public necessity, or other good cause, such as a significant change in circumstances.[96]

What information needs to be in the record?

Minutes of zoning board meetings and hearings must be kept recording motions, seconds, and how each member voted, including absences and abstentions. Hearings, discussion, and decision making by the zoning board should also be recorded by a tape recorder or stenographer and be understandable so they can be transcribed if a decision is appealed to court. These records need to be preserved and available to the public consistent with the Wisconsin Public Records Law.[97] In addition to the minutes and tape or transcript, the record for a zoning board hearing and decision should include the application; all evidence related to the application (including photos, sketches, letters, emails, audio tapes, and video tapes); minutes; the decision form; and any other information considered in making the decision.

[95] *Tateoka v. City of Waukesha Bd. of Zoning Appeals*, 220 Wis. 2d 656, 583 N.W.2d 871 (Ct. App. 1998)
[96] *Goldberg v. Milwaukee Bd. of Zoning Appeals*, 115 Wis. 2d 517, 340 N.W.2d 558 (Ct. App. 1983)
[97] Wis. Stat. § 19.21

How long must records of the zoning board be kept?

Zoning board records, including meeting minutes and supporting documents submitted to the board must be kept for at least seven years.[98]

Who enforces the decisions of the zoning board?

While the zoning board decides whether to grant or deny specific zoning permits, they do not enforce their decisions.[99] Zoning decisions, including those made by the zoning board, are typically enforced by the zoning administrator or building inspector.[100] In addition, under county zoning an owner of real estate in the district who is affected by an ordinance violation may also sue to enforce the ordinance.[101] Similarly, under zoning by cities, villages, or towns with village powers, any adjacent or neighboring property owner who would be specially damaged may sue to enforce the ordinance.[102]

If the Supreme Court changes a legal decision standard after a zoning board decides a case and before that case is remanded back to the zoning board, what decision standard should the board use when reevaluating the case?

The zoning board should reevaluate the facts under the more recent decision standard if it has previously applied an old standard.[103]

[98] Wis. Stat. § 19.21 requires town, city, village or county public records to be kept at least 7 years.
[99] *Forest County v. Goode*, 219 Wis. 2d 654, 579 N.W.2d 715 (1998)
[100] Other people who may enforce the ordinance include the secretary of the zoning agency, or another appropriate person. Wis. Stat. §§ 59.69(2)(bm), 59.69(10)(b), 59.698 & 62.23(8)
[101] Wis. Stat. § 59.69(11)
[102] Wis. Stat. § 62.23(8)
[103] *Lamar Central Outdoor, Inc. v. Bd. of Zoning Appeals of Milwaukee*, 2005 WI 117, 284 Wis. 2d 1, 700 N.W.2d 87

Section III – Review

Keywords

- Onsite inspection
- Meeting
- Hearing
- Contested case
- Quorum

Test your Knowledge (answers on page 72)

Chapter 8 – Application Process

1) Why is it recommended to have a complete zoning board application on file for all decisions by the first time that notice is given for the final public hearing on the application?

2) Name four items that may be required in a zoning board application.

Chapter 9 – Site Visits

3) When conducting a site visit, what are the options for complying with the open meetings law?

4) Who may go on-site for a site inspection?

Chapter 10 – Meetings and Hearings

5) Does your zoning board follow set procedures for conducting meetings and hearings?

Chapter 11 – Voting and Recording Decisions

6) May a zoning board go into closed session to vote on a controversial variance application?

7) How much information and rationale needs to be in the record for a zoning board decision?

8) Should a zoning board rehear its past decisions?

Answers

1) a. To avoid creating an incentive for permit seekers to withhold controversial information from their application until during or after the public hearing.
   b. To provide ample time and opportunity for interested parties to review the complete application, digest the information, and develop their ideas before the hearing, so that they are prepared to discuss all of their concerns.

2) See list on pages 53-56.

3) a. Visit the site as a group and follow the public notice and accessibility requirements of the open meetings law.
   b. Visit the site as individuals or send a staff representative and avoid the requirements of the open meetings law.

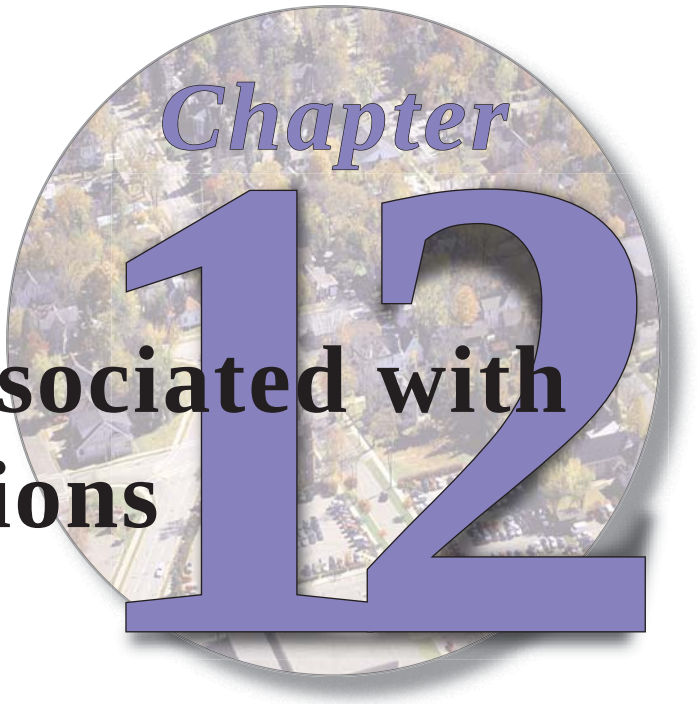
4) Generally the zoning board or zoning staff, and members of the public if noticed as an open meeting. These persons may access the site only after obtaining permission from the owner.

5) If not, consider the checklist and announcement of proceedings contained on pages 62-64.

6) No. This is not one of the exceptions to open meetings listed in section 19.88(1) of Wisconsin Statutes. Also see *State ex rel. Hodge v. Turtle Lake*, 180 Wis.2d 62 (1993) .

7) The board must refer to the specific evidence related to each legal standard for the decision so that if their decision is appealed, the circuit court judge can follow their reasoning.

8) Generally no. Only if they have made a mistake or if there has been a significant change in circumstances.



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 varies 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.

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.[104] 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

If you're on the zoning board, your role is to apply the rules as written.

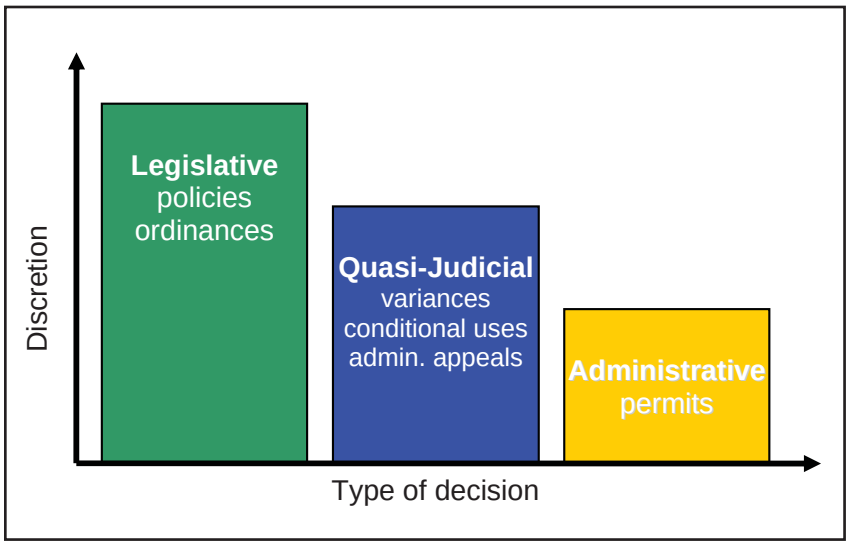
If you want to make or change the rules, run for elected office.

[104] *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

substitute their judgment for that of the elected local governing body.

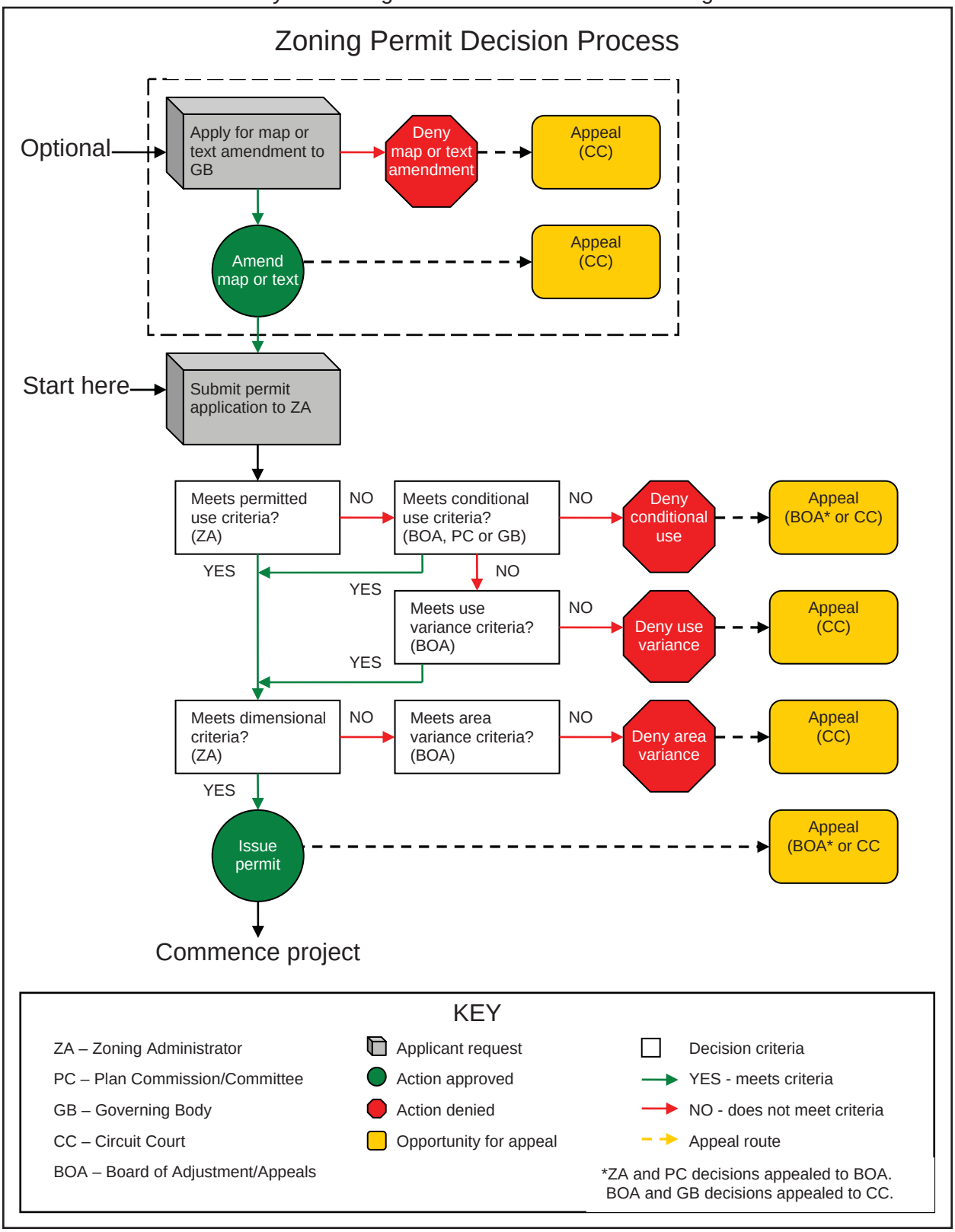
Ordinance proposal, adoption and revision are **legislative decisions** reserved by state law for the planning committee/ commission (in an advisory capacity) and the local governing body following prescribed procedures.[105] These bodies enjoy greater latitude than administrative or quasi-judicial decision-makers. They may involve the public in helping to shape their decisions and are limited only by procedural and constitutional concerns.

Figure 17: Discretion Asociated with Zoning Decisions



[105] 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.



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.

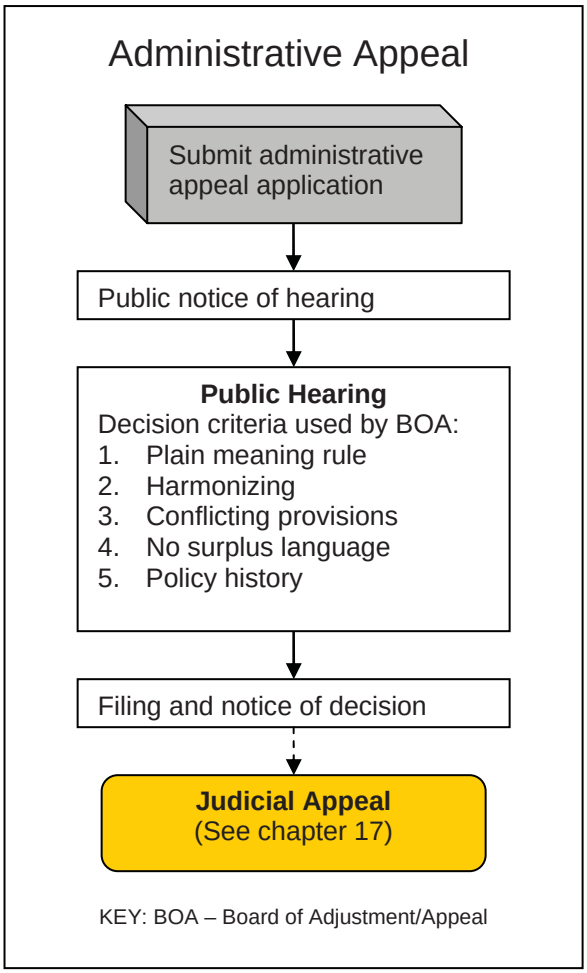
Appeals of zoning administrative decisions, such as the reasonableness or accuracy of measurements, conditions on development, issuance of permitted or conditional uses, or whether the administrative official had authority to make a decision, are generally heard by the zoning board.[106] When hearing an appeal, the zoning board should review the record of proceedings before it and may take new evidence.[107] The applicant has the burden of proof to demonstrate that the administrative decision is incorrect or unreasonable. We recommend that, when deciding administrative

[106] 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.

[107] 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

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.[108] For specific guidance related to appeals of conditional use permits, refer to *Chapter 14*.

Figure 19: Administrative Appeal Process



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

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 the municipality affected by an administrative decision of a zoning officer may appeal the decision to the zoning board.[109] A "person" includes partnerships, corporations, associations and governmental units.[110] A person is "aggrieved" when the decision has a direct effect on the person's legally protected interests.[111] The aggrieved party is not required to have attended a previous hearing on the matter.[112]

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.[113] 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

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.[114]

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

SECTION IV

[109] Wis. Stat. §§ 59.694(4) & 62.23(7)(e)4
[110] Wis. Stat. § 990.01(26)
[111] *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).
[112] *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*, 131 Wis. 2d 101, 122, 388 N.W.2d 593 (1986)
[113] Wis. Stat. §§ 59.694(4) & 62.23(7)(e)4
[114] Wis. Stat. §§ 59.694(5) & 62.23(7)(e)5

Figure 20: Posting at a Project Site

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*).[115] If no such provisions are made, the appeal period begins when the aggrieved parties find out about the decision[116] or have notice of the decision.[117] 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 to potentially affected parties before they start construction. Some developers post a large sign at a project site to give additional notice, as shown in Figure 20.

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

[115] Wis. Stat. §§ 59.694(4) & 62.23(7)(e)4
[116] *State ex rel. DNR v. Walworth County Bd. of Adjustment*, 170 Wis. 2d 406, 414, 489 N.W.2d 631 (Ct. App. 1992)
[117] *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)

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 the word. Technical words should be 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. See Figure 21 on the next page.
- **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 ordinance 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.

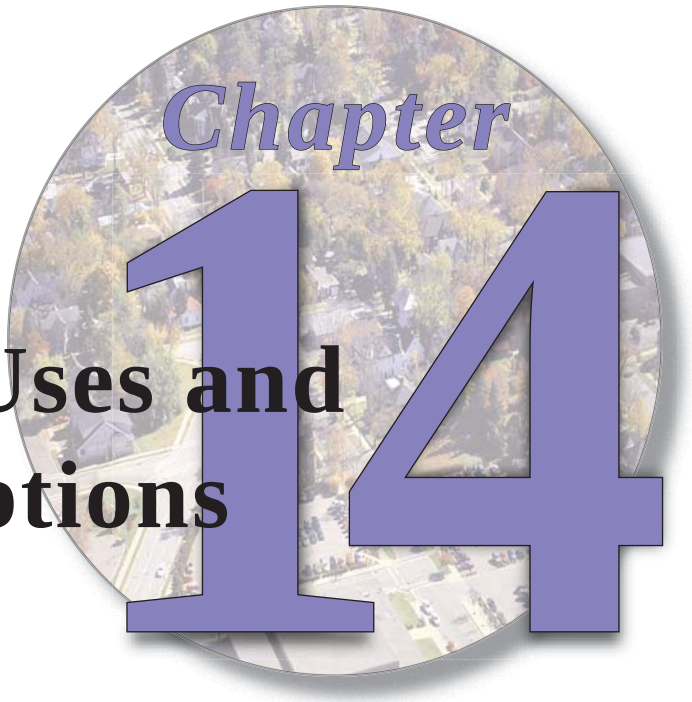
How are disputes regarding boundary interpretations resolved?

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.[118] (*See Chapter 17 Appeal of Zoning Board Decisions*.)

[118] Wis. Stat. § 59.694(10)



Conditional Uses and Special Exceptions

What is a conditional use?

A **conditional use**, also known as a **special exception** in Wisconsin case law,[119] 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.[120] 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.[121]

Conditional uses and **special exceptions** are similar and considered together in this chapter. They must be expressly listed in the zoning ordinance.

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

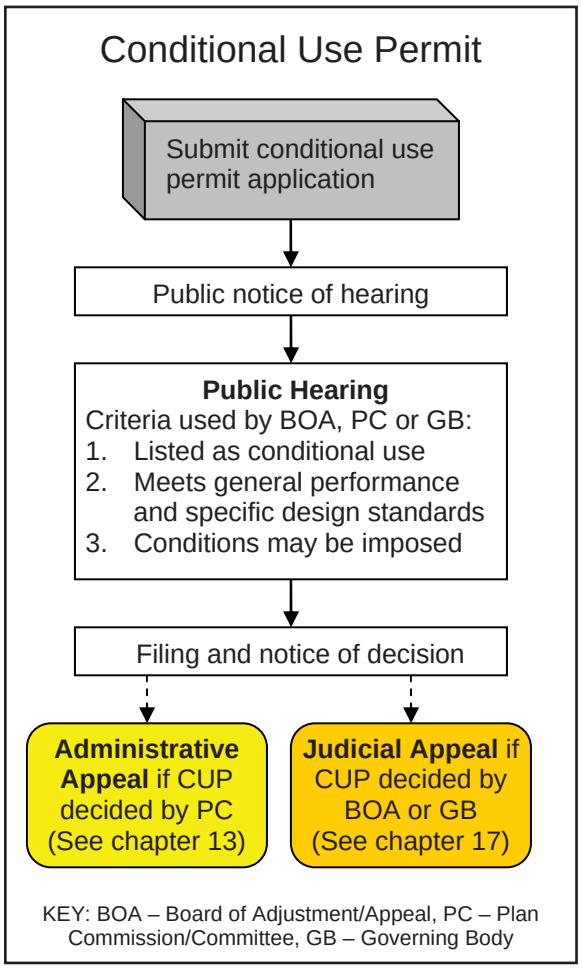
Conditional uses, in some ordinances, refer only to land uses.

[119] *State ex rel. Skelly Oil Co. v. City of Delafield*, 58 Wis. 2d 695, 207 N.W.2d 585 (1973)
[120] *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.
[121] Wis. Stat. §§ 91.75(5) & 91.77

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.[122] 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



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.[123] 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.[124] This avoids arbitrary or politically driven assignment of conditional use permits to different decision-making bodies.

[122] *Weber v. Town of Saukville*, 209 Wis. 2d 214, 562 N.W.2d 412 (1997)
[123] Counties - Wis. Stat. § 59.694(1) & (7)(a); Cities, villages and towns with village powers - Wis. Stat. § 62.23(7)(e)1 & 7.
[124] *Magnolia Township v. Town of Magnolia*, 2005 WI App 119, 284 Wis. 2d 361, 701 N.W.2d 60

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.[125] 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.

[125] *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.[126]
- **Rough Proportionality Test** - The limitation must be commensurate with the extent of the resulting harm or need for services.[127]

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.[128] Impact fees must also meet the essential nexus and rough proportionality tests.

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.

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.

[126] *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (U.S. 1987)
[127] *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed.2d 304 (U.S. 1994)
[128] 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

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.[129] 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.

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.[130] 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 a conditional use 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.[131]

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. 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.[132] Conditional use decisions made initially by the governing body or zoning board must be appealed directly to circuit court.

[129] 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.
[130] Anderson, *American Law of Zoning*, 3d, Vol. 3, S. 21.32, pp. 754-5.
[131] *Rainbow Springs Golf Co. v. Town of Mukwonago*, 2005 WI App 163; 284 Wis. 2d 519; 702 N.W.2d 40
[132] Wis. Stat. §§ 59.694(8) & 62.23(7)(e)8

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

If the local ordinance authorizes the plan commission/committee to decide conditional uses, their decisions may be appealed to the zoning board[133] 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.[134]

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.[135] 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:

- **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.[136]

[133] *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.

[134] Counties - Wis. Stat. § 59.694(4); Cities, villages and towns with village powers - Wis. Stat. § 62.23(7)(e)4.

[135] *Osterhues v. Bd. of Adjustment for Washburn County*, 2005 WI 92, 282 Wis. 2d 228; 698 N.W.2d 701

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

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.[137]

If conditional uses are decided by the governing body, they may be appealed to circuit court.[138] Circuit courts use the *certiorari* review standards described in *Chapter 17* to review conditional use decisions.[139]

[137] Wis. Stat. §§ 59.694(10) & 62.23(7)(e)10

[138] *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.

[139] *Town of Hudson v. Hudson Town Bd. of Adjustment*, 158 Wis. 2d 263, 461 N.W.2d 827 (Ct. App. 1990)

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.[140] 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.[141] **Use variances** permit a landowner to put a property to an otherwise prohibited use.[142] Though not specifically restricted by statute or case law,[143] use variances are problematic for reasons discussed on page 102. Variance decisions related to zoning are always heard by the zoning board of adjustment or appeals.

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

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

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

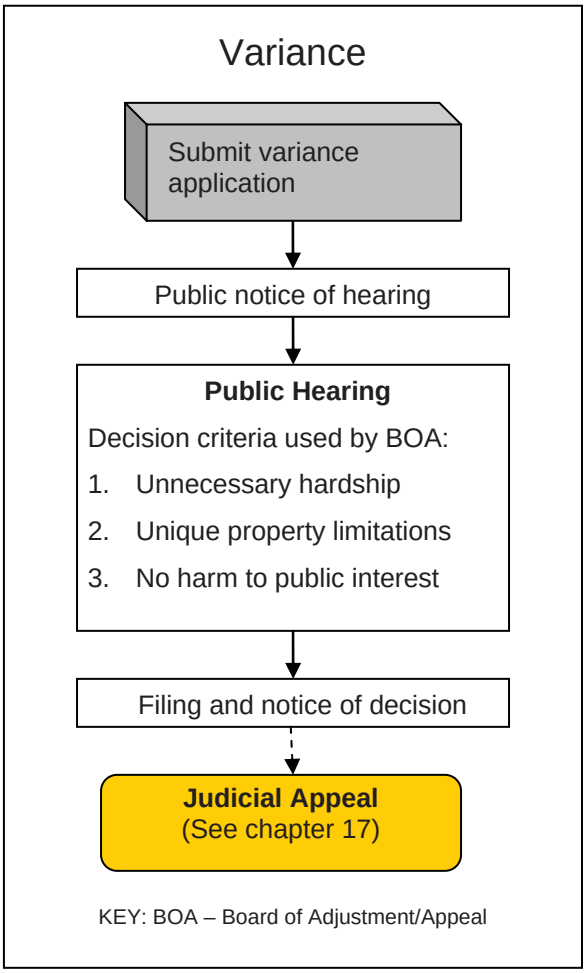
[143] In the past, it was doubtful that zoning boards of adjustment in Wisconsin had the authority to grant use variances [see *State ex rel. Markdale Corp. v. Bd. of Appeals of Milwaukee*, 27 Wis. 2d 154, 133 N.W.2d 795 (1965)]. Now, the Supreme Court has determined that boards of adjustment do have 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].

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 defined in state statutes and outlined below are met.[144]

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

Figure 24: Variance Process



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 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.[145] 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 *reasonable* when it:

[144] *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).

[145] *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 413-414, 577 N.W.2d 813 (1998).

- 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."[146] 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 zoning), its effects on the property, and the short-term, long-term, and cumulative effects of granting the variance.[147]

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.[148] The circumstances of an applicant (growing family, need for a larger garage, etc.) are not a factor in deciding variances.[149] Property limitations that prevent ordinance compliance and are common to a number of properties

[146] *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).
[147] *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401
[148] *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)
[149] *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 478-79, 247 N.W.2d 98

should be addressed by amending the ordinance.[150] 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.[151] 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.[152] 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.

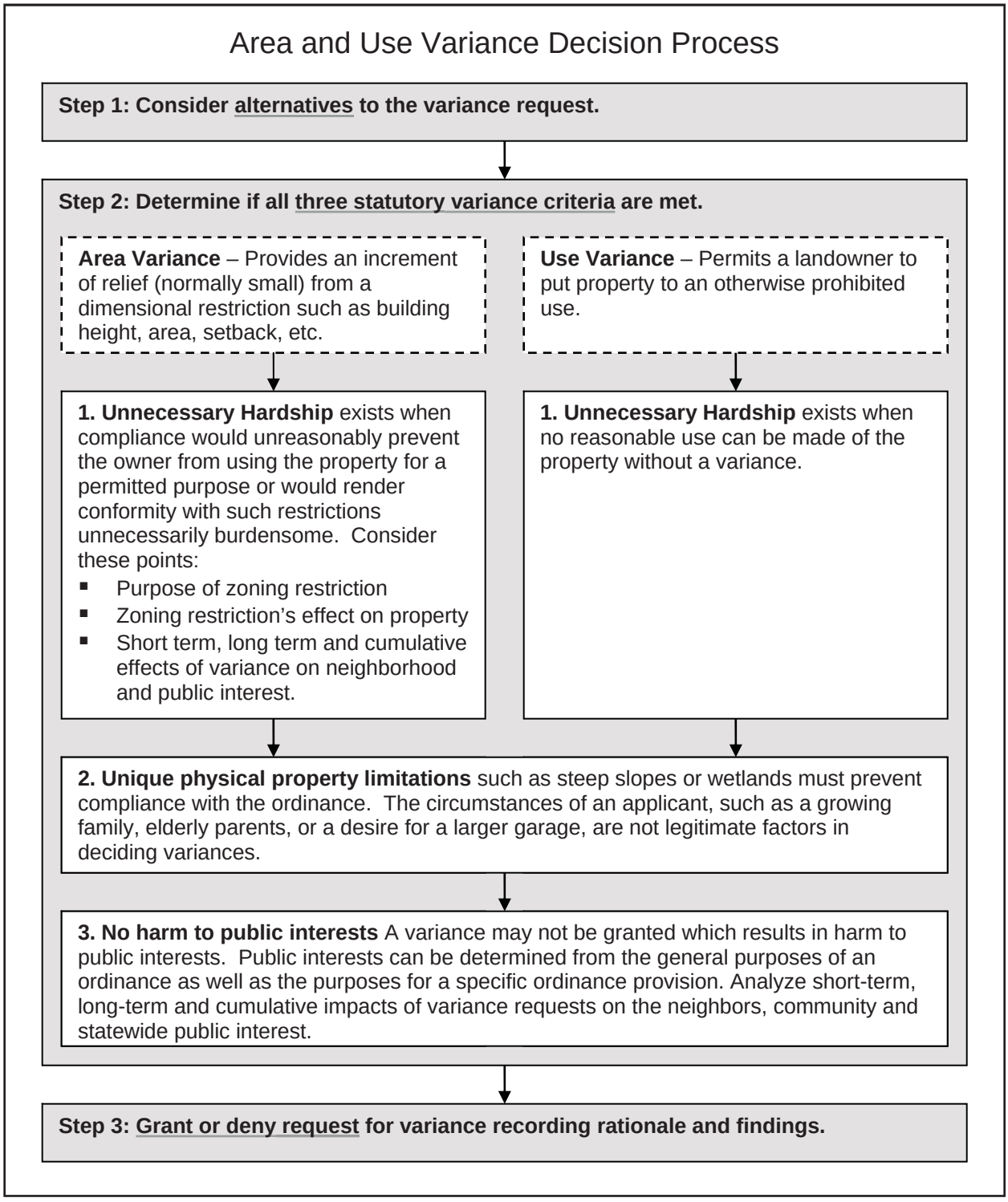
The flow chart in Figure 25 summarizes the standards for area variances and use variances. Application forms and decision forms reflecting these standards are included in *Appendix D*.

[150] *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)

[151] *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)

[152] *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.

Figure 25: Area and Use Variance Decision Process



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 decisions 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**. The entire parcel, not just a portion of the parcel, must be considered when applying the unnecessary hardship test.[153]

- **Self-imposed hardship**. An applicant may not claim hardship because of conditions which are self-imposed.[154] Examples include excavating a pond on a vacant lot and then 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.[155]

- **Financial hardship**. Economic loss or financial hardship do not justify a variance.[156] 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.[157]

- **Objections from neighbors**. A lack of objections from neighbors does not provide a basis for granting a variance.[158]

[153] *State v. Winnebago County*, 196 Wis. 2d 836, 844-45 n.8, 540 N.W.2d 6 (Ct. App. 1995)
[154] *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).
[155] *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 478-79, 247 N.W.2d 98 (1976)
[156] *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).
[157] *Von Elm v. Bd. of Appeals of Hempstead*, 258 A.D. 989, 17 N.Y.S.2d 548 (N.Y. App. Div. 1940)
[158] *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 254, 469 N.W.2d 831 (1991)

- **Variance to meet code**. Variances to allow a structure to be brought into compliance with building code requirements have been upheld by the courts.[159]

Are there any limits on granting a variance?

Minimum variance allowed

The board may grant only the minimum variance needed.[160] 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[161] 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. Referring to Figure 26 on the next page, 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.

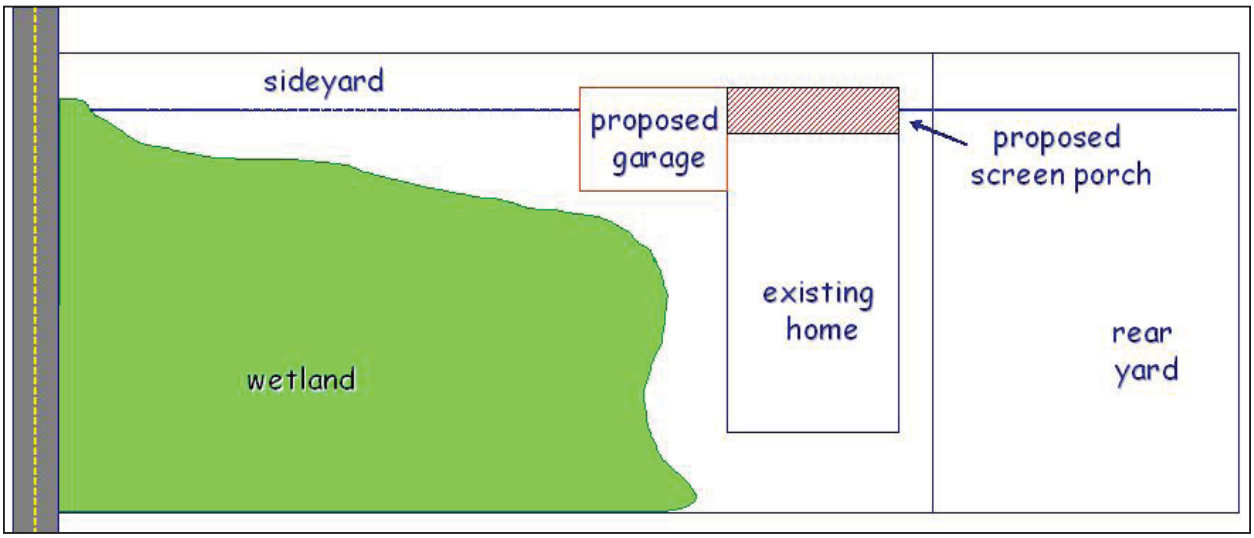
Variances do not create nonconforming structures

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

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.

[159] *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).
[160] Anderson, Robert M. *American Law of Zoning* 3d, (1986) Vol. 3, s. 20.86, pp. 624-5
[161] Anderson, Robert M. *American Law of Zoning* 3d, (1986) Vol. 3, ss. 2070 and 20.71, pp. 587-95

Figure 26: A Variance Grants Specific Relief
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.



contrast, nonconforming 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.[162]

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

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

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.[163] (*See Chapter 17 Judicial Appeal of Zoning Board Decisions*.)

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.

Figure 27: 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.

[163] Wis. Stat. § 59.694 (10)

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,[164] 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." [165] 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.[166] 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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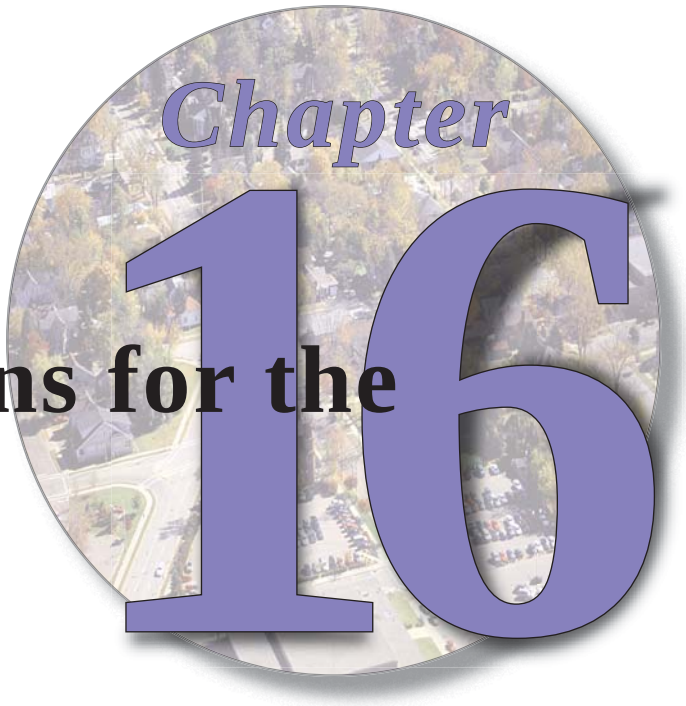
[164] *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401 and *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

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

[166] *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).



Accomodations for the Disabled

The Americans with Disabilities Act (ADA) requires 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 public accommodations such as restaurants, retail establishments, or other businesses normally open to the public. Similarly, the federal Fair Housing Act, and more specifically, Wisconsin's Fair Housing Law[167] requires local governments to make reasonable accommodations to provide equal access to housing for persons with disabilities. These laws must be considered when making local land use and zoning decisions, but do not specifically preempt or invalidate local zoning.

In many instances, local zoning regulations are designed to accomplish public health and safety goals and appear to be neutral, but may in fact adversely impact individuals with disabilities. Consider for example, the case of a zoning ordinance that requires homes to be set back twenty feet from the street to ensure the visibility and safety of passing vehicles and pedestrians. If an existing home is built to the setback line, installing a ramp to enable a person with a disability to enter their home would be impermissible without a modification or exception. In such

[167] Wis. Stat. § 106.50 and Wis. Admin. Code § DWD 220

cases, local governments are required to make reasonable accommodations to prevent the discrimination of persons with disabilities.

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. A reasonable accommodation might entail modifications to existing ordinances, regulations or policies, or a waiver of such requirements for persons with disabilities. 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 and the local government is not required to meet that request.[168]

When considering the extent to which a modification is reasonable (for example, how much of setback reduction should be allowed), local governments may wish to refer to ADA standards. Although these requirements do not apply to housing, they may provide guidance in terms of how large of a ramp or other structure is generally necessary to afford accessibility.

What is the recommended approach for providing reasonable accommodations?

Communities use a variety of approaches to provide reasonable accommodations for persons with disabilities—common tools include variances, conditional use permits, special exceptions, permitted uses and waivers of zoning regulations. Strengths and weaknesses associated with each of these tools are considered in turn.

Variance

Granting a variance requires the finding of three conditions: unnecessary hardship, unique property limitations, and no harm to public interest. Applicants must satisfy all three requirements in order to be granted a variance, even in the case of persons with disabilities. While not illegal, we do not recommend the variance approach for several reasons. First, the physical limitations of a

[168] 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.

disabled applicant do not substitute for the physical limitations of the property.[169] Second, a hardship cannot be self-created. Since the need for a variance arises from an applicant's physical disability it is often difficult to justify both the unnecessary hardship and unique property limitations tests. If the variance technique is considered, applicants should be encouraged to find a suitable site arrangement that does not necessitate the variance (for example, constructing a ramp to the side door rather than the front door).

Conditional Use/Special Exception

Granting a conditional use or special exception is also commonly used to accommodate persons with disabilities. In particular, communities utilize these tools frequently to allow group homes, which is an acceptable use of the technique.[170] In the case of physical or dimensional requests, additional consideration should be given to the use of this technique. First, many communities define conditional uses to include only uses of the property, not physical or dimensional requirements. Second, much like a variance, a conditional use "runs with the property," meaning all subsequent property owners are entitled to continue the use or exception subject to any limitations specified at the time of granting. If the public purpose of enforcing the regulation is so great that the accommodation should be discontinued after the disabled person vacates the property, the zoning administrator may impose a condition to that effect or should consider using an altogether different technique.

Permitted Use/Waiver of Zoning Restrictions

A technique that many communities find works very well for granting reasonable accommodations is the use of an administrative permit or simple waiver of zoning restrictions made by the zoning administrator. Barron County includes the following language in their local zoning code to accomplish this purpose:[171]

[169] Sawyer County Zoning Bd. v. Wisconsin Dept. of Workforce Development, 231 Wis. 2d 534, 605 N.W.2d 627 (Ct. App., 1999) involves a request for a variance to accommodate a person with a disability. This case reiterates the unique property limitations standard found in State v. Kenosha County Bd. of Adj., 218 Wis. 2d 396, 413-14, 577 N.W.2d 813, 821-22 (1998).

[170] 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. 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.

[171] 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.

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
   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.

Other Remedies

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

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) to a home, 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. In other circumstances, communities may wish to allow ramps and other structures that serve the disabled to remain for a specified time period (eg. six months) to encourage other handicapped individuals to inhabit the property while at the same time avoiding some of the time and expenses involved in constructing handicap accessible structures.

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 (answers on page 109)

Chapter 12 – Discretion Associated with Zoning Decisions

1) What are the three discretionary levels of decision-making? Provide examples of each.

2) Name four of the five major types of zoning decisions.

3) Which zoning decisions are typically made by the zoning board?

Chapter 13 – Administrative Appeals

4) Name three guidelines for determining the intent of ambiguous ordinances.

5) Name five guidelines for interpreting the text of ordinances.

Chapter 14 – Conditional Uses/Special Exceptions

6) Who may decide a conditional use permit?

7) What is the difference between performance and design standards?

8) What are the tests for determining whether conditions are legally acceptable?

Chapter 15 – Variances

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

10) What are the three standards for granting a variance?

Chapter 16 – Accommodations for the Disabled

11) What is the process for providing reasonable accommodations for the disabled?

Answers

1) 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) a. Permitted uses
   b. Conditional uses
   c. Variances (area or use)
   d. Amendments (text or map)
   e. Appeals (administrative or judicial)

3) a. Administrative appeals
   b. Variances
   c. Conditional uses (if authorized by local ordinance)

4) a. Scope or jurisdiction
   b. Context
   c. Subject matter

5) a. Plain meaning rule
   b. Harmonizing
   c. Conflicting provisions
   d. No surplus language
   e. Value of testimony

6) The governing body, plan commission/committee, or zoning board as specified by local ordinance

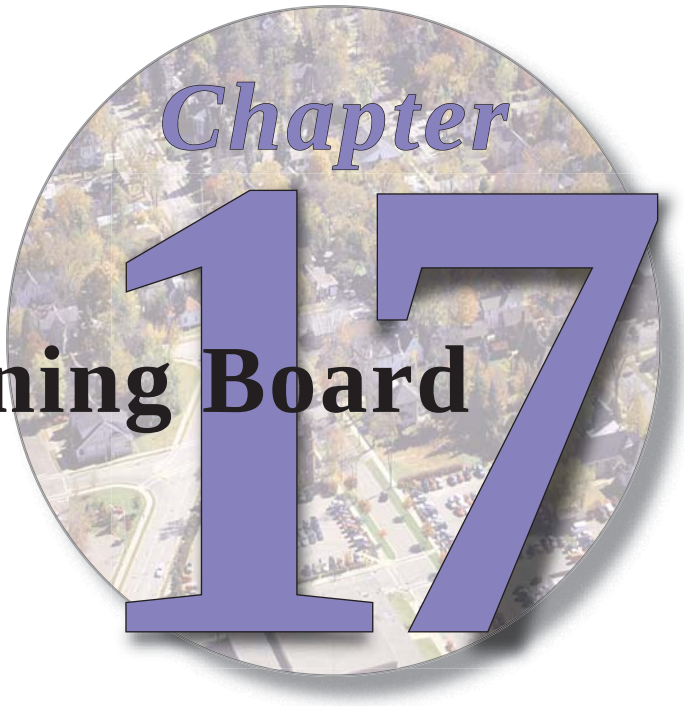
7) a. Performance standards state the expected results and allow landowners to use a variety of techniques custom-tailored to the site to achieve those results
   b. Design standards state specific requirements (less flexible but easier to administer)

8) a. Rough proportionality
   b. Essential nexus

9) 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) 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

11) We recommend including language in your local zoning ordinance to grant reasonable accommodations through a simple permit or waiver of restrictions issued by the zoning administrator. Variances and conditional uses may also be appropriate in some cases.



Appeal of Zoning Board Decisions

Zoning board decisions may be appealed to circuit court. When reviewing zoning board decisions on appeal, the circuit court generally reviews the record using certiorari standards. To minimize having their decisions overturned by the courts, zoning boards should understand and apply the certiorari standards to create an accurate and complete record for each of their decisions. When making decisions, zoning boards and the courts are governed by rules in local ordinances, state statutes, and the constitution.

What is an appeal?

For the purposes of this chapter, an appeal is the submission of a decision made by a zoning board to a circuit court for review to determine whether the board erred and to affirm, reverse, or remand the decision.[172] *Chapter 13* discusses administrative appeals which occur when decisions made by zoning administrators or plan commissions are appealed to the zoning board.

[172] *Black's Law Dictionary*, 2nd pocket edition, 2001, 38; Klein, Bobbie, Attorney and Laura Dulski, Attorney. "Filing an Appeal: A Citizen's Guide to Filing an Appeal in the Wisconsin Court of Appeals." June 1991 (Revised effective January 1, 2004). Available at http://www.courts.state.wi.us/ca/citizens.pdf

Who may appeal zoning board decisions?

An aggrieved person, taxpayer, municipal officer, or municipal body may appeal a zoning board decision to circuit court.[173] A "person" includes partnerships, corporations, associations, and governmental units.[174] These people and bodies are said to have **standing** to appeal zoning board decisions. The test for standing has two parts:

Standing - the status required by law to allow a person or body to appeal a decision.

1. whether the decision of the agency directly causes injury to the interest of the petitioner, and
2. whether the interest asserted is recognized by law.[175]

The DNR, because of its role as trustee of the navigable waters of Wisconsin, has standing to appeal shoreland, wetland, and floodplain zoning decisions.[176] The DNR has standing to appeal decisions that violate the public trust and in fact, has a duty to appeal decisions that do not comply with shoreland zoning administrative rule standards.[177]

How long does a person have to appeal a zoning board decision?

A person has 30 days after the filing of the decision in the office of the zoning board to appeal a decision.[178] In the absence of zoning board by-laws defining what it means to "file the decision," the appeal period begins when the decision is physically filed in the office of the zoning board. The 30-day appeal period runs from the filing of the original decision and is not extended by filing a motion to reconsider unless the motion raises a new issue.[179] In

[173] Wis. Stat. §§ 59.694(10) & 62.23(7)(e)10. The municipal law and tax sections of the statutes are pretty clear in distinguishing between a resident (which can include a renter) and taxpayer (used in this context as a "taxpayer of the municipality," which generally refers to a property taxpayer. While there may be an argument that a renter is a taxpayer in a county which collects a county sales tax, it's questionable that the term taxpayer used in this section of the statute was intended to include renters---but rather, a person who pays property taxes directly to the municipality. A renter may fit within the term "aggrieved person", if the decision affects the property that they are renting; *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*, 131 Wis. 2d 101, 388 N.W.2d 593 (1986) states residents had appeal rights even though they did not appear at planning and zoning committee hearings because statues provide that persons aggrieved, not parties, have a right to appeal.

[174] Wis. Stat. § 990.01(26)

[175] *Mendonca v. DNR*, 126 Wis. 2d 207, 376 N.W.2d 73 (Ct. App. 1985); *Kammes v. State, Mining Inv. & Local Impact Fund Bd.*, 115 Wis. 2d 144, 340 N.W.2d 206 (Ct. App. 1983).

[176] *State ex rel. DNR v. Walworth County Bd. of Adjustment*, 170 Wis. 2d 406, 489 N.W.2d 631 (Ct. App. 1992)

[177] Wis. Admin. Code ch. NR 115; *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W2d 761 (1972)

[178] Wis. Stat. §§ 59.694(10) & 62.23(7)(e)10

[179] *Bettendorf v. St. Croix County Bd. of Adjustment*, 188 Wis. 2d 311, 525 N.W.2d 89 (Ct. App. 1994)

one case in which a zoning board first issued a tentative decision[180] and after a subsequent public hearing on the case issued a more complete decision, the court determined the 30-day appeal period began after the final zoning board decision.[181]

What must be done within the 30 day time period to appeal a zoning board decision?

A lawsuit must be filed in circuit court seeking **certiorari** review of the zoning board decision. In a certiorari lawsuit, the person or body with standing requests that the circuit court issue a **writ** requiring the zoning board to submit the record of their decision to the court. The request to the circuit court must identify which certiorari standards the decision did not meet, but does not need to make a full argument describing all of the reasons they feel the zoning board decision is insufficient.

Certiorari - A writ from a higher court to a lower court (or zoning board) requesting a transcript of the proceedings of a case for review.

If a certiorari lawsuit is filed, what is the zoning board required to do?

The board must submit the transcript of the proceedings of the decision (the record) or certified or sworn copies of the record to the circuit court.[182]

Writ - A written order issued by a court requiring specific action.

When a zoning board decision is pending before the circuit court, what may the zoning administrator and zoning board do?

When the zoning board decision is pending before the court, the court has exclusive jurisdiction over the dispute, and neither the zoning administrator nor the zoning board may reevaluate their decision until the court relinquishes that jurisdiction. To allow otherwise would encourage conflicting and competing decisions of courts and administrative agencies.[183]

[180] *Miswald v. Waukesha County Bd. of Adjustment*, 202 Wis.2d 401, 550 N.W.2d 434 (Ct. App. 1996); first decision stated that the zoning board's decision may be taken up at the next hearing and the decision may be subject to change and modification.
[181] *Miswald v. Waukesha County Bd. of Adjustment*, 202 Wis.2d 401, 550 N.W.2d 434 (Ct. App. 1996)
[182] Wis. Stat. §§ 59.694(10), 62.23(7)(e)10 & 781.03
[183] *Mills v. Vilas County Bd. of Adjustment*, 2003 WI App 66, 261 Wis.2d 598, 660 N.W.2d 705

What happens to the construction project if the zoning board decision is appealed?

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

A zoning board decision is not automatically **stayed** by filing an appeal with the court.[184] For instance, construction may go forward if authorized by a board decision. However, upon petition, the court may find cause to issue a **stay**.

What decisions may a circuit court make on appeal?

Court review of a zoning board decision is highly deferential to the board,[185] with the court presuming the decision of the board is correct and valid when reviewing it by certiorari.[186] Even if the court would not have made the same decision, it will uphold the zoning board's decision if the decision is supported by any reasonable view of the evidence. However, the zoning board decision must be consistent with the law and based on evidence in the record, not on its attitude toward the applicant, the proposal or the zoning ordinance.[187]

Courts may interpret ordinance language de novo if the language is similar to that used in communities across the state.[188] For instance, after the Town of Saukville decided on a conditional use permit that included their interpretation of whether "mineral extraction operations" included "blasting and crushing," the Wisconsin Supreme Court interpreted these terms de novo. The rationale for this decision is that one county agency's interpretation of the language in a single case should not be controlling or persuasive for the many other counties that have ordinances with the same or similar language.[189] Note that the court did not hear the entire conditional use permit anew.

Remand - to send a case back to a court or original decision-making body from which it came for

The court may wholly or partly affirm, reverse, or modify the decision appealed.[190] The court, in overturning a decision, will typically send the case back to the board, or **remand** it, for further proceedings consistent with the court's opinion. Courts may

[184] Wis. Stat. §§ 59.694(10) & 62.23(7)(e)10
[185] *Clark v. Waupaca County Bd. of Adjustment*, 186 Wis. 2d 300, 519 N.W.2d 782 (Ct. App. 1994)
[186] *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401; *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514; *Nielsen v. Waukesha County Bd. of Supervisors*, 178 Wis. 2d 498, 511, 504 N.W.2d 621 (Ct. App. 1993)
[187] *Schalow v. Waupaca County*, 139 Wis. 2d 284, 407 N.W.2d 316 (Ct. App. 1987)
[188] *Marris v. Cedarburg*, 176 Wis. 2d 14, 498 N.W.2d 842 (1993); *Weber v. Town of Saukville*, 209 Wis. 2d 214, 223-4, 562 N.W.2d 412 (1997)
[189] *Bd. of Regents v. Dane County Bd. of Adjustment*, 2000 WI App 211, 238 Wis. 2d 810, 618 N.W.2d 537
[190] Wis. Stat. § 59.694(10)

remand decisions to the zoning board for workload or process-related reasons, including:

1. If they did not, local zoning boards might be tempted to go along with public opinion on difficult or controversial decisions rather than applying the legal standards governing zoning boards, thereby leaving the unpopular decisions to the circuit court.
2. Circuit courts do not have the time to hear numerous local zoning appeals that are the responsibility of local zoning boards.
3. Local zoning boards learn correct procedure and decision making standards if they revisit decisions where the court disagreed and must decide them in ways consistent with the instructions that accompany a remand from circuit court.

Zoning boards should understand and apply the certiorari standards in all of their decisions to minimize having their decisions overturned by the courts.

There is wide variability in the detail and direction provided by the court when it remands decisions to the zoning board. It is very helpful when the court clarifies whether the zoning board is to conduct a de novo hearing or whether they are only allowed to address the issue the court decided on. Typically, a zoning board only collects additional evidence on remand when the court finds that the evidence in the record is insufficient to support their decision or if the decision standards have changed.

May the circuit court take additional evidence?

While state law allows circuit courts to take evidence if necessary to properly decide a matter,[191] this seldom happens. Due to the three political and workload reasons described above, courts often remand decisions back to the zoning board with instructions if they do not provide sufficient evidence.

While there is not a complete list of circumstances that might justify the circuit court to take evidence, courts have concluded that a reviewing court may decide to take additional evidence in the following circumstances:

- When the record before the zoning board is incomplete because the aggrieved party was refused an opportunity to be fully heard or the board excluded relevant evidence.
- When good and sufficient cause is shown for the failure to have offered the evidence to the board.

[191] Wis. Stat. § 59.694(10)

- When the record presented to the circuit court does not contain all the evidence actually presented to the zoning board.
- When the zoning board's record fails to present the hearing in sufficient scope to determine the merits of the appeal.
- When new evidence is discovered after the zoning board's proceedings were closed, although the circuit court may remand to the board to consider the new evidence first.[192]

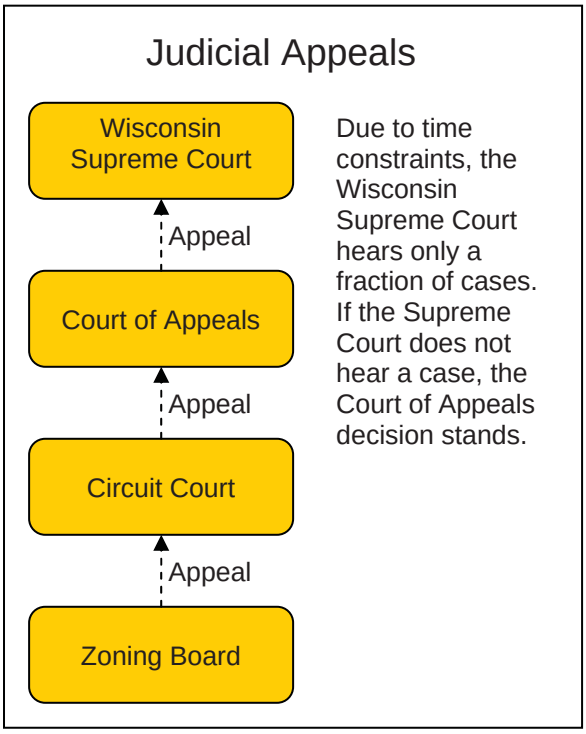
If the circuit court does not take additional evidence, what standards does the court use in reviewing zoning board decisions?

The circuit court reviews the record under the traditional standards of common law certiorari listed on page 117.[193] We recommend that zoning boards understand and apply the same certiorari standards in all of their decisions to minimize having their decisions overturned by the courts. The circuit court may not substitute their discretion for the discretion of the zoning board.[194]

[192] *Klinger v. Oneida County*, 149 Wis.2d 838 , 440 N.W.2d 348 (1989) .
[193] *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401; *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514
[194] *Clark v. Waupaca County Bd. of Adjustment*, 186 Wis. 2d 300, 519 N.W.2d 782 (Ct. App. 1994); *Klinger v. Oneida County*, 149 Wis.2d 838, 440 N.W.2d 348 (1989)

Figure 28: Certiorari Review Standards		
Standard	**Questions the court will ask when reviewing a BOA decision**	**Tips to help the zoning board comply with this standard**
1. Jurisdiction	Did the board have the authority to make this decision?	■ For each hearing, ensure that the geographical location and type of decision are within the jurisdiction of the board.
2. Proper procedures	Did the board follow proper legal procedures?	■ Ensure that public notice and open meeting laws are followed as well as other procedures specified in local or state codes.
3. Proper legal standards	Did the board follow the proper legal standards?	■ Ensure that variance decisions are based on the 3-step statutory test. ■ Ensure that conditional use decisions are based on ordinance standards.
4. Unbiased decision-makers	Was the zoning board's action arbitrary, oppressive or unreasonable, and representative of its will and not its judgment?	■ Ensure that board members are unbiased
5. Substantial evidence	Could a fair and reasonable person have reached the same conclusion as the zoning board based on the facts in the record?	■ Make sure that all evidence, including that from site inspections, is included in the record. ■ Ensure that the decision explains the reasons why the board feels each decision standard was or was not met and specifies which evidence supports each part of their decision.

Figure 29: Common Route for Appealing a Zoning Board Decision



Can zoning board decisions be appealed beyond circuit court?

Yes, there are multiple levels of appeal possible. In the most common route of appeal, the zoning board decision is first appealed to the circuit court. The circuit court decision can be appealed to the court of appeals, which must either take the case or ask the Wisconsin Supreme Court to take the case directly.[195] If the court of appeals issues a decision, its decision can be appealed to the Wisconsin Supreme Court, which hears only a small fraction of the cases sent to it.[196] For a full range of appeal routes, see the diagram on the Wisconsin Supreme Court webpage.[197]

Wisconsin Supreme Court. *Photo courtesy of Bob Rashid Photography*.

[195] Wisconsin Supreme Court website, http://www.courts.state.wi.us/about/organization/moves.htm
[196] The Wisconsin Supreme Court receives about 1,000 petitions for review each term, and agrees to hear about 100 of these cases. Wisconsin Supreme Court, 2000, http://www.courts.state.wi.us/about/organization/moves.htm
[197] http://www.courts.state.wi.us/about/organization/moves.htm

Section V – Review

Keywords

- Certiorari
- Writ
- Stay
- Remand

Test Your Knowledge (answers on page 120)

Chapter 17 - Appeal of Zoning Board Decisions

1) How long does a person have to appeal a decision made by the zoning board?

2) What are the five certiorari standards that zoning board decisions must meet to be upheld?

3) Do the circuit courts take additional testimony related to zoning board decisions?

4) When a court overturns a zoning board decision, why do they typically remand the decision to the zoning board?

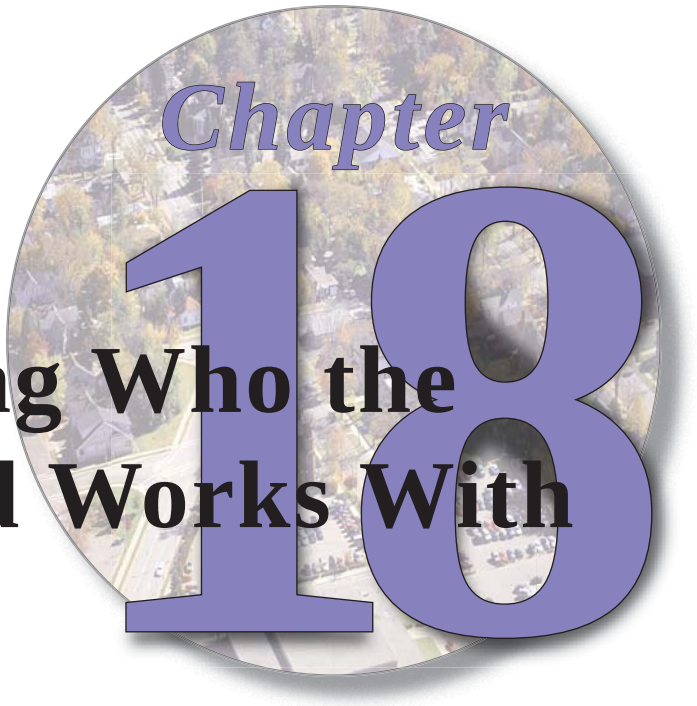
Answers

1) 30 days after the filing of the decision in the office of the board.

2) a. Jurisdiction – geographic and subject matter
   b. Proper procedures
   c. Proper legal standards
   d. Exercise of judgment
   e. Substantial evidence test

3) While state law allows circuit courts to take evidence if necessary to properly decide a matter, this seldom happens

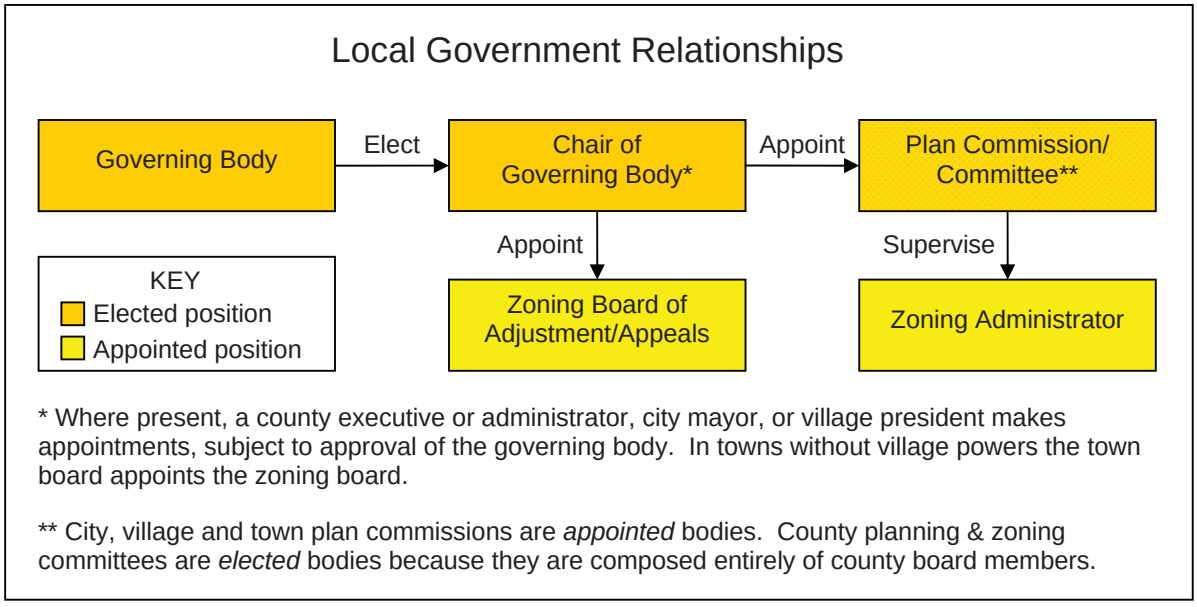
4) a. If they did not, local zoning boards might be tempted to go along with public opinion on difficult or controversial decisions rather than applying the legal standards governing zoning boards, thereby leaving the unpopular decisions to the circuit court
   b. Circuit courts do not have the time to hear numerous local zoning appeals that are the responsibility of local zoning boards
   c. Local zoning boards learn correct procedure and decision making standards if they revisit decisions with which the court disagreed and must decide them in accordance with the instructions that accompany a remand from circuit court



Understanding Who the Zoning Board Works With

Zoning boards are most effective when they understand not only their own roles, but also the roles of the groups they work with on a regular basis. By understanding the roles and responsibilities of these groups, the zoning board becomes more effective in its work. Figure 30 illustrates the relationship between local government bodies that are involved in zoning, as defined in Wisconsin Statutes.

Figure 30: Organizational Structure of Bodies Involved in Zoning



Beyond the public sector, zoning boards also have important interactions with local residents, landowners, developers, realtors, builders, attorneys, news reporters, and UW-Extension educators.

Planning and Zoning Staff

Planning and zoning staff are responsible for the day-to-day administration and enforcement of the zoning ordinance. They are responsible for granting permits for permitted uses and providing information to the public about applying for administrative appeals, variances and conditional uses. Zoning staff play a key role in helping the public understand the rationale behind the ordinances. Planning and zoning staff also work with the zoning board in multiple ways. They are often responsible for preparing staff reports for applications decided by the zoning board, scheduling hearings, providing public notice of hearings, and recording and taking minutes at the hearings.

To enhance the relationship between the zoning board and staff, we recommend that zoning board members consider the following tips:

- The role of staff is to provide support and assistance to help the board be more productive.
- Staff are not mind readers, so let them know what you need and by when.[198]
- When considering an appeal of an administrative decision, the zoning administrator or other staff member is an opposing party to the applicant. Therefore, consider staff presentations and evidence side-by-side with that of the applicant.

Planning and Zoning Committee/Commission

The key role of the planning and zoning committee or plan commission is to prepare and recommend plans,[199] zoning ordinances, and other programs for implementing the plan to the governing body. The governing body is legally responsible for making final decisions. We recommend that the zoning board

[198] Easley, V. Gail and David A Theriaque. The Board of Adjustment. 2005. Planners Press, pp. 18-19.

[199] Including developing: clear community vision and goals; sufficient public education and buy-in; and zoning that complements, and is complemented by, other community tools.

meet with the plan commission/committee[200] annually to discuss potential revisions to the zoning ordinance in order to improve provisions that are unclear, inadequate, overly restrictive, or otherwise problematic.

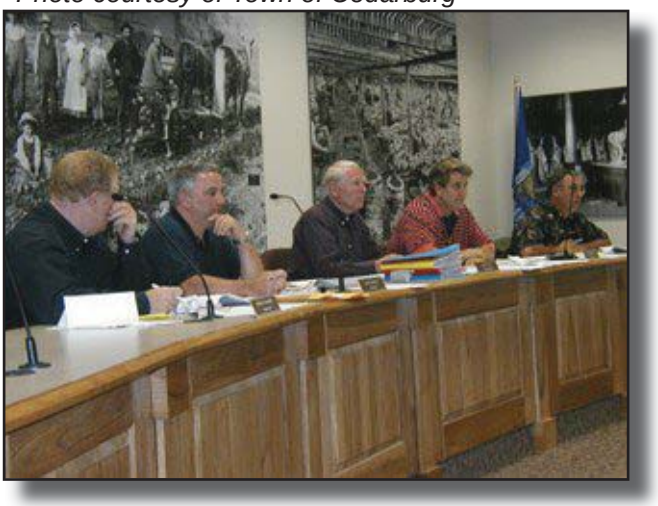
If assigned by the local zoning ordinance, the plan commission/committee also decides whether to grant conditional use permits. Additionally, they may be charged with overseeing the hiring, training, workload, and personnel matters of planning and zoning staff.

Governing Body (County Board, Town Board, Village Board, City Council)

The governing body adopts and amends plans and zoning ordinances and appoints members to the zoning board. Specifically, the chair, administrator, or executive of the governing body appoints the zoning board subject to the approval of the governing body. Other responsibilities assigned to the governing body include approving the government budget (including a budget for the zoning board), and deciding conditional use permits if assigned by the local zoning ordinance.

To achieve community planning goals and adhere to legal standards, the zoning board must sometimes make unpopular decisions. The elected officials on the governing body will eventually hear about these decisions, making it important that they understand land use issues and the rationale of the zoning board. Land use planning initiatives, education about zoning and other plan implementation tools, and discussions about current land use topics can help the governing body gain a sense of confidence in the decisions that the board makes.

Figure 31: Cedarburg Town Board.
Photo courtesy of Town of Cedarburg



[200] 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.

Local Residents

Local residents are valuable resources on the issues affecting their communities. Most residents are heard during public hearings when they appear to support—or more often object to—a proposed variance, conditional use or administrative appeal.[201] To optimize public input:

- Provide additional notification beyond the required legal notice about hearings by posting signs and sending letters or postcards to neighbors and other interested parties.
- Provide clear, straightforward application materials that are available to applicants and all local residents.
- Have zoning staff willing and able to explain the zoning procedures, standards, and rationale.
- Require applications to be completed and available to local residents through the zoning office well in advance of a public hearing. This provides time for the public to read, digest and perhaps further explore the information in the application prior to the hearing, often leading to more well-informed and thoughtful discussion.
- Describe the role of the zoning board at the beginning of each hearing or meeting.
- Make zoning board decisions consistent with the standards.

Through participation in public meetings residents offer a range of perspectives and knowledge that can be used to develop stronger decisions.

Figure 32: Residents attend a public hearing.
Photo by Robert Korth, UW-Extension Lakes Program

[201] Easley, V. Gail and David A Theriaque. *The Board of Adjustment*. 2005. Planners Press. p. 19.

Developers, Realtors, Builders, and Other Contractors

Developers, realtors, builders and other contractors represent the private sector side of planning and development. These are the companies and individuals that design, build and sell subdivisions and other developments based on the codes and regulations that a community has in place. While developers and builders may complain about regulations, they appreciate a place where the process for obtaining permits is streamlined and transparent (there are no hidden costs or requirements), even though that place may be highly regulated.[202] Realtors, builders and other contractors often represent the landowner in applying for zoning permits.

Attorneys

Zoning rests on legal principles, statutes and codes. While many zoning boards rely on a municipal attorney for legal representation, some zoning boards hire their own attorney who specializes in land use issues. This ensures that the zoning board is working with someone who is up to speed on zoning board issues, will spend adequate time on their current applications, and may provide personalized education for the board. While there is upfront cost for this, a talented land use attorney assisting the zoning board may save the municipality money by avoiding litigation costs.

Applicants who bring lawyers to zoning board meetings may have a different interpretation of statutes or local codes than the zoning board, but this does not mean that the zoning board is wrong. In fact, the Wisconsin Supreme Court has stated repeatedly that the courts may not disturb the decision of a zoning board if any reasonable view of the evidence sustains the decision.[203] Thus, by making decisions based on the law and keeping a complete record of hearings, zoning boards minimize the likelihood their decisions will be overturned.

News Reporters

The media may attend controversial zoning board hearings. Recognizing that reporters are required to cover a very broad range

[202] Senville, Wayne M. *Welcome to the Commission! A Guide for New Members*. 2000. Champlain Planning Press, Inc., Burlington, VT.

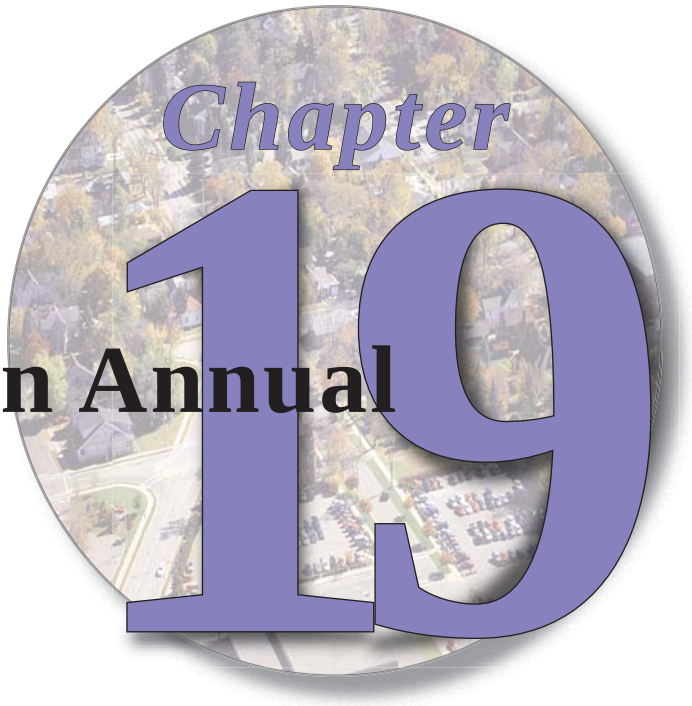
[203] *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401; *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

of issues and work under short timelines, it's best to help them understand the role of the zoning board before a controversial issue arises. Share some, or all, of this handbook with them or invite them to a zoning board training session. Additionally, zoning staff can help reporters understand the issues at hand by providing them with copies of staff reports and applicable ordinances, plans, statutes and case law, and by taking the time to explain these materials and answer questions. When working with the media, be sure to provide clear graphics and translate your technical language into lay terminology. Reporters will get information from somewhere, so it might as well be from you or your staff. Working as a team with reporters is the best approach for obtaining accurate press coverage.

UW-Extension Educators

UW-Extension educators seek to improve the quality of local decisions by providing public, private and non-profit clients with information, targeted research results, and process support. The UW-Extension Center for Land Use Education offers educational workshops for zoning boards covering the roles and responsibilities of the zoning board and updates on recently adopted laws and court decisions. Upcoming zoning board workshops are listed at http://www.uwsp.edu/cnr/landcenter/workshopszb.html

Figure 33: St. Croix County planning director, David Fodroczi reviews a land use map with UW-Extension community development educator, Jim Janke.
Photo by Jim Gill, UW-Extension photo gallery



Conducting an Annual Self-Audit

Review Zoning Board Decisions

Zoning board members may be tempted to bend the rules to fit their view of proper zoning policy if they forget their quasi-judicial role in deciding variances, administrative appeals and conditional uses. One way to avoid this temptation is to provide an opportunity for the zoning board to become directly involved in local land use policy development. Because of its unique role, the board has special insight into circumstances in which flexible development standards may be required, where policies concerning nonconforming lots and structures may need reconsideration, or where enforcement or board related procedures require revision.

An annual summary of the number and type of board decisions and related development conditions imposed can guide the board in making recommendations for policy changes. An example of such a report is provided in *Appendix D*. Look for patterns in the report that suggest opportunities for improving ordinance language clarity, effectiveness of standards, and administrative efficiency.

Communicate with Plan Committee/Commission

We recommend that the zoning board meet annually with zoning staff, the plan commission/committee, or the governing body to discuss concerns or make recommendations related to zoning. In addition, zoning boards may invite plan commission/committee members to attend zoning board meetings to gain an understanding and appreciation for the work of the zoning board. Similarly zoning board members may also consider attending plan commission/committee meetings and meetings of the governing body when zoning issues are on the agenda. You might choose one zoning board member to do this, or rotate the role through the zoning board members so everyone benefits from this experience. Provide a zoning board notice in accordance with the open meetings law if you will have multiple zoning board members at meetings of other bodies. Also ensure that zoning board members do not discuss any current cases.

Review Informational Materials and Forms

Zoning boards rely heavily on written reports, forms and other materials to make well-informed decisions. Application materials and forms should prompt applicants to submit sufficient information to meet their burden of proof and may ultimately reduce the number of requests that come before a zoning board. Staff reports and decision forms should prompt zoning boards to follow appropriate legal standards and properly record their rationale for making decisions. We recommend that the zoning board work jointly with zoning staff to review and update these important materials on a regular basis:

- **Application materials** should clearly describe the zoning board hearing process, submittal requirements, and decision criteria. Together with guidance from zoning staff, these materials should also help applicants to identify alternative site locations or project designs that comply with ordinance standards.

- **Application forms** should prompt applicants to meet their legal burden of proof. Many jurisdictions supply an example site plan and a sample petition as part of a packet of application materials. The site plan is used to illustrate dimensional standards and other ordinance requirements. Many jurisdictions also require project site photos, which are

useful to the board in evaluating a proposal and later to the zoning department in monitoring project compliance.

- **Staff reports** should provide zoning boards with critical information regarding relevant plans, ordinances, restrictions, and site conditions on the property and neighboring properties. Zoning staff, together with zoning boards, should decide whether it is appropriate to prepare staff reports and what to include in them.

- **Decision forms** should prompt findings of fact and conclusions of law by the zoning board. They should also reflect appropriate legal standards (e.g. variance criteria) and specify appeal rights, a permit expiration date, and circumstances that might prompt the board to revisit its decision in the matter.

Examples of materials and forms are provided in *Appendices D and E*.

Review, Enforcement, and Appeals Procedures

There are many procedural issues related to zoning administration and enforcement that are not specified in state statutes or case law. These may cause undue administrative burdens, frustrate landowners and other interested parties, and potentially provide opportunity for appeal of zoning decisions. We recommend that governing bodies, in consultation with zoning boards or staff, review and adopt necessary rules or ordinances that:

- Provide for adequate notice of decisions of administrative officials to affected parties,
- Limit the time period for appeal of administrative decisions to the zoning board,
- Specify how the filing date of a board decision is determined (which establishes the commencement of the 30-day appeal period),
- Specify circumstances allowing reconsideration of a decided matter, and
- Specify how after-the-fact applications will be treated.

Review Rules for Conduct of Meetings and Hearings

To avoid similar issues related to zoning board meetings and hearings, we recommend that local communities adopt necessary rules, ordinances, or materials that:

- Provide proper notice for meetings, hearings and closed sessions,
- Describe how site inspections will comply with open meetings law requirements,
- Identify and address bias and conflicts of interest,
- Provide for appointment and education of alternate board members,
- Determine admissibility of written testimony, and
- Provide instructions for those providing testimony in order to promote hearings that are orderly, fair and efficient.

Review Need for Counsel

Generally, the municipal attorney provides legal representation for the governing body of the local unit of government. However, as land use issues become increasingly complex, case loads increase, and applicants regularly hire their own attorneys, more zoning boards are opting to retain independent legal counsel with expertise in land use or zoning issues. These zoning boards find that it is worthwhile to spend money upfront in exchange for avoiding potential litigation—and the time, money and headaches associated with it! Many communities who opt for this approach retain an attorney from outside of the area to avoid someone who represents local property owners.

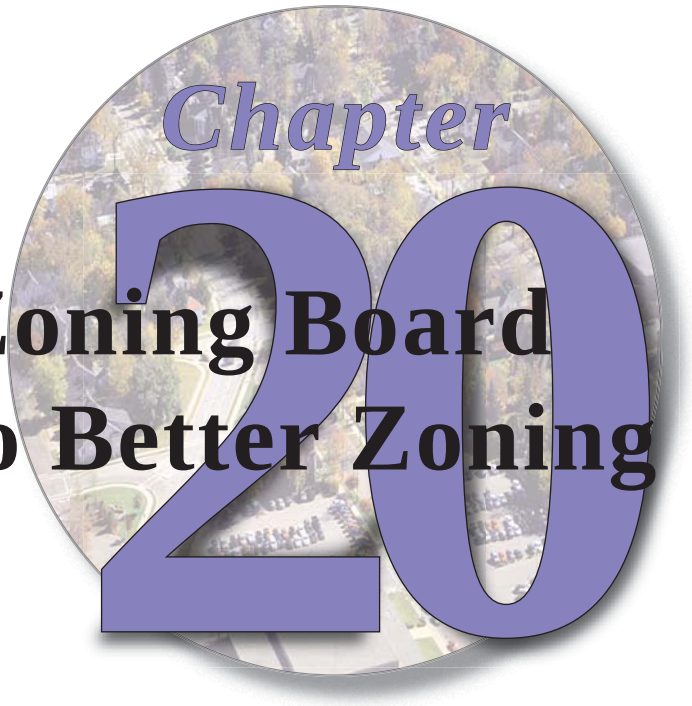
Since a zoning officer or the planning commission/committee may contest any zoning board decision, and a municipal attorney may not represent more than one body within a local government in the same case,[204] the zoning board should anticipate needing their own attorney and have this provided for in local rules, policies and budgets. We recommend that zoning boards meet with the appropriate standing committee or governing body to discuss issues such as when the zoning board may retain independent legal counsel and how counsel will be selected and compensated.

[204] *Nova Services v. Village of Saukville*, 211 Wis.2d 691, 565 N.W.2d 283 (Ct. App. 1997)

Take Advantage of Opportunities for Continuing Education

Zoning boards should regularly assess their needs for ongoing education. Local zoning staff may be able to provide zoning boards with updates to local ordinances, statutes, and case law. Training may also be provided by other groups such as the University of Wisconsin-Cooperative Extension. For example, the Center for Land Use Education regularly provides training for zoning boards, including updates to state statutes and case law. The Local Government Center provides training on topics such as Wisconsin's open meeting law, public records law, and code of ethics. County-based Extension educators may also be available to assist with these or other topics.

Scheduling periodic educational or working sessions also provides a good opportunity for zoning boards to work through and discuss the impacts of development scenarios outside of the pressures of a formal decision-making process. (However, zoning boards must be careful not to discuss current or pending development decisions outside of an open meeting). These types of opportunities may also allow zoning board members to become more comfortable with fellow board members and staff.



Translating Zoning Board Decisions into Better Zoning Ordinances

Ordinances are not carved on stone tablets—and that's not just because Wisconsin is the nation's leading paper producer! Since it's impossible to foresee all future changes and how the ordinance will apply to these situations, zoning ordinances should be working documents that are modified as needs arise. We recommend updating the zoning ordinance every few years to:

- Incorporate changes in standards or administration that improve ordinance clarity or efficiency based on the practical knowledge you've gained from working with the ordinance,
- Plan for or respond to new uses or development patterns, and
- Maintain consistency with any changes to your community comprehensive plan.

Through experience interpreting an ordinance and applying it to specific fact situations, zoning boards often develop useful ideas about improving the ordinance. We recommend they share these ideas with the plan commission as described below.

How can the zoning board and plan committee/ commission work together to improve the local zoning ordinance?

Ultimately, the decision to amend a zoning ordinance is made by the local governing body, based on a recommendation from the plan commission. Following their annual self-audit, we recommend that the zoning board meet with the plan commission/ committee to discuss their experience applying the ordinance to specific situations and other findings. Specifically, the zoning board may suggest the plan commission/committee revise the zoning ordinance in the following ways:

- **Clarify terminology**. Definitions may need to be added or clarified. Clarify ordinance definitions and text based on recent administrative appeals.
- **Recommend effective design or performance standards**. See the discussion of the advantages and disadvantages of each in *Chapter 14*.
- **Recommend appropriate levels of permit review**. If the zoning board has developed a set of conditions that it applies routinely to specific conditional uses that result in effective control, the zoning board may recommend including these conditions in the ordinance as requirements of the conditional use. Conversely, if a certain type of permitted use is proving problematic, the board may recommend adding requirements to the ordinance or converting the permitted use to a conditional use, so that additional conditions may be applied to mitigate adverse impacts.
- **Ensure enforceability**. Provide clear directions about how measurements such as setbacks, heights, and floor areas are to be made and ensure adequate staffing and staff training. Encourage the planning commission/committee to adopt an enforcement policy if none exists.

If you want to change the law – get elected!

If zoning board members want to go beyond the points outlined above and change the zoning ordinance, we recommend they participate in an advisory group for ordinance revision or run for a position on the local governing body.

Section VI – Review

Keywords

- Self-audit

Test Your Knowledge (answers on page 136)

Chapter 18 - Understanding Who the Zoning Board Works With

1) Name five of the eight groups that zoning boards regularly work with.

2) Which local government body has the power to change the zoning ordinance?

3) Describe three ways that zoning staff can help the zoning board.

4) Describe two ways to optimize public participation at a zoning board hearing.

Chapter 19 – Conducting an Annual Self-Audit

5) What should be included in an annual self-audit?

6) Who is available to provide continuing education for zoning boards?

Chapter 20 – Translating Zoning Board Decisions into Better Zoning Ordinances

7) How often should zoning ordinances be updated?

8) Who has the authority to change or amend the zoning ordinance?

9) If a zoning board member wants to change the ordinance, what should they do?

Answers

1) a. Planning and zoning staff
   b. Plan commission/committee
   c. Governing body
   d. Residents
   e. Development community
   f. Attorneys
   g. News reporters, and
   h. UW-Extension

2) The governing body (county board, town board, village board, city council)

3) a. By providing information about applying for administrative appeals, variances, and conditional uses
   b. By helping the public understand the rationale behind the ordinances
   c. By preparing staff reports for the applications decided by the zoning board
   d. By scheduling hearings
   e. By providing public notice of hearings
   f. By recording and taking minutes at the hearings

4) a. By providing public notice of hearings as required by state law
   b. By providing clear, straight forward application materials that are available to applicants and all local residents
   c. By encouraging zoning staff to explain zoning procedures, standards, and rationale
   d. By requiring applications to be completed and available to local residents through the zoning office in advance of the public hearing
   e. By describing the role of the zoning board at the beginning of each hearing or meeting
   f. By make zoning board decisions consistent with the standards

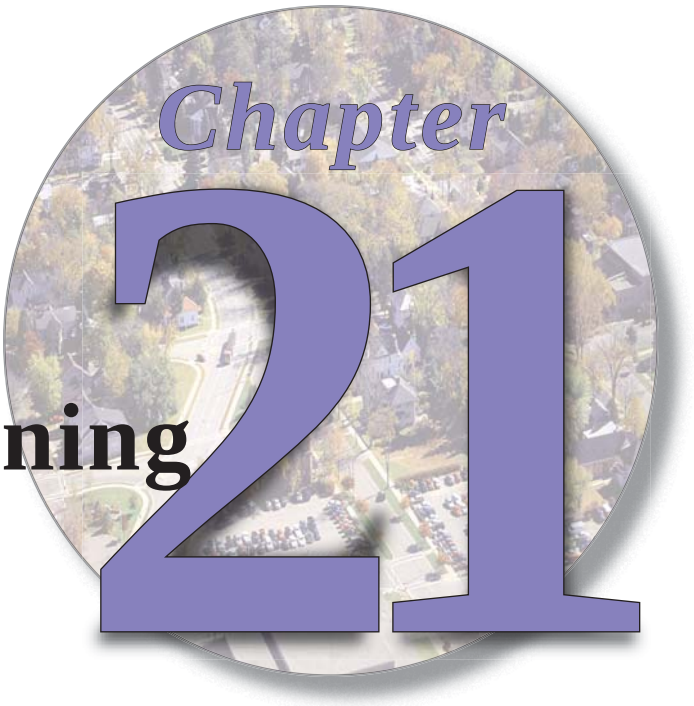
5) Decisions, procedures, forms, rules of conduct, need for counsel, and opportunities for continuing education. Any issues or needs that arise should be clearly communicated with zoning staff, the plan commission/committee, and/or the governing body, as appropriate

6) a. First, check with your local planning and zoning staff. They can often provide updates regarding local development issues, ordinances, and even relevant case law or statutory updates
   b. Next, contact your local Extension office. They may be able to offer training or put you in contact with the Center for Land Use Education or Local Government Center, depending on your needs

7) Every few years

8) The governing body, with recommendations from the plan committee/commission

9) Meet with the plan committee/commission to discuss potential changes, participate in an advisory group for ordinance revision, or run for office on the governing body



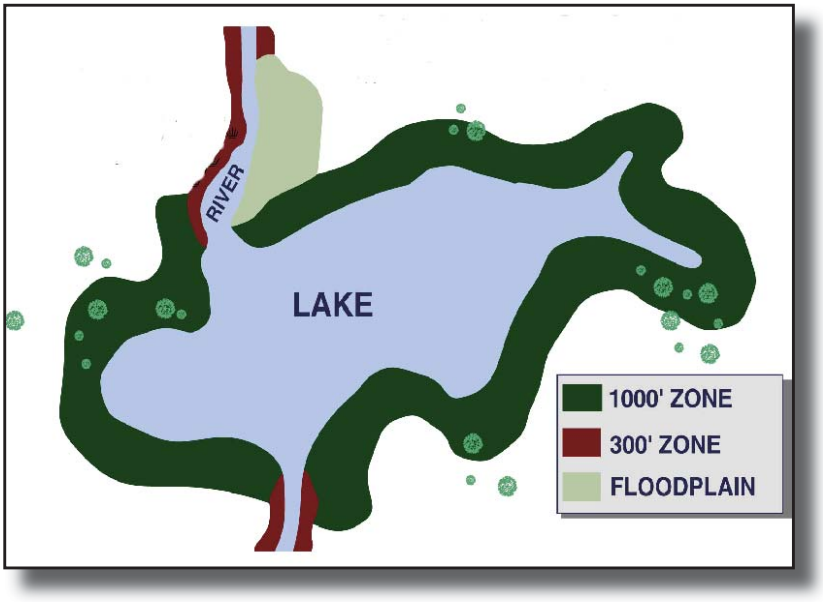
Shoreland Zoning

Where does shoreland zoning apply?

Wisconsin statutes define shorelands as lands within 1,000 feet of the ordinary high-water mark (OHWM) of a navigable lake, pond, or flowage and lands within 300 feet or within the floodplain of a navigable river or stream, whichever distance is greater.

A state administrative rule (NR 115) sets minimum standards for local ordinances. The state requires counties to adopt and administer development standards for shorelands in unincorporated areas,[205] which are areas outside of cities and villages. Many counties have adopted standards that are more restrictive than state minimum standards. Towns may not opt out of county shoreland zoning, as they may general county zoning.[206] While cities and villages are not required to adopt

Figure 34: Areas Where Shoreland Zoning Applies



[205] Wis. Stat. § 59.692; Wis. Admin. Code § NR115.
[206] Wis. Stat. § 59.692(2)(a)

shoreland zoning, shorelands within their municipal boundaries may be subject to shoreland zoning in three cases:[207]

1. When official state maps describe wetlands within shoreland areas,
2. When a city or village has annexed unincorporated shorelands,[208] and
3. When cities or villages have voluntarily enacted their own shoreland zoning requirements.

What are the purposes of shoreland zoning?

The specific purposes of a shoreland zoning ordinance should be considered when deciding whether to grant variances, conditional uses and administrative appeals for properties in the shoreland zone, just as with any other ordinance.

The purposes of shoreland zoning, as defined by the state, are to:

- Maintain safe and healthful conditions,
- Prevent and control water pollution,
- Protect spawning grounds, fish, and aquatic life,
- Control building sites, placement of structures, and uses, and
- Reserve shore cover and natural beauty.[209]

In addition, shoreland zoning protects the rights of all Wisconsin residents to access the water, fish, swim, boat, and enjoy the scenic beauty, which is also known as the public interest.

How do our shoreland decisions affect property values, water quality, fisheries and wildlife?

Extensive research exists describing how land use along lakes and streams affects water quality, fisheries and wildlife. Here is a very brief summary of the research and a few references if you would like to learn more.

The quality of our lakes and streams is ultimately a reflection of how we take care of our land. Specifically, how our communities develop and redevelop the land around lakes and streams plays a

[207] Kent, Paul G. and Tamara A. Dudiak. *Wisconsin Water Law: A Guide to Water Rights and Regulations*, 2nd Ed., 2001, p. 38.
[208] Wis. Stat. § 59.692(7)(a)
[209] Wis. Stat. § 281.31

large role in whether those lakes and streams remain healthy for generations to come or are degraded and become a detriment to the community.

Property values

A recent study of over 1,000 waterfront properties found that when all other factors were equal, properties on lakes with clearer water commanded significantly higher property prices. In other words, people prefer clean water and will pay more to live on lakes with better water quality.[210]

Water quality, fisheries and wildlife

Maintaining good water quality, fisheries and wildlife in lakes and streams depends on three steps:

1. Curb pollutants

Curb pollutants at their source – fertilizers, eroding soils, malfunctioning septic systems, household toxins and agricultural runoff.

Phosphorus is an essential nutrient for plants. However, when too much phosphorus makes its way into our lakes and streams, it promotes the rapid growth of weeds and algae and decreases water clarity, often turning lakes green. Decaying algae also deplete oxygen in the water, so that fish can no longer thrive. Human activities contribute a great deal to the amount of phosphorus that enters a lake or stream.

Consider this – one pound of phosphorus in runoff can result in up to 500 pounds of algae growth! Phosphorus comes from soils and fertilizers, which are easily washed into lakes.

Since phosphorus is often bound to soil particles, one key to keeping phosphorus out of lakes and streams is to minimize the amount of land that is cleared or otherwise disturbed, so that soil erosion is minimized.

Figure 35: Land Use Affects Water Quality

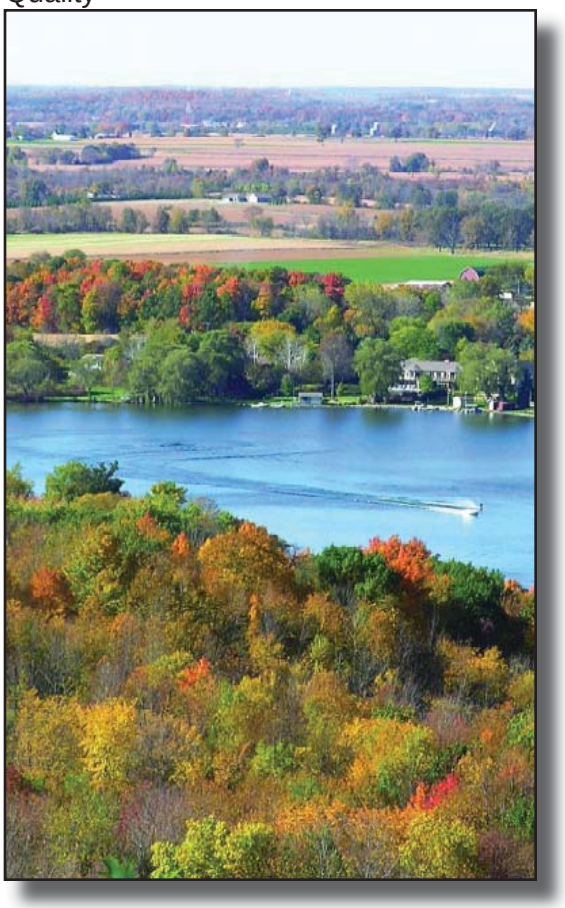
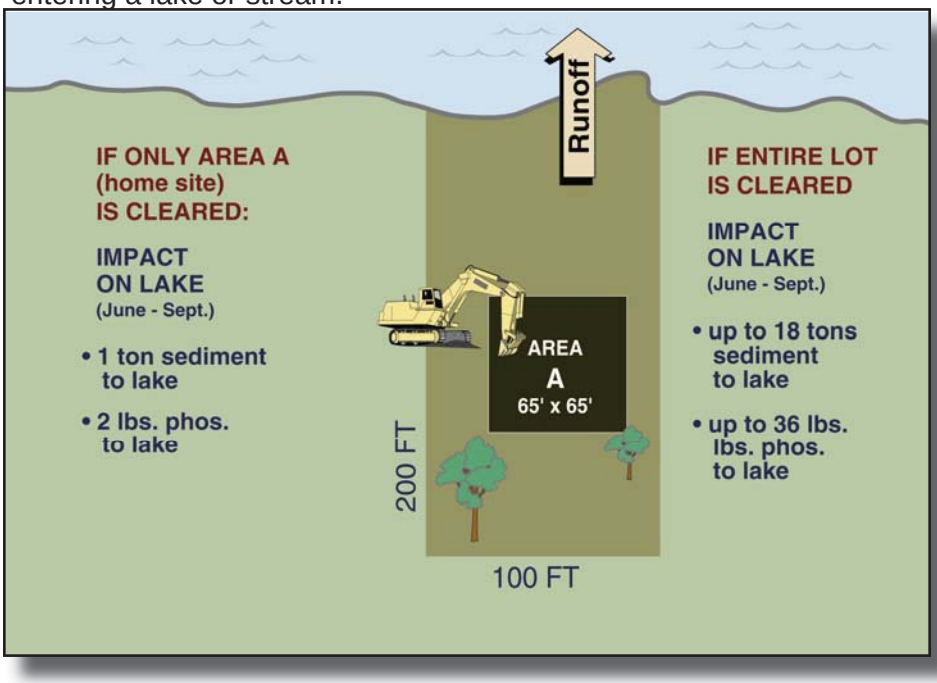


Figure 36: Effects of Excessive Phosphorus One pound of phosphorus can result in up to 500 pounds of algae growth.

[210] Krysel. Charles et al. *Lakeshore property values and water quality: Evidence from property sales in the Mississippi headwaters region*. June 2003. Mississippi Headwaters Board. Available: www.mhbriverwatch.dst.mn.us/publications/lakeshore_property.pdf

Figure 37: Less land clearing limits the amount of phosphorus entering a lake or stream.



Another approach is to attempt to capture the eroded soil before it enters the waterbody. As Figure 37 illustrates, completely clearing a half-acre lot can add up to 36 pounds of phosphorus to a lake or stream.

In addition to phosphorus, many other chemicals – from antifreeze to zylene – can pollute lakes and streams.

To curb pollutants, zoning board members may apply the following conditions. Land conservation employees or private licensed engineers may help create erosion control plans.

- Limit the area of grading and other disturbance and make the remainder of the parcel off-limits to heavy equipment.
- Maintain established trees and native plants with deep root systems to hold soil in place.
- Require a complete erosion control plan and inspection of erosion control measures prior to and during construction. Require bonding to repair damage if erosion control measures fail.
- Require a list of the chemicals and of the maximum quantities of them that will be used or stored in the shoreland zone. For instance, a nursery may use or store quantities of fertilizers and pesticides that could have a large impact on a nearby lake or stream. Gasoline and other toxic chemicals should also be considered. Use this information to decide whether the proposed use is reasonably suited for the location.
- To ensure that conditions are met, require self-reporting or independent inspections and use bonding or specific predetermined fines.

Keeping phosphorus or any other chemical 100% contained over a long timeframe is not feasible. Thus, the zoning board may decide that the potential for water pollution is too great on a site and deny the permit.

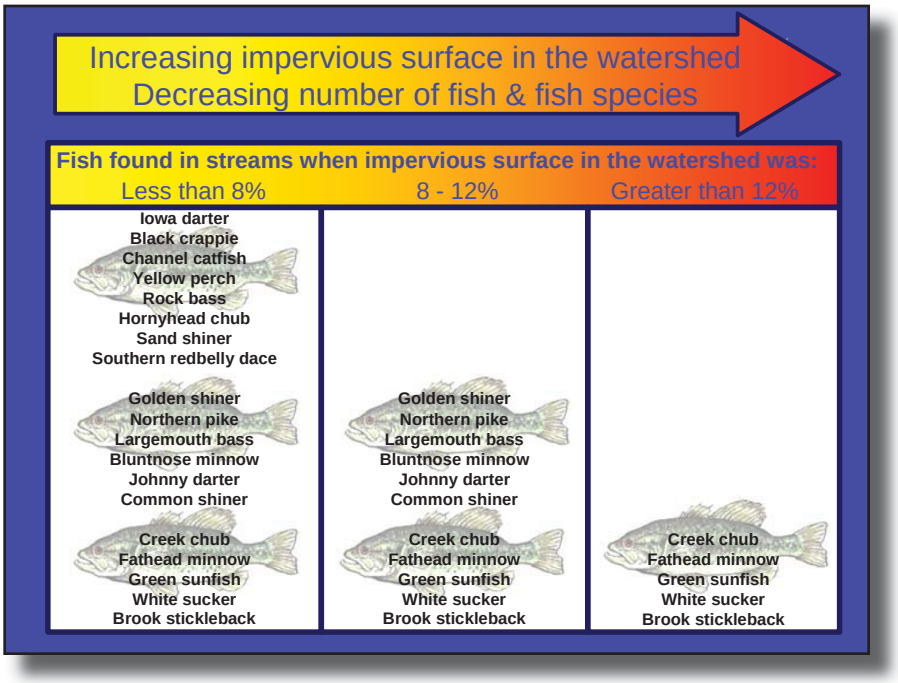
2. Cut runoff

Runoff is excess water that comes from hard surfaces like rooftops, driveways, parking areas, sidewalks, decks, and compacted soils. Gravel areas quickly become compacted and create nearly as much runoff as paved surfaces. Runoff water washes soil, fertilizer, car fluids and other pollutants into our lakes and streams. To reduce runoff, let water soak into the ground.

Lawns absorb little rainfall. In fact, a recent Wisconsin study found that lawns created much more runoff than wooded areas. As a consequence, the runoff from unfertilized lawns carried eight times more phosphorus to the lake than the runoff from similar sized wooded areas.[211]

Runoff also affects fisheries. Researchers studied 47 Wisconsin streams and found that fish and insect populations decline dramatically when more than 8-10% of the watershed is covered with hard surfaces such as rooftops, roads and driveway. Streams with more than 12% hard surfaces have consistently poor fish communities.[212] Not surprisingly, impervious surfaces closer to the water have a greater impact because there is less opportunity for the runoff from these areas to soak into the ground or be filtered before reaching the lake or stream.[213] Hard surfaces harm fisheries because:

Figure 38: Impervious surfaces greater than 8% of the watershed decrease fish in streams.



[211] Graczyk, David J. et al. *Hydrology, nutrient concentrations, and nutrient yields in nearshore areas of four lakes in northern Wisconsin*, 1999-2001, 2003. USGS Water Resources Investigation Report 03-4144, p.41. Available: http://pubs.usgs.gov/wri/wrir-03-4144

[212] Wang, L., J. Lyons, P. Kanehl, R. Bannerman, and E. Emmons 2000. "Watershed Urbanization and Changes in Fish Communities in Southeastern Wisconsin Streams." *Journal of the American Water Resources Association*. 36:5(1173-1187); Wang, L., J. Lyons, and P. Kanehl 2001. "Impacts of Urbanization on Stream Habitat and Fish across Multiple Spatial Scales." *Environmental Management*. 28(2):255-266.

[213] Wang, L., J. Lyons, and P. Kanehl 2001. "Impacts of Urbanization on Stream Habitat and Fish across Multiple Spatial Scales." *Environmental Management*. 28(2):255-266.

- Warm runoff from roads and other hard surfaces raises water temperatures and decreases oxygen levels, eliminating some fish species,
- Sediment carried in the runoff creates cloudy water, so fish that hunt by sight have a hard time finding dinner,
- Sediment covers spawning areas and clogs the gills of some fish, and
- Streams become 'flashy', meaning runoff occurs more quickly after a storm, peak flows become larger, and critical dry season flows decrease because less groundwater recharge is available.

To cut runoff, zoning board members may apply the following conditions. Land conservation employees or private engineers can help design or approve effective designs.

- Limit the area of impervious surfaces. This can be done by narrowing roads and driveways and building up rather than out or by replacing conventional hard surfaces with alternatives such as green roofs and pervious pavers.
- Locate impervious surfaces as far as possible from lakes and streams and in locations where their runoff will soak into the ground or at least be substantially filtered prior to entering the water body.
- Maintain established trees and native plants whose deep root systems hold soil in place and extend each year to create new pores in the soil that allow water to soak in.
- Limit the area of compacted soils that prevent water from soaking in. To do this, limit the area compacted by heavy equipment and other vehicles.
- Minimize grading that removes the natural divots where water naturally collects and has time to soak in.
- Consider requiring landowners to decompact soil after construction in areas where compaction is not necessary to support buildings, roads or driveways. A review of methods that are and are not effective is available from the Center for Land Use Education.
- To ensure that conditions are met, require self-reporting or independent inspections and use bonding or specific predetermined fines.
    - To impress upon a contractor that he was serious about not removing unmarked trees, a landowner having a motel built on his shoreland property included a fine of $10,000 per unmarked tree that was damaged.

A proposal may create more runoff than can soak in on the lot. To avoid adversely affecting neighboring landowners, lakes or streams, the zoning board may decide to deny the permit.

3. Capture and cleanse

Figure 39: Intact Shoreland Buffers Cleanse Runoff

If pollutants are present and hard surfaces increase the amount of runoff carrying pollutants toward the lake, the last line of defense is to capture and cleanse the runoff before it reaches the waterway by using shoreland buffers, rain gardens, rain barrels or engineered approaches.

Natural shorelands contain a lush mixture of native grasses, flowers, shrubs and trees that help to filter polluted runoff and provide important habitat for animals in the water and on the land. Trees and branches that have fallen in the water provide another important component of wildlife habitat—natural fish cribs, basking areas for reptiles, and feeding sites. If a property has lawn to the water's edge, the best place to start planting to improve water quality is in the area where the most water runs off your property. Larger areas of natural shoreline provide more benefits.

A mature native buffer represents many years of nature at work and discourages undesirable, exotic plants and animals while attracting songbirds, butterflies, turtles and frogs.

To capture and cleanse runoff, zoning board members may apply the following conditions. Land conservation employees, professional licensed engineers and natural landscaping professionals may help create storm water management plans.

- Require a storm water management plan with a defined performance standard (e.g., no net increase in storm water runoff from a 50 year storm). Storm water practices may include green rooftops, pervious pavers, infiltration basins/raingardens, buffer strips, etc.
- Maintain established plants, including trees and native plants with stiff stems to slow down and filter runoff. The plants also provide essential food and habitat for wildlife.
- Require downspouts to be directed to lawn or landscaping, not onto hard surfaces.
- Require rain gardens that collect water during wet times and serve as beautiful gardens all the time. They are landscaped areas planted to wildflowers and other native vegetation to replace areas of lawn. The gardens fill with a few inches of water and allow the water to slowly filter into the ground. To determine the necessary size to capture runoff from hard surfaces, see the publication *Rain Gardens: A How-To Manual for Homeowners* (http://clean-water.uwex.edu/pubs/pdf/home.rgmanual.pdf).
- Require shoreline buffer restoration or expansion to filter runoff. See the publication *Protecting and Restoring Shorelands* at http://clean-water.uwex.edu/pubs/pdf/shore.protect.pdf to find out how large of a buffer is needed to achieve various benefits.
- To ensure that conditions are met, require self-reporting or independent inspections and use bonding or specific predetermined fines.

A proposal may create more runoff than can be captured and cleansed on the lot. To avoid adversely affecting neighboring landowners, lakes or streams the zoning board may decide to deny the permit.

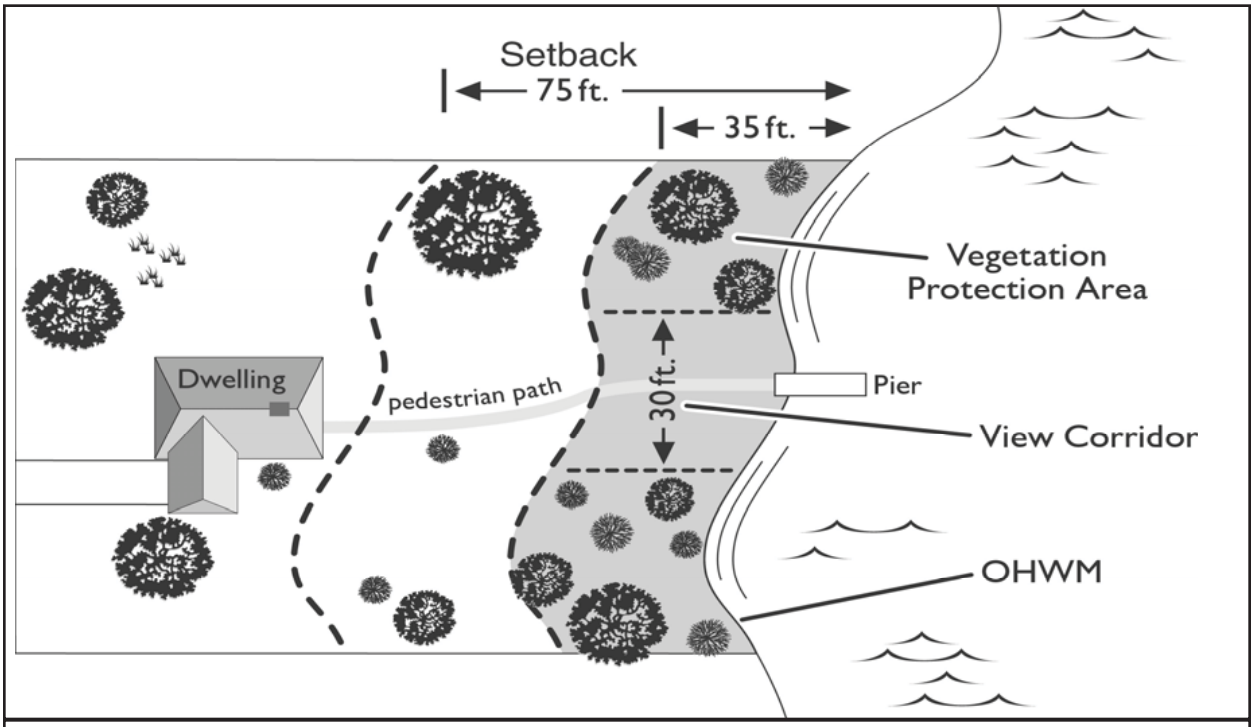
Minimum statewide shoreland zoning standards

To achieve the purposes of shoreland zoning, the state sets minimum building setbacks, restrictions on shoreline vegetation removal, and minimum lot sizes to limit the density of development. Many counties have adopted standards that are more restrictive than state minimum standards. The state minimum standards are described generally in *Figure 40*.[214]

Area variances in shoreland areas compromise water quality, fish and wildlife habitat, and natural scenic beauty. The effects

[214] Figure created by Jeffrey Strobel, Environmental Resources Center, for *Wisconsin Water Law: A Guide to Water Rights and Regulations*, 2nd Ed., 2001.

Figure 40: Minimum Statewide Shoreland Zoning Standards



Limited removal of shoreline vegetation—In the 35-foot strip adjacent to the ordinary high water mark, no more than 30 feet in any 100 feet may be clear cut.[215]

Building setbacks—Unless a development pattern exists, a setback of 75 feet from the ordinary high water mark is required for structures except piers, boat hoists and boathouses.[216] A limited exception is available for certain minor structures in exchange for shoreline revegetation.[217]

Minimum lot sizes—Unswered lots must have a 100 foot minimum average width and 20,000 square feet. Sewered lots must have a 65 foot minimum average width and 10,000 square feet.[218]

of variances, though they may be imperceptible on an individual site, accumulate lot by lot throughout the shoreland. For instance, runoff from structures located too close to the shore quickly carries nutrients and sediment to a lake or stream with very little opportunity for a shoreland buffer to filter contaminants or infiltrate runoff. Consequently, many communities limit variances to minimize impacts on public waters.[219]

[215] Wis. Admin. Code § NR 115.05 (3)(c)
[216] Wis. Admin. Code § NR 115.05 (3)(b)
[217] Wis. Stat. § 59.692(1v)
[218] Wis. Admin. Code § NR 115.05 (3)(a)
[219] *Creating an Effective Shoreland Zoning Ordinance: A Summary of Wisconsin Shoreland Zoning Ordinances*, 2000, DNR publication #WT-542-00. See Appendix C for ordering information.

For more information on how shoreland management affects lakes and streams, read—

Phosphorus in Lawns, Landscapes and Lakes. 2004. Minnesota Department of Agriculture and partners. Phone: 651-296-6121 Available: www.mda.state.mn.us/appd/ace/phosphorusguide.pdf

Protecting Your Waterfront Investment: 10 Simple Shoreland Stewardship Practices. 2005. UWEX Publication GWQ044 and Wisconsin DNR (WT-821 2005). Available: www.uwsp.edu/cnr/landcenter/Publications/waterfront.pdf

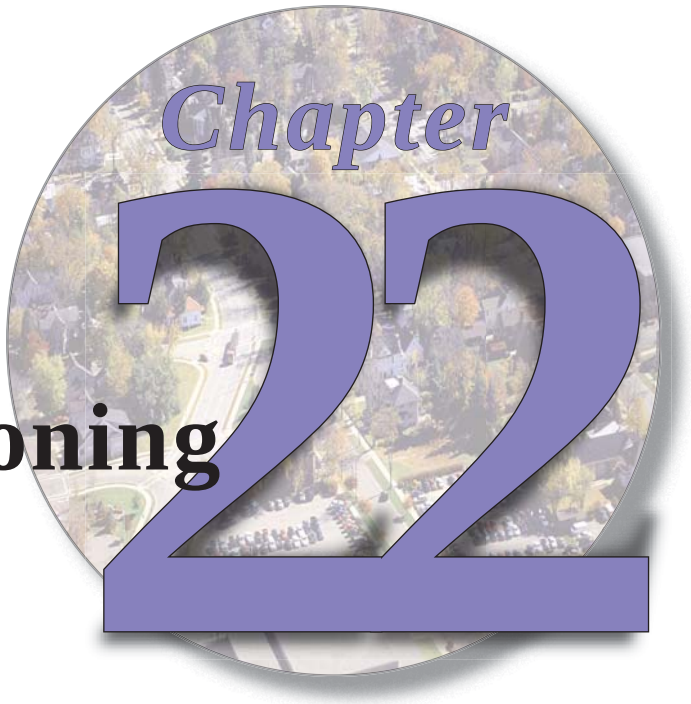
Shoreland Development Density and Impervious Surfaces. (research summary) 2003. Center for Land Use Education. Available: www.uwsp.edu/cnr/landcenter/pdffiles/Imp_Surf_Shoreland_Dev_Density.pdf

Erosion Control for Homebuilders. 1996. UW-Extension (GWQ001) and Wisconsin DNR (WT-457-96) Available: http://clean-water.uwex.edu/pubs/pdf/storm.erosio.pdf

A Storm on the Horizon: An Educational Video on the Effects of Stormwater on Our Rivers. 18 minute video by Trout Unlimited. Phone: 715-386-7568 or andrewlamberson@hotmail.com

Rain Gardens: A How-To Manual for Homeowners. 2003. UW-Extension (GWQ037) and Wisconsin DNR (WT-776 2003) Phone: 608-267-7694 Available: http://clean-water.uwex.edu/pubs/pdf/home.rgmanual.pdf

The Waters Edge: Helping Fish and Wildlife on Your Waterfront Property. 2000. Wisconsin DNR (PUB-FH-428 00). Available: www.dnr.state.wi.us/org/water/fhp/fish/pubs/thewatersedge.pdf



Floodplain Zoning

Where does floodplain zoning apply?

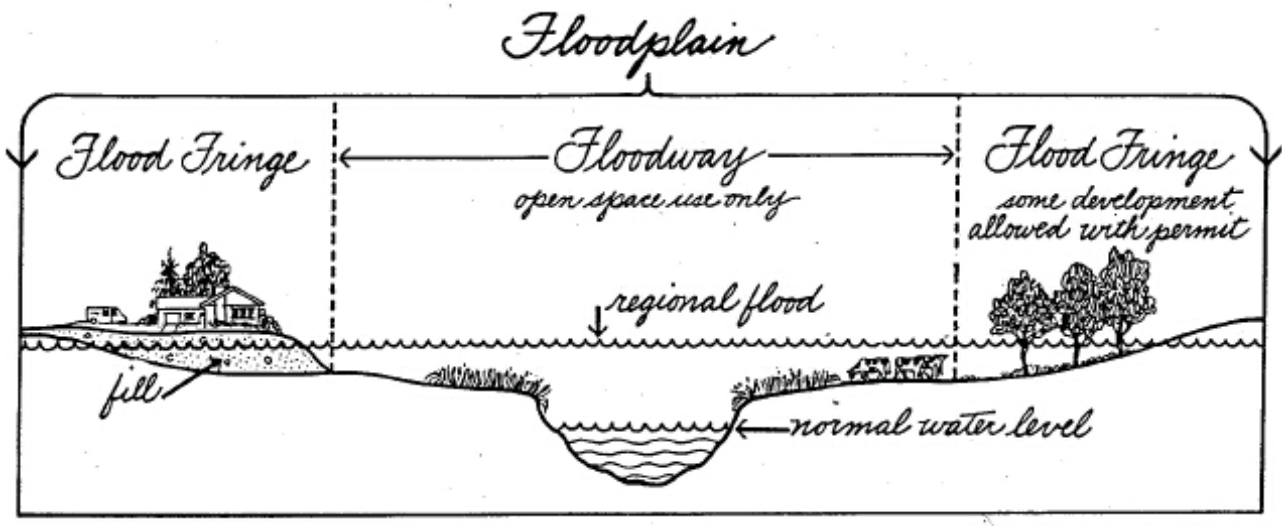
A community that has been issued official floodplain maps by the DNR must adopt and administer a floodplain zoning ordinance.[220] As a consequence, citizens in the community become eligible to apply for federal flood insurance. A state administrative rule (NR 116) sets minimum standards for local ordinances.

The **floodplain** consists of lands that are subject to flooding during the regional flood. The floodplain includes floodway and flood fringe zones. Regional flood elevations are calculated by hydraulic models that consider the size of a drainage basin, amount of precipitation and land characteristics. They are also based on evidence of previous flooding.

The **floodway** consists of the channel of a river or stream, and those portions of the floodplain adjoining the channel that are required to carry the regional flood discharge. The floodway is the most dangerous part of the floodplain. It is characterized by deeper moving water.

[220] Wis. Stat. § 87.30(1)

Figure 41: Floodplain Illustration



The **flood fringe** is the portion of the floodplain landward of the floodway. It is generally associated with standing water rather than flowing water and with shallower depths.

What are the purposes of floodplain zoning?

The purposes of floodplain zoning are to protect human life, health and to minimize property damages and economic losses.

Section VII – Review

Keywords

- Ordinary high water mark
- Floodplain
- Floodway
- Flood fringe

Test your Knowledge (answers on page 152)

Chapter 21 – Shoreland Zoning

1) Name the five statewide purposes of shoreland zoning.

2) Does your local shoreland zoning ordinance provide any additional purpose statements?

3) A recent study of waterfront properties found that one factor resulted in significantly higher property prices. What is that one factor?

4) Name three steps that zoning boards can take to maintain good water quality, fisheries and wildlife in lakes and streams.

5) When the impervious surfaces in a watershed exceed a certain level the number of fish and fish species decreases significantly. What percentage is this?

Chapter 22 – Floodplain Zoning

6) Name the purposes of floodplain zoning.

Answers

1) a. Maintain safe and healthful conditions
   b. Prevent and control water pollution
   c. Protect spawning grounds, fish, and aquatic life
   d. Control building sites, placement of structures, and uses; and
   e. Reserve shore cover and natural beauty

2) Answers may vary

3) Clearer water

4) a. Curb pollutants
   b. Cut runoff
   c. Capture and cleanse

5) 8%

6) a. Protect human life and health
   b. Minimize property damage and economic losses

Reference Materials

Zoning Boards of Adjustment and Appeals

Zoning Board Handbook for Zoning Boards of Adjustment/ Appeals, 2nd edition. Lynn Markham and Rebecca Roberts. 2006, Published by Center for Land Use Education at 715-346-3783 or www.uwsp.edu/cnr/landcenter/pubs.html

Guide for County Boards of Adjustment, 3rd edition. Robert Horowitz and Richard C. Yde. 2004. 41 pages. Addresses related topics in question and answer form with legal citations. Published by Wisconsin County Mutual Insurance Corporation at 608-224-5330.

The Board of Adjustment. V. Gail Easley and David A Theriaque. 2005. Available from APA Planners Press at 312-431-9100 or www.planning.org/bookservice, libraries and bookstores.

The Zoning Board Manual. Frederick H. Bair, Jr. 1984. Available from APA Planners Press at 312-431-9100 or www.planning.org/bookservice, libraries and bookstores.

Zoning

Zoning. Adapted by Kevin Struck from Brian Ohm's Guide to Community Planning in Wisconsin. Available on the Center for Land Use Education website at http://www.uwsp.edu/cnr/landcenter/pubs.html

"The Zoning Ordinance." Chapter 16 in *The Small Town Planning Handbook*, 2nd edition. Thomas L. Daniels, John W. Keller and Mark B. Lapping. 1995. 305 pages. Available from APA Planners Press at 312-431-9100 or www.planning.org/bookservice, libraries and bookstores.

The Citizens Guide to Zoning. Herbert H. Smith. 1983. 242 pages. Available from libraries and bookstores.

Local Government

Wisconsin Town Officer's Handbook, 2nd edition. James H. Schneider and Richard Stadelman (editor). 2006. 292 pages. Published by the Wisconsin Towns Association at (715) 526-3157 or http://www.wisctowns.com

Handbook for Wisconsin Municipal Officials. 2002. Published by the League of Wisconsin Municipalities at 608-267-2380 or http://www.lwm-info.org/

Wisconsin County Supervisor's Handbook. 2004. 142 pages. Published by the Wisconsin Counties Association at 1-866-404-2700 or http://www.wicounties.org/

Planning and Zoning Committees/Commissions

Plan Commission Handbook. 2002. 84 pages. Published by Center for Land Use Education at 715-346-3783 or www.uwsp.edu/cnr/landcenter/pubs.html

Job of the Planning Commissioner. 3rd edition revised. Albert Solnit. 1987. 198 pages. Available from libraries and bookstores.

Open Meetings Law

Wisconsin Open Meetings Law: A Compliance Guide. Peggy A. Lautenschlager, Attorney General, Wisconsin Department of Justice. 2005. 38 pages. Explains Wisconsin's Open Meetings Law and discusses significant cases that have an impact on the law's implementation. Available at: www.doj.state.wi.us/AWP/OpenMeetings/2005-OML-GUIDE.pdf

Understanding Wisconsin's Open Meeting Law. Burt P. Natkins and James H. Schneider. 1994. 145 pages. Describes application of the open meeting law, required notice, exemptions and more. Available from Local Government Services, Inc., 185 W. Netherwood St., Oregon, WI 53575-1153 or 608-835-7761.

Public Records Law

Wisconsin Public Records Law: Compliance Outline. Peggy A. Lautenschlager, Attorney General, Wisconsin Department of Justice. 2005. 57 pages. Explains Wisconsin's Public Records Law and discusses significant cases that have an impact on the law's implementation. Available at: www.doj.state.wi.us/dls/docs/publicrecords805.pdf

Water Law

Wisconsin Water Law: A Guide to Water Rights and Regulations, 2nd edition. Paul G. Kent and Tamara A. Dudiak. 2001. Available from Cooperative Extension Publications at 608-262-3346.

Newsletters

Land Use Tracker. Four issues per year covering Wisconsin land use issues, including zoning. Available on-line from the Center for Land Use Education at www.uwsp.edu/cnr/landcenter/newsletters.html

Zoning Bulletin. Monthly bulletins summarizing the most significant recent zoning lawsuits from throughout the United States. Available from 800-229-2084 or www.qpgmunicipal.com/zo.shtml

Zoning News. Monthly four-page newsletter monitors the latest trends in local land-use controls using case studies. Available at 312-431-9100 or www.planning.org/ZoningNews/index.htm

Plan Commissioners Journal. Four issues per year, about 20 pages per issue, about planning and zoning issues. Available from 802-864-9083 or www.plannersweb.com

Websites

UW-Extension Center for Land Use Education
www.uwsp.edu/cnr/landcenter

UW-Extension Local Government Center
www.uwex.edu/lgc/

Wisconsin DNR shoreland zoning
www.dnr.state.wi.us/org/water/wm/dsfm/shore/title.htm

Wisconsin DNR floodplain zoning
www.dnr.state.wi.us/org/water/wm/dsfm/flood/rules.htm

American Planning Association
www.planning.org

Legal Resources

When legal writers make assertions about the law or quote or paraphrase published sources, they must support each statement with a reference to the original material. This legal citation or cite may be to a particular court opinion, a statute, an administrative opinion, a regulation, or a secondary authority such as a treatise or a law review article.[221] This appendix provides a primer on the organization and referencing systems used for locating state and local regulations and case law.

State Regulations

The terms used to identify legislative acts can be confusing. The state legislature adopts laws called statutes (e.g., Wisconsin Statutes Chapter 59: Counties, or Wis. Stat. § 59). These laws often provide only general policies. State agencies hold public hearings and adopt administrative rules to provide the detailed regulations needed to implement general statutory policies. After review by the state legislature, administrative rules have the full force of law (e.g., Wisconsin Administrative Code ch. NR 115: Shoreland Management, or Wis. Admin. Code ch. NR 115).

[221] Information excerpted from *Introduction to Legal Materials: A Manual for Non-Law Librarians in Wisconsin* by the Law Librarians Association of Wisconsin. Available at: http://www.aallnet.org/chapter/llaw/paliguide/.

Annotations
Following each affected section of state statutes you will often find annotations that provide information on the history of the section, interpretative notes, related court decisions or attorney general opinions, and published articles.

State statutes and administrative rules are available at many libraries and on-line at: www.legis.state.wi.us.

Local Ordinances

Similar to state statutes and administrative rules, local ordinances are organized and referenced in the following manner.

Numbering systems
Understanding the numbering system, terms and abbreviations used to identify specific provisions and to organize an ordinance or statute is essential to interpretation. The following example from Wisconsin Statutes illustrates an organizational scheme that must be mastered in order to determine a law's meaning. For example, "s. 8.31(2)(a)" in an ordinance refers to:
Chapter = ch. 8
Section = s. 8.31 (literally "section 31 of chapter 8" but common usage is "section 8 point 31")
Subsection = sub. (2)
Paragraph = par. (a)

Internal references
The entire citation is often not used to refer to a provision within the same section. For example, in s. 8.31(2), "sub. (b)" refers to s. 8.31(2)(b).

Case Law

Case law is the dynamic body of law containing legal principles derived from the application of law to individual court cases. Case law records the facts of controversy within a case, explains the judges' decisions, and in some cases provides judges' dissenting opinions. Following exhaustion of local relief remedies, zoning decisions may be appealed through several levels of court, starting with the circuit courts and preceding through the court of appeals, and in rare instances the Wisconsin Supreme Court or U.S. Supreme Court. When examining the findings of similar cases, higher court decisions take precedent over lower court decisions.

Citations to court decisions generally begin with the name of the case, which is usually in the form of Plaintiff v. Defendant. The first number to appear will be a reference to a volume number. Following the first number is an abbreviation for a court reporter. Lists of these abbreviations and the titles for which they stand are included as appendices in many legal research texts. Following the reporter abbreviation a series number may appear, such as 2d.

Many reporters are numbered up to a certain point, then begin again with volume one of a second series. Following the series number, if there is one, will be a number indicating the page on which the decision begins. A second page number may indicate a specific page reference within a particular case. Many citations will also include a parallel cite, which leads to the same case in a different set of reporters. Finally, the citation may end with the date of the decision enclosed in parentheses.

The Wisconsin Supreme Court adopted a new, slightly different citation format for Wisconsin decisions in 2000. In Wisconsin, cases are now also identified by a public domain citation that includes a sequential number assigned by the clerk of court, and a paragraph number that indicates where in the decision the cited information is located. Illustrations of various case citations are provided below.[222]

Figure 42: Citation Format for Wisconsin Court Decisions Before 2000

***Snyder v. Waukesha County Zoning Bd.*, 74 Wis. 2d 468, 247 N.W.2d 98 (1976)**

Case name — *Location(s) in official reporters* — *Year*

74 Wis. 2d 468	Volume 74, Wisconsin Reports Second Edition, page 468
247 N.W.2d 98	Volume 247, North Western Reporter Second Edition, page 98
Ct. App.	Indicates a court of appeals decision when placed in parentheses prior to the year

Figure 43: Citation Format for Wisconsin Court Decisions After 2000

***State ex rel. Ziervogel v. Washington County BOA*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W. 2d 401**

Case name — *Public domain* — *Location(s) in official reporters*

ex. rel.	Abbreviation for *ex relatione* meaning "on behalf of"
2004 WI 23	Year 2004 Wisconsin Supreme Court case 23 (may be followed by ¶ paragraph #)
WI App.	Indicates a court of appeals decision when placed in the public domain
269 Wis. 2d 549	Volume 269, Wisconsin Reports Second Edition, page 549
676 N.W. 2d 401	Volume 676, North Western Reporter Second Edition, page 401

[222] Information excerpted from *Introduction to Legal Materials: A Manual for Non-Law Librarians in Wisconsin* by the Law Librarians Association of Wisconsin. Available at: http://www.aallnet.org/chapter/llaw/paliguide/.

Websites for Accessing Wisconsin Court Decisions

Wisconsin Supreme Court decisions released since September 1995
http://www.courts.state.wi.us/opinions/sopinion.htm

Wisconsin Court of Appeal decisions released since June 1995
http://www.courts.state.wi.us/opinions/aopinion.htm

Older Wisconsin Supreme Court and Court of Appeal decisions
http://web.lexis-nexis.com/universe/form/academic/s_casecite.html

DNR's *Zoning Case Law in Wisconsin*. Includes summaries of published decisions of the Wisconsin Supreme Court and Court of Appeals relevant to shoreland and floodplain zoning in Wisconsin. DNR Publication # WT-540, Revised October 2004.
http://www.dnr.wi.gov/org/water/wm/dsfm/shore/documents/zoning-case-law-2004.pdf

To request supplemental updates, contact:
WDNR Dam Safety/Floodplain/Shoreland Section
101 S. Webster St.
P.O. Box 7921
Madison, WI 53707-7921
Telephone: 608-266-8030

Who Decides Whether to Grant Conditional Uses and Special Exceptions

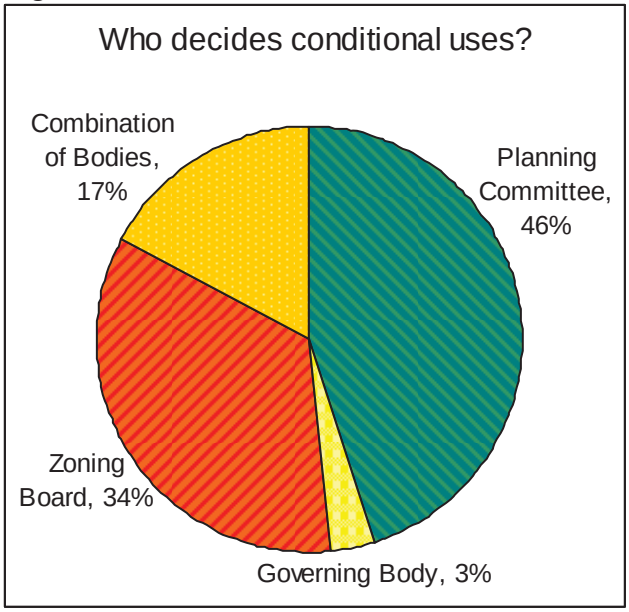
Conditional use is used in this appendix to mean both conditional uses and special exceptions.

The local governing body must determine by ordinance whether the zoning board, the governing body or the planning commission/ committee will decide special exceptions and conditional use permits.[223] *Figure 44* shows who decides conditional uses for Wisconsin counties based on a 2004 survey completed by 31 counties.

When the local ordinance is written or amended to determine which body is best suited to decide conditional uses, consider the following factors:

- **Plan commission/committee** - This body commonly decides conditional use permits

Figure 44: Conditional Use Decision Makers



[223] Counties - Wis. Stat. § 59.694(7)(a); Cities, villages and towns with village powers - Wis. Stat. § 62.23(7)(e)1

because they are usually the most knowledgeable about the community plan and zoning ordinance, as well as relevant state statutes and case law. The plan commission/committee is continuously involved in the process of recommending legislative changes in the zoning ordinance and is therefore more apt to be conversant with the "purpose and intent" of the ordinance than the zoning board.[224] In some cases, the plan commission/committee makes recommendation on conditional use permits to the governing body.

There are drawbacks to the plan commission/committee deciding conditional use permits. Their biases about ordinance provisions may be on record from the time of ordinance adoption/amendment. In addition, there could be a conflict between the role of being an unbiased decision maker when deciding conditional use permits and the fact that some plan commission/committee members are elected and may be tempted to represent their constituents rather than make objective decisions based on applicable standards and evidence in the record.

- **Governing body** - The governing body typically does not know the ordinance as thoroughly as the plan commission/committee and often already has a full workload. Sometimes, the plan commission/committee makes a recommendation to the governing body on conditional use permits. The governing body has the same drawbacks as the plan commission/committee in deciding conditional use permits by having recorded biases and being elected officials. Additionally, the total amount of time invested in conditional use permit decisions will likely increase significantly if assigned to the governing body as it has many more members than either of the other two bodies.

- **Zoning board** - This body should be relatively familiar with the zoning ordinance due to its responsibilities for deciding variances and administrative appeals, yet may not consider community-wide planning issues to the same extent as the plan commission/committee. Because zoning board members are appointed rather than elected, they clearly do not represent a group of constituents and are less likely to be biased.

[224] *State ex rel. Skelly Oil Co. v. City of Delafield*, 58 Wis. 2d 695, 207 N.W.2d 585 (1973)

Sample Forms

The following sample forms provide information about the information necessary to make a decision, and the legal decision standards from Wisconsin law. Please tailor the forms to better suit your local situation. Specifically, you may want to:

- Require more or less factual information from the applicant, and
- Insert additional decision standards or procedural requirements from local ordinances or by-laws.

The forms are available on-line as Word documents for easy modification at www.uwsp.edu/cnr/landcenter/pubs-documents.html

Hearing Appearance Slip

Date: _____

Hearing name/number: _____

Regarding: _____

Name: _____

Address: _____

Representing: _____

- ❑ I wish to speak in favor of the appeal or application.
- ❑ I wish to speak in opposition of the appeal or application.
- ❑ I wish to speak for informational purposes only.

Comments:

_____
_____
_____
_____
_____

(Tear off this portion and deliver to the Board Chair)

Instructions for witnesses:

- Complete an appearance slip and deliver it to the Board chair.
- You will be recognized by the Board chair when you are to speak.
- Your testimony may be sworn if required by rules of the Board.
- Direct all comments, questions and replies to the chair.
- When asked to speak:
  1. State your name and place of residence.
  2. Indicate whether you represent a group or association.
  3. Indicate whether or not you favor the appeal or application or are speaking for informational purposes.
  4. Please state your qualifications to speak on this matter or the source of your information.
  5. Limit your testimony to facts relevant to the case at hand.
  6. Limit your comments to the time period specified by the chair.
  7. Avoid repetitive testimony.

_____ Zoning Board of Adjustment/Appeals

[address for correspondence with the zoning board]

Administrative Appeal Application

_____ Zoning Board of Adjustment/Appeals

Petition # Date filed _____☐ $_____ fee paid (payable to _____)

Name	
Address	
Phone	

Legal description: ____1/4, ____1/4, S ____, T ____ N, R ____ E
City/Village/Town of _____
Fire number _____ Tax parcel number _____
Lot area & dimensions: _____ sq. ft., _____ x _____ ft.
Zoning district _____
Current use & improvements
_____

Nature & disposition of any prior petition for appeal, variance or conditional use
_____

Description of all nonconforming structures & uses on the property _____
_____

Reason for Appeal (Check the type of administrative decision appealed.)

❑ Zoning district boundary dispute (location and districts involved)
_____
_____
Describe petitioner's boundary location criteria:
_____
Describe petitioner's boundary determination:
_____

❑ Ordinance interpretation (include section number)
_____
_____
Describe petitioner's interpretation and rationale:
_____

❑ Administrative decision/measurement/order in dispute
_____
_____

I certify that the information I have provided in this application is true and accurate.

Signed: _____ Date: _____
Petitioner

Remit to: [Zoning office address, phone & e-mail]

Conditional Use/Special Exception Application

_____ (Governing Body/Committee/Commission/Zoning Board)

Date filed _____ ☐ $_____ fee paid (payable to _____)

	Owner or agent	Contractor
Name		
Address		
Phone		

Legal description: ____1/4, ____1/4, S ____, T ____ N, R ____ E
City/Village/Town of _____
Fire number _____ Tax parcel number _____
Lot area & dimensions: _____ sq. ft., _____ x _____ ft.
Zoning district _____
Current use & improvements _____

Nature & disposition of any prior petition for appeal, variance or conditional use
_____

Description of all nonconforming structures & uses on the property _____
_____

Conditional use requested (ordinance section # & specific use):
_____

General standards for approval:
_____
_____

Specific (design) standards for approval:
_____
_____

Design/practices proposed to achieve standards:
_____
_____

Attach a plat or other map of your site and detailed construction plans.

I certify that the information I have provided in this application is true and accurate.

Signed: _____ Date: _____
Applicant/Agent/Owner

Remit to: [Zoning office address, phone & e-mail]

Variance Application

A variance is a relaxation of a standard in a land use ordinance. Variances are decided by the zoning board of adjustment/appeals. The zoning board is a quasi-judicial body because it functions almost like a court. The board's job is not to compromise ordinance provisions for a property owner's convenience but to apply legal criteria provided in state laws, court decisions and the local ordinance to a specific fact situation. Variances are meant to be an infrequent remedy where an ordinance imposes a unique and substantial burden.

Process

At the time of application you will be asked to:

1. **Complete an application** form and submit a $_____ fee;
2. **Provide detailed plans** describing your lot and project (location, dimensions and materials);
3. **Provide a written statement** of verifiable facts showing that your project meets the legal criteria for a variance (Three Step Test in Part 2); and
4. **Stake out lot corners or lines**, the proposed building footprint and all other features of your property related to your request so that the zoning board may inspect the site.

Following these steps, the zoning agency will publish notice of your request for a variance in the county's official newspaper noting the location and time of the required public hearing before the zoning board. Your neighbors and any affected state agency will also be notified. The burden will be on you as property owner to provide information upon which the board may base its decision. At the hearing, any party may appear in person or may be represented by an agent or attorney. You or your agent must convince the zoning board to make a ruling in your favor. The board must make its decision based only on the evidence submitted to it at the time of hearing. Unless you or your agent is present, the board may not have sufficient evidence to rule in your favor and must then deny your application.

Variance Application

_____ Zoning Board of Adjustment/Appeals

Part 1: General information and alternatives analysis
To be completed jointly by the applicant and zoning staff.

Petition # Date filed _____☐ $____ fee paid (payable to _____)

	Owner/agent	Contractor
Name		
Address		
Phone		

Legal description: ____1/4, ____1/4, S ____, T ____ N, R ____ E
City/Village/Town of _____
Fire number _____ Tax parcel number _____
Lot area & dimensions: _____ sq. ft., _____ x _____ ft.
Zoning district _____

Current use & improvements:

Description of any prior petition for appeal, variance or conditional use:

Description and location of all nonconforming structures & uses on the property:

Ordinance standard from which variance is being sought (section number and text):

Describe the variance requested:

Type of variance requested:

_____ **use variance** – permits a landowner to put a property to an otherwise prohibited use.

_____ **area variance** – provides an increment of relief (normally small) from a physical dimensional restriction such as a building height or setback.

Describe the effects on the property if the variance is not granted:

Alternatives

Describe alternatives to your proposal such as other locations, designs and construction techniques. Attach a site map showing alternatives you considered in each category below.

a. Alternatives you considered that comply with existing standards. If you find such an alternative, you can move forward with this option with a regular permit. If you reject compliant alternatives, provide the reasons you rejected them.

b. Alternatives you considered that require a lesser variance and reasons you rejected them. If you reject such alternatives, provide the reasons you rejected them.

Part 2: Three-Step Test
To qualify for a variance, the applicant must demonstrate that their property meets the following three requirements.

1) Unique property limitations (*To be completed by the applicant*)
Unique physical limitations of the property such as steep slopes or wetlands that are not generally shared by other properties must prevent compliance with ordinance requirements. The circumstances of an applicant (growing family, need for a larger garage, etc.) are not a factor in deciding variances. Nearby ordinance violations, prior variances or lack of objections from neighbors do not provide a basis for granting a variance. Property limitations that prevent ordinance compliance and are common to a number of properties should be addressed by amending the ordinance.

Do unique physical characteristics of your property prevent compliance with the ordinance?

€ Yes. Where are they located on your property? Please show the boundaries of these features on the site map that you used to describe alternatives you considered.

€ No. A variance cannot be granted.

2) No Harm to Public Interests *(To be completed by zoning staff)*
A variance may not be granted which results in harm to public interests. In applying this test, the zoning board must consider the impacts of the proposal and the cumulative impacts of similar projects on the interests of the neighbors, the entire community and the general public. These interests are listed as objectives in the purpose statement of an ordinance and may include:

- *Public health, safety and welfare*
- *Water quality*
- *Fish and wildlife habitat*
- *Natural scenic beauty*
- *Minimization of property damages*
- *Provision of efficient public facilities and utilities*
- *Achievement of eventual compliance for nonconforming uses, structures and lots*
- *Any other public interest issues*

Ordinance purpose:

Purpose(s) of standard from which variance is requested:

Analysis of impacts
Discuss impacts that would result if the variance was granted. For each impact, describe potential mitigation measures and the extent to which they reduce project impact (completely, somewhat, or minor). Mitigation measures must address each impact with reasonable assurance that it will be reduced to an insignificant level in the short term, long term and cumulatively.

Short term impacts: (through the completion of construction)
Impact:
Mitigation:
Extent to which mitigation reduces project impact:

Impact:
Mitigation:
Extent to which mitigation reduces project impact:

Long term impacts: (after construction is completed)
Impact:
Mitigation:
Extent to which mitigation reduces project impact:

Impact:
Mitigation:
Extent to which mitigation reduces project impact:

Cumulative impacts: (What would happen if a similar variance request was granted for many properties?)
Impact:
Mitigation:
Extent to which mitigation reduces project impact:

Impact:
Mitigation:
Extent to which mitigation reduces project impact:

Will granting the variance harm the public interest?

€ Yes. A variance cannot be granted.

€ No. Mitigation measures described above will be implemented to protect the public interest.

3) Unnecessary hardship *(To be completed by the applicant)*
An applicant may not claim unnecessary hardship because of conditions which are self-imposed or created by a prior owner (for example, excavating a pond on a vacant lot and then arguing that there is no suitable location for a home). Courts have also determined that economic or financial hardship does not justify a variance. When determining whether unnecessary hardship exists, the property as a whole is considered rather than a portion of the parcel. The property owner bears the burden of proving unnecessary hardship.

- 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. The board of adjustment must consider the purpose of the zoning restriction, the zoning restriction's effect on the property, and the short-term, long-term and cumulative effects of a variance on the neighborhood, the community and on the public interests. This standard reflects the new *Ziervogel* and *Waushara County* decisions.
- 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.

Note: While Wisconsin Statutes do not specifically prohibit *use variances*, 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, no reasonable use can be made of the property.
- 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*. Elected officials consider the larger land area to avoid piecemeal decisions that may lead to conflict between adjacent incompatible uses or may undermine land use plan and ordinance objectives. Towns have meaningful input (veto power) for zoning amendments to general zoning ordinances.
  - Zoning map amendments can change zoning district boundaries so as to allow uses provided in other zoning districts.
  - Zoning text amendments can add (or delete) permitted or conditional uses allowed in each zoning district.

Is unnecessary hardship present?

- ❑ Yes. Describe:

- ❑ No. A variance cannot be granted.

Part 3: Construction Plans
To be completed and submitted by the applicant.

Attach construction plans detailing:

- ❑ Property lines
- ❑ Vegetation removal proposed
- ❑ Contour lines (2 ft. interval)
- ❑ Ordinary high water mark
- ❑ Floodplain & wetland boundaries
- ❑ Dimensions, locations & setbacks of existing & proposed structures
- ❑ Utilities, roadways & easements
- ❑ Well & sanitary system
- ❑ Location & extent of filling/grading
- ❑ Location & type of erosion control measures
- ❑ Any other construction related to your request
- ❑ Anticipated project start date

I certify that the information I have provided in this application is true and accurate.

Signed: (applicant/agent/owner) _____
Date: _____

Remit to: [Zoning office address, phone & e-mail]

Decision Form

_____ Zoning Board of Adjustment/Appeals

Application/petition # _____

FINDINGS OF FACT
Having heard the testimony and considered the evidence presented, the Board determines the facts of this case to be:

Filing Date: _____
Affidavit of publication/posting is on file.
Hearing Date: _____

A. The applicant or appellant is (name and address):
_____
_____
_____

B. The applicant or appellant is the owner/lessee/mortgagee of the following described property which is the subject of the application or appeal: _____ 1/4 of _____ 1/4, City/Village/Town of _____, _____ County known as (street address) _____

C. The property is presently in use for _____ and has been so used continuously since _____.

D. The property includes a nonconforming structure/use described as
_____
_____

E. The property has been the subject of a prior appeal/variance/conditional use described as
_____
_____

F. The applicant or appellant proposes (brief project description/attach plans):

G. The applicant or appellant requests:
- ❑ an appeal of the zoning administrator's determination
- ❑ a conditional use/special exception
- ❑ a use variance
- ❑ an area variance

under Section _____ of the ordinance.

The features of the proposed construction and property that relate to the grant or denial of the application or appeal are (refer to the language/standards of the ordinance):
_____
_____

CONCLUSIONS OF LAW
Based on the above findings of fact the Board concludes that:

Appeal/Interpretation – The order of the zoning administrator (is/is not) in excess of his/her authority because (or)
The zoning administrator's interpretation of Section _____ of the zoning code (is/is not) a correct interpretation because

_____
_____
_____

Variance – The variance (does/does not) meet all three of the following tests:

A. The hardship (is/is not) due to physical limitations of the property rather than the circumstances of the appellant because

_____
_____
_____

B. The variance (will/will not) harm the public interest because

_____
_____
_____

C. Unnecessary hardship
   - 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. The board of adjustment must consider the purpose of the zoning restriction, the zoning restriction's effect on the property, and the short-term, long-term and cumulative effects of a variance on the neighborhood, the community and on the public interests. This standard reflects the new *Ziervogel* and *Waushara County* decisions.
   - For a use variance, unnecessary hardship exists only if there is no reasonable use of the property without the variance.

D. Unnecessary hardship (is/is not) present because

_____
_____
_____

Conditional Use – The application for a conditional use permit (does/does not) qualify under the criteria of Section _____ of the ordinance because

_____
_____
_____

ORDER AND DETERMINATION
On the basis of the above findings of fact, conclusions of law and the record in this matter the board orders:

Appeal/Interpretation – The zoning administrator's order/interpretation of the zoning code or map is (affirmed/modified/reversed) and the administrator is ordered to:

_____
_____
_____

Variance/Conditional Use – The requested (variance/conditional use) is (denied/granted/granted-in-part) subject to the following conditions/mitigation:

1. _____
2. _____
3. _____
4. _____
5. _____

The zoning administrator is directed to issue a zoning permit incorporating these conditions and certifying by the petitioner/applicant's signature that he/she understands and accepts the conditions.

Expiration of permit. Any privilege granted by this decision must be exercised within _____ months of the date of this decision after obtaining the necessary building, zoning and other permits for the proposed construction. This period will be extended if this decision is stayed by the order of any court or operation of law.

Revocation. This order may be revoked by the Board after notice and opportunity to be heard for violation of any of the conditions imposed.

Appeals. This decision may be appealed by a person aggrieved by this decision or by any officer, department, board or bureau of the municipality by filing an action in certiorari in the circuit court for this county within 30 days after the date of filing of this decision. The municipality assumes no liability for and makes no warranty as to reliance on this decision if construction is commenced prior to expiration of this 30-day period.

_____ Zoning Board of Adjustment/Appeals

Signed _____ Attest _____
Chairperson Secretary

Dated: _____

Filed: _____

Decision Self Audit Form

Use an annual self-assessment of board activities to increase board efficiency and the effectiveness of ordinance standards:

1. Revise ordinance language to reflect interpretations of the board;
2. Adjust dimensional standards where similar limiting site conditions make current standards unworkable or ineffective (e.g. nonconforming lots); and
3. Convert conditional uses to permitted uses if appropriate location, design and use standards can be developed.

Track and assess disposition of individual petitions/applications or categories of similar requests. Discuss your findings with the planning committee/commission and cooperate to propose appropriate amendments to the local governing body.

EXAMPLES

Administrative Appeals		
Section & Subject	Decision/Interpretation	Recommendations
9.12 – Modification of nonconforming structures	Modifications requiring permit & subject to limitations: Construction beyond foundation footprint? Additional story or basement? Replacement of structural members? Foundation replacement included?	Revise ordinance to enumerate activities requiring permit.
3.4 – Minimum area requirement	Are screened porches included in "enclosed area" requirement?	Revise ordinance to better describe "enclosed areas."
4.6 – Setback measurement	From what point on a structure and in what plane are setbacks measured?	Revise ordinance to state "setbacks are measured from nearest connected portion of a structure and in a horizontal plane."

Variances				
Section & Subject	Relaxation requested	Granted/Denied	Conditions	Recommendations
3.2 – 75' Shore setback for new home	<5' 5-10' 11-20' 21-30' 31-50' >50'	5/4 6/3 3/12 2/22 1/5	Remove NC accessory bldg. (6) Plant/maintain screening vegetation (4) Restore 50' shore buffer (5)	Standardize conditions 1-3 as mitigation requirements in ordinance.

Conditional Use Permits			
Section & Subject	Granted/Denied	Conditions	Recommendations
4.1 - Fill & grade	23/4	Avoid areas >15% slope (23) Divert runoff around site during construction & stabilization (23) Stabilize according to NRCS guidelines for site (23)	Convert to permitted use for areas <2,000 sq. ft. & <15% slope provided conditions 2 & 3 are implemented & pre-construction photo is submitted.

Examples from Wisconsin Communities

JEFFERSON COUNTY ZONING BOARD OF ADJUSTMENT

Lloyd Holterman, Chair; Janet Sayre Hoeft; Lloyd Zastrow; Donald Carroll, Alternate; Dale Weis, Alternate

BEGINNING AT ******* ON THURSDAY, JULY 13, 2006**
ROOMS 203 & 205, JEFFERSON COUNTY COURTHOUSE
320 S. MAIN ST., JEFFERSON, WI 53549

1. Call to Order-Room 203
2. Roll Call
3. Certification of Compliance with Open Meetings Law Requirements
4. Approval of Agenda
5. Approval of June 8, 2006 Meeting Minutes
6. Site Inspections – Beginning at ******** and Leaving from Room 203**
7. Public Hearing – Beginning at 1 p.m. in Room 205

NOTICE OF PUBLIC HEARING
JEFFERSON COUNTY ZONING BOARD OF ADJUSTMENT

NOTICE IS HEREBY GIVEN that the Jefferson County Zoning Board of Adjustment will conduct a public hearing at 1 p.m. on Thursday, July 13, 2006 in Room 205 of the Jefferson County Courthouse, Jefferson, Wisconsin. Matters to be heard are applications for variance from terms of the Jefferson County Zoning Ordinance. No variance may be granted which would have the effect of allowing in any district a use not permitted in that district. No variance may be granted which would have the effect of allowing a use of land or property which would violate state laws or administrative rules. Subject to the above limitations, variances may be granted where strict enforcement of the terms of the ordinance results in an unnecessary hardship and where a variance in the standards will allow the spirit of the ordinance to be observed, substantial justice to be accomplished and the public interest not violated. Based upon the findings of fact, the Board of Adjustment must conclude that: 1) Unnecessary hardship is present in that a literal enforcement of the terms of the ordinance would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome; 2) The hardship is due to unique physical limitations of the property rather than circumstances of the applicant; 3) The variance will not be contrary to the public interest as expressed by the purpose and intent of the zoning ordinance. PETITIONERS, OR THEIR REPRESENTATIVES, SHALL BE PRESENT. There may be site inspections prior to public hearing; decisions shall be rendered after public hearing on the following:

V1192-06 – George & Mary Presley: Variance to allow a third accessory structure in a Residential R-2 zone. The site is at W6690 Oak Rd. in the Town of Watertown, on PIN 032-0815-0333-005 (3 Acres) in a Residential R-2 zone.

V1193-06 – Howard Jacobs: Allow building reconstruction at less than the required road setbacks. The site is at N8646 Jacobs Lane in the Town of Waterloo, on PIN 020-0973-1521-000 (35.124 Acres) in an Agricultural A-1 zone.

V1194-06 – Stanley Johnson: Variance to sanction garage construction at less than the required side yard setback in a Residential R-1 zone. The site is at N1030 Lake Rd. in the Town of Sumner, on PIN 029-0611-1835-036 (0.5 Acre).

V1195-06 – Joseph Price/Mary Clark Property: Reduce the minimum required frontage on and access to a public road for A-1 zoned property on Kroghville Road. The site is part of PIN 019-0828-1781-000 (40 Acres) in the Town of Lake Mills.

8. Decisions on Above Petitions
9. Adjourn

JEFFFERSON COUNTY ZONING BOARD OF ADJUSTMENT
Lloyd Holterman, Chairman

GREEN LAKE COUNTY STAFF REPORT

REQUEST: a variance to allow construction of four single-family dwellings on a single land area.

EXISTING ZONING AND USES OF ADJACENT AREA: The lot in question is zoned Recreational (RC), located within the shoreland jurisdiction of Green Lake, and occupied by a commercial restaurant and guest house. The lands surrounding this lot are zoned Single-Family Residential (R-1), located in the shoreland jurisdiction, and characterized by single-family dwellings and similar residential structures/uses.

ADDITIONAL INFORMATION/ANALYSIS: The owner/applicant is proposing to construct four single-family dwelling units under condominium style ownership. Section 350-13B of the County Zoning Ordinance clearly states there shall be no more than one principal residential structure per land area. There are no limiting factors to prevent compliance with the zoning ordinance. The plan submitted with this request is the desired outcome; not one conceived out of hardship.

VARIANCE CRITERIA: To qualify for a variance it must be demonstrated that the property meets the following three requirements:

1. **Unnecessary Hardship**
   - For use variances – no reasonable use of the parcel as a whole
   - For area variances – compliance with standards would unreasonably prevent landowner from using property for permitted purpose or be unnecessarily burdensome
   - Hardship may not be self-created
   - Economic or financial hardship is not justification
2. **Unique Property Limitations**
   - Limitations such as steep slopes, wetland, shape or size prevent compliance with ordinance
   - Limitations common to a number of properties is not justification
   - Circumstances of the individual is not justification
3. **No Harm to Public Interest**
   - Variance may not harm public interest; look to ordinance purpose and intent for guidance
   - Short term, long term and cumulative impacts on neighborhood, community and general public

- Alternative designs and locations on the property have been investigated
- Only minimal relief may be granted for use of property
- May impose conditions on development to mitigate adverse impacts

STAFF COMMENTS: Staff has the following comments related to this variance request:

1. **Unnecessary Hardship**
   - Compliance with the ordinance standards would limit use of the premises to one structure (having multiple units), not multiple structures as proposed
   - The hardship of proposing to place four new structures on the property is self-created
2. **Unique Property Limitations**
   - Property does not appear to have unique limiting factors that prevent compliance with ordinance
   - Other lots in this area share similar site conditions
3. **No Harm to Public Interest**
   - This request and the cumulative impact of this type of development pattern could change the density and character of the shoreland area, effecting the public interest

- Alternate designs that comply with the ordinance were not presented; a compliant design may exist
- Only minimal relief should be allowed; no relief is needed if code compliant project could occur
- If this request meets the three-part test, conditions should be attached as part of approval

PETITION FOR VARIANCE

Variance # 17-04

Date filed Oct 04 Fee $340.00 Receipt # 3227

Owner Information: Name

Mailing Address:

Daytime Telephone Number:

Legal description of the property: GL ¼, ¼, Sec , T. N, R. E

and/or Lot Number , Subdivision Name

Property Address W7695 107264

Tax Parcel Number PIN 006 3105 132 9997

Zoning district Agriculture Lot size 1 acre

Current use and improvements Deck

Proposed use and improvements

Ordinance section relating to variance request 17.22(1)(a)(2)

Relief is requested to allow: less than 110' setback to 64+107

Owner Last Name First Name Property Desc Tax Parcel # 006.1331.05.006.002.00 Town Corning Block Subdiv. Lot 3 IN, R 5 E, T 13, Sec. NW¼ NW¼

Address each of the following criteria for granting a variance (please be specific).

1) Unnecessary hardship is present because... People are stealing everything that we have outside (lawn chairs, umbrella's, yard swing, Garden plants, work cart, yard Birds etc.

2) Unique features of this property prevent compliance with the terms of the ordinance; they include... The deck is built on the back of a garage over hang that was once a horse ~~raff~~ roof - There is no way that the public can get on to it - There for our yard stuff is safe

3) A variance will not be contrary to the public interest because... this deck was built and meant for our own private use to hold family get togethers only.

Names of adjoining property owners: None to this area

See reverse side for additional requirements and signature line

A SCALE DRAWING MUST BE ATTACHED that accurately depicts the following:

1. The location and size of the property including all lot line dimensions
2. Indicate north
3. Show the location and names of all surrounding roads / highways
4. Show the location of all area water bodies (lakes, rivers, streams, ponds, etc.)
5. Indicate all existing buildings and mark with "EB"
6. Indicate all wells and sanitary systems and mark as such
7. Include all directly abutting properties and structures, sanitary systems, etc.
8. Show the requested change or construction and include the following measurements:
   a. Distance from the centerline of all roads
   b. Distance from the right-of-way of all roads
   c. Distance to all lots lines
   d. Distance to all water bodies
   e. Distance from sanitary system drainfield and tanks
   f. Distance from well

Application will be dismissed if a scale drawing is not received in the Zoning Department within 10 days of the application deadline.

Applicants are required to clearly mark on their property the location of:

1. The proposed change or construction
2. All property lines
3. Sanitary system components (drain fields, tanks, etc.)
4. Wells
5. Other physical features pertinent to the decision

These features should be marked with high visibility flags, tape, or stakes.

Additional information beyond what has been specifically requested in this application may be required by the Lincoln County Board of Adjustment before rendering a decision. Failure to provide all requested information could result in the dismissal or denial of your application The Lincoln County Board of Adjustment is governed by Rules of Procedure. A copy of the Rules of Procedure are available to any interested party upon request.

To the Lincoln County Zoning Administrator / Lincoln County Board of Adjustment: The undersigned hereby makes application for a PETITION FOR VARIANCE for work described and located as shown herein. The undersigned agrees that all work shall be done in accordance with the requirements of the Lincoln County Zoning Ordinance and with all other applicable County Ordinances and the laws and regulations of the State of Wisconsin. I declare that the information that I am supplying is true and accurate to the best of my knowledge and I acknowledge that this information will be relied upon for the issuance of this permit. By signing this application I am also granting permission to the zoning department staff to enter my property at any reasonable time for the purpose of inspection to assure compliance with the zoning laws relative to the issuance of this permit.

Signed: _____ Date: 10-20-04
property owner's signature(s) required

Signed: _____ Date: 10-20-04
property owner's signature(s) required

Co-Applicant information (other than owner)

Name _____

Address _____

City,ST,Zip _____

Phone # ( ) _____

IF GRANTED, NO CONSTRUCTION SHALL BEGIN UNTIL A LAND USE PERMIT HAS BEEN ISSUED

Petition for Variance (rev 11/02)

Variance Request Staff Report *Lincoln County Zoning*

Applicant: [redacted]
Nature of Request: To grant an after-the-fact variance for a deck that was constructed onto a nonconforming garage that fails to meet the hwy setback.

Results of Investigation

(A) Uses of the Property

What is the property currently being used for? There is a tavern with living quarters, a beer garden, volleyball court and a private garage on the property.

Is the use a permitted use? The private living quarters and accessory structures are permitted uses in an Agriculture zoning district.

(B) Property Features

Lot Features
Zoning District: Agriculture
Size of Lot: 1 acre
Amount of Water Frontage: NA
Size and Dimensions of Buildable Area: 82' x 122' or about 10,000 sq. ft.

Septic System
Type of Septic System: Holding Tanks
Age of Septic System:

Natural Features
Slope Information: Steep adjacent to Hwy 64 and gentle to the south from the rear of the buildings.
Buffer Condition: NA

Other Relevant Features: The deck is purported to be used privately and for security of personal property. A locked building would offer more security for private property.

(C) The Public Interest

Potential positive impacts (environmental, aesthetic, safety, etc.) of the applicant's request:

Potential negative impacts (environmental, aesthetic, safety, etc.) of the applicant's request: It increases the nonconformity of an already grossly nonconforming building.

Alternative Solutions
Are their alternatives to the request made by the applicants that would meet the requirements of the ordinance? The applicants could build a garage or shed in the buildable area to secure their personal property.

Zoning Department recommendation: Based on the evidence available in the application, in our records, and by visiting the site, the Zoning Department recommends that the Board deny the request and order the removal of the deck on the basis that the property has a reasonable use already without the deck. By building the deck before obtaining a permit or a variance, the applicants have created a self imposed hardship.

Other possible actions that the Board may take: None, as staff feels that the request does not fulfill all three of the necessary elements for consideration of a variance (i.e. unnecessary hardship and public interest protection are not met).

Applicable Ordinance Sections

17.22 SETBACKS. (Am. #326-98)

(1) HIGHWAY SETBACKS.

(a) Class A Highways.

1. All State and federal highways are hereby designated as Class A highways.

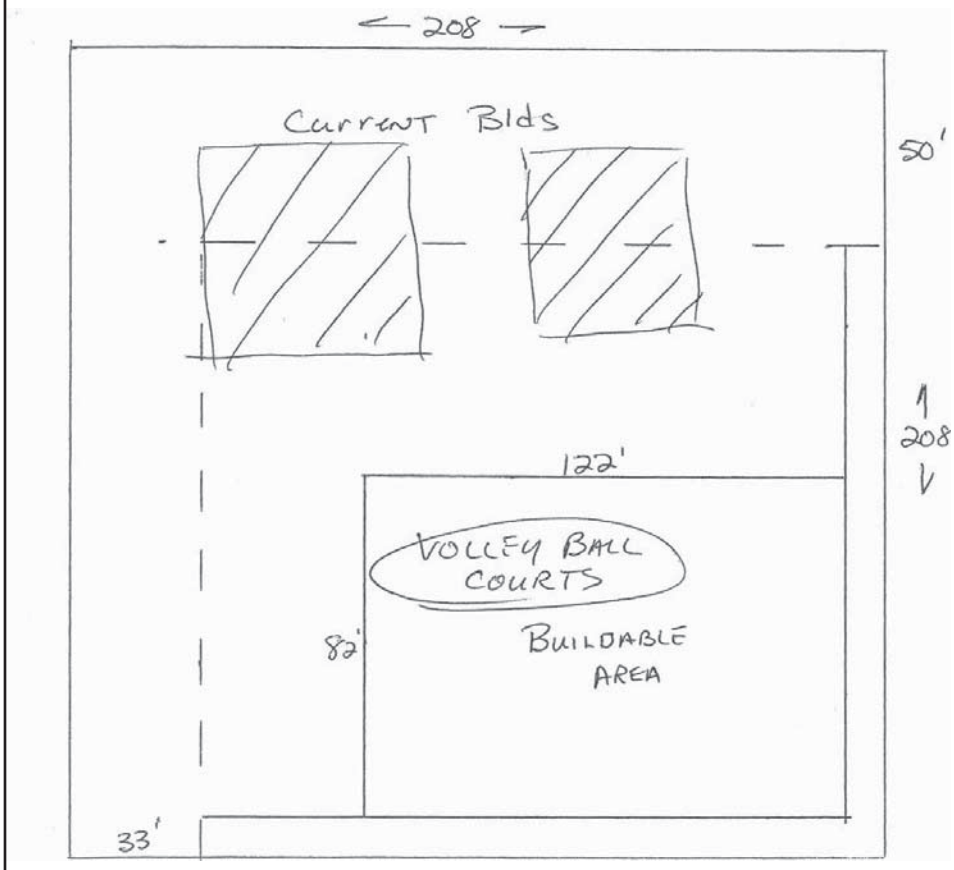
2. The setback from a Class A highway shall be 110' from the centerline of the highway or 50' from the right-of-way line, whichever is greater.

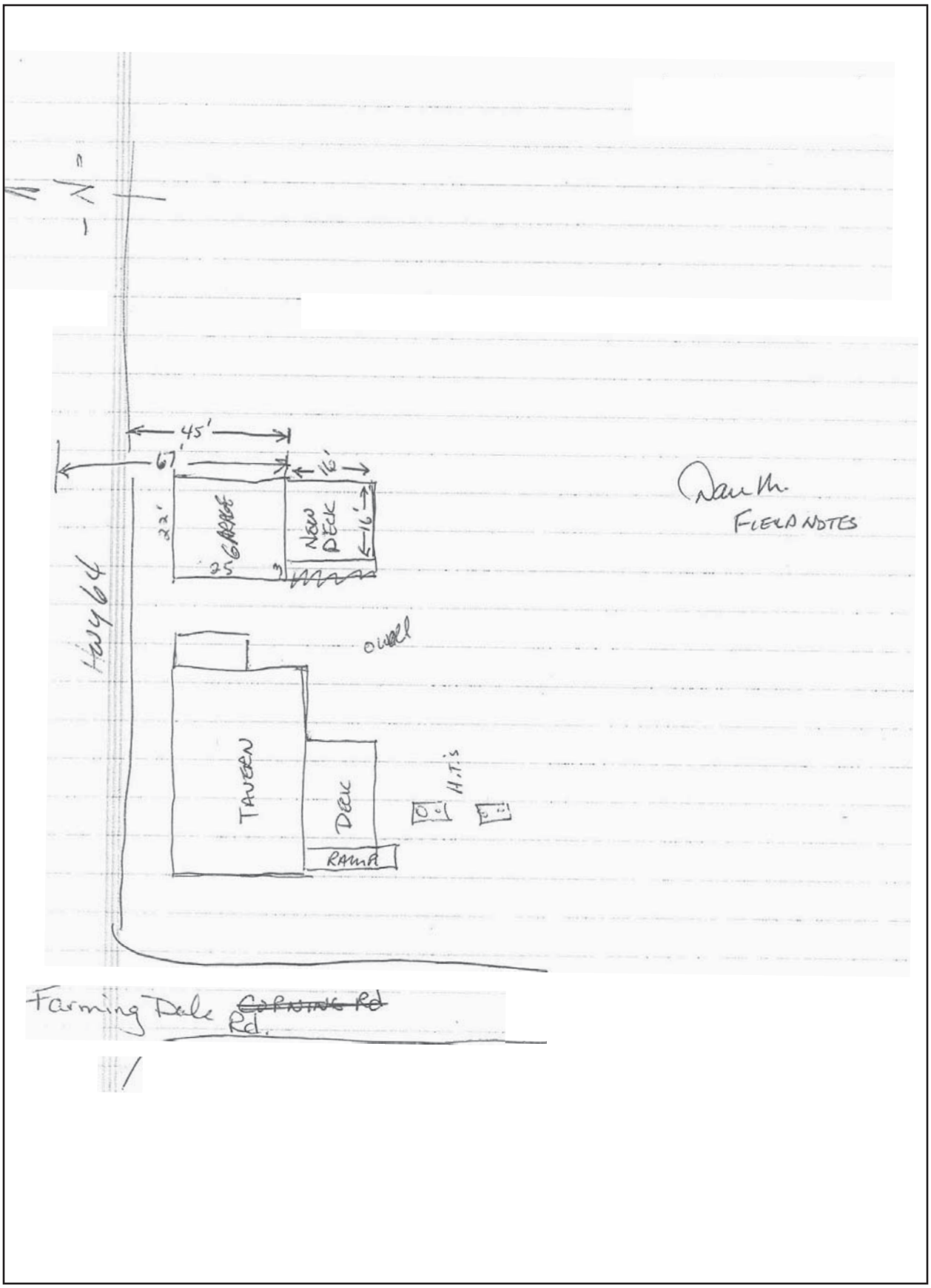
17.25 NONCONFORMING USES AND STRUCTURES ("GRANDFATHERING"). (Am. #326-98; #388-2002)

(1) GENERAL. These regulations apply to the modification of or addition to any structure and to the use of any structure or premises which was lawful before the passage of this code or any applicable amendment thereto. The existing lawful use of a property, structure, building or its accessory use which is not in conformity with the provisions of this chapter may continue subject to the following conditions:

(e) No modifications or additions to a nonconforming use or structure that fails to meet side yard or highway setbacks shall be permitted unless they are made in conformity with the provisions of this chapter. For purposes of this chapter, the words "modification" and "addition" include, but are not limited to, any addition, modification, structural alteration, rebuilding or replacement of any such existing use, structure or accessory structure or use that results in an addition to the floor area or current measurable footprint of the structure. Ordinary maintenance repairs which include internal and external painting, decorating, paneling, interior remodeling and the replacement of doors, windows and other nonstructural components are allowed and not subject to review by a permit. Other structural alterations and repairs, such as replacement of roof trusses, rafters, foundational elements, and similar components are permitted but subject to review by a zoning permit under § 17.46(1)(a) provided no additions to floor area are created and the footprint of the structure is not expanded. This section futher authorizes changes to the pitch of existing roofs, but it does not authorize the enclosure of decks or patios.

```
    0801                              Land Records                    11/10/04
    08I                                  Browse                       15:59:53
                                                                      LZTMP1
 ↓N     |0|0|6| |3|1|0|5| |1|3|2| |9|9|9|7|      Town of CORNING
Parcel |16| 133105 006 002 00 00                                Status: ACTIVE
Adr  1
Own  1

Parcel Descriptions:

      1   Description(s) on File

Year      Acres    Front    Depth   Flood Line  Description
1994      1.000
                                                1                  SEC 13-31-05
                                                2  1 SQ ACRE IN THE NW COR OF
                                                3  THE NW 1/4 NW 1/4
                                                4  *C-13-6B


F1=Help F2=Assessment          F3=Exit          F7=Previous F8=Next F12=Cancel
F13=Select View F14=Municipal Views     F15=Reports              F24=More Keys
Positioning to Owner:                                                      +
```




45'
67'
16'
22'
25'
GARAGE
NEW DECK
16'
Dan M.
FIELD NOTES
Hwy 64
TAVERN
DECK
RAMP
H.T.'s
Farming Dale
Rd.

DECISION OF LINCOLN COUNTY
ZONING BOARD OF ADJUSTMENT

Application #: 17-04 Parcel #: 06.133105.006.002

Filing Date: 10/20/04 Hearing Date: 11/18/04

Notice Dates: 10/26/04 & 11/2/04 ***ZONING VARIANCE***

FINDINGS OF FACT

Having heard the testimony and considered the evidence presented, the Board finds the following facts:

1. The applicant is: (provide name and address) _____

2. The applicant is the [owner] [lessee] of the following described property which is the subject of the application or appeal: NW ¼ of the NW ¼ (or Gov Lot _____), Section 13, T 31 N, R 05 E, Town of Corning, Lincoln County known as (rural address, CSM, or other description):

3. The property is presently being used as a Residence / Bar use and is a X permitted use in the zoning district ; or a ____ a legal non-conforming use in the zoning district in which it lies.

4. The existing structure ___ does; or X does not conform to current zoning standards. → Due to Road Setbacks

5. The applicant proposes (brief description / attach plans):

A deck, attached to the garage, setback 67 feet from the center of State Hwy 64 & 107.

6. The applicant requests a variance to the following section of the Lincoln County Zoning Ordinance (attached): 17.22 (1)(a)(2)

7. What specific departure from the ordinance is being proposed (refer to the standards of the ordinance):

Reduce the ordinary 110' setback for state Hwy 64 & 107 to 67' from the centerline.

CONCLUSIONS OF LAW

Based on the above findings of fact, the Board draws the following conclusions:

A. Are the restrictions placed on the property unnecessarily burdensome, preventing the owner from using the property for a permitted purpose?
Yes _=_ or, No _X_. If yes, why is it unnecessarily burdensome?

B. Do physical limitations of the property prevent compliance with the ordinance standards?
Yes _=_ or, No _X_. Why?

s a legal buildable area on the property.

C. Could the applicant's request have potential negative impacts to surrounding lands, their uses or the environment? Yes _=_ or, No _X_. If yes, then how may the impacts be minimized or mitigated?

ORDER AND DETERMINATION

On the basis of the above findings of fact, conclusions of law and the record in this matter the Board orders the requested variance is [~~granted] subject to the following conditions~~: [denied], ~~or [held over] until _____ provided the following additional information is supplied~~:

because the hardship is self imposed and not a result of the regulations or physical property features.

The Zoning Administrator is directed to issue a zoning permit incorporating these conditions.

Any privilege granted by this decision must be exercised within 2 years of the date of the decision by obtaining necessary land use, sanitary and other permits for the proposed construction. If not exercised within the allowed time, the permit and/or other privilege shall be automatically null and void. Extension for exercise of the permit or privilege may be granted by the Board upon written request by the applicant.

This order may be revoked by the Board after notice and opportunity to be heard for violation of any of the conditions imposed.

This decision may be appealed by filing an action in certiorari in the Lincoln County Circuit Court within 30 days after the date of filing of this decision. Lincoln County assumes no liability for and makes no warranty as to reliance on this decision of construction is commenced prior to expiration of this 30 day period.

ZONING BOARD OF ADJUSTMENT

Signed _____ Chairperson Attest _____ Secretary

Dated: 11/18/04

Filed: 11/18/04

PETITION FOR VARIANCE

Variance # 16-04

Date filed 10-10-04 Fee $340.00 (PB) Receipt # 3230

Owner Information: Name

Mailing Address:

Daytime Telephone Number:

Legal description of the property: GL 8 ¼, ¼, Sec , T. N, R. E

and/or Lot Number D040885 5 , Subdivision Name N/A

Property Address

Tax Parcel Number ~~012-3507-232-9997~~ PIN 012 28350 7.005.009

Zoning district Recreation Lot size .750 ACRES

Current use and improvements Rental Prop. / Single Person

Proposed use and improvements Rental Prop. / New GA

Ordinance section relating to variance request Setback off Town Road U 17.22(1)(c)

Relief is requested to allow: Construction of Garage, Requesting setback footage, from Lincoln City Zoning.

Address each of the following criteria for granting a variance (please be specific).

1) Unnecessary hardship is present because... I also own property immediately to South as Rental but no Room to add garage. Existing garage at N10444 could be utilized by other Rental.

2) Unique features of this property prevent compliance with the terms of the ordinance; they include... To keep open area for upgrade of septic system upon failure of existing.

3) A variance will not be contrary to the public interest because... Neighboring existing dwellings are as close or closer than new garage and will enhance property.

Names of adjoining property owners:

See reverse side for additional requirements and signature line

Owner Last Name First Name Property Desc D040 8855 ¼ ¼, Sec. T N, R E Lot Block Subdiv. Tax Parcel # ~~012-3507-232-9997~~ Attached Copy of taxes w/ description Town Kings 12.28.350 7.005.009

A SCALE DRAWING MUST BE ATTACHED that accurately depicts the following:

1. The location and size of the property including all lot line dimensions
2. Indicate north
3. Show the location and names of all surrounding roads / highways
4. Show the location of all area water bodies (lakes, rivers, streams, ponds, etc.)
5. Indicate all existing buildings and mark with "EB"
6. Indicate all wells and sanitary systems and mark as such
7. Include all directly abutting properties and structures, sanitary systems, etc.
8. Show the requested change or construction and include the following measurements:
   a. **Distance from the centerline of all roads**
   b. Distance from the right-of-way of all roads
   c. Distance to all lots lines
   d. Distance to all water bodies
   e. Distance from sanitary system drainfield and tanks
   f. Distance from well

Application will be dismissed if a scale drawing is not received in the Zoning Department within 10 days of the application deadline.

Applicants are required to clearly mark on their property the location of:

1. The proposed change or construction
2. All property lines
3. Sanitary system components (drain fields, tanks, etc.)
4. Wells
5. Other physical features pertinent to the decision

These features should be marked with high visibility flags, tape, or stakes.

Additional information beyond what has been specifically requested in this application may be required by the Lincoln County Board of Adjustment before rendering a decision. Failure to provide all requested information could result in the dismissal or denial of your application The Lincoln County Board of Adjustment is governed by Rules of Procedure. A copy of the Rules of Procedure are available to any interested party upon request.

To the Lincoln County Zoning Administrator / Lincoln County Board of Adjustment: The undersigned hereby makes application for a PETITION FOR VARIANCE for work described and located as shown herein. The undersigned agrees that all work shall be done in accordance with the requirements of the Lincoln County Zoning Ordinance and with all other applicable County Ordinances and the laws and regulations of the State of Wisconsin. I declare that the information that I am supplying is true and accurate to the best of my knowledge and I acknowledge that this information will be relied upon for the issuance of this permit. By signing this application I am also granting permission to the zoning department staff to enter my property at any reasonable time for the purpose of inspection to assure compliance with the zoning laws relative to the issuance of this permit.

Signed: _____ Date: 10-10-04
property owner's signature(s) required

Signed: _____ Date: _____
property owner's signature(s) required

Co-Applicant information (other than owner)

Name _____

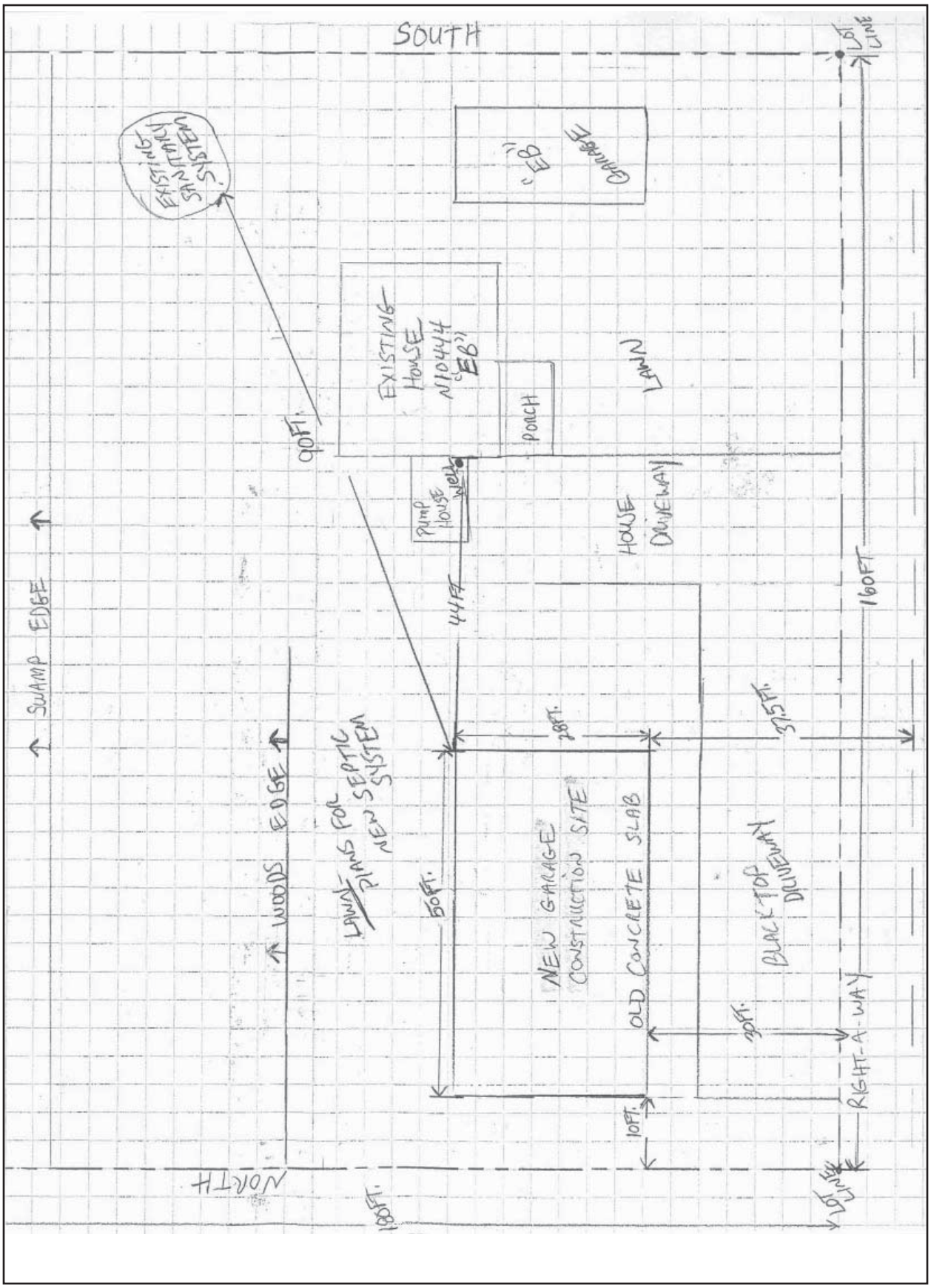
Address _____

City,ST,Zip _____

Phone # ( ) _____

RECEIVED
OCT 21 2004
Petition for Variance (rev 11/02)
10/21/04
Lincoln Co. Zoning

IF GRANTED, NO CONSTRUCTION SHALL BEGIN UNTIL A LAND USE PERMIT HAS BEEN ISSUED


SOUTH
LOT LINE
EXISTING SEPTIC SYSTEM
EB
GARAGE
EXISTING HOUSE N10444 "EB"
PORCH
LAWN
90FT.
PUMP HOUSE
WELL
HOUSE DRIVEWAY
44FT.
160FT.
SWAMP EDGE
WOODS EDGE
LAWN/PLANS FOR SEPTIC NEW SYSTEM
60FT.
28FT.
NEW GARAGE CONSTRUCTION SITE
OLD CONCRETE SLAB
37.5FT.
BLACK TOP DRIVEWAY
30FT.
RIGHT-A-WAY
10FT.
NORTH
100FT.
LOT LINE

Variance Request Staff Report *Lincoln County Zoning*

Applicant:
Nature of Request: Reduce the 75' road setback to Horseshoe Road for construction of a garage

Results of Investigation

(A) Uses of the Property

What is the property currently being used for? Residential rental property.

*Is the use a permitted use?*Yes

(B) Property Features

Lot Features
Zoning District: Recreation
Size of Lot: .5 acres
Amount of Water Frontage: None
Size and Dimensions of Buildable Area: approximately 30' x 130' ; between the 75' road setback and wetland edge

Septic System
Type of Septic System: Unknown
Age of Septic System: Unknown
Natural Features
Slope Information: approximately 10 to 15 feet of moderate slope near the swamp edge
Buffer Condition: Not Applicable

Other Relevant Features: The wetland edge starts at approximately 100 to 110 feet from the centerline of the Horseshoe Road, providing for a small building envelope on the property. The area between the proposed garage and the wetland is likely the only available spot for a replacement septic system on the property. The proposed garage location would not likely be suitable for a septic system because of the existence of an old concrete slab. The applicant does have an existing garage and house on the property; these buildings occupy the majority of suitable building ground on the small lot.

(C) The Public Interest

Potential positive impacts (environmental, aesthetic, safety, etc.) of the applicant's request:
The granting of a variance in this instance for the garage could preserve another location on the property which would be best served by an onsite waste treatment system.

Potential negative impacts (environmental, aesthetic, safety, etc.) of the applicant's request:
The allowance for a garage at a reduced setback to the road could create a safety hazard as vehicles would back out of the garage directly onto Horseshoe Road.

Alternative Solutions
Are there legal alternatives?
The legal alternative location for another garage would be in the only remaining location for a potential on-site waste treatment system; 75 feet from the road near the wetland edge.

Zoning Department recommendation: Based on the evidence available in the application, in our records, and by visiting the site, the Zoning Department recommends **Approval** with the following conditions:

1. The garage be constructed at a minimum setback of 40 feet from the centerline of Horseshoe Road.
2. A soil test be performed for the area between the proposed garage and wetland edge to prove that an onsite waste treatment would be suitable for that location. If the area is proven to be unsuitable for an onsite waste treatment system then the garage be constructed at a minimum setback of 65 feet from the centerline of Horseshoe Road.

Other possible actions that the Board may take: Deny the request.

Applicable Ordinance Sections

17.22 SETBACKS. (Am. #326-98)

(1) HIGHWAY SETBACKS.

(c) Class C Highways.

1. All town roads, public streets and highways not otherwise classified are hereby designated Class C highways.

2. The setback from Class C highways shall be 75' from the centerline of such highway or 42' from the right-of-way line, whichever is greater.

DECISION OF LINCOLN COUNTY
ZONING BOARD OF ADJUSTMENT

Application #: 16-04 Parcel #: 12.283507.005.009

Filing Date: 10/21/04 Hearing Date: 11/18/04

Notice Dates: 10/26/04 & 11/2/04 ***ZONING VARIANCE***

FINDINGS OF FACT

Having heard the testimony and considered the evidence presented, the Board finds the following facts:

1. The applicant is: (provide name and address) [redacted]

2. The applicant is the [owner] [lessee] of the following described property which is the subject of the application or appeal: NE ¼ of the NW ¼ (or Gov Lot), Section 28, T 35 N, R 07 E, Town of King, Lincoln County known as (rural address, CSM, or other description): [redacted]

3. The property is presently being used as a Residential use and is a X permitted use in the zoning district ; or a = a legal non-conforming use in the zoning district in which it lies.

4. The existing structure ___does; or ___does not conform to current zoning standards. N/A

5. The applicant proposes (brief description / attach plans):

Proposes to build a garage setback less than 75 feet from the centerline of Horseshoe Road.

6. The applicant requests a variance to the following section of the Lincoln County Zoning Ordinance (attached): 17.22 (1) (c) (2)

7. What specific departure from the ordinance is being proposed (refer to the standards of the ordinance):

Reduce the road setback less than 75 feet to the centerline of Horseshoe Road.

CONCLUSIONS OF LAW

Based on the above findings of fact, the Board draws the following conclusions:

A. Are the restrictions placed on the property unnecessarily burdensome, preventing the owner from using the property for a permitted purpose?
Yes X or, No =. If yes, why is it unnecessarily burdensome?

Setback restrictions prevent him from building a garage in a compliant location.

B. Do physical limitations of the property prevent compliance with the ordinance standards?
Yes X or, No =. Why?

Wetland and narrow dimension between the Wetland and road.

C. Could the applicant's request have potential negative impacts to surrounding lands, their uses or the environment? Yes X or, No =. If yes, then how may the impacts be minimized or mitigated?

Closeness to the road could create a hazard. Could move further back onto the property if the soil is deemed unsuitable for a sanitary system.

ORDER AND DETERMINATION

On the basis of the above findings of fact, conclusions of law and the record in this matter the Board orders the requested variance is [granted] subject to the following conditions: [~~denied~~], ~~or [held over] until _____ provided the following additional information is supplied:~~

1. The garage be constructed no closer than 40 feet from the centerline of Horseshoe Road.

2. But first a soil test must be Performed in the area between the proposed garage and wetland edge to prove that an onsite waste treatment system would be suitable in that location. If the area is proven to be unsuitable for an onsite waste treatment system then the garage must be constructed at a minimum setback of 65 feet from the centerline of Horseshoe Road.

The Zoning Administrator is directed to issue a zoning permit incorporating these conditions.

Any privilege granted by this decision must be exercised within 2 years of the date of the decision by obtaining necessary land use, sanitary and other permits for the proposed construction. If not exercised within the allowed time, the permit and/or other privilege shall be automatically null and void. Extension for exercise of the permit or privilege may be granted by the Board upon written request by the applicant.

This order may be revoked by the Board after notice and opportunity to be heard for violation of any of the conditions imposed.

This decision may be appealed by filing an action in certiorari in the Lincoln County Circuit Court within 30 days after the date of filing of this decision. Lincoln County assumes no liability for and makes no warranty as to reliance on this decision of construction is commenced prior to expiration of this 30 day period.

ZONING BOARD OF ADJUSTMENT

Signed Lenn Lamer
Chairperson

Attest _____
Secretary

Dated: 11/18/04

Filed: 11/19/04

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Case Law Index

ARTICLE L

Appeals

SEC. 13-1-150 APPEALS TO THE ZONING BOARD OF APPEALS.

(a) **SCOPE OF APPEALS.** Appeals to the Board of Appeals may be taken by any person aggrieved or by any officer, department, board or bureau of the City affected by any decision of the administrative officer. Such appeal shall be taken within thirty (30) days of the alleged grievance or judgment in question by filing with the officer(s) from whom the appeal is taken and with the Board of Appeals a notice of appeal specifying the grounds thereof, together with payment of a filing fee as may be established by the Common Council. The officer(s) from whom the appeal is taken shall forthwith transmit to the Board of Appeals all papers constituting the record from which action the appeal was taken.

(b) **STAY OF PROCEEDINGS.** An appeal shall stay all legal proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certified to the Board that, by reason of facts stated in the certificate, a stay would, in his opinion, cause immediate peril to life or property. In such cases, proceedings shall not be stayed otherwise than by a restraining order which may be granted by the Board of Appeals or by a court of record on application, on notice to the officer from whom the appeal is taken and on due cause shown.

(c) **POWERS OF ZONING BOARD OF APPEALS.** In addition to these powers enumerated elsewhere in this Code of Ordinances, the Board of Appeals shall have the following powers:

(1) Errors. To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by the Zoning Administrator or Building Inspector.

(2) Variances. To hear and grant appeals for variances as will not be contrary to the public interest where, owing to practical difficulty or unnecessary hardship, so that the spirit and purposes of this Chapter shall be observed and the public safety, welfare and justice secured. Use variances shall not be granted.

(3) Interpretations. To hear and decide application for interpretations of the zoning regulations and the boundaries of the zoning districts after the City Plan Commission has made a review and recommendation.

(4) Substitutions. To hear and grant applications for substitution of more restrictive nonconforming uses for existing nonconforming uses provided no structural alterations are to be made and the City Plan Commission has made a review and recommendation. Whenever the Board permits such a substitution, the use may not thereafter be changed without application.

(5) Unclassified Uses. To hear and grant applications for unclassified and unspecified uses provided that such uses are similar in character to the principal uses permitted in the district and the City Plan Commission has made a review and recommendation.

(6) Temporary Uses. To hear and grant applications for temporary uses, in any district provided that such uses are of a temporary nature, do not involve the erection of a substantial structure and are compatible with the neighboring uses and the City Plan Commission has made a review and recommendation. The permit shall be temporary, revocable, subject to any condition required by the Board of Zoning Appeals and shall be issued for a period not to exceed twelve (12) months. Compliance with all other provisions of this Chapter shall be required.

(7) Permits. The Board may reverse, affirm wholly or partly, modify the requirements appealed from and may issue or direct the issue of a permit.

SEC. 13-1-151 HEARING ON APPEALS.

The Board of Appeals shall fix a reasonable time for the hearing, cause notice thereof to be published in the official newspaper not less than seven (7) days prior thereto, cause notice to be given to the appellant or applicant and the administrative officer(s) appealed from by regular mail or by personal service not less than five (5) days prior to the date of hearing. In every case involving a variance, notice shall also be mailed not less than five (5) days prior to the hearing of the fee owners of records of all land within one hundred (100) feet of any part of the subject building or premises involved in the appeal.

SEC. 13-1-152 DECISIONS OF BOARD OF APPEALS.

(a) **TIME FRAME.** The Board of Appeals shall decide all appeals and applications within thirty (30) days after the public hearing and shall transmit a signed copy of the Board's decision to the appellant or applicant and the Zoning Administrator.

(b) **CONDITIONS.** Conditions may be placed upon any zoning permit ordered or authorized by this Board.

(c) **VALIDITY.** Variances, substitutions or use permits granted by the Board shall expire within six (6) months unless substantial work has commenced pursuant to such grant.

SEC. 13-1-153 VARIATIONS.

(a) **PURPOSE.**

(1) A request for a variance may be made when an aggrieved party can submit proof that strict adherence to the provisions of this Zoning Code would cause him undue hardship or create conditions causing greater harmful effects than the initial condition. A variance granted to a nonconforming use brings that use into conformance with the district and zoning requirements.

(2) The Board of Appeals may authorize upon appeal, in specific cases, such variance from the terms of the Zoning Code as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of the Zoning Code will result in unnecessary hardship and so that the spirit of the Zoning Code shall be observed and substantial justice done. No variance shall have the effect of allowing in any district uses prohibited in that district, permit a lower degree of flood protection that the flood protection elevation for the particular area or permit standards lower than those required by state law.

(3) For the purposes of this Section, "unnecessary hardship" shall be defined as an unusual or extreme decrease in the adaptability of the property to the uses permitted by the zoning district which is caused by facts, such as rough terrain or poor soil conditions, uniquely applicable to the particular piece of property as distinguished from those applicable to most or all property in the same zoning district.

(b) **APPLICATION FOR VARIATION.** The application for variation shall be filed with the Zoning Administrator. Applications may be made by the owner or lessee of the structure,

land or water to be affected. The application shall contain the following information:

(1) Name and address of applicant and all abutting and opposite property owners of record.

(2) Statement that the applicant is the owner or the authorized agent of the owner of the property.

(3) Address and description of the property.

(4) A site plan showing an accurate depiction of the property.

(5) Additional information required by the City Plan Commission, City Engineer, Board of Zoning Appeals or Zoning Administrator.

(6) Fee receipt in the amount of Two Hundred Twenty-five Dollars ($225.00).

(c) **PUBLIC HEARING OF APPLICATION.** The Board of Appeals shall conduct at least one (1) public hearing on the proposed variation. Notice of such hearing shall be given not more than thirty (30) days and not less than ten (10) days before the hearing in one (1) or more of the newspapers in general circulation in the City of Menasha, and shall give due notice to the parties in interest, the Zoning Administrator and the City Plan Commission. At the hearing the appellant or applicant may appear in person, by agent or by attorney. The Board shall thereafter reach its decision within thirty (30) days after the final hearing and shall transmit a written copy of its decision to the appellant or applicant, Zoning Administrator and Plan Commission.

(d) **ACTION OF THE BOARD OF APPEALS.** For the Board to grant a variance, it must find that:

(1) Denial of variation may result in hardship to the property owner due to physiographical consideration. There must be exceptional, extraordinary or unusual circumstances or conditions applying to the lot or parcel, structure, use or intended use that do not apply generally to other properties or uses in the same district and the granting of the variance would not be of so general or recurrent nature as to suggest that the Zoning Code should be changed.

(2) The conditions upon which a petition for a variation is based are unique to the property for which variation is being sought and that such variance is necessary for the preservation and enjoyment of substantial property rights possessed by other properties in the same district and same vicinity.

(3) The purpose of the variation is not based exclusively upon a desire to increase the value or income potential of the property.

(4) The granting of the variation will not be detrimental to the public welfare or injurious to the other property or improvements in the neighborhood in which the property is located.

(5) The proposed variation will not undermine the spirit and general and specific purposes of the Zoning Code.

(e) **CONDITIONS.** The Board of Appeals may impose such conditions and restrictions upon the premises benefitted by a variance as may be necessary to comply with the standards established in this Section.

SEC. 13-1-154 REVIEW BY COURT OF RECORD.

Any person or persons aggrieved by any decision of the Board of Appeals may present to a court of record a petition, duly verified, setting forth that such decision is illegal and specifying the grounds of the illegality. Such petition shall be presented to the court within thirty (30) days after the filing of the decision in the offices of the Board.

SEC. 13-1-155 THROUGH SEC. 13-1-159 RESERVED FOR FUTURE USE.

DAVIS KUELTHAU
attorneys at law

October 19, 2022

City of Menasha Board of Zoning Appeals
Attn: Board Chair
100 Main Street
Menasha, WI 54952

Re: Appeal Request - Replace an Existing Legal Nonconforming Off-Premise Billboard Sign - Lamar Central Outdoors, LLC - 923 Valley Road, Menasha

Dear Board Chair:

As you know, the City of Menasha Community Development Department retained us to represent its interests in the upcoming Appeal Hearing in the above-referenced matter. Please allow this letter to serve as the Community Development Department's position statement.

Lamar Central Outdoors, LLC ("Lamar"), currently owns and operates a billboard within an easement at 923 Valley Road, Menasha (along the southern property of the WOW Logistics facility along Hwy 441). Dated April 25, 2022, the City of Menasha received a sign permit application to replace the existing billboard with a new structure which includes back-to-back digital sign faces. This sign permit application was reviewed and officially denied via a letter from the Community Development Department on May 24, 2022.

Article F of Title 13, City Zoning Code, of the City of Menasha Code of Ordinances (the "Sign Code") is established *"to regulate signs and outdoor advertising within the City of Menasha in order to protect public safety, health, and welfare; minimize abundance and size of signs; reduce motorist distraction and loss of safe sight distance; promote public convenience; preserve property values; support and complement appearance and quality of life within the City."* In accordance with that purpose, Section 13-1-63(d) of Sign Code prohibits off-premise signs and billboards signs within the City of Menasha:

> *"**Off-Premise Signs and Billboards.** Off-premise signs and billboards erected for the purposes of directing attention to a use, facility, activity, message, product, or service which is not conducted on or related to the premises upon which the sign is located, except as provided for in this ordinance."*

Importantly, the existing sign is considered a legal nonconforming sign as regulated by Section 13-1-68 of the Sign Code. Section 13-1-68(a) of the Sign Code defines a legal nonconforming sign as follows:

Phone 920.435.9378 Direct 920.431.2237 Fax 920.431.2277
318 S. Washington Street Suite 300, Green Bay, WI 54301
asteffek@dkattorneys.com

"Any sign located within the City of Menasha limits as of the date of adoption of this ordinance or located in an area annexed to the City of Menasha hereafter which does not conform with the provisions of this ordinance shall be considered a legal nonconforming sign and may be permitted to remain in accordance with this ordinance as long as the sign is properly maintained and not detrimental to the health, safety, and welfare of the community."

While the existing sign is permitted to remain and be properly maintained, the Sign Code, Section 13-1-68(b), describes when signs lose legal nonconforming status, including, but not limited to, when a sign is enhanced with any new features, including the addition of illumination:

*"**Loss of Legal Nonconforming Status.***

(1) A sign shall lose its legal nonconforming status when one or more of the following occurs:

a. the business, event, or use ceases and the building, unit of the building, or property remains vacant for a period of ninety (90) days;

b. the sign is expanded or changed to another nonconforming sign;

c. the sign is removed or relocated to another site;

d. the sign is altered so as to change the shape, size, type, placement, or design of its structural or basic parts;

e. the sign is enhanced with any new feature, including the addition of illumination;

f. the sign is repaired, except if such repair brings the sign into conformance with this ordinance, when such repair involves the following:

1. the replacement of both the sign frame and sign panels;

2. the replacement of the primary support poles or other support structure;

3. for signs without framework for sign panels, requires replacement of the sign panels."

On August 26, 2022, Menn Law Firm, Ltd. ("Menn Law") submitted an appeal application regarding the denial of sign permit on behalf of Lamar. As part of this Application, Menn Law claims the Sign Code improperly restricts the size, location and type of sign based upon the content displayed on the sign and, as such, is unconstitutional under the rationale outlined in *Reed v. Town of Gilbert*, 576 U.S 155 (2015), a decision of the United States Supreme Court ("*Reed*"). No further explanation or rationale was provided in support of this assertion.

We have reviewed *Reed* and other decisions analyzing ordinances like the Sign Code and conclude, based on extensive applicable precedent, that the Sign Code is constitutional, both on its face and as applied to Lamar's permit application. To begin, Lamar's reliance on *Reed* is misplaced. In that case, the restrictions in the Town of Gilbert's sign code hinged on the content of the subject sign; specifically, ideological, political and temporary directional signs were subject to greater restrictions than other types of signs. Based on these differences, the United States Supreme Court found that the subject code was a "content-based" regulation of speech and, therefore, was subject to "strict scrutiny," meaning that, to be enforceable, the distinctions needed to further a compelling governmental interest and be narrowly tailored to that end. As the Town of Gilbert could not satisfy this "strict scrutiny" standard, the Court found its code unconstitutional.

While *Reed* is an important case within the realm of sign code enforcement, it is inapplicable to the current situation. Nowhere does the Sign Code, particularly the provisions cited above, contain any content-based restrictions or considerations. Paying specific attention to the provisions at hand, the Off-Premise Signs and Billboards and Loss of Legal Nonconforming Status sections of the Sign Code are drafted and implemented in ways that do not implicate the content of the sign regulated by those sections. As such, *Reed* provides no grounds for overturning the Community Development Department's rejection of Lamar's permit application.

We anticipate that Lamar and Menn Law may argue that the "off-premise" qualification of the Sign Code deems it "content-based" and thus, in some way, unconstitutional. Any such argument, however, has no legal merit. Earlier this year, in *City of Austin, Texas v. Reagan National Advertising of Austin, LLC*, 142 S.Ct. 1464 (2022), the United States Supreme Court analyzed whether a sign code differentiating between "on-premises" and "off-premises" signs was "content-based" and thus subject to strict scrutiny. The Court firmly rejected that argument, holding that an off-premises/on-premises regulation "requires an examination of speech only in service of drawing neutral, location-based lines" and, as such, "is agnostic as to content[.]" The Court, consequently, upheld that sign code as constitutional.

Importantly, the Court's decision in *City of Austin* lines up with other United States Supreme Court decisions, including a 1981 ruling that upheld an ordinance that prohibited all off-premises commercial advertising but allowed on-premises commercial advertising. *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981).

Based on these decisions, it is clear that the Sign Code's restriction of off-premises advertising is constitutional and, accordingly, the Community Development Department's decision was lawful. While Lamar can continue to maintain the subject sign in its current

form, the Community Development Department can lawfully reject any applications for modifications that would cause the sign to lose its legal nonconforming status.

We look forward to further presenting the Community Development Department's position at the upcoming hearing.

Very truly yours,

Davis & Kuelthau, s.c.

Anthony J. Steffek

AJS:ajs

cc: Community Development Department

City of Menasha
Department of Community Development
100 Main Street, Suite 200
Menasha WI 54952
(920) 967-3650 (920).967-5272 fax

APPLICATION FOR SIGN PERMIT

Date: 4-25-22		
Site Address: 923 Valley Rd		
Zoning: I1 - Heavy Industrial	Parcel #: 7400076402	
Name of Business: Northern WI Warehouses, LLC		
Property Owner: Easement Owner= Lamar	Phone: 920-347-1765	
Address: 1900 Scheuring Rd, Ste C De Pere, WI 54115	Fax: Email: rstlaurent@lamar.com	
Applicant: Lamar Advertising	Phone: 920-347-1765	
Contact: Renee St. Laurent	Fax:	
Address: PO Box 5846 De Pere, WI 54115	Email: rstlaurent@lamar.com	

The undersigned hereby agrees to install all signs in accordance with applicable ordinances and holds the City of Menasha harmless from any and all damages, claims or causes of action whatsoever of any nature by reason of installation, use, continuances, or maintenance of said sign(s).

Property Owner Signature — Date: 3/25/2022

Required Submissions *(staff use only)*

___ Site Plan
___ Building Elevations
___ Sign Illustration & Description
___ Permit Fee(s)
Total: $_____
Receipt: #_____

Review & Approval *(staff use only)*

___ Zoning
___ C-2 Central Business District Design Standards
___ Landmarks Commission - Historic District
___ Common Council - Special Use Permit
___ Public Works - Vision Control Area/ROW

___ Final Approval
___ Conditions:_____

Zoning Administrator — Date Issued

Sign Permit Application Instructions

1. It is recommended that applicants consult with the Zoning Administrator during the initial planning stages to avoid delays and ensure that all proposed signage complies with City of Menasha ordinance requirements.
2. Before construction or installation of any sign(s) requiring a permit, applicants shall submit a sign permit application package that includes:

- A completed permit application form with the signature of the property owner.
- Required permit fees for each sign.
- For monument/pole signs, an accurate plot plan drawn to scale of the entire lot on which the sign(s) will be located showing the location of buildings, parking lots, driveways, and landscaped areas on the lot.
- For wall-mounted signs, location of each sign on the building(s), with building elevations (e.g., over doors, over windows, awnings, etc)
- An accurate indication on the plot plan of the location and orientation of all existing signs, each sign for which a permit is requested, and the anticipated location of future signs requiring a permit.
- A description and illustration of each proposed sign including the following:
  - Colors and materials to be used in sign construction (e.g., limestone base with bronze letters, etc);
  - Style of lettering for all signs;
  - Appearance/location of logos or icons;
  - All sign proportions; and,
  - Types of illumination (e.g. external illumination with description of type of outdoor light fixture).
- In addition, optional submittals may be required by the Zoning Administrator if deemed necessary due to the character of the proposed signs and/or site.

Over – Please complete both sides of the application form

Please provide the following information for all proposed new signs along with any existing signs to remain on the property and attach the required site plan and sign illustration(s):

PROPERTY INFORMATION (REQUIRED FOR ALL APPLICATIONS)

Linear Dimensions of Building Exposures: North: _____ft South: N/A ft East: _____ft West: _____ft
Corner Lot: Yes: _____ No: X
Multiple Tenants: Yes: _____ No: X
Existing Signs: Yes: X No: _____

Business Center Signs ($150/sign + Special Use Permit) *Approval*

Existing:	Area: _____sq ft	Base Height: _____ft	Total Height: _____ft	Setback: _____ft	_____
Proposed 1:	Area: _____sq ft	Base Height: _____ft	Total Height: _____ft	Setback: _____ft	_____
Proposed 2:	Area: _____sq ft	Base Height: _____ft	Total Height: _____ft	Setback: _____ft	_____
Illumination:	None: _____	Internal: _____	External: _____	Backlit/Halo: _____	
Description:	_____				

Monument Signs ($150/sign) *Approval*

Existing:	Area: _____sq ft	Base Height: _____ft	Total Height: _____ft	Setback: _____ft	_____
Proposed 1:	Area: _____sq ft	Base Height: _____ft	Total Height: _____ft	Setback: _____ft	_____
Proposed 2:	Area: _____sq ft	Base Height: _____ft	Total Height: _____ft	Setback: _____ft	_____
Illumination:	None: _____	Internal: _____	External: _____	Backlit/Halo: _____	
Description:	_____				

Monument Signs with Electronic Message Centers ($250/sign + annual inspection fee) *Approval*

Existing:	Area: _____sq ft	Base Height: _____ft	Total Height: _____ft	Setback: _____ft	_____
Proposed 1:	Area: _____sq ft	Base Height: _____ft	Total Height: _____ft	Setback: _____ft	_____
EMC 1:	Message Area: _____sq ft	Static Area _____sq ft	Total EMC Area: _____sq ft		_____
Proposed 2:	Area: _____sq ft	Base Height: _____ft	Total Height: _____ft	Setback: _____ft	_____
EMC 2:	Message Area: _____sq ft	Static Area: _____sq ft	Total EMC Area: _____sq ft		_____
Illumination:	None: _____	Internal: _____	External: _____	Backlit/Halo: _____	
Description:	_____				

Pole Signs (STH 441 Only) ($150/sign) *Approval*

Existing:	Area: 1344 sq ft	Total Height: 40 ft	Setback: _____ft		_____
Proposed:	Area: 1344 sq ft	Total Height: 40 ft	Setback: _____ft		_____
Illumination:	None: 1344	Internal: _____	External: _____	Backlit/Halo: _____	
Description:	replace existing sign with a new structure in same location. New structure to be back to back digital.				

Projecting Signs ($75/sign) *Approval*

North Elevation:	Existing: _____sq ft	Proposed 1: _____sq ft	Clearance Height: _____ft		_____
South Elevation:	Existing: _____sq ft	Proposed 2: _____sq ft	Clearance Height: _____ft		_____
East Elevation:	Existing: _____sq ft	Proposed 3: _____sq ft	Clearance Height: _____ft		_____
West Elevation:	Existing: _____sq ft	Proposed 4: _____sq ft	Clearance Height: _____ft		_____
Illumination:	None: _____	Internal: _____	External: _____	Backlit/Halo: _____	
Description:	_____				

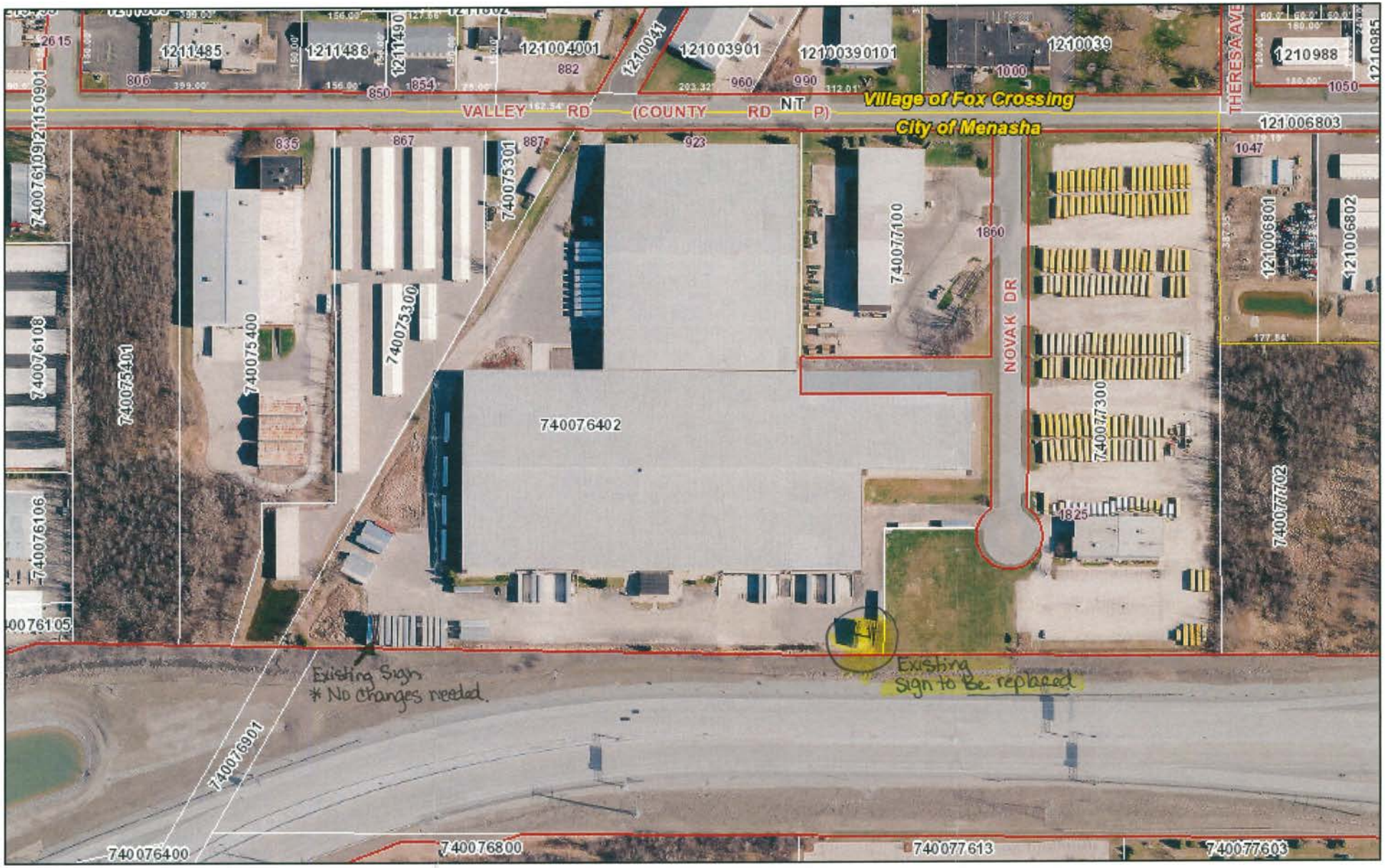
Sidewalk Signs ($50/sign) *Approval*

Proposed:	Area: _____sq ft	Height: _____ft	Location: _____	_____
Description:	_____			

Wall, Awning, Canopy, or Marquee Signs ($75/sign) *Approval*

North Elevation:	Existing: _____sq ft	Proposed 1: _____sq ft	Type: _____		_____
South Elevation:	Existing: _____sq ft	Proposed 2: _____sq ft	Type: _____		_____
East Elevation:	Existing: _____sq ft	Proposed 3: _____sq ft	Type: _____		_____
West Elevation:	Existing: _____sq ft	Proposed 4: _____sq ft	Type: _____		_____
Illumination:	None: _____	Internal: _____	External: _____	Backlit/Halo: _____	
Description	_____				

Site Map



3/25/2022, 9:28:17 AM

Adjacent Counties

Lakes, Ponds and Rivers

Navigable Waterways

Navigable - Permanent (unchecked)

Navigable - Intermittent (unchecked)

Navigable - Stream (unchecked)

Navigable - Permanent (checked)

Navigable - Intermittent (checked)

1:3,000

0 0.03 0.05 0.1 mi

0 0.04 0.08 0.16 km

Winnebago County GIS, Imagery Date: April 2020

Winnebago County GIS

Winnebago County GIS | Imagery Date: April 2020 |

Addition Site Plan

PANEL #33033

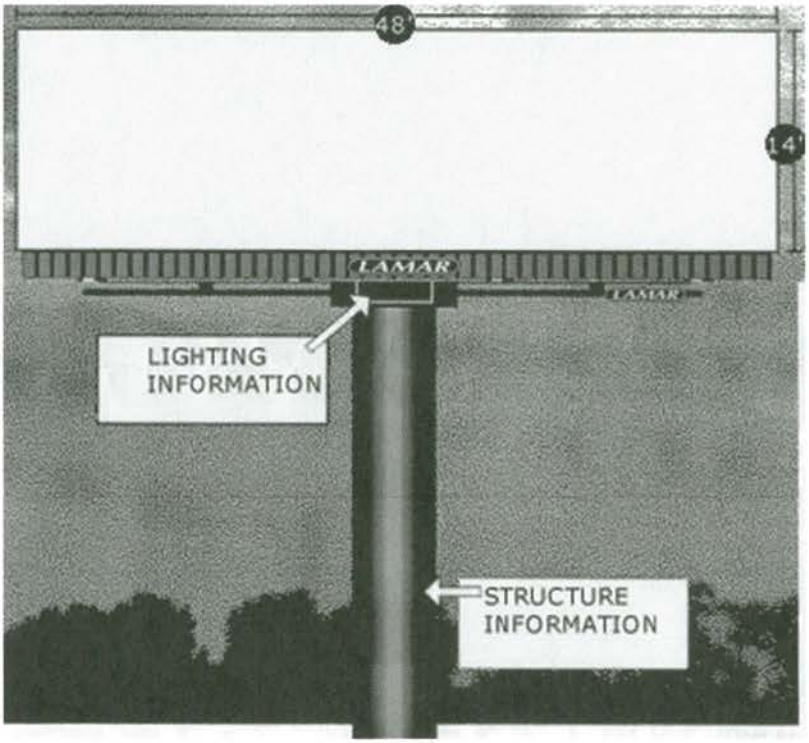
HWY 441 @ NOVAK WS

LOCATION #1

ADVERTISING STRENGTHS: This east facing bulletin is a right hand read on busy Hwy 441, which connects the citie's east side to Interstate 41 on both the north and south sides of Appleton. It is positioned near many of the citie's small businesses, restaurants and residential housing. It is minutes from UW-Fox Valley, the Valley Fair Mall, St Elizabeth Hospital and Interstate 41.

WEEKLY IMPRESSIONS:	233,850*
MEDIA TYPE/STYLE:	Permanent Bulletin - Regular
LAT/LONG:	44.23452 / -88.43149
MARKET:	FOX CITIES
GEOPATH ID:	30642407
PANEL SIZE:	14' 0" x 48' 0" View Spec Sheet
VINYL SIZE:	15' 0" x 49' 0"
FACING/READ:	East / Right
ILLUMINATED:	YES
SHIPPING ADDRESS:	1800 Scheuring Road De Pere, WI 54115

LAMAR
OUTDOOR ADVERTISING



HAGL 24'

OVERALL HEIGHT 40'

ADDITIONAL COMMENTS:

Existing structure to be replaced with the same size structure in the same location. New structure will have back to back digital faces.

BULLETIN
CENTER MOUNT
SINGLE POLE

COPY

May 24, 2022

Larmar Advertising
Attn: Renee St. Laurent
P O Box 5846
De Pere, WI 54115

RE: Sign Permit at 923 Valley Road, Menasha, WI – Parcel No. 4-00764-02

To Whom It May Concern:

Your sign permit to enhance the billboard located at 923 Valley Road, Menasha has been denied. The current sign is an off-premise billboard which is considered a prohibited sign pursuant to Section 13-1-63 (d) and therefore considered a legal nonconforming sign.

The addition of back to back digital faces would cause loss of the legal nonconforming status pursuant to Section 13-1-68(b)(1)(e):

(b) **Loss of Legal Nonconforming Status.**

(1) A sign shall lose its legal nonconforming status when one or more of the following occurs:

a. the business, event, or use ceases and the building, unit of the building, or property remains vacant for a period of ninety (90) days;

b. the sign is expanded or changed to another nonconforming sign;

c. the sign is removed or relocated to another site;

d. the sign is altered so as to change the shape, size, type, placement, or design of its structural or basic parts;

e. the sign is enhanced with any new feature, including the addition of illumination;

f. the sign is repaired, except if such repair brings the sign into conformance with this ordinance, when such repair involves the following:

1. the replacement of both the sign frame and sign panels;
2. the replacement of the primary support poles or other support structure;
3. for signs without framework for sign panels, requires replacement of the sign panels.

Enclosed with this letter please find the Sign Permit Application Form and renderings and check for $150.00. Should you have any questions, please feel free to contact me.

Respectfully,

Kristi Heim

Kristi Heim
Community Development Coordinator

Enclosures (2)

City of Menasha Application

Appeal or Variance

SUBMIT TO:
City of Menasha
Dept. of Com. Development
100 Main Street, Suite 200
Menasha, WI 54952-3190
PHONE: (920) 967-3650

APPLICANT INFORMATION

Petitioner: Attorney Travis T. Schreurs - Menn Law Firm, Ltd. Date: 8/26/22

Petitioner's Address: 480 Pilgrim Way, Ste. 1200 City: Green Bay State: WI Zip: 54307

Telephone #: (920) 435-4391 Fax: (920) 435-0730 Other Contact # or Email: Travis-Schreurs@mennlaw.com

Status of Petitioner (Please Circle): Owner (Representative) Tenant Prospective Buyer

Petitioner's Signature (required): _____ Date: 8/26/22

OWNER INFORMATION

Owner(s): Lamar Central Outdoors, LLC (Easement Owner) Date: 8/26/22

Owner(s) Address 1800 Scheuring Road, Ste. C City: De Pere State: WI Zip: 54115

Telephone #: (920) 347-1765 Fax: ( ) _____ Other Contact # or Email: rstlaurent@lamar.com

Ownership Status (Please Circle): Individual Trust Partnership Corporation (Limited Liability Company)

Property Owner Consent: (required)
By signature hereon, I/We acknowledge that City officials and/or employees may, in the performance of their functions, enter upon the property to inspect or gather other information necessary to process this application. I also understand that all meeting dates are tentative and may be postponed by the Community Development Dept. for incomplete submissions or other administrative reasons.

Easement
~~Property~~ Owner's Signature: _____ Date: 8/26/22
By: Attorney Travis T. Schreurs

APPEAL OR VARIANCE INFORMATION

Address/Location of Appeal/Variance Request: 923 Valley Road

Tax Parcel Number(s): 740076402

Reason for Appeal/Variance Request: Appeal of denial of application for sign permit. For additional reasons, see attached.

Zoning Adjacent to the Site:
North: I1 - Heavy Industrial
South: I1 - Heavy Industrial
East: I1 - Heavy Industrial
West: I1 - Heavy Industrial

Staff _____ Date Rec'd 8/29/2022

SUBMITTAL REQUIREMENTS – Must accompany the application to be complete.

- ❑ Name and address of applicant and all abutting and opposite property owners of record Northern WI Warehouses LLC
- ❑ Statement that the applicant is the owner or the authorized agent of the owner of the property
- ❑ Address and description of the property
- ❑ A site plan showing an accurate depiction of the property
- ❑ Completed Variance Questionnaire N/A

➢ **Fee of $350.00 is due at time of application, payable to the City of Menasha.**
FEE IS NON-REFUNDABLE

SUMMARY OF PROCESS

The application for variation shall be filed with the Zoning Administrator. The petitioner or owner should be present at the Board of Appeals meeting to discuss and answer possible questions regarding the request.

Neighborhood opinion is an important factor in the decision-making process. For complex or controversial proposals, it is recommended that the petitioner conduct a neighborhood meeting to solicit public input prior to action by the Board of Appeals. Community Development staff is available to offer assistance in compiling a mailing list for a neighborhood meeting. Please note that a meeting notice will be mailed to property owners within 100 feet of the subject property regarding your request.

The application package is reviewed by Community Development staff. A staff recommendation is prepared for consideration by the Board of Appeals. The petitioner will be provided with a copy of the staff memorandum and meeting notice several days prior to the Board of Appeals meeting.

The Board of Appeals will make the final decision regarding all appeal and variance requests.

For more information please contact the Community Development Department at 920.967.3650

CITY OF MENASHA
APPEAL REQUEST

Subject Address: 923 Valley Rd.
Applicant: Attorney Travis Schreurs on behalf of Lamar Central Outdoor, LLC ("Lamar")

Description of Request:

On April 25, 2022, Lamar submitted an Application for Sign Permit (see attached) seeking to replace an existing sign at the Subject Address with a new structure. The new structure would include two, back-to-back digital faces. The Department of Community Development denied the Permit Application by letter (the "Denial Letter") dated May 24, 2022 (received by Lamar on August 2, 2022). The Denial Letter indicated that "the current sign is an off-premise billboard which is considered a prohibited sign pursuant to Section 13-1-63(d) and therefore considered a legal nonconforming sign. The addition of back to back digital faces would cause loss of the legal nonconforming status pursuant to Section 13-1-68(b)(1)(e)."

Article F of Title 13 of The Code of Ordinances of the City of Menasha, Wisconsin (the "Sign Code") improperly restricts the size, location and type of sign based upon the content displayed on the sign. This content-based distinction is unconstitutional under the rationale outlined in *Reed v. Town of Gilbert,* 576 U.S. 155 (2015).

Lamar respectfully appeals the permit denial decision and requests that the Board of Appeals grant a sign permit based upon the Application for Sign Permit submitted by Lamar.

SEC. 13-1-60 APPLICABILITY AND PURPOSE OF SIGN REGULATIONS

(a) **Applicability.** This ordinance shall apply to all outdoor/exterior signs. The standards of the ordinance shall apply to all persons, firms, partnerships, associations, and corporations owning, occupying, or having control or management of any premises located within the limits of the City of Menasha.

(b) **Purpose.** The purpose of this ordinance is to regulate signs and outdoor advertising within the City of Menasha in order to protect public safety, health, and welfare; minimize abundance and size of signs; reduce motorist distraction and loss of safe sight distance; promote public convenience; preserve property values; support and complement land use objectives as set forth in the city's zoning ordinance; and enhance the aesthetic appearance and quality of life within the city. The standards contained herein are intended to achieve the following objectives:

(1) Establish a sign permit system to allow a variety of types of signs in the community and prohibit all signs not expressly permitted by this ordinance.

(2) Encourage the effective use of signs as a means of communication.

(3) Enable the public to locate goods, services, and facilities without excessive difficulty and confusion by restricting the number and placement of signs.

(4) Protect the public right to receive messages, especially non-commercial messages such as political, religious, economic, social, philosophical, and other types of information protected by the First Amendment of the U.S. Constitution.

(5) Recognize that the principal intent of commercial signs, to meet the purpose of these standards and serve the public interest, should be for identification of an establishment on the premises, and not for advertising special events, brand names, or off-premise activities. Alternative channels of advertising communication and media are available which do not create visual blight and compromise the safety of the motoring public.

(6) Recognize that the proliferation of signs is unduly distracting to motorists and non-motorized travelers, reduces the effectiveness of signs directing and warning the public, causes confusion, reduces desired uniform traffic flow, and creates potential for vehicular accidents.

(7) Maintain and improve the image of the city by encouraging signs that are compatible with existing signs, have good viewing qualities with passing motorists, and are compatible with buildings and streets, through the establishment of specific standards for various zoning districts in the city.

(8) Prevent signs that are potentially dangerous to the public due to structural deficiencies, disrepair, or distraction to motorists.

(9) Reduce visual pollution and physical obstructions caused by a proliferation of signs that could diminish the city's image, property values, and quality of life.

(10) Prevent placement of signs that will conceal or obscure signs of adjacent uses.

(11) Limit the use of portable commercial signs in recognition of their collective significant negative impact on traffic, safety, and aesthetics of the community.

(c) The regulations and standards of this ordinance are considered the minimum amount of regulation necessary to achieve a substantial government interest for public safety, aesthetics, and protection of property values.

SEC. 13-1-61 DEFINITIONS

(a) **Accessory Structure Sign.** Any sign permanently attached to an accessory structure.

(b) **Animated Sign.** Any sign that uses movement or change of lighting to depict action or create a special effect or scene.

(c) **Awning/Canopy.** A permanently-mounted durable hood or cover which projects from the wall of the building and may or may not be retracted, folded, or collapsed against the face of a supporting structure.

(d) **Banner.** Any sign of lightweight fabric or similar material that is mounted to the ground, pole, sign, or structure and is designed to be easily moved from one location to another. Government-related flags shall not be considered banners.

(e) **Bench Sign.** A sign attached to or painted on any bench that is located in any right-of-way or is in view from any right-of-way.

(f) **Billboard.** A sign directing attention to a use, facility, activity, message, product, or service which is not conducted on or related to the premises upon which the sign is located.

(g) **Blanketing.** The unreasonable obstruction of view of a sign caused by the placement of another sign.

(h) **Building Exposure.** For the purposes of this ordinance only, a building exposure shall be determined by enclosing the most protruding points or edges of a structure within a square or rectangle that will encompass the extreme limits of the structure. Each side of such square or rectangle shall be designated a building exposure.

(i) **Business.** A person, partnership, organization, cooperative, association, trust, corporation, or similar entity which has a legal existence and functions for commercial, industrial, professional, or philanthropic purposes.

(j) **Business Center.** Multiple businesses located on **a** unit or units of contiguous property meeting any of the following criteria:

(1) utilizing shared or inter-connected parking areas;

(2) utilizing shared access drives.

(k) **Business Center Sign.** A monument sign identifying the entrance to a business center and/or the names of the businesses located within the business center.

(l) **Commercial Message.** Any sign wording, logo, or other representation that directly or indirectly names, advertises, or calls attention to a business, product, service, or other commercial activity.

(m) **Commercial Vehicle Sign.** A commercial vehicle containing sign copy which is parked in such a manner and for such duration as to demonstrate its intention to serve as a sign. This definition does not include any commercial vehicle that is used in the normal day-to-day operations of the business and is parked in any parking space approved for such parking by the City of Menasha.

(n) **Construction Sign.** Construction signs are temporary signs which consist of two types:

(1) Signs erected on the premises where a building permit has been issued or other city approval has been granted. Such signs may indicate the name of the business, or the architects, engineers, landscape architects, contractors, or similar artisans, and the owners, financial supporters, sponsors, and similar individuals or firms having a role or interest with respect to the business, structure, or project.

(2) Signs erected either on or off-premises for the purposes of facilitating traffic flow or identifying businesses whose access has been temporarily disrupted by right-of-way construction activities such as street or utility projects.

(o) **Directional Sign.** Signs limited to directional messages, principally for pedestrian or vehicular traffic, such as “one-way,” “entrance,” or “exit.”

(p) **Electronic Message Center.** A permanent sign whose informational content can be changed or altered by electronic means.

(q) **Erect.** Shall mean to build, construct, attach, hang, place, install, suspend, affix, reconstruct, or relocate.

(r) **Flag.** Any fabric, banner, or bunting containing distinctive colors, patterns, or symbols, used as a symbol of a government, school, or other political subdivision.

(s) **Frontage.** The boundary of a lot which abuts an existing or dedicated public street.

(t) **Hanging Sign.** A small pedestrian-oriented sign that is permanently suspended below a horizontal plane surface such as a marquee or canopy.

(u) **Integral Sign.** A sign containing the names of buildings, dates or erection and other similar monumental citation, when carved into stone, concrete, or similar material or made of bronze, aluminum, or other non-combustible material and made an integral part of the structure.

(v) **Landmark Sign.** An older sign of artistic or historic merit, uniqueness, or extraordinary significance to the city or a sign which describes state or national designation of an historic site or structure. Such signs shall be identified by the Landmarks Commission.

(w) **Legal Non-Conforming Sign.** A sign lawfully existing at the time of the adoption of this ordinance, or amendment thereto, which does not conform to this ordinance.

(x) **Marquee Sign.** A sign attached to or consisting in part of an interchangeable copy reader on a permanent overhanging shelter which projects from the face of a building.

(y) **Monument Sign.** A sign in which the entire bottom is in contact with or is close to the ground and is independent of any other signs.

(z) **Non-Commercial Sign.** Signs containing non-commercial messages, such as those designating the location of public telephones, restrooms, restrictions on smoking, and restrictions on building entrances.

(aa) **Off-Premise Sign.** A sign directing attention to a use, business, commodity, service, or activity not conducted, sold, or offered upon the premises where the sign is located.

(bb) **On-Premise Sign.** A sign which identifies the occupant(s) of the premises or relates solely to the use, business, or profession conducted, or to a principal commodity, service, or entertainment sold, offered, or provided upon the premises.

(cc) **Pennant.** Any lightweight plastic, fabric, or other material, whether or not containing a message of any kind, suspended from a rope, wire, or string, sometimes in series, designed to move in the wind. Flags as defined in this Section shall not be considered pennants.

(dd) **Plaque Sign.** A small, pedestrian-oriented version of a wall sign that is permanently attached to surfaces adjacent to store front entries.

(ee) **Pole Sign.** A sign in which the bottom is not in contact with or close to the ground and that is mounted on a freestanding pole(s), column(s), or similar support.

(ff) **Political Sign.** A temporary sign announcing or supporting political candidates or issues in connection with any national, state, or local election or political event, or expressing a political opinion.

(gg) **Portable Sign.** Any sign designed or constructed to be easily moved or transported, including, but not limited to the following signs:

(1) banners;
(2) non-government related flags;
(3) pennants;
(4) sandwich board signs;
(5) signs with wheels or wheels removed;
(6) signs with chassis or support constructed without wheels;
(7) signs designed to be transported by trailer or wheels;
(8) signs attached temporarily to the ground, structure, or other signs;
(9) searchlights and stands;
(10) hot-air or gas-filled balloons or umbrellas used for advertising; and,
(11) substantially similar signs as determined by the Zoning Administrator.

(hh) **Premises.** Shall mean a unit or units of contiguous property meeting any of the following criteria:
(1) utilizing shared or inter-connected parking areas;
(2) utilizing shared access drives;

(ii) P**rojecting Sign.** A pedestrian-oriented sign that is permanently affixed to the face of a building or structure and projects in a perpendicular manner more than twelve (12) inches from the wall surface of that portion of the building or structure to which it is mounted.

(jj) **Real Estate Sign.** A temporary sign which is used to offer for sale, lease, or rent the property, business, or structure upon which the sign is placed.

(kk) **Restaurant Menu Sign.** A small, pedestrian-oriented sign which incorporates a menu containing a list of products and prices offered by the restaurant.

(ll) **Roof Sign.** A sign located on a roof or projecting above any portion of a roof or exterior wall of the structure.

(mm) **Sandwich Board Sign.** A portable sign having two separate and opposite facing sign faces which are hinged at the top, and supported be spreading the sign faces into an upside down "V" formation.

(nn) **Sidewalk Sign.** A portable sign placed on a public sidewalk.

(oo) **Sign.** Any object, device, display, or structure, or part thereof, situated outdoors or indoors, which is used to advertise, identify, display, direct, or attract attention to an object, person, institution, organization, business, product, service, event, or location by any means, including words, letters, figures, design, symbols, fixtures, colors, illumination, or projected images.

(pp) **Static Display.** A sign display whose characters or images are not changed more than once in a 24-hour period.

(qq) **Store Front.** A store front shall be determined by measuring the linear feet of that portion of a building exposure that corresponds to the interior ground level space occupied by a single tenant and abutting a public street, parking area, access drive, or pedestrian walkway.

(rr) **Structure.** Anything constructed or erected, the use of which requires a permanent location on the ground or attached to something having a permanent location on the ground.

(ss) **Temporary Sign.** Any sign designed or constructed to be easily moved from one location to another and which are only planned to be in use for time periods of limited duration. Under this ordinance, real estate signs, political signs, and construction signs shall be considered temporary signs. Portable signs as defined in this Section are not included in this definition.

(tt) **Tenant Directory Sign.** A sign used to identify multi-tenant buildings and businesses that do not have direct frontage on a public street.

(uu) **Wall Sign.** A sign fastened to the wall of a building or structure in such a manner that the wall becomes the supporting structure for, or forms the background surface of, the sign and that does not project more than twelve (12) inches from such buildings or structure.

(vv) **Window Sign.** Any sign that is placed inside a window or upon window panes or glass and is visible from the exterior of the window.

SEC. 13-1-62 SIGNS EXEMPT FROM PERMIT REQUIREMENTS

(a) **Artwork.** Works of art which do not identify a business, product, or service.

(b) **Construction Signs.** Temporary construction signs shall be permitted in accordance with the following standards:

(1) Construction signs in single and two family residential districts shall not exceed six (6) square feet per sign face, twelve (12) square feet per sign, and six (6) feet in height, and are limited to one (1) per lot. The sign shall be removed within three (3) days of the end of construction activity.

(2) Construction signs in multi-family and other districts shall not exceed thirty-two (32) square feet per sign face, sixty-four (64) square feet per sign. Such signs shall be limited to one (1) sign per street frontage per business. The signs shall be removed within fifteen (15) days of the end of construction activity.

(3) In instances where temporary signs are necessary in commercial and industrial districts due to right-of-way or similar construction, the following standards shall apply:

a. Signs shall be used to facilitate business identification and traffic flow only for lots temporarily impacted by right-of-way construction.

b. Such signs shall not exceed thirty-two (32) square feet per sign face, sixty-four (64) square feet per sign and shall be limited to one (1) sign per access point.

c. In no instance shall signs be placed within vision control areas. When necessary, signs may be placed off premise on private property with permission of the property owner. The Director of Public Works may grant permission for signs to be temporarily placed in the right-of-way when deemed necessary and appropriate.

d. Such signs shall not be placed more than ten (10) days before construction commences and shall be removed within three (3) days of the end of right-of-way construction activity.

(c) **Directional Signs.** Directional signs shall be permitted in accordance with the following standards:

(1) Each premises shall be permitted two (2) directional signs per driveway, plus additional directional signs to improve circulation on-site provided they are not placed within the front yard.

(2) Directional signs shall not exceed twelve (12) square feet per sign face, twenty-four (24) square feet per sign, and shall not exceed six (6) feet in height.

(3) Directional signs may be placed in the vision control area provided they do not exceed three (3) feet in height.

(4) The sign may contain the following information only:

a. name of business or symbol (not both);

b. directional arrows;

c. the words “entrance” or “exit” or similar terms.

(d) **Flags.** Government-related flags.

(e) **Government Signs.** Signs erected by a governmental body.

(f) **Hanging Signs.** Hanging signs shall be permitted in accordance with the following standards:

(1) One sign is allowed per business

(2) Signs may not exceed four (4) sq. ft. per sign face excluding supports

(3) Signs may not be illuminated

(4) Signs must be pedestrian-oriented and positioned in a perpendicular manner to the building’s wall surface.

(5) Hanging signs may be used only at ground floor locations except for upper floor businesses with covered entry porches or balconies.

(g) **Holiday Lighting.** Temporary lighting and displays that are part of customary holiday decoration, provided that they contain no commercial message and are not located in the right-of-way. Holiday displays and lighting in commercial, industrial, or multi-family

districts may be displayed up to sixty (60) days prior to the holiday and shall be removed within fifteen (15) days after the holiday.

(h) **Integral Sign.** Names of buildings, dates of erection, monumental citation, commemorative tablets when carved into stone, concrete, or similar material, or made of bronze, aluminum, or other non-combustible material and made an integral part of the structure. Such signs shall not exceed twenty-five (25) square feet in area.

(i) **Landmark Signs.** Landmark signs as defined in this ordinance.

(j) **Nameplate.** Address, owner, or occupant nameplate and other signs of up to two (2) square feet in area attached to a mailbox, light fixture, or an exterior wall.

(k) **Off-Premise Special Event Signs.** Announcements by public or non-profit organizations of fund raising events, special events, or activities of interest to the general public which are located off-premise, other than political signs, provided that they meet the following:

(1) Such signs shall not exceed six (6) square feet per sign face, twelve (12) square feet per sign in residential districts and thirty-two (32) square feet per sign face for other districts.

(2) Such signs may be placed in the right-of-way at the discretion of and with authorization by the Director of Public Works.

(3) Signs may be erected up to two (2) weeks before the event and shall be removed within three (3) days after the event.

(l) **Parking Lot Signs.** Parking lot signs indicating restrictions on parking, when placed within approved parking lots.

(m) **Plaque Signs.** Plaque signs shall be permitted in compliance with the following standards:

(1) Signs must be located adjacent to a business entrance;

(2) One (1) sign shall be allowed per business entrance;

(3) Signs shall not exceed two (2) sq. ft. maximum and shall not project from wall surfaces more than two (2) inches;

(4) Signs may not be illuminated.

(n) **Political Signs.** Temporary political signs shall be removed within fifteen (15) days after the election or event.

(o) **Portable Signs.** Portable signs as defined in Sec. 13-1-61 shall be permitted in compliance with the following standards.

(1) The use of a portable sign shall be limited to thirty (30) days at a time, and not more frequently than three (3) times per calendar year at any one business. The placement of one portable sign constitutes one (1) event.

(2) For a special event, such as a grand opening or special sale, multiple portable signs may be used (such as banners, flags, or pennants). Use of multiple portable signs for special events shall be permitted one (1) time per calendar year per business, not to exceed (30) days at a time. This time period will be counted towards the allowable portable sign use of three (3) times per calendar year.

(3) The maximum size of any portable sign shall be thirty-two (32) square feet per sign face, sixty-four (64) square feet per sign.

(4) Portable signs shall be securely mounted, legible, and maintained in good condition.

(5) Portable signs with commercial messages are prohibited on properties employing the use of electronic message centers.

(p) **Real Estate Signs.** Real estate signs are permitted in compliance with the following standards:

(1) Real estate signs in residential districts are limited to one (1) sign per street frontage and may not exceed six (6) square feet per sign face, twelve (12) square feet per sign, and six (6) feet in height.

(2) Real estate signs in nonresidential district are limited to one (1) sign per street frontage and may not exceed thirty-two (32) square feet per sign face, sixty-four (64) square feet per sign, and eight (8) feet in height.

(3) Real estate signs shall be removed on or before fifteen (15) calendar days after the sale, lease, or rental of the premises or structure, property, subdivision, or condominium. The date of the acceptance of an offer to purchase, to lease, or to rent by the current owner, or the date of a placement of a sold, leased, or rented sign on the premises, whichever date is earlier, shall determine the beginning of the fifteen (15) day period.

(q) **Restaurant Menu Sign.** Restaurant menu signs shall be permitted in compliance with the following standards:

(1) Signs must be located adjacent to the business entrance;

(2) One (1) sign shall be allowed per business entrance;

(3) Signs shall not exceed six (6) sq. ft. maximum;

(4) Menus shall be located within a permanently mounted display area and protected from the elements;

(5) Menus may be illuminated from an exterior source only.

(r) **Rummage Sale and Seasonal Home Occupation Signs.** Signs announcing rummage sales or seasonal home occupations in accordance with Section 13-1-86 are permitted in compliance with the following:

(1) One (1) sign is allowed per street frontage.

(2) Signs may be located off-premises but must be on private property; such signs in the public right-of-way are prohibited.

(3) Signs may not exceed six (6) square feet per sign face, twelve (12) square feet per sign.

(4) Such signs may be erected no more than seven (7) days before and shall be removed within three (3) days after the announced sale.

(s) **Window Signs.** Window signs and other signs within a building provided such signs shall not occupy more than thirty percent (30%) of the window space.

(t) **Warning Signs.** Signs that provide warning messages, such as no trespassing or warning of electrical currents or animals.

(u) **Certain Non-Commercial Signs.** Signs containing non-commercial messages, such as those designating the location of public telephones, restrooms, restrictions on smoking, and restrictions of building entrances, provided that such signs do not exceed a maximum of four (4) square feet.

(v) **Certain Incidental Commercial Signs.** Vending machines, automatic tellers, gasoline pumps, and similar devices which display prices and/or the name, trademark, or logo of a company or brand, provided the display is an integral part of the device and does not exceed four (4) square feet in area per side of the device.

SEC. 13-1-63 PROHIBITED SIGNS.

(a) **Animated Signs.** Animated signs, including but not limited to the following:

(1) Signs having moving members or parts, excluding barber poles and time and temperature signs which do not contain commercial messages.

(2) Signs using high intensity or flashing lights.

(3) Signs or lighting which in any way simulate or could be confused with the lighting of emergency vehicles or traffic signals.

(b) **Bench Signs.** Signs attached to or painted on any bench that is located in any right-of-way or is in view from any right-of-way or public area.

(c) **Commercial Vehicle Signs.** Commercial vehicle signs as defined in Sec. 13-1-61.

(d) **Off-Premise Signs and Billboards.** Off-premise signs and billboards erected for the purposes of directing attention to a use, facility, activity, message, product, or service which is not conducted on or related to the premises upon which the sign is located, except as provided for in this ordinance.

(e) **Pole Signs.** Except as allowed in 13-1-67, a sign in which the bottom is not in contact with or close to the ground and that is mounted on a freestanding pole(s), column(s), or similar support.

(f) **Roof Signs.** Signs located on a roof or projecting above any portion of a roof or exterior wall of a structure.

(g) **Signs Obstructing Access or Egress.** Signs which obstruct free access or egress from any building, including those that obstruct any fire escape, required exit way, window, or door opening or that prevent free access to the roof by firefighters.

(h) **Signs in Vision Control Area.** Signs located in any vision control area as defined in Sec. 13-1-53, except signs that are three (3) feet or lower or are pole-mounted (with a pole diameter of twelve (12) inches or less) and maintain ten (10) feet in height to the bottom of the sign. This vision control area shall be applied to any intersection of street right-of-way, driveways, or combination thereof.

(i) **Signs in the Right-of-Way.** Signs placed in, or projecting into any public street right-of-way, with the exception of signage erected by any governmental body having jurisdiction over the right-of-way or as provided for in this ordinance.

(j) **Signs Painted on Walls.** Signs painted directly on an exterior building wall. Murals or artwork of a non-commercial nature are permitted.

SEC. 13-1-64 SIGN PERMITS REQUIRED.

(a) **Permit Required**. No person shall erect any sign in the City of Menasha without first having obtained the appropriate permit from the Zoning Administrator, except as provided for in this ordinance.

(b) **Exceptions.** A permit is not required for the following changes to existing signs with valid permits, however, a drawing or photo of the changes shall be submitted in order to update the sign permit:
- (1) repainting of a sign message;
- (2) a copy change or replacement of panels within an existing sign frame or cabinet;
- (3) repair of a conforming sign with a valid permit.

(c) **Application**. Before construction of any sign(s) requiring a permit, applicants shall consult with the Zoning Administrator and submit an application that shall include:
- (1) A completed permit application with the signature of the property owner.
- (2) An accurate plot plan drawn to scale of the entire lot on which the sign(s) will be located.
- (3) Location of buildings, parking lots, driveways, and landscaped areas on the lot.
- (4) A table (or tables) containing:
  - a. Computation of the maximum total sign area;
  - b. Maximum area for individual signs;
  - c. Height and number of monument signs; and
  - d. Statement of the maximum total sign area and maximum number of signs permitted on the site by this Code.

(5) An accurate indication on the plot plan of the location and orientation of all existing signs, each sign for which a permit is requested, and the anticipated location of future signs requiring a permit.

(6) A description and illustration of the following:

a. Colors and materials to be used in sign construction (e.g., limestone base with bronze letters, etc);

b. Style of lettering for all signs;

c. Appearance/location of logos or icons;

d. Location of each sign on the building(s), with building elevations if necessary (e.g., over doors, over windows, awnings, etc);

e. All sign proportions; and,

f. Types of illumination (e.g., internally illuminated, or external illumination with description of type of outdoor light fixture).

(7) In addition, optional submittals may be required by the Zoning Administrator if deemed necessary due to the character of the proposed signs and/or site.

(d) P**ermit Fees.**

(1) A permit fee established by the Common Council shall be paid to the City of Menasha for each sign permit issued under this Code.

(2) A fee shall not be charged for putting an existing sign into conformance with this ordinance or for a copy change as listed in 13-1-64(a).

(3) The fee does not include electrical permit fees, which shall be in addition to the sign permit fees listed in this section.

(4) Any person failing to obtain a sign permit prior to erecting a sign shall pay double permit fees.

(e) **Approval by Landmarks Commission.** Signs to be located in a designated historic district are subject to review and approval by the Landmarks Commission prior to the issuance of a sign permit.

(f) **Signs in Right-of-Way.** Permit applications for a sign which projects into a public right-of way as allowed in this ordinance must include the following:

(1) **Liability Agreement.** An agreement by the business and/or property owner to indemnify and hold harmless the City of Menasha for any damages or liabilities whatsoever resulting from the placement of such sign.

(2) **Revocation Agreement.** An agreement by the business and/or property owner that in the event it is deemed necessary to revoke the sign permit on the basis of a need to expand capacity, improve safety, or other reason related to the orderly use of the right-of-way, the City of Menasha may terminate the permit and order the sign to be removed according to the process outlined in Sec. 13-1-70(a).

(g) **Revocation of Permit; Appeal.** The Zoning Administrator, Building Inspector, and/or designee may at any time for a violation of this ordinance revoke a permit or require changes to bring the sign into conformance with this ordinance. Notice shall be given according to the process outlined in Sec. 13-1-70(a). The holder of a revoked permit shall be entitled to an appeal before the Board of Appeals.

SEC. 13-1-65 GENERAL SIGN REGULATIONS

(a) **Design.** Signs shall be designed to be compatible with the character of building materials and landscaping to promote an overall unified and aesthetic effect.

(b) **Maintenance.** Every sign shall be constructed and maintained in good structural condition at all times. All signs shall be kept neatly painted, stained, sealed, or preserved including all parts and supports.

(c) **Illumination.** Illumination of signs as permitted in Sec. 13-1-66 shall be subject to the following standards:

(1) Illumination of signs shall be directed or shaded so that the no direct rays shall:

a. interfere with the vision of persons on adjacent streets or properties

b. be directed onto adjacent residential uses or districts; or,

c. create a nuisance condition as determined by the Zoning Administrator and/or designee.

(2) Where internal illumination of signs is permitted, signs shall be designed to minimize the amount of light that is transmitted through the sign panel. The display of white light should be limited to the sign copy. If lighting the sign copy only is not an option, the display of internal illumination through the background shall be controlled by one or more of the following:

a. limiting the illuminated background to 30% of the sign area;

b. changing the shape of the sign to reduce the lighted surface area,

c. using a dark color;

d. using an opaque screen.

(3) Underground wiring shall be required for illuminated signs not attached to a building.

(d) **Blanketing.** Blanketing of signs is prohibited.

(e) **Clearance Areas.**

(1) **Vehicle Area Clearance.** When a sign extends over a private area where vehicles travel or are parked, the bottom of the overhanging sign must be at least twelve (12) feet above the ground. Vehicle areas include but are not limited to driveways, alleys, parking areas, and loading and maneuvering areas.

(2) **Pedestrian Area Clearance.** When a sign extends over a sidewalk, walkway, or other space accessible to pedestrians, the bottom of the sign structure must be at least seven (7) feet above the ground.

(f) **Corner Lots.** Corner lot properties may choose one of the following options for monument signs:

(1) One sign may be placed along each street frontage in accordance with the standards for the zoning district; the permissible sign area for each sign shall be equal to the average linear feet of the both building exposures, not to exceed 125% of the shorter building exposure.

(2) In lieu of two signs, one sign may be erected not to exceed 125% of the permissible sign area based on the average of both building exposures and in accordance with the standards for the zoning district.

(g) **Transitional Areas.** Signs are prohibited within any transitional area required by Sec. 13-1-17.

(h) **Calculation of Sign Area.** Sign area shall be calculated as follows:

(1) **Calculation of Area of Individual Signs.** The allowable area of a sign face shall be measured by enclosing the most protruding points or edges of a sign within the smallest square, circle, rectangle, triangle, or combination thereof that will encompass the extreme limits of the writing, representation, emblem, or other display, together with any material, color, or decoration forming an integral part of the background of the display or used to differentiate the sign from the backdrop or structure against which it is placed. Such area shall not include any base, supports, bracing, supporting fence, or supporting wall when they are clearly incidental to the display itself.

(2) **Calculation of Area of Multi-faced Signs.** The allowable sign area for a sign with more than one face shall be computed by adding together the area of all sign faces visible from any one point. When two identical sign faces are placed back

to back, so that both faces cannot be viewed from any point at the same time, and when such sign faces are part of the same sign structure and are not more than two (2) feet apart, the sign area shall be computed by measurement of one of the faces.

(i) **Computation of Height.** The allowable height of a sign shall be measured by calculating the distance from the base of the sign at normal grade to the top of the highest attached component of the sign. Normal grade shall be the lower of:

(1) the existing grade prior to construction; or,

(2) the newly established grade after construction, exclusive of any filling, berming, mounding, or excavating solely for the purpose of locating the sign.

(j) **Assignment of Allowable Sign Area - Multi-Tenant Buildings.** When the allowable area for signs is based on the linear feet of a building exposure, the allowable sign area may be assigned to each tenant as follows:

(1) allowable sign area multiplied by the percent of building exposure or building space occupied by each tenant;

(2) the allowable sign area divided by the number of tenants; or,

(3) the allowable sign area may be assigned at the discretion of the property owner.

SEC. 13-1-66 SIGN STANDARDS BY ZONING DISTRICT.

(a) All signs in the C-2 Central Business District shall be subject to the Downtown Menasha Sign Design Guidelines as adopted by the Common Council.

(b) The following charts list standards by zoning district for signs that require a sign permit:

Zoning District	**Sign Type Permitted**	**Restrictions** see Sec. 13-1-67	**Allowable Sign Area per Building Exposure**	**Min & Max Sign Area/ Business***	**Max #**	**Max Height**	**Setback** see Sec. 13-1-65(e)
A-1, R-1, R-2, R2-A (2 unit only)	wall (for general home occupations only)	no illumination	2 sq. ft./sign	NA	1/unit	below 2nd floor windows or 20', whichever is less	NA
R-2A (3+ units), R-3, R-4	monument	external illumination only	32 sq. ft./sign face, not to exceed 64 sq. ft./sign	NA	1/street frontage; see Sec. 13-1-65(f) for corner lots	10'	2'
Special Use: A-1, R-1, R-2, R-2A, R-3, R-4	wall	external illumination only	1 sq. ft. for each linear ft. of the building exposure	at least 20 sq. ft., not to exceed 50 sq. ft.	allowable sign area may be applied per building exposure	below 2nd floor windows or 20', whichever is less	NA
	monument	external illumination only	32 sq. ft./sign face, not to exceed 64 sq. ft./sign		1/street frontage; see Sec. 13-1-65(f) for corner lots	10'	10'

* The aggregate maximum sign area per business may not exceed the allowable sign area per building exposure. In order to accommodate businesses with very narrow building exposures, a minimum sign area per business is granted for certain types of signs. A sign smaller than the minimum may be erected subject to the requirements of this ordinance.

Zoning District	**Type Permitted**	Restrictions (See Sec. 13-1-67)	**Allowable Sign Area per Building Exposure**	**Min & Max Sign Area per Business***	**Max#**	**Max Height**	**Setback** see Sec. 13-1-65(e)
C-1, I-1, I-2	wall - ground floor businesses, including awning, canopy, and marquee		1 sq. ft. for each linear ft. of the building exposure	at least 20 sq. ft, not to exceed 300 sq. ft.	allowable sign area may be applied per building exposure	top of wall	NA
	wall - upper floor businesses and/or tenant directory		8 sq. ft.	NA	1/entrance	at entrance, below 2nd floor windows or 20', whichever is less	NA
	monument (see Sec. 13-1-67 for electronic message centers)		1 sq. ft./sign face for each linear ft. of the building exposure, not to exceed 200 sq. ft.	not to exceed 75 sq. ft/sign face for 1st business, 50 sq. ft./sign face for each business thereafter	1/street frontage; see Sec. 13-1-65(f) for corner lots	16'	2'
	business center	requires Special Use Permit	not to exceed 200 sq. ft.	not to exceed 75 sq. ft/sign face for 1st business, 50 sq. ft./sign face for each business thereafter	1/business center entrance	16'	per Special Use Permit
	projecting - ground floor businesses	external or back lit/halo illumination only	25 sq. ft./sign face, not to exceed 50 sq. ft./sign	NA	1/business	below 2nd floor windows or 20', whichever is less	NA
	projecting - upper floor businesses or tenant directory	external or back lit/halo illumination only	8 sq. ft.	NA	1/entrance	at entrance below 2nd floor windows or 20', whichever is less	NA

* The aggregate maximum sign area per business may not exceed the allowable sign area per building exposure. In order to accommodate businesses with very narrow building exposures, a minimum sign area per business is granted for certain types of signs. A sign smaller than the minimum may be erected subject to the requirements of this ordinance.

Zoning District	**Type Permitted**	Restrictions (See Sec. 13-1-67)	**Allowable Sign Area per Building Exposure**	**Min & Max Sign Area per Business***	**Max#**	**Max Height**	**Setback** see Sec. 13-1-65(e)
C-1, I-1, I-2 adjacent STH 441 frontage	wall		1 sq. ft. for each linear ft. of the building exposure	at least 20 sq. ft, not to exceed 500 sq. ft.	1/business on building exposure facing STH 441 only	top of wall	NA
	monument		1 sq. ft./sign face for each linear ft. of the building exposure, not to exceed 200 sq. ft.	not to exceed 100 sq. ft/sign face for first business, 50 sq. ft./sign face for each business thereafter	1/lot	16’	2’
	pole	See Sec. 13-1-67	1 sq. ft./sign face for each linear ft. of the building exposure, not to exceed 300 sq. ft./sign face	not to exceed 150 sq. ft/sign face for first business, plus 50 sq. ft./sign face for each business thereafter	1/lot facing STH 441	16’ above STH 441 centerline grade	2’

* The aggregate maximum sign area per business may not exceed the allowable sign area per building exposure. In order to accommodate businesses with very narrow building exposures, a minimum sign area per business is granted for certain types of signs. A sign smaller than the minimum may be erected subject to the requirements of this ordinance.

Zoning District	**Type Permitted**	Restrictions (See Sec. 13-1-67)	**Allowable Sign Area per Building Exposure**	**Min & Max Sign Area per Business***	**Max#**	**Max Height**	**Setback** see Sec. 13-1-65(e)
C-2	wall - ground floor businesses, including awning, canopy, and marquee	external or back lit/halo illumination only	1 sq. ft. for each linear ft. of the store front	at least 10 sq. ft., not to exceed 50 sq. ft.	allowable sign area may be applied per store front	below 2nd floor windows or 20', whichever is less	NA
	wall - upper floor businesses and/or tenant directory	external or back lit/halo illumination only	8 sq. ft.	NA	1/entrance	at entrance below 2nd floor windows or 20', whichever is less	NA
	projecting - ground floor businesses	external or back lit/halo illumination only	1 sq. ft for each linear ft. of store front, not to exceed 25 sq. ft./sign face	NA	1/business	below 2nd floor windows or 20', whichever is less	NA
	projecting - upper floor businesses or tenant directory	external or back lit/halo illumination only	8 sq. ft.	NA	1/entrance	at entrance below 2nd floor windows or 20', whichever is less	NA
	monument	external or back lit/halo illumination only	1 sq. ft/sign face for each linear ft. of the building exposure; not to exceed 50 sq. ft.	NA	1/street frontage, see Sec. 13-1-65(f) for corner lots	8'	2'
	business center	requires Special Use Permit	not to exceed 100 sq. ft.	not to exceed 50 sq. ft/sign face for 1st business, plus 25 sq. ft./sign face for each business thereafter	1/business center entrance	8'	per Special Use Permit
	sidewalk	see Sec. 13-1-67	8 sq. ft./sign face, 16 sq. ft./sign	NA	1/business	6'	see Sec. 13-1-67

* The aggregate maximum sign area per business may not exceed the allowable sign area per building exposure. In order to accommodate businesses with very narrow building exposures, a minimum sign area per business is granted for certain types of signs. A sign smaller than the minimum may be erected subject to the requirements of this ordinance.

Zoning District	**Type Permitted**	Restrictions (See Sec. 13-1-67)	**Allowable Sign Area per Building Exposure**	**Min & Max Sign Area per Business***	**Max#**	**Max Height**	**Setback** see Sec. 13-1-65(e)
C-3, C-4	wall - ground floor businesses, including awning, canopy, and marquee	for retail uses, the C-1 standards for wall signs shall apply	1 sq. ft. for each linear ft. of the building exposure	at least 20 sq. ft., not to exceed 75 sq. ft.	allowable sign area may be applied per building exposure facing a street or customer parking lot	below 2nd floor windows or 20', whichever is less	NA
	wall - upper floor businesses or tenant directory	external or back lit/halo illumination only	8 sq. ft.	NA	1/entrance	at entrance below 2nd floor windows or 20', whichever is less	NA
	monument	for retail uses, the C-1 standards for monument signs shall apply	1 sq. ft./sign face for each linear ft. of the building exposure; not to exceed 100 sq. ft.	not to exceed 50 sq. ft./sign face for 1st business, 25 sq. ft./sign face for each business thereafter	1/street frontage, see Sec. 13-1-65(f) for corner lots	16'	2 ft
	business center	requires Special Use Permit	not to exceed 100 sq. ft.	not to exceed 50 sq. ft/sign face for 1st business, 25 sq. ft./sign face for each business thereafter	1/business center entrance	16'	per Special Use Permit
	projecting - ground floor businesses	external or back lit/halo illumination only	1 sq. ft for each linear ft. of store front, not to exceed 25 sq. ft./sign face	NA	1/business	below 2nd floor windows or 20', whichever is less	NA
	projecting - upper floor businesses or tenant directory signs	external or back lit/halo illumination only	8 sq. ft.	NA	1/entrance	at entrance below 2nd floor windows or 20', whichever is less	NA

* The aggregate maximum sign area per business may not exceed the allowable sign area per building exposure. In order to accommodate businesses with very narrow building exposures, a minimum sign area per business is granted for certain types of signs. A sign smaller than the minimum may be erected subject to the requirements of this ordinance.

SEC. 13-1-67 REQUIREMENTS BY SIGN TYPE

(a) **Accessory Structure Signs.** Signs may be placed on the walls of accessory structures facing a street or customer parking lot, but the sign area used shall be deducted from the allowable wall sign area for the building exposure of the primary building.

(b) **Awnings/Canopies/Marquees.** Awning, canopy, and marquee signs shall be permitted subject to the following standards:

(1) In the C-2 Central Business District, they may project into the public right-of-way, but may not be erected closer than three (3) feet to any street curb line.

(2) A minimum clearance of seven (7) feet shall be maintained from ground level.

(3) They shall not extend above the roof or parapet of the structure to which it is attached.

(4) Any text, logos, or other graphic representation qualifying as a sign which is placed on an awning, canopy, or marquee shall be included within the calculation of total allowable wall sign area and are subject to the requirements of this ordinance.

(5) Marquee signs shall be limited to buildings occupied by theaters, cinemas, performing arts facilities, or parking structures.

(c) **Business Center Signs.** Business center signs shall be permitted subject to the following standards:

(1) Signs shall require a Special Use Permit and are intended to identify the entrance, the name of the business center, and/or the names of businesses within the business center.

(2) The boundaries of the business center shall be determined through review and approval of the Special Use Permit.

(3) Business center signs shall keep the first two (2) feet of the sign closest to the ground free of sign copy for the purposes of snow storage and landscaping. This portion of the sign shall not be counted toward the calculation of allowable sign area.

(4) The maximum height of the sign base shall be no more than 1/3 the total sign height.

(5) In granting a Special Use Permit, additional conditions may be required depending on the unique conditions of the business center and surrounding area. These conditions may include, but are not limited to:

a. location
b. design details
c. colors
d. materials
e. illumination
f. size
g. height
h. landscaping
i. number of businesses identified

(6) Electronic message centers are prohibited.

(d) **Electronic Message Centers.** Signs whose informational content can be changed or altered by electronic means shall be subject to the following standards:

(1) Electronic message centers are permitted in the C-1, C-3, C-4, I-1, and I-2 districts and, within all residential districts, institutional uses. Electronic message centers shall require a Special Use Permit and be turned off between the hours of 9:00pm and 6:00am if they are located within three hundred (300) feet of either of the following:

a. a residential use or district;
b. any property use that requires a Special Use Permit.

(2) Electronic message centers shall be allowed on monument signs only and are subject to all monument sign requirements of the applicable zoning district.

(3) The sign shall be equipped with photosensitive equipment which automatically adjusts the brightness and contrast of the sign in direct relation to the ambient outdoor illumination. The sign must not exceed a maximum illumination of 5,000 nits (candelas per square meter) during daylight hours and a maximum illumination of 500 nits (candelas per square meter) between dusk to dawn as measured from the sign's face at maximum brightness.

(4) Electronic message centers shall be integral to and a part of the original approved monument sign and may not comprise more than 30% of the sign face and shall be located in the lower one half of the sign. Static displays consisting only of letters or numerals that are not changed more than once in a 24-hour period shall not be included in the area computation of the electronic message center. The combined square footage of the electronic message center plus any static display area may not comprise more than 75% of the total allowable square footage.

(5) Each message displayed on an electronic message center must be static or depicted for a minimum of 3 seconds. Each transition shall take place in less than one (1) second.

(6) Electronic message centers shall not utilize animation, chasing, flashing, scintillation, scrolling or running messages, fade, or any other effect which depicts movement or is intended to draw attention to the sign.

(7) Including an electronic message center as part of a permanent sign will prohibit the use of any portable signs (as defined in Sec. 13-1-61).

(8) Electronic message centers shall not display off-premise commercial advertising.

(9) The Zoning Administrator shall inspect annually or at such other times as deemed necessary each electronic message center for the purpose of ascertaining whether the software settings are in compliance with the requirements of this Code. The owner of the electronic message center shall pay to the City of Menasha an annual inspection fee in an amount established by the Common Council.

(e) **Monument Signs.** Monument signs shall be permitted subject to the following standards:

(1) Monument signs shall keep the first two (2) feet of the sign closest to the ground free of sign copy for the purposes of snow storage and landscaping. This portion of the sign shall not be counted toward the calculation of allowable sign area.

(2) Monument signs must incorporate design details, materials, and colors of the associated building(s). EIFS shall not be allowed on the bottom 3 feet.

(3) The maximum height of the sign base shall be no more than 1/3 the total sign height.

(f) **Pole Signs.** Pole signs are allowed on properties zoned C-1, I-1, or I-2 that directly abut WIS 441. Pole signs shall be subject to the following standards:

(1) The structure shall be constructed on no less than two columns which must be designed to incorporate design details, materials, and colors of the associated building(s). **EIFS** shall not be allowed on the bottom 3 feet. Poles shall be shrouded and integrated into the overall sign design.

(2) Maximum height of a pole sign is sixteen (16) feet above the WIS 441 centerline grade directly adjacent to the subject property.

(3) Individual tenant sign panels should be uniform in size, recognizing that the major tenant, or the name of the center may have a slightly larger sign panel.

(4) Sign panels shall not extend more than two (2) feet beyond the width of the architectural support elements on the sign.

(5) Electronic Message Centers are prohibited.

(g) **Projecting Signs.** Projecting signs shall be subject to the following standards:

(1) They shall project from the wall at an angle of ninety (90) degrees.

(2) A minimum clearance of seven (7) feet shall be maintained from ground level.

(3) No projecting sign may be erected within twenty (20) feet of any other projecting sign; however, this provision shall not deny any place of business at least one (1) projecting sign.

(4) In the C-2 Central Business District, such signs may project into the public right-of-way, but may not be erected closer than three (3) feet to any street curb line.

(h) **Sidewalk Signs in the C-1 General Commercial District.** Sidewalk signs may be placed in the C-1 General Commercial District subject to the following limitations:

(1) Number of Signs Allowed.

a. The number of signs shall be limited to one (1) per building exposure per business with direct street and/or public area entry. Multi-tenant buildings are allowed a total of three sidewalk signs per street and/or public area entry. No business shall be displayed on more than one sign per street or public area entry.

b. When a sidewalk sign is in use for a business, no other temporary signage on the property may be in use for said business.

c. Sidewalk signs are not permitted on parcels with electronic message centers.

(2) Design.

a. Sidewalk signs shall be a sandwich board type ("A-frame") with multiple (minimum of 2) or one continuous hinge across the top.

b. Signs must be portable.

c. Signs shall not exceed a width of two and one-half feet.

d. Removable signage panels on thin sign board material such as; aluminum, Centrex, or other quality sign grade material, shall be attached to the sign frame with screws or through the use of slide rails – no Velcro, staples, or double-sided tape. Cardboard or paper as sign materials shall not be permitted.

e. Interchangeable letters or letter copy on rails are discouraged.

f. Sidewalk signs shall not be illuminated, animated, have moving parts, or electrically powered in any way.

g. Windblown devices such as balloons, banners, or other similar items shall not be attached or otherwise made part of the sidewalk sign.

h. Signs shall contain a device such as a chain, rope, or cable to prevent the sign panels from spreading.

i. Signs shall not have more than two (2) sign faces.

j. Sidewalk signs shall be free standing, internally weighted and shall not be anchored or affixed to any sidewalk, light pole, sign, traffic signal, bench, newspaper vending box, planting structure or similar structure or appurtenances. The signs shall be placed at sidewalk grade level and shall not be placed on planters, walls, curbs or any similar structure.

(3) Materials.

a. Signs shall be constructed using quality exterior sign board materials, wood or other durable material.

b. All wood and metal shall be painted or stained.

c. All signs shall be professionally printed or painted, changeable copy that is hand lettered shall comprise no more than 75% of the sign face.

(4) Location and Removal.

a. Placement is allowed on landscaped areas in front of the business, between building frontage and sidewalk or in terrace space of the right-of-way when the terrace is larger than forty-eight (48) inches.

b. All signs must be removed after the conclusion of business hours each day and are allowed only from 5:00 a.m. to 10:00 p.m.

c. Signage shall not obstruct the ingress/egress of parked vehicles.

d. Signs placed near points of ingress/egress will be subject to vision control review.

e. When multiple signs are placed on one parcel, signs shall have a minimum clear spacing of twenty-five (25) feet between signs.

f. Sidewalk signs shall not be anchored or affixed to any sidewalk, light pole, sign, traffic signal, bench, newspaper vending box, planting structure or other similar structure or appurtenances. The signs shall be placed at sidewalk grade level and shall not be placed on planters, wall, curbs or any similar structure.

(5) General Condition of Signs.

a. To keep signs legible and functional, all sidewalk signs shall be maintained and kept free of peeling or fading paint or vinyl.

b. Any signs which have become deteriorated due to lapse of time, weather, or other reason may be ordered to be removed by the Zoning Administrator and/or designee according to the process outlined in Sec. 13-1-70(a).

(i) **Sidewalk Signs in the C-2 Central Business District.** Sidewalk signs may be placed in the C-2 Central Business District subject to the following limitations:

(1) Number of Signs Allowed.

a. The number of signs shall be limited to one (1) per building exposure per business with direct street and/or public area entry. Multi-tenant buildings are allowed a total of three sidewalk signs per street and/or public area entry. No business shall be displayed on more than one sidewalk sign per street or public area entry.

b. When a sidewalk sign is in use for a business, no other temporary signage on the property may be in use for said business.

(2) Design.

a. Design of such signs in a designated historic district shall be subject to approval of the Landmarks Commission.

b. Sidewalk signs shall be a sandwich board type ("A-frame") with multiple (minimum of 2) or one continuous hinge across the top.

c. Signs must be portable.

d. Signs shall not exceed a width of two and one-half feet.

e. Removable signage panels on thin sign board material such as; aluminum, Centrex, or other quality sign grade material, shall be attached to the sign frame with screws or through the use of slide rails – no Velcro, staples, or double-sided tape. Cardboard or paper as sign materials shall not be permitted.

f. Interchangeable letters or letter copy on rails are discouraged.

g. Sidewalk signs shall not be illuminated, animated, have moving parts, or electrically powered in any way.

h. Windblown devices such as balloons, banners, or other similar items shall not be attached or otherwise made part of the sidewalk sign.

i. Signs shall contain a device such as a chain, rope, or cable to prevent the sign panels from spreading.

j. Signs shall not have more than two (2) sign faces.

k. Signs shall be free standing, internally weighted and shall not be anchored or affixed to any sidewalk, light pole, sign, traffic signal, bench, newspaper vending box, planting structure or similar structure or appurtenances. The signs shall be placed at sidewalk grade level and shall not be placed on planters, walls, curbs or any similar structure.

(3) Materials.

a. Sign materials in a designated historic district shall be subject to approval of the Landmarks Commission.

b. Signs shall be constructed using quality exterior sign board materials, wood or other durable material.

c. All wood and metal shall be painted or stained.

d. All signs shall be professionally printed or painted, changeable copy that is hand lettered shall comprise no more than 75% of the sign face.

(4) Location and Removal.

a. Signs shall be located within twenty (20) feet of the building exposure whose business name, goods, or services are being offered.

b. Such signs may be placed in the first four (4) feet adjacent to the building or the first 4 (4) feet adjacent to the curb. Signage shall not obstruct the ingress/egress of parked vehicles. A minimum of four (4) feet of sidewalk shall remain open between the sign and any other impediment to pedestrian movement.

c. All signs must be removed from the public right-of-way after the conclusion of business hours each day and are allowed only from 5:00 a.m. to 10:00 p.m.

d. When multiple signs are placed on one parcel, signs shall have a minimum clear spacing of twenty-five (25) feet between signs.

e. Signs shall not be anchored or affixed to any sidewalk, light pole, sign, traffic signal, bench, newspaper vending box, planting structure or other similar structure or appurtenances. The signs shall be placed at sidewalk grade level and shall not be placed on planters, wall, curbs or any similar structure.

(5) General Condition of Signs.

a. To keep signs legible and functional, all sidewalk signs shall be maintained and kept free of peeling or fading paint or vinyl.

b. Any signs which have become deteriorated due to lapse of time, weather, or other reason may be ordered to be removed by the Zoning Administrator and/or designee according to the process outlined in Sec. 13-1-70(a).

(j) **Wall Signs.** Wall signs shall be subject to the following standards:

(1) They shall not project more than twelve (12) inches from the building surface.

(2) They shall not extend above the lowest point of the roof, nor beyond the ends of the wall to which it is attached.

(3) They shall not obscure architectural features of the building, including but not limited to windows, arches, sills, moldings, cornices, and transoms.

(4) For multiple story building in the C-2 Central Business District and C-3 Business and Office District, wall signs shall only be permitted as follows (except as provided for in this ordinance):

a. on the building sign frieze;
b. on a window;
c. on an awning, canopy, or marquee;
d. on a first story panel; and,
e. in the area between the first floor and the window sill of the second story window; if no windows are present, then no higher than twenty (20) feet.

SEC. 13-1-68 NONCONFORMING SIGNS.

(a) **Legal Nonconforming Status.** Any sign located within the City of Menasha limits as of the date of adoption of this ordinance or located in an area annexed to the City of Menasha hereafter which does not conform with the provisions of this ordinance shall be considered a legal nonconforming sign and may be permitted to remain in accordance with this ordinance as long as the sign is properly maintained and not detrimental to the health, safety, and welfare of the community.

(b) **Loss of Legal Nonconforming Status.**

(1) A sign shall lose its legal nonconforming status when one or more of the following occurs:

a. the business, event, or use ceases and the building, unit of the building, or property remains vacant for a period of ninety (90) days;
b. the sign is expanded or changed to another nonconforming sign;
c. the sign is removed or relocated to another site;
d. the sign is altered so as to change the shape, size, type, placement, or design of its structural or basic parts;
e. the sign is enhanced with any new feature, including the addition of illumination;
f. the sign is repaired, except if such repair brings the sign into conformance with this ordinance, when such repair involves the following:
   1. the replacement of both the sign frame and sign panels;
   2. the replacement of the primary support poles or other support structure;
   3. for signs without framework for sign panels, requires replacement of the sign panels.

(2) A sign that loses its legal nonconforming status shall be immediately brought into compliance with this ordinance with a new permit secured or shall be removed. The Zoning Administrator and/or designee shall order the removal or repair of such sign according to the process outlined in Sec. 13-1-70(a).

(c) **Permitted Modifications.** Routine repairs are permitted in order to maintain the sign in a safe and aesthetic condition exactly as it existed at the time of the enactment of the ordinance. A change of sign copy or replacement of sign panels within an existing sign frame is permitted except as provided herein.

(d) **Elimination of Nonconforming Signs.** The City of Menasha may acquire by purchase, condemnation, or by other means any nonconforming sign which is deemed necessary to preserve the health, safety, and welfare of the city's residents.

(e) **Annual Billboard/Off-Premise Sign Inspection.** The Zoning Administrator and/or designee shall inspect annually or at such other times as deemed necessary each existing billboard or off-premise sign for the purpose of ascertaining whether the same is secure or insecure and whether it is in need of removal or repair. The owner of the billboard or off-

premise sign shall pay to the City of Menasha an annual inspection fee in an amount established by the Common Council.

SEC. 13-1-69 ABANDONED, DANGEROUS, UNSAFE, AND ILLEGALLY ERECTED SIGNS.

(a) **Abandoned Signs.**

(1) When a business, event, or use ceases and the building, unit of the building, or property remains vacant for a period of thirty (30) days or more, the property owner shall be required to:

a. remove all signs advertising the former business, event, or use (including any frame, support poles, wiring, etc.); or,

b. if applicable, install blank panels in the sign frames.

(2) The provisions of Sec. 13-1-68(b) shall apply to abandoned nonconforming signs.

(b) **Dangerous Signs.** Any sign constituting an immediate hazard to health or safety shall be deemed a public nuisance by the Zoning Administrator and/or designee and may be removed by the city according to the process outlined in Sec. 11-7-5 and the cost thereof charged against the owner of the property on which it was installed. If the property owner fails to pay for such costs, the costs shall be placed as a special tax on the property and entered on the tax rolls.

(c) **Unsafe Signs.** Any sign that is determined by the Zoning Administrator and/or designee to be unsafe, but not representing an immediate health or safety hazard, shall be removed or repaired according to the process outlined in Sec. 13-1-70(a).

(d) **Illegally Erected Signs.** The Zoning Administrator and/or designee shall order the removal of any sign erected illegally in violation of this ordinance, according to the process outlined in Sec. 13-1-70(a). Persons erecting a sign prior to securing a sign permit shall be given notice to submit a sign permit application according to the process outlined in Sec. 13-1-70(a).

SEC. 13-1-70 ENFORCEMENT PROCESS.

(a) **Enforcement Process.** The Zoning Administrator and/or designee shall have the authority to enforce the provisions of this ordinance and issue orders related to and promoting the purposes of this ordinance. The provisions of the sign ordinance shall be enforced according to the following procedures:

(1) Notice of the violation or required action shall be sent by certified mail addressed to the property owner and/or permit holder at the last known address.

(2) The notice shall describe the violation or required action and allow the following time period for removal, repair, or completion of the required action:

a. fifteen (15) days for violations of portable or temporary sign requirements, failure to secure a sign permit, and repair or removal of unsafe signs;

b. thirty (30) days for all other violations, required actions, or permit revocations.

(3) Should the sign not be removed or repaired or the required action completed within the time specified, the Zoning Administrator and/or designee shall have the authority to remove the sign, and the property owner shall be liable for the cost thereof. If the property owner fails to pay for such costs, the costs shall be placed as a special tax on the property and entered on the tax rolls.

(b) **Exceptions.** Signs illegally located in the right-of-way may be removed by the City of Menasha and held for a period of thirty (30) days. The owner of said sign(s) may recover the sign after paying a fee in an amount established by the Common Council. If the

owner does not recover the sign(s) held by the city within the specified time period, the sign will be destroyed.

(c) **Penalties.** Failure to comply with the standards specified in this ordinance may subject the property owner and/or permit holder to the penalties listed in Sec. 1-1-7.

(d) **Appeal.** Decisions by the Zoning Administrator and/or designee based on this ordinance shall be subject to appeal to the Board of Appeals.

135 S.Ct. 2218
Supreme Court of the United States

Clyde REED, et al., Petitioners
v.
TOWN OF GILBERT, ARIZONA, et al.

No. 13–502.
|
Argued Jan. 12, 2015.
|
Decided June 18, 2015.

Synopsis
Background: Church and pastor seeking to place temporary signs announcing services filed suit claiming that town's sign ordinance, restricting size, duration, and location of temporary directional signs violated the right to free speech. The United States District Court for the District of Arizona, Susan R. Bolton, J., denied church's motion for preliminary injunction barring enforcement of ordinance. Church appealed. The United States Court of Appeals for the Ninth Circuit, M. Margaret McKeown, Circuit Judge, 587 F.3d 966, affirmed in part and remanded in part.On remand, the District Court, Bolton, J., 832 F.Supp.2d 1070, granted town summary judgment. Church and pastor appealed. The Court of Appeals, Callahan, Circuit Judge, 707 F.3d 1057, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Thomas, held that:

[1] sign code was subject to strict scrutiny, and

[2] sign code violated free speech guarantees.

Reversed and remanded.

Justice Alito filed concurring opinion in which Justices Kennedy and Sotomayor joined.

Justice Breyer filed opinion concurring in the judgment.

Justice Kagan filed opinion concurring in the judgment, in which Justices Ginsburg and Breyer joined.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (21)

[1] **Constitutional Law** Viewpoint or idea discrimination
Constitutional Law Content-Based Regulations or Restrictions
Under the First Amendment, a government, including a municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content. U.S.C.A. Const.Amend. 1.
48 Cases that cite this headnote

[2] **Constitutional Law** Content-Based Regulations or Restrictions
Constitutional Law Strict or exacting scrutiny; compelling interest test
Content-based laws, that is, those that target speech based on its communicative content, are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. U.S.C.A. Const.Amend. 1.
327 Cases that cite this headnote

[3] **Constitutional Law** Content-Based Regulations or Restrictions
Government regulation of speech is "content based," and thus presumptively unconstitutional, if a law applies to particular speech because of the topic discussed or the idea or message expressed, and this commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys. U.S.C.A. Const.Amend. 1.
417 Cases that cite this headnote

[4] **Constitutional Law** Strict or exacting scrutiny; compelling interest test

Constitutional Law Strict or exacting scrutiny; compelling interest test

Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose, but both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny. U.S.C.A. Const.Amend. 1.

71 Cases that cite this headnote

[5] **Constitutional Law** Governmental disagreement with message conveyed

Constitutional Law Strict or exacting scrutiny; compelling interest test

Laws that, though facially content neutral, cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message the speech conveys, like those laws that are content based on their face, must satisfy strict scrutiny. U.S.C.A. Const.Amend. 1.

243 Cases that cite this headnote

[6] **Constitutional Law** Temporary signs

Town's sign code, which subjected ideological signs to certain restrictions, subjected political signs to greater restrictions, and subjected temporary directional signs relating to events to even greater restrictions, was content based on its face, and thus was subject to strict scrutiny in free speech challenge by church seeking to place temporary signs announcing its services; any innocent motives on part of town did not eliminate danger of censorship, sign code singled out specific subject matter for differential treatment even if it did not target viewpoints within that subject matter, and sign code singled out signs bearing a particular message, i.e., the time and location of a particular event. U.S.C.A. Const.Amend. 1.

25 Cases that cite this headnote

[7] **Constitutional Law** Content-Neutral Regulations or Restrictions

The crucial first step in the content-neutrality analysis in a free speech challenge is determining whether the law is content neutral on its face. U.S.C.A. Const.Amend. 1.

16 Cases that cite this headnote

[8] **Constitutional Law** Strict or exacting scrutiny; compelling interest test

A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech. U.S.C.A. Const.Amend. 1.

80 Cases that cite this headnote

[9] **Constitutional Law** Freedom of Speech, Expression, and Press

Constitutional Law Censorship

Illicit legislative intent is not the sine qua non of a violation of the First Amendment's free speech guarantee, and a party opposing the government need adduce no evidence of an improper censorial motive. U.S.C.A. Const.Amend. 1.

9 Cases that cite this headnote

[10] **Constitutional Law** Strict or exacting scrutiny; compelling interest test

Although a content-based purpose may be sufficient in certain circumstances to show that a regulation of speech is content based and thus subject to strict scrutiny, it is not necessary. U.S.C.A. Const.Amend. 1.

92 Cases that cite this headnote

[11] **Constitutional Law** Strict or exacting scrutiny; compelling interest test

An innocuous justification cannot transform a facially content-based law regulating speech into

one that is content neutral and thus subject to a lower level of scrutiny than strict scrutiny. U.S.C.A. Const.Amend. 1.

259 Cases that cite this headnote

[12] **Constitutional Law** Content-Neutral Regulations or Restrictions

Constitutional Law Strict or exacting scrutiny; compelling interest test

Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny in a free speech challenge. U.S.C.A. Const.Amend. 1.

67 Cases that cite this headnote

[13] **Constitutional Law** Content-Based Regulations or Restrictions

Government discrimination among viewpoints, or the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker, is a more blatant and egregious form of content discrimination, but the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. U.S.C.A. Const.Amend. 1.

78 Cases that cite this headnote

[14] **Constitutional Law** Strict or exacting scrutiny; compelling interest test

A speech regulation targeted at specific subject matter is content based, and thus subject to strict scrutiny, even if it does not discriminate among viewpoints within that subject matter. U.S.C.A. Const.Amend. 1.

71 Cases that cite this headnote

[15] **Constitutional Law** Content-Neutral Regulations or Restrictions

The fact that a speech-related distinction is speaker based does not automatically render the distinction content neutral and thus subject to a lower level of scrutiny than strict scrutiny. U.S.C.A. Const.Amend. 1.

11 Cases that cite this headnote

[16] **Constitutional Law** Strict or exacting scrutiny; compelling interest test

Because speech restrictions based on the identity of the speaker are all too often simply a means to control content, laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference. U.S.C.A. Const.Amend. 1.

25 Cases that cite this headnote

[17] **Constitutional Law** Content-Neutral Regulations or Restrictions

The fact that a speech-related distinction is event based does not render it content neutral and thus subject to a lower level of scrutiny than strict scrutiny. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[18] **Constitutional Law** Strict or exacting scrutiny; compelling interest test

Strict scrutiny requires the Government to prove that a restriction on speech furthers a compelling interest and is narrowly tailored to achieve that interest. U.S.C.A. Const.Amend. 1.

122 Cases that cite this headnote

[19] **Constitutional Law** Temporary signs

Municipal Corporations Billboards, signs, and other structures or devices for advertising purposes

Town's content-based sign code, which subjected ideological signs to certain restrictions, subjected political signs to greater restrictions, and subjected temporary directional signs relating to events to even greater restrictions, did not survive strict scrutiny, and thus violated

free speech guarantees; even if town had compelling government interests in preserving town's aesthetic appeal and traffic safety, sign code's distinctions were underinclusive, and thus were not narrowly tailored to achieve that end, in that temporary directional signs were no greater an eyesore than ideological or political ones, and there was no reason to believe that directional signs posed a greater threat to safety than ideological or political signs. U.S.C.A. Const.Amend. 1.

27 Cases that cite this headnote

[20] **Constitutional Law** Freedom of Speech, Expression, and Press

A law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[21] **Constitutional Law** Strict or exacting scrutiny; compelling interest test

Constitutional Law Content-Neutral Regulations or Restrictions

Constitutional Law Strict or exacting scrutiny; compelling interest test

Not all speech-related distinctions are subject to strict scrutiny, only content-based ones are; laws that are content neutral are instead subject to lesser scrutiny. U.S.C.A. Const.Amend. 1.

107 Cases that cite this headnote

****2221** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

***155** Gilbert, Arizona (Town), has a comprehensive code (Sign Code or Code) that prohibits the display of outdoor signs without a permit, but exempts 23 categories of signs, including three relevant here. "Ideological Signs," defined as signs "communicating a message or ideas" that do not fit in any other Sign Code category, may be up to 20 square feet and have no placement or time restrictions. "Political Signs," defined as signs "designed to influence the outcome of an election," may be up to 32 square feet and may only be displayed during an election season. "Temporary Directional Signs," defined as signs directing the public to a church or other "qualifying event," have even greater restrictions: No more than four of the signs, limited to six square feet, may be on a single property at any time, and signs may be displayed no more than 12 hours before the "qualifying event" and 1 hour after.

Petitioners, Good News Community Church (Church) and its pastor, Clyde Reed, whose Sunday church services are held at various temporary locations in and near the Town, posted signs early each Saturday bearing the Church name and the time and location of the next service and did not remove the signs until around ****2222** midday Sunday. The Church was cited for exceeding the time limits for displaying temporary directional signs and for failing to include an event date on the signs. Unable to reach an accommodation with the Town, petitioners filed suit, claiming that the Code abridged their freedom of speech. The District Court denied their motion for a preliminary injunction, and the Ninth Circuit affirmed, ultimately concluding that the Code's sign categories were content neutral, and that the Code satisfied the intermediate scrutiny accorded to content-neutral regulations of speech.

Held : The Sign Code's provisions are content-based regulations of speech that do not survive strict scrutiny. Pp. 2226 – 2233.

(a) Because content-based laws target speech based on its communicative content, they are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *E.g.*, *R.A.V. v. St. Paul,* 505 U.S. 377, 395, 112 S.Ct. 2538, 120 L.Ed.2d 305. Speech regulation is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E.g.*, *Sorrell v. IMS Health, Inc.,* 564 U.S. ——, ———–——, 131 S.Ct. 2653,

2663–2664, 180 L.Ed.2d 544. ***156** And courts are required to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Id.,* at ——, 131 S.Ct., at 2664. Whether laws define regulated speech by particular subject matter or by its function or purpose, they are subject to strict scrutiny. The same is true for laws that, though facially content neutral, cannot be " 'justified without reference to the content of the regulated speech,' " or were adopted by the government " because of disagreement with the message" conveyed. *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661. Pp. 2226 – 2227.

(b) The Sign Code is content based on its face. It defines the categories of temporary, political, and ideological signs on the basis of their messages and then subjects each category to different restrictions. The restrictions applied thus depend entirely on the sign's communicative content. Because the Code, on its face, is a content-based regulation of speech, there is no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny. P. 2227.

(c) None of the Ninth Circuit's theories for its contrary holding is persuasive. Its conclusion that the Town's regulation was not based on a disagreement with the message conveyed skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99. Thus, an innocuous justification cannot transform a facially content-based law into one that is content neutral. A court must evaluate each question—whether a law is content based on its face and whether the purpose and justification for the law are content based—before concluding that a law is content neutral. *Ward* does not require otherwise, for its framework applies only to a content-neutral statute.

The Ninth Circuit's conclusion that the Sign Code does not single out any idea or viewpoint for discrimination conflates two distinct but related limitations that the First Amendment places on government ****2223** regulation of speech. Government discrimination among viewpoints is a "more blatant" and "egregious form of content discrimination," *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700, but "[t]he First Amendment's hostility to content-based regulation [also] extends ... to prohibition of public discussion of an entire topic," *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 530, 537, 100 S.Ct. 2326, 65 L.Ed.2d 319. The Sign Code, a paradigmatic example of content-based discrimination, singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter.

***157** The Ninth Circuit also erred in concluding that the Sign Code was not content based because it made only speaker-based and event-based distinctions. The Code's categories are not speaker-based—the restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. And even if the sign categories were speaker based, that would not automatically render the law content neutral. Rather, "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 658, 114 S.Ct. 2445, 129 L.Ed.2d 497. This same analysis applies to event-based distinctions. Pp. 2227 – 2231.

(d) The Sign Code's content-based restrictions do not survive strict scrutiny because the Town has not demonstrated that the Code's differentiation between temporary directional signs and other types of signs furthers a compelling governmental interest and is narrowly tailored to that end. See *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 564 U.S. ——, ——, 131 S.Ct. 2806, 2817, 180 L.Ed.2d 664. Assuming that the Town has a compelling interest in preserving its aesthetic appeal and traffic safety, the Code's distinctions are highly underinclusive. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town when other types of signs create the same problem. See *Discovery Network, supra,* at 425, 113 S.Ct. 1505. Nor has it shown that temporary directional signs pose a greater threat to public safety than ideological or political signs. Pp. 2231 – 2232.

(e) This decision will not prevent governments from enacting effective sign laws. The Town has ample content-neutral options available to resolve problems with safety and aesthetics, including regulating size, building materials, lighting, moving parts, and portability. And the Town may be able to forbid postings on public property, so long as it does so

in an evenhanded, content-neutral manner. See *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 817, 104 S.Ct. 2118, 80 L.Ed.2d 772. An ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—*e.g.,* warning signs marking hazards on private property or signs directing traffic —might also survive strict scrutiny. Pp. 2232 – 2233.

707 F.3d 1057, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, ALITO, and SOTOMAYOR, JJ., joined. ALITO, J., filed a concurring opinion, in which KENNEDY and SOTOMAYOR, JJ., joined. BREYER, J., filed an opinion concurring in the judgment. KAGAN, J., filed an opinion concurring in the judgment, in which GINSBURG and BREYER, JJ., joined.

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Opinion

Justice THOMAS delivered the opinion of the Court.

***159** The town of Gilbert, Arizona (or Town), has adopted a comprehensive code governing the manner in which people may display outdoor signs. Gilbert, Ariz., Land Development Code (Sign Code or Code), ch. 1, § 4.402 (2005). [1] The Sign Code identifies various categories of signs based on the type of information they convey, then subjects each category to different restrictions. One of the categories is "Temporary Directional Signs Relating to a Qualifying Event," loosely defined as signs directing the public to a meeting of a nonprofit group. § 4.402(P). The Code imposes more stringent restrictions on these signs than it does on signs conveying other messages. We hold that these provisions are content-based regulations of speech that cannot survive strict scrutiny.

1 The Town's Sign Code is available online at http://www. gilbertaz.gov/departments/development-service/planning-development/land-development-code (as visited June 16, 2015, and available in Clerk of Court's case file).

I

A

The Sign Code prohibits the display of outdoor signs anywhere within the Town without a permit, but it then exempts 23 categories of signs from that requirement. These exemptions include everything from bazaar signs to flying banners. Three categories of exempt signs are particularly relevant here.

The first is "Ideological Sign[s]." This category includes any "sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency." Sign Code, Glossary of General Terms (Glossary), p. 23 (emphasis deleted). Of the three categories discussed here, the Code treats ideological signs most favorably, allowing them to be up to 20 ***160** square feet in area and to be placed in all "zoning districts" without time limits. § 4.402(J).

The second category is "Political Sign[s]." This includes any "temporary sign designed to influence the outcome of an election called by a public body." Glossary 23. [2] The Code treats these signs less favorably than ideological signs. The Code allows the placement of political signs up to 16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and "rights-of-way." ****2225** § 4.402(I). [3] These signs may be displayed up to 60 days before a primary election and up to 15 days following a general election. *Ibid.*

2 A "Temporary Sign" is a "sign not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display." Glossary 25.

3 The Code defines "Right–of–Way" as a "strip of publicly owned land occupied by or planned for a street, utilities, landscaping, sidewalks, trails, and similar facilities." *Id.,* at 18.

The third category is "Temporary Directional Signs Relating to a Qualifying Event." This includes any "Temporary Sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.' " Glossary 25 (emphasis deleted). A "qualifying event" is defined as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." *Ibid.* The Code treats temporary directional signs even less favorably than political signs.[4] Temporary directional signs may be ***161** no larger than six square feet. § 4.402(P). They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any time. *Ibid.* And, they may be displayed no more than 12 hours before the "qualifying event" and no more than 1 hour afterward. *Ibid.*

4 The Sign Code has been amended twice during the pendency of this case. When litigation began in 2007, the Code defined the signs at issue as "Religious Assembly Temporary Direction Signs." App. 75. The Code entirely prohibited placement of those signs in the public right-of-way, and it forbade posting them in any location for more than two hours before the religious assembly or more than one hour afterward. *Id.,* at 75–76. In 2008, the Town redefined the category as "Temporary Directional Signs Related to a Qualifying Event," and it expanded the time limit to 12 hours before and 1 hour after the "qualifying event." *Ibid.* In 2011, the Town amended the Code to authorize placement of temporary directional signs in the public right-of-way. *Id.,* at 89.

B

Petitioners Good News Community Church (Church) and its pastor, Clyde Reed, wish to advertise the time and location of their Sunday church services. The Church is a small, cash-strapped entity that owns no building, so it holds its services at elementary schools or other locations in or near the Town. In order to inform the public about its services, which are held in a variety of different locations, the Church began placing 15 to 20 temporary signs around the Town, frequently in the public right-of-way abutting the street. The signs typically displayed the Church's name, along with the time and location of the upcoming service. Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday. The display of these signs requires little money and manpower, and thus has proved to be an economical and effective way for the Church to let the community know where its services are being held each week.

This practice caught the attention of the Town's Sign Code compliance manager, who twice cited the Church for violating the Code. The first citation noted that the Church exceeded the time limits for displaying its temporary directional signs. The second citation referred to the same problem, along with the Church's failure to include the date of the event on the signs. Town officials even confiscated one of the Church's signs, which Reed had to retrieve from the municipal offices.

Reed contacted the Sign Code Compliance Department in an attempt to reach an accommodation. His efforts proved unsuccessful. The Town's Code compliance manager informed the Church that there ****2226** would be "no leniency under the Code" and promised to punish any future violations.

***162** Shortly thereafter, petitioners filed a complaint in the United States District Court for the District of Arizona, arguing that the Sign Code abridged their freedom of speech in violation of the First and Fourteenth Amendments. The District Court denied the petitioners' motion for a preliminary injunction. The Court of Appeals for the Ninth Circuit affirmed, holding that the Sign Code's provision regulating temporary directional signs did not regulate speech on the basis of content. 587 F.3d 966, 979 (2009). It reasoned that, even though an enforcement officer would have to read the sign to determine what provisions of the Sign Code applied to it, the " 'kind of cursory examination' " that would be necessary for an officer to classify it as a temporary directional sign was "not akin to an officer synthesizing the expressive content of the sign." *Id.,* at 978. It then remanded for the District Court to determine in the first instance whether the Sign Code's distinctions among temporary directional signs, political signs, and ideological

signs nevertheless constituted a content-based regulation of speech.

On remand, the District Court granted summary judgment in favor of the Town. The Court of Appeals again affirmed, holding that the Code's sign categories were content neutral. The court concluded that "the distinctions between Temporary Directional Signs, Ideological Signs, and Political Signs ... are based on objective factors relevant to Gilbert's creation of the specific exemption from the permit requirement and do not otherwise consider the substance of the sign." 707 F.3d 1057, 1069 (C.A.9 2013). Relying on this Court's decision in *Hill v. Colorado,* 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), the Court of Appeals concluded that the Sign Code is content neutral. 707 F.3d, at 1071–1072. As the court explained, "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed" and its "interests in regulat[ing] temporary signs are unrelated to the content of the sign." *Ibid.* Accordingly, the court believed that the Code was ***163** "content-neutral as that term [has been] defined by the Supreme Court." *Id.,* at 1071. In light of that determination, it applied a lower level of scrutiny to the Sign Code and concluded that the law did not violate the First Amendment. *Id.,* at 1073–1076.

We granted certiorari, 573 U.S. ——, 134 S.Ct. 2900, 189 L.Ed.2d 854 (2014), and now reverse.

II

A

[1] **[2]** The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws "abridging the freedom of speech." U.S. Const., Amdt. 1. Under that Clause, a government, including a municipal government vested with state authority, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *R.A.V. v. St. Paul,* 505 U.S. 377, 395, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 115, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991).

****2227** **[3]** **[4]** Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E.g., Sorrell v. IMS Health, Inc.,* 564 U.S. ——, —— – ——, 131 S.Ct. 2653, 2663–2664, 180 L.Ed.2d 544 (2011); *Carey v. Brown,* 447 U.S. 455, 462, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); *Mosley, supra,* at 95, 92 S.Ct. 2286. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Sorrell, supra,* at ——, 131 S.Ct., at 2664. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions ***164** drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

[5] Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be " 'justified without reference to the content of the regulated speech,' " or that were adopted by the government "because of disagreement with the message [the speech] conveys," *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

B

[6] The Town's Sign Code is content based on its face. It defines "Temporary Directional Signs" on the basis of whether a sign conveys the message of directing the public to church or some other "qualifying event." Glossary 25. It defines "Political Signs" on the basis of whether a sign's message is "designed to influence the outcome of an election." *Id.,* at 24. And it defines "Ideological Signs" on the basis of whether a sign "communicat [es] a message or ideas" that do not fit within the Code's other categories. *Id.,* at 23. It then subjects each of these categories to different restrictions.

The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider ***165** the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

C

In reaching the contrary conclusion, the Court of Appeals offered several theories to explain why the Town's Sign Code should be deemed content neutral. None is persuasive.

1

The Court of Appeals first determined that the Sign Code was content neutral because the Town "did not adopt its regulation of speech [based on] disagree [ment] with the message conveyed," and its justifications for regulating temporary directional signs were "unrelated to the content of the sign." 707 F.3d, at 1071–1072. ****2228** In its brief to this Court, the United States similarly contends that a sign regulation is content neutral—even if it expressly draws distinctions based on the sign's communicative content—if those distinctions can be " 'justified without reference to the content of the regulated speech.' " Brief for United States as *Amicus Curiae* 20, 24 (quoting *Ward, supra,* at 791, 109 S.Ct. 2746; emphasis deleted).

[7] **[8]** **[9]** **[10]** **[11]** But this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). We have thus made clear that " '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,' " and a party opposing the government "need adduce 'no evidence of an improper censorial motive.' " *Simon & Schuster, supra,* at 117, 112 S.Ct. 501. Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." ***166** *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

[12] That is why we have repeatedly considered whether a law is content neutral on its face *before* turning to the law's justification or purpose. See, *e.g., Sorrell, supra,* at ——– ——, 131 S.Ct., at 2663–2664 (statute was content based "on its face," and there was also evidence of an impermissible legislative motive); *United States v. Eichman,* 496 U.S. 310, 315, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990) ("Although the [statute] contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is related to the suppression of free expression" (internal quotation marks omitted)); *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 804, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) ("The text of the ordinance is neutral," and "there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance"); *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (requiring that a facially content-neutral ban on camping must be "justified without reference to the content of the regulated speech"); *United States v. O'Brien,* 391 U.S. 367, 375, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (noting that the statute "on its face deals with conduct having no connection with speech," but examining whether the "the governmental interest is unrelated to the suppression of free expression"). Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.

The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's

purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved ***167** a facially content-*neutral* ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city. 491 U.S., at 787, and n. 2, 109 S.Ct. 2746. In that context, we looked to ****2229** governmental motive, including whether the government had regulated speech "because of disagreement" with its message, and whether the regulation was " 'justified without reference to the content of the speech.' " *Id.,* at 791, 109 S.Ct. 2746. But *Ward* 's framework "applies only if a statute is content neutral." *Hill,* 530 U.S., at 766, 120 S.Ct. 2480 (KENNEDY, J., dissenting). Its rules thus operate "to protect speech," not "to restrict it." *Id.,* at 765, 120 S.Ct. 2480.

The First Amendment requires no less. Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—*i.e.,* the "abridg[ement] of speech"—rather than merely the motives of those who enacted them. U.S. Const., Amdt. 1. " 'The vice of content-based legislation ... is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.' " *Hill, supra,* at 743, 120 S.Ct. 2480 (SCALIA, J., dissenting).

For instance, in *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), the Court encountered a State's attempt to use a statute prohibiting " 'improper solicitation' " by attorneys to outlaw litigation-related speech of the National Association for the Advancement of Colored People. *Id.,* at 438, 83 S.Ct. 328. Although *Button* predated our more recent formulations of strict scrutiny, the Court rightly rejected the State's claim that its interest in the "regulation of professional conduct" rendered the statute consistent with the First Amendment, observing that "it is no answer ... to say ... that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression." *Id.,* at 438–439, 83 S.Ct. 328. Likewise, one could easily imagine a Sign Code compliance manager ***168** who disliked the Church's substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services. Accordingly, we have repeatedly "rejected the argument that 'discriminatory ... treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.' " *Discovery Network,* 507 U.S., at 429, 113 S.Ct. 1505. We do so again today.

2

The Court of Appeals next reasoned that the Sign Code was content neutral because it "does not mention any idea or viewpoint, let alone single one out for differential treatment." 587 F.3d, at 977. It reasoned that, for the purpose of the Code provisions, "[i]t makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted." 707 F.3d, at 1069.

The Town seizes on this reasoning, insisting that "content based" is a term of art that "should be applied flexibly" with the goal of protecting "viewpoints and ideas from government censorship or favoritism." Brief for Respondents 22. In the Town's view, a sign regulation that "does not censor or favor particular viewpoints or ideas" cannot be content based. *Ibid.* The Sign Code allegedly passes this test because its treatment of temporary directional signs does not raise any concerns that the government is "endorsing or suppressing 'ideas or viewpoints,' " *id.,* at 27, and the provisions for political signs and ideological signs "are neutral as to particular ideas or viewpoints" within those categories. *Id.,* at 37.

[13] This analysis conflates two distinct but related limitations that the First ****2230** Amendment places on government regulation of speech. Government discrimination among viewpoints—or the regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker"—is a "more blatant" and "egregious form of content discrimination." ***169** *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). But it is well established that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 530, 537, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980).

[14] Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among

viewpoints within that subject matter. *Ibid.* For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed. See *Discovery Network, supra,* at 428, 113 S.Ct. 1505. The Town's Sign Code likewise singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter. Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination.

3

Finally, the Court of Appeals characterized the Sign Code's distinctions as turning on " 'the content-neutral elements of who is speaking through the sign and whether and when an event is occurring.' " 707 F.3d, at 1069. That analysis is mistaken on both factual and legal grounds.

To start, the Sign Code's distinctions are not speaker based. The restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. If a local business, for example, sought to put up signs advertising the Church's meetings, those signs would be subject to the same limitations as such signs placed by the Church. And if Reed had decided to display signs in support of a particular candidate, he could have made those signs far ***170** larger—and kept them up for far longer—than signs inviting people to attend his church services. If the Code's distinctions were truly speaker based, both types of signs would receive the same treatment.

[15] **[16]** In any case, the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral. Because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 340, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010), we have insisted that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference," *Turner,* 512 U.S., at 658, 114 S.Ct. 2445. Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based. Likewise, a content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out corporations as a class of speakers. See *Citizens United, supra,* at 340–341, 130 S.Ct. 876. Characterizing a distinction ****2231** as speaker based is only the beginning—not the end—of the inquiry.

Nor do the Sign Code's distinctions hinge on "whether and when an event is occurring." The Code does not permit citizens to post signs on any topic whatsoever within a set period leading up to an election, for example. Instead, come election time, it requires Town officials to determine whether a sign is "designed to influence the outcome of an election" (and thus "political") or merely "communicating a message or ideas for noncommercial purposes" (and thus "ideological"). Glossary 24. That obvious content-based inquiry does not evade strict scrutiny review simply because an event (*i.e.,* an election) is involved.

[17] And, just as with speaker-based laws, the fact that a distinction is event based does not render it content neutral. The Court of Appeals cited no precedent from this Court ***171** supporting its novel theory of an exception from the content-neutrality requirement for event-based laws. As we have explained, a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed. *Supra,* at 2226 – 2227. A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea. Here, the Code singles out signs bearing a particular message: the time and location of a specific event. This type of ordinance may seem like a perfectly rational way to regulate signs, but a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem "entirely reasonable" will sometimes be "struck down because of their content-based nature." *City of Ladue v. Gilleo,* 512 U.S. 43, 60, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (O'Connor, J., concurring).

III

[18] **[19]** Because the Town's Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny, " 'which requires the

Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest,' " *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 564 U.S. ——, ——, 131 S.Ct. 2806, 2817, 180 L.Ed.2d 664 (2011) (quoting *Citizens United,* 558 U.S., at 340, 130 S.Ct. 876). Thus, it is the Town's burden to demonstrate that the Code's differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tailored to that end. See *ibid*.

The Town cannot do so. It has offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town's aesthetic appeal and traffic safety. Assuming for the sake of argument that those are compelling governmental interests, the Code's distinctions fail as hopelessly underinclusive.

***172** Starting with the preservation of aesthetics, temporary directional signs are "no greater an eyesore," *Discovery Network,* 507 U.S., at 425, 113 S.Ct. 1505, than ideological or political ones. Yet the Code allows unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller directional ones. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.

****2232** The Town similarly has not shown that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not. The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.

[20] In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest. Because a " 'law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited,' " *Republican Party of Minn. v. White,* 536 U.S. 765, 780, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002), the Sign Code fails strict scrutiny.

IV

[21] Our decision today will not prevent governments from enacting effective sign laws. The Town asserts that an " 'absolutist' " content-neutrality rule would render "virtually all distinctions in sign laws ... subject to strict scrutiny," Brief for Respondents 34–35, but that is not the case. Not "all distinctions" are subject to strict scrutiny, only *content-based* ones are. Laws that are *content neutral* are instead subject to lesser scrutiny. See *Clark,* 468 U.S., at 295, 104 S.Ct. 3065.

***173** The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts, and portability. See, *e.g.,* § 4.402(R). And on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner. See *Taxpayers for Vincent,* 466 U.S., at 817, 104 S.Ct. 2118 (upholding content-neutral ban against posting signs on public property). Indeed, some lower courts have long held that similar content-based sign laws receive strict scrutiny, but there is no evidence that towns in those jurisdictions have suffered catastrophic effects. See, *e.g., Solantic, LLC v. Neptune Beach,* 410 F.3d 1250, 1264–1269 (C.A.11 2005) (sign categories similar to the town of Gilbert's were content based and subject to strict scrutiny); *Matthews v. Needham,* 764 F.2d 58, 59–60 (C.A.1 1985) (law banning political signs but not commercial signs was content based and subject to strict scrutiny).

We acknowledge that a city might reasonably view the general regulation of signs as necessary because signs "take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." *City of Ladue,* 512 U.S., at 48, 114 S.Ct. 2038. At the same time, the presence of certain signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny. The signs at issue

in this case, including political and ideological signs and signs for events, are far removed from those purposes. As discussed above, they are facially content based and are neither justified by traditional safety concerns nor narrowly tailored.

* * *

**2233 *174 We reverse the judgment of the Court of Appeals and remand the case for proceedings consistent with this opinion.

It is so ordered.

Justice ALITO, with whom Justice KENNEDY and Justice SOTOMAYOR join, concurring.
I join the opinion of the Court but add a few words of further explanation.

As the Court holds, what we have termed "content-based" laws must satisfy strict scrutiny. Content-based laws merit this protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its "topic" or "subject" favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth. See *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 530, 537, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980).

As the Court shows, the regulations at issue in this case are replete with content-based distinctions, and as a result they must satisfy strict scrutiny. This does not mean, however, that municipalities are powerless to enact and enforce reasonable sign regulations. I will not attempt to provide anything like a comprehensive list, but here are some rules that would not be content based:

Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.

Rules regulating the locations in which signs may be placed. These rules may distinguish between free-standing signs and those attached to buildings.

Rules distinguishing between lighted and unlighted signs.

Rules distinguishing between signs with fixed messages and electronic signs with messages that change.

*175 Rules that distinguish between the placement of signs on private and public property.

Rules distinguishing between the placement of signs on commercial and residential property.

Rules distinguishing between on-premises and off-premises signs.

Rules restricting the total number of signs allowed per mile of roadway.

Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed. *

* Of course, content-neutral restrictions on speech are not necessarily consistent with the First Amendment. Time, place, and manner restrictions "must be narrowly tailored to serve the government's legitimate, content-neutral interests." *Ward v. Rock Against Racism,* 491 U.S. 781, 798, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). But they need not meet the high standard imposed on viewpoint- and content-based restrictions.

In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. See *Pleasant Grove City v. Summum,* 555 U.S. 460, 467–469, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public **2234 safety and serves legitimate esthetic objectives.

Justice BREYER, concurring in the judgment.
I join Justice KAGAN's separate opinion. Like Justice KAGAN I believe that categories alone cannot satisfactorily resolve the legal problem before us. The First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as

***176** "content discrimination" and "strict scrutiny," would permit. In my view, the category "content discrimination" is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic "strict scrutiny" trigger, leading to almost certain legal condemnation.

To use content discrimination to trigger strict scrutiny sometimes makes perfect sense. There are cases in which the Court has found content discrimination an unconstitutional method for suppressing a viewpoint. *E.g.,* *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 828–829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); see also *Boos v. Barry,* 485 U.S. 312, 318–319, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (plurality opinion) (applying strict scrutiny where the line between subject matter and viewpoint was not obvious). And there are cases where the Court has found content discrimination to reveal that rules governing a traditional public forum are, in fact, not a neutral way of fairly managing the forum in the interest of all speakers. *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 96, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) ("Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say"). In these types of cases, strict scrutiny is often appropriate, and content discrimination has thus served a useful purpose.

But content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny. To say that it is not an automatic "strict scrutiny" trigger is not to argue against that concept's use. I readily concede, for example, that content discrimination, as a conceptual tool, can sometimes reveal weaknesses in the government's rationale for a rule that limits speech. If, for example, a city looks to litter prevention as the rationale for a prohibition against placing newsracks dispensing free advertisements on public property, why does it exempt other newsracks causing similar litter? Cf. *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). I also concede that, whenever government disfavors ***177** one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with an individual's ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live, help shape that society, and help define his place within it.

Nonetheless, in these latter instances to use the presence of content discrimination automatically to trigger strict scrutiny and thereby call into play a strong presumption against constitutionality goes too far. That is because virtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity.

Consider a few examples of speech regulated by government that inevitably involve ****2235** content discrimination, but where a strong presumption against constitutionality has no place. Consider governmental regulation of securities, *e.g.,* 15 U.S.C. § 78*l* (requirements for content that must be included in a registration statement); of energy conservation labeling-practices, *e.g.,* 42 U.S.C. § 6294 (requirements for content that must be included on labels of certain consumer electronics); of prescription drugs, *e.g.,* 21 U.S.C. § 353(b)(4)(A) (requiring a prescription drug label to bear the symbol "Rx only"); of doctor-patient confidentiality, *e.g.,* 38 U.S.C. § 7332 (requiring confidentiality of certain medical records, but allowing a physician to disclose that the patient has HIV to the patient's spouse or sexual partner); of income tax statements, *e.g.,* 26 U.S.C. § 6039F (requiring taxpayers to furnish information about foreign gifts received if the aggregate amount exceeds $10,000); of commercial airplane briefings, *e.g.,* 14 CFR § 136.7 (2015) (requiring pilots to ensure that each passenger has been briefed on flight procedures, such as seatbelt fastening); of signs at petting zoos, ***178** *e.g.,* N.Y. Gen. Bus. Law Ann. § 399–ff(3) (West Cum. Supp. 2015) (requiring petting zoos to post a sign at every exit " 'strongly recommend[ing] that persons wash their hands upon exiting the petting zoo area' "); and so on.

Nor can the majority avoid the application of strict scrutiny to all sorts of justifiable governmental regulations by relying on this Court's many subcategories and exceptions to the rule. The Court has said, for example, that we should apply less strict standards to "commercial speech." *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N. Y.,* 447 U.S. 557, 562–563, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). But I have great concern that many justifiable instances of "content-based" regulation are noncommercial. And, worse than that, the Court has applied the heightened "strict scrutiny" standard even in cases where the less stringent "commercial speech"

standard was appropriate. See *Sorrell v. IMS Health Inc.,* 564 U.S. ——, ——, 131 S.Ct. 2653, 2664, 180 L.Ed.2d 544 (2011) (BREYER, J., dissenting). The Court has also said that "government speech" escapes First Amendment strictures. See *Rust v. Sullivan,* 500 U.S. 173, 193–194, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991). But regulated speech is typically private speech, not government speech. Further, the Court has said that, "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *R.A.V. v. St. Paul,* 505 U.S. 377, 388, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). But this exception accounts for only a few of the instances in which content discrimination is readily justifiable.

I recognize that the Court could escape the problem by watering down the force of the presumption against constitutionality that "strict scrutiny" normally carries with it. But, in my view, doing so will weaken the First Amendment's protection in instances where "strict scrutiny" should apply in full force.

The better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where ***179** viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool, in an appropriate case, to determine the strength of a justification. I would use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of ****2236** the relevant regulatory objectives. Answering this question requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so. See, *e.g., United States v. Alvarez,* 567 U.S. ——, —— – ——, 132 S.Ct. 2537, 2551–2553, 183 L.Ed.2d 574 (2012) (BREYER, J., concurring in judgment); *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 400–403, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (BREYER, J., concurring). Admittedly, this approach does not have the simplicity of a mechanical use of categories. But it does permit the government to regulate speech in numerous instances where the voters have authorized the government to regulate and where courts should hesitate to substitute judicial judgment for that of administrators.

Here, regulation of signage along the roadside, for purposes of safety and beautification is at issue. There is no traditional public forum nor do I find any general effort to censor a particular viewpoint. Consequently, the specific regulation at issue does not warrant "strict scrutiny." Nonetheless, for the reasons that Justice KAGAN sets forth, I believe that the Town of Gilbert's regulatory rules violate the First Amendment. I consequently concur in the Court's judgment only.

Justice KAGAN, with whom Justice GINSBURG and Justice BREYER join, concurring in the judgment.

Countless cities and towns across America have adopted ordinances regulating the posting of signs, while exempting ***180** certain categories of signs based on their subject matter. For example, some municipalities generally prohibit illuminated signs in residential neighborhoods, but lift that ban for signs that identify the address of a home or the name of its owner or occupant. See, *e.g.,* City of Truth or Consequences, N. M., Code of Ordinances, ch. 16, Art. XIII, §§ 11–13–2.3, 11–13–2.9(H)(4) (2014). In other municipalities, safety signs such as "Blind Pedestrian Crossing" and "Hidden Driveway" can be posted without a permit, even as other permanent signs require one. See, *e.g.,* Code of Athens–Clarke County, Ga., Pt. III, § 7–4–7(1) (1993). Elsewhere, historic site markers—for example, "George Washington Slept Here"—are also exempt from general regulations. See, *e.g.,* Dover, Del., Code of Ordinances, Pt. II, App. B, Art. 5, § 4.5(F) (2012). And similarly, the federal Highway Beautification Act limits signs along interstate highways unless, for instance, they direct travelers to "scenic and historical attractions" or advertise free coffee. See 23 U.S.C. §§ 131(b), (c)(1), (c)(5).

Given the Court's analysis, many sign ordinances of that kind are now in jeopardy. See *ante,* at 2231 (acknowledging that "entirely reasonable" sign laws "will sometimes be struck down" under its approach (internal quotation marks omitted)). Says the majority: When laws "single[ ] out specific subject matter," they are "facially content based"; and when they are facially content based, they are automatically subject to strict scrutiny. *Ante,* at 2230, 2232 – 2233. And although the majority holds out hope that some sign laws with subject-matter exemptions "might survive" that stringent review, *ante,* at 2232 – 2233, the likelihood is that most will be

struck down. After all, it is the "rare case[ ] in which a speech restriction withstands strict scrutiny." *Williams–Yulee v. Florida Bar,* 575 U.S. ——, ——, 135 S.Ct. 1656, 1666, ——L.Ed.2d —— (2015). To clear that high bar, the government must show that a content-based distinction "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc.* ***181** ****2237** *v. Ragland,* 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987). So on the majority's view, courts would have to determine that a town has a compelling interest in informing passersby where George Washington slept. And likewise, courts would have to find that a town has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs. (Well-placed speed bumps? Lower speed limits? Or how about just a ban on hidden driveways?) The consequence—unless courts water down strict scrutiny to something unrecognizable—is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter. *

* Even in trying (commendably) to limit today's decision, Justice ALITO's concurrence highlights its far-reaching effects. According to Justice ALITO, the majority does not subject to strict scrutiny regulations of "signs advertising a one-time event." *Ante,* at 2233 (ALITO, J., concurring). But of course it does. On the majority's view, a law with an exception for such signs "singles out specific subject matter for differential treatment" and "defin[es] regulated speech by particular subject matter." *Ante,* at 2227, 2230 (majority opinion). Indeed, the precise reason the majority applies strict scrutiny here is that "the Code singles out signs bearing a particular message: the time and location of a specific event." *Ante,* at 2231.

Although the majority insists that applying strict scrutiny to all such ordinances is "essential" to protecting First Amendment freedoms, *ante,* at 2231, I find it challenging to understand why that is so. This Court's decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley,* 573 U.S. ——, —— – ——, 134 S.Ct. 2518, 2529, 189 L.Ed.2d 502 (2014) (internal quotation marks omitted). The second is to ensure that the government has not regulated speech "based on hostility—or favoritism—towards the underlying message expressed." *R.A.V. v. St. Paul,* 505 U.S. 377, 386, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Yet the ***182** subject-matter exemptions included in many sign ordinances do not implicate those concerns. Allowing residents, say, to install a light bulb over "name and address" signs but no others does not distort the marketplace of ideas. Nor does that different treatment give rise to an inference of impermissible government motive.

We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is any "realistic possibility that official suppression of ideas is afoot." *Davenport v. Washington Ed. Assn.,* 551 U.S. 177, 189, 127 S.Ct. 2372, 168 L.Ed.2d 71 (2007) (quoting *R.A.V.,* 505 U.S., at 390, 112 S.Ct. 2538). That is always the case when the regulation facially differentiates on the basis of viewpoint. See *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). It is also the case (except in non-public or limited public forums) when a law restricts "discussion of an entire topic" in public debate. *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 530, 537, 539–540, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) (invalidating a limitation on speech about nuclear power). We have stated that "[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating.' " *Id.,* at 537–538, 100 S.Ct. 2326 (quoting *Police Dept. of* ****2238** *Chicago v. Mosley,* 408 U.S. 92, 96, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972)). And we have recognized that such subject-matter restrictions, even though viewpoint-neutral on their face, may "suggest[ ] an attempt to give one side of a debatable public question an advantage in expressing its views to the people." *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 785, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978); accord, *ante,* at 2233 (ALITO, J., concurring) (limiting all speech on one topic "favors those who do not want to disturb the status quo"). Subject-matter regulation, in other words, may have the intent or effect of favoring some ideas over others. When that is realistically possible—when the restriction "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace"—we insist that the law pass the most

demanding ***183** constitutional test. *R.A.V.,* 505 U.S., at 387, 112 S.Ct. 2538 (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991)).

But when that is not realistically possible, we may do well to relax our guard so that "entirely reasonable" laws imperiled by strict scrutiny can survive. *Ante,* at 2231. This point is by no means new. Our concern with content-based regulation arises from the fear that the government will skew the public's debate of ideas—so when "that risk is inconsequential, ... strict scrutiny is unwarranted." *Davenport,* 551 U.S., at 188, 127 S.Ct. 2372; see *R.A.V.,* 505 U.S., at 388, 112 S.Ct. 2538 (approving certain content-based distinctions when there is "no significant danger of idea or viewpoint discrimination"). To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever. We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.

And indeed we have done just that: Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws—including in cases just like this one. See *Davenport,* 551 U.S., at 188, 127 S.Ct. 2372 (noting that "we have identified numerous situations in which [the] risk" attached to content-based laws is "attenuated"). In *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), the Court declined to apply strict scrutiny to a municipal ordinance that exempted address numbers and markers commemorating "historical, cultural, or artistic event[s]" from a generally applicable limit on sidewalk signs. *Id.,* at 792, n. 1, 104 S.Ct. 2118 (listing exemptions); see *id.,* at 804–810, 104 S.Ct. 2118 (upholding ordinance under intermediate scrutiny). After all, we explained, the law's enactment and enforcement revealed "not even a hint of bias or censorship." ***184** *Id.,* at 804, 104 S.Ct. 2118; see also *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (applying intermediate scrutiny to a zoning law that facially distinguished among movie theaters based on content because it was "designed to prevent crime, protect the city's retail trade, [and] maintain property values ..., not to suppress the expression of unpopular views"). And another decision involving a similar law provides an alternative model. In *City of Ladue v. Gilleo,* 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994), the Court assumed *arguendo* that a sign ordinance's exceptions for address ****2239** signs, safety signs, and for-sale signs in residential areas did not trigger strict scrutiny. See *id.,* at 46–47, and n. 6, 114 S.Ct. 2038 (listing exemptions); *id.,* at 53, 114 S.Ct. 2038 (noting this assumption). We did not need to, and so did not, decide the level-of-scrutiny question because the law's breadth made it unconstitutional under any standard.

The majority could easily have taken *Ladue* 's tack here. The Town of Gilbert's defense of its sign ordinance—most notably, the law's distinctions between directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test. See *ante,* at 2231 – 2232 (discussing those distinctions). The Town, for example, provides no reason at all for prohibiting more than four directional signs on a property while placing no limits on the number of other types of signs. See Gilbert, Ariz., Land Development Code, ch. I, §§ 4.402(J), (P)(2) (2014). Similarly, the Town offers no coherent justification for restricting the size of directional signs to 6 square feet while allowing other signs to reach 20 square feet. See §§ 4.402(J), (P)(1). The best the Town could come up with at oral argument was that directional signs "need to be smaller because they need to guide travelers along a route." Tr. of Oral Arg. 40. Why exactly a smaller sign better helps travelers get to where they are going is left a mystery. The absence of any sensible basis for these and other distinctions dooms the Town's ordinance under even the intermediate scrutiny that the Court typically applies to "time, place, or manner" speech regulations. ***185** Accordingly, there is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption.

I suspect this Court and others will regret the majority's insistence today on answering that question in the affirmative. As the years go by, courts will discover that thousands of towns have such ordinances, many of them "entirely reasonable." *Ante,* at 2231. And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.) And courts will strike down those democratically

enacted local laws even though no one—certainly not the majority—has ever explained why the vindication of First Amendment values requires that result. Because I see no reason why such an easy case calls for us to cast a constitutional pall on reasonable regulations quite unlike the law before us, I concur only in the judgment.

All Citations

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142 S.Ct. 1464
Supreme Court of the United States.

CITY OF AUSTIN, TEXAS, Petitioner
v.
REAGAN NATIONAL ADVERTISING OF AUSTIN, LLC, et al.

No. 20-1029
|
Argued November 10, 2021
|
Decided April 21, 2022

Synopsis

Background: Owners of billboards advertising off-premises products or services, i.e., off-premises signs, filed state court lawsuit for declaratory judgment that city's sign ordinance, which distinguished between on-premises and off-premises signs, violated their First Amendment free speech rights, after city denied their applications for permits to digitize grandfathered off-premises signs. After removal and bench trial, the United States District Court for the Western District of Texas, Robert Pitman, J., 377 F.Supp.3d 670, entered judgment for city. Plaintiffs appealed. The United States Court of Appeals for the Fifth Circuit, Elrod, Circuit Judge, 972 F.3d 696, reversed and remanded. Certiorari was granted.

[Holding:] The Supreme Court, Justice Sotomayor, held that a regulation of signs is not automatically content based, so that strict scrutiny for a violation of First Amendment free speech rights would be applicable, merely because to apply the regulation, a reader must ask who is speaking and what the speaker is saying, abrogating *Thomas v. Bright*, 937 F. 3d 721.

Court of Appeals reversed; remanded.

Justice Breyer filed a concurring opinion.

Justice Alito filed an opinion concurring in the judgment in part and dissenting in part.

Justice Thomas filed a dissenting opinion, in which Justices Gorsuch and Barrett joined.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Judgment.

West Headnotes (11)

[1] **Constitutional Law** Content-Based Regulations or Restrictions

A regulation of speech is facially content based, so that strict scrutiny for a First Amendment violation is applicable, if it targets speech based on its communicative content, that is, if it applies to particular speech because of the topic discussed or the idea or message expressed. U.S. Const. Amend. 1.

17 Cases that cite this headnote

[2] **Constitutional Law** Signs
Zoning and Planning Signs and billboards

A regulation of signs is not automatically content based, so that strict scrutiny for a First Amendment violation would be applicable, merely because to apply the regulation, a reader must ask who is speaking and what the speaker is saying; abrogating *Thomas v. Bright*, 937 F. 3d 721. U.S. Const. Amend. 1.

[3] **Constitutional Law** Content-Based Regulations or Restrictions

The First Amendment's hostility to content-based regulation of speech extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[4] **Constitutional Law** Off-premises signs

City's sign ordinance, which distinguished between signs relating to on-premises and off-premises products, services, or locations, was not content based, so that strict scrutiny for a

violation of First Amendment free speech rights would be applicable, merely because the off-premises distinction required a reading of a sign, to determine whether it directed readers offsite; a given sign was treated differently based solely on whether it was located on same premises as the thing being discussed or not, so message on sign mattered only to extent that it informed sign's relative location, making on-premises and off-premises distinction similar to ordinary time, place, or manner restrictions. U.S. Const. Amend. 1.

4 Cases that cite this headnote

[5] **Constitutional Law** Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising

The First Amendment allows for regulations of solicitation, that is, speech requesting or seeking to obtain something or an attempt or effort to gain business. U.S. Const. Amend. 1.

[6] **Constitutional Law** Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising

Restrictions on solicitation are not content based and do not inherently present the potential for becoming a means of suppressing a particular point of view, so that strict scrutiny for a First Amendment free speech violation would be applicable, so long as they do not discriminate based on topic, subject matter, or viewpoint. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[7] **Constitutional Law** Content-Based Regulations or Restrictions

A regulation of speech is not content based, so that strict scrutiny for a First Amendment violation is applicable, merely because speech or expression must be examined; rather, it is regulations that discriminate based on the topic discussed or the idea or message expressed that are content based. U.S. Const. Amend. 1.

10 Cases that cite this headnote

[8] **Constitutional Law** Content-Based Regulations or Restrictions

While overt subject-matter discrimination is a facially content-based regulation of speech, so that strict scrutiny for a First Amendment violation is applicable, so, too, are subtler forms of discrimination that achieve identical results based on function or purpose; in other words, a regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a function or purpose proxy that achieves the same result, but this does not mean that any classification that considers function or purpose is always content based. U.S. Const. Amend. 1.

10 Cases that cite this headnote

[9] **Constitutional Law** Content-Based Regulations or Restrictions

If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction of speech, that restriction may be content based, so that strict scrutiny for a First Amendment violation is applicable. U.S. Const. Amend. 1.

13 Cases that cite this headnote

[10] **Constitutional Law** Narrow tailoring requirement; relationship to governmental interest

To survive intermediate scrutiny for a violation of the First Amendment, a content neutral restriction on speech or expression must be narrowly tailored to serve a significant governmental interest. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[11] **Federal Courts** Presentation of Questions Below or on Review; Record; Waiver

Federal Courts Reversal, Vacation, and Remand

The Supreme Court is a court of final review and not first view, and it does not ordinarily decide in the first instance issues not decided below; in particular, when it reverses on a threshold question, it typically remands for resolution of any claims the lower courts' error prevented them from addressing.

2 Cases that cite this headnote

***1466** *Syllabus* *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Like a great many jurisdictions around the country, the City of Austin, Texas (City), specially regulates signs that advertise things that are not located on the same premises as the sign, as well as signs that direct people to offsite locations. See City Code § 25–10–102(1). These are known as off-premises signs. The City's sign code at the time of this dispute prohibited construction of new off-premises signs. *Ibid*. Grandfathered off-premises signs could remain in their existing locations as "nonconforming signs," but could not be altered in ways that increased their nonconformity. §§ 25–10–3(10), 25–10–152(A)–(B). On-premises signs were not similarly restricted. § 25–10–102(6).

Respondents, Reagan National Advertising of Austin, LLC, and Lamar Advantage Outdoor Company, L. P., own billboards in Austin. When Reagan sought permits to digitize some of its billboards, the City denied its applications. Reagan filed suit in state court, alleging that the City's prohibition against digitizing off-premises signs, but not on-premises signs, violated the First Amendment's Free Speech Clause. The City removed the case to federal court, and Lamar intervened. The District Court held that the challenged sign code provisions were content neutral under *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S.Ct. 2218, 192 L.Ed.2d 236, reviewed the City's on-/off-premises distinction under intermediate scrutiny, and found that the distinction satisfied that standard. The Court of Appeals reversed. It found the on-/off-premises distinction to be facially content based because a government official had to read a sign's message to determine whether the sign was off-premises. The court then reviewed the City's on-/off-premises distinction under strict scrutiny, and it held that the City failed to satisfy that onerous standard.

Held: The City's on-/off-premises distinction is facially content neutral under the First Amendment. Pp. 1471 – 1476.

(a) *Reed* held that a regulation of speech is content based under the First Amendment if it "target[s] speech based on its communicative content," *i.e.,* if it "applies to particular speech because of the topic discussed or the idea or message expressed." 576 U.S. at 163, 135 S.Ct. 2218. The Court of Appeals' interpretation of *Reed*—to mean that a regulation cannot be content neutral if its application requires reading the sign at issue—is too extreme an interpretation of this Court's precedent. Pp. 1471 – 1475.

(1) In *Reed*, the town of Gilbert, Arizona, adopted a comprehensive sign code that applied distinct size, placement, and time restrictions to 23 different categories of signs, giving more favorable treatment to some categories (such as ideological signs or political signs) and less favorable treatment to others (such as temporary directional signs relating to religious events, educational events, or other similar events). The Court rejected the contention that the restrictions were content neutral because they did not discriminate on the basis of particular viewpoints, reasoning that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." 576 U.S. at 169, 135 S.Ct. 2218. Unlike the sign code in *Reed*, the City's sign ordinances here do not single out any topic or subject matter for differential treatment. A sign's message matters only to the extent that it informs the sign's relative location. Thus, the City's on-/off-premises distinction is more like ordinary time, place, or manner restrictions, which do not require the application of strict scrutiny. Cf. *Frisby v. Schultz*, 487 U.S. 474, 482, 108 S.Ct. 2495, 101 L.Ed.2d 420. Pp. 1471 – 1473.

(2) This Court's precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral. Most relevant here, the First Amendment allows for regulations of solicitation, and speech must be read or heard

to determine whether it entails solicitation. See *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298. Moreover, the Court has previously understood distinctions between on-premises and off-premises signs to be content neutral. See *Suffolk Outdoor Advertising Co. v. Hulse*, 439 U.S. 808, 99 S.Ct. 66, 58 L.Ed.2d 101 (order dismissing appeal); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772. Underlying these cases and others is a rejection of the view that *any* examination of speech or expression inherently triggers heightened First Amendment concern. Rather, content-based regulations are those that discriminate based on "the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 171, 135 S.Ct. 2218. Pp. 1472 – 1474.

(3) Reagan's counterargument relies primarily on a sentence in *Reed* recognizing that "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." 576 U.S. at 163, 135 S.Ct. 2218. Reagan contends that the City's sign code defines off-premises signs on the basis of function or purpose and is therefore content based and subject to strict scrutiny. This stretches *Reed*'s "function or purpose" language too far. *Reed* held that subtler forms of content discrimination cannot escape classification as content based simply because they swap an obvious subject-matter distinction for a function or purpose proxy. That does not mean that any classification that considers function or purpose is *always* content based. Reagan's reading of *Reed* would contravene numerous precedents and cast doubt on the Nation's history of regulating off-premises signs. Pp. 1474 – 1475.

(b) This Court's determination that the City's on-/off-premises distinction is facially content neutral does not end the First Amendment inquiry. Evidence that an impermissible purpose or justification underpins a facially content-neutral restriction may mean that the restriction is nevertheless content based. Moreover, to survive intermediate scrutiny, a restriction on speech or expression must be " 'narrowly tailored to serve a significant governmental interest.' " *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661. Because the Court of Appeals did not address these issues, the Court leaves them for remand and expresses no view on the matters. Pp. 1475 – 1476.

972 F.3d 696, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and BREYER, KAGAN, and KAVANAUGH, JJ., joined. BREYER, J., filed a concurring opinion. ALITO, J., filed an opinion concurring in the judgment in part and dissenting in part. THOMAS, J., filed a dissenting opinion, in which GORSUCH and BARRETT, JJ., joined.

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Opinion

Justice SOTOMAYOR delivered the opinion of the Court.

***1468** Like thousands of jurisdictions around the country, the City of Austin, Texas (City), regulates signs that advertise things that are not located on the same premises as the sign, as

well as signs that direct people to offsite locations. These are ***1469** known as off-premises signs, and they include, most notably, billboards. The question presented is whether, under this Court's precedents interpreting the Free Speech Clause of the First Amendment, the City's regulation is subject to strict scrutiny. We hold that it is not.

I

A

American jurisdictions have regulated outdoor advertisements for well over a century. See C. Taylor & W. Chang, The History of Outdoor Advertising Regulation in the United States, 15 J. of Macromarketing 47, 48 (Spring 1995). By some accounts, the proliferation of conspicuous patent-medicine advertisements on rocks and barns prompted States to begin regulating outdoor advertising in the late 1860s. *Ibid.*; F. Presbrey, The History and Development of Advertising 500–501 (1929). As part of this regulatory tradition, federal, state, and local governments have long distinguished between signs (such as billboards) that promote ideas, products, or services located elsewhere and those that promote or identify things located onsite. For example, this Court in 1932 reviewed and approved of a Utah statute that prohibited signs advertising cigarettes and related products, but allowed businesses selling such products to post onsite signs identifying themselves as dealers. *Packer Corp. v. Utah*, 285 U.S. 105, 107, 110, 52 S.Ct. 273, 76 L.Ed. 643.

On-/off-premises distinctions, like the one at issue here, proliferated following the enactment of the Highway Beautification Act of 1965 (Act), 23 U.S.C. § 131. In the Act, Congress directed States receiving federal highway funding to regulate outdoor signs in proximity to federal highways, in part by limiting off-premises signs. See §§ 131(b)–(c) (allowing exceptions for "signs, displays, and devices advertising the sale or lease of property upon which they are located" and "signs, displays, and devices ... advertising activities conducted on the property on which they are located"). Under the Act, approximately two-thirds of States have implemented similar on-/off-premises distinctions. See App. A to Reply to Brief in Opposition (collecting statutes); Brief for State of Florida et al. as *Amici Curiae* 7, n. 3 (same). The City represents, and respondents have not disputed, that "tens of thousands of municipalities nationwide" have adopted analogous on-/off-premises distinctions in their sign codes. Brief for Petitioner 19; see also App. B to Reply to Brief in Opposition (collecting examples of ordinances); Brief for State of Florida et al. as *Amici Curiae* 8, n. 4 (same).

The City of Austin is one such municipality. The City distinguishes between on-premises and off-premises signs in its sign code, and specially regulates the latter, in order to "protect the aesthetic value of the city and to protect public safety." App. 39.

During the time period relevant to this dispute, the City's sign code defined the term "off-premise sign" to mean "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." Austin, Tex., City Code § 25–10–3(11) (2016). This definition was materially analogous to the one used in the federal Highway Beautification Act and many other state and local codes referenced above. The code prohibited the construction of any new off-premises signs, § 25–10–102(1), but allowed existing off-premises signs to remain as grandfathered "non-conforming signs," § 25–10–3(10). An owner of a grandfathered off-premises sign could "continue or maintain [it] at its existing location" and could change the "face of the sign," but could not "increase the degree ***1470** of the existing nonconformity," "change the method or technology used to convey a message," or "increase the illumination of the sign." §§ 25–10–152(A)–(B). By contrast, the code permitted the digitization of on-premises signs. § 25–10–102(6) (permitting "electronically controlled changeable-copy sign[s]"). [1]

1 The City subsequently amended its sign code. The parties agree that the amendments do not affect this dispute. Reply to Brief in Opposition 11–12; Brief for Respondent Reagan 9.

B

Respondents, Reagan National Advertising of Austin, LLC (Reagan), and Lamar Advantage Outdoor Company, L. P. (Lamar), are outdoor-advertising companies that own billboards in Austin. In April and June of 2017, Reagan sought permits from the City to digitize some of its off-premises billboards. The City denied the applications. Reagan filed suit against the City in state court alleging that the code's

prohibition against digitizing off-premises signs, but not on-premises signs, violated the Free Speech Clause of the First Amendment. The City removed the case to federal court, and Lamar intervened as a plaintiff. [2]

2 Lamar did not participate in the proceedings on the merits before this Court. Brief for Respondent Reagan II.

After the parties stipulated to the pertinent facts, the District Court held a bench trial and entered judgment in favor of the City. 377 F.Supp.3d 670, 673, 683 (WD Tex. 2019). As relevant, the court held that the challenged sign code provisions were content neutral under *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). The court explained that "the on/off premises distinction [did] not impose greater restrictions for political messages, religious messages, or any other subject matter," and "d[id] not require a viewer to evaluate the topic, idea, or viewpoint on the sign"; instead, it required the viewer only "to determine whether the subject matter is located on the same property as the sign." 377 F.Supp.3d at 681. The court therefore held that the distinction was a facially content-neutral "regulation based on location." *Ibid.* The court further found "no evidence in the record" that the City had applied the sign code provisions "differently for different messages or speakers" or that its stated concern for esthetics and safety was "pretext for any other purpose." *Id.,* at 681–682. Accordingly, the court reviewed the City's on-/off-premises distinction under the standard of intermediate scrutiny applicable to content-neutral regulations of speech. *Id.,* at 682. The court found that the distinction satisfied this standard. *Id.,* at 682–683.

The Court of Appeals reversed. 972 F.3d 696, 699 (CA5 2020). The court opined that because the City's on-/off-premises distinction required a reader to inquire "who is the speaker and what is the speaker saying," "both hallmarks of a content-based inquiry," the distinction was content based. *Id.,* at 706. It reasoned that "[t]he fact that a government official ha[s] to read a sign's message to determine the sign's purpose [i]s enough to" render a regulation content based and "subject [it] to strict scrutiny." *Ibid.* (citing *Thomas v. Bright*, 937 F.3d 721, 730–731 (CA6 2019)); see also 972 F.3d at 704 ("To determine whether a sign is on-premises or off-premises, one must read the sign ... "). The court acknowledged that its interpretation of *Reed* was "broad," but reasoned that the consequences were "not ... unforeseen," given the concerns raised by Justices who did not join the opinion of the Court. 972 F.3d at 707.

***1471** Because the Court of Appeals determined that the City's on-/off-premises distinction imposed a content-based restriction on speech, it reviewed that distinction under the onerous standard of strict scrutiny. Recognizing that strict scrutiny "is, understandably, a hard standard to meet" and that it "leads to almost certain legal condemnation," *id.,* at 709, the court held that the City's justifications for the distinction could not meet that standard, rendering it unconstitutional, *id.,* at 709–710. [3]

3 The Court of Appeals further considered the possibility that the code provisions regulated only commercial speech, such that only intermediate scrutiny would apply even if the provisions were content based. 972 F.3d at 707–709; see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The court rejected this view because the provisions "applie[d] with equal force to both commercial and noncommercial messages." 972 F.3d at 709. Before this Court, the City makes a similar argument, claiming that "[a]s applied to billboards like those owned by respondents," the contested code provisions regulate commercial speech and so are subject to intermediate scrutiny. Brief for Petitioner 49. It is undisputed, however, that Reagan's billboards also display noncommercial messages, meaning that the City's denial of Reagan's applications for digitization implicated Reagan's commercial and noncommercial speech alike. See Brief for Respondent Reagan 45–46; App. 130–141. More importantly, as the Court of Appeals explained, the contested code provisions admit of no exception for noncommercial speech. The only way in which they differentiate speech is by distinguishing between on-premises and off-premises signs. The Court thus must determine which level of scrutiny applies to the manner in which the provisions actually regulate speech.

This Court granted certiorari. 594 U. S. ——, 141 S.Ct. 2849, 210 L.Ed.2d 959 (2021).

II

[1] **[2]** A regulation of speech is facially content based under the First Amendment if it "target[s] speech based on its communicative content"—that is, if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163, 135 S.Ct. 2218. The Court of Appeals interpreted *Reed* to mean that if "[a] reader must ask: who is the speaker and what is the speaker saying" to apply a regulation, then the regulation is automatically content based. 972 F.3d at 706. This rule, which holds that a regulation cannot be content neutral if it requires reading the sign at issue, is too extreme an interpretation of this Court's precedent. Unlike the regulations at issue in *Reed*, the City's off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It is agnostic as to content. Thus, absent a content-based purpose or justification, the City's distinction is content neutral and does not warrant the application of strict scrutiny.

A

The *Reed* Court confronted a very different regulatory scheme than the one at issue here: a comprehensive sign code that "single[d] out specific subject matter for differential treatment." 576 U.S. at 169, 135 S.Ct. 2218. The town of Gilbert, Arizona, had adopted a code that applied distinct size, placement, and time restrictions to 23 different categories of signs. *Id.,* at 159, 135 S.Ct. 2218. The Court focused its analysis on three categories defined by whether the signs displayed ideological, political, or certain temporary directional messages. The code gave the most favorable treatment to " 'Ideological Sign[s],' " defined as those " 'communicating a message or ideas for noncommercial purposes' " with certain exceptions. *Id.,* at 159–160, 135 S.Ct. 2218 (alteration in original). ***1472** It offered less favorable treatment to " 'Political Sign[s],' " defined as those " 'designed to influence the outcome of an election.' " *Id.,* at 160, 135 S.Ct. 2218 (alteration in original). Most restricted of all were " 'Temporary Directional Signs Relating to a Qualifying Event,' " with qualifying events defined as gatherings " 'sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.' " *Id.,* at 160–161, 135 S.Ct. 2218.

[3] The *Reed* Court determined that these restrictions were facially content based. *Id.,* at 164–165, 135 S.Ct. 2218. Rejecting the contention that the restrictions were content neutral because they did not discriminate on the basis of viewpoint, the Court explained: "[I]t is well established that '[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.' " *Id.,* at 169, 135 S.Ct. 2218 (quoting *Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 530, 537, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980)); accord, *e.g., Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) (explaining that "[t]he central problem" with a municipality's effort to exempt labor picketing from a prohibition on picketing near public schools was "that it describes permissible picketing in terms of its subject matter"); *Carey v. Brown*, 447 U.S. 455, 460–461, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980) (subjecting a similar statute that "accord[ed] preferential treatment to the expression of views on one particular subject" to strict scrutiny).[4] Applying these principles, the Court reasoned that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.... For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." 576 U.S. at 169, 135 S.Ct. 2218. By treating ideological messages more favorably than political messages, and both more favorably than temporary directional messages, "[t]he Town's Sign Code likewise single[d] out specific subject matter for differential treatment, even if it [did] not target viewpoints within that subject matter." *Ibid.*

4 The concurrence in *Reed*, which spoke for three of the six Justices in the majority, similarly explained that "[c]ontent-based laws merit th[e] protection" of strict scrutiny "because they present,

> albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its 'topic' or 'subject' favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth." 576 U.S. at 174, 135 S.Ct. 2218 (ALITO, J., concurring) (quoting *Consolidated Edison Co. of N. Y.*, 447 U.S. at 537, 100 S.Ct. 2326).

[4] In this case, enforcing the City's challenged sign code provisions requires reading a billboard to determine whether it directs readers to the property on which it stands or to some other, offsite location. Unlike the sign code at issue in *Reed*, however, the City's provisions at issue here do not single out any topic or subject matter for differential treatment. A sign's substantive message itself is irrelevant to the application of the provisions; there are no content-discriminatory classifications for political messages, ideological messages, or directional messages concerning specific events, including those sponsored by religious and nonprofit organizations. Rather, the City's provisions distinguish based on location: A given sign is treated ***1473** differently based solely on whether it is located on the same premises as the thing being discussed or not. The message on the sign matters only to the extent that it informs the sign's relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions. *Reed* does not require the application of strict scrutiny to this kind of location-based regulation. Cf. *Frisby v. Schultz*, 487 U.S. 474, 482, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (sustaining an ordinance that prohibited "only picketing focused on, and taking place in front of, a particular residence" as content neutral).

B

This Court's First Amendment precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral.

[5] **[6]** Most relevant here, the First Amendment allows for regulations of solicitation—that is, speech "requesting or seeking to obtain something" or "[a]n attempt or effort to gain business." Black's Law Dictionary 1677 (11th ed. 2019). To identify whether speech entails solicitation, one must read or hear it first. Even so, the Court has reasoned that restrictions on solicitation are not content based and do not inherently present "the potential for becoming a means of suppressing a particular point of view," so long as they do not discriminate based on topic, subject matter, or viewpoint. *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).

Thus, in 1940, the Court invalidated a statute prohibiting solicitation for religious causes but observed that States were "free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience." *Cantwell v. Connecticut*, 310 U.S. 296, 306–307, 60 S.Ct. 900, 84 L.Ed. 1213. Decades later, the Court reviewed just such a time, place, and manner regulation restricting all solicitation at the Minnesota State Fair, as well as all sale or distribution of merchandise, to a specific location. *Heffron*, 452 U.S. at 643–644, 101 S.Ct. 2559. The State had applied the restriction against a religious practice that included "solicit[ing] donations for the support of the Krishna religion." *Id.,* at 645, 101 S.Ct. 2559. As a result, members of the religion were free to roam the fairgrounds and discuss their beliefs, but they were prohibited from asking for donations for their cause outside of a designated location. *Id.,* at 646, 655, 101 S.Ct. 2559. The Court upheld the State's application of this restriction as content neutral, emphasizing that it "applie[d] evenhandedly to all who wish[ed] ... to solicit funds," whether for "commercial or charitable" reasons. *Id.,* at 649, 101 S.Ct. 2559.

Consistent with these precedents, the Court has previously understood distinctions between on-premises and off-premises signs, like the one at issue in this case, to be content neutral. In 1978, the Court summarily dismissed an appeal "for want of a substantial federal question" where a state court had approved of an on-/off-premises distinction as a permissible time, place, and manner restriction under the Free Speech Clause. *Suffolk Outdoor Advertising Co. v. Hulse*, 439 U.S. 808, 99 S.Ct. 66, 58 L.Ed.2d 101 (1978). Three years later, the Court upheld in relevant part an ordinance that prohibited all off-premises commercial advertising but allowed on-premises commercial advertising. ***1474** *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 503–512, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (plurality opinion). [5] The *Metromedia* Court did not need to decide whether the

off-premises prohibition was content based, as it regulated only commercial speech and so was subject to intermediate scrutiny in any event. See *id.*, at 507–512, 101 S.Ct. 2882 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)). Shortly thereafter, however, the Court applied the relevant portion of *Metromedia* and described the off-premises prohibition as "a *content-neutral* prohibition against the use of billboards." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 807, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (emphasis added).

5 Although the opinion in *Metromedia* was labeled a plurality for four Justices, the relevant portion of the opinion was also joined by a fifth. See 453 U.S. at 541, 101 S.Ct. 2882 (STEVENS, J., dissenting in part) ("join[ing] Parts I through IV of Justice WHITE's opinion").

[7] Underlying these cases and others is a rejection of the view that *any* examination of speech or expression inherently triggers heightened First Amendment concern. Rather, it is regulations that discriminate based on "the topic discussed or the idea or message expressed" that are content based. *Reed*, 576 U.S. at 171, 135 S.Ct. 2218. The sign code provisions challenged here do not discriminate on those bases.

C

Reagan does not claim *Reed* expressly or implicitly overturned the precedents discussed above. Its argument relies primarily on one sentence in *Reed* recognizing that "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id.*, at 163, 135 S.Ct. 2218. Seizing on this reference, Reagan asserts that the City's sign code "defines off-premises signs based on their 'function or purpose.' " Brief for Respondent Reagan 20 (quoting *Reed*, 576 U.S. at 163, 135 S.Ct. 2218). It asks the Court to "reaffirm that, where a regulation 'define[s] regulated speech by its function or purpose,' it is content-based on its face and thus subject to strict scrutiny." Brief for Respondent Reagan 34 (quoting *Reed*, 576 U.S. at 163, 135 S.Ct. 2218).

[8] The argument stretches *Reed*'s "function or purpose" language too far. The principle the *Reed* Court articulated is more straightforward. While overt subject-matter discrimination is facially content based (for example, " 'Ideological Sign[s],' " defined as those " 'communicating a message or ideas for noncommercial purposes' "), so, too, are subtler forms of discrimination that achieve identical results based on function or purpose (for example, " 'Political Sign[s],' " defined as those " 'designed to influence the outcome of an election' "). *Id.*, at 159, 160, 163–164, 135 S.Ct. 2218 (alterations in original). In other words, a regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a "function or purpose" proxy that achieves the same result. That does not mean that any classification that considers function or purpose is *always* content based. Such a reading of "function or purpose" would contravene numerous precedents, including many of those discussed above. *Reed* did not purport to cast doubt on these cases.

Nor did *Reed* cast doubt on the Nation's history of regulating off-premises signs. Off-premises billboards of the sort that predominate today were not present in the founding era, but as large outdoor advertisements ***1475** proliferated in the 1800s, regulation followed. As early as 1932, the Court had already approved a location-based differential for advertising signs. See *Packer Corp.*, 285 U.S. at 107, 110, 52 S.Ct. 273. Thereafter, for the last 50-plus years, federal, state, and local jurisdictions have repeatedly relied upon on-/off-premises distinctions to address the distinct safety and esthetic challenges posed by billboards and other methods of outdoor advertising. See *supra,* at 1469. The unbroken tradition of on-/off-premises distinctions counsels against the adoption of Reagan's novel rule. See *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 446, 135 S.Ct. 1656, 191 L.Ed.2d 570 (2015) (recognizing "history and tradition of regulation" as relevant when considering the scope of the First Amendment). [6]

6 The Court of Appeals, for its part, understood *Reed* to have deemed a regulation content based solely because "it 'single[d] out signs bearing a

particular message: the time and location of a specific event.' " 972 F.3d 696, 706 (CA5 2020) (quoting *Reed*, 576 U.S. at 171, 135 S.Ct. 2218). Reagan does not rely as heavily on this language, and for good reason. As a preliminary matter, the *Reed* Court found that the provisions at issue in that case did not, in fact, "hinge on 'whether and when an event is occurring.' " *Id.,* at 170, 135 S.Ct. 2218. More fundamentally, those provisions did not target all events generally, regardless of topic; they targeted "a specific event" (an election) "because of the topic discussed or the idea or message expressed" (political speech). *Id.,* at 171, 135 S.Ct. 2218. The Court of Appeals' contrary reading would render the majority opinion in *Reed* irreconcilable with the concurrence, which recognized that "[r]ules imposing time restrictions on signs advertising a one-time event," which "do not discriminate based on topic or subject," would be content neutral. *Id.,* at 174, 175, 135 S.Ct. 2218 (ALITO, J., concurring).

D

Tellingly, even today's dissent appears reluctant to embrace the read-the-sign rule adopted by the court below. Instead, the dissent attacks a straw man. Contrary to its accusations, we do not "nullif[y]" *Reed*'s protections, "resuscitat[e]" a decision that we do not cite, or fashion a novel "specificity test" simply by quoting the standard repeatedly enunciated in *Reed*. *Post,* at 1473, 1485 – 1486, 1487, 1492 (opinion of THOMAS, J.). Nor do we cast doubt on any of our precedents recognizing examples of topic or subject-matter discrimination as content based. See, *e.g., post,* at 1473 – 1474. We merely apply those precedents to reach the "commonsense" result that a location-based and content-agnostic on-/off-premises distinction does not, on its face, "singl[e] out specific subject matter for differential treatment." *Reed*, 576 U.S. at 163, 169, 135 S.Ct. 2218.

It is the dissent that would upend settled understandings of the law. Where we adhere to the teachings of history, experience, and precedent, the dissent would hold that tens of thousands of jurisdictions have presumptively violated the First Amendment, some for more than half a century, and that they have done so by use of an on-/off-premises distinction this Court has repeatedly reviewed and never previously questioned. For the reasons we have explained, the Constitution does not require that bizarre result.

III

[9] **[10]** This Court's determination that the City's ordinance is facially content neutral does not end the First Amendment inquiry. If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction, for instance, that restriction may be content based. See *Reed*, 576 U.S. at 164, 135 S.Ct. 2218. Moreover, to survive intermediate scrutiny, a restriction on speech or expression must be " 'narrowly tailored to serve a significant governmental interest.' " ***1476** *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

[11] The parties dispute whether the City can satisfy these requirements. This Court, however, is "a court of final review and not first view," and it does not "[o]rdinarily ... decide in the first instance issues not decided below." *Zivotofsky v. Clinton*, 566 U.S. 189, 201, 132 S.Ct. 1421, 182 L.Ed.2d 423 (2012) (internal quotation marks omitted). "In particular, when we reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error prevented them from addressing." *Ibid.* Because the Court of Appeals did not address these issues, the Court leaves them for remand and expresses no view on the matters.

* * *

For these reasons, the judgment of the Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BREYER, concurring.

Reed v. Town of Gilbert, 576 U.S. 155, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015), is binding precedent here. Given that precedent, I join the majority's opinion. I write separately because I continue to believe that the Court's reasoning in

Reed was wrong. The Court there struck down a city's sign ordinance under the First Amendment. It wrote that the First Amendment requires strict scrutiny whenever a regulation "target[s] speech based on its communicative content." *Id.*, at 163, 135 S.Ct. 2218. It therefore concluded that "[c]ontent-based laws ... are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Ibid.*

But the First Amendment is not the Tax Code. Its purposes are often better served when judge-made categories (like "content discrimination") are treated, not as bright-line rules, but instead as rules of thumb. And, where strict scrutiny's harsh presumption of unconstitutionality is at issue, it is particularly important to avoid jumping to such presumptive conclusions without first considering "whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives." *Id.*, at 179, 135 S.Ct. 2218 (BREYER, J., concurring in judgment); *Barr* v. *American Assn. of Political Consultants, Inc.*, 591 U. S. ——, —— – ——, 140 S.Ct. 2335, 2361-2362, 207 L.Ed.2d 784 (2020) (BREYER, J., concurring in judgment and dissenting in part); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 582, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011) (BREYER, J., dissenting). Here, I would conclude that the City of Austin's (City's) regulation of off-premises signs works no such disproportionate harm. I therefore agree with the majority's conclusion that strict scrutiny and its attendant presumption of unconstitutionality are unwarranted. The majority reaches this conclusion by applying *Reed*'s formal framework, as *stare decisis* requires. I would add that *Reed*'s strict formalism can sometimes disserve the very First Amendment interests it was designed to protect.

I

The First Amendment helps to safeguard what Justice HOLMES described as a marketplace of ideas. *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 63 L.Ed. 1173 (1919) (dissenting opinion). A democratic people must be able to freely "generate, debate, and discuss both general and specific ideas, hopes, and experiences." ***1477** *Barr*, 591 U. S., at ——, 140 S.Ct., at 2358 (opinion of BREYER, J.). They "must then be able to transmit their resulting views and conclusions to their elected representatives, which they may do directly, or indirectly through the shaping of public opinion." *Ibid.* Those representatives can respond by turning the people's ideas into policies. The First Amendment, by protecting the "marketplace" and the "transmission" of ideas, thereby helps to protect the basic workings of democracy itself. See *Meyer v. Grant*, 486 U.S. 414, 421, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988) ("The First Amendment was 'fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people' ").

Courts help to protect these democratic values in part by strictly scrutinizing certain categories of laws that threaten to " 'drive certain ideas or viewpoints from the marketplace.' " *R. A. V. v. St. Paul*, 505 U.S. 377, 387, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). We have recognized, for example, that First Amendment values are in danger when the government imposes restrictions upon " 'core political speech,' " *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 186–187, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999); when it discriminates against "particular views taken by speakers on a subject," *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829–830, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); and, in some contexts, when it removes "an entire topic" of discussion from public debate, *Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 530, 537–538, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980).

But not all laws that distinguish between speech based on its content fall into a category of this kind. That is in part because many ordinary regulatory programs may well turn on the content of speech without posing any "realistic possibility that official suppression of ideas is afoot." *R. A. V.*, 505 U.S. at 390, 112 S.Ct. 2538. Those regulations, rather than hindering the ability of the people to transmit their thoughts to their elected representatives, may constitute the very product of that transmission. *Barr*, 591 U. S., at ——, 140 S.Ct., at 2358-2359 (opinion of BREYER, J.).

The U. S. Code (as well as its state and local equivalents) is filled with regulatory laws that turn, often necessarily, on the content of speech. Consider laws regulating census reporting requirements, *e.g.,* 13 U.S.C. § 224; securities-

related disclosures, *e.g.,* 15 U.S.C. § 78*l*; copyright infringement, *e.g.,* 17 U.S.C. § 102; labeling of prescription drugs, *e.g.,* 21 U.S.C. § 353(b)(4)(A), or consumer electronics, *e.g.,* 42 U.S.C. § 6294; highway signs, *e.g.,* 23 U.S.C. § 131(c); tax disclosures, *e.g.,* 26 U.S.C. § 6039F; confidential medical records, *e.g.,* 38 U.S.C. § 7332; robocalls, *e.g.,* 47 U.S.C. § 227; workplace safety warnings, *e.g.,* 29 C.F.R. § 1910.145 (2021); panhandling, *e.g.,* Ala. Code § 13A–11–9(a) (2022); solicitation on behalf of charities, *e.g.,* N. Y. Exec. Law Ann. § 174–b (West 2019); signs at petting zoos, *e.g.,* N. Y. Gen. Bus. Law Ann. § 399–ff(3) (West 2015); and many more.

If *Reed* is taken as setting forth a formal rule that courts must strictly scrutinize regulations simply because they refer to particular content, we have good reason to fear the consequences of that decision. One possibility is that courts will strike down " 'entirely reasonable' " regulations that reflect the will of the people. *Reed*, 576 U.S. at 171, 135 S.Ct. 2218; *e.g.,* *Barr*, 591 U. S., at ——, 140 S.Ct., at 2361-2362 (striking down the Telephone Consumer Protection Act's exception allowing robocalls that collect government debt); *IMDB.com v. Becerra*, 962 F.3d 1111, 1125–1127 (CA9 2020) (striking down a California law ***1478** prohibiting certain websites from publishing the birthdates of entertainment professionals). If so, the Court's content-based line-drawing will "substitut[e] judicial for democratic decisionmaking" and threaten the ability of the people to translate their ideas into policy. *Sorrell*, 564 U.S. at 603, 131 S.Ct. 2653 (BREYER, J., dissenting).

A second possibility is that courts instead will (perhaps unconsciously) dilute the stringent strict scrutiny standard in an effort to avoid striking down reasonable regulations. Doing so would "weaken the First Amendment's protection in instances where 'strict scrutiny' should apply in full force." *Reed*, 576 U.S. at 178, 135 S.Ct. 2218 (opinion of BREYER, J.).

A third possibility is that courts will develop a matrix of formal subsidiary rules and exceptions that seek to distinguish between reasonable and unreasonable content-based regulations. Such a patchwork, however, may prove overly complex, unwieldy, or unworkable. And it may make it more difficult for ordinary Americans to understand the importance of First Amendment values and to live their lives in accord with those values.

For these reasons, as I have said before, I would reject *Reed's* approach, which too rigidly ties content discrimination to strict scrutiny (and, consequently, to "almost certain legal condemnation"). *Id.*, at 176, 135 S.Ct. 2218. Instead, I would treat content discrimination as a rule of thumb to be applied with what Justice KAGAN has called "a dose of common sense." *Id.,* at 183, 135 S.Ct. 2218 (opinion concurring in judgment). Where content-based regulations are at issue, I would ask a more basic First Amendment question: Does "the regulation at issue wor[k] harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives"? *Id.,* at 179, 135 S.Ct. 2218 (opinion of BREYER, J.). I believe we should answer that question by examining "the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so." *Ibid.*

II

The regulation at issue in this case is the City of Austin's sign code, which regulates billboards and other "off-premises" signs. The City defines an "off-premises" sign as "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." Austin, Tex., City Code § 25–10–3(11) (2016).

Some years ago, the City forbid construction of new off-premises signs. § 25–10–102(1). At the same time, it grandfathered in existing off-premises signs, allowing them to remain but subjecting them to regulation. §§ 25–10–3(10), 25–10–152(A), (B). Owners of grandfathered off-premises signs are allowed to change the face of their signs, but not to digitize them. *Ibid.* In the case before us, owners who wanted to digitize their off-premises signs challenged the City's regulation on the ground that it violates the First Amendment.

The Court remands for the lower courts to assess the constitutionality of this regulation in the first instance, so I

need not answer that question conclusively now. I wish only to illustrate why I believe a strong presumption of unlawfulness is out of place here.

Billboards and other roadside signs can generally be categorized as a form of outdoor advertising. Regulation of outdoor advertising in order to protect the public's interest in "avoiding visual clutter," ***1479** *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), or minimizing traffic risks, *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 507–508, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), is unlikely to interfere significantly with the "marketplace of ideas." In this case, for example, there is no evidence that the City regulated off-premises signs in order to censor a particular viewpoint or topic, or that its regulations have had that effect in practice. There is consequently little reason to apply a presumption of unconstitutionality to this kind of regulation.

Without such a presumption, I would weigh the First Amendment harms that a regulation imposes against the regulatory objectives that it serves. The City's regulation here appears to work at most a limited, niche-like harm to First Amendment interests. Respondents own a number of grandfathered off-premises signs. They can use those signs to communicate whatever messages they choose. They complain only that they cannot digitize the signs, which would allow them to display several messages in rapid succession. Perhaps digitization would enable them to make more effective use of their billboard space. But their inability to maximize the use of their space in this way is unlikely to meaningfully interfere with their participation in the "marketplace of ideas."

At the same time, the City has asserted a legitimate interest in maintaining the regulation. As I have said, the public has an interest in ensuring traffic safety and preserving an esthetically pleasing environment, *supra* this page, and the City here has reasonably explained how its regulation of off-premises signs in general, and digitization in particular, serves those interests. *Amici* tell us that billboards, especially digital ones, can distract drivers and cause accidents. See, *e.g.,* Brief for United States as *Amicus Curiae* 21 (citing a study of 450 crashes in Alabama and Florida that "revealed that the presence of digital billboards increased the overall crash rates in areas of billboard influence"); Brief for National League of Cities et al. as *Amici Curiae* 22 (" 'The Wisconsin Department of Transport found a 35% increase in collisions near a variable message sign' " (alteration omitted)). They add that on-premises signs are less likely to cause accidents. *Id.,* at 23 ("[A] 2014 study found no evidence that on premises digital signs led to an increase in crashes"). The City further says that billboards cause more visual clutter than on-premises signs because the latter are "typically 'small in size' and integrated into the premises." Reply Brief 19.

I would leave for the courts below to weigh these harms and interests, and any alternatives, in the first instance, without a strong presumption of unconstitutionality.

Justice ALITO, concurring in the judgment in part and dissenting in part.

I agree with the majority that we must reverse the decision of the Court of Appeals holding that the provisions of the Austin City Code regulating on- and off-premises signs are facially unconstitutional. *Ante*, at 1471 – 1472. The Court of Appeals reasoned that those provisions impose content-based restrictions and that they cannot satisfy strict scrutiny, but the Court of Appeals did not apply the tests that must be met before a law is held to be facially unconstitutional. "Normally, a plaintiff bringing a facial challenge must 'establish that no set of circumstances exists under which the [law] would be valid,' or show that the law lacks 'a plainly legitimate sweep.' " *Americans for Prosperity Foundation* v. *Bonta*, 594 U. S. ——, ——, 141 S.Ct. 2373, 2387, 210 L.Ed.2d 716 (2021) (citation omitted). A somewhat less ***1480** demanding test applies when a law affects freedom of speech. Under our First Amendment "overbreadth" doctrine, a law restricting speech is unconstitutional "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (internal quotation marks omitted).

In this case, the Court of Appeals did not apply either of those tests, and it is doubtful that they can be met. Many (and possibly the great majority) of the situations in which the relevant provisions may apply involve commercial speech, and under our precedents, regulations of commercial speech are analyzed differently. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571–572, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011).

It is also questionable whether those code provisions are unconstitutional as applied to most of respondents' billboards. It appears that most if not all of those billboards are located off-premises in both the usual sense of that term, [1] and in the sense in which the term is used in the Austin code. See Austin, Tex., City Code § 25–10–3(11) (2016) (a sign is off-premises if it "advertis[es] a business, person, activity, goods, products, or services not located on the site where the sign is installed" or if it "directs persons to any location not on that site"). The record contains photos of some of these billboards, see App. 130–147, and all but one appears to be located on otherwise vacant land. Thus, they are clearly off-premises signs, and because they were erected before the enactment of the code provisions at issue, the only relevant restriction they face is that they cannot be digitized. [2] The distinction between a digitized and non-digitized sign is not based on content, topic, or subject matter. Even if the message on a billboard were written in a secret code, an observer would have no trouble determining whether it had been digitized.

1 In ordinary usage, a sign that is attached to or located in close proximity to a building is not described as located "off-premises." The distinction between on- and off-premises signs is based solely on location, and that is why such a classification is not content-based. See *Reed v. Town of Gilbert*, 576 U.S. 155, 175, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015) (ALITO, J., concurring).

2 A grandfathered sign can be maintained at its existing location, but the owner cannot "increase the degree of the existing nonconformity," "change the method or technology used to convey a message," or "increase the illumination of the sign." Austin, Tex., City Code §§ 25–10–152(A)–(B).

Because the Court of Appeals erred in holding that the code provisions are facially unconstitutional, I agree that we should reverse that decision. On remand, the lower courts should determine whether those provisions are unconstitutional as applied to each of the billboards at issue.

Today's decision, however, goes further and holds flatly that "[t]he sign code provisions challenged here do not discriminate" on the basis of " 'the topic discussed or the idea or message expressed,' " *ante*, at 1474, and that categorical statement is incorrect. The provisions defining on- and off-premises signs clearly discriminate on those grounds, and at least as applied in some situations, strict scrutiny should be required.

As the Court notes, under the provisions in effect when petitioner's applications were denied, a sign was considered to be off-premises if it "advertis[ed]," among other things, a "person, activity, ... or servic[e] not located on the site where the sign is installed" or if it "direct[ed] persons to any location not on that site." Austin, Tex., City Code § 25–10–3(11). Consider ***1481** what this definition would mean as applied to signs posted in the front window of a commercial establishment, say, a little coffee shop. If the owner put up a sign advertising a new coffee drink, the sign would be classified as on-premises, but suppose the owner instead mounted a sign in the same location saying: "Contribute to X's legal defense fund" or "Free COVID tests available at Y pharmacy" or "Attend City Council meeting to speak up about Z." All those signs would appear to fall within the definition of an off-premises sign and would thus be disallowed. See also *post*, at 3–4 (THOMAS, J., dissenting). Providing disparate treatment for the sign about a new drink and the signs about social and political matters constitutes discrimination on the basis of topic or subject matter. The code provisions adopted in 2017 are worded differently, but the new wording may not rule out similar results. [3]

3 The amended code now defines "off-premise[s] sign" as "a sign that displays any message directing attention to a business, product, service, profession, commodity, activity, event, person, institution, or other commercial message which is generally conducted, sold, manufactured, produced, offered, or occurs elsewhere than on the premises where the sign is located," and defines an "on-premise[s] sign" as "a sign that is not an off-premise[s] sign." Austin, Tex., City Code §§ 25–10–4(9)–(10) (2021). It is not clear that the inclusion of "other commercial message" modifies the terms "activity," "event," "person," or "institution" such that the provision would not draw topic-based distinctions as applied to non-commercial speech.

For these reasons, I would simply hold that the provisions at issue are not facially unconstitutional, and I would refrain from making any broader pronouncements.

Justice THOMAS, with whom Justice GORSUCH and Justice BARRETT join, dissenting.

In *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015), we held that a speech regulation is content based—and thus presumptively invalid—if it "draws distinctions based on the message a speaker conveys." *Id.*, at 163, 135 S.Ct. 2218. Here, the city of Austin imposes special restrictions on "off-premise[s] sign[s]," defined as signs that "advertis[e] a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that direc[t] persons to any location not on that site." Austin, Tex., City Code § 25–10–3(11) (2016). Under *Reed*, Austin's off-premises restriction is content based. It discriminates against certain signs based on the message they convey—*e.g.*, whether they promote an on- or off-site event, activity, or service.

The Court nevertheless holds that the off-premises restriction is content neutral because it proscribes a sufficiently broad category of communicative content and, therefore, does not target a specific "topic or subject matter." *Ante*, at 1472. This misinterprets *Reed*'s clear rule for content-based restrictions and replaces it with an incoherent and malleable standard. In so doing, the majority's reasoning is reminiscent of this Court's erroneous decision in *Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), which upheld a blatantly content-based prohibition on "counseling" near abortion clinics on the ground that it discriminated against "an extremely broad category of communications." *Id.*, at 723, 120 S.Ct. 2480. Because I would adhere to *Reed* rather than echo *Hill*'s long-discredited approach, I respectfully dissent.

I

A

The First Amendment, applicable to the States through the Fourteenth, prohibits ***1482** laws "abridging the freedom of speech." U. S. Const., Amdt. 1; see also *Stromberg v. California*, 283 U.S. 359, 368, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). "When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations." *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. ——, ——, 138 S.Ct. 2361, 2371, 201 L.Ed.2d 835 (2018). A content-based law is "presumptively invalid," *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (internal quotation marks omitted), and may generally be upheld only if the government proves that the regulation is narrowly tailored to serve compelling state interests, *R. A. V. v. St. Paul*, 505 U.S. 377, 395, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). [1]

1 For several categories of historically unprotected speech, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, the government ordinarily may enact content-based restrictions without satisfying strict scrutiny. See *United States v. Stevens*, 559 U.S. 460, 468–469, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010). This Court's precedents have also declined to apply strict scrutiny to several other types of content-based restrictions, including laws targeting "commercial speech." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557, 561–566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). But see *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001) (THOMAS, J., concurring in part and concurring in judgment). As the Court recognizes, Austin's off-premises sign rule is not limited to any of these categories of speech. See *ante,* at 1471, n. 3.

In *Reed* v. *Town of Gilbert*, we held that courts should identify content-based restrictions by applying a "commonsense" test: A speech regulation is content based if it "target[s] speech based on its communicative content." 576 U.S. at 163, 135 S.Ct. 2218. Put another way, a law is content based " 'on its face' [if it] draws distinctions based on the message a speaker conveys." *Ibid.* While we noted that "[s]ome facial distinctions based on a message are obvious," we emphasized that others could be "more subtle, defining regulated speech by its function or purpose." *Ibid.* In all events, whether a law is characterized as targeting a "topic," "idea," "subject matter," or "communicative content," the law is content based if it draws distinctions based in any way "on the message a speaker conveys." *Id.*, at 163–164, 135 S.Ct. 2218. [2]

2

> In *Reed*, we acknowledged that some prior decisions had skipped over this facial analysis and applied a justification-focused test. See 576 U.S. at 165–167, 135 S.Ct. 2218. But we explained that the justification-focused test implicated a "separate and additional category of laws that, though facially content neutral, [are] content-based regulations [because they] cannot be ' "justified without reference to the content of the regulated speech," ' or ... were adopted by the government 'because of disagreement with the message [the speech] conveys.' " *Id.,* at 164, 135 S.Ct. 2218 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). All agree that this second type of content-based regulation is not at issue here.

Applying this standard, we held that the town of Gilbert's sign code was "a paradigmatic example of content-based discrimination" because it classified "various categories of signs based on the type of information they convey[ed], [and] then subject[ed] each category to different restrictions." *Id.*, at 169, 159, 135 S.Ct. 2218. For instance, Gilbert defined " 'Temporary Directional Signs' " as any sign that "convey[ed] the message of directing the public to [a] 'qualifying event,' " and permitted their display for no more than 12 hours before and 1 hour after the event occurred. *Id.*, at 164, 161, 135 S.Ct. 2218. Meanwhile, " 'Ideological Sign[s],' " defined as any sign (not covered by another ***1483** category) that " 'communicat[ed] a message or ideas for noncommercial purposes,' " were subject to no temporal limitations. *Id.*, at 159–160, 135 S.Ct. 2218. In short, the restrictions on any given sign depended "on the communicative content of the sign." *Id.*, at 164, 135 S.Ct. 2218. Gilbert's sign code was thus facially content based and presumptively unlawful. See *id.*, at 159, 135 S.Ct. 2218.

In contrast to *Reed*'s "commonsense" test, Gilbert urged us to define "content based" as a "term of art that 'should be applied flexibly' with the goal of protecting 'viewpoints and ideas from government censorship or favoritism.' " *Id.*, at 168, 135 S.Ct. 2218. Such a functionalist test, Gilbert argued, could ferret out illicit government motives while obviating the need to subject reasonable laws to strict scrutiny. See *ibid.* We rejected Gilbert's attempt to cast the phrase "content based" as a "term of art" because "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute." *Id.*, at 167, 135 S.Ct. 2218. We noted that "one could easily imagine a Sign Code compliance manager who disliked [a] Church's substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services." *Id.*, at 167–168, 135 S.Ct. 2218. Thus, we concluded that "a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem entirely reasonable will sometimes be struck down because of their content-based nature." *Id.*, at 171, 135 S.Ct. 2218 (internal quotation marks omitted).

We also rejected the Ninth Circuit's reasoning that Gilbert's sign restrictions were content neutral because they depended on "the content-neutral elements of ... whether and when an event is occurring." *Id.*, at 169, 135 S.Ct. 2218 (internal quotation marks omitted). That is, whether a temporary directional sign was permissible depended, in part, on its temporal proximity to a " 'qualifying event.' " *Id.*, at 164, 135 S.Ct. 2218. This partial dependence on content-neutral elements was immaterial, we explained, because the restrictions also depended on the signs' communicative content. Gilbert officials still had to examine a sign's message to determine what type of sign it was, and this "obvious content-based inquiry d[id] not evade strict scrutiny simply because an event [was] involved." *Id.*, at 170, 135 S.Ct. 2218.

B

Under *Reed*'s approach for identifying content-based regulations, Austin's off-premises sign restriction is content based. As relevant to this suit, Austin's sign code imposes stringent restrictions on a category of "off-premise[s] sign[s]." § 25–10–3(11). The code defines "off-premise[s] sign[s]" as those "advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed," or as signs "direct[ing] persons to any location not on that site." *Ibid.* This broad definition sweeps in a wide swath of signs, from 14- by 48-foot billboards to 24- by 18-inch yard signs. The sign code prohibits new off-premises signs and makes it difficult (or impossible) to change

existing off-premises signs, including by digitizing them. See *ante*, at 1469 – 1470.

Like the town of Gilbert in *Reed*, Austin has identified a "categor[y] of signs based on the type of information they convey, [and] then subject[ed that] category to different restrictions." 576 U.S. at 159, 135 S.Ct. 2218. A sign that conveys a message about off-premises activities is restricted, while one that conveys a message about on-premises activities is not. See *id.*, at 171, 135 S.Ct. 2218 (regulating signs based ***1484** on "a particular message" about "the time and location of a specific event" is content based). And, per *Reed*, it does not matter that Austin's code "defin[es] regulated speech by its function or purpose"—*i.e.*, advertising or directing passersby elsewhere. *Id.*, at 163, 135 S.Ct. 2218. Again, all that matters is that the regulation "draws distinctions based on" a sign's "communicative content," which the off-premises restriction plainly does. *Ibid.*

This conclusion is not undermined because the off-premises sign restriction depends in part on a content-neutral element: the location of the sign. Much like in *Reed*, that an Austin official applying the sign code must know *where* the sign is does not negate the fact that he also must know *what* the sign says. Take, for instance, a sign outside a Catholic bookstore. If the sign says, "Visit the Holy Land," it is likely an off-premises sign because it conveys a message directing people elsewhere (unless the name of the bookstore is "Holy Land Books"). But if the sign instead says, "Buy More Books," it is likely a permissible on-premises sign (unless the sign also contains the address of another bookstore across town). Finally, suppose the sign says, "Go to Confession." After examining the sign's message, an official would need to inquire whether a priest ever hears confessions at that location. If one does, the sign could convey a permissible "on-premises" message. If not, the sign conveys an impermissible off-premises message. Because enforcing the sign code in any of these instances "requires [Austin] officials to determine whether a sign" conveys a particular message, the sign code is content based under *Reed*. *Id.*, at 170, 135 S.Ct. 2218.

In sum, the off-premises rule is content based and thus invalid unless Austin can satisfy strict scrutiny. See *Playboy Entertainment Group*, 529 U.S. at 813, 120 S.Ct. 1878. Because Austin has offered nothing to make that showing, the Court of Appeals did not err in holding that the off-premises rule violates the First Amendment.

II

To reach the opposite result, the majority implicitly rewrites *Reed*'s bright-line rule for content-based restrictions. In the majority's view, the off-premises restriction is not content based because it does not target a specific "topic or subject matter." *Ante*, at 1472. The upshot of the majority's reasoning appears to be that a regulation based on a sufficiently general or broad category of communicative content is not actually content based.

Such a rule not only conflicts with *Reed* and many pre-*Reed* precedents but is also incoherent and unworkable. Tellingly, the only decision that even remotely supports the majority's rule is one it does not cite: *Hill* v. *Colorado*. There, the Court held that an undeniably content-based law was nonetheless content neutral because it discriminated against "an extremely broad category of communications," supposedly without regard to "subject matter." 530 U.S. at 723, 120 S.Ct. 2480. The majority's decision today is erroneous for the same reasons that *Hill* is an aberration in our case law.

A

The majority concedes that "[t]he message on the sign matters" when applying Austin's sign code. *Ante*, at 1472. That concession should end the inquiry under *Reed*. But the majority nonetheless finds the sign code to be content neutral by recasting facially content-based restrictions as only those that target sufficiently specific categories of communicative content and not as those that depend on communicative content *simpliciter*.

***1485** For example, while *Reed* defined content-based restrictions as those that "dra[w] distinctions based on the *message* a speaker conveys," 576 U.S. at 163, 135 S.Ct. 2218 (emphasis added), the majority decides that Austin's sign code is not content based because it draws

no distinctions based on "[a] sign's *substantive* message," *ante*, at 1472 (emphasis added). Elsewhere, the majority speaks not of "substantive message[s]" but of "topic[s] or subject matter[s]," which the majority thinks are sufficiently *specific* categories of communicative content. *Ibid.* As a result, the majority contends that a law targeting directional messages concerning "events generally, regardless of topic," would not be content based, but one targeting "directional messages concerning *specific* events" (*e.g.*, "religious" or "political" events) would be. *Ante*, at 1475, n. 6, 1472 (emphasis added).[3] Regardless of the label, the majority today excises, without a word of explanation, a subset of supposedly non-substantive or unspecific messages from the First Amendment's protection against content-based restrictions.

3 On this point, the majority's analysis tracks the position advanced by Austin, which asserted that content neutrality was a "question of generality." Tr. of Oral Arg. 14; see also *id.,* at 19 (explaining that whether a law is content based turns on the "level of specificity" at which the government regulates speech).

This understanding of content-based restrictions contravenes *Reed*, which held that a law is content based if it "target[s] speech based on its communicative content"—not "specific" or "substantive" categories of communicative content. 576 U.S. at 163, 135 S.Ct. 2218; see also, *e.g.*, *Norton v. Springfield*, 806 F.3d 411, 412 (CA7 2015) ("*Reed* effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification"). Only by jettisoning *Reed*'s "commonsense" definition of what it means to be content based can the majority assert that the off-premises rule is strictly "location-based" and "agnostic as to content," *ante*, at 1471, even though the law undeniably depends on *both* location *and* communicative content, *supra*, at 1470 – 1471.

Moreover, the majority's suggestion that laws targeting broad categories of communicative content are not content based is hard to square with the sign categories that *Reed* invalidated. For instance, we found Gilbert's expansive definition of "Ideological Sign[s]" to be content based even though it broadly covered any "sign communicating a message or ideas for noncommercial purposes" that did not already fall into one of the other categories. 576 U.S. at 159, 135 S.Ct. 2218 (internal quotation marks omitted). Nor did we suggest that the outcome in *Reed* would have been different if the sign categories were defined even more generally.

The majority answers that it is not "fashion[ing] a novel 'specificity test,' " but instead "simply" "quoting the standard repeatedly enunciated in *Reed*." *Ante*, at 1475. The majority finds this alleged specificity test in a paragraph near the end of *Reed*, where we noted that a law "targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter," and then affirmed that Gilbert's sign code "single[d] out specific subject matter for differential treatment." 576 U.S. at 169, 135 S.Ct. 2218.

These statements never purported to endorse a specificity test of the sort now suggested by the majority. Read in context, *Reed*'s two references to "specific subject matter" naturally address laws ***1486** that target a "subject matter," however broadly defined, as opposed to some other subject matter; they did not refer only to laws targeting some sufficiently "specific" category of "subject matter." Moreover, the concept of "specificity" or "generality" appears nowhere in the part of *Reed* that set forth its "commonsense" test for content neutrality. See *id.*, at 163–164, 135 S.Ct. 2218. If *Reed*'s content-neutrality test turned on specificity, we would have said so explicitly when stating the test. Finally, even crediting the majority's strained reading of *Reed*'s passing references to "specific subject matter," the paragraph where they appear made clear that it was describing only "a paradigmatic *example* of content-based discrimination." *Id.*, at 169, 135 S.Ct. 2218 (emphasis added). That part of *Reed* never professed to announce a comprehensive rule with respect to all laws targeting speech based on its communicative content.

Our pre-*Reed* precedents likewise foreclose a construction of "content based" that applies only to some content. We have held many capacious speech regulations to be content based, including restrictions on " 'advice or assistance derived from scientific, technical or other specialized knowledge,'

" *Holder v. Humanitarian Law Project*, 561 U.S. 1, 12–13, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010); " 'advertising, promotion, or any activity ... used to influence sales or the market share of a prescription drug,' " *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 559, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011); "editorializing," *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 382–383, and n. 14, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984); " '[publication] for philatelic, numismatic, educational, historical, or newsworthy purposes,' " *Regan v. Time, Inc.*, 468 U.S. 641, 644, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984); and "anonymous speech," *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348, 357, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). These speech categories are no more "specific" or "substantive" than messages regarding off-premises activities. And some of these examples, like "editorializing" or publishing "newsworthy" information, are clearly *less* so. What unites these speech restrictions is that their application turns "on the nature of the message being conveyed," *Carey v. Brown*, 447 U.S. 455, 461, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980), not whether they regulate specific or general categories of speech, or whether they address substantive or non-substantive categories of speech.

We have defined content-based restrictions to include *all* content-based distinctions because any other rule would be incoherent. After all, off-premises advertising could be considered a "subject" or a "topic" as those words are ordinarily used. See *L. D. Management Co. v. Gray*, 988 F.3d 836, 839 (CA6 2021) (off-premises billboard restriction "turns on the '*topic* discussed' " (emphasis added)). And, in any event, there is no principled way to decide whether a category of communicative content is "substantive" or "specific" enough for the majority to deem it a "topic" or "subject" worthy of heightened protection. Although off-premises advertising is a more general category of speech than some (*e.g.*, off-premises advertising of religious events), it is a more specific category than others (*e.g.*, advertising generally). The majority offers only its own *ipse dixit* to explain why off-premises advertising is insufficiently specific to qualify as content based under *Reed*. Worse still, the majority does not explain how courts should draw the line between a sufficiently substantive or specific content-based classification and one that is insufficiently substantive or specific.

On this point, Austin suggests there is no need to worry because our cases provide ***1487** "guideposts" from which one can divine what "level of generality" renders a speech regulation content based. Tr. of Oral Arg. 18, 24. To be sure, that is the sort of inquiry the majority's opaque test invites. But *Reed* directed us elsewhere—to the text of the law in question and whether that law " 'on its face' draws distinctions based on the message a speaker conveys." 576 U.S. at 163, 135 S.Ct. 2218. The majority's holding that some rules based on content are not, as it turns out, content based nullifies *Reed*'s clear test.

B

The majority offers several reasons why its approach is consistent with *Reed* and other cases. None of these arguments is persuasive. Instead, they only serve to underscore the Court's ill-advised departure from our doctrine.

1

The majority first suggests that deeming Austin's sign code content based would require us to adopt an "extreme" reinterpretation of *Reed*. *Ante*, at 1471. Specifically, the majority faults the Court of Appeals for concluding that Austin's regulation was content based because, to enforce the off-premises rule, " '[a] reader must ask: who is the speaker and what is the speaker saying' "? *Ibid.* (quoting 972 F.3d 696, 706 (CA5 2020)). In the majority's view, *Reed* cannot stand for such a simplistic read-the-sign test.

The majority's skepticism is misplaced. We have often acknowledged that the need to examine the content of a message is a strong indicator that a speech regulation is content based. One year before *Reed*, for example, we stated that an abortion clinic buffer-zone law "would be content based if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014) (internal quotation marks omitted). That statement was not an outlier. See, *e.g.*, *Arkansas Writers' Project, Inc. v.*

Ragland, 481 U.S. 221, 230, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987) (tax exemption for periodicals "uniformly devoted to religion or sports" was content based because it required state officials to "examine the content of the message" (internal quotation marks omitted)); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) (regulation requiring parade organizers to pay a fee depending on the security costs anticipated for the event was content based because "[i]n order to assess accurately the cost of security for parade participants, the administrator must necessarily examine the content of the message that is conveyed" (internal quotation marks omitted)); *League of Women Voters*, 468 U.S. at 366, 383, 104 S.Ct. 3106 (law forbidding public broadcasting stations from "engag[ing] in editorializing" was content based because it required "enforcement authorities [to] necessarily examine the content of the message that is conveyed" (internal quotation marks omitted)).

Ultimately, the majority's objection to the Court of Appeals' reliance on a read-the-sign test is a red herring; its real objection is to *Reed*'s rule that any law that draws distinctions based on communicative content is content based.

2

The majority next argues that Austin's sign code is content neutral under our precedents. See *ante*, at 1472 – 1474. But none of the cases the majority cites supports its crabbed view of what constitutes a content-based restriction.

First, in *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981), ***1488** the Court upheld, as content neutral, an ordinance providing that the "[s]ale or distribution of any merchandise, including printed or written material," could occur only from certain booths at the fairgrounds. *Id.*, at 643, 101 S.Ct. 2559 (internal quotation marks omitted). Such a statute is facially content neutral under *Reed* because it does not " 'on its face' dra[w] distinctions based on the message a speaker conveys" when selling or distributing merchandise subject to the ordinance. 576 U.S. at 163, 135 S.Ct. 2218. True, the Court construed the ordinance also to limit "fund solicitation operations," 452 U.S. at 644, 101 S.Ct. 2559, but that was not, as the majority claims, a prohibition on "asking for donations," *ante*, at 1473. Rather, anyone was free to "as[k] for donations" wherever he liked, because the ordinance did "not prevent respondents from wandering throughout the fairgrounds and directing interested donors or purchasers to their booth." 452 U.S. at 664, n. 2, 101 S.Ct. 2559 (BLACKMUN, J., concurring in part and dissenting in part). Then, once "at the booth," the donor could "make a contribution." *Ibid.*

Second, in *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), the Court invalidated a licensing system for religious and charitable solicitation while acknowledging in dicta that a State could regulate the time, place, and manner of solicitation. *Id.*, at 304, 307, 60 S.Ct. 900. But here, we are not faced with a true time, place, or manner restriction, as even the majority concedes. See *ante*, at 1472.[4] And, in any event, *Cantwell* did not suggest that a content-based restriction could be sustained as a time, place, or manner restriction; its analysis focused predominantly on the plaintiff 's free exercise claim; and the case predated our modern content-neutrality doctrine by nearly three decades. Thus, nothing in *Heffron* or *Cantwell* supports the majority's narrow approach to identifying content-based restrictions.

4 The majority says only that Austin's sign code is "similar" to a time-place-manner restriction, citing *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). *Ante,* at 1472. But *Frisby* upheld an ordinance that regulated only *where* picketing may take place and not *what* message the picketers could communicate. See 487 U.S. at 477, 108 S.Ct. 2495 (ordinance made it "unlawful for any person to engage in picketing before or about the residence or dwelling of any individual" (internal quotation marks omitted)); cf. *Hill v. Colorado*, 530 U.S. 703, 766, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (KENNEDY, J., dissenting) ("[n]o examination of the content of a speaker's message is required to determine whether an individual is picketing").

Finally, the majority argues that we have "previously understood distinctions between on-premises and off-premises signs ... to be content neutral." *Ante*, at 1473.

To be sure, in both *Suffolk Outdoor Adv. Co. v. Hulse*, 439 U.S. 808, 99 S.Ct. 66, 58 L.Ed.2d 101 (1978), and *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 503–512, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) (plurality opinion), this Court suggested that some restrictions on off-premises advertising were constitutional. And later, in *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), the Court described *Metromedia* as upholding "a *content-neutral* prohibition against the use of billboards." 466 U.S. at 807, 104 S.Ct. 2118 (emphasis added). But the statement in *Vincent* was dictum, and, as the majority concedes, both our summary decision in *Suffolk* and the plurality opinion in *Metromedia* sanctioned off-premises restrictions only insofar as they applied to *commercial* speech. *Ante*, at 1474. That is, the "Court did not need to decide"—and did not decide—"whether the off-premises ***1489** prohibition was content based" because restrictions on commercial speech are "subject to intermediate scrutiny in any event." *Ibid.*

3

The majority also claims that finding Austin's sign code to be content based "would render the majority opinion in *Reed* irreconcilable with" Justice ALITO's *Reed* concurrence. *Ante*, at 1475, n. 6. In particular, Justice ALITO identified nine different types of sign regulations that he believed "would not be content based," including "[r]ules distinguishing between on-premises and off-premises signs" and "[r]ules imposing time restrictions on signs advertising a one-time event." 576 U.S. at 174–175, 135 S.Ct. 2218. The majority evidently believes that these two types of sign regulations necessarily turn on a sign's communicative content, like the off-premises sign restriction at issue here.

That reading of the *Reed* concurrence makes little sense. First, there is no reason to interpret the concurrence as referring to off-premises or one-time-event rules that turn on a sign's communicative content. Doing so would make those two rules categorically different from the other seven, none of which would ever turn on message content. See, *e.g.*, *id.*, at 174, 135 S.Ct. 2218 ("Rules distinguishing between lighted and unlighted signs"). And although off-premises and one-time-event rules *could* be drafted in terms of a sign's communicative content, as is true here, they need not be. "There might be many formulations of an on/off-premises distinction that are content-neutral." *Thomas v. Bright*, 937 F.3d 721, 733 (CA6 2019); see also *ante*, at 1480, n. 1 (ALITO, J., concurring in judgment in part and dissenting in part) (explaining that "[i]n ordinary usage" an "off-premises" sign is one that is not "attached to or located in close proximity to a building"). For instance, a city could define " 'an o[n]-premise[s] sign as any sign within 500 feet of a building,' " 937 F.3d at 732, or a sign that is installed by " 'a business ... licensed to occupy ... the premises where the sign is located,' " Brief for Summus Outdoor as *Amicus Curiae* 10. As for regulations of one-time-event signs, Austin itself amended its sign code, at the behest of its lawyers, specifically to make its ordinance content neutral. See Austin, Tex., City Code § 25–10–102(D) (2021); App. 152. Thus, interpreting Justice ALITO's concurrence as referring to rules that turn on communicative content, as opposed to rules that are content neutral, is unwarranted.

Second, it would be strange to interpret the concurrence as proclaiming that *all* off-premises sign restrictions are content neutral considering the longstanding dispute over that question. In fact, 20 years before *Reed*, then-Judge Alito opined that there was "no easy answer to [the] question" whether "exceptions for 'for sale' signs and signs relating to on-site activities" would render a sign code content based. *Rappa v. New Castle County*, 18 F.3d 1043, 1080 (CA3 1994) (concurring opinion); see also, *e.g.*, *Ackerley Communications of Mass., Inc. v. Cambridge*, 88 F.3d 33, 36, n. 7 (CA1 1996) ("In 'commonsense' terms, the distinction surely is content-based because determining whether a sign must stay up or must come down requires consideration of the message it carries"); *Norton Outdoor Adv., Inc. v. Arlington Heights*, 69 OhioSt.2d 539, 541, 433 N.E.2d 198, 200 (1982) ("In prohibiting all forms of offsite billboard advertising, the ordinance is thus inescapably directed to the content of protected speech"). Ultimately, it seems quite unlikely that Justice ALITO's quick recital of some content-neutral rules purported to pre-emptively decide an issue that had long perplexed federal and state courts.

***1490** 4

Near the end of its analysis, the majority invokes an allegedly "unbroken tradition of on-/off-premises distinctions" that it

claims "counsels against" faithful application of *Reed*. *Ante*, at 1475. To be sure, history and tradition are relevant to identifying and defining those "few limited areas" where, "[f]rom 1791 to the present," "the First Amendment has permitted restrictions upon the content of speech." *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 791, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (internal quotation marks omitted); see *supra*, at 1482, n. 1. But the majority openly admits that off-premises regulations "were not present [at] the founding." *Ante*, at 1474. And while it asserts that "large outdoor advertisements proliferated in the 1800s," *ibid.*, it offers no evidence of any content-based restrictions from that period, let alone off-premises restrictions on *noncommercial* speech. The *earliest* example of an off-premises restriction that the majority cites arose in *Packer Corp. v. Utah*, 285 U.S. 105, 52 S.Ct. 273, 76 L.Ed. 643 (1932), but that case involved a restriction on *commercial* advertising and did not even feature a First Amendment claim. See *id.*, at 108–112, 52 S.Ct. 273.

Ultimately, the majority's only "historical" support is that regulations like Austin's "proliferated following the enactment of the Highway Beautification Act of 1965." *Ante*, at 1469. The majority's suggestion that the First Amendment should yield to a speech restriction that "proliferated"—under pressure from the Federal Government—some two centuries after the founding is both "startling and dangerous." *United States v. Stevens*, 559 U.S. 460, 470, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010). This Court has never hinted that the government can, with a few decades of regulation, subject "new categories of speech" to less exacting First Amendment scrutiny. *Id.*, at 472, 130 S.Ct. 1577.

Regardless, even if this allegedly "unbroken tradition" did not fall short by a century or two, the majority offers no explanation why historical regulation is relevant to the question whether the off-premises restriction is content based under *Reed* and our modern content-neutrality jurisprudence. If Austin had met its burden of identifying a historical tradition of analogous regulation—as can be done, say, for obscenity or defamation—that would not make the off-premises rule content neutral. It might simply mean that the off-premises rule is a constitutional form of content-based discrimination. But content neutrality under *Reed* is an empirical question, not a historical one. Thus, the majority's historical argument is not only meritless but misguided.

C

Despite asserting that the Court of Appeals' analysis under *Reed* would "contravene numerous precedents," *ante*, at 1474, the majority identifies no decision of this Court supporting the idea that a speech restriction is not content based so long as it regulates a sufficiently broad or non-substantive category of communicative content. In fact, there is only one case that could possibly validate the majority's aberrant analysis: *Hill* v. *Colorado*. That *Hill* is the majority's only support underscores the danger that today's decision poses to the First Amendment.

Hill involved a law that prohibited persons outside abortion clinics from knowingly approaching within eight feet of another person without consent "for the purpose of ... engaging in oral protest, education, or counseling." 530 U.S. at 707, 120 S.Ct. 2480 (internal quotation marks omitted). *Hill* concluded, implausibly, that this regulation was content neutral.

***1491** The majority's reasoning in this case is just as implausible. The majority asserts that the off-premises rule is not content based because it does not target a sufficiently "specific" or "substantive" category of communications. *Ante*, at 1472. *Hill* correspondingly held that restrictions on "protest, education, or counseling" were not content-based classifications because they cover "an extremely broad category of communications." 530 U.S. at 723, 120 S.Ct. 2480. The majority also tries to disguise its redefinition of content neutrality by characterizing Austin's rule as a "neutral, location-based" restriction. *Ante*, at 1471. So too did *Hill* try to conceal its doctrinal innovation by characterizing the buffer-zone law as a neutral "place restriction." 530 U.S. at 723, 120 S.Ct. 2480. Finally, the majority finds it immaterial that Austin's rule can be enforced only by "reading a [sign] to determine whether it" contains an off-premises message. *Ante*, at 1472. *Hill* likewise found it irrelevant that "the content of the oral statements" would need to "be examined to determine whether" the prohibition applied. 530 U.S. at 720, 120 S.Ct. 2480.

The parallel between the majority's opinion and *Hill* should be discomforting given that *Hill* represented "an unprecedented departure" from this Court's First Amendment jurisprudence. *Id.*, at 772, 120 S.Ct. 2480 (KENNEDY, J., dissenting). Its content-neutrality analysis was, as Justice SCALIA explained, "absurd" given that the buffer-zone law was "obviously and undeniably content based." *Id.*, at 742–743, 120 S.Ct. 2480 (dissenting opinion). First Amendment scholars from across the ideological spectrum agree. See, *e.g.*, M. McConnell, Professor Michael W. McConnell's Response, in K. Sullivan, Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term, 28 Pepperdine L. Rev. 723, 748 (2001) ("The Court said that this statute is content-neutral. I just literally cannot see how they could possibly come to that conclusion"); Colloquium, *id.*, at 750, 120 S.Ct. 2480 (Laurence Tribe stating *Hill* "was slam-dunk simple and slam-dunk wrong"); R. Fallon, Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1298, and n. 174 (2007) (*Hill* "unconvincingly ... maintain[ed] that a content-based restriction on speech [was] not really content-based"). And, since *Hill*, this Court has all but interred its flawed content-neutrality analysis in both *McCullen*, see *supra*, at 1486 – 1487, and *Reed*. See *Price v. Chicago*, 915 F.3d 1107, 1118 (CA7 2019) ("In the wake of *McCullen* and *Reed*, it's not too strong to say that what *Hill* explicitly rejected is now prevailing law").

The majority's refusal to acknowledge *Hill* simply underscores the decision's defunct status. Again, *Hill* is the only case that could support the majority's ill-conceived content-neutrality analysis, and yet the majority disclaims reliance on it. Lower courts should take the majority's disclaimer at face value: *Hill* is "a decision that we do not cite." *Ante*, at 1475. And today's decision amounts to little more than an ad hoc exemption for the "location-based" and supposedly "content-agnostic on-/off-premises distinction." *Ibid.*

Even so, the majority's approach should offer little comfort because arbitrary carveouts from *Reed* undermine the "clear and firm rule governing content neutrality" that we understood to be "an essential means of protecting the freedom of speech." 576 U.S. at 171, 135 S.Ct. 2218. The majority's deviation from that "clear and firm rule" poses two serious threats to the First Amendment's protections.

First, transforming *Reed*'s clear definition of "content based regulation" back into an opaque and malleable "term of art" turns the concept of content neutrality into ***1492** a "vehicl[e] for the implementation of individual judges' policy preferences." *Tennessee v. Lane*, 541 U.S. 509, 556, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004) (SCALIA, J., dissenting). *Hill* exemplifies this danger. See 530 U.S. at 742, 120 S.Ct. 2480 (SCALIA, J., dissenting) ("I have no doubt that this regulation would be deemed content based *in an instant* if the case before us involved antiwar protesters, or union members seeking to 'educate' the public about the reasons for their strike"). The majority's approach in this case is cut from the same cloth. As the majority transparently admits, it seeks to "apply [our] precedents to reach the 'commonsense' *result*" and avoid what it perceives as a "bizarre *result*." *Ante*, at 1475 (emphasis added). But *Reed* mandates a "commonsense" test for content neutrality even if the *result* is that "laws that might seem entirely reasonable will sometimes be struck down." 576 U.S. at 163, 171, 135 S.Ct. 2218 (internal quotation marks omitted).

Second, sanctioning certain content-based classifications but not others ignores that even seemingly reasonable content-based restrictions are ready tools for those who would "suppress disfavored speech." *Id.*, at 167, 135 S.Ct. 2218; see also *Hill*, 530 U.S. at 743, 120 S.Ct. 2480 (SCALIA, J., dissenting) (" 'The vice of content-based legislation ... is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes' "). This is because "the responsibility for distinguishing between" permissible and impermissible content "carries with it the potential for invidious discrimination of disfavored subjects." *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423–424, n. 19, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). That danger only grows when the content-based distinctions are "by no means clear," giving more leeway for government officials to punish disfavored speakers and ideas. *Ibid.*

The content-based distinction drawn by Austin's off-premises speech restriction is "by no means clear," *ibid.*, and plainly

lends itself "to suppress[ing] disfavored speech," *Reed*, 576 U.S. at 167, 135 S.Ct. 2218. As the Court of Appeals noted, Austin's "prepared counsel" "struggled to answer whether" signs conveying messages like " 'God Loves You,' " " 'Vote for Kathy,' " or " 'Sally makes quilts here and sells them at 3200 Main Street' " would be regulated as off-premises signs. 972 F.3d at 706. Before us, Austin's counsel had similar difficulties, and *amici* have proposed dozens of religious and political messages that would be next to impossible to categorize under Austin's rule. See, *e.g.*, Brief for Alliance Defending Freedom et. al. as *Amici Curiae* 15–19; Brief for Institute for Justice as *Amicus Curiae* 3–9. These pervasive ambiguities offer enforcement officials ample opportunity to suppress disfavored views. And they underscore *Reed*'s warning that "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute." 576 U.S. at 167, 135 S.Ct. 2218.

* * *

Because *Reed* provided a clear and neutral rule that protected the freedom of speech from governmental caprice and viewpoint discrimination, I would adhere to that precedent rather than risk resuscitating *Hill*. I respectfully dissent.

All Citations

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