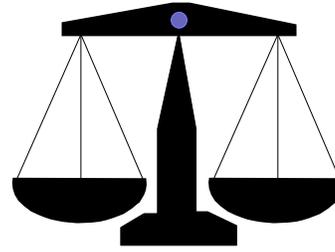


Zoning



Case Law in Wisconsin

Cases Relevant to Shoreland and
Floodplain Zoning in Wisconsin

Published Decisions of the
Wisconsin Supreme Court and
Court of Appeals

DNR Publication # WT-540
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ZONING CASE LAW IN WISCONSIN

PUBLISHED DECISIONS OF THE WISCONSIN SUPREME COURT AND COURT OF APPEALS

1 AMERICANS WITH DISABILITIES ACT ("ADA") & FAIR HOUSING ACTS APPLIED TO ZONING DECISIONS

Reasonable Accommodation Decisions

K Care, Inc. v. Town of Lac du Flambeau, 181 Wis. 2d 59, 510 N.W.2d 697 (Ct. App. 1993).

Facts: The owners of an existing residential facility for the frail elderly located on a 40 acre lakeshore parcel wished to expand, and requested an exception to the statutory prohibition under s. 62.23(7)(i)(1), Stats., against building community living facilities within 2500 feet of each other unless an exception is granted at the discretion of the town. (Actually, it is s. 60.63(1), Stats., that applies to towns, but the wording of the two sections of the statutes is comparable.) The town board refused to grant the exception.

Holding/Analysis: **The Court of Appeals held that the town board failed to make a reasonable accommodation within the meaning of the federal Fair Housing Act (42 U.S.C. § 3604 (f)(3)(B), 1977). Failure to make a reasonable accommodation under the Fair Housing Act and reliance on the state spacing statute constituted discrimination against the handicapped.** The Town had argued that the Fair Housing Act did not apply because the residents of the proposed facility were elderly, but not handicapped. **The Court of Appeals found that the proposed elderly residents were handicapped within the meaning of the Fair Housing Act.** “At the hearing before the town board, uncontradicted evidence was presented that the present group home residents were frail elderly. Most suffer from disabilities that often affect the elderly. Some residents had suffered strokes, others have had hip replacements, others suffered early dementia. Heart problems, high blood pressure and diabetes were also common ailments. None of the residents require skilled nursing, though all require assistance in daily living. Some require assistance eating, bathing and using a toilet. Some residents need assistance using a toilet. Some residents need assistance using a walker or exiting in the event of an emergency. Others are confined to a wheelchair. We conclude that the proposed residents of the new facility, whose physical condition is undisputed, are handicapped within the meaning of the FHA. These residents obviously suffer from physical and mental impairments that substantially limit one or more major life activities. They are unable to eat, bathe, walk or use a toilet without assistance. In short, they are no longer able to live independently.”

K Care, Inc., 181 Wis. 2d 59 at 67. The Court found that the evidence presented at the hearing before the town board did not support the board’s finding that granting an exception would undermine the purposes of the statutory spacing statute. The factual basis for the town's refusal to grant the exception reflected an opposition to change in population density, which was not a rational basis from which to conclude that a proposed facility for eight more people would alter the character of the neighborhood.

County of Sawyer Zoning Board v. Wisconsin Department of Workforce Development, 231 Wis. 2d 534, 605 N.W.2d 627 (Ct. App., 1999).

Facts: Mr. Gregory Klint owned a cabin on a parcel that abuts Grindstone Creek as it flows into Lac

Courte Oreilles in Sawyer County. He and his family used the cabin on summer weekends. Mr. Klint suffers from Marfan's Syndrome (he has congestive heart failure, pulmonary hypertension and restrictive lung disease, which necessitates use of a room air concentrator or an oxygen supply.) The parties to the lawsuit stipulated that he is disabled for purposes of applying the "Wisconsin Fair Housing Act (WFHA)"(now numbered s. 106.50, Stats., and currently referred to as the Wisconsin's open housing law). In 1993, Mr. Klint hired a contractor to build a 20' x 22' addition to the cabin (which more than doubled the size of the cabin). A building permit was not obtained before the addition was built, and a triangular portion of the addition infringed upon the 40-foot shoreland setback (determined by setback averaging). The addition permitted Mr. Klint to have a better view of the creek and lake and the sandbar area where his children played. In addition, Mr. Klint argued that the linear design of the addition allowed him to keep his air hose out of the traffic pattern and to move about the cabin without the hose getting tangled. After construction of the addition was completed, the zoning administrator issued two citations to Mr. Klint, one for building without a permit and one for violating the minimum setback. Mr. Klint applied for an after-the-fact variance. The Sawyer County Zoning Board rejected the variance request on the grounds that it would be for the convenience of the owner and would not be due to special conditions unique to the property. The Board ordered the removal of part of the addition so that it would comply with the setback requirement. Mr. Klint filed a disability discrimination complaint against the Board under the "Wisconsin Fair Housing Act," claiming that the Board had refused to grant him a reasonable accommodation.

Issue: Whether the Department of Workforce Development, in enforcing the "Wisconsin Fair Housing Act," may order a county zoning board to issue a shoreland zoning variance based upon characteristics unique to the landowner, not unique characteristics of the land.

Holding/Analysis: **The Court of Appeals held that the Board's failure to grant the variance did not constitute discrimination against the disabled, but rather was the only legal action it could take given the proof before it.** "The department [of Workforce Development] contends that the board is subject to the WFHA when enforcing its zoning ordinances. Initially, the department asserts that the 'reasonable accommodation requirement of the WFHA can be read harmoniously with the literal language of Wis. Stats. s. 59.694(7)(c), since a person with a disability may present "special conditions" which result in an "unnecessary hardship" if a variance is not granted.' We reject this argument because, as the department concedes, **our supreme court has consistently interpreted the terms 'special conditions' and 'unnecessary hardship' in s. 59.694(7)(c), Stats., to apply to the conditions especially affecting the lot in question and not to conditions personal to the landowner.**" *County of Sawyer Zoning Bd.*, 231 Wis. 2d 534 at 539–540 (emphasis added). "The department next urges us to modify the supreme court's consistent holdings by interpreting them 'slightly more expansively . . . to encompass persons with a "disability" who require a variance as a "reasonable accommodation"' within the unnecessary hardship definition. We reject this invitation for the same reason; our supreme court has proscribed examination of personal characteristics of the owner when considering granting a variance to a shoreland zoning ordinance." *County of Sawyer Zoning Bd.*, 231 Wis. 2d 534 at 541. **"The board could consider only those factors delineated by s. 59.694(7)(c), Stats., and existing case law. There is no dispute that Klint has feasible uses of the property absent a variance. The board could not grant the variance without acting in excess of its powers and contrary to state law."** *County of Sawyer Zoning Bd.*, 231 Wis. 2d 534 at 542 (emphasis added).

See also *Oconomowoc Residential Programs, Inc. v. City of Greenfield and Village of Greendale*, 23 F. Supp. 2d 941 (United States District Court for the Eastern District of Wisconsin, September 30, 1998).

See also *United States v. Village of Marshall, Wisconsin*, 787 F. Supp. 872 (U. S. District Court for the Western District of Wisconsin, April 22, 1991).

Facts: The Housing and Civil Enforcement Section, Civil Rights Division of the United States Department of Justice sued the Village of Marshall alleging that the Village had discriminated against the operator of a group residential facility for the mentally ill when the Village failed to grant an exception, pursuant to the federal Fair Housing Act, from the group home spacing requirement that is found in s. 62.23 (7)(i) 1, Stats.

Holding/Analysis: The U.S. District Court held that the Wisconsin statute that established spacing restrictions for proposed community-based residential facilities constituted “rules, policies, practices, or services” within the meaning of the federal Fair Housing Act, and that **the Village’s refusal to grant an exception to the spacing restriction constituted a failure to make “reasonable accommodation” and was wrongful discrimination under the federal Fair Housing Act.**

See also *Brandt v. Village of Chebanse, Illinois*, 82 F. 3d 172 (7th Circuit, 1996)

See also *Oak Ridge Care Center, Inc. v. Racine County*, 896 F. Supp. 867 (E.D. Wis. 1995)

See also *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D. N.Y. 1983) and *U.S. v. Borough of Audubon*, 797 F. Supp. 353 (D. N.J. 1991)

“Courts have unanimously applied the reasonable accommodations requirement to zoning ordinances and other land use regulations and practices.” *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 at 1185 (E.D. N.Y. 1983)

"An accommodation is reasonable under the FHA if it does not cause any undue hardship or fiscal or administrative burdens on the municipality, or does not undermine the basic purpose that the zoning ordinance seeks to achieve." *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 at 1186 (E.D. N.Y. 1983)

“ . . . although a municipality has a legitimate governmental interest in regulating land use, we have a duty under the [federal Fair Housing] Act to ensure that the interest is effectuated in a nondiscriminatory manner.” *U.S. v. Borough of Audubon*, 797 F. Supp. 353 (D. N.J. 1991)

2 APPEALS TO BOARDS OF ADJUSTMENT OR BOARDS OF APPEALS

Authority of BOAs to Interpret Ordinances

Cohen v. Dane County Board of Adjustment, 74 Wis. 2d 87, 246 N.W.2d 112 (1976).

Facts: The Cohens owned a farm in Dane County that was zoned A-1 Agricultural. They also operated a wholesale grocery business and owned a semi-tractor and four semi-trailers which they stored at their farm when they were empty and not in use. The County ordered the Cohens to stop storing the truck and trailers on their farm property, arguing that the storage of the truck and trailers constituted a “truck terminal” and truck terminals were prohibited in the A-1 Agricultural district.

Holding/Analysis: **The Supreme Court held that “the storage of trucks by the Cohens on their property did not constitute the use of the property as a truck terminal,”** and reversed the judgment of the circuit court.” *Cohen*, 74 Wis. 2d 87 at 90 (emphasis added). **“This court has consistently resolved all ambiguity in the meaning of zoning terms in favor of the free use of private property. . . . The provisions of a zoning ordinance, to operate in derogation of the common law, must be in clear, unambiguous, and peremptory terms.”** *Cohen*, 74 Wis. 2d 87 at 91 (citations omitted). “As we have stated above, an ambiguous term in a zoning ordinance must be construed in favor of the free use of private property, and unless this court can be satisfied that the use that the property has been put to by the Cohens is unambiguously a ‘truck terminal,’ it is not a prohibited use.” *Cohen*, 74 Wis. 2d 87 at 92.

Nodell Investment Corp. v. City of Glendale, 78 Wis. 2d 416, 254 N.W.2d 310 (1977).

Facts: Nodell Investment Corp. and other applicants for building permits were required by the city plan commission to dedicate to the city a strip of land along North Port Washington Road for road expansion purposes as a condition of obtaining the building permits. The applicants did not appeal the road dedication condition to the city board of appeals. Several years later, when the road widening project began and the State began purchasing frontage property that had not been previously dedicated to the city, Nodell Investment Corp. and Echo Bowl Partnership commenced this action seeking a declaratory judgment that would declare the deeds given to the city for road expansion purposes to be null and void.

Holding/Analysis: **The Supreme Court stated that an “administrative agency has no right to repeal or declare unconstitutional zoning ordinances enacted by the legislative body from which the board derives its existence.”** *Nodell Investment*, 78 Wis. 2d 416 at 426 (emphasis added). **However, the Court also observes that “in this case the board of appeals does have the power to invalidate the conditions imposed by the plan commission and to afford relief to the property owners without invalidating the ordinance itself. . . . Section 85.17(9) of the city ordinances neither require nor expressly authorizes the plan commission to condition approval of the issuance of building permits on the dedication of land.”** *Nodell Investment*, 78 Wis. 2d 416 at 426 (emphasis added). **“The property owners, having failed to utilize available administrative remedies provided by law, are precluded from judicial review at this time.”** *Nodell Investment*, 78 Wis. 2d 416 at 428 (emphasis added).

State ex rel. Tingley v. Gurda, 209 Wis. 63, 243 N.W. 317 (1932).

Facts: C. W. Tingley owned property that was originally part of the city of North Milwaukee and was subsequently annexed to the city of Milwaukee, at which time the zoning of the property was changed from industrial to residential. For that reason, Tingley was refused a license to construct a stone yard and plant on the premises. Tingley claimed that the ordinance was unconstitutional and the lower court so held and issued a peremptory writ of mandamus.

Holding/Analysis: **The Supreme Court held that an appeal to the Board of Appeals “would**

afford the relator [Mr. Tingley] no adequate relief, for which reason his resort to the remedy of mandamus is proper.” The Court also held that the City of Milwaukee’s zoning ordinance was unreasonable and void as applied to Mr. Tingley’s property. “The gist of the power thus conferred [on boards of appeals by section 62.23 (8)(b), Stats.] is that of reviewing the decision or determination of administrative officials charge with the enforcement of such ordinances. The terms of the ordinance itself necessarily form a basis of administrative action, and whether the action of the administrative officer, as, for instance, the building inspector, is in conformity with the requirements of the ordinance, is at least one of the matters which may be reviewed by the board of appeals. We find no express provision in the statute conferring upon the board of appeals power to revise, amend, or repeal the ordinance.” *Tingley*, 209 Wis. 63 at 67. The Supreme Court found that Mr. Tingley’s property was “a block of land in an industrial center, valuable for industrial purposes, condemned to a use for residential purposes, and for such purposes it is comparatively valueless.” *Tingley*, 209 Wis. 63 at 69. The Court apparently thought that the City of Milwaukee had deliberately zoned land that was not suited for residential use in a residential district to reduce its value. The decision states “. . . we find suggestions in the record that the city planning commission contemplates sometime in the future a boulevard along Mud creek and, with that in view, a zoning regulation has been promulgated destroying the value of the property which will later have to be taken for that purpose, so that the city may be able to carry out the boulevarding project with less expense to itself. . . . Such use of the [zoning] power is utterly unreasonable and cannot be sanctioned.” *Tingley*, 209 Wis. 63 at 69-70.

State v. Outagamie County Bd. of Adjustment, 2001 WI 78, 251 Wis. 2d 484, 628 N.W.2d 736.

Facts: The Warnings built a three bedroom, ranch-style house in the 100-year flood fringe of Outagamie County in 1984, after obtaining a building permit from the town building inspector. Town building inspector did not tell the Warnings that they needed to also obtain a zoning permit from the Outagamie Zoning Department, and the Warnings did not do so (in spite of the fact that the Warnings had obtained a conditional use permit from the County Zoning Committee in 1980 that allowed them to place fill and a mobile home on their property within the flood fringe district). The basement of the Warnings home was constructed 3.7 feet below the regional flood elevation and 5.7 feet below the flood protection elevation, in violation of the County’s floodplain zoning ordinance. In 1995, eleven years after their home was built, the Warnings applied for a building permit to add a sun porch to their home. The Outagamie County Zoning Administrator denied the Warnings’ request because their home did not meet flood protection elevation requirements. The Warnings then applied to the Outagamie County Board of Adjustment for an after-the-fact variance for their nonconforming basement floor, so that they would then be eligible for a building permit for the sun porch that they proposed to construct on fill above the flood protection elevation. The BOA granted a variance to the Warnings, and the Wisconsin Dept. of Justice, at the request of the Wisconsin Department of Natural Resources, appealed the variance decision to the circuit court, arguing that the Warnings had not established that their property would have no reasonable use in the absence of a variance, and that the BOA decision violated Wis. Admin. Code § NR 116.13 (2). The Warnings argued that the “no reasonable use” standard did not apply to their variance request and that the State had waived the argument that the BOA’s decision was contrary to Wis. Admin. Code § NR 116.13 (2) because the State had not raised this issue before the BOA. The Outagamie County Circuit Court upheld the BOA’s decision to grant the variance and ruled that the State had waived the argument that the variance violated Wis. Admin. Code § NR 116.13 (2) because it was not raised at the hearing before the BOA. However, the Court of Appeals reversed the Circuit Court’s decision and decided that (1) under the Huntoon case (*State v. Kenosha County Board of Adjustment*), the variance could not be granted since the Warnings had not established that their property would have “no reasonable use” without the variance; and (2) the variance was contrary to Wis. Admin. Code § NR 116.13 (2), which prohibited the granting of any variance that would allow a basement floor below the regional flood elevation. The Warnings

appealed the Court of Appeals decision to the Supreme Court.

Holding/Analysis: **The Wisconsin Supreme Court held that “Wis. Admin. Code § NR 116.13 (2) conflicts with Wis. Stat. § 87.30 (1g) and is therefore invalid to the extent that it prohibits all variances for residential floors below the regional flood elevation,” and reinstated the circuit court’s decision affirming the Outagamie County BOA’s issuance of a variance to the Warnings.** Justice Diane Sykes wrote in the lead opinion that: “Four members of the court join me in concluding that because Wis. Admin. Code § NR 116.13(2) categorically prohibits variances for *any* deviation from basement elevation requirements in floodplains, it inexorably conflicts with the discretionary authority over variances vested in local boards of adjustment by state statute, and therefore must give way.” *Outagamie County*, 2001 WI 78, ¶ 5.

“An administrative agency cannot exercise its rulemaking authority in contradiction of the will of the legislature as expressed in the statutes. *See* Wis. Stat. §§ 227.10(2) (‘[n]o agency may promulgate a rule which conflicts with state law’) and 227.11(2)(a); *Seider v. O’Connell*, 2000 WI 76 at ¶24, 236 Wis.2d 211, 612 N.W.2d 659. This administrative rule purports to circumscribe the authority over variance decisions that the legislature has explicitly vested in local boards of adjustment.” *Outagamie County*, 2001 WI 78, ¶ 60.

“There is nothing in the DNR’s general grant of authority to regulate floodplains that permits the agency to write rules that nullify the discretion over variance decisions that the legislature has specifically committed to local boards of adjustment. Thus, to the extent that § NR 116.13(2) prohibits county boards of adjustment from granting variances from flood elevation requirements where the proper statutory standards for such variances have otherwise been met, it is invalid. Accordingly, the rule is no impediment to our sustaining the variance here.” *Outagamie County*, 2001 WI 78, ¶ 61.

[**Note:** The Supreme Courts’ decision in the *Outagamie County* case is confusing because it consists of 4 separate opinions: (1) The lead opinion written by Justice Diane Sykes (Justices William Bablitch and David Prosser joined in the lead opinion in its entirety); (2) a concurring opinion written by Patrick Crooks (Justice Jon Wilcox joined in this concurring opinion); (3) a concurring opinion written by Justice David Prosser; and (4) a dissenting opinion written by Justice Shirley Abrahamson (Justice Ann Walsh Bradley joined in the dissenting opinion). A majority of the Court agreed that the court of appeals decision should be reversed; and that the circuit court’s decision should be reinstated, affirming the Board of Adjustment’s decision to grant a variance. A majority of the Court also found s. NR 116.13(2) invalid, to the extent that it prohibits BOAs from granting variances from flood protection standards where the statutory standards for variances are otherwise met. The lead opinion (and Justice Prosser’s concurring opinion) sought to overrule the unnecessary hardship standard that was established in *State v. Kenosha County BOA* (the Huntoon case). However, that effort failed for lack of a majority vote. A majority of the Court (two concurring Justices and two dissenting Justices) refused to overturn the unnecessary hardship standard that was established in the Huntoon decision.]

(**Note:** For a summary of other issues that were decided in the *Outagamie County* case, see “Unnecessary Hardship” in Section 26.)

State of Wisconsin v. Waushara County Board of Adjustment and G. Edwin Howe and Suzanne Howe, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in this section, and “Area Variances” in Section 32.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that “in evaluating whether to grant an area variance to a zoning ordinance, a board of adjustment should focus on the purpose of the zoning law at issue in determining whether an unnecessary hardship exists for the property owner seeking such variance.” *Waushara County*, ¶ 35. In this decision, the Supreme Court stated: “**Boards of adjustment exercise discretion when determining whether a request for a variance should be granted.** *State ex rel. Schleck v. Zoning*

Bd. of Appeals, 254 Wis. 2d 42, 52, 35 N.W.2d 312 (1948). **Nevertheless, ‘boards of adjustment (are) not authorized to rewrite the law, but rather, to apply it.’** *State v. Ozaukee Bd. of Adjustment*, 152 Wis. 2d 552, 564-65, 449 N.W.2d 47 (1989).” *Waushara County*, ¶ 13. (emphasis added)
“ . . . Interpretation of ordinances and interpretation of statutes invoke the same rules. *Kenosha County*, 218 Wis. 2d at 412.” *Waushara County*, ¶ 14.

Burden of Proof

Arndorfer v. Sauk County Board of Adjustment, 162 Wis. 2d 246, 469 N.W.2d 831 (1991).

Facts: For a summary of the facts and other issues decided in this case, see "Inadequate Record" and "Unnecessary Hardship" in the Variances section.

Holding/Analysis: "The dispositive issue in this case is whether the Arndorfers have met their burden of proving unnecessary hardship, which includes the burden of proving 'uniqueness.'" *Arndorfer*, 162 Wis. 2d 246 at 254. "We cannot conclude from the record that the Arndorfers would suffer unnecessary hardship if the variance is not granted. The record provides no basis for concluding that the soil problems that have caused the Arndorfers' hardship are unique to their land. **Because the Arndorfers have not met their burden of establishing uniqueness, this court is not in a position to order the Board to grant their variance.**" *Arndorfer*, 162 Wis. 2d 246 at 258 (emphasis added).

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

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in this section, and "Area Variances" in Section 32.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that the "no reasonable use" standard is no longer applicable in area variance cases and reaffirming the *Snyder* definition of unnecessary hardship for area variance cases. *Ziervogel*, ¶ 41. In this decision, the Supreme Court stated: "**The following judicial rules of unnecessary hardship are well-established: . . . The property owner bears the burden of proving unnecessary hardship.**" *Arndorfer*, 162 Wis. 2d at 253; *see also Outagamie County*, 244 Wis. 2d 613, ¶ 50." *Ziervogel*, ¶ 20. (emphasis added)

Discretionary Authority of BOAs

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

Facts: The plaintiffs in the *Ziervogel* case own a 1.4 acre parcel of land with 200 feet of frontage on Big Cedar Lake in the Town of West Bend in Washington County. A public highway divides their lot. The portion of the lot on the opposite side of the highway from the lake is in a floodplain. There is no location on the lot on which to build a home that would be setback 75 feet from the ordinary high-water mark of the lake, which is the minimum shoreland setback required under ch. NR 115, Wis. Adm. Code, and the Washington County shoreland zoning ordinance. The plaintiffs sought a variance to construct a 1200 square foot addition to their home that is located only 26 feet from the ordinary high-water mark. They propose to add an additional story within the footprint of the existing home in order to convert it from a seasonal residence to a year-round residence. The Washington County Board of Adjustment denied their variance request on the grounds that the plaintiffs already had reasonable use of their property without a variance. Both the Washington County Circuit Court and the Court of Appeals affirmed the Board's decision.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that the "no reasonable use" standard is no longer applicable in area variance cases and

reaffirming the *Snyder* definition of unnecessary hardship for area variance cases. *Ziervogel*, ¶ 41.

In its opinion in *Ziervogel*, the Supreme Court observed that: “**The legislature has by this enactment [enacting Wis. Stat. § 59.694 (7)] delegated to local boards of adjustment substantial discretion to grant variances where the literal application of zoning regulations would result in unnecessary hardship not justified by the underlying purposes of the ordinance in question.** The statute, however, does not define ‘unnecessary hardship,’ which is a prerequisite to the issuance of a variance. It has been left to the courts to give content to the term.” *Ziervogel*, ¶ 19 (emphasis added).

“For the statutory discretionary authority to be meaningful, boards of adjustment must have the opportunity to distinguish between hardships that are unnecessary in light of unique conditions of the property and the purpose of the ordinance, and hardships that do not warrant relief, either because they are inconsequential or not unique or because a variance would unduly undermine the purpose of the ordinance or the public interest. Boards of adjustment must ‘have some very real flexibility in granting variances.’ *Id.* [Outagamie County, 244 Wis. 2d 613, ¶ 74] (Crooks, J., concurring). Under the ‘no reasonable use’ standard, however, boards of adjustment are effectively prohibited from considering the graduated nature of intrusions upon the strict letter of area restrictions. The ‘no reasonable use’ standard, therefore, leaves boards of adjustment with almost no flexibility and empties the concept of ‘discretion’ of any real meaning.” *Ziervogel*, ¶ 29.

“*Kenosha County*’s adoption of the ‘no reasonable use’ standard for area variances generally precludes any property owner currently using his property from ever getting a variance, regardless of the merits of the application or the type, size, and nature of the variance requested. This ‘unreasonably prevent[s] private property owners from making even highly beneficial, completely legal improvements to their property, ‘if doing so requires a variance to legalize even the slightest nonconformity. *Id.* [Outagamie County, 244 Wis. 2d 613, ¶ 74], ¶¶ 42, 47. Almost all variance applicants – certainly all applicants who are putting their property to some use at the time of application – will flunk the ‘no reasonable use’ test, divesting the board of any real discretion. Universal application of the ‘no reasonable use’ definition of unnecessary hardship to all variances has drained the variance statute of its meaning and effect.” *Ziervogel*, ¶ 30 (footnotes omitted).

(**Note:** For information on other issues discussed in *Ziervogel*, see “Burden of Proof” in this section, Section 3 (“Presumption of Correctness and Validity,” “Standing to Appeal,” and “Standard of Review”), Section 9 (County Zoning Jurisdiction and Home Rule) and Section 32 (“Area Variances,” “Burden of Proof,” “Not Contrary to Public Interest,” “No reasonable use,” “Personal Inconvenience,” “Purpose of Variance Procedure,” “Purpose of Zoning Provision,” “Self-Created Hardship,” “Unique Physical Property Features,” “Unnecessarily Burdensome,” “Unnecessary Hardship,” and “Use Variances”).)

State of Wisconsin v. Waushara County Board of Adjustment and G. Edwin Howe and Suzanne Howe, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

Facts: The property owners in the *Waushara County* case own a .324 acre parcel of land with frontage on Silver Lake in Waushara County. Due to a 110-foot highway setback and the size of the lot, there is not enough room on the lot for a house to be built that complies with the 75-foot shoreland setback requirement in the Waushara County zoning ordinance. The Waushara County zoning ordinance allows for setback averaging, but under that provision, the property owners could build no closer than 35 feet from the ordinary high-water mark of Silver Lake. They have an existing two-story home on the lot that is between 30 and 34 feet from the ordinary high-water mark. The property owners applied for, and were granted, variances in 1989 and 1994 that allowed them to enlarge their home because they wanted to convert it to a year-round residence. In 2001, the property owners applied for a third variance to construct a 10-foot by 20.5-foot addition to their living room (with a full basement) and a

4-foot by 10-foot porch. The Waushara County Board of Adjustment granted the requested variance. The State of Wisconsin, at the request of the Department of Natural Resources, appealed the Board's variance decision on the grounds that the property owners already had reasonable use of their property without a variance. The Waushara County Circuit Court reversed the Board's decision and the Court of Appeals affirmed the circuit court's decision.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that "in evaluating whether to grant an area variance to a zoning ordinance, a board of adjustment should focus on the purpose of the zoning law at issue in determining whether an unnecessary hardship exists for the property owner seeking such variance." *Waushara County*, ¶ 35.

In the majority opinion in this case, the Supreme Court stated: "**Boards of adjustment exercise discretion when determining whether a request for a variance should be granted.** *State ex rel. Schleck v. Zoning Bd. of Appeals*, 254 Wis. 42, 52, 35 N.W.2d 312 (1948). **Nevertheless, 'board(s) of adjustment (are) not authorized to rewrite the law, but rather, to apply it.'** *State v. Ozaukee Bd. of Adjustment*, 152 Wis. 2d 552, 564-65, 449 N.W.2d 47 (1989). In general, we are hesitant to overrule administrative decisions. *Snyder*, 74 Wis. 2d at 476. A board's decision is presumed to be correct and valid. *Id.* **The board's findings may not be disturbed if any reasonable view of the evidence sustains such findings. *Id.* Moreover, we may not substitute our discretion for that of the board's, as committed to it by the legislature. *Id.*"** *Waushara County*, ¶ 13. (emphasis added)

" . . . The plurality in *Outagamie County* noted that '(a) reviewing court may not substitute its discretion for that of the board, the entity to which the legislature has committed these decisions.' *Outagamie County*, 244 Wis. 2d 613, ¶ 25. *See also Snyder*, 74 Wis. 2d at 476, *Kenosha County*, 218 Wis. 2d at 415. Even in *Schleck*, which preceded *Outagamie County* by over 50 years, we stated that a board exercises its discretion when deciding whether to grant a variance. *Schleck*, 254 Wis. at 52. We realize that this final principle is closely akin to the first principle set forth in this opinion, namely that boards' decisions have a presumption of correctness. Nevertheless, we feel that the notion that boards should have flexibility is sufficiently important so as to warrant mentioning it as a separate principle." *Waushara County*, ¶ 33.

(Note: For information on other issues discussed in *Waushara County*, see "Authority of BOAs to Interpret Ordinances" in this section, Section 3 ("Presumption of Correctness and Validity," and "Standard of Review"), Section 26 (Shoreland Zoning) and Section 32: "Area Variances," "Not Contrary to Public Interest," "No reasonable use," "Purpose of Zoning Provision," "Unnecessarily Burdensome," and "Unnecessary Hardship.")

Exclusive Remedy in Most Cases

Jefferson County v. Timmel, 261 Wis. 39, 51 N.W.2d 518 (1952).

Facts: A property owner who occasionally sold gasoline from a single farm pump constructed a new building, installed new pumps and began selling gas, oil, antifreeze, tobacco products and soda. The county building inspector refused to issue a building permit because the property owner's actions constituted an impermissible expansion of a nonconforming use.

Holding/Analysis: The Supreme Court held that nonconforming use status was lost because the property owner did not appeal the decision of the building inspector to deny a building permit. ". . . [T]he authorities are in conflict as to whether a property owner must first pursue and exhaust the administrative remedy available to him under a zoning ordinance or statute before resorting to the courts for injunctive or other relief. We believe the sounder rule is that which holds that **if a zoning ordinance provides for an appeal to a board of adjustment created pursuant to a statute similar**

to sec. 59.99 [now 59.694, Stats.] from an adverse ruling of an administrative officer or board in administering the ordinance, and court review of the decision or order of the board of adjustment is specifically provided for by statute, such remedy is exclusive of all other remedies and must be exhausted before a party can resort to the courts for other relief except in cases where the validity of the ordinance itself is attacked.” *Timmel*, 261 Wis. 39 at 63–64 (emphasis added).

Kmiec v. Town of Spider Lake, 60 Wis. 2d 640, 211 N.W.2d 471 (1973).

Facts: The plaintiffs purchased 296 acres of land with some frontage on Clear Lake in 1970 with the intention to reconstruct an old farmhouse as their permanent residence and to develop the property with a golf course and clubhouse. In September of 1970, the plaintiffs obtained a permit from the Spider Lake town clerk for the reconstruction of the farmhouse and the construction of a clubhouse. Upon receipt of the permit, the plaintiffs began work on the farmhouse and clubhouse, and also excavated and graded fairways and began building perimeter roads for the proposed golf course. On March 1, 1971, Sawyer County adopted a zoning ordinance that became effective on March 26, 1971. The plaintiff’s property, except for their personal residence, was zoned A-1, agricultural district. On April 10, 1971, the town of Spider Lake adopted the county ordinance. On September 23, 1971, the plaintiffs were notified by the town to cease and desist from any further construction, improvement or use of the property for a clubhouse and golf course. After the plaintiffs discovered the classification of their property under the new zoning ordinance, they petitioned the town board to change the classification to residential/recreational. Their petition was denied. The plaintiffs commenced an action in circuit court arguing that the classification of their property in an agricultural district was an unconstitutional denial of due process and equal protection. It was undisputed that the property had not been used as farmland for at least eleven years, and the plaintiff’s appraiser had testified in circuit court that it would cost \$150 to \$200 an acre to bring the land into farming condition again, and then it would only be worth \$75 an acre as farmland.

Holding/Analysis: **The Supreme Court concluded that the Sawyer County zoning ordinance was unconstitutional as applied to the plaintiffs’ property, and the plaintiffs were not required to appeal to the administrative agencies of either the town or the county before initiating the declaratory judgment action. “a challenge to the constitutional validity of a zoning ordinance presents a question of law. Such a challenge may properly be made by commencing an action for declaratory judgment and the doctrine of exhaustion of remedies is not applicable.”** *Kmiec*, 60 Wis. 2d 640 at 645 (emphasis added). “The restrictions of the A-1 classification gives at least 216 acres of the plaintiffs’ land a substantial negative value and the classification is without any reasonable basis. The classification is unreasonable and contravenes art. I, sec. 13 of the Wisconsin Constitution on the grounds of both due process and equal protection.” *Kmiec*, 60 Wis. 2d 640 at 652.

Findings That BOAs Must Make

State v. Trudeau, 139 Wis. 2d 91, 408 N.W.2d 337 (1987).

Facts: For a summary of the facts and other issues decided in this case, see “Entire Lakebed Need Not Be Navigable” in Section 15.

Holding/Analysis: **The Supreme Court remanded the case to the circuit court with directions to remand the matter to the Ashland County Board of Adjustment, for the Board to determine what portion of the property, if any, had elevations higher than 602 feet, the ordinary high water mark of Lake Superior and to make other appropriate findings.** The Supreme Court stated: “The board must make appropriate findings supporting its conclusion so a meaningful judicial review is possible. The board is required to include findings on public interest, special conditions and unnecessary hardships as well as any of the relevant eight factors set out in sec. 7.34 of the Ashland

County Flood Plain Zoning Ordinance [the factors listed in sec. 7.34 of the ordinance included ‘will not be contrary to the public interest,’ ‘owing to special conditions, a literal enforcement . . . would result in unnecessary hardship,’ ‘shall be consistent with the spirit and intent of this . . . ordinance,’ and shall not be granted ‘solely on the basis of economic gain or loss’ nor for ‘a self-created hardship.’].” (citations omitted) *Trudeau*, 139 Wis. 2d 91 at 110.

Reconsideration/Rehearing by BOAs

Goldberg v. Milwaukee Zoning Appeals Bd., 115 Wis. 2d 517, 340 N.W.2d 558 (Ct. App. 1983).

Facts: Prior to purchasing the property, the Piepers applied for a variance to permit use of the building on the property as a six-family dwelling. The Zoning Appeals Board held a hearing and issued a decision granting the requested variance. However, eleven days later, without further hearing or notice to landowners, the Zoning Appeals Board revised the previously-issued variance, adding the condition that the variance was granted to the landowners personally. The Piepers did not appeal the revised variance after they learned about it. Four and half years later, Sidney Goldberg made an offer to purchase the Piepers’ property and applied for a six-family occupancy permit. His application was denied because the variance was granted personally to the Piepers. Mr. Goldberg applied to the Zoning Appeals Board for a variance and after a hearing, the Board denied his request. Mr. Goldberg appealed the Board’s denial, and the circuit court affirmed the Board’s decision.

Holding/Analysis: **The Court of Appeals held that the Board did not have the authority to reverse a decision that it had made earlier to grant a variance request, or to attach new conditions to the variance as the Board in this case attempted to do, unless there was “public necessity or other good cause” for reopening the matter (such as a procedural error in the prior proceedings) and proper notice had been given and a second hearing was held to reconsider the matter.** The Court of Appeals stated: “We are unaware of any Wisconsin authority to support or reject the board’s revision. Although there is some split of authority on a board’s power to reopen or reconsider, our research persuades us that the better rule is that a zoning board acts in excess of its power in reopening a proceeding which has once been terminated. . . . Possible exceptions to this rule, such as public necessity or other good cause, are not evident from the record and are, therefore, inapplicable here.” *Goldberg*, 115 Wis. 2d 517 at 521. Just as it is important to notify adjoining landowners when a variance is granted, it is equally important to notify the applicants and adjoining landowners when a variance is proposed to be modified. “We are persuaded and guided by a statement by the Superior Court of New Jersey . . . ‘[V]iewing the board of appeals as a *quasi*-judicial tribunal, the general rule is that *such a board is not vested with the power to reopen and rehear a proceeding which has once been terminated*, at least in the absence of mistake in the prior proceedings. Otherwise there would be no finality to the proceeding; the result would be subject to change at the whim of members, or due to influence exerted upon them or other undesirable elements tending to uncertainty and impermanence.’ [Emphasis in original]” *Goldberg*, 115 Wis. 2d 517 at 521-522 (citations omitted).

(**Note**: For a summary of other issues that were decided in the *Goldberg* case, see “Variances Generally Not Revocable” and “Variances Run with the Land/Vested Rights” in Section 26.)

Tateoka v. City of Waukesha Board of Zoning Appeals, 220 Wis. 2d 656, 583 N.W.2d 871 (Ct. App. 1998).

Facts: In January of 1996, the Tateokas purchased a residential property in the city of Waukesha. The broker who showed them the property represented that it was a duplex. In September of 1996, the Tateokas placed a “for rent” sign in their front yard. They then received a letter from the City Housing Inspector advising them that they could not rent the upper unit of the building that they had purchased

under the applicable provisions of the city's zoning ordinance. In November of 1996, the Tateokas applied for a variance. The City Director of Planning refused to place the matter on the Board of Zoning Appeals agenda because prospective purchasers of the property that the Tateokas later bought had applied for, and been denied, a variance to allow the property to be used as a duplex in August of 1995. The rules of the Board of Zoning Appeals provided:

"Rehearings, reconsiderations and new applications seeking the same relief concerning the same property after a previous application has been denied will not be heard by the Board of Appeals unless a substantial change of conditions or circumstances has intervened between the time the matter was first decided by the Board of Appeals and the subsequent application. A change of ownership or the passage of time without additional conditions or circumstances will not justify another hearing before the Board."

The Tateokas filed an appeal in circuit court, challenging the validity of the BOA rule. The circuit court ruled that the Board's rule was invalid because it conflicts with s. 62.23 (7)(e) 6, Stats.

Holding/Analysis: The Court of Appeals held that the Board of Zoning Appeals did not exceed its jurisdiction when it adopted the above rule and that the rule did not conflict with s. 62.23 (7)(e) 6, Stats. The Court concluded that "the rule is reasonably related to the Board's legitimate interest in efficiency and the finality of its decisions," "the rule does not violate the Tateokos' right to due process and equal protection," and "the Board's decision to deny the Tateokos' variance request was not arbitrary and capricious in light of its failure to provide facts evidencing a change of circumstances." *Tateoka*, 220 Wis. 2d 656 at 672. "Where a zoning board denies a variance, it will not be permitted, at a subsequent hearing on the same facts, to reverse itself Absent a change in conditions between the two hearings, a board will not be permitted to *review* and *reverse* its former action." (emphasis in original) *Tateoka*, 220 Wis. 2d 656 at 665-66, quoting with approval from 3 Edward H. Ziegler Jr., *Rahkopf's The Law of Zoning and Planning* § 37.08, at 123-24 (4th ed. 1998).

Timeliness of an Appeal

State ex rel. Brookside v. Jefferson County Bd. of Adjustment, 131 Wis. 2d 101, 388 N.W.2d 593 (1986).

Facts: For a summary of the facts and other issues that were decided in this case, see "Standing to Appeal" in Section 3.

Holding/Analysis: Given the fact that s. 59.99 (4), Stats. (now numbered s. 59.694 (4), Stats.) provides that an "appeal shall be taken within a reasonable time," the court had to decide when the appeal period began, and what is a reasonable length of time during which an appeal can be filed. **The Supreme Court determined that commencement of construction, not publication of hearing notices, constituted notice to the residents that the permit had been issued**, despite the financial investment made by Brookside in reliance on the permit. "Before it began construction Brookside Poultry could have protected itself by taking steps to ensure that the Residents [the Respondents] had notice of the issuance of the permit." *Brookside*, 131 Wis. 2d 101 at 118.

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

Facts: For a summary of the facts and other issues that were decided in this case, see "Certiorari Appeals – Procedures for Commencement of Review" in Section 3.

Holding/Analysis: The Court of Appeals held that the appeal time for challenging a zoning administrator's decision begins on one of two dates: if there is a provision in the ordinance for notice, then the clock begins to run at the time the notice is given. If no such provision exists, then the clock begins to run when the aggrieved parties find out about the decision. The court distinguished this case on its facts from those in *State ex. rel. Brookside v. Jefferson County Bd. of*

Adjustment, 131 Wis. 2d 101, 388 N.W.2d 593 (1986). In *State ex rel. DNR*, the time for appealing the zoning administrator's decision was clearly specified in the county zoning ordinance: "30 days after the date of written notice or the decision or order of the zoning administrator." In *State ex rel. Brookside*, the county had failed to promulgate rules for zoning appeals as authorized in s. 59.99(4), Stats. (now numbered s. 59.694, Stats.), and the Supreme Court decided that the residents had constructive notice when they first found out about the board's decision and their appeal time started to run from that date. The Court of Appeals observed that the decision in *State ex rel. Brookside* "was designed to *expand* access to judicial review rather than limit it."

Waiver of an Issue

State v. Outagamie Cty. Bd. of Adjustment, 2001 WI 78, 244 Wis. 2d 613, 628 N.W.2d 376.

Facts: The Warnings built a three bedroom, ranch-style house in the flood fringe of a 100-year flood plain in Outagamie County in 1984, after obtaining a building permit from the town building inspector. The town building inspector did not tell the Warnings that they also needed to obtain a zoning permit from the Outagamie County Zoning Department, and the Warnings did not do so (in spite of the fact that the Warnings had obtained a conditional use permit from the County Zoning Committee in 1980 that allowed them to place fill and a mobile home on their property within the flood fringe district). The basement of the Warnings home was constructed 3.7 feet below the regional flood elevation and 5.7 feet below the flood protection elevation, in violation of the County's floodplain zoning ordinance. In 1995, eleven years after their home was built, the Warnings applied for a building permit to add a sun porch to their home. The Outagamie County Zoning Administrator denied the Warnings' request because their home did not meet flood protection elevation requirements. The Warnings then applied to the Outagamie County Board of Adjustment for an after-the-fact variance for their nonconforming basement floor, so that they would then be eligible for a building permit for the sun porch that they proposed to construct on fill above the flood protection elevation. The BOA granted a variance to the Warnings, and the Wisconsin Dept. of Justice, at the request of the Wisconsin Department of Natural Resources, appealed the variance decision to the circuit court, arguing that the Warnings had not established that their property would have no reasonable use in the absence of a variance, and that the BOA decision violated Wis. Admin. Code § NR 116.13 (2). The Warnings argued that the "no reasonable use" standard should not apply to their variance request and that the State had waived the argument that the BOA's decision was contrary to Wis. Admin. Code § NR 116.13 (2) because the State had not raised this issue before the BOA. The Outagamie County Circuit Court upheld the BOA's decision to grant the variance and ruled that the State had waived the argument that the variance violated Wis. Admin. Code § NR 116.13 (2) because it was not raised at the hearing before the BOA. The Court of Appeals reversed the Circuit Court's decision and decided that (1) under the Huntoon case (*State v. Kenosha County Board of Adjustment*) the variance could not be granted since the Warnings had not established that their property would have "no reasonable use" without the variance; and (2) the variance was contrary to Wis. Admin. Code § NR 116.13 (2), which prohibited the granting of any variance that would allow a basement floor below the regional flood elevation. The Warnings appealed the Court of Appeals' decision to the Supreme Court.

Holding/Analysis: **The Supreme Court held that "Wis. Admin. Code § NR 116.13 (2) conflicts with Wis. Stat. § 87.30 (1g) and is therefore invalid to the extent that it prohibits all variances for residential floors below the regional flood elevation," and reinstated the circuit court's decision affirming the Outagamie County BOA's issuance of a variance to the Warnings.** The Supreme Court's decision in the *Outagamie County* case is confusing because it consists of 4 separate opinions: (1) The lead opinion written by Justice Diane Sykes (Justices William Bablitch and David Prosser joined in the lead opinion in its entirety); (2) a concurring opinion written by Patrick Crooks (Justice Jon Wilcox joined in this concurring opinion); (3) a concurring opinion written by Justice David

Prosser; and (4) a dissenting opinion written by Justice Shirley Abrahamson (Justice Ann Walsh Bradley joined in the dissenting opinion).

Justice Sykes argued in the lead opinion in the *Outagamie Cty. Bd. of Adjustment* case that the failure to raise an issue before an administrative agency generally constitutes a waiver of the right to raise the issue before the reviewing court. However, only three Justices (Justices Sykes, Bablitch and Prosser) joined in this portion of the lead opinion, so it can't be considered to be part of the decision of a majority of the Court in this case.

It is, nonetheless, important to note that the lead opinion stated that: **"It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency.** Judicial review of administrative agency decisions contemplates review of the record developed before the agency. Ordinarily an appellate court will not consider issues beyond those properly raised before the administrative agency, and a failure to raise an issue generally constitutes a waiver of the right to raise the issue before a reviewing court." (footnotes omitted that cite cases involving judicial review under ch. 227, Stats., instead of s. 59.694(10), Stats.) *Outagamie Cty. Bd. of Adjustment*, 2001 WI 78, ¶ 55. **"One exception to this rule permits consideration of an issue otherwise waived if all the facts are of record and the issue is a legal one of great importance.** Whether § NR 116.13 (2) prohibits boards of adjustment from granting variances for residential floors below regional flood elevation is a question of law that has been briefed in this court by both parties and is an issue of great importance to property owners, the DNR, boards of adjustment and the courts. Accordingly, we will look past the waiver in this case and decide the issue." *Outagamie Cty. Bd. of Adjustment*, 2001 WI 78, ¶ 56.

It is also worth noting that Justice Prosser stated in his concurring opinion that: **"Courts normally will not review an issue raised for the first time on appeal.** The failure to make a timely objection constitutes a waiver of the objection." (citations omitted) *Outagamie Cty. Bd. of Adjustment*, 2001 WI 78, ¶ 100. **"The waiver rule is a rule of judicial administration, although not an inflexible one.** *Wirth v. Ehly*, 93 Wis. 2d 433, 287 N.W.2d 140 (1980); *Northern State Power Co. v. Hunter Bd. of Supervisors*, 57 Wis. 2d 118, 132-33, 203 N.W.2d 878 (1973). Consequently, a court should be reluctant to fault a board of adjustment for not considering a legal argument that was never made. To expect clairvoyance from a board about an unstated objection to the board's action disrespects the board, undermines its authority, encourages gamesmanship, and alters the nature of certiorari review. It also deprives an adverse party of the opportunity to address the objection and make a record before the board." *Outagamie Cty. Bd. of Adjustment*, 2001 WI 78, ¶ 101.

3 APPEALS TO CIRCUIT COURT (WRITS OF CERTIORARI)

[NOTE: Persons aggrieved by any decision of a BOA may commence an action in circuit court under s. 59.694(10), Stats., or s. 62.23(7)(e) 10, Stats., within 30 days after the filing of the decision in the board's office, seeking the remedy available by certiorari. The court may affirm or reverse (remanding the case to the BOA or modifying it, in whole or in part).]

Certiorari Appeals - Procedures for Commencement of Review

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

Facts: When the DNR sought review of the county zoning administrator's decision to allow a campground owner to develop her property without a permit, issues of timeliness, standing, and procedure arose.

Holding/Analysis: There are two different procedures for commencing certiorari review: Complaint procedure and writ procedure. Complaint procedure can be pursued by two methods: The complaint and summons method which gives the respondent 60 days to answer, or complaint and court order method, which is used when time for service or time for respondents answer needs to be shortened. If an appellant employs the complaint procedure, commencement of the appeal is measured by the act of filing, whereas when employing the writ procedure, commencement of the appeal is measured by the act of serving the original writ. **The Court of Appeals held that “the DNR’s summons and petition were the same in content and purpose as if they were called a summons and complaint. . . . The naming of the pleading as a ‘petition’ was a technical error that did not cause prejudice.”** *State ex rel. DNR*, 170 Wis. 2d 406 at 418 (emphasis added).

(Note: For a summary of other issues decided in the *Walworth County* case, see “Timeliness of an Appeal” in Section 2 and “DNR Standing” in this section.)

State ex rel. Schwochert v. Marquette County Bd. of Adjustment, 132 Wis. 2d 196, 389 N.W.2d 841 (Ct. App. 1986).

Facts: This case concerns two separate actions, one involving the Schwochert petitioners and the other involving petitioners from Crystal Lake Club, Inc. In the first action, the Schwochert petitioners appeal from an order dismissing their petition for a writ of certiorari to review a zoning decision by the Marquette County BOA. In the second action, the BOA appeals from an order denying its motion to dismiss a companion certiorari petition filed by the Crystal Lake Club petitioners. These two cases deal with the same zoning decision, both seeking review of the issuance of a special exception permit, and were decided on a common dispositive issue: whether the certiorari proceedings were properly and timely commenced. The Schwochert petitioners filed a petition for writ of certiorari with the circuit court but failed to serve it on the board, and the board moved to dismiss. Similarly, the Crystal Lake Club petitioners filed a petition with the court within 28 days but served some members of the board after the 30-day limit.

Holding/Analysis: **The Court of Appeals held that the filing the petition, without more, did not result in the commencement of an action. Commencement of actions is governed by s. 801.02, Stats., but in these two cases all the petitioners did within thirty days of the board's decision was file their petition with the court. No "original writ" was served on any party, nor was any "complaint" filed or served, as required by s. 801.02, Stats.**

Certiorari Review Not Only Means to Challenge Floodplain Zoning Variance

State v. Trudeau, 139 Wis. 2d 91, 408 N.W.2d 337 (1987).

Facts: For a summary of the facts and other issues decided in this case, see “Entire Lakebed Need Not Be Navigable” in Section 15.

Holding/Analysis: **The Supreme Court held that certiorari review under s. 59.99, Stats. (now numbered s. 55.694, Stats.), is not the State's exclusive means of challenging a floodplain zoning variance. The State is also authorized under s. 87.30(2), Stats., to bring actions to enjoin a public nuisance whenever there exists a violation of any local floodplain zoning ordinance.** In remanding the case back to the BOA, the Supreme Court directed the board to determine what portion of the site was above the ordinary highwater mark (that is, was not part of the lakebed of Lake Superior) and to make appropriate findings on the variance criteria for that portion of the site that was not lakebed, so that a meaningful judicial review would be possible.

DNR Standing

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

Facts: When a county zoning administrator determined that a campground owner didn't need a zoning permit to develop her lakefront property, the DNR appealed the determination to the BOA and ultimately sought review in circuit court. The owner challenged the DNR's standing to appeal.

Holding/Analysis: **The Court of Appeals held that the DNR has standing to appeal zoning decisions affecting shorelands because of its role as a trustee of the state's navigable waters. "The DNR is a 'person aggrieved' by county decisions affecting shorelands because it is a trustee of the navigable waters of the state. The Wisconsin Supreme Court has recognized that the state has standing to appeal decisions which violate the public trust. Moreover, according to *Just v. Marinette County*, 56 Wis. 2d 7], the DNR has a duty to appeal decisions which do not comply with shoreland zoning requirements."** *State ex rel. DNR*, 170 Wis. 2d 406 at 412 (emphasis added). The Court also observed that the state administrative code, which has the force and effect of law, gives the DNR the responsibility of monitoring the administration and enforcement of shoreland zoning ordinances and the authority to appeal actions of county zoning officials or county boards of adjustment.

(**Note**: For a summary of other issues decided in the *Walworth County* case, see “Timeliness of an Appeal” in Section 2 and “Certiorari Appeals – Procedures for Commencement of Review” in this section.)

Defendants in Certiorari Actions

See *County of Rusk v. Rusk County BOA*, 221 Wis. 2d 526, 585 N.W.2d 706 (Ct. App. 1998). under “Indispensable Parties” in this section.

Enforcement of Appealed Decisions

Winkelman v. Town of Delafield and Town of Delafield Board of Appeals, 2000 WI App 254, 239 Wis.2d 542, 620 N.W.2d 438 (“*Winkelman I*”).

Facts: The Winkelmans owned a lot with two houses on it in the Town of Delafield, both of which were legal nonconforming structures. The Town Zoning Code prohibited repairs to a nonconforming structure that exceeded fifty percent of the fair market value of the structure. The Winkelmans made repairs to their houses in excess of 50% of their value. They asked the Town Board of Appeals to grant them a variance, which was granted on the condition that one of houses would be razed within

three years. The Winkelmanns appealed this condition to the circuit court under section 62.23 (7)(e) 10, Stats. The circuit court affirmed the conditional variance that had been granted by the Board. Three years passed, and the Winkelmanns failed to raze one of the houses. The Town of Delafield Board of Appeals brought a motion entitled "Motion for Further Relief" requesting that the certiorari court order that the Winkelmanns raze the house or that the Town be allowed to do so. The certiorari court granted the Board's motion. The Winkelmanns appealed, arguing that the certiorari court did not have continuing jurisdiction over the landowners to order specific performance of the variance conditions.

Holding/Analysis: **The Court of Appeals held that the trial court did not have continuing jurisdiction over the landowners, and that the Town of Delafield needed to "obtain jurisdiction over the landowners for this different kind of legal action by serving a summons and complaint or by serving an appropriate original writ."** *Winkelman*, 2000 WI App 254, ¶ 1 (emphasis added). **"Statutory certiorari review is not for resolving disputes; rather, it exists only to test the validity of agency decisions.** See *Merkel v. Village of Germantown*, 218 Wis. 2d 572, 580, 581 N.W.2d 552 (Ct. App.) review denied, 220 Wis. 2d 367, 585 N.W.2d 159 (Wis. Aug. 21, 1998)(No. 97-3347)." *Winkelman*, 2000 WI App 254, ¶ 3 (emphasis added).

Dicta: Ordinarily, a court will not address the merits of legal issues that it does not need to decide in order to conclude the case. Here, however, the Court of Appeals chose, in an effort to "save scarce judicial resources," to address an issue raised by the Winkelmanns. The court stated that it will exercise its discretion to reach an issue that it does not need to decide to conclude the case "when we are sure that the issue will come before the circuit court at a later time and we have the means with which to answer the question so as to avoid future litigation on the topic." *Winkelman*, 2000 WI App 254, ¶ 9. The Winkelmanns claimed that the language contained in Section 5 of the general conditions of the variance provided only one remedy for noncompliance: revocation of the variance. The Court of Appeals stated its opinion that "We disagree that Section 5 limits the Board's remedy to revocation. Section 5 alerts the Winkelmanns that one of the Board's options is revocation of the variance if the Winkelmanns fail to comply with its conditions. Section 5 in no way limits other remedies available to the Board or precludes enforcement of the conditional variance. Moreover, the wording of Section 5 says only that the Board 'may revoke.' We agree with the Board that the remedy of revocation is strictly optional. Consequently, if the Board obtains personal jurisdiction over the Winkelmanns, it may seek to enforce the conditions of the variance." *Winkelman*, 2000 WI App 254, ¶ 11.

(Note: The facts underlying *Winkelman I* are the basis for a subsequent Court of Appeals decision. See *Town of Delafield v. Eric and Christine Winkelman*, 2003 WI App 92, 264 Wis. 2d 264, 663 N.W.2d 324 in Section 12, Enforcement – Injunctive Relief.)

Exclusive Remedy . . . See also "Exclusive Remedy in Most Cases" in Section 2.

Mills v. Vilas County Bd. of Adjustments, 2003 WI App 66, ___ Wis. 2d ___, ___ N.W.2d ___.

Facts: In 1976, Mills received approval for a subdivision plat on a 26-acre island in Flambeau Lake, which is located within the Lac du Flambeau reservation. In 1995, he applied for a permit to build a single-family home and garage on one of the lots. The county zoning administrator denied the permit and gave Mills a list of five concerns that he had with the proposed development. Mills appealed to the board of adjustment, which affirmed the denial. Mills then filed for an appeal in circuit court. While the certiorari review was pending in circuit court, Mills gave the zoning administrator information to address his concerns. The zoning administrator issued the building permit. The Lac du Flambeau Band of Lake Superior Chippewa Indians intervened as an interested party and appealed. The board of adjustment concluded that the zoning administrator's decision was improper because of the pending certiorari review. Mills then sought an appeal of this decision by the board. In addition, the tribe sought injunctive relief to prevent the zoning administrator from issuing further permits until

the court could resolve both certiorari reviews. The circuit court consolidated the three cases and affirmed the board's decision to uphold the zoning administrator's original denial of the building permit, and the board's determination that the zoning administrator had improperly issued a new permit while the certiorari review was pending. Mills appealed.

Holding/Analysis: The Court of Appeals held that the trial court had correctly determined that the certiorari appeal prevented the zoning administrator from issuing another permit.

In the opinion, the Court of Appeal stated that:

"If a zoning ordinance provides for an appeal to a board of adjustment from an adverse ruling of an administrative officer and circuit court review of the board's decision is also provided by statute, such remedies are exclusive of all others. *Nodell Invest. Corp. v. Glendale*, 78 Wis. 2d 416, 423, 254 N.W.2d 310 (1977) (citing *Jefferson County v. Timmel*, 261 Wis. 39, 63-64, 51 N.W.2d 518 (1952)).

As the circuit court noted, parties often erroneously resort to court before exhausting their administrative remedies. When the party is properly before the court, however, the court has exclusive jurisdiction over the dispute, and the administrative agencies cannot reevaluate their decision until the court relinquishes that jurisdiction. To allow otherwise would be to encourage conflicting and competing decisions of courts and various administrative agencies." *Mills*, 2003 WI App 66, ¶ 15 (emphasis added).

Exhaustion of Remedies

County of Sauk v. Trager, 118 Wis. 2d 204, 223, 346 N.W.2d 756 (1984).

Facts: Warren Trager and his father began constructing the foundation for a garage in 1960 on their property in the Town of Baraboo. The edge of the foundation that was closest to Pit Road was 33 feet south of the centerline. Work on the garage ceased until 1974 when electricity was installed and 1978 when construction of a wooden frame superstructure started. In 1970, the Town of Baraboo had become subject to the Sauk County Zoning Ordinance that required that a building permit be obtained for constructing buildings and that the buildings be located at least 63 feet from the centerline of certain roads, including Pit Road. The Sauk County Office of Planning and Zoning notified Trager that his garage violated the 63-foot setback line and required him to move the garage or seek approval from the Board of Adjustment. Trager applied for a variance, but did not appeal an adverse decision by the Sauk County Board of Adjustment that concluded that he should not be granted a setback variance since he would suffer little hardship if he were required to move the building or construct the garage elsewhere on his land. Trager continued work on his garage and contested the validity of the BOA's decision in enforcement proceedings brought by the County in Circuit Court. The County argued that Trager was precluded from judicial review of the Board's decision because of his failure to appeal the Board's decision under s. 59.99, Stats. (now numbered s. 59.694, Stats.).

Holding/Analysis: The Supreme Court concluded that Trager should be allowed to assert the invalidity of the Board's decision in the enforcement action and that the Board erred in its interpretation of the ordinance. "This court has, on numerous occasions, recognized the doctrine of exhaustion of administrative remedies. Although the exhaustion doctrine is sometimes expressed in absolute terms and in terms of a court's subject matter jurisdiction, we have not applied the doctrine in this manner. The cases demonstrate that sometimes exhaustion is required and other times not and that the exhaustion doctrine has numerous exceptions. Our court has been willing to assume jurisdiction of a case, notwithstanding a party's failure to exhaust administrative remedies, where the court finds that the reasons supporting the exhaustion rule are lacking." *County of Sauk*, 118 Wis. 2d 204 at 210. "To determine the application of the exhaustion doctrine we must look at the circumstances under which the doctrine arises and the reason for the doctrine, and then balance the advantages and disadvantages of applying the doctrine in the particular case." *County of Sauk*, 118 Wis. 2d 204 at 210. **"We believe the general rule set forth in *Timmel* is correct. The decision of an administrative agency is**

legally binding although subject to review and the aggrieved party should comply with the agency decision or initiate a challenge promptly and in accordance with the applicable statutes. A party who wants judicial review of an agency decision should carry the burden of initiating a petition for review rather than defying the agency and awaiting an enforcement action.” *County of Sauk*, 118 Wis. 2d 204 at 213 (emphasis added). However, the Court found that “There may be exceptional cases in which the court will not bar a defense by the application of the exhaustion doctrine when a good reason exists for making an exception.” *County of Sauk*, 118 Wis. 2d 204 at 214 (emphasis added). The Court found that the only issue presented in the enforcement action (and the only issue that would have been presented on statutory certiorari) was whether the Board proceeded on a correct interpretation of the ordinance. **The Court found that the pleadings and stipulation of the facts in this case indicated that the Board’s decision was suspect on its face, and the application of the exhaustion doctrine in this case would be harsh and outweighs its benefit. Therefore, the Court held that this case was an exception to the exhaustion rule.** The Court also observed: “we do not think that our allowing Trager to defend this action will encourage others to avoid sec. 59.99 review [now numbered s. 59.694, Stats.]. Not many will be foolhardy enough to forego judicial review and run the risk of prosecution, of being barred from asserting defenses in an enforcement action, and of paying a substantial forfeiture. Regardless of the outcome of this case there is sufficient incentive for an aggrieved party to comply with sec. 59.99 review procedures.” *County of Sauk*, 118 Wis. 2d 204 at 217. (Note: For a summary of other issues decided in the *Trager* case, see “Discontinuance/Abandonment” in Section 16.)

(See also *State ex rel. Tingley v. Gurda*, 209 Wis. 63, 243 N.W. 317 (1932) under “Authority of BOA’s to Interpret Ordinances and Review Permit Conditions” in Section 2.)

Indispensable Parties

County of Rusk v. Rusk County BOA, 221 Wis. 2d 526, 585 N.W.2d 706 (Ct. App. 1998).

Facts: The Radikers were granted a variance from setback requirements of the Rusk County Shoreline Zoning Ordinances by the Rusk County Board of Adjustment. Rusk County timely filed for a certiorari review of the Board of Adjustment’s decision. The BOA was the only defendant named in the action. Because the Radikers were not named nor given notice of the action, they filed a motion to intervene more than 30 days after the BOA’s decision approving the variance. The trial court granted Radikers’ motion to intervene, and later dismissed the action because of the County’s failure to join the Radikers as necessary and indispensable parties and its failure to serve notice on the Radikers within the 30-day limit for filing certiorari review.

Holding/Analysis: **The Court of Appeals held that the failure to join all indispensable parties is not jurisdictional and does not warrant dismissal.** The statute requires only that an action to review the BOA’s decision be commenced within 30 days. “The joining of other parties at some subsequent date, amendment of the pleadings and other procedural matters have no affect on the petitioner’s right to obtain review once the petition has been timely filed.” *County of Rusk*, 221 Wis. 2d 526 at 531.

Intervention under s. 803.09 (1), Stats.

Wolff v. Town of Jamestown, 229 Wis. 2d 738 (Ct. App. 1999).

Facts: The Town of Jamestown appealed a decision of the circuit court denying their right to intervene and participate in a suit between Grant County and Clark and Linda Wolff. The Wolffs sought to develop for residential use a rugged piece of land that was not accessible from Wisconsin roads. The Town opposed development on the grounds that it would be difficult to provide services to the

residents. The Grant County Planning and Zoning Committee approved the Wolff's application for a conditional use permit. The Town appealed to the Grant County BOA and the BOA denied the Wolff's application. The Wolffs filed suit in circuit court seeking certiorari review and a writ of mandamus. The Town moved to intervene and participate in litigation. The circuit court denied the Town's motion on the grounds the Town was adequately represented by the County. The sole issue is: Does the Town meet the requirements of s. 803.19 (1), Stats.?

Holding/Analysis: **The Court of Appeals ruled that the Town met the requirements for intervention under s. 803.19 (1), Stats, because the County may not have adequately represented the Town's interests.** The Court found there was no requirement that the Town's interest be "judicially enforceable" in a separate proceeding. The Town does have a "legally protected interest" in that the Town has a significant interest in the outcome of zoning decisions made by the County and the Town retains substantial responsibility of the well-being of its residents and the property within its boundaries.

Presumption of Correctness and Validity

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

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in Section 2, and "Area Variances" in Section 32.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that the "no reasonable use" standard is no longer applicable in area variance cases and reaffirming the *Snyder* definition of unnecessary hardship for area variance cases. *Ziervogel*, ¶ 41. In this decision, the Supreme Court stated: "**A court on certiorari review must accord a presumption of correctness and validity to a board of adjustment's decision. *Snyder*, 74 Wis. 2d at 476. A reviewing court may not substitute its discretion for that of the board, the entity to which the legislature has committed these decisions. *Id.*"** *Ziervogel*, ¶ 13 (emphasis added).

State of Wisconsin v. Waushara County Board of Adjustment and G. Edwin Howe and Suzanne Howe, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in Section 2, and "Area Variances" in Section 32.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that "in evaluating whether to grant an area variance to a zoning ordinance, a board of adjustment should focus on the purpose of the zoning law at issue in determining whether an unnecessary hardship exists for the property owner seeking such variance." *Waushara County*, ¶ 35.

In the majority opinion in this case, the Supreme Court stated: "Boards of adjustment exercise discretion when determining whether a request for a variance should be granted. *State ex rel. Schleck v. Zoning Bd. of Appeals*, 254 Wis. 42, 52, 35 N.W.2d 312 (1948). Nevertheless, 'board(s) of adjustment (are) not authorized to rewrite the law, but rather, to apply it.' *State v. Ozaukee Bd. of Adjustment*, 152 Wis. 2d 552, 564-65, 449 N.W.2d 47 (1989). In general, we are hesitant to overrule administrative decisions. *Snyder*, 74 Wis. 2d at 476. **A board's decision is presumed to be correct and valid. *Id.* The board's findings may not be disturbed if any reasonable view of the evidence sustains such findings. *Id.* Moreover, we may not substitute our discretion for that of the board's, as committed to it by the legislature. *Id.*"** *Waushara County*, ¶ 13. (emphasis added)

“ . . . it was stated in *Outagamie County* that the board’s decision is given a presumption of correctness and validity. *Outagamie County*, 244 Wis. 2d 613, ¶ 76 (Crooks, J., concurring). We have consistently recognized this standard in several cases. See *Snyder*, 74 Wis. 2d at 476 (‘the findings of the board may not be disturbed if any reasonable view of the evidence sustains them.’); *Arndorfer*, 162 Wis. 2d at 253 (‘a court shall accord a presumption of correctness and validity to the Board’s decision.’); *Kenosha County*, 218 Wis. 2d at 415 (‘Reviewing courts accord a decision of a board of adjustment a presumption of correctness and validity.’); and *Outagamie County*, 244 Wis. 2d 613, ¶ 26 (‘a reviewing court is required to defer to the decision of the board unless it is “unreasonable or without rational basis . . . Thus, the findings of the board may not be disturbed if any reasonable view of the evidence sustains them.” ’). Thus, it is clear that reviewing courts will overrule a board’s decision only when it is unreasonable or irrational.” *Waushara County*, ¶ 25.

Standing to Appeal

State ex rel. Brookside v. Jefferson County Bd. of Adjustment, 131 Wis. 2d 101, 388 N.W.2d 593 (1986).

Facts: When Brookside Poultry sought to expand their hen-raising operation, it obtained a conditional use permit from the Planning and Zoning Committee. Residents appealed to the BOA, which modified the permit to reduce the planned expansion. The circuit court reversed the modification. However, the Court of Appeals reinstated the BOA's decision. Brookside raised issues of estoppel, standing, timeliness, and whether the circuit court erred in modifying the BOA's order.

Holding/Analysis: **The Supreme Court upheld the Court of Appeals' decision to reinstate the modified permit.** Brookside's claim of equitable estoppel based on its reliance on the board's original grant of a permit was rejected by the Supreme Court because it would jeopardize the residents' appeal rights. **The residents had appeal rights even though they did not appear at committee hearings. The residents had standing to appeal because s. 59.99(4), Stats. (now numbered s.59.694 (4), Stats.) provides that persons aggrieved, not parties, have a right to appeal.**

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

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in Section 2, and "Area Variances" in Section 32.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that the “no reasonable use” standard is no longer applicable in area variance cases and reaffirming the *Snyder* definition of unnecessary hardship for area variance cases. *Ziervogel*, ¶ 41. In this decision, the Supreme Court stated: “**A person aggrieved by the issuance or denial of a zoning variance may commence an action in circuit court seeking the remedy available by certiorari, as the petitioners did here.** See Wis. Stat. § 59.694 (10).” *Ziervogel*, ¶ 13. (emphasis added)

Standard of Review

Bettendorf v. St. Croix County Board of Adjustment, 224 Wis. 2d 735, 591 N.W.2d 916 (Ct. App. 1999).

Facts: For a summary of the facts and other issues decided in this case, see “Special Exception Permits: Scope of the Issuing Board’s Authority” in Section 21.

Holding: “**The construction and application of an ordinance to a particular set of facts is a question of law we review de novo.** *Eastman v. City of Madison*, 117 Wis. 2d 106, 112, 342 N.W.2d 764, 767 (Ct. App. 1983).” *Bettendorf*, 224 Wis. 2d 735 at 739 (emphasis added).

Clark v. Waupaca County Bd. of Adjustment, 186 Wis. 2d 300, 519 N.W.2d 782 (Ct. App. 1994).

Facts: The BOA denied Clark's request for a variance to build a single-family house on a very small lot with lake frontage.

Holding/Analysis: **The Court of Appeals applied the substantial evidence test to determine whether the evidence is sufficient to support a board's findings.** "Substantial evidence is evidence of such convincing power that reasonable persons could reach the same decision as the board. As the substantial evidence test is highly deferential to the board's findings, we may not substitute our view of the evidence for that of the board when reviewing the sufficiency of the evidence on certiorari. If any reasonable view of the evidence would sustain the board's findings, they are conclusive. Even if we would not have made the same decision, in the absence of statutory authorization we cannot substitute our judgment for that of the zoning authority." (citations omitted) *Clark*, 186 Wis. 2d 300 at 304-305. The Court stated that if it could affirm the board's decision on any one of the board's reasons, the court did not need to look at the board's other reasons. **In this case, the Court of Appeals determined that the evidence supported the board's first reason for denying the variance, that the lot was too small for any kind of reasonable home and the proposed dwelling would not conform to the surrounding dwellings in the neighborhood.**

(**Note:** For a summary of other issues decided in the *Clark* case, see "Substandard Lots" in Section 29.)

Hansman v. Oneida County, 123 Wis. 2d 511, 366 N.W.2d 901 (Ct. App. 1985).

Facts: Hansman obtained a zoning permit to place a modular home on his property. The term "modular home" was not defined in the Oneida County Zoning and Shorelands Protection Ordinance. The structure that was placed on Hansman's property was brought there on its own structural steel undercarriage. Once the structure was on the property, the undercarriage and trailer hitch were removed and the structure was placed on a foundation of cement blocks. Hansman argued that his structure was a "building" as that term was defined in the ordinance, and was not a "mobile home." "Mobile homes" were prohibited in the Town of Minocqua where the Hansman property was located. The ordinance defined "mobile home" to mean "any vehicle, house, car, camp car, bus, truck, automobile, or any portable or mobile vehicle on wheels which either is or was originally designed to be either self-propelled or propelled by any other means and which is used or was designed to be used for residential, living or sleeping purposes." The County Board of Adjustment decided that Hansman's structure was a "mobile home." Hansman appealed to the circuit court, and then to the court of appeals after the circuit court affirmed the Board's decision.

Holding/Analysis: **The Court of Appeals concluded that Hansman's home was a "building" and not a "mobile home," and reversed the trial court's order.**

"The construction of the ordinance under the facts of record is a question of law. Although the board's interpretation may be entitled to some weight, we need not accept its interpretation. Because the board merely concluded that the structure was a mobile home without stating its reasoning or construction of the ordinance, we will interpret the ordinance *ab initio*." (citations omitted) *Hansman*, 123 Wis. 2d 511 at 514.

Klinger v. Oneida County, 149 Wis. 2d 838, 440 N.W.2d 348 (1989).

Facts: When the owner of a trailer wanted to build a new house around the existing nonconforming structure that greatly exceeded 50% of the value of the structure, he was first denied a building permit and then denied a variance. The BOA's decision to deny a variance was overturned by the circuit court. The Court of Appeals reversed when it found that the circuit court had improperly reviewed the matter de novo rather than applying the traditional standard of review.

Issue: “The determinative issue is whether the circuit court applies the common-law certiorari standard of review or makes a de novo decision when a circuit court takes evidence that is substantially the same evidence as the county Board of Adjustment received.” *Klinger*, 149 Wis. 2d 838 at 841.

Holding/Analysis: **The Supreme Court held that the circuit court should have applied the common-law certiorari standard of review since the evidence taken by the circuit court was substantially the same as that taken by the BOA.** “When, as in this case, the circuit court takes evidence that is substantially the same as that taken by the Board, deference to the Board demands that the evidentiary hearing should be treated as a nullity for purposes of determining the standard of review to be applied to the Board’s decision. The legislature could not have intended to allow the circuit court to pre-empt the discretion of the Board by conducting a duplicative evidentiary hearing. Accordingly we conclude that the circuit court should apply the common-law certiorari standard of review when, as in this case, the evidence taken by the circuit court is substantially the same as that taken by the Board.” *Klinger*, 149 Wis. 2d 838 at 845. **The Supreme Court also held that, when the common-law certiorari standard of review is applied to this case, the board's decision not to grant the variance must be affirmed.**

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

Facts: A property owner obtained verbal approval from a building inspector and proceeded to build a porch onto his nonconforming residence prior to obtaining a permit. After construction, the permit was denied because the porch encroached on the side-yard offset and violated a floor-to-lot ratio ordinance. The owner sought a variance, claiming that strict enforcement of the ordinance would result in practical difficulty or unnecessary hardship. The Board of Adjustment denied his variance request.

Holding/Analysis: In reviewing decisions that are before the court on certiorari under s. 59.99 (10), Stats. (now numbered s. 59.694 (10), Stats.), judicial review is limited to: “(1) whether the board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.” *Snyder*, 74 Wis. 2d 468 at 475. In reviewing the decisions of a Board of Adjustment, the Supreme Court is hesitant to interfere with administrative determinations, and accords the decision of the BOA a presumption of correctness and validity. “The decision of the board will be arbitrary or capricious if it is unreasonable or without rational basis . . . **the findings of the board may not be disturbed if any reasonable view of the evidence sustains them. . . . The court may not substitute its discretion for that committed to the board by the legislature.**” *Snyder*, 74 Wis. 2d 468 at 476. (emphasis added)

(**Note:** For a summary of other issues decided in the *Snyder* case, see “Erroneous or Unauthorized Acts” in Section 14, and “Financial Hardship or Loss of Profit” and “Unnecessary Hardship” in Section 26.)

State ex rel. Brookside v. Jefferson County Bd. of Adjustment, 131 Wis. 2d 101, 388 N.W.2d 593 (1986).

Facts: For a summary of the facts and other issues decided in this case, see “Standing to Appeal” in Section 3.

Holding/Analysis: “In common law certiorari the circuit court does not take evidence on the merits of the case and the scope of review is limited to the record presented to the tribunal whose decision is being reviewed.” *Brookside*, 131 Wis. 2d 101 at 119. The standard of review in such cases requires the circuit court to defer to the decision of the board unless the decision is unreasonable and without a rational basis. “The test is whether reasonable minds could arrive at the same conclusion reached by

the administrative tribunal.” *Brookside*, 131 Wis. 2d 101 at 120. **The Court concluded that “when a circuit court is empowered under the statute providing for certiorari to take evidence on the merits of an administrative decision but takes no such evidence, the circuit court reviews the administrative record under traditional standards of common-law certiorari.”** *Brookside*, 131 Wis. 2d 101 at 122. (emphasis added)

State ex rel. Spinner v. Kenosha County Bd. of Adjustment, 223 Wis. 2d 99, 588 N.W.2d 662 (Ct. App. 1998).

Facts: Mr. George Wronowski owned a 1.3 acre lot with lake frontage on Lake George in the Town of Bristol, Kenosha County. A creek also runs through the lot. When the shoreland setback from both the lake and the creek were measured, it was calculated that there were only 1879 square feet of buildable space on the lot. In order to build a two-story residence with 2585 sq. ft. of living space, Mr. Wronowski sought a variance from the shoreland setback for both the lake and the creek. The Kenosha County Board of Adjustment granted the requested variance because of the “unique topography of Wronowski’s property.”

Holding/Analysis: “When conducting statutory certiorari judicial review, our standard of review of the circuit court’s ruling is de novo. . . . Our review of a certiorari action is limited to determining: (1) whether the board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the board might reasonably make the order or determination in question.” (citations omitted) *Spinner*, 223 Wis. 2d 99 at 103.

“We accord a presumption of correctness and validity to the decision of the board when reviewing a decision by statutory certiorari. . . . Thus, the board’s findings will not be disturbed if any reasonable view of the evidence sustains them.” *Spinner*, 223 Wis. 2d 99 at 104 (citations omitted and emphasis added).

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

Facts: For a summary of the facts and other issues decided in this case, see “Discretionary Authority of BOAs” in Section 2, and “Area Variances” in Section 32.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that the “no reasonable use” standard is no longer applicable in area variance cases and reaffirming the *Snyder* definition of unnecessary hardship for area variance cases. *Ziervogel*, ¶ 41. In this decision, the Supreme Court stated: **“When no additional evidence is taken, statutory certiorari review is limited to: (1) whether the board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the board might reasonably make the order or determination in question based on the evidence. *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 253, 469 N.W.2d 831 (1991).”** *Ziervogel*, ¶ 14 (emphasis added).

State v. Kenosha County Board of Adjustment, 218 Wis. 2d 396, 577 N.W.2d 813 (1998).

Facts: Janet Huntoon owned a house on a parcel of land abutting Hooker Lake that was built by her grandfather in 1936 (before shoreland zoning was in effect in Kenosha County). The house, used for residential purposes since it was built, sat 78 feet from the ordinary high water mark. The Kenosha County shoreland zoning ordinance required that all structures (other than piers, boathouses, and boat hoists) be set back at least 75 feet from the OHWM. Ms. Huntoon applied for a variance to allow her to build a 14-foot by 23-foot deck between the house and the lake that would be set back only 64 feet from the OHWM. The variance was granted because the Board determined that Ms. Huntoon would

suffer unnecessary hardship if she were denied a variance to build the deck. At the Department of Natural Resources' request, the State initiated a certiorari proceeding in circuit court for review of the Board's action. The circuit court upheld the Board's decision, and the Court of Appeals affirmed.

Holding/Analysis: The Supreme Court held that **the Board did not properly apply the legal standard of unnecessary hardship and that the Board's decision to grant the variance was not reasonably based on the evidence.** The Supreme Court, therefore, reversed the decision of the Court of Appeals and remanded the case for further proceedings consistent with their opinion.

In the opinion, the Supreme Court stated:

"On statutory certiorari review, when the circuit court does not take additional evidence, we limit our review to 1) whether the Board kept within its jurisdiction; 2) whether it proceeded on a correct theory of law; 3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and 4) whether the Board might reasonably make the order or determination in question, based on the evidence." (citation omitted) *Kenosha County Board of Adjustment*, 218 Wis. 2d 396 at 410-411, ¶ 25.

"Reviewing courts accord a decision of a board of adjustment a presumption of correctness and validity. A reviewing court may not substitute its discretion for that committed to the Board by the legislature. However, when a Board of Adjustment acts on an application for a variance, it acts in a quasi-judicial capacity. The Board's action must be based upon evidence. **On certiorari review, a reviewing court applies the substantial evidence test to ascertain whether the evidence before the Board was sufficient. If any reasonable view of the evidence would sustain the findings of the Board, the findings are conclusive.**" *Kenosha County Board of Adjustment*, 218 Wis. 2d 396 at 416, ¶ 35 (citations omitted and emphasis added). "However, **a board may not find the existence of the elements of hardship, uniqueness, a necessity to preserve the comprehensive plan of zoning, and substantial justice 'merely because no persons appeared to object to the grant [of the variance] or because objectors neither presented evidence showing that the converse of the claims [of the] applicant is true nor refuted the evidence of the applicant.'**" 3 Ziegler, Rathkopf's *The Law of Zoning and Planning*, § 37.06, p. 37-82 (4th ed. 1993)." *Kenosha County Board of Adjustment*, 218 Wis. 2d 396 at 416, ¶ 35 (emphasis added).

State of Wisconsin v. Waushara County Board of Adjustment and G. Edwin Howe and Suzanne Howe, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in Section 2, and "Area Variances" in Section 32.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that "in evaluating whether to grant an area variance to a zoning ordinance, a board of adjustment should focus on the purpose of the zoning law at issue in determining whether an unnecessary hardship exists for the property owner seeking such variance." *Waushara County*, ¶ 35.

" . . . **On statutory certiorari review, we limit our review to the following issues: (1) whether the board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the board might reasonably make the order or determination in question based on the evidence.**" *Kenosha County*, 218 Wis. 2d at 410-11; *Arndorfer v. Bd. of Adjustment*, 162 Wis. 2d 246, 254, 469 N.W.2d 831 (1991)." *Waushara County*, ¶ 12.

Timeliness of an Appeal

Bettendorf v. St. Croix County Board of Adjustment, 188 Wis. 2d 311, 525 N.W.2d 89 (Ct. App. 1994).

Facts: When Bettendorf obtained a zoning variance to construct a new driveway, the BOA
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conditioned it upon closing a third existing driveway on the property. Bettendorf requested a rehearing so that strict use restrictions could be placed upon the third driveway instead of closure, but the board upheld its original condition. On appeal, the circuit court dismissed for failure to file within 30-days after the filing of the decision in the office of the board, as provided by s. 59.99(10), Stats. (now numbered s. 55.694, Stats.).

Holding/Analysis: **The Court of Appeals held that because the issue of the modification of the prior decision raised a new issue, the Bettendorf's appeal was timely.** The Court stated: "If § 59.99 (10) [now § 59.694 (10)] were read literally, it would permit appellants to extend the ordinary appeal time beyond the thirty-day period, even indefinitely, through the device of a motion to reconsider. A literal reading of a statute may be rejected if it leads to an absurd or unreasonable result. . . . We adopt the rationale of the oft-cited case, *Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 197 N.W.2d 752 (1972), in our construction of § 59.99 (10), STATS. *Ver Hagen* holds that where the only issues raised by a motion to reconsider were disposed of by the original order or judgment, the decision denying reconsideration does not extend the time to appeal those issues." (citations omitted) *Bettendorf*, 188 Wis. 2d 311 at 315. The Court held that the decision denying use restrictions in place of closure was a new issue entitled to certiorari review of the merits.

Waiver of an Issue

State v. Outagamie Cty. Bd. of Adjustment, 2001 WI 78, 244 Wis. 2d 613, 628 N.W.2d 376.

Facts: For a summary of the facts in this case, see "Waiver of an Issue" in Section 2.

Holding/Analysis: The Supreme Court held that "Wis. Admin. Code § NR 116.13 (2) conflicts with Wis. Stat. § 87.30 (1g) and is therefore invalid to the extent that it prohibits all variances for residential floors below the regional flood elevation," and reinstated the circuit court's decision affirming the Outagamie County BOA's issuance of a variance to the Warnings. The Supreme Court's decision in the *Outagamie County* case is confusing because it consists of 4 separate opinions: (1) The lead opinion written by Justice Diane Sykes (Justices William Bablitch and David Prosser joined in the lead opinion in its entirety); (2) a concurring opinion written by Patrick Crooks (Justice Jon Wilcox joined in this concurring opinion); (3) a concurring opinion written by Justice David Prosser; and (4) a dissenting opinion written by Justice Shirley Abrahamson (Justice Ann Walsh Bradley joined in the dissenting opinion).

Justice Sykes argued in the lead opinion in the *Outagamie Cty. Bd. of Adjustment* case that the failure to raise an issue before an administrative agency generally constitutes a waiver of the right to raise the issue before the reviewing court. However, only three Justices (Justices Sykes, Bablitch and Prosser) joined in this portion of the lead opinion, so it can't be considered to be part of the decision of a majority of the Court in this case.

It is, nonetheless, important to note that Justice Prosser stated in his concurring opinion that: "**Courts normally will not review an issue raised for the first time on appeal.** The failure to make a timely objection constitutes a waiver of the objection." (citations omitted) *Outagamie Cty. Bd. of Adjustment*, 2001 WI 78, ¶ 100. "**The waiver rule is a rule of judicial administration, although not an inflexible one.** *Wirth v. Ehly*, 93 Wis. 2d 433, 287 N.W.2d 140 (1980); *Northern State Power Co. v. Hunter Bd. of Supervisors*, 57 Wis. 2d 118, 132-33, 203 N.W.2d 878 (1973). Consequently, a court should be reluctant to fault a board of adjustment for not considering a legal argument that was never made. To expect clairvoyance from a board about an unstated objection to the board's action disrespects the board, undermines its authority, encourages gamesmanship, and alters the nature of certiorari review. It also deprives an adverse party of the opportunity to address the objection and make a record before the board." *Outagamie Cty. Bd. of Adjustment*, 2001 WI 78, ¶ 101.

Village of Elm Grove v. T.V. John & Son, 173 Wis. 2d 170, 496 N.W.2d 167 (1992).

Facts: A nonconforming shed for storing construction materials located in a floodplain was declared a public nuisance and ordered removed pursuant to the 50% rule since the assessed value of the shed was zero. The Village sued to require removal of the shed and to impose forfeitures. In a motion for reconsideration after the circuit court ruled in favor of the Village, the owner of the shed, T.V. John & Sons, argued that, under the *Covenant Harbor* case, the Court should have applied the 50% rule to the entire nonconforming use, a general contracting business, operated out of a masonry building on the same property.

Holding/Analysis: **The Supreme Court held that the *Covenant Harbor* exception** (that, in applying the 50% rule in the *Covenant Harbor* situation, the value of all buildings that compose a nonconforming use rather than just the one destroyed should be looked at when a building housing a nonconforming use is damaged) **is not applicable in all cases where the 50% rule applies and was not raised in a timely fashion in this case.**

"The party alleging error has the burden of establishing, by reference to the record, that the error was raised before the trial court. *Young v. Young*, 124 Wis. 2d 306, 316, 369 N.W.2d 178, 182 (Ct. App. 1985). We are unpersuaded by the record that the issue of the applicability of the *Covenant Harbor* exception was ever tried. Nor does it appear to have been raised in the trial court until the motion for reconsideration." *Village of Elm Grove*, 173 Wis. 2d 170 at 180 (emphasis added).

"Because the *Covenant Harbor* issue was not raised until the motion for reconsideration and because the motion for reconsideration was untimely, the *Covenant Harbor* issue is not properly before this court. We do not, therefore, address its merits." *Village of Elm Grove*, 173 Wis. 2d 170 at 181.

4 APPEALS OF DNR ADMINISTRATIVE DECISIONS (CHAPTER 227 REVIEWS)

Floodplain Zoning Ordinance Adoption

Citizens for Sensible Zoning, Inc. v. DNR, 90 Wis. 2d 804, 280 N.W.2d 702 (1979).

Facts: After conducting public hearings, the DNR found that Columbia County had not enacted a reasonable and effective floodplain zoning ordinance. The DNR then delineated a floodplain and adopted a zoning ordinance for the county. No one sought judicial review of the delineation or the ordinance, but a citizens group filed a complaint 10 months later, seeking an injunction against enforcement.

Holding/Analysis: **The Supreme Court held that the DNR floodplain zoning ordinance is not an administrative decision subject to review within the 30-day limit provided by s. 227.16(1), Stats. (now numbered s. 227.53, Stats.) Instead, the DNR's adoption of a floodplain zoning ordinance is a rule subject to judicial review pursuant to s. 227.05, Stats. (now numbered s. 227.40, Stats.), which provides that the exclusive means of judicial review of the validity of a rule is an action for a declaratory judgment in the county circuit court.**

City of La Crosse v. DNR, 120 Wis. 2d 168, 353 N.W.2d 68 (Ct. App. 1984).

Facts: The DNR performed a study of the La Crosse River floodplain and advised the city that its floodplain zoning ordinance needed to be upgraded, further recommending what flood profile and floodway lines should be adopted. Municipalities must upgrade their floodplain zoning ordinances as new information, including new flood data, new hydrologic data, and improved technological information and methods, becomes available. Rather than amend its floodplain zoning ordinance in accordance with DNR's recommendation, La Crosse hired a private engineering firm to perform a second study, which showed a floodway much narrower than the DNR's study. The DNR disapproved the city's floodplain zoning ordinance because it was not reasonable and effective and was based on an inadequate engineering study.

Issue: Was the DNR's disapproval of La Crosse's ordinance lawful under ch. 227, Stats.?

Holding/Analysis: **The Court of Appeal held that the trial court erred when it placed the burden on the Department to prove the city's ordinance was not reasonable and effective, because the statute provided that the City had the burden to show that the ordinance met statutory and regulatory criteria after the Department had disapproved it.** Land use on floodplains is regulated jointly by local governments and DNR, with the municipalities having the first opportunity to regulate local land use and DNR acting both in advisory and supervisory roles. DNR is required to review and approve or disapprove all local floodplain zoning ordinances, and all municipalities' amendments to floodplain zoning ordinances, floodplain zoning maps, official floodway lines, and water surface profiles. If a municipality fails to adopt a "reasonable and effective" floodplain zoning ordinance, DNR must hold a public hearing, determine the boundaries of the floodplain, and adopt a floodplain zoning ordinance which will supersede the municipality's ordinance. DNR's floodplain determination and zoning ordinance are reviewable under ch. 227, Stats., as provided in s. 87.30(1)(b), Stats.

(Note: This case led to a takings claim in *Reel Enterprises v. City of La Crosse*. See "Public Benefit vs. Public Harm; Was Owner Deprived of All, or Practically All, Use?" in Section 23.)

Standing to Request Review of DNR Wetland Designation

Mendonca v. DNR, 126 Wis. 2d 207, 376 N.W.2d 73 (Ct. App. 1985).

Facts: When the DNR adopted the final wetland inventory maps for Door County, the county was
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mandated to place all lands designated as wetlands into a shoreland-wetland zoning district with a comprehensive list of restrictions. The petitioners' property was included in the shoreland-wetland zoning district, but the trial court denied a request for review of the designation, incorrectly holding that they lacked standing.

Holding/Analysis: **The Court of Appeals held that the test for standing has two parts: “whether the decision of the agency directly causes injury to the interest of the petitioner,” and “whether the interest asserted is recognized by law.”** *Mendonca*, 126 Wis. 2d 207 at 209 (emphasis added). In this case, the Court found that the “mandate to rezone, coupled with severe use restrictions, causes the petitioners direct and tangible harm.” *Mendonca*, 126 Wis. 2d 207 at 210. “Contrary to the DNR’s claim, the classification of the land as wetland is the triggering event causing this direct harm.” *Mendonca*, 126 Wis. 2d 207 at 210. “Petitioners’ interest in their land is a legally protected interest, and they therefore satisfy the second standing requirement. Petitioners, like all landowners, have a right to be free of unreasonable and illegal restraints on the use and enjoyment of their property.” *Mendonca*, 126 Wis. 2d 207 at 211.

5 BIAS OF BOARD MEMBERS

Right to a Fair Hearing Denied

Marris v. City of Cedarburg, 176 Wis. 2d 14, 498 N.W.2d 842 (1993).

Facts: For a summary of the facts and other issues decided in the case, see "Categorizing 'Structural Repairs or Alterations' under the 50% Rule" in Section 14.

Issue: Did the board chairperson prejudge the matter and create an impermissibly high risk of bias so that his refusal to recuse himself deprived Marris of a fair hearing?

Holding/Analysis: **The Supreme Court held that Marris was denied her right to a fair hearing.**

In determining whether a board acted according to law, the court looks to whether there was a fair and impartial hearing, which includes the common law concepts of due process and fair play. **Due process and fair play can be violated when there is bias or unfairness in fact or when the risk of bias is impermissibly high.** If, upon judicial review, the facts demonstrate that a board member prejudged the matter based on statements made at the hearing which overcame the presumption of honesty and integrity ordinarily applied to the case, the decision should be invalidated. The board must engage in fact-finding and make a decision based on the application of those facts to the ordinance.

6 BULKHEAD LINES

Filling of Shoreland-Wetlands

State v. Land Concepts, Ltd., 177 Wis. 2d 24, 501 N.W.2d 817 (Ct. App. 1993).

Facts: When a Door County landowner deposited fill without a permit in violation of a county shoreland-wetland zoning ordinance, the circuit court granted the county's request for a judgment enjoining further filling, imposing daily forfeitures and requiring return of the shoreline to its former condition. The owner intended to fill over an acre of mostly wetlands lying between the ordinary high water mark and a legally established bulkhead line. The property owner argued that a zoning permit was not necessary for two reasons: first, the state bulkhead statute (s. 30.11 (4), Stats.) that allows riparians to place fill up to a legally established bulkhead line preempted the county's attempt to restrict filling; and second, the county ordinance provision that exempted from permit requirements "the establishment of bulkhead lines" should be interpreted to exempt filling below the ordinary high water mark.

Holding/Analysis: **The Court of Appeals held that a state statute which authorized riparian proprietors to place fill up to an established bulkhead line along navigable waters did not preempt the county's ordinance which restricted wetland filling.** Land Concepts, Ltd. cited no authority to support its preemption argument. The Court found that the historical context of the law's development showed that s. 30.11 (4), Stats., was not intended to render rights fixed and immutable. Enactment of the Navigable Waters Protection Law (now numbered s. 281.31, Stats.) demonstrated the intent of the legislature to limit private riparian rights, and the exercise of authority to limit those rights is consistent with the spirit and general policy of the public trust doctrine. The Court of Appeals examined the statutory and the ordinance language in light of the public trust doctrine. Viewed from this perspective, the court concluded that a county permit was necessary.

CONDITIONAL USE PERMITS SEE SPECIAL EXCEPTION/CONDITIONAL USE PERMITS

7 CONTRACT ZONING

State ex rel. Zupancic v. Schimenz, 46 Wis. 2d 22, 174 N.W.2d 533 (1970).

Facts: In 1961, developers requested that a platted parcel of land be rezoned from “neighborhood shopping” to “local business” in order to construct a bowling alley on the site. Objections arose and an agreement was reached with the owners of nearby homes after which a declaration of restrictions was drafted and recorded on August 2, 1961, limiting the use of the property to a bowling alley with a restaurant and lounge (and containing several other specific requirements, such as the placement of a fence to prevent pedestrian access from Honey Creek Drive on the south). A rezoning ordinance, that changed the zoning from “neighborhood shopping” to “local business,” became effective on August 9, 1961. A few weeks later, on August 27, 1961, the common council passed a resolution dividing the platted parcel, creating the lot for the bowling alley and a surplus lot (Parcel G), both of which were restricted by the declarations of restrictions. The resolution provided that compliance with the restrictions was a condition of the land division. Unaware of the restrictions, Zupancic attempted to buy Parcel G on the condition of obtaining a building permit for the construction of a car wash. A building permit was issued then later revoked and subsequently Parcel G was rezoned from “local business” to “neighborhood shopping.” Zupancic petitioned for a writ of mandamus in circuit court to reverse the rezoning of Parcel G. The city filed a counterclaim to enforce the restrictions and asked for an injunction enjoining Zupancic from constructing any building in violation of the terms of the declaration of restrictions. The trial court dismissed the counterclaim and granted a building permit. The city appealed.

Holding/Analysis: **The Supreme Court held that the declaration of restrictions limiting the use of the land was not part of a contract to rezone the property, created valid restrictions and did not invalidate the rezoning of the property.** The Supreme Court reversed the judgment of the trial court, with directions to grant an injunction enjoining Zupancic from constructing any building in violation of the terms of the declaration of restrictions. “A contract made by a zoning authority to zone or rezone or not to zone is illegal and the ordinance is void because a municipality may not surrender its governmental powers and functions or thus inhibit the exercise of its police or legislative powers.” (citations omitted) *Zupancic*, 46 Wis. 2d 22 at 28. “[W]hen the agreement by others than the city [in this case, the homeowners and the developers] to conform the property in a way or manner which makes it acceptable for the requested rezoning and the city is not committed to rezone, it is not contract zoning in the true sense and does not vitiate the zoning if it is otherwise valid.” *Zupancic*, 46 Wis. 2d 22 at 30. “This latter situation is sometimes confused with conditional zoning. But conditional zoning properly understood involves only an adopted zoning ordinance which provides either: (1) The rezoning becomes effective immediately with an automatic repealer if specified conditions are not met within a set time limit, or (2) the zoning becomes effective only upon the conditions being met within the time limit.” *Zupancic*, 46 Wis. 2d 22 at 30. “[L]andowners may make a contract which may legitimately be recognized by the zoning authorities as a motivation for rezoning but such zoning must meet the test of all valid zoning, i.e., must be for the safety, welfare, health of the community, sec. 67.23 (7), Stats. and should not constitute spot zoning. Spot zoning per se is not illegal and we do not consider the rezoning in this case to be illegal spot zoning because it was in the public interest and not solely for the benefit of the developer. See *Boershtinger v. Elkay Enterprises, Inc.* (1966), 32 Wis. 2d 168, 145 N. W. 2d 108; *Cushman v. Racine* (1968), 39 Wis. 2d 303, 159 N. W. 2d 67.” *Zupancic*, 46 Wis. 2d 22 at 32.

8 CONSERVANCY DISTRICT ORDINANCES

Ordinance Interpretation

County of Adams v. Romeo, 191 Wis. 2d 379, 528 N.W.2d 418 (1995).

Facts: The Romeos owned land in a conservancy district, where they raised fish to stock in various ponds on their property. The county imposed a forfeiture on the Romeos for violating the county shoreland protection ordinance and enjoined them from charging the public a fee to fish from the ponds, and from selling fish from a non-residential building on the property.

Holding/Analysis: **The Supreme Court held that the owners could not be fined and enjoined from charging the public to fish from manmade ponds located on property within a conservancy district because the county shoreland protection ordinance lists fishing as a permitted use, and no risk of harm was shown.** The ordinance did not distinguish between commercial and noncommercial fishing, although Justice Bablitch dissented on this point. However, the Romeos were prohibited from using a non-residential building to clean and sell fish and jams because those uses were not listed in the ordinance. "A fundamental rule of statutory interpretation is that, if possible, **statutes are to be construed in a manner such that no word is rendered surplusage and every word is given effect.** *Donaldson v. State*, 93 Wis. 2d 306, 286 N.W.2d 817 (1980). The **rules governing the interpretation of ordinances and statutes are the same.** *State v. Ozaukee Board of Adjustment*, 152 Wis. 2d 552, 559, 449 N.W. 2d 47 (Ct. App. 1989). Thus, if possible, this court must give effect to each word used in the ordinance . . ." *County of Adams*, 191 Wis. 2d 379 at 387 (emphasis added).

9 COUNTY ZONING JURISDICTION AND HOME RULE

Schmeling v. Phelps, 212 Wis. 2d 898, 569 N.W.2d 784 (Ct. App. 1997).

Facts: Robert McGinnity owned an 8.4 acre parcel that was zoned in a RH (Rural Homes) – 3 district in Dane County which requires a minimum lot area for a residence of 8 acres. The Dane County Board of Supervisors approved of Mr. McGinnity’s rezoning petition that would have divided his property into two lots: one zoned RH-1 (which requires a 2 acre minimum lot size) and the other zoned RH-2 (where the minimum lot size is four acres). However, Dane County Executive Phelps vetoed the rezoning on the basis it violated the Town of Albion’s and the County’s Farmland Preservation Plan with respect to density and development standards. Mr. McGinnity argued the County Executive did not possess the authority to veto the petition and sought a declaratory judgment. After briefs and oral arguments from parties, the trial court ruled that the County Executive did not have the power to perform a legislative act. The trial court declared the veto invalid, and reinstated the county board’s approval of the rezoning petition.

Holding/Analysis: **The Court of Appeals reversed the trial court and held that the facts in the case did not establish that Dane County Executive Phelps had abused his discretion, exceeded his power or committed an error of law in vetoing the rezoning petition.** Mr. McGinnity claimed that the enabling statute, s. 59.69 (5)(e) 6, Stats. (that provides that amendments to a zoning ordinance which have the prior approval of affected town boards are effective on passage) should prevail over Article IV, section 23a of the Wisconsin Constitution which created a constitutional executive veto authority. McGinnity argues that s.59.69, Stats., predated the constitutional amendment that created the executive veto authority. The Court concluded that s.59.69 (5)(e), Stats., must yield to the constitutional grant of executive veto authority, citing *State ex rel. La Follette v. Board of Supervisors of Milwaukee County*, 109 Wis. 2d at 629, 327 N.W.2d at 164. Phelps argued that his veto of the rezoning petition was a discretionary act for which he is immune from suit under s. 893.80 (4), Stats. “Phelps’s argument that his reasons for vetoing the proposed rezoning are beyond the reach of court review might well be persuasive if the object of his veto were ‘general’ legislation and not a zoning action. Zoning actions, however, because they affect the property rights of specific individuals, have traditionally been treated differently than general municipal legislation under both statute and case law. . . . the supreme court has held that the failure of a county board to grant a rezoning request is similarly subject to court review. *See Buhler v. Racine County*, 33 Wis. 2d 137, 146, 146 N.W.2d 403, 407 (1966); *see also Quinn*, 122 Wis. 2d at 585, 364 N.W.2d at 157-58 (town board veto of zoning amendment is subject to judicial review).” *Schmeling*, 212 Wis. 2d 898 at 911-912. The Court stated that to protect parties from abuse of power, a county executive’s veto is not immune from review. The Court also stated that: “Given the express statutory authorizations under s. 806.04 and 59.69 (14), Stats., for citizens affected by local ordinances in general, and county zoning ordinances in particular, to seek a judicial determination of rights, we concluded that s. 893.80 (4), Stats., is not a bar for this action for a declaratory judgment.” *Schmeling*, 212 Wis. 2d 898 at 915. “The trial court’s invalidation of the veto was based on its conclusion that Phelps had acted ‘arbitrarily and capriciously,’ largely because Phelps had not vetoed what the court found were similar rezoning petitions. In essence, the trial court concluded that the veto represented an abuse of discretion.” *Schmeling*, 212 Wis. 2d 898 at 916. The Court concluded that: “McGinnity has not meet his burden to show that Phelps’s veto was an abuse of discretion, in excess of his power, or an error of law. This was a question of law that we determined de novo. “*K” Care, Inc. v. Town of Lac du Flambeau*, 181 Wis. 2d 59, 65, 510 N.W.2d 697, 699 (Ct. App. 1993).” *Schmeling*, 212 Wis. 2d 898 at 917. “Even though a court may question the wisdom of a specific zoning action, it may not substitute its judgment for that of the zoning authority. *Buhler*, 33 Wis. 2d at 146-47, 146 N.W.2d at 407-08. An exercise of legislative discretion by a zoning authority may not be disturbed on judicial review if there is any “reasonable

basis” for the action taken. *Jefferson County v. Timmel*, 261. 39, 62-63, 51 N. Wis. W.2d 518, 529-30 (1952).” *Schmeling*, 212 Wis. 2d 898 at 917. “The burden to show an equal protection violation is on McGinnity, who must demonstrate that he was the object of differential treatment for improper or unlawful reasons.” *Schmeling*, 212 Wis. 2d 898 at 919. The Court concluded: “In order to require a government official or governing body to justify why a certain legislative decision was made in one instance but not in others, more is needed than simply a showing that different decisions were made on different occasions. See *Nick v. State Highway Comm’n*, 21 Wis. 2d 489, 496, 124 N.W.2d 574, 577 (1963) (‘mere inconsistency’ does not rise to level of equal protection violation).” *Schmeling*, 212 Wis. 2d 898 at 920.

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

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in Section 2, and "Area Variances" in Section 32.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that the “no reasonable use” standard is no longer applicable in area variance cases and reaffirming the *Snyder* definition of unnecessary hardship for area variance cases. *Ziervogel*, ¶ 41.

In this decision, the Supreme Court stated: “We note in this case that the Washington County zoning ordinance incorporates *Kenosha County*’s ‘no reasonable use of the property’ definition of statutory unnecessary hardship, which we have now determined is no longer applicable.” *Ziervogel*, ¶ 35.

“The zoning enabling statute authorizes the availability of variances upon a showing of unnecessary hardship, and explicitly commits to boards of adjustment the discretion to make variance decisions. Wis. Stat. § 59.694 (7)(c). The ‘no reasonable use’ definition in the Washington County ordinance, to the extent it is applicable to area variance requests, conflicts with the statutory grant of authority and operates to eliminate what the statute allows.” *Ziervogel*, ¶ 36.

“**Counties have statutory home rule authority pursuant to Wis. Stat. § 59.03, but may not exercise that authority in a way that conflicts with legislative enactments of statewide concern that uniformly affect all counties.** Wis. Stat. § 59.03 (1); *Mommsen v. Schueller*, 228 Wis. 2d 627, 635-36, 599 N.W.2d 21 (Ct. App. 1999). This is consistent with the general rule of limitation on the constitutionally-based home rule authority of other local units of government. See Wis. Const. art. XI, § 3 (1); *De Rosso Landfill Company, Inc. v. City of Oak Creek*, 200 Wis. 2d 642, 657, 547 N.W.2d 770 (1996); *Anchor Savings & Loan Association v. Madison Equal Opportunities Commission*, 120 Wis. 2d 391, 395-97, 355 N.W.2d 234 (1984). While local units of government may adopt ‘ordinances which, while addressed to local issues, concomitantly regulate matters of statewide concern,’ this authority is limited to ordinances that complement rather than conflict with the state legislation. *DeRosso*, 200 Wis. 2d at 651-52.” *Ziervogel*, ¶ 37. (emphasis added)

“Accordingly, **local home rule regulations in areas where the legislature has adopted uniformly applicable statutes on matters of statewide concern are subjected to the following analysis for validity: 1) has the legislature withdrawn the power of municipalities to act; 2) does the local ordinance logically conflict with the state legislation; 3) does the ordinance defeat the purpose of the state legislation; or 4) does the ordinance go against the spirit of the state legislation?** *DeRosso*, 200 Wis. 2d at 651-52 (citing *Anchor*, 120 Wis. 2d at 397); *Mommsen*, 228 Wis. 2d at 636-37. **If ‘any one of these tests [is] met, the municipal ordinance is void.’** *DeRosso*, 200 Wis. 2d at 652.” *Ziervogel*, ¶ 38. (emphasis added)

“For the reasons we have noted, **the Washington County ordinance adopting the ‘no reasonable use of the property’ definition for unnecessary hardship in area variance cases**

logically conflicts with the statutory grant of discretion to local boards of adjustment pursuant to Wis. Stats. § 59.694 (7)(c). It also operates to defeat the purpose of the statute, for the reasons we have discussed, **and contradicts the spirit of the statutory grant of discretion to local boards of adjustment.**” *Ziervogel*, ¶ 39. (emphasis added)

“ . . . The ordinance’s ‘no reasonable use’ requirement for unnecessary hardship in area variance cases, which mirrors Kenosha County’s ‘no reasonable use’ standard for area variances, conflicts with the statute **and is therefore unenforceable as applied to area variances.**” *Ziervogel*, ¶ 40. (emphasis added)

State of Wisconsin v. St. Croix County, 2003 WI App 173, 266 Wis. 2d 498, 668 N.W.2d 743.

Facts: At the State’s direction, St. Croix County adopted a riverway zoning ordinance that regulated the portion of the Lower St. Croix Riverway within the county. In 2000, the county amended its ordinance so that it did not apply to the portion of the Riverway that is under federal administration (the “federal” Riverway zone). The State sued to nullify the County’s amendment. The State argued that s. 30.27, Wis. Stats., required the county to maintain its Riverway zoning in both the “state” and “federal” Riverway zones. The county argued that the federal government preempted regulation of the Lower St. Croix Riverway in the “federal” zone, that the State lacks authority to regulate in the “federal” zone and that s. 30.27, Wis. Stats., was no longer valid. The circuit court granted summary judgment to the State.

Holding/Analysis: The Court of Appeals affirmed the circuit court’s grant of summary judgment to the State. The court held that the federal Wild and Scenic Rivers Act did not preempt state and local regulation in the “federal” Riverway zone. When the local regulation is in an area where local police powers are typically exercised, as in zoning, the court assumes that those powers are not superseded by federal law. Additionally, the Wisconsin Supreme Court has held that federal law preempts state action in only 3 situations: 1) when Congress expressly requires no state or local regulation; 2) when Congress implicitly demonstrates its intent to occupy the field; or 3) where state law conflicts with federal law. The court held there was no preemption here. The court found the reasoning in the case of *Kiernat v. County of Chisago*, 564 F. Supp 1089 (D. Minn 1983) persuasive. In that case, county zoning in the “federal” St. Croix Riverway zone was upheld. In this decision, the Court of Appeals stated: **“Counties are creatures of the State, and as such they have no authority to refuse to follow a statutory directive, absent a showing that the statute is unconstitutional or is infirm in some other respect.”** *St. Croix County*, 2003 WI App 173, ¶ 17. “Because we conclude that the Wild and Scenic Rivers Act did not preempt State and local governmental regulation of the Lower St. Croix River; the State has the authority to exercise its police power in the federal zone; and Wis. Stat. § 30.27 remains in full force and effect, we affirm the judgment of the circuit court.” *St. Croix County*, 2003 WI App 173, ¶ 18.

Town of Salem v. Kenosha County, 57 Wis. 2d 432, 204 N.W.2d 467 (1973).

Facts: When Kenosha County passed a floodlands and shoreland zoning ordinance, the town claimed that the ordinance was arbitrary, capricious, inequitable, confiscatory, and unconstitutional.

Holding/Analysis: **The Supreme Court held that although the town had standing to sue, the cause of action was not properly pleaded because the complaint was so indefinite that it did not identify the kind or character of the ordinance involved.** The Court held that: “A shorelands and floodland ordinance may be passed to effect the purpose of sec. 144.26, Stats.[now numbered s. 281.31, Stats.], and to promote public health, safety, and general welfare by counties by way of an ordinance, but such an ordinance must be enacted separately from ordinances pursuant to sec. 59.97 [now numbered s. 59.69, Stats.] Such an ordinance may zone all lands in unincorporated areas within certain distances from navigable waters and streams. Such an ordinance under sec.

59.971(5) [now numbered s. 59.962, Stats.], supersedes all ordinances enacted under sec. 59.97

[now numbered s. 59.69, Stats.], which relate to shorelands. To promote public health, safety, convenience, and general welfare, counties are given the power under sec. 59.97 to pass zoning ordinances and to provide for a master plan and an official map. Counties under sec. 59.07(51) [now s. 59.70(1), Stats.], have the power to adopt building and sanitary codes but such codes shall not apply within cities, villages, or towns which have adopted ordinances or codes concerning the subject matter." *Town of Salem*, 57 Wis. 2d 432 at 434-435. In this case, the town seemed to be claiming that the ordinance in question was a sanitary code, while the county claimed it was a zoning ordinance adopted under s. 59.971, Stats. (now numbered s. 59.692, Stats.) This question could not be determined by a demurrer because of the inadequacy of the pleading.

10 DECLARATORY JUDGMENT ACTIONS

Weber v. Town of Lincoln, 159 Wis. 2d 144, 463 N.W.2d 869 (Ct. App. 1990).

Facts: In January, 1980, the town board of the Town of Lincoln adopted a zoning ordinance that they subsequently purported to repeal on two occasions. The plaintiffs alleged that the town board didn't follow proper procedure for repealing zoning ordinance and sought a judgment declaring the zoning ordinance still in effect. On the defendant's motion, the circuit court dismissed the action on the basis that plaintiffs lacked standing to maintain action.

Holding: The Court of Appeals concluded that the plaintiffs had standing under the Declaratory Judgments Act. **Any person whose rights are affected by a municipal ordinance may have determined any question of validity arising under the ordinance and obtain a declaration of rights or status as provided in sec. 806.04(2), Stats.**

11 DUE PROCESS

Procedural Due Process

Schalow v. Waupaca County, 139 Wis. 2d 284, 407 N.W.2d 316 (Ct. App. 1987).

Facts: The BOA improperly denied the Schalows' variance application in part because the Schalows' knowingly purchased a substandard lot.

Holding/Analysis: **The Court of Appeals held that denial of a variance because it is a departure from the ordinance is contrary to law.** The purpose of the variance procedure is to obtain relief from ordinance requirements which cannot be complied with. There was no evidence presented to the board that the proposed dwelling was too large, thus the determination of the board was not supported by evidence in the record. There was no testimony and no indication of concern about wetland vegetation, thus citing this reason was also contrary to law. **It is a denial of procedural due process to base a decision upon a hidden reason, thus affording no opportunity for rebuttal.** Prior knowledge of ordinance regulations does not constitute self-imposed hardship because buyers do not lose the right to apply for variances.

(See also “Knowledge of Ordinances Does Not Constitute Self-Imposed Hardship” in Section 26.)

12 ENFORCEMENT

Certiorari Court Does Not Have Continuing Jurisdiction

Winkelman v. Town of Delafield and Town of Delafield Board of Appeals, 2000 WI App 254, 239 Wis.2d 542, 620 N.W.2d 438 (“*Winkelman I*”).

Facts: The Winkelmans owned a lot with two houses on it in the Town of Delafield, both of which were legal nonconforming structures. The Town Zoning Code prohibited repairs to a nonconforming structure that exceeded fifty percent of the fair market value of the structure. The Winkelmans made repairs to their houses in excess of 50% of their value. They asked the Town Board of Appeals to grant them a variance, which was granted on the condition that one of houses would be razed within three years. The Winkelmans appealed this condition to the circuit court under section 62.23 (7)(e)10, Stats. The circuit court affirmed the conditional variance that had been granted by the Board. Three years passed, and the Winkelmans failed to raze one of the houses. The Town of Delafield Board of Appeals brought a motion entitled “Motion for Further Relief” requesting that the certiorari court order that the Winkelmans raze the house or that the Town be allowed to do so. The certiorari court granted the Board’s motion. The Winkelmans appealed, arguing that the certiorari court did not have continuing jurisdiction over the landowners to order specific performance of the variance conditions.

Holding/Analysis: **The Court of Appeals held that the trial court did not have continuing jurisdiction over the landowners, and that the Town of Delafield needed to “obtain jurisdiction over the landowners for this different kind of legal action by serving a summons and complaint or by serving an appropriate original writ.”** *Winkelman*, 2000 WI App 254, ¶ 1 (emphasis added). **“Statutory certiorari review is not for resolving disputes; rather, it exists only to test the validity of agency decisions.** See *Merkel v. Village of Germantown*, 218 Wis. 2d 572, 580, 581 N.W.2d 552 (Ct. App.) *review denied*, 220 Wis. 2d 367, 585 N.W.2d 159 (Wis. Aug. 21, 1998)(No. 97-3347).” *Winkelman*, 2000 WI App 254, ¶ 3 (emphasis added).

Dicta: Ordinarily, a court will not address the merits of legal issues that it does not need to decide in order to conclude the case. Here, however, the Court of Appeals chose, in an effort to “save scarce judicial resources,” to address an issue raised by the Winkelmans. The court stated that it will exercise its discretion to reach an issue that it does not need to decide to conclude the case “when we are sure that the issue will come before the circuit court at a later time and we have the means with which to answer the question so as to avoid future litigation on the topic.” *Winkelman*, 2000 WI App 254, ¶ 9. The Winkelmans claimed that the language contained in Section 5 of the general conditions of the variance provided only one remedy for noncompliance: revocation of the variance. The Court of Appeals stated its opinion that “We disagree that Section 5 limits the Board’s remedy to revocation. Section 5 alerts the Winkelmans that one of the Board’s options is revocation of the variance if the Winkelmans fail to comply with its conditions. Section 5 in no way limits other remedies available to the Board or precludes enforcement of the conditional variance. Moreover, the wording of Section 5 says only that the Board ‘may revoke.’ We agree with the Board that the remedy of revocation is strictly optional. Consequently, if the Board obtains personal jurisdiction over the Winkelmans, it may seek to enforce the conditions of the variance.” *Winkelman*, 2000 WI App 254, ¶ 11.

(**Note:** The facts underlying *Winkelman I* were the basis for a subsequent Court of Appeals decision. See *Town of Delafield v. Eric and Christine Winkelman*, 2003 WI App 92, 264 Wis. 2d 264, 663 N.W.2d 324 in this section, Section 12, Enforcement – Injunctive Relief.)

Enforcement Proceeding, Not Judicial Review

State v. Ozga Enterprises, Inc., 160 Wis. 2d 783, 467 N.W.2d 134 (Ct. App. 1991).
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Facts: When Ozga did additional construction on a dam and began to build an adjacent residence in a floodplain without plan approval, the DNR sought an injunction, and Ozga sued the town to bring the dam into compliance. The parties disagreed as to the determination of the 100 year flood elevation, so the determination was submitted to the jury as a special verdict. At the DNR's request, the trial court set aside the jury's determination of the flood elevation and inserted the DNR's determination. Ozga appealed.

Holding/Analysis: **The Court of Appeals found that the department's determination as to the correct elevations prepared for trial purposes without administrative proceedings, which did not affect a legal right, was not an administrative decision reviewable under s. 227.52 Stats., and is thus not entitled to deference. The circuit court erred in setting aside the verdict (as beyond the jury's authority and within the department's expertise) because the proceedings were enforcement, rather than a judicial review of an administrative agency decision.**

Exhaustion of Remedies

County of Sauk v. Trager, 118 Wis. 2d 204, 346 N.W.2d 756 (1984.)

Facts: For a summary of the facts in this case, see “Exhaustion of Remedies” in Section 3.

Holding/Analysis: **The Supreme Court concluded that Trager should be allowed to assert the invalidity of the Board’s decision in the enforcement action and that the Board erred in its interpretation of the ordinance. “We believe the general rule set forth in *Timmel* is correct. The decision of an administrative agency is legally binding although subject to review and the aggrieved party should comply with the agency decision or initiate a challenge promptly and in accordance with the applicable statutes. A party who wants judicial review of an agency decision should carry the burden of initiating a petition for review rather than defying the agency and awaiting an enforcement action.”** *County of Sauk*, 118 Wis. 2d 204 at 213 (emphasis added). **However, the Court also found that “There may be exceptional cases in which the court will not bar a defense by the application of the exhaustion doctrine when a good reason exists for making an exception.”** *County of Sauk*, 118 Wis. 2d 204 at 214 (emphasis added). The Court found that the only issue presented in the enforcement action (and the only issue that would have been presented on statutory certiorari) was whether the Board proceeded on a correct interpretation of the ordinance. **The Court found that the pleadings and stipulation of the facts in this case indicated that the Board’s decision was suspect on its face, and the application of the exhaustion doctrine in this case would be harsh and outweighs its benefit. Therefore, the Court held that this case was an exception to the exhaustion rule.**

(Note: For other issues decided in this case, see “Discontinuance/Abandonment” in Section 16.)

Injunctive Relief

County of Columbia v. Bylewski, 94 Wis. 2d 153, 288 N.W.2d 129 (1980).

Facts: In October, 1973, the appellant, Joseph Bylewski and his wife, purchased a tract of land which included a mobile home in Blackhawk Park in Columbia county. Previously in 1966, Columbia county had enacted a zoning ordinance declaring the Blackhawk Park area to be a “Recreation District” which limited the types of buildings allowed in the district. In December, 1973, the appellant replaced the existing nonconforming mobile home with another mobile home thus terminating the nonconforming protection afforded to the prior structure. In 1974 he constructed a garage without obtaining the necessary building permit. In December, 1975, Columbia county commenced two actions alleging the appellant violated sec. 11.07 of the County Zoning Code by substituting a new mobile home for the old mobile home and building the garage

without a building permit which violated sec. 11.13-3(a) of the County Zoning Code. A small claims type trial was held in county court that found the appellant guilty of violating both zoning ordinances but did not impose a forfeiture. However, the county court ordered the appellant to remove the mobile home and garage from his property. Bylewski appealed to circuit court requesting an order reversing the judgment of the county court or a new trial. The circuit court affirmed the judgment of the county court.

Holding/Analysis: The Supreme Court held that although the small claims court has the authority to impose forfeitures, they lack the authority for granting injunctive relief under sec. 299.01(2), Stats. The purpose for the small claims court is for expeditious justice and should be as summary as possible. To grant the county court authority to order injunctive relief in a small claims type action without the statutory authority would be contrary to the intent and wisdom of the legislature. When the appellant removed the old mobile home and substituted it with a new one, he made alterations in excess of 50 percent and therefore lost the protection of the nonconforming use doctrine. The ordinance limiting the type of structures located on land in a "recreation district" became applicable to the new mobile home. The Supreme Court held the trial court's finding that Bylewski was in violation of sec. 11.07 of the County Zoning Code was not "against the great weight and clear preponderance of the evidence" and thus its findings will not be set aside on appeal. *City of Madison v. Geier*, 27 Wis. 2d 687, 690, 135 N.W.2d 761 (1965). On appeal Bylewski abandoned his argument and concedes that he violated sec. 11.13-3(a) of the zoning code for failure to obtain a building permit prior to constructing his garage. The Supreme Court affirms the judgment of the trial court and held that the appellant violated sec. 11.13-3(a).

Forest County and State of Wisconsin v. Wesley S. Goode, 219 Wis. 2d 654, 579 N.W.2d 715 (1998).

Facts: In 1993, Wesley Goode decided to tear down an existing structure on one of his lots on Ground Hemlock Lake in Forest County and build a new residence. Goode and the Forest County zoning administrator staked a fifty-foot setback on the property, as required by the county zoning ordinance under setback averaging. The property, however, was remeasured and restaked by Mr. Goode's builder prior to construction so that the setback was only thirty-five feet rather than the required fifty feet. Goode then requested a variance for the property, which was denied. The county initiated an enforcement action under s. 59.69(11), Stats., requesting forfeitures and an injunction requiring Goode to comply with the setback requirements. The circuit court denied the county's request for injunctive relief, but imposed a forfeiture against Goode. The court of appeals reversed the denial of injunctive relief, concluding that it was an improper exercise of the circuit court's discretion to deny the county's request for an injunction requiring compliance with the setback requirement. The issue before the supreme court was whether a circuit court retains equitable power to deny injunctive relief after a zoning ordinance violation has been proven.

Holding/Analysis: The Supreme Court concluded "that Wis. Stat. s. 59.69(11), Stats., the zoning ordinance enforcement statute, does not eliminate the traditional equitable power of the circuit court. Therefore it was within the power of the circuit court to deny the county's request for injunctive relief." *Goode*, 219 Wis. 2d 654 at 683 (emphasis added). The circuit court, however, did not take sufficient evidence and failed to weigh the appropriate equitable considerations before reaching its decision. Therefore, the case was remanded to the circuit court to hear more evidence.

"Once a violation is established, a circuit court should grant the injunction except, in rare cases, when it concludes, after examining the totality of the circumstances, there are compelling equitable reasons why the court should deny the request for an injunction. If the circuit court is inclined to deny an injunction, it should first explore alternatives to a full injunction to determine whether a more "equitably crafted" injunction might be appropriate." *Goode*, 219 Wis.2d 654 at 684 (emphasis added). This decision discusses the applicable equitable considerations the circuit court should weigh in deciding whether to deny a request for an injunction: "the substantial

interest of the citizens of Wisconsin in the vigilant protection of the state's shorelands; the extent of the violation; the good faith of other parties; any available equitable defenses such as laches, estoppel or unclean hands; the degree of hardship compliance will create; and the role, if any, the government played in contributing to the violation. This list is not meant to be exhaustive but only to illustrate the importance of the circuit court's consideration of the substantial public interest in enforcing shoreland zoning ordinances." *Goode*, 219 Wis. 2d 654 at 684.

Lake Bluff Housing Partners v. City of South Milwaukee, 222 Wis. 2d 222, 588 N.W.2d 45 (Ct. App. 1998) ("*Lake Bluff III*").

Facts: (The basic facts material to this appeal were the subject of an earlier appeal in this case, *Lake Bluff II*, summarized in Section 33, Writ of Mandamus.) A developer of rental properties purchased a parcel of land along Lake Michigan shoreline, commissioned surveys and contracted with an architect to prepare plans, intending to construct a multi-family development. The city rezoned the property to allow only single-family housing and denied the application for a permit. Lake Bluff resubmitted its application for a building permit, and also filed a complaint seeking a writ of mandamus to compel issuance of the permit. The trial court granted the writ of mandamus and the Court of Appeals affirmed the circuit court. The Supreme Court reversed the Court of Appeals decision and held that "Lake Bluff obtained no vested rights, because it never submitted an application for a building permit conforming to the zoning or building code requirements in effect at the time of application" and directed that the trial court should quash the writ of mandamus. However, by the time that the Supreme Court issued its decision in 1995, Lake Bluff had finished building its project. Fearing that South Milwaukee would try to have the development razed, Lake Bluff Housing Partners brought this declaratory judgment action seeking an order that South Milwaukee was "equitably estopped from revoking the building permits issued to Lake Bluff" and enjoining South Milwaukee from "issuing raze orders" for the project. The trial court granted Lake Bluff its requested relief.

Holding/Analysis: **The Court of Appeals reversed the trial court's judgment and remanded the matter for the trial court to consider whether the analysis required under the *Goode* decision, in case where § 59.69 (11), Stats., was applicable, applies in this case, and, if so, whether Lake Bluff can marshal a sufficient showing that there are compelling equitable reasons why the trial court should not issue an order of abatement. The Court of Appeals noted that "the law of this state is settled that 'a building permit grants no right to an unlawful use.'" (citing *Lake Bluff*, 197 Wis. 2d at 180, *Jelinski v. Eggers*, 34 Wis. 2d 85, 93, and *Snyder v. Waukesha County Zoning BOA*, 74 Wis. 2d 468, 476-477). *Lake Bluff*, 222 Wis. 2d 222 at 227-228 (emphasis added). "Additionally, South Milwaukee's issuance of the permits did not waive its obligation to enforce its zoning regulations." *Lake Bluff*, 222 Wis. 2d 222 at 227. The Court also commented that "Lake Bluff gambled on a favorable outcome of the prior litigation. It lost. It seeks to retain the benefit of its gamble, nevertheless, and avoid the mandate of § 62.23 (8) because it completed the development while the lawfulness of that development was being litigated and South Milwaukee did not seek a stay of the trial court's order pending appeal. This it may not do." *Lake Bluff*, 222 Wis. 2d 222 at 228. **"That South Milwaukee did not seek a stay of Judge McCormick's order pending appeal does not change things."** *Lake Bluff*, 222 Wis. 2d 222 at 229 (emphasis added). The Court of Appeals stated that "If the trial court concludes that the *Goode* analysis applies to § 62.23 (8), Stats., it should consider the 'totality of the circumstances,' as explained and defined by the supreme court in *Goode*, to determine whether this is one of 'those rare cases' where the requested order of abatement should not be issued." *Lake Bluff*, 222 Wis. 2d 222 at 232.**

Lake Bluff Housing Partners v. City of South Milwaukee, 2001 WI App 150, 246 Wis. 2d 785, 632 N.W.2d 485 ("*Lake Bluff IV*"); review denied, 2002 WI 23, 250 Wis. 2d 556, 643 N.W.2d 93.

Facts: (The basic facts of this case were the subject of earlier appeals in this case, summarized above

and in Section 33, Writ of Mandamus.) After the Court of Appeals concluded (in *Lake Bluff III*) that the City was not estopped from revoking the developer's building permits and ordering the property razed, the Court remanded the case back to the trial court to determine, using the analysis required under the *Goode* case, whether "there are compelling equitable reasons" which would make this one of "those rare cases" where the requested order of abatement should not be issued. The trial court, on remand, concluded that there were no compelling equitable reasons requiring that an order of abatement not be issued and the trial court issued a judgment ordering Lake Bluff "to raze and remove the two apartment buildings." Lake Bluff appealed that judgment, claiming that 1) the City had unclean hands; 2) abatement would cause unnecessary hardship; and 3) equity favored allowing the buildings to remain.

Holding/Analysis: **The Court of Appeals affirmed the judgment of the trial court, concluding that the trial court properly engaged in the equitable analysis under *Goode* and provided an extensive and thorough consideration of all the pertinent factors.** In its decision, the Court of Appeals found to be reasonable the trial court's conclusions: 1) that Lake Bluff, not the City, was the party with unclean hands; 2) that there was no "unnecessary hardship" because a reasonable use for the property in compliance with the zoning law was possible (applying the *Kenosha County Board of Adjustment*, 218 Wis. 2d 396 (1998) test); and 3) that the equitable factors cited by Lake Bluff did not require that the buildings be allowed to remain. The Court of Appeals noted that "municipalities, and the citizens who reside there, have a right to enforce their zoning laws". The Court reviewed both the trial court's consideration of whether another remedy other than abatement might be appropriate and the trial court's conclusion that "the only appropriate remedy was an abatement order" and determined that the trial court's findings are not clearly erroneous and its ruling was reasonable. The Court stated: "Although this case presented an unfortunate financial conundrum for Lake Bluff, ultimately it was Lake Bluff's own business decision, driven by the potential for financial gain, which resulted in proceeding with construction despite the uncertainty of the outcome, causing the ultimate financial loss." **The Court of Appeals concluded that "[u]nder the totality of the circumstances presented, this is not one of those rare cases where equity overcomes the City's legal right and duty to secure compliance with its zoning classification."** *Lake Bluff IV*, 246 Wis. 2d 785 at 801 (emphasis added).

(**Note:** The Wisconsin Supreme Court denied Lake Bluff's petition for review of this decision, 2002 WI 23, 250 Wis. 2d 556, 643 N.W. 2d 93.)

Town of Cedarburg v. Thomas and Dorothy Shewczyk, 2003 WI App 10, 259 Wis. 2d 818, 656 N.W.2d 491.

Facts: The Town issued a conditional use permit (CUP) to the Shewczyks allowing them to use an outbuilding on their property for 1 year while their house was being remodeled. The conditional use permit included several conditions related to the temporary residential use of the secondary structure, including a requirement that all temporary plumbing to the secondary structure be dug up, disconnected and capped upon the expiration of the CUP. Because the Shewczyks didn't comply with this condition, the Town refused to issue an occupancy permit for the residence once the remodeling was completed. The Shewczyks then sought a zoning permit to change the use of the outbuilding to an accessory use for servant, laborer and guest quarters; their application was denied because they failed to comply with the CUP condition; and the Shewczyks appealed the denial to the Board of Appeals (BOA). The BOA affirmed the Town's denial of the permit and the Shewczyk's sought certiorari review. Meanwhile the Town sued the Shewczyks seeking injunctive relief and forfeitures for their failure to remove the plumbing and for using the principal residence without obtaining a certificate of occupancy. Finally, the Shewczyks filed a second application for a zoning permit for an alternative use of the outbuilding as a recreational facility; the Town's denial of the

second permit application was appealed to the Town's BOA. The Town filed a declaratory judgment action in circuit court: 1) to defer the Shewczyks' appeal to the BOA of the 2nd permit application until the circuit court decided the original certiorari action; 2) to affirm the Town's denial of the 2nd permit application; and 3) to require the Shewczyks to comply with the condition of the CUP to remove plumbing. The circuit court consolidated the 3 cases and ruled in the Town's favor: 1) ordering the Shewczyks to disconnect the plumbing within 45 days and to pay \$100 per day if the plumbing is not disconnected by that deadline; 2) deferred the issue of forfeitures for past violations to a subsequent court proceeding; 3) upheld the BOA's affirmation of the Town's denial of the (1st) zoning permit application; and 4) declared that the Town's deferral of the Shewczyks' appeal to the BOA on the denial of the 2nd permit application was not improper. The Shewczyks appealed.

Holding/Analysis: The Court of Appeals affirmed the circuit court's decision on the 3 consolidated cases. **The Court concluded that noncompliance with the terms of the CUP was tantamount to noncompliance with a town ordinance and the circuit court did not err when it granted the Town's request for an injunction and forfeitures for Shewczyks' noncompliance with the CUP issued under the ordinance.** The Court of Appeals also affirmed the BOA's denial of the Shewczyks' 1st zoning permit application agreeing with the BOA's conclusion that mere expiration of the 1-year CUP did not relieve the Shewczyks from the obligation of compliance with the terms of the CUP, since the conditions were consideration for the Town granting the CUP to begin with. Finally, the Court deemed as moot the issue of the Town's deferral of the Shewczyks' appeal to the BOA of the Town's denial of their 2nd permit application, since judicial review of the 1st denial was complete and the BOA could not address the 2nd zoning permit application.

Town of Delafield v. Eric and Christine Winkelman, 2003 WI App 92, 264 Wis. 2d 264, 663 N.W.2d 324 ("Winkelman II").

Facts: (The basic facts of this case were the subject of an earlier appeal in this case, *Winkelman I*, summarized in Section 3, Appeals to Circuit Court - Enforcement of Appealed Decisions and Section 12, Enforcement - Certiorari Court Does Not Have Continuing Jurisdiction.) The Town filed a complaint in circuit court seeking a court order directing the Winkelmans to remove immediately a 2nd nonconforming residence on their property (the removal of which was a condition of a variance granted to the Winkelmans authorizing them to remodel the primary nonconforming residence on the property) and for fines for failing to do the removal. The Town filed a motion for summary judgment. The Winkelmans asked the court to consider a number of equitable factors which they contended should result in a denial of the Town's request for an order to raze the 2nd residence. The trial court granted the Town's summary judgment motion after concluding that it had no authority to weigh the competing equities in the case, since a determination that a violation existed had been previously determined in separate litigation and that determination was the law in the case.

Holding/Analysis: **Citing the Supreme Court's decision in *Forest County v. Goode and Lake Bluff Housing Partners v. City of South Milwaukee (Lake Bluff IV)*, the Court of Appeals reversed the trial court's grant of summary judgment to the Town because the trial court's decision was based on the mistaken belief that if separate litigation had previously determined that there was a violation, that determination was the law of the case and the court was powerless to refuse to enforce a sanction for that violation.** The Court of Appeals interpreted *Goode and Lake Bluff IV* as concluding that a reviewing court retains its power to deny the relief sought (and the right of a property owner to defend himself or herself in equity) in an enforcement action by a municipality seeking to enforce an ordinance violation through an equitable remedy (injunction or abatement), even though previous litigation has already determined that a violation has occurred. The Court of Appeals rejected the Town's efforts to distinguish its actions from those in the *Goode and Lake Bluff IV* decisions finding that the cases applied to enforcement actions seeking equitable remedies. The Court also noted that a certiorari action is limited to the record and is a review of the reasonableness of the

board's action, not the reasonableness of the ordinance itself, which is the subject of the current judicial review action. The Court of Appeals remanded the case to the trial court to allow the Winkelmans to make their equitable arguments and for the court to balance the competing equities (except for the Winkelmans' equitable argument that they would suffer undue hardship because their mortgage payments were based on projected income from the 2nd rental residence---an argument which the trial court disposed of in the original appeal).

(**Note:** The Wisconsin Supreme Court granted review of the Court of Appeals' decision in *Winkelman II*; oral argument was heard before the Supreme Court on 12/04/03.)

Rules Inconsistent with Unambiguous Statute

Oneida County v. Converse, 180 Wis. 2d 120, 508 N.W.2d 416 (1993).

Facts: Oneida County initiated enforcement against the owner of a wet boathouse for violating the county zoning and shoreland protection ordinance by reconstructing a boathouse, considered a nonconforming use, after it was destroyed by a tornado. The owners cited s. NR 325.065, Wis. Adm. Code, which permitted repairs beyond 50% of the value of a nonconforming structure if the damage was caused by violent wind, vandalism, or fire.

Holding/Analysis: **The Supreme Court held that the DNR rule was inconsistent with the express language of s. 30.121(3) Stats.**, which did not allow owners of existing wet boathouses to completely replace those structures. The statute provided that wet boathouses could only be repaired if the cost of repair did not exceed 50% of the assessed fair market value. **The DNR rule was therefore invalid, and the owners were bound by the county ordinance and were required to remove the new boathouse.**

13 EQUAL PROTECTION

Discriminatory Ordinances Are Void

Katt v. Village of Sturtevant, 269 Wis. 638, 70 N.W.2d 188 (1955).

Facts: The plaintiff purchased 2 ½ acres of land in September of 1953 bordering the village limits of the Village of Sturtevant on which were located several buildings and a fenced-in minkyard, and then purchased some mink. In November of 1953, the village board adopted an ordinance prohibiting the establishment and maintenance of additional fur farms or ranchs within the village, but also providing that the ordinance did not affect any such business already established and operating prior to the passage of the ordinance. The plaintiff commenced a declaratory judgment action, asking the court to declare the ordinance to be void. The plaintiff did not claim to be exempt as a pre-existing fur farm business. Instead, he challenged the validity of the ordinance. The trial court granted the plaintiff's summary judgment motion and declared that the challenged ordinance was null and void. The defendants appealed.

Holding/Analysis: The Supreme Court affirmed the trial court's decision and held that the village ordinance, which made it unlawful to "maintain, keep, set up, or operate a fur farm or ranch" within the village, but also provided that the ordinance did not affect any such business already established and operating prior to its passage, was discriminatory and void because such an ordinance is prohibited under the equal protection clauses of the federal and state constitutions. The Supreme Court stated: "Municipal restrictions of the use of real and personal property by owners thereof must be reasonable in classification used, and an ordinance that arbitrarily and unreasonably discriminates is void.

Generally, an ordinance that prohibits the future use of property but which permits the continuance of existing uses of the same kind discriminates in favor of those enjoying the existing use and against those who would make similar uses of their property." *Katt*, 269 Wis. at 640 (emphasis added). **"Ordinances that are discriminatory are held to be void within the prohibition of the equal-protection provisions of the federal and state constitutions."** *Katt*, 269 Wis. at 641 (emphasis added).

See also UNEQUAL PROTECTION and *Schmeling v. Phelps* Under COUNTY ZONING JURISDICTION

14 EQUITY/LACHES

Was There Unreasonable Delay? Did Laches Apply?

Smart v. Dane County Board of Adjustment, 177 Wis. 2d 445, 501 N.W.2d 782 (1993).

Facts: In 1968, Dane County adopted an ordinance that made existing mineral extraction operations nonconforming uses which could be continued if they had been worked prior to adoption of the ordinance and registered with the county Zoning Department. Wingra Stone Company owned an 80-acre parcel in Dane County on which mining operations had started in 1967. Wingra Stone Company submitted a written registration form for its entire 80-acre parcel to the Dane County Zoning Department. The Zoning Department reviewed the form and determined in 1969 that Wingra Stone's 80-acre parcel should be considered to be two 40-acre parcels, only one of which was accepted as having a nonconforming use because of existing mining activity. However, there was nothing in the county records to indicate that Wingra Stone Company was informed of the Zoning Department's 1969 determination. In September of 1989, Wingra Stone Company asked the Dane County Zoning Administrator to review the status of its 80-acre parcel. The Zoning Administrator issued a written determination that the entire 80 acres had nonconforming use status. James Smart, a property owner in a residential development adjacent to Wingra Stone's land, appealed the Zoning Administrator's determination to the county board of adjustment. The Board affirmed the Zoning Administrator's decision, and Mr. Smart appealed the Board's decision to the circuit court. The circuit court reversed the Board's decision, holding that Wingra Stone Company had waived any right to assert a nonconforming use by failing to appeal in 1970 the Zoning Department's refusal to accept its registration for the entire 80-acre parcel. Wingra Stone Company challenged the circuit court decision in the Court of Appeals. The Court of Appeals reversed the circuit court decision, and Mr. Smart appealed the case to the Supreme Court.

Holding/Analysis: **The Supreme Court held that the mining company was not barred by the doctrine of laches from mining the disputed 40 acres as a nonconforming use since there was no evidence on record that the mining company was ever informed of the zoning department's original decision, and the mining company was entitled to request review of the zoning status at any time.** The Supreme Court also held that the Board of Adjustment could reasonably conclude from the evidence that the Zoning Department made a mistake in 1969 when it determined that the entire 80-acre parcel owned by Wingra Stone Company did not have nonconforming use status, because of the diminishing assets rule. "The equitable doctrine of laches has been defined as: '[A] recognition that a party ought not to be heard when he has not asserted his right for unreasonable length of time or that he was lacking in diligence in discovering and asserting his right in such a manner so as to place the other party at a disadvantage.' *Bade v. Badger Mut. Ins. Co.*, 31 Wis. 2d 38, 47, 142 N.W.2d 218 (1966). The elements of laches are '(1) unreasonable delay, (2) lack of knowledge on the part of the party asserting the defense [of laches] that the other party would assert the right on which he bases his suit, and (3) prejudice to the party asserting the defense [of laches] in the event the action is maintained.' *Schafer v. Wegner*, 78 Wis. 2d 127, 132, 254 N.W. 2d 193 (1977)." *Smart*, 177 Wis. 2d at 458. The Supreme Court rejected the argument that Wingra Stone Company was not diligent in challenging the Zoning Department's 1969 determination. There was no evidence in the record that Wingra Stone Company was ever informed in 1969 of the Zoning Department's determination. However, the Court stated "Even if Wingra was informed of the Zoning Department's decision in 1969, it was not unreasonable for Wingra to accept that decision at that time. We can find no law suggesting that a property owner cannot request a review of the zoning status of his property at any time." *Smart*, 177 Wis. 2d at 459. The Court apparently recognized that the *Sturgis* decision (that held that the diminishing assets rule was applicable in a fact situation similar to the *Smart* case) wasn't decided until 1987. The Supreme Court apparently was unwilling to hold that Wingra Stone Company

should have challenged the Zoning Department's 1969 determination in 1969 or 1970 when there was no Wisconsin case on the issue until 1987. Mr. Smart argued that he was prejudiced by the Board of Adjustment's 1989 decision to allow Wingra Stone Company to mine the disputed 40 acres. However, the Supreme Court stated that "The property owners [of adjacent residential property] knew or should have known when they purchased their land and built their homes that Wingra owned the entire adjacent 80 acres and was mining on a portion of it." *Smart*, 177 Wis. 2d at 459. "Zoning laws change from time to time. Zoning classifications are changed as land use plans are developed or redesigned. A person who purchases land in reliance upon current zoning restrictions on adjacent property acquires no right that the restrictions will not change. 1 Robert M. Anderson, *American Law of Zoning* 3d § 4.28 (1986)." *Smart*, 177 Wis. 2d at 459. The Supreme Court went on to observe: "Smart's argument really boils down to the fact that he wishes to benefit from a mistake of the Zoning Department in 1969. The Zoning Department mistakenly believed the 1969 ordinance required it to break property down into quarter-quarters for determination of nonconforming use status. The Board's later correction of an error cannot be prejudicial to Smart." *Smart*, 177 Wis. 2d at 459.

(For further information on the diminishing assets rule, see the summary of the *Smart* decision in Section 20, Nonconforming Structures and Uses – Diminishing Assets Rule.)

Equitable Power of Grant or Deny Injunctive Relief

See *Forest County and State of Wisconsin v. Wesley S. Goode*, 219 Wis. 2d 654, 579 N.W.2d 715 (1998). **Error! Bookmark not defined.** and other cases summarized in Section 12, Enforcement – Injunctive Relief.

ERRORS IN ADMINISTRATING ZONING ORDINANCES SEE ESTOPPEL

15 ESTOPPEL

Erroneous or Unauthorized Acts

City of Milwaukee v. Leavitt, 31 Wis. 2d 72, 142 N.W.2d 169 (1966).

Facts: A building used for nonresidential purposes in a residential area was abandoned for four years, and then reoccupied for a number of nonconforming uses, despite the fact that the nonconforming use status had been lost. When the new owner's nonconforming use permit was revoked, he claimed the city was estopped from revoking the permit.

Holding/Analysis: **The Supreme Court held that, despite the fact that city officials had issued permits for the illegal nonconforming use and the owner had spent a substantial amount of money to prepare the building, in reliance on the illegal permits, erroneous acts of municipal officials do not afford a basis for estoppel.**

Lake Bluff Housing Partners v. City of South Milwaukee, 222 Wis. 2d 222, 588 N.W.2d 45 (Ct. App. 1998) (“*Lake Bluff III*”).

Facts: (The basic facts material to this appeal were the subject of an earlier appeal in this case, “*Lake Bluff II*,” summarized in Section 34, Writ of Mandamus.) A developer of rental properties purchased a parcel of land along Lake Michigan shoreline, commissioned surveys and contracted with an architect to prepare plans, intending to construct a multi-family development. The city rezoned the property to allow only single-family housing and denied the application for a permit. Lake Bluff resubmitted its application for a building permit, and also filed a complaint seeking a writ of mandamus to compel issuance of the permit. The trial court granted the writ of mandamus and the Court of Appeals affirmed the circuit court. The Supreme Court reversed the Court of Appeals decision and held that “Lake Bluff obtained no vested rights, because it never submitted an application for a building permit conforming to the zoning or building code requirements in effect at the time of application” and directed that the trial court should quash the writ of mandamus. However, by the time that the Supreme Court issued its decision in 1995, Lake Bluff had finished building its project. Fearing that South Milwaukee would try to have the development razed, Lake Bluff Housing Partners brought this declaratory judgment action seeking an order that South Milwaukee was “equitably estopped from revoking the building permits issued to Lake Bluff” and enjoining South Milwaukee from “issuing raze orders” for the project. The trial court granted Lake Bluff its requested relief.

Holding/Analysis: **The Court of Appeals reversed the trial court’s judgment and remanded the matter for the trial court to consider whether the analysis required under the *Goode* decision, in case where § 59.69 (11), Stats., was applicable, applies in this case, and, if so, whether Lake Bluff can marshal a sufficient showing that there are compelling equitable reasons why the trial court should not issue an order of abatement. The Court of Appeals noted that “the law of this state is settled that ‘a building permit grants no right to an unlawful use.’”** (citing *Lake Bluff II*, 197 Wis. 2d at 180, *Jelinski v. Eggers*, 34 Wis. 2d 85, 93, and *Snyder v. Waukesha County Zoning BOA*, 74 Wis. 2d 468, 476-477). *Lake Bluff*, 222 Wis. 2d 222 at 227-228 (emphasis added). “Additionally, South Milwaukee’s issuance of the permits did not waive its obligation to enforce its zoning regulations.” *Lake Bluff*, 222 Wis. 2d 222 at 227. The Court also commented that “Lake Bluff gambled on a favorable outcome of the prior litigation. It lost. It seeks to retain the benefit of its gamble, nevertheless, and avoid the mandate of § 62.23 (8) because it completed the development while the lawfulness of that development was being litigated and South Milwaukee did not seek a stay of the trial court’s order pending appeal. This it may not do.” *Lake Bluff*, 222 Wis. 2d 222 at 228. **“That South Milwaukee did not seek a stay of Judge McCormick’s order pending appeal does not change things.”** *Lake Bluff*, 222 Wis. 2d 222 at 229 (emphasis added). The Court of Appeals stated that “If the trial court concludes that the *Goode* analysis applies to § 62.23 (8), Stats., it should

consider the 'totality of the circumstances,' as explained and defined by the supreme court in *Goode*, to determine whether this is one of 'those rare cases' where the requested order of abatement should not be issued." *Lake Bluff*, 222 Wis. 2d 222 at 232.

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

Facts: For a summary of the facts and other issues decided in this case, see "Standard of Review" in Section 3 and "Financial Hardship or Loss of Profit" and "Unnecessary Hardship" in Section 26.

Holding/Analysis: **The Supreme Court held that the board's decision to deny a variance was not unreasonable or without a rational basis.** The owner argued that the hardship was created by reliance on the assurances of the building inspector, but the Supreme Court stated that **"no such estoppel may arise against a municipality for the unauthorized acts of its officers. Even if the inspector issued a building permit, it would have been void for a structure which is forbidden by the ordinance."** *Snyder*, 74 Wis. 2d 468 at 476-477 (citations omitted and emphasis added). **"A building permit cannot confer the right to violate the ordinance."** *Snyder*, 74 Wis. 2d 468 at 477.

State v. Outagamie Cty. Bd. of Adjustment, 2001 WI 78, 244 Wis. 2d 613, 628 N.W.2d 376.

Facts: For the facts of this case and other issues discussed in this case, see "Unnecessary hardship" in Section 26.

Holding/Analysis: **The Supreme Court held that "Wis. Admin. Code § NR 116.13 (2) conflicts with Wis. Stat. § 87.30 (1g) and is therefore invalid to the extent that it prohibits all variances for residential floors below the regional flood elevation," and reinstated the circuit court's decision affirming the Outagamie County BOA's issuance of a variance to the Warnings.**

In Justice Crooks' concurring opinion (that only Justice Wilcox joined), **the position of a minority of the Court on the estoppel issue was explained:**

"Because the Outagamie County Board of Adjustment did not consider the purpose of the underlying ordinance or *Kenosha County's* 'no reasonable use' test, this case might be remanded to the Board to determine whether the Warnings are entitled to a variance in consideration of the purpose of the ordinance at issue and the nature of the restriction involved. However, remand is not necessary because the Board properly considered that a variance was in order, due to the fact that the Warning's hardship had been caused 'by the Town of Bovina and the building inspector.'" (footnote and citation omitted) *Outagamie County*, 2001 WI 78, ¶ 77.

"The Outagamie County Board of Adjustment apparently realized that the circumstances here effectively estopped the Board from denying the Warning's variance request. Apparently, the Warnings needed, in addition to the building permit from the Town of Bovina, a zoning permit from the County. Although the Warnings needed the additional zoning permit, there is no contention that the building permit issued was invalid. The Town has issued a building permit, upon which the Warnings depended in building their house. Consequently, **we do not have before us the situation that existed in *Snyder*, where the variance applicant had proceeded with construction before he obtained a permit--which would have been an 'unauthorized act[]' of a municipal officer and 'void as issued for a structure which is forbidden by the ordinance.'** 74 Wis. 2d at 477. **Nor do we have before us the situation where a subordinate municipal officer acted erroneously, and the municipality later sought to enforce a zoning ordinance.**⁴ See *Willow Creek Ranch v. Town of Shelby*, 2000 WI 56, ¶56, 235 Wis. 2d 409, 611 N.W.2d 693; *Milwaukee v. Leavitt*, 31 Wis. 2d 72, 78, 142 N.W.2d 169 (1966); see also *Jelinski v. Eggers*, 34 Wis. 2d 85, 94, 148 N.W.2d 750 (1967)." *Outagamie County*, 2001 WI 78, ¶ 78 (emphasis added).

Footnote: "The dissent has ignored the important distinction between this case and *Snyder*, 74 Wis. 2d 468, and *Willow Creek Ranch v. Town of Shelby*, 2000 WI 56, ¶ 56, 235 Wis. 2d 409, 611 N.W.2d

693. In *Snyder* and *Willow Creek*, the applicant attempted to assert estoppel to prevent the municipality from enforcing its zoning ordinance. *Snyder*, 74 Wis. 2d at 476; *Willow Creek*, 2000 WI 56 at ¶ 49. 'Although municipalities are not wholly immune from the doctrine of equitable estoppel, it is well established that erroneous acts or representations of municipal officers do not afford a basis to estop a municipality from enforcing zoning ordinances enacted pursuant to the police power.' *Willow Creek*, 2000 WI 56 at ¶ 49 (citing, among others, *Snyder*, 74 Wis. 2d at 476-77) (footnote and other citations omitted). However, here, in contrast, it is the Outagamie Board of Adjustment which has apparently considered that it was estopped from enforcing its zoning ordinances. There is nothing in *Snyder*, *Willow Creek*, or any of our other cases that suggests that a County Board of Adjustment cannot consider estoppel, when determining whether or not to grant a variance from the County's ordinance."

Willow Creek Ranch v. Town of Shelby, 2000 WI 56, 235 Wis. 2d 409, 611 N.W.2d 693

Facts: Willow Creek Ranch owned 115 acres of land in the Town of Shelby, La Crosse County that was zoning in an "Exclusive Agricultural" district under the La Crosse County Zoning Ordinance. In late 1993, Willow Creek Ranch contacted the Town to inquire whether a zoning change was required to operate a game bird farm on its property. The Town chairperson allegedly informed Willow Creek Ranch that no county rezoning was needed. Willow Creek Ranch started operation of a game bird farm in late 1994, shortly after obtaining a license for the game bird farm from the DNR. In 1995, the County notified Willow Creek that because it was conducting a commercial hunting enterprise on property zoning exclusively for agricultural purposes, it needed to petition for rezoning. Willow Creek Ranch petitioned for rezoning. Although the County granted Willow Creek Ranch's petition, the Town vetoed the County's decision. In May of 1996, Willow Creek Ranch filed the first of two lawsuits, seeking a declaratory judgment that the Town and County had acted in excess of their authority and requesting an injunction prohibiting the Town and County from taking further action in interference with the operation of its game bird farm. The circuit court granted the Town's and the County's motions for summary judgment in their favor in both lawsuits. Willow Creek Ranch appealed. The Court of Appeals affirmed the circuit court's decisions.

Holding/Analysis: The Supreme Court affirmed the Court of Appeals decision, and concluded that DNR's statutory authority to regulate the operation of game bird farms does not preclude the authority of the Town of Shelby and La Crosse County to regulate the zoning of the game bird farm, that the Town's and the County's actions in the case are immune from suit under Wis. Stats. § 893.80 (4) (1995-96) and that their actions were legal and constitutional, and that the Town and County were not equitably estopped from asserting immunity as a defense or preventing the operation of Willow Creek Ranch's game bird farm.

In its opinion, the Supreme Court stated: "Although municipalities are not wholly immune from the doctrine of equitable estoppel, ¹³ **it is well established that erroneous acts or representations of municipal officers do not afford a basis to estop a municipality from enforcing zoning ordinances enacted pursuant to the police power.** *Town of Richmond v. Murdock*, 70 Wis. 2d 642, 654, 235 N.W.2d 497 (1975); *City of Milwaukee v. Leavitt*, 31 Wis. 2d 72, 76-77, 142 N.W.2d 169 (1966). See also *Snyder v. Waukesha County Zoning Bd.*, 74 Wis. 2d 468, 476-77, 247 N.W.2d 98 (1976); *State ex rel. Westbrook v. City of New Berlin*, 120 Wis. 2d 256, 262, 354 N.W.2d 206 (Ct. App. 1984).¹⁴" *Willow Creek Ranch*, 2000 WI 56, ¶49 (emphasis added).

Footnote ¹³: "*City of Milwaukee v. Milwaukee County*, 27 Wis. 2d 53, 66, 133 N.W.2d 393 (1965)."

Footnote ¹⁴: "The dissent's extensive recitation of the facts to depict the perceived injustice to Willow Creek ignores that the law of estoppel in the zoning context is well-defined.

Notwithstanding the unjust results of those acts, the erroneous acts of officers do not serve as a basis for estopping a municipality from enforcing an ordinance enacted pursuant to its police

power. . . ."

"Binding municipalities to every representation made by subordinate employees would produce severe results for the municipalities. Endless litigation would ensue over the words of those employees, and important municipal decisions would be delayed pending resolution of those suits." *Willow Creek Ranch*, 2000 WI 56, ¶ 50.

16 FEDERAL PREEMPTION

State of Wisconsin v. St. Croix County, 2003 WI App 173, 266 Wis. 2d 498, 668 N.W.2d 743.

Facts: At the State's direction, St. Croix County adopted a riverway zoning ordinance that regulated the portion of the Lower St. Croix Riverway within the county. In 2000, the county amended its ordinance so that it did not apply to the portion of the Riverway that is under federal administration (the "federal" Riverway zone). The State sued to nullify the County's amendment. The State argued that s. 30.27, Wis. Stats., required the county to maintain its Riverway zoning in both the "state" and "federal" Riverway zones. The county argued that the federal government preempted regulation of the Lower St. Croix Riverway in the "federal" zone, that the State lacks authority to regulate in the "federal" zone and that s. 30.27, Wis. Stats., was no longer valid. The circuit court granted summary judgment to the State.

Holding/Analysis: The Court of Appeals affirmed the circuit court's grant of summary judgment to the State. **The court held that the federal Wild and Scenic Rivers Act did not preempt state and local regulation in the "federal" Lower St. Croix Riverway zone.** When the local regulation is in an area where local police powers are typically exercised, as in zoning, the court assumes that those powers are not superceded by federal law. Additionally, the Wisconsin Supreme Court has held that federal law preempts state action in only 3 situations: 1) when Congress expressly requires no state or local regulation; 2) when Congress implicitly demonstrates its intent to occupy the field; or 3) where state law conflicts with federal law. The court held there was no preemption here. The court found the reasoning in the case of *Kiernat v. County of Chisago*, 564 F. Supp 1089 (D. Minn 1983) persuasive. In that case, county zoning in the "federal" St. Croix Riverway zone was upheld.

[EDITOR'S NOTE: An example of a federal law that does preempt local zoning regulation can be found in the FCC regulations in 47 Code of Federal Regulations (CFR) sections 1.4000 and 25.101 to 25.104 that apply to certain satellite dishes and antennas.]

HEARING NOTICES SEE PUBLIC HEARING NOTICES

17 LAND DIVISION

Public Improvements as a Condition of Plat Approval

Rogers Development, Inc. and Town of Beloit v. Rock County Planning and Development Committee and County of Rock, 2003 WI App 113, Wis. 2d , N.W.2d .

Facts: The Town of Beloit, pursuant to s. 236.45 (2) and s. 236.13 (2), Stats., and Rock County, pursuant to s. 236.45 (2), Stats., adopted requirements for the subdivision of land. Rogers Development, Inc. filed a preliminary plat for Glen Hills subdivision with the Town and the County in 1994. In 1994 and 1997, the Town and the County approved the first two phases of Glen Hills. Rogers Development later submitted the final plat for the third phase of Glen Hills, and the Town approved it. The County, however, issued a conditional approval subject to specific requirements for the size of cul-de-sacs, the length of street blocks and the location of town roads in the subdivision that were contrary to directives that the Town had made. Rogers Development filed suit against the County. The Town joined the lawsuit as a co-plaintiff. The circuit court granted judgment in favor of Rogers Development and the Town.

Holding/Analysis: **The Court of Appeals affirmed the circuit court's judgment**, after concluding that: ". . . land division regulations relating to the size of cul-de-sacs, the length of street blocks and the location of town roads constitute public improvement requirements. Because WIS. STATS. § 236.13 (2)(a) grants only to a 'town or municipality' within which the plat lies the authority to require public improvements as a condition of plat approval, and a county is not a municipality for purposes of ch. 236, we conclude that **the County may not regulate the size of cul-de-sacs, the length of street blocks and the location of town roads when the plat is located within a town . . .**" *Rogers Development*, 2003 WI App 113, ¶ 19.

18 LOWER ST. CROIX RIVERWAY

State of Wisconsin v. St. Croix County, 2003 WI App 173, 266 Wis. 2d 498, 668 N.W.2d 743.

Facts: At the State's direction, St. Croix County adopted a riverway zoning ordinance that regulated the portion of the Lower St. Croix Riverway within the county. In 2000, the county amended its ordinance so that it did not apply to the portion of the Riverway that is under federal administration (the "federal" Riverway zone). The State sued to nullify the County's amendment. The State argued that s. 30.27, Wis. Stats., required the county to maintain its Riverway zoning in both the "state" and "federal" Riverway zones. The county argued that the federal government preempted regulation of the Lower St. Croix Riverway in the "federal" zone, that the State lacks authority to regulate in the "federal" zone and that s. 30.27, Wis. Stats., was no longer valid. The circuit court granted summary judgment to the State.

Holding/Analysis: The Court of Appeals affirmed the circuit court's grant of summary judgment to the State. **The court held that the federal Wild and Scenic Rivers Act did not preempt state and local regulation in the "federal" Lower St. Croix Riverway zone.** When the local regulation is in an area where local police powers are typically exercised, as in zoning, the court assumes that those powers are not superceded by federal law. Additionally, the Wisconsin Supreme Court has held that federal law preempts state action in only 3 situations: 1) when Congress expressly requires no state or local regulation; 2) when Congress implicitly demonstrates its intent to occupy the field; or 3) where state law conflicts with federal law. The court held there was no preemption here. The court found the reasoning in the case of *Kiernat v. County of Chisago*, 564 F. Supp 1089 (D. Minn 1983) persuasive. In that case, county zoning in the "federal" St. Croix Riverway zone was upheld. In this decision, the Court of Appeals stated: **"Counties are creatures of the State, and as such they have no authority to refuse to follow a statutory directive, absent a showing that the statute is unconstitutional or is infirm in some other respect."** *St. Croix County*, 2003 WI App 173, ¶ 17. "Because we conclude that the Wild and Scenic Rivers Act did not preempt State and local governmental regulation of the Lower St. Croix River; the State has the authority to exercise its police power in the federal zone; and Wis. Stat. § 30.27 remains in full force and effect, we affirm the judgment of the circuit court." *St. Croix County*, 2003 WI App 173, ¶ 18.

19 NAVIGABILITY

Entire Lakebed Need Not Be Navigable

State v. Trudeau, 139 Wis. 2d 91, 408 N.W.2d 337 (1987).

Facts: In August of 1984, the State of Wisconsin commenced a lawsuit alleging that Thomas D. Trudeau, certain other real estate developers and the Ashland County BOA and Zoning Administrator had violated s. 30.12, Stats., by constructing, or allowing the construction of, condominiums and a parking lot on the bed of Lake Superior as part of a real estate development known as Marina Point Condominiums on Madeline Island in Ashland County. The project site was separated from the Madeline Island Marina by Old Fort Road, and water on the site was connected by several culverts to Lake Superior, including one running under Old Fort Road into the marina. The developers had obtained a variance from the Ashland County BOA in January of 1984 after construction of the first condominium building was well underway. The State had not sought review of the variance decision within 30 days pursuant to s. 59.99 (now numbered s. 59.694), Stats. There was some water on the project site and some aquatic-type vegetation. However, the project site itself was not “navigable” in the sense that a canoe could have been paddled across the site.

Holding/Analysis: **The Supreme Court affirmed the Court of Appeals decision and remanded the case to the trial court for findings as to the various elevations of the project site. “An area need not be navigable to be lakebed. If the land is part of the navigable lake, then the fact that the specific area cannot be navigated is irrelevant to the state’s claim. Lakebed may be heavily vegetated by plants rising far above the water.”** *Trudeau*, 139 Wis.2d 91 at 103 (emphasis added). “The erection of the artificial barrier, the Old Fort Road, with culverts between the site and the marina does not remove the site as part of Lake Superior. As long as lake water would naturally flow to and from the site in the absence of an artificial barrier, it is a part of Lake Superior. The state therefore properly determined the lake’s OHWM at ‘other places on the . . . shore of the same . . . lake’ and transferred that finding to the project site.” *Trudeau*, 139 Wis. 2d 91 at 109.

Navigability Test

DeGayner & Co., Inc. v. Department of Natural Resources, 70 Wis. 2d 936, 236 N.W.2d 217 (1975).

Facts: DeGayner proposed the damming up of Five Mile Creek, the creation of an artificial lake, and the construction along its banks of approximately 500 housing units. If the stream was determined to be navigable, a permit would first have to be issued under s. 30.10(2), Stats.

Holding/Analysis: **The Supreme Court determined that Five Mile Creek was navigable in fact.** “*Muench v. Public Service Comm.* (1952), 261 Wis. 492, 506, 53 N.W. 2d 514, 55 N.W. 2d 40, established the modern test of navigability: ‘[A]ny stream is ‘*navigable in fact*’ which is capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes.’” *DeGayner*, 70 Wis. 2d 936 at 945. “Navigability . . . is not determined by the ‘normal’ condition of the stream. . . . whether the circumstances creating navigability were natural or artificial is irrelevant. This court has frequently held that, where artificial conditions create navigability, the stream is navigable in fact where such conditions have existed for a period of time.” *DeGayner*, 70 Wis. 2d 936 at 946. A stream is navigable if it is navigable in fact at recurring times each year long enough to make the stream useful for recreational uses. “**...the test is whether the stream has periods of navigable capacity which ordinarily recur from year to year, e.g., spring freshets, or has continued navigable long enough to make it useful as a highway for recreation or commerce. The test is not whether the stream is navigable in a normal or natural condition, but whether it is in some sense permanently navigable, i.e., regularly recurring or of a duration sufficient to make it conducive to recreational uses.**” *DeGayner*, 70 Wis.2d 936 at 946-947 (emphasis added).

20 NONCONFORMING STRUCTURES AND USES

Categorizing "Structural Repairs or Alterations" under the 50% Rule

Marris v. City of Cedarburg, 176 Wis. 2d 14, 498 N.W.2d 842 (1993).

Facts: Before Jean Marris purchased a property in the City of Cedarburg with two buildings on it that was zoned for residential use, she petitioned the Cedarburg Plan Commission to allow the use of the rear building as office space for her construction and real estate businesses as a substitute legal nonconforming use. The previous owner had used the rear building as a retail flower shop. In 1988, Ms. Marris began converting the rear building into space for three rather than two offices without obtaining building permits. The Plan Commission asked the Board of Zoning Appeals for an interpretation of the nonconforming use provisions in the Cedarburg zoning ordinance. The Board determined that Marris's property had lost its nonconforming use status because the total lifetime structural repairs or alterations to the property exceeded 50% of the property's current assessed value.

Holding/Analysis: **The Supreme Court remanded the matter to the BOA to determine whether total lifetime structural repairs or alterations exceeded 50% of property's current assessed value, based on the guidelines set forth in the Supreme Court's decision.** "We cannot set forth a hard and fast definition which easily distinguishes between structural and non-structural repairs. Any discussion of the meaning of the phrase 'structural repairs' must be in terms of the purpose of this type of ordinance, the language of the ordinance, and the proposed improvement. Nonetheless, some general guidelines can be set forth. . . . We construe structural repairs in this ordinance to include work that would convert an existing building into a new or substantially different building, or work that would affect the structural quality of the building. We also construe structural repairs in this ordinance to include proposed improvements that would contribute to the longevity or permanence of the building." *Marris*, 176 Wis. 2d 14 at 37-38. "Therefore proposed improvements such as the addition of acoustical ceilings or the installation of heating, electricity, plumbing (including fixtures) or insulation, might not ordinarily be regarded as structural repairs. Such improvements might be characterized as remodelling, or as improving the appearance or efficiency of a nonconforming use structure." *Marris*, 176 Wis. 2d 14 at 38. The court acknowledged that any modernization or maintenance carries with it some possibility of extending the life expectancy of the nonconforming use, but concluded that in order to serve the community's interest that buildings be maintained in good, safe and sanitary condition, and to respect ownership rights, some modernization and maintenance must be permitted. This ruling will control only to the extent that an ordinance uses similar language.

Determining 50% of the Value of Nonconforming Structures

State ex rel. Covenant Harbor Bible Camp v. Steinke, 7 Wis. 2d 275, 96 N.W.2d 356 (1956).

Facts: Covenant Harbor Bible Camp was a church owned and operated 53-acre bible camp with frontage on Lake Geneva. Forty acres of the bible camp property and most of the improvements on the premises were located within the City of Lake Geneva. The property was a former family estate. The camp utilized the family residence (with 26 rooms and 11 bathrooms) and half a dozen guest houses to house a maximum of about 225 people at a time. On January 17, 1957, the family residence burned. In July of 1957, the church that owned the bible camp applied for building permits for six cottages to replace the campers' quarters that were lost as a result of the fire. The city building inspector and the city council rejected the application. After holding a hearing, the city Board of Appeals affirmed the denial. The church appealed.

Holding/Analysis: **The Supreme Court held that a single nonconforming building destroyed by fire could be rebuilt because the building was only a small part of the permitted nonconforming**

use of the property as a camp, and the value of the building did not exceed 50% of the value of the entire camp. The building could not, however, be replaced with six cabins located elsewhere on the camp premises. "The 50 per cent rule, which may be reasonable if applied to one building containing a separate use, may not be reasonable if applied to an individual building used jointly with other buildings in a single nonconforming use upon one premises . . . Suppose that one property is used for an institution or industry housed in several buildings, no one of which is worth as much as half the total but each of which is essential to the operation of the whole. In situations of the type suggested the application of the 50 per cent rule to the individual building might well result in a substantial loss of investment out of all proportion to the value of the building destroyed by accident." *Covenant Harbor Bible Camp*, 7 Wis.2d 275 at 283-284.

The Supreme Court also stated that: "In the case before us the buildings have not been assessed because the use makes the property exempt from taxation. Assessed value, however, is required by law to equal fair market value and the fair market value could be determined by evidence. We conclude that the question of whether relator [the church] had the right to restore the family residence without changing it to a conforming use depends upon whether the fair market value of the destroyed building prior to its destruction was more than 50 per cent of the fair market value of all the buildings on the premises (excluding the cook's cabin) [which was built after the use became nonconforming] used by relator for its bible camp." *Covenant Harbor Bible Camp*, 7 Wis. 2d 275 at 284.

(**Note:** For a summary of other issues decided in the *Covenant Harbor Bible Camp* case, see also "Policy Against Expansion of Nonconforming Uses" in this section.)

State ex rel. Home Ins. Co. v. Burt, 23 Wis. 2d 231, 127 N.W.2d 270 (1964).

Holding/Analysis: The prohibition against repair of a building damaged by fire was due to a substantial under assessment of the property. Razing a building that had been damaged only to the extent of 26% of its stipulated market value would constitute a near confiscation of property.

Village of Elm Grove v. T.V. John & Son, 173 Wis. 2d 170, 496 N.W.2d 167 (1992).

Facts: A nonconforming shed for storing construction materials located in a floodplain was declared a public nuisance and ordered removed pursuant to the 50% rule since the assessed value of the shed was zero. The Village sued to require removal of the shed and to impose forfeitures. In a motion for reconsideration after the circuit court ruled in favor of the Village, the owner of the shed, T.V. John & Sons, argued that, under the *Covenant Harbor* case, the Court should have applied the 50% rule to the entire nonconforming use, a general contracting business, operated out of a masonry building on the same property.

Holding/Analysis: **The Supreme Court held that the *Covenant Harbor* exception** (that, in applying the 50% rule in the *Covenant Harbor* situation, the value of all buildings that compose a nonconforming use rather than just the one destroyed should be looked at when a building housing a nonconforming use is damaged) **is not applicable in all cases where the 50% rule applies and was not raised in a timely fashion in this case.** The Supreme Court pointed out in this decision that the Court had previously explained in *State ex rel. Home Insurance Co. v. Burt*, 23 Wis. 2d 231, 127 N.W.2d 270 (1964) "that in *Covenant Harbor* it 'reversed for the reason that, in the situation presented, application of the 50 percent rule might well result in a substantial loss of investment out of all proportion to the value of the building destroyed by accident.' *Id.* at 241, 127 N.W.2d at 275 (emphasis added)." *Village of Elm Grove*, 173 Wis. 2d 170 at 179. "Because the *Covenant Harbor* issue was not raised until the motion for reconsideration and because the motion for reconsideration was untimely, the *Covenant Harbor* issue is not properly before this court. We do no, therefore, address its merits." *Village of Elm Grove*, 173 Wis. 2d 170 at 181.

Diminishing Assets Rule

Smart v. Dane County Board of Adjustment, 177 Wis. 2d 445, 501 N.W.2d 782 (1993).

Facts: In 1968, Dane County adopted an ordinance that made existing mineral extraction operations nonconforming uses which could be continued if they had been worked prior to adoption of the ordinance and registered with the county Zoning Department. Wingra Stone Company owned an 80-acre parcel in Dane County on which mining operations had started in 1967. Wingra Stone Company submitted a written registration form for its entire 80-acre parcel to the Dane County Zoning Department. The Zoning Department reviewed the form and determined in 1969 that Wingra Stone's 80-acre parcel should be considered to be two 40-acre parcels, only one of which was accepted as having a nonconforming use because of existing mining activity. However, there was nothing in the county records to indicate that Wingra Stone Company was informed of the Zoning Department's 1969 determination. In September of 1989, Wingra Stone Company asked the Dane County Zoning Administrator to review the status of its 80-acre parcel. The Zoning Administrator issued a written determination that the entire 80 acres had nonconforming use status. James Smart, a property owner in a residential development adjacent to Wingra Stone's land, appealed the Zoning Administrator's determination to the county board of adjustment. The Board affirmed the Zoning Administrator's decision, and Mr. Smart appealed the Board's decision to the circuit court. The circuit court reversed the Board's decision, holding that Wingra Stone Company had waived any right to assert a nonconforming use by failing to appeal in 1970 the Zoning Department's refusal to accept its registration for the entire 80-acre parcel. Wingra Stone Company challenged the circuit court decision in the Court of Appeals. The Court of Appeals reversed the circuit court decision, and Mr. Smart appealed the case to the Supreme Court.

Holding/Analysis: The Supreme Court held that the mining company was not barred by the doctrine of laches from mining the disputed 40 acres as a nonconforming use since there was no evidence on record that the mining company was ever informed of the zoning department's original decision, and the mining company was entitled to request review of the zoning status at any time. **The Supreme Court also held that the Board of Adjustment could reasonably conclude from the evidence that the Zoning Department made a mistake in 1969 when it determined that the entire 80-acre parcel owned by Wingra Stone Company did not have nonconforming use status, because of the diminishing assets rule.** The Supreme Court quoted from *Sturgis v. Winnebago County Board of Adjustment*, 141 Wis. 2d 149, 153, 413 N.W.2d 642 (Ct. App. 1987): "In a quarrying business the land itself is a mineral or resource. It constitutes a diminishing asset and is consumed in the very process of use. Under such facts the ordinary concept of use, as applied in determining the existence of a nonconforming use, must yield to the realities of the business in question and the nature of its operations. *We think that in cases of a diminishing asset the enterprise is 'using' all that land which contains the particular asset and which constitutes an integral part of the operation, notwithstanding the fact that a particular portion may not yet be under actual excavation.* It is in the very nature of such business that reserve areas be maintained which are left vacant or devoted to incidental uses until they are needed. Obviously, it cannot operate over an entire tract at once. (Emphasis in original.) *Sturgis*, 141 Wis. 2d at 153, quoting *County of DuPage v. Elmhurst-Chicago Stone Co.*, 165 N.W.2d 310, 313 (Ill. 1960)." *Smart*, 177 Wis. 2d at 454.

(See also the summary of the *Smart* decision in Section 13, Equity/Laches for more information on the doctrine of laches.)

Discontinuance/Abandonment

County of Sauk v. Trager, 118 Wis. 2d 204, 346 N.W.2d 756 (1984).)

Facts: For a summary of the facts and other issues decided in this case, see “Exhaustion of Remedies” in Section 3.

Holding/Analysis: The Supreme Court stated: “The county board’s final argument is that since Trager’s garage is located within the setback line, the provisions in the ordinance relating to a nonconforming use govern this case. The county contends that Trager discontinued the nonconforming use by failing to work on or occupy the garage for a period of 12 months and that any further use of the foundation must comply with the setback requirement of the zoning ordinance.”

County of Sauk, 118 Wis. 2d 204 at 221. “The parties disagree as to whether a structure that does not conform to setback requirements is a nonconforming use as the latter term is used in the Sauk county ordinance. The ambiguity of the term ‘nonconforming use’ is not unique to the Sauk county ordinance but is a problem that has been discussed by numerous commentators and courts.” *County of Sauk*, 118 Wis. 2d 204 at 221. “When an ordinance is ambiguous, an ordinance, like a statute, must be interpreted to give effect to the legislative intent.” (citations omitted) *County of Sauk*, 118 Wis. 2d 204 at 222. **The Supreme Court concluded that: “We read the zoning ordinance to mean that a nonconforming use refers to premises used for a purpose not permitted in the district in which the premises are situated; nonconforming use does not include a nonconforming (noncomplying) structure which is used for a purpose permitted in the district. Since a personal garage (in contrast to a commercial garage) is a permitted use in the agricultural district in which Trager’s property is situated, Trager’s foundation is not a non-conforming use under the ordinance. Since the foundation is not a nonconforming use, the 12-month discontinuation rule does not apply.”** *County of Sauk*, 118 Wis. 2d 204 at 224 (emphasis added).

Lessard v. Burnett County Board of Adjustment, 2002 WI App 186, 256 Wis. 2d 821, 647 N.W.2d 831.

Facts: The Lessards owned and operated a campground that was established in 1935, predating the Burnett County Zoning Ordinance. The campground was located in a RR-1 (Residential-Recreational) District and was a legal non-conforming use, because 6 camping sites in the Lessards’ campground were located within 75 feet of the ordinary high water mark of Yellow Lake (and therefore didn’t comply with the required shoreland setback) and because the Burnett County Zoning Ordinance only permitted resorts and trailer parks in areas zoned RR-1 if those uses were authorized by a conditional use permit (which the Lessards had not previously obtained). In August of 2000, the Lessards applied for a conditional use permit to add 23 RV sites to their campground, and proposed to remove six existing cabins. At the time that the conditional use application was filed, their campground consisted of 21 camping sites and six cabins. For more than 10 years before the Lessards filed their application, their campground was licensed for 21 camping units. The County’s zoning committee issued a permit to the Lessards on the condition that the 6 camping sites within 75 feet of the ordinary high water mark be moved over the next five years in order to comply with the shoreland setback requirement in the County’s ordinance. The Lessards appealed to the Burnett County Board of Adjustment. The BOA affirmed the zoning committee’s decision. The Lessards appealed the BOA’s decision to the Burnett County Circuit Court. The Circuit Court concluded that the County’s ordinance applied to the Lessard’s proposed expansion of the campground, that the ordinance authorized the County to attach reasonable conditions to a conditional use permit and that the BOA’s desire to eliminate nonconforming uses in a planned manner was consistent with the intent of the ordinance. The Lessards appealed the Circuit Court’s decision to the Court of Appeals (District III), arguing that because their campground was a preexisting use and because they were not proposing any structural additions that would exceed 50% of the property’s current market value, or that would violate the setback requirements, the ordinance was inapplicable. They also argued that they were not proposing to expand the campground but merely resuming former use of at least 44 units.

Holding/Analysis: **The Court of Appeals affirmed the Circuit Court’s decision and held that the Board of Adjustment had “correctly applied the ordinance to the proposed expansion and did not attempt to regulate a mere increase in a preexisting use.”** *Lessard*, 2002 WI App 186, ¶ 2 (emphasis added). **The Court found that “the board could reasonably find that any units in excess of twenty-one had been discontinued and the resumption of their use required a permit.”** *Lessard*, 2002 WI App 186, ¶ 32 (emphasis added). **The Court also upheld the condition imposed by the board requiring discontinuance of the campsites within the setback area as it was reasonably related to the legitimate goal of bringing the campground into compliance with the ordinance.** “[T]he spirit of zoning is to restrict a nonconforming use and to eliminate such uses as quickly as possible.’ *Seitz*, 140 Wis. 2d at 116. . . . The board's decision to permit the proposed expansion upon the condition that the six sites within the setback be eventually eliminated is reasonably related to the legitimate goal to bring the campground into compliance with the land use ordinance.” *Lessard*, 2002 WI App 186, ¶ 31.

The Court of Appeals also held that the Lessards’ plans to eliminate cabins in their campground and expand the number of RV sites to forty-four was not a mere increase in use of their nonconforming campground. The Court held that it was “an identifiable change and extension of the previous use for which it had been licensed.” *Lessard*, 2002 WI App 186, ¶ 24 (emphasis added). The BOA argued that even if the Lessards’ campground had operated 44 RV sites in the past, its failure to license more than 22 sites for at least ten years demonstrates that their use had been discontinued for more than one year, allowing the County to apply the ordinance. The Lessards argued that the ordinance provision on discontinuance of nonconforming uses could only be applied to the entire campground, citing the “diminishing assets” rule that the Wisconsin Court of Appeals had recognized in a case involving the operation of mineral extraction quarry. The Court of Appeals agreed with the BOA, and refused to apply the “diminishing assets” rule beyond mineral extraction cases. “Under the terms of the ordinance, if a nonconforming use has been discontinued for more than twelve months, proof of intent to abandon the nonconforming use is not required. *Peterson*, 42 Wis. 2d at 290-91 [*State ex rel. Peterson v. Burt*]. Here, the campground was licensed for just twenty-one sites for more than ten years preceding the application. Consequently, the board could find that sites in excess of twenty-one had been discontinued within the meaning of the ordinance.” *Lessard*, 2002 WI App 186, ¶ 30.

Schaetz v. Manders, 206 Wis. 121, 238 N.W. 835 (1931).

A dairy that discontinued operations when it went into receivership was permitted to remodel and reopen because the cessation of business was temporary and due to circumstances over which the owner had no control, thus there was no intent to abandon. However, see *State ex rel. Peterson v. Burt* below.

State ex rel. Brill v. Mortenson, 6 Wis. 2d. 325, 94 N.W.2d 691 (1959).

For the facts and holding of this case, see “Right to a Nonconforming Use Can Be Lost” in this section.

State ex rel. Morehouse v. Hunt, 235 Wis. 358, 291 N.W. 745 (1940).

Facts/Holding: During the Depression, after a fraternity house was temporarily used as a single family house, it was permitted to resume its former use because the lease during that time indicated the owner's intent not to discontinue that usage. **This case defines "discontinue," as used in zoning ordinances, to mean more than mere temporary cessation and requiring abandonment, which connotes a voluntary, affirmative, completed act.** A nonconforming use is not discontinued when it ceases temporarily because of the inability of the owner to obtain a tenant or buyer who will make use

of the property. However, see *State ex rel. Peterson v. Burt* below.

(**Note:** For a summary of other issues discussed in the *Hunt* case, see also “Establishing a Legal Nonconforming Use” in this section.)

State ex rel. Peterson v. Burt, 42 Wis. 2d 284, 166 N.W.2d 207 (1969).

Facts: Two residences in the City of Madison became nonconforming when an area was zoned as a manufacturing district in July of 1966. The buildings were not occupied after September of 1966. They were purchased in May of 1967 by the appellant after he had applied for and been issued a building permit for each building. In November of 1967, the Madison building inspection department condemned the buildings and ordered a change of use or razing of the buildings within 30 days. The property owner appealed to the Madison Zoning Board of Appeals. The Zoning BOA voted to uphold the decision to discontinue the nonconforming use of the properties. The property owner sought review of the Zoning BOA decision.

Holding/Analysis: **The Supreme Court held that the former doctrine that mere cessation of a nonconforming use did not destroy the right to continue it, or prevent its resumption, was rejected by the State Legislature when it enacted s. 62.23 (7)(h), Stats., which provides that if a nonconforming use is discontinued for a period of 12 months, any future use of the building and premises shall conform to the ordinance.** “Soon after the decision in *Morehouse*, the legislature enacted ch. 203, Laws of 1941 . . . This change in the law renders inapplicable the doctrine of ‘voluntary abandonment. . .’” *State ex rel. Peterson*, 42 Wis. 2d 284 at 290. The Supreme Court found that it was no longer necessary to prove intent to abandon in the face of a definite legislative time period that applies to discontinued use.

The subjective test applied in *Schaetz v. Manders*, above, and *State ex rel. Morehouse v. Hunt*, above, was no longer applicable. The Supreme Court observed: “It is important that neither of the ordinances considered in these cases contained any limitation as to the period of time required to effect a discontinuance of a nonconforming use.” *State ex rel. Peterson*, 42 Wis. 2d 284 at 288.

State ex rel. Robst v. Bd. of Appeals of the City of Wauwatosa, 244 Wis. 566, 13 N.W.2d 64 (1944).

Facts/Holding: A property owner who remodeled a nonconforming five family dwelling into a two family house was found to have abandoned and relinquished any nonconforming use. Remodeling demonstrated intent to make an alternative use of the property.

Establishing a Legal Nonconforming Use

David A. Ulrich Inc. v. Town of Saukville, 7 Wis. 2d 173, 96 N.W.2d 612 (1959).

Facts: A claim of vested rights in use of property as a trailer park prior to adoption of an ordinance was denied because the owner had failed to apply for a license and was therefore in violation of an existing trailer-camp ordinance.

Holding: **A use must be legal prior to the adoption of an ordinance in order to be considered a legal nonconforming use after passage of the ordinance.** There is no right, vested or otherwise, in an unlawful use.

Gabe v. City of Cudahy, 52 Wis. 2d 13, 187 N.W.2d 874 (1971).

Using a tract of land for commercial excavation of topsoil did not qualify as a nonconforming activity because plaintiffs could not prove that the farm was "actually and actively" used for this purpose, and that its use was continuous. Operations had begun later than what was claimed and were only partly used for the purpose stated.

Lessard v. Burnett County Board of Adjustment, 2002 WI App 186, 256 Wis. 2d 821, 647 N.W.2d 831.

Facts: For a summary of the facts and other issues decided in this case, see "Discontinuance/Abandonment," "Expansion That Changes a Nonconforming Use," "Policy Against Expansion of Nonconforming Uses," and "Some Growth and Modernization Permitted" in this section.

Holding/Analysis: **The Court held that ". . . the Board could reasonably find that any units in excess of twenty-one had been discontinued and the resumption of their use required a [conditional use] permit."** *Lessard*, 2002 WI App 186, ¶ 32 (emphasis added).

"A nonconforming use will not be recognized in the absence of sufficient competent evidence to prove it was lawfully in existence at the time the ordinance was enacted. *McQuillin, supra*, at §25.188.50.

'The burden of establishing that the use in question is fundamentally the same use and not a new and impermissible one is on the party asserting it.' *Pewaukee Marina*, 187 Wis.2d at 30 (citation omitted).

The allocation of this burden is 'in accordance with the general policy of zoning to carefully limit the extension and enlargement of nonconforming uses.' *Id.*" *Lessard*, 2002 WI App 186, ¶ 20.

"Because the Lessards identify no proofs and fail to provide appropriate references to the record to support their contentions [that 23 additional RV units preexisted the ordinance], their argument fails. (footnote omitted) See *Tam v. Luk*, 154 Wis.2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990)."

Lessard, 2002 WI App 186, ¶ 22.

State ex rel. Morehouse v. Hunt, 235 Wis. 358, 291 N.W. 745 (1940).

Facts: The owner of a Madison fraternity house was unable to sell the property during the Depression, and rented out the house under a more restrictive status to two families. Later a new owner wanted to resume operations as a fraternity house, contrary to a zoning ordinance. The court noted that the lease arrangements showed evidence of intent not to abandon the original nonconforming use as a fraternity house.

Holding/Analysis: The supreme court ruled in favor of the owner of a nonconforming use, nevertheless stating that it is as much the purpose of a zoning ordinance to protect the owner's right to a lawful nonconforming use, as it is to protect the right of an owner to prevent unlawful nonconforming uses. The general purpose of a zoning ordinance is to restrict uses of buildings according to terms of the ordinance and to require conformance as speedily as it may under all the circumstances reasonably be accomplished.

(For a summary of other issues discussed in the *Hunt* case, see also "Discontinuance/Abandonment" in this section.)

Town of Delafield v. Sharpley, 212 Wis. 2d 332, 568 N.W.2d 779 (Ct. App. 1997).

Facts: Paul Sharpley Sr. purchased several acres of wooded property in 1945 and built his home there.

In 1969 Paul Sharpley Jr. purchased an acre of his father's land and built his residence there. Since 1960 both have engaged in various businesses on the properties and have maintained equipment and vehicles there. Upon inspection, a considerable number of wrecked, abandoned, disassembled vehicles; numerous batteries, radiators, junk, and other car parts were found on both properties that the Town of Delafield alleged violated its public nuisance ordinances. The trial court granted summary judgment for the town, finding it was undisputed that the Sharpleys created a public nuisance on their properties and did not have a valid and legal nonconforming use of their properties.

Holding/Analysis: The Court of Appeals held that both properties constituted public nuisances in violation of town ordinances. The court further concluded that if the properties created public nuisances, then whether the Sharpleys had a valid and legal nonconforming use of the properties that predated the town's ordinances was irrelevant. **"A valid, nonconforming use, irrespective of its duration, may be prohibited or restricted when it also constitutes a public nuisance or is harmful to the public health, safety or welfare."** *Town of Delafield*, 212 Wis. 2d 332 at 337 (emphasis

added). **The Wisconsin Supreme Court has recognized that "a nonconforming use existing at the time a zoning ordinance goes into effect cannot be prohibited or restricted by statute or ordinance, where it is a lawful business or use of property and is not a public nuisance or harmful in any way to the public health, safety, morals, or welfare."** *Town of Delafield*, 212 Wis. 2d 332 at 337-38 (emphasis added). "Neither the legitimacy of the business nor the length of time it has been in existence is controlling in determining whether a public nuisance exists because a public nuisance can always be abated." Citing *Madison Metro. Sewerage Dist. v. Committee on Water Pollution*, 260 Wis. 229, 251, 50 N.W.2d 424, 436 (1951).

Village of Menomonee Falls v. Veierstahler, 183 Wis. 2d 96, 103, 515 N.W.2d 290 (Ct. App. 1994). Facts: Among other legal nonconforming uses, Donald Veierstahler operated a legal nonconforming tavern business on his property. After his liquor licenses were revoked in June of 1989 and a subsequent application for another liquor license had been denied by the Village of Menomonee Falls, Veierstahler continued to conduct certain limited licensed activities out of the tavern, such as serving lunches and selling cigarettes and soda. In December of 1990, Veierstahler rented the former tavern to a third party who operated nonalcoholic social club. The Village's zoning administrator issued a citation to Mr. Veierstahler alleging that the social club activity was not permitted under the current zoning ordinance. Veierstahler argued that his cessation of the tavern business did not constitute an abandonment of the nonconforming use because he had continued activities related to the tavern operation. The circuit court rejected Veierstahler's arguments and imposed a forfeiture penalty. Mr. Veierstahler appealed.

Holding/Analysis: **The Court of Appeals held that Veierstahler had discontinued or terminated the legal nonconforming tavern use, and affirmed the circuit court's decision that the operation of the social club on Veierstahler's premises constituted a violation of the current zoning ordinance.** The Court disagreed with Veierstahler's argument that continuation of activities incidental to the tavern operation after the revocation of licenses served to perpetuate the nonconforming use and found no authority to support that proposition. The Court stated that "Veierstahler's argument would frustrate the policy of the law to restrict and ultimately eliminate nonconforming uses. *Smuda*, 75 Wis.2d at 538, 249 N.W.2d at 787." Veierstahler argued that he did not voluntarily abandon his tavern operation, that his conduct following the revocation reflects good faith efforts to maintain the nonconforming activities, and the Village's denial of liquor licenses frustrated his goal to operate the tavern. The Court responded that the revocation of Veierstahler's liquor license and the denial of the third party's application were never challenged or litigated. Mr. Veierstahler's good faith efforts did not assist his legal position in this case.

Walworth County v. Hartwell, 62 Wis. 2d 57, 214 N.W.2d 288 (1974).

A race track used only sporadically for motorcycle races and other recreational activities failed to establish that use was "active and actual" and thus a vested interest in a nonconforming use.

Waukesha County v. Seitz, 140 Wis. 2d 111, 409 N.W.2d 403 (Ct. App. 1987).

Facts: For a summary of the facts and other issues decided in this case, see "Some Growth and Modernization Permitted" in this section.

Holding/Analysis: The Court of Appeals held that: "Land use qualifies as 'nonconforming' if there is an active and actual use of the land and buildings which existed prior to the commencement of the zoning ordinance and which has continued in the same or related use until the present. *Walworth County v. Hartwell*, 62 Wis. 2d 57, 60, 214 N.W.2d 288, 289-90 (1974). **The property owner bears the burden to prove by a preponderance of the evidence that the nonconforming use was in existence at the time that the ordinance was passed.** *Id.* At 61, 214 N.W.2d at 290. This burden also requires the property owner to show that the use was 'so active and actual that it can be said he [or she]

has acquired a “vested interest” in its continuance.’ *Id.* If the use is characterized as merely casual and occasional or accessory or incidental to the principal use, then the use does not acquire a nonconforming status. *Id.*” *Seitz*, 140 Wis.2d 111 at 115 (emphasis added).

Expansion That Changes A Nonconforming Use

Lessard v. Burnett County Board of Adjustment, 2002 WI App 186, 256 Wis. 2d 821, 647 N.W.2d 831.

Facts: For a summary of the facts and other issues decided in this case, see “Discontinuance/Abandonment” “Establishing a Legal Nonconforming Use,” “Policy Against Expansion of Nonconforming Uses,” and “Some Growth and Modernization Permitted” in this section. Holding/Analysis: **The Court of Appeals held that the Lessards’ plans to eliminate cabins in their campground and expand the number of RV sites to forty-four was not a mere increase in use of their nonconforming campground. The Court held that it was “an identifiable change and extension of the previous use for which it had been licensed.”** *Lessard*, 2002 WI App 186, ¶ 24 (emphasis added). “. . . the Lessards correctly argue that mere increases in use due to change in volume or frequency cannot be regulated, citing *Pewaukee Marina*. Here, however, the board was not attempting to regulate mere increases in the use of the twenty-one sites due to a change in volume or frequency. Rather, the board issued the conditional use permit to regulate the expansion from twenty-one sites to forty-four sites.” *Lessard*, 2002 WI App 186, ¶ 23. “While a mere increase in the volume, intensity or frequency of a nonconforming use is not sufficient to invalidate it, if the increase in volume, intensity or frequency of use is coupled with some element of identifiable change or extension, the enlargement will invalidate a legal nonconforming use. *Seitz*, 140 Wis. 2d at 117. The Lessards’ proposed elimination of cabins and the expansion from twenty-one to forty-four RV sites was an identifiable change and extension of the previous use for which it had been licensed. Consequently, the board could properly issue a conditional use permit to regulate the change.” (footnote omitted) *Lessard*, 2002 WI App 186, ¶ 24.

Village of Menomonee Falls v. Pruess, 225 Wis. 2d 746, 593 N.W.2d 496 (Ct. App. 1999).

Facts: Bryan Preuss added a commercial garage to his legal nonconforming residence. The Village of Menomonee Falls sought a judgment requiring Preuss to remove the garage and terminate his use of the property as a residence. The trial court ordered Preuss to remove the garage but ruled that he retained his residential rights.

Holding/Analysis: The Court of Appeals held that the trial court erred when it relied on *Village of Sister Bay v. Hockers*, 106 Wis. 2d 474 (Ct. App. 1982), in using its discretion when ruling on the nonconforming use of Preuss’ property. **The Court of Appeals ordered Preuss to remove the commercial addition and terminated the residential nonconforming use.** The Court held that *Pewaukee Marina* gave the Village the authority to eliminate the entire use when an illegal change was attempted. The Court of Appeals found that the *Hockers* decision did not affect the ruling in *Pewaukee Marina* that the “violation of the nonconforming use by expansion or enlargement which changes the use invalidates the legal nonconforming use as well as the illegal change.” *Pruess*, 225 Wis.2d at 750, quoting *Waukesha County v. Pewaukee Marina, Inc.*, 187 Wis. 2d 536, 542 (Ct. App. 1994).

Village of Sister Bay v. Hockers, 106 Wis. 2d 474, 317 N.W.2d 505 (Ct. App. 1982).

Facts: The Hockers owned 4 rental cottages that were legal nonconforming uses. They added porches to two of the cottages. The Village sued the Hockers for forfeitures and injunctive relief for violating the zoning ordinance. The alleged violations consisted of “a violation of the setback requirement from

the highway, a violation of the setback requirement from the high water [the ordinary high water mark], the making of structural alteration without a permit, and the enlargement of a nonconforming structure." The trial court assessed a \$ 1,000 forfeiture that would be reduced to \$ 500 if the Hockers removed the violations within seven months. The Village appealed contending that the trial court did not have the authority to assess a forfeiture that was less than the minimum prescribed in the Village ordinance. The Hockers cross-appealed, arguing that Sister Bay had failed to prove that the structural changes to the nonconforming cottages exceeded 50% of the structure's assessed valuation.

Holding/Analysis: The Court of Appeals modified the trial court's judgment (by increasing the assessed forfeitures to \$ 7,880, the minimum forfeiture provided for in the Village ordinance) and affirmed the trial court's judgment, as modified. **The Court found that the porches constructed by the Hockers violated the Village ordinance provision, sec. 10.07 (1)(a), that prohibited the extension or enlargement of a structure with a nonconforming use.** The Court did not accept the Hockers argument that another paragraph in the nonconforming use section of the Village ordinance, sec. 10.07 (1)(b), meant that they were allowed to add porches to their cottages as long as they did not exceed 50% of the equalized assessed valuation of those cottages. The Court stated that "Sections 10.07 (1)(a) and (b) are separate and independent limitations upon the continuation of grandfathered nonconforming uses. The Hockers construe sec. 10.07 (1)(b) to permit alterations and enlargements restricted by sec. 10.07 (1)(a). Their reading renders sec. 10.07 (1)(a) superfluous, and such a reading is disfavored by rules of statutory construction. We conclude that the trial court correctly interpreted sec. 10.07 (1) when it determined that the Hockers' porch additions violated the ordinance." (footnotes omitted) *Village of Sister Bay*, 106 Wis. 2d 474 at 483.

Waukesha County v. Pewaukee Marina, Inc., 187 Wis. 2d 18, 522 N.W.2d 536 (Ct. App. 1994).

Facts: Seitz expanded his marina from a docking, fuel and bait facility to include a retail store, with sale of new boats, boat lifts and piers, and a place for lounging and entertainment.

Holding/Analysis: The supreme court found Seitz's expansion to be invalid, distinguishing its holding in the earlier *Seitz* case. A county's authority to regulate a nonconforming use includes the power to limit the extension or expansion of the nonconforming use if the result is a change in use.

Nonconforming uses are an anomaly; they are suspect and therefore circumscribed. **If the owner of a nonconforming use expands or enlarges the use, it is the owner's burden to prove that the nonconforming use is still valid. The violation of the nonconforming use by expansion or enlargement which changes the use invalidates the legal nonconforming use as well as the illegal change.**

(For a summary of other issues discussed in the *Pewaukee Marina* case, see also "Right to a Nonconforming Use Can Be Lost" in this section.)

(**Note:** This case involves the same property that was the subject of the Court of Appeals' decision in *Waukesha County v. Seitz*, 140 Wis. 2d 111 (Ct. App. 1987) under "Some Growth Permitted" in this section.)

Ordinance Prohibiting Expansion Upheld

Jefferson County v. Timmel, 261 Wis. 39, 51 N.W.2d 518 (1952).

Facts: A property owner who occasionally sold gasoline from a single farm pump constructed a new building, installed new pumps and began selling gas, oil, antifreeze, tobacco products and soda.

Holding/Analysis: **The Supreme Court held that the new construction and new services were an impermissible expansion.** The Court also indicated that the nonconforming use status was lost because the original owner did not appeal the decision of the building inspector to deny a building

permit.

State ex rel. Carter v. Harper, 182 Wis. 148, 196 N.W. 451 (1923).

Facts: An ordinance provided that a building devoted to a nonconforming use and located in a residential district (a dairy in the City of Milwaukee) could not be enlarged unless changed to a conforming use.

Holding/Analysis: **The Supreme Court did not find this ordinance provision to be unreasonable, emphasizing the reciprocal benefits of land use control and its possible contribution to welfare, safety and quality of life.** This case raises constitutional issues and is specific to residential areas. [Note: The Supreme Court also discusses takings issues and public v. private rights in this decision.]

Policy Against Expansion of Nonconforming Uses

Lessard v. Burnett County Board of Adjustment, 2002 WI App 186, 256 Wis. 2d 821, 647 N.W.2d 831.

Facts: For a summary of the facts and other issues decided in this case, see "Discontinuance/Abandonment," "Establishing a Legal Nonconforming Use," "Expansion that Changes a Nonconforming Use" and "Some Growth Permitted" in this section.

Holding/Analysis: "The County may properly limit its recognition of nonconforming uses to only those in effect at the time the zoning law became effective. '[N]onconforming uses are closely limited and *are not to be enlarged* in derogation of the general scheme' of the ordinance." *Waukesha County v. Pewaukee Marina, Inc.*, 187 Wis. 2d 18, 24, 522 N.W.2d 536 (Ct. App. 1994) (citation omitted).

'While a county may not prohibit the continuance of the lawful use of any building or premises for any trade or industry for which such building or premises is used at the time the ordinances take effect, *see* § 59.69(10), Stats., the statutory authority to regulate nonconforming uses under § 59.69(10) includes the authority to enact ordinances that limit the change or extension of non-conforming uses.'

Schroeder v. Dane County Bd. of Adj., 228 Wis. 2d 324, 339, 596 N.W.2d 472 (Ct. App. 1999)." *Lessard*, 2002 WI App 186, ¶ 16 (emphasis in original)(footnote omitted).

"In general, a nonconforming use is limited to the area it covers at the time of the enactment of the zoning ordinance or restriction and cannot later be expanded to the boundaries of the tract.' 8A McQuillan, *Municipal Corporations* § 25.208, at 128 (rev. 3^d ed. 1994).

'Where an extension of a nonconforming use involves a physical extension of the use to land not used for the prohibited purpose prior to the enactment of the restrictive ordinance, the courts have held that the extension violates an ordinance which in general language prohibits the extension of nonconforming uses.'

1 Anderson's *American Law of Zoning* § 6.51, at 642 (4th ed. 1995)." *Lessard*, 2002 WI App 186, ¶ 17.

State ex rel. Covenant Harbor Bible Camp v. Steinke, 7 Wis. 2d 275, 96 N.W.2d 356 (1959)

Facts: Covenant Harbor Bible Camp was a church owned and operated a 53-acre bible camp with frontage on Lake Geneva. Forty acres of the bible camp property and most of the improvements on the premises were located within the City of Lake Geneva. The property was a former family estate. The camp utilized the family residence (with 26 rooms and 11 bathrooms) and half a dozen guest houses to house a maximum of about 225 people at a time. On January 17, 1957, the family residence burned. In July of 1957, the church that owned the bible camp applied for building permits for six

cottages to replace the campers' quarters that were lost as a result of the fire. The city building inspector and the city council rejected the application. After holding a hearing, the city Board of Appeals affirmed the denial. The church appealed.

Holding/Analysis: **The Court held that, as a general principle, uses which do not conform with zoning ordinances are not to be increased but are to be eliminated as speedily as possible.** "It appears to be an accepted principle that 'The spirit of zoning is to restrict rather than increase a nonconforming use and to eliminate such uses as speedily as possible.' Legislatures have generally refrained from requiring an immediate discontinuance of nonconforming uses presumably because of doubt that such a provision would be constitutional. Evidently courts have considered that where a nonconforming use has been carried on in a building which has been accidentally destroyed in large measure, it is not unreasonable to compel the owner to conform to zoning requirements thereafter." (citations omitted) *Covenant Harbor Bible Camp*, 7 Wis. 2d 275 at 283.

(**Note:** For a summary of other issues decided in the *Covenant Harbor Bible Camp* case, see also "Determining 50% of the Value of Nonconforming Structures" in this section.)

State ex rel. Peterson v. Burt, 42 Wis. 2d 284, 166 N.W.2d 207 (1969).

Facts: Two residences in the City of Madison became nonconforming when an area was zoned as a manufacturing district in July of 1966. The buildings were not occupied after September of 1966. They were purchased in May of 1967 by the appellant after he had applied for and been issued a building permit for each building. In November of 1967, the Madison building inspection department condemned the buildings and ordered a change of use or razing of the buildings within 30 days. The property owner appealed to the Madison Zoning Board of Appeals. The Zoning BOA voted to uphold the decision to discontinue the nonconforming use of the properties. The property owner sought review of the Zoning BOA decision.

Holding/Analysis: **The Supreme Court held that the former doctrine that mere cessation of a nonconforming use did not destroy the right to continue it, or prevent its resumption, was rejected by the State Legislature when it enacted s. 62.23 (7)(h), Stats., which provides that if a nonconforming use is discontinued for a period of 12 months, any future use of the building and premises shall conform to the ordinance.** The Court quoted with approval the following analysis in the New York case of *Franmor Realty Corp. v. Le Boeuf*, 201 Misc. 220, 104 N.Y. Supp. 2d 247 (1951):

_____ ". . . it must be borne in mind that the policy of the law is the gradual elimination of nonconforming uses and, accordingly, ordinances should not be given an interpretation which would permit an indefinite continuation of the nonconforming use. (8 McQuillin on Municipal Corporations [3d ed.], sec. 25.189 and cases cited.)"

The Court also stated: "We have spoken approvingly of the general principle: '**The spirit of zoning is to restrict rather than increase a nonconforming use and to eliminate such uses as speedily as possible.**'" (citing 2 Rathkopf, *Law of Zoning and Planning* (1956 ed.), ch. 62, p. 75; quoted with approval in *State ex rel. Covenant Harbor Bible Camp v. Steinke* (1959), 7 Wis. 2d 275, 283, 96 N.W.2d 356.) *State ex rel. Peterson*, 42 Wis. 2d 284, 291.

Town of Yorkville v. Fonk, 3 Wis. 2d 371, 88 N.W.2d 319 (1958).

Facts: A trailer camp had begun improvements to expand trailer sites prior to enactment of an ordinance, which established a vested right in completing the expansion. However, the camp was not permitted to relocate the planned expansion to land purchased after the ordinance was adopted.

Holding/Analysis: Nonconforming uses are closely watched and are not to be enlarged in derogation of the general scheme of the ordinance. Thus, **the right to nonconforming use is not ambulatory.**

(Note: For a summary of other issues discussed in the *Town of Yorkville* case, see also “Right to a Nonconforming Use Can Be Lost” in this section.)

Right to a Nonconforming Use Can Be Lost

State ex rel. Brill v. Mortenson, 6 Wis. 2d 325, 94 N.W.2d 691 (1959).

Facts: A nonconforming use was abandoned for a period of twelve months.

Holding/Analysis: **The Supreme Court held that nonconforming uses are closely limited and not to be enlarged in derogation of the general scheme of the zoning ordinance. The protection of a legal nonconforming use is extended only to the particular lawful use at the time the ordinance takes effect (or at most a closely similar one) and does not extend to protecting other nonconforming uses.** In this case, the original use was woodworking, which is very different from the proposed use for meat processing and distributing. The right to continue such use may be lost by such acts or omissions as moving a structure to a different though nearby location, by failing to appeal the administrator's denial of permit to continue prior use, or by abandonment. (This case is also cited for the proposition that when a definite time period for abandonment is established by ordinance, a showing of intent to abandon is not required.)

See also *State ex rel. Peterson v. Burt* under “Discontinuance/Abandonment,” *Town of Yorkville v. Fonk* under “Policy Against Expansion of Nonconforming Uses,” and *Jefferson County v. Timmel* under “Ordinance Prohibiting Expansion Upheld” in this section.

Village of Elm Grove v. T.V. John & Son, 173 Wis. 2d 170, 496 N.W.2d 167 (1992).

Facts: A nonconforming shed for storing construction materials located in a floodplain was declared a public nuisance and ordered removed pursuant to the 50% rule since the assessed value of the shed was zero. The Village sued to require removal of the shed and to impose forfeitures. In a motion for reconsideration after the circuit court ruled in favor of the Village, the owner of the shed, T.V. John & Sons, argued that, under the *Covenant Harbor* case, the Court should have applied the 50% rule to the entire nonconforming use, a general contracting business, operated out of a masonry building on the same property.

Holding/Analysis: **The Supreme Court held that the *Covenant Harbor* exception** (that, in applying the 50% rule in the *Covenant Harbor* situation, the value of all buildings that compose a nonconforming use rather than just the one destroyed should be looked at when a building housing a nonconforming use is damaged) **is not applicable in all cases where the 50% rule applies and was not raised in a timely fashion in this case. The Court also states that “. . . T.V. John argues that the village building inspector's order to raze and remove the building under sec. 66.05 (3), Stats., [now numbered s. 66.0413 (1)(h), Stats.] was unreasonable. We cannot agree.”** *Village of Elm Grove*, 173 Wis. 2d 170 at 181. The Court points out that in *Posnanski v. City of West Allis*, 61 Wis. 2d 461, 468-69, 213 N.W.2d 51, 54 (1973), the Court held “that '[o]nly if a property owner can show that the legislature's formula operates arbitrarily in the individual case can a court, after due consideration of the legislature's declared public policy of ridding the state of old and dilapidated buildings, make a finding that a reconstruction in excess of the 50 percent limit be allowed.' That court went on to say that '[o]nly if it can clearly be said that the operation of the legislative rule is without any rational basis in the individual case may a court find that the presumption is not applicable.’ *Id.* at 469, 213 N.W.2d at 54.” *Village of Elm Grove*, 173 Wis. 2d 170 at 182.

Village of Menomonee Falls v. Pruess, 225 Wis. 2d 746, 593 N.W.2d 496 (Ct. App. 1999).

Facts: For a summary of the facts and other issues decided in this case, see “Expansion That Changes a Nonconforming Use” in this section.

Holding/Analysis: As a matter of law, when an owner of a nonconforming use modifies that use, the municipality is entitled to terminate the entire nonconforming use.

Waukesha County v. Pewaukee Marina, Inc., 187 Wis. 2d 18, 522 N.W.2d 536 (Ct. App. 1994).

Facts: Seitz expanded his marina from a docking, fuel and bait facility to include a retail store, with sale of new boats, boat lifts and piers, and a place for lounging and entertainment.

Holding/Analysis: **The Court of Appeals found Seitz's expansion to be invalid, distinguishing its holding in the earlier Seitz case. A county's authority to regulate a nonconforming use includes the power to limit the extension or expansion of the nonconforming use if the result is a change in use.** Nonconforming uses are an anomaly; they are suspect and therefore circumscribed. If the owner of a nonconforming use expands or enlarges the use, it is the owner's burden to prove that the nonconforming use is still valid. The violation of the nonconforming use by expansion or enlargement which changes the use invalidates the legal nonconforming use as well as the illegal change.

(**Note:** For a summary of other issues decided in the *Pewaukee Marina* case, see also “Expansion That Changes a Nonconforming Use” in this section.)

(**Note:** This case involves the same property which was the subject of the court of appeals' decision in *Waukesha County v. Seitz*, 140 Wis. 2d 111 (Ct. App. 1987) which is summarized under “Some Growth Permitted” in this section.)

Some Growth and Modernization Permitted

Lessard v. Burnett County Board of Adjustment, 2002 WI App 186, 256 Wis. 2d 821, 647 N.W.2d 831.

Facts: For a summary of the facts and other issues decided in this case, see “Discontinuance/Abandonment,” “Establishing a Legal Nonconforming Use,” “Expansion That Changes a Nonconforming Use,” and “Policy Against Expansion of Nonconforming Uses” in this section.

Holding/Analysis: **The Court of Appeals held that the Lessards’ plans to eliminate cabins in their campground and expand the number of RV sites to forty-four was not a mere increase in use of their nonconforming campground. The Court held that it was “an identifiable change and extension of the previous use for which it had been licensed.”** *Lessard*, 2002 WI App 186, ¶ 24 (emphasis added). “. . . the Lessards correctly argue that mere increases in use due to change in volume or frequency cannot be regulated, citing *Pewaukee Marina*. Here, however, the board was not attempting to regulate mere increases in the use of the twenty-one sites due to a change in volume or frequency. Rather, the board issued the conditional use permit to regulate the expansion from twenty-one sites to forty-four sites.” *Lessard*, 2002 WI App 186, ¶ 23.

“While a mere increase in the volume, intensity or frequency of a nonconforming use is not sufficient to invalidate it, if the increase in volume, intensity or frequency of use is coupled with some element of identifiable change or extension, the enlargement will invalidate a legal nonconforming use. *Seitz*, 140 Wis. 2d at 117.⁵ The Lessards' proposed elimination of cabins and the expansion from twenty-one to forty-four RV sites was an identifiable change and extension of the previous use for which it had been licensed. Consequently, the board could properly issue a conditional use permit to regulate the change.” *Lessard*, 2002 WI App 186, ¶ 24.

⁵ Arguably, *Waukesha County v. Seitz*, 140 Wis. 2d 111, 409 N.W.2d 403 (Ct. App. 1987), could be read as authorizing an expanded nonconforming use. See *Waukesha County v. Pewaukee County, Inc.*, 187 Wis. 2d 18, 20, 522 N.W.2d 536 (Ct. App. 1994) (“Extension of Seitz's marina pier was simply an improvement of a legal nonconforming use to accommodate increased boater traffic; it did

not change the use.’). A close reading of *Seitz* reveals, however, that it did not directly address the issue whether a physical extension or physical enlargement of a nonconforming use invalidates it. *Seitz* states: ‘The expansion of a pier ... may ... serve to constitute an illegal expansion of a nonconforming use.’ *Seitz*, 140 Wis. 2d at 119. *Seitz* noted that the issue is expressly controlled by statute and ordinance, ‘neither of which was alleged or proven in this case.’ *Id.* *Seitz* also noted that the ‘record is devoid of any allegation or evidence indicating that Seitz’s pier expansion has somehow violated these legislative markers.’ *Id.* at 121.” *Lessard*, 2002 WI App 186, footnote 5 (emphasis added).

Racine County v. Cape, 2002 WI App 19, 250 Wis. 2d 44, 639 N.W.2d 782.

Facts: James Cape and Sons ran a concrete crushing and recycling operation (as part of its road and utility construction business) which was a legal nonconforming use. They added a new piece of crushing equipment to use in their concrete recycling operation which broke concrete into gravel-sized pieces. After neighbors complained of the noise generated by the crusher, the County cited Cape for a zoning violation. Cape petitioned the County to rezone a portion of its property to allow concrete crushing as a permitted use. The County denied the petition and filed suit against Cape, seeking a court order prohibiting all of Cape’s concrete crushing and stockpiling activities. The County argued that the crusher that Cape had acquired was a new use because it produced gravel which was a new product that Cape could not have made previously using its old methods of breaking down concrete. The County also argued that the crusher was not merely replacement or modernization of the old methods used to crush concrete because of Cape’s admission that it would continue to use the old methods as well.

Holding/Analysis: **The Court of Appeals reversed the circuit court’s denial of Cape’s summary judgment motion and held that, although the crusher allowed Cape to expand the frequency, intensity and volume of its gravel crushing operations, the change in the method of breaking down the concrete was not an identifiable change in use.**

"We disagree with the County’s argument that an identifiable change has occurred because the crusher produces gravel which is a new product in the stream of commerce. . . .

None of the affidavits the County offers . . . demonstrate that the gravel is a product that Cape puts into the stream of commerce. The gravel is simply produced and recycled into Cape’s construction projects as its recycled materials always have been. We cannot conclude, therefore, that Cape’s production of gravel for its own use is a change in the type of services offered or products sold. If the facts demonstrated that Cape had purchased concrete from other sources, broken it down into gravel and then sold it to outside customers, then we might conclude that an identifiable change in use had occurred." *Racine County*, 2002 WI App 19, ¶¶ 11-12.

". . . We firmly established in *Seitz I* that Wisconsin law protects expansion of a legal nonconforming use so long as the essential character of the use is not identifiably changed. *Seitz I*, 140 Wis. 2d at 121.

Consistent with *Seitz I*, we now conclude that a change in the method or quantity of production of a nonconforming use is not an entirely new use when the original character of the use remains the same. This holding allows the operator of a nonconforming use to incorporate modern technology into his or her business without fear of losing that business." *Racine County*, 2002 WI App 19, ¶ 14.

"Having concluded in this particular case that a change in the method of production is not an identifiable change in use, we also reject the County’s argument that continuing use of the frost ball by Cape invalidates the nonconforming use. As the facts in this case demonstrate, the older methods were not entirely obsolete; they were simply time consuming and costly for purposes of producing a finer product. Use of the frost ball or hydraulic hammer in tandem with the crusher allows Cape to recycle its used materials more efficiently." *Racine County*, 2002 WI App 19, ¶ 15.

"Finally, we recognize there may be circumstances where a more modern instrumentality would so drastically alter the nonconforming use as to render it a new and different use under the zoning ordinance. We are not faced with such circumstances in this instance." *Racine County*, 2002 WI App

Waukesha County v. Seitz, 140 Wis. 2d 111, 409 N.W.2d 403 (Ct. App. 1987).

Facts: Mr. Seitz purchased the “Miller Brothers Resort” on Pewaukee Lake in 1969. At that time, the resort provided cottage rentals, boat livery, fuel and bait, with minor motor repair services at the resort's marina. During the seventeen years following the adoption of the Waukesha County Shoreland and Floodplain Protection Ordinance in 1970 (when the resort became a nonconforming use), the recreational activity on Pewaukee Lake increased dramatically. Seitz expanded his dry-docking facility from three to five boats in 1969 to fifty-four boats in 1987. In 1980, Seitz extended the length of his pier from 80 feet to 120 feet. In 1981, he extended the pier to a length of 192 feet. In 1985, Seitz changed the name of the business to “Pewaukee Marina.” Waukesha County filed a complaint alleging that Jack Seitz was illegally operating a marina and boat livery, seeking forfeitures and an order directing that he cease the activity. The circuit court dismissed the county’s complaint.

Holding/Analysis: **The Court of Appeals concluded that “the evidence supports the trial court’s rulings that Seitz’s use constituted a valid nonconforming use and that Seitz’s subsequent use of the property did not constitute an illegal expansion or enlargement of a nonconforming use.”**

Seitz, 140 Wis. 2d 111 at 113 (emphasis added). “The county does not dispute the trial court’s findings that Seitz engaged in boat rentals and storage and fuel and bait sales in 1970. Rather, the county argues that these uses were merely incidental or accessory to the principal use of cottage rentals and, as a result, Seitz’s ‘marina activities’ did not rise to the level of a ‘vest interest.’” *Seitz*, 140 Wis. 2d 111 at 115. “Nonetheless, we conclude that the trial court correctly held that Seitz’s pre-ordinance activities gave him a vested interest in their continuance. Although these activities produced lesser revenues than those generated by Seitz’s cottage rentals, this alone is not sufficient to disqualify the use from a vested rights status. Such ‘piecemealing’ of Seitz’s activities is unrealistic in that it overlooks the true nature of the services he was providing.” *Seitz*, 140 Wis. 2d 111 at 116. “Next, the county argues that Seitz’s development of his pier facilities and enlargement of his dry-docking business constituted an illegal expansion of a nonconforming use. If an increase in volume, intensity or frequency of use is coupled with some element of identifiable change or extension, the enlargement will invalidate a legal nonconforming use. See 1 R. Anderson, *American Law of Zoning* 3d § 6.50 (1986). However, a mere increase in the volume, intensity or frequency of a nonconforming use is not sufficient to invalidate it. *Id.*” *Seitz*, 140 Wis. 2d 111 at 117-118. “Structural repairs or alterations up to fifty percent of the structure’s fair market value are permitted by ordinance. . . Section 59.97 (10)(a), Stats., [now numbered s. 59.69 (10)(a), Stats.] has a similar repair or alteration marker. The policy of these restrictions is to ‘encourage at least some improvement and modernization of nonconforming buildings at the expense of extending the life expectancy of nonconforming uses.’ 1 R. Anderson, *supra*, § 6.56, at 617. The record is devoid of any allegation or evidence indicating that Seitz’s pier expansion has somehow violated these legislative markers.” *Seitz*, 140 Wis. 2d 111 at 120-121. “We conclude that a violation of the statute or ordinance expressly regulating the alteration or repair of nonconforming use structures is required when a zoning authority claims that a structural change has resulted in a legal nonconforming use being impermissibly expanded. No such violation was alleged or proven in this case.” *Seitz*, 140 Wis. 2d 111 at 121. “Consequently, we are left with a situation where there has been an increase in the volume of Seitz’s marine activities and no proof of structural alternations or repairs in violation of any statute or ordinance. The increase in the volume and intensity of Seitz’s use is attributable to nothing more than the increased recreational use of Pewaukee Lake and Seitz’s response thereto by conducting his pre-ordinance activities on a larger scale. No identifiable change or extension in Seitz’s use has been established.” *Seitz*, 140 Wis. 2d 111 at 121.

invalidated the legal nonconforming use status. See *Waukesha County v. Pewaukee Marina, Inc.*, (a 1994 Court of Appeals decision involving the same property) under “Right to a Nonconforming Use Can Be Lost” in this section.)

Timing

Chrome Plating Co. v. City of Milwaukee, 246 Wis. 526, 17 N.W.2d 705 (1945).

Facts: A number of shops were legally erected 13 years prior to enactment of a zoning ordinance.

Holding: Where the language of the ordinance provides that nonconforming uses may be continued, structures legally established many years before the ordinance was enacted could not be punished later.

21 OPEN MEETING LAW - ZONING CASES

Alleged Violations – Actions in the Name of the State

Fabyan v. Achtenhagen, 2002 WI App 214, 257 Wis. 2d 310, 652 N.W.2d 649.

Facts: August Fabyan applied for a variance from a town of Delafield zoning ordinance. The town board of appeals held a public hearing on his variance request on February 26, 1998. On March 3, 1998, the board met again, adjourned into a closed session, reconvened into an open session and then voted to deny Fabyan's request. Fabyan filed a complaint with the circuit court alleging that the board had met to debate his request for a zoning variance in closed session in violation of the open meeting laws, and that the Waukesha County district attorney's office had failed to prosecute the matter within 20 days after receipt of his complaint. The circuit court granted the board's motion for summary judgment, and held that there was no violation of the open meetings law at the March 3, 1998 hearing or in the preparation of the findings of fact and conclusions of law in the case. Fabyan appealed.

Holding/Analysis: The Court of Appeals dismissed Fabyan's appeal because he had failed to bring the action on behalf of the State pursuant to Wis. Stat. § 19.97. Fabyan argued that his failure to title the action "State ex rel. Fabyan" was not fatal, and that he should be allowed to amend his complaint because pleading statutes should be liberally construed, and he cited several general pleading statutes to support his arguments. However, **the Court held that Fabyan's failure to bring the action on behalf of the State was fatal and deprived the court of competency to proceed.** "Here, the legislature has specifically dictated what a plaintiff must do to initiate a cause of action. Fabyan did not comply with this mandate. The trial court lacked the competence to proceed with this case because the clear mandates of the statute were not followed." *Fabyan*, 2002 WI App 214, ¶ 8. The Court also held that: "Where a general statute is at odds with a more specific statute, the more specific statute applies." (citation omitted) *Fabyan*, 2002 WI App 214, ¶ 10.

Closed Sessions

State ex rel. Hodge v. Town of Turtle Lake, 180 Wis. 2d 62, 508 N.W.2d 603 (1993).

Facts: Hodge petitioned the town board of supervisors for a permit to store junked automobiles within 500 feet of the centerline of a town street. The board initially denied the petition, and Hodge filed suit in circuit court. The board called a meeting to reconsider the permit request and deliberated in closed session. Hodge claimed the board's closed deliberations violated the Open Meeting Law. The board claimed its actions were authorized under the Open Meeting Law exemption which allows closed deliberations concerning a case which is the subject of any judicial or quasi-judicial trial or hearing.

Holding/Analysis: **The Supreme Court held that the board's closed deliberations were not about a "case" within the meaning of the exemption, therefore, the board violated the Open Meeting Law (ss. 19.81 to 19.98, Stats).** The word "case" contemplates a controversy between or among parties adverse to one another and a proceeding to redress wrongs or enforce rights. However, the board meeting concerned the mere application and granting of a permit. The board meeting resembled a judicial proceeding only because the board was making a decision impacting a particular individual, but this alone was insufficient to conclude the matter was a "case" within the Open Meeting Law exemption.

Triggering the Open Meeting Law

State ex rel. Newspapers Inc. v. Showers, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).

Facts: Four commissioners of the eleven-member Milwaukee Metropolitan Sewerage District held a closed meeting to discuss the operating and capital budget.

Holding/Analysis: **The Supreme Court found the four commissioners to be in violation of the Open Meeting Law.** Whenever members of a governmental body meet to engage in government business, be it discussion, decision or information gathering, the Open Meeting Law applies if the number of members present are sufficient to determine the parent body's course of action regarding the proposal discussed at the meeting. Although four of the eleven members did not constitute a majority, they did have the power to determine the parent body's course of action by voting together, so the Open Meeting Law applied. The Open Meeting Law is triggered by two criteria: first, there must be a purpose to engage in governmental business; and second, the number of members present must be sufficient to determine the parent body's course of action regarding the proposal discussed. The burden of proving that a meeting of this nature occurred involving less than one-half of the total members rests with the party asserting the violation.

**22 ORDINANCE INTERPRETATION..... SEE ALSO APPEALS TO BOAs;
CONSERVANCY DISTRICTS; NONCONFORMING USES AND STRUCTURES; PUBLIC
HEARING NOTICES; and VARIANCES**

County Ordinances Strictly Construed

Hansman v. Oneida County, 123 Wis. 2d 511, 366 N.W.2d 901 (Ct. App. 1985).

Facts: Hansman obtained a zoning permit to place a modular home on his property. The term "modular home" was not defined in the Oneida County Zoning and Shorelands Protection Ordinance. The structure that was placed on Hansman's property was brought there on its own structural steel undercarriage. Once the structure was on the property, the undercarriage and trailer hitch were removed and the structure was placed on a foundation of cement blocks. Hansman argued that his structure was a "building" as that term was defined in the ordinance, and was not a "mobile home." "Mobile homes" were prohibited in the Town of Minocqua where the Hansman property was located. The ordinance defined "mobile home" to mean "any vehicle, house, car, camp car, bus, truck, automobile, or any portable or mobile vehicle on wheels which either is or was originally designed to be either self-propelled or propelled by any other means and which is used or was designed to be used for residential, living or sleeping purposes." The County Board of Adjustment decided that Hansman's structure was a "mobile home." Hansman appealed to the circuit court, and then to the court of appeals after the circuit court affirmed the Board's decision.

Holding/Analysis: **The Court of Appeals concluded that Hansman's home was a "building" and not a "mobile home," and reversed the trial court's order.**

"Public policy favors the free and unrestricted use of property. *Crowley v. Knapp*, 94 Wis. 2d 421, 434, 288 N.W.2d 815, 822 (1980). Accordingly, **restrictions contained in a zoning ordinance must be strictly construed.** *Id*; *Missionaries*, 267 Wis. at 614, 66 N.W.2d at 630. **A provision of a zoning ordinance, which operates in derogation of the free use of property, must be in clear, unambiguous, and peremptory terms.** *Cohen v. Dane County Board of Adjustment*, 74 Wis. 2d 87, 91, 246 N.W.2d 112, 114 (1976)." *Hansman*, 123 Wis. 2d 511 at 514.

"Cases occasionally state that zoning ordinances are to be liberally construed in favor of the municipality. *State ex rel. B'nai B'rith Foundation v. Walworth County Board of Adjustment*, 59 Wis. 2d 296, 304, 208 N.W.2d 113, 117 (1973). The source of this rule, however, is sec. 62.23 (7), Stats. *Hearney v. City of Oshkosh*, 47 Wis. 2d 303, 307, 177 N.W.2d 74, 76 (1970). *B'nai B'rith* does not stand for the liberal construction of terms in a county zoning ordinance enacted under sec. 59.97, Stats. *Cohen*, 74 Wis. 2d at 91, 246 N.W.2d at 114. **Unless the structure is unambiguously a 'mobile home' under the county zoning ordinance, use of the structure is not prohibited.**" *Hansman*, 123 Wis. 2d 511 at 514-515.

" . . . The county argues that . . . [there is] a two-part test to determine whether a 'portable or mobile vehicle on wheels' is a 'mobile home.' The structure must be designed to be mobile and must be intended for residential, living, or sleeping purposes. . . .

Although the county's test is correct, the county fails to suggest any meaning for the additional requirement that the structure first be a 'portable or mobile vehicle on wheels.' Strictly construing the ordinance, we conclude that the county intended to prohibit only those vehicles that are transitory and lack the permanency conducive to well-ordered community development. . . .

Hansman's structure is not a portable or mobile vehicle on wheels. Hansman has acted to remove the structure from the scope of the ordinance. The structure is no longer portable or mobile, but is affixed to a foundation on Hansman's property and is connected to various utilities. Nor is the structure 'on wheels.' The trial court noted that, at Hansman's direction, the hitch, wheels and axle were cut from the structure." *Hansman*, 123 Wis. 2d 511 at 515-516.

Weber v. Town of Saukville, 209 Wis. 2d 214, 562 N.W.2d 412 (1997).

Facts: For a summary of the facts of the case and other issues there were decided in this case, see "Public Hearing Notices" in Section 20.

Holding/Analysis: The Supreme Court held that conditional use permits for blasting and crushing were authorized under the Town's zoning ordinance (since the Court considered blasting and crushing to be an integral part of a mineral extraction operation), but the Court concluded that the permit issued in this case was invalid because the Town failed to satisfy the Town's zoning ordinance notice provision, and because the application for the permit was incomplete at the time that notice was given of the last public hearing.

In its decision, the Court of Appeals stated:

"The construction of an ordinance under the facts is a question of law. An appellate court must decide questions of law independently without deference to the trial court. Although the board's interpretation may be entitled to some consideration, we are not bound by its characterization." (citations omitted) *Weber*, 197 Wis. 2d 830 at 836.

"The primary source of statutory construction is the language itself. If the language is clear and unambiguous, the court is precluded from engaging in statutory construction. When there is no ambiguity, the court must afford statutory language its ordinary and accepted meaning." (citations omitted) *Weber*, 197 Wis. 2d 830 at 836-837.

"The test of ambiguity is whether 'well-informed persons *could have* become confused.' *DOR v. Nagle-Hart, Inc.*, 70 Wis. 2d 224, 227, 234 N.W.2d 350, 352 (1975) (quoted source omitted). While there may be disagreement between the parties as to the meaning of a statute, this is not controlling. Nor are we constrained by a long-standing administrative interpretation or construction if the language of the statute can be clearly understood." *Weber*, 197 Wis. 2d 830 at 837 (emphasis in original) (two additional citations to *DOR v. Nagle-Hart, Inc.* omitted).

"If words that are used in a statute are not specifically defined, they should be accorded their commonly accepted meaning. There is a presumption favoring the common meaning. This meaning may be established by reference to a recognized dictionary." (citations omitted) *Weber*, 197 Wis. 2d 830 at 837-838.

23 ORDINARY HIGH WATER MARK

Case Law Definition

Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914).

Facts: Husting took his boat into navigable water to shoot ducks, and was charged with trespass because the Shooting Club alleged that it had leased the land abutting the water, the bed of the river, and the water where Husting was hunting, and had exclusive hunting privileges there.

Holding/Analysis: The Supreme Court held that “Navigable waters are public waters and as such they should inure to the benefit of the public. They should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation.” *Diana Shooting Club*, 156 Wis. 261 at 271. “Hunting on navigable waters is lawful when it is confined strictly to such waters while they in a navigable stage, and between the boundaries of ordinary high-water marks. When so confined it is immaterial what the character of the stream or water is. It may be deep or shallow, clear or covered with aquatic vegetation.” *Diana Shooting Club*, 156 Wis. 261 at 272.

The Supreme Court defined ordinary high water mark to mean “the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark whether by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.” *Diana Shooting Club*, 156 Wis. 261 at 272 (emphasis added).

PERSONAL JURISDICTION SEE ENFORCEMENT, "Certiorari Court Does Not Have Continuing Jurisdiction"

24 PUBLIC HEARING NOTICES

Weber v. Town of Saukville, 209 Wis. 2d 214, 562 N.W.2d 412 (1997).

Facts: A construction company, Payne & Dolan, submitted a conditional use application to the Town of Saukville, seeking a permit to use blasting and crushing as part of a limestone quarrying operation. After receiving the application, the Town mailed and published a notice that erroneously stated that the matter would be addressed at a public hearing on Tuesday, February 10, 1992. The actual date of the public hearing was Tuesday, February 11, 1992. The Town Clerk mailed written notice of the public hearing to 27 property owners who resided within one-half mile of the site of the proposed quarry. However, 9 property owners who owned property within one-half mile of the site were not sent notices because their residences were not within one-half mile of the site, even though the Town ordinance provides that “all owners of the property within one-half mile of the proposed mineral extraction operation” are entitled to mailed or hand-delivered notice of the required public hearing. The Town Clerk was apparently confused by the fact that the Town ordinance also provided that “[n]o mineral extraction operation shall be permitted if 30 or more families reside within a half mile of the proposed site.” The Town Clerk also provided defective notice of the public hearing by publishing notice twice in one week, rather than once a week for two consecutive weeks (the Town Ordinance required publication of “a Class 2 notice, pursuant to the requirements of Chapter 985 of the Wisconsin Statutes.”). The Town Board granted a conditional use permit to Payne & Dolan, and the plaintiffs in this case appealed. The Circuit Court for Ozaukee County and the Court of Appeals held that the Town’s zoning ordinance did not authorize the issuance of a conditional use permit for blasting and crushing in a quarry operation. The defendant, Payne & Dolan, sought review before the Supreme Court.

Holding/Analysis: **The Supreme Court held that conditional use permits for blasting and crushing were authorized under the Town’s zoning ordinance (since the Court considered blasting and crushing to be an integral part of a mineral extraction operation), but the Court concluded that the permit issued in this case was invalid because the Town failed to satisfy the Town’s zoning ordinance notice provision, and because the application for the permit was incomplete at the time that notice was given of the last public hearing.** The Court reasoned that since the date of the public hearing was inaccurate on all of the notices that were mailed and published and since a “Class 2 notice requires newspaper publication of notice once each week for two consecutive weeks,” the Town had clearly provided deficient notice of the public hearing. However, the conditional use permit was not automatically invalid because of these notice defects. The Town ordinance required “substantial compliance” with its notice provisions. The Court stated that: “Substantial compliance with a statutory or ordinance notice requirement exists when the defective notice given nevertheless fulfills the objective of the provision and the record shows that no one was prejudiced by the defect. See *Radtke v. City of Milwaukee*, 116 Wis. 2d 550, 555-56, 342 N.W.2d 435 (1984); *Joint School District v. Joint County School Comm.*, 26 Wis. 2d 580, 585, 133 N.W.2d 317 (1965).” *Weber*, 209 Wis. 2d 214 at 233. The Court found that **the erroneous date in the notices and failure to published in a newspaper for two consecutive weeks were technical errors of little consequence in this case** (primarily because the Town Clerk stayed at the Town Hall on the evening of Monday, February 10, 1992, in order to advise anyone who appeared on that date that the hearing would be held the following day; and no one appeared). The Supreme Court had held in *Village of Cobb v. Public Service Commission*, 12 Wis. 2d 441, 107 N.W.2d 595 (1961) that “plaintiffs who received actual notice of a hearing and who were not prejudiced by other’s lack of notice could not object to a commission decision . . . [where others were not given proper notice].” *Weber*, 209 Wis. 2d 214 at 235. However, in this case, the Court held that “Payne & Dolan does not meet its burden of disproving prejudice when it notes that the plaintiffs in this action attended the public hearing. **To discharge its burden of proof, Payne & Dolan must show that notice to the nine property owners**

would not have resulted in a Board decision more beneficial to the plaintiffs. Because Payne & Dolan has placed no such evidence in the record, it has failed to meet its burden of proving lack of prejudice.” *Weber*, 209 Wis. 2d 214 at 236 (emphasis added).

Step Now Citizens v. Town of Utica PZC, 2003 WI App 109, 264 Wis. 2d 662, 663 N.W.2d 833.

Facts: Algoma Ethanol, LLC proposed to build a \$36 million plant for the production of ethanol on 24 acres in a predominantly rural, agricultural area in the Town of Utica. After holding three public informational meetings, the Town Board adopted an ordinance amendment to rezone the property from agricultural to industrial to allow the construction of the ethanol plant even though there was disagreement as to whether the rezoning was consistent with the Town Land Use Plan. The ordinance amendment contained the provision that the property would revert back to the agricultural district in the event that the approvals, permits and favorable test results are not obtained for the ethanol plant within 18 months. The Winnebago County Board also voted to approve of the rezoning. A citizen’s group, Step Now, filed a complaint in circuit court seeking a declaratory judgment that the rezoning constituted illegal spot zoning. The circuit court agreed with the plaintiffs, finding that the rezoning was unreasonable and unconstitutional because the area rezoned was too small; the creation of jobs and opportunities for citizens afforded by the plant was too little; the distance from an industrial area designated in the Town’s Land Use Plan was too great; and the distance from a private golf course and several residences was too little. The Town of Utica and Winnebago County appealed. Step Now filed a cross-appeal, arguing among other things that the Town violated its own zoning ordinance when it failed to properly publish a public hearing notice three times and thus the rezoning was null and void (even though statutory notice requirements, requiring two publications, were complied with).

Holding/Analysis: **The Court of Appeals reversed the circuit court’s decision**, holding that the rezoning did not constitute illegal spot zoning for two reasons: First, the court refused to substitute its opinion for the opinion of the zoning authority in what was a matter of legislative discretion, even though the rezoning was arguably not consistent with the Town’s Land Use Plan. Second, although the court found that the rezoning did fall within the definition of spot zoning, it did not find that it was illegal. The court disagreed with Step Now’s argument that the rezoning constituted illegal spot zoning because it was inconsistent with the Town’s Land Use Plan. **The Court also disagreed with Step Now’s argument that the Town’s failure to publish three times a notice of the public hearing to be held before the planning and zoning committee, as required by the Town ordinance, nullified the rezoning.** “The purpose of notice requirements is to provide the public with a right to appear and voice objections to the proposed ordinance. Notice requirements are generally intended to provide an accurate statement of the time, place and purpose of a public hearing to those entitled to such notice so that they may attend the hearing and express their views. Substantial compliance with statutory or ordinance requirements exists if the defective notice given fulfills the objective of the provisions and the record demonstrates that no one was prejudiced by the defect.” (citations omitted) *Step Now Citizens*, 2003 WI App 109, ¶ 58. **“We conclude that the failure to comply with the Town’s notice requirements, when all statutory notice requirements were met, did not defeat the purpose of the ordinance’s notice provision.”** *Step Now Citizens*, 2003 WI App 109, ¶ 59 (emphasis added).

Step Now also argued that the rezoning was invalid because the Town had failed to publish any notice prior to a Town Board public hearing on the rezoning, held eleven days after the planning and zoning committee hearing. The Court held that “Here, a second Wis. Stat. §62.23 (7)(d)2 notice was not required. There was no substantive difference between the proposed zoning amendment before the PZC and the Town. The proposal before the PZC and the before the Town affected the same people in the same manner and a second notice would have provided the same people the opportunity to express the same views. All parties in attendance at the PZC hearing knew it was simply to make a recommendation to the Town Board, which would make the ultimate decision on the proposed

rezoning. The Town Board's agenda and amended agenda for the January 14, 2002 meeting was posted. . . . Step Now does not allege that anyone was prejudiced by the Town's failure to publish notice prior to the Town Board hearing. Section 62.23 (7) 'shall be liberally construed in favor of the city and as minimum requirements adopted for the purposes stated.' Sec. 62.23 (7)(a); see also *Oliveira*, 2001 WI 27 at ¶ 21. Here, compliance with state statute requirements was more than sufficient to satisfy due process concerns." *Step Now Citizens*, 2003 WI App 109, ¶ 63.

Step Now further argued that the rezoning was invalid because the Town failed to provide a properly noticed public hearing after the application for rezoning was substantially amended. However, the Court of Appeals held that the application was not substantially amended. The addition to the proposed zoning amendment was a reverter clause that provided that the zoning would revert back to agricultural if the necessary approvals were not obtained for the ethanol plant. The Court found that: "The reverter clause did not constitute a substantial change requiring additional notice because the fundamental character of the proposal remained unchanged; no new rights were created. The amendment did not affect different landowners nor did it affect the same landowners in a different way. An additional public hearing could have only resulted in repetitive statements by the same parties. Nothing would have been accomplished by requiring another notice and public hearing except delay." (citations omitted) *Step Now Citizens*, 2003 WI App 109, ¶ 67.

[For discussion of holdings related to the issue of the legality of spot zoning, see also "Spot Zoning" in Section 27.]

25 REZONING

Authority to Veto Rezoning Decisions

Buhler v. Racine County, 33 Wis. 2d 137, 146 N.W.2d 403 (1966).

See the summary of *Buhler v. Racine County* under “Spot Zoning” – “Not Illegal Per se” in Section 22.

Schmeling v. Phelps, 212 Wis. 2d 898, 569 N.W.2d 784 (Ct. App. 1997).

See the summary of *Schmeling v. Phelps* under “County Zoning Jurisdiction” in Section 9.

26 SHORELAND ZONING

Purpose of Shoreland Zoning

State v. Kenosha County Bd. of Adjustment, 218 Wis. 2d 396, 577 N.W.2d 813 (1998).

Facts: Janet Huntoon owned a house on a parcel of land abutting Hooker Lake that was built by her grandfather in 1936 (before shoreland zoning was in effect in Kenosha County). The house, used for residential purposes since it was built, sat 78 feet from the ordinary high water mark. The Kenosha County shoreland zoning ordinance required that all structures (other than piers, boathouses, and boat hoists) be set back at least 75 feet from the OHWM. Ms. Huntoon applied for a variance to allow her to build a 14-foot by 23-foot deck between the house and the lake that would be set back only 64 feet from the OHWM. The board determined that Ms. Huntoon would suffer unnecessary hardship if she were denied a variance to build the deck, and granted the variance. The board claimed that one of the reasons it granted Huntoon a variance was because the public interest is served when citizens are allowed a reasonable use of their property that does not cause harm to the public. At the Department of Natural Resources' request, the State initiated a certiorari proceeding in circuit court for review of the board's action. The circuit court upheld the board's decision, and the Court of Appeals affirmed.

Holding/Analysis: The Supreme Court reversed the decision of the Court of Appeals and remanded the case for further proceedings consistent with their opinion. The Supreme Court held that for area variances "when the record before the Board demonstrates that the property owner would have a reasonable use of his or her property without the variance, the purpose of the [shoreland zoning] statute takes precedence [over the burden on the applicant] and the variance request should be denied." *Kenosha County*, 218 Wis. 2d 396 at 414. To begin its analysis of the issues presented in this case, the Supreme Court reviewed the purposes of shoreland zoning:

"Wisconsin has a long history of protecting its water resources, its lakes, rivers, and streams, which depend on wetlands for their proper survival.' *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 382, 548 N.W.2d 528 (1996). To ensure this protection, the legislature has authorized the DNR to develop water conservation standards, and to 'disseminate these general recommended standards and criteria to local municipalities.' *State v. Winnebago County*, 196 Wis. 2d 836, 847, 540 N.W.2d 6 (Ct. App. 1995). The purpose of state shoreland zoning standards is to 'further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty.' Wis. Stats. § 144.26 [now numbered § 281.31]; Wis. Adm. Code § NR 115.01 (2). **The basic purpose of a shoreland zoning ordinance 'is to protect navigable waters and the public rights therein from the degradation and deterioration which results from uncontrolled use and development of shorelands.'** *Just v. Marinette County*, 56 Wis. 2d 7, 10, 201 N.W.2d 761 (1972)." *Kenosha County*, 218 Wis. 2d 396 at 406 (emphasis added).

For additional issues decided in this case, see "Unnecessary Hardship" in Section 28.

State of Wisconsin v. Waushara County Board of Adjustment and G. Edwin Howe and Suzanne Howe, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in Section 2, and "Area Variances" in Section 32.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that "**in evaluating whether to grant an area variance to a zoning ordinance, a board of adjustment should focus on the purpose of the zoning law at issue in determining whether an unnecessary hardship exists for the property owner seeking such variance.** . . . 'No reasonable use,' as set forth in *Kenosha County*, is no longer applicable when an area variance is

being considered. Moreover, **while there is a claim [in the Waushara County case] that the variance implicates shoreland zoning concerns, it should be noted that the proposed addition would not bring the Howes' home any closer to Silver Lake.** *Waushara County*, ¶ 35 (emphasis added)

In a dissenting opinion written by Justice Bradley (and join in by Justice Abrahamson), the dissenting justices argued:

“The threshold requirement for granting a variance is that it not be contrary to the public interest. The legislature has long recognized that strict regulation of buildings near shorelands is necessary to safeguard the constitutionally protected interests of the public in the state’s navigable waters. Wis. Const. Art. IX, § 1 (‘Jurisdiction on Rivers and Lakes; Navigable Waters’). *Waushara County*, ¶ 41. (Bradley, J., dissenting)(emphasis added and footnote omitted)

“To aid in the fulfillment of the state’s role as trustee of its navigable waters, the legislature directed the Department of Natural Resources to establish minimum standards for shoreland ordinances. Wis. Stat. § 281.31 (6). The shoreland setback is the centerpiece of those minimum standards. It protects the value and views of the lakeshore property. The setback further serves as a visual and ecological buffer between protected public rights in navigable waters and development in adjacent lands. See Tracy K. Kuczynski, *Wisconsin’s Shoreland Management Program: An Assessment With Implications for Effective Natural Resources Management and Protection*, 1999 Wis. L. Rev. 273, 283-84.” *Waushara County*, ¶ 43. (Bradley, J., dissenting)

27 SPECIAL EXCEPTION/CONDITIONAL USE PERMITS

Decision by a Town Board to Deny a Special Exception Permit May Only be Appealed to the Circuit Court, Not to the Town Board of Adjustment

Town of Hudson v. Hudson Town Board of Adjustment, 158 Wis. 2d 263, 461 N.W.2d 827 (1990).

Facts: J. Transport Corporation of America, Inc. operated a truck service center in Hudson. Transport applied for a special exception permit to construct a second building to expand its business. After the Town Board voted twice to deny the permit, Transport appealed the Town Board's decision to the town board of adjustment (BOA). After a de novo hearing, the BOA overruled the Town Board and granted the permit subject to conditions. The Town Board filed a petition for writ of certiorari with the circuit court. Transport intervened as a defendant. The circuit court concluded that the BOA should have conducted a certiorari-type review of the Town Board's decision, the BOA exceeded its authority by holding a de novo hearing and the Town Board's decision to deny the special exception permit should be upheld.

Holding/Analysis: **The Court of Appeals held that s. 62.23 (7)(e) 1, Stats., allows a town, by ordinance, to authorize the town board to have the exclusive power to consider applications for special exception permits, that there is no statutory authorization for BOA review of a town board's decision on a special exception application, and that, in this case, the Town Board's decision to deny the special exception permit should be affirmed.** Transport argued that the BOA had the final authority to review the Town Board's decision under s. 62.23(7)(e) 8, Stats. However, the Court of Appeals disagreed. The Court stated: "We conclude that the statutes authorize the town board preemptive power to grant special exceptions if the town so chooses by ordinance. We also conclude that the BOA cannot review a town board's actions if such a preemptive ordinance is adopted." *Town of Hudson*, 158 Wis.2d 263 at 268. Transport also argued that since the Town Board had failed to make formal, written findings, and relied on personal knowledge in making its decision, it did not provide a rational basis for the decision. The Court held that the transcribed minutes of the Town Board's meetings adequately set out the rationale. The Court found that: "Based upon Transport's application that stated that there will be additional truck parking, along with the new services of truck maintenance and refueling, it was reasonable for the town board to infer that there would be additional truck traffic in Hudson and that this does not conform to sec. 4.5.1 [of the Town of Hudson Ordinance], which states that special exception permits shall not be 'allowed which would be contrary to the public health, safety or general welfare . . .'" *Town of Hudson*, 158 Wis. 2d 263 at 277.

(**Note:** The Court of Appeal's decision in the *Town of Hudson* case seems inconsistent with the Wisconsin Supreme Court's decision in *League of Women Voters v. Outagamie County*, 113 Wis. 2d 313, 334 N.W.2d 887 (1983) under "Planning and Zoning Committee Decisions May Be Appealed to a County BOA" in this section. Two different statutes are interpreted, s. 62.23(7)(e) 7 and s. 59.694(7)(a), but the wording of the relevant portion of these two statutes is identical.)

Distinguishing Nonconforming Use from Conditional Use (Special Exceptions)

State ex rel. Brooks v. Hartland Sportsman's Club, 192 Wis. 2d 606, 531 N.W.2d 445 (Ct. App. 1995).

Facts: A sportsman's club featuring rifle, shotgun and pistol shooting was established in 1955 with approval from the town on mostly vacant land that was zoned residential. A conditional use permit was issued in 1968, limiting membership and hours of operation. Over time, the club expanded and nearby development led to increasing objections to the noise, and in 1992 the town board modified the conditional use permit to further restrict hours of operation. An area resident commenced a lawsuit in

1991 requesting a temporary injunction to compel the club to comply with the 1968 conditional use permit, and a lawsuit in 1992 to compel compliance with the 1992 conditional use permit. The two actions were consolidated and the Town intervened. The trial court ordered the club to comply with the conditional use permits.

Holding/Analysis: **The Court of Appeals held that the club does not have a legal nonconforming use and has waived its argument that the Town's issuance of the conditional use permit was invalid (the argument was made at least twenty-three years too late).** The Court found that the club had permission to operate under the 1960 zoning code, as a conditional use. Therefore, the club could not claim to have a legal nonconforming use. "A legal nonconforming use is 'a use of land for a purpose *not permitted*' under the zoning ordinance but which was an active and actual use existing prior to the commencement of the zoning ordinance. *Seitz*, 140 Wis. 2d 114-15, 409 N.W.2d at 405 (emphasis added). A conditional use is one which the zoning code allows." *State ex rel. Brooks*, 192 Wis. 2d 606 at 616. Because only the board of zoning appeals had the authority to pass upon conditional uses, the Court found that the town board did not have authority to issue conditional use permits. However, the Court concluded that the club had acquiesced to many terms of the permit and did not appeal the town board decision regarding the terms of the permit. The Court held that "the club's actions invited error, and it thereby waived any right to now, many years after the fact, assert as a defense the invalidity of the conditional use permit." *State ex rel. Brooks*, 192 Wis. 2d 606 at 619. The Court also held that the imposition of the 1992 conditional use permit was a proper exercise of the Town's police power under s. 62.23 (7), Stats. (that applied to the Town because it had adopted village powers).

Distinguishing Variances from Conditional Uses

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

Facts: The Waukesha County Board of Adjustment granted a special exception to the floor area ratio requirement of the County's shoreland zoning ordinance. (Section 3.10(4) 4 of the Waukesha County shoreland zoning ordinance authorized the Board of Adjustment to grant a special exception to the floor area ratio requirement for accessory structures.) A neighbor appealed, arguing that the BOA had actually granted a camouflaged variance without the necessary finding of "unnecessary hardship". The trial court upheld the special exception and the neighbor appealed to the Court of Appeals.

Holding/Analysis: **The Court of Appeals held that the property owners' desire to use the lower portion of their garage for storage was not a prohibited use under the ordinance. The ordinance stated that if a person was proposing to exceed the floor area ratio, they could request a special exception. Therefore, the BOA properly treated the matter as a special exception, not a variance.** "We hold that the owners' request was properly presented as one for a special exception. Since the shoreland ordinance expressly recognizes special exceptions as authorized by § 59.694 (7)(d) [Stats.], we conclude that the Board acted upon a correct theory of law." *Fabyan*, 2001 WI App 162, ¶ 1.

The decision discusses the difference between variances and special exceptions. A special exception involves a use allowed by the zoning ordinance but which is allowed only upon approval by the Board of Adjustment. The court quotes approvingly from Anderson, *American Law of Zoning*:

"The decisive difference between these forms of relief is that a variance is 'authority extended to a property owner to use his property in a manner forbidden by the zoning enactment,' while an exception 'allows him to put his property to a use which enactment expressly permits.'

A variance authorizes a landowner to establish or maintain a use which is prohibited by the zoning regulations. A special permit authorizes a use which is permitted by the zoning regulations, subject to the issuance of such a permit. Thus, a variance results in a deviation from

the literal import of the ordinance; a special permit results in the establishment or maintenance of a use in the location and under the circumstances mandated by the ordinance.” Anderson, *American Law of Zoning*, § 20.03 at 416 and § 21.02 at 695 (4th edition).

Planning and Zoning Committee Decisions May Be Appealed to a County BOA

League of Women Voters v. Outagamie County, 113 Wis. 2d 313, 334 N.W.2d 887 (1983).

Facts: When the League of Women Voters and a group of downtown Appleton businesses opposed the construction of a shopping mall in the Town of Grand Chute, they requested that the public hearing that had been scheduled before the Outagamie County Zoning Committee be conducted as a contested case hearing under ch. 68, Stats. The Outagamie County Zoning Committee, a committee of the County Board, was authorized to decide whether or not to issue conditional use permits to the mall development company. After the County refused to conduct a contested case hearing, the League and the businesses commenced a declaratory judgment action requesting a declaration that ch. 68, Stats., required a contested case hearing.

Holding/Analysis: **The Supreme Court held that: “We cannot conclude that the legislature . . . intended to permit appeals to the board of adjustment only when conditional use permits, or other actions sought by the landowner were denied. . . . An aggrieved person has a right, under the statutes, to appeal to the board of adjustment from the zoning committee’s decision to grant conditional use permits.”** *League of Women Voters*, 113 Wis. 2d 313 at 325-326 (emphasis added). The Supreme Court noted that persons are not entitled to invoke the review procedures of ch. 68 if they are entitled to review under another statute, or if they are not aggrieved by the administrative determination at issue. If the plaintiffs were aggrieved by the action of the zoning committee, they had a right to an administrative appeal to the board of adjustment under s. 59.971 (4)(b), Stats. (now numbered s. 59.692 (4)(b), Stats.) and s. 59.99, Stats. (now numbered s. 55.694). If they were not aggrieved, they are not entitled to review under either s. 59.99 (now numbered s. 55.694), Stats., or ch. 68, Stats. The Supreme Court found that the plaintiffs had no right to a contested case hearing under ch. 68, Stats., and affirmed the dismissal of their complaint.

Scope of the Issuing Board's Authority

Bettendorf v. St. Croix County Board of Adjustment, 224 Wis. 2d 735, 591 N.W.2d 916 (Ct. App. 1999).

Facts: The Bettendorfs operated a trucking business on a portion of the land that they own in the Town of Kinnickinnic, St. Croix County. In December of 1990, the St. Croix County Board of Adjustment approved, without conditions, the Bettendorfs’ application for a conditional use permit for a truck repair shop and transfer point on a portion of their property that was zoned commercial (designated on a certified survey map). The remainder of the Bettendorfs’ land remained zoned agriculture/residential. In 1997, the county zoning office ordered the Bettendorfs to confine the truck repair and transfer point operations to the parcel subject to the conditional use permit and to remove all of the business’s trucks, trailers and other equipment from the property not subject to the conditional use permit. The Bettendorfs did not comply with the order to the zoning office’s satisfaction. The St. Croix BOA then sought to revoke the conditional use permit. After a hearing, the BOA added a condition to the permit by requiring the Bettendorfs to construct a fence around the commercially-zoned land by December 1, 1997. Failure to comply would result in the immediate revocation of the conditional use permit. The Bettendorfs did not construct the fence. Instead, they filed a certiorari review action in St. Croix County Circuit Court. The circuit court affirmed the BOA’s decision.

Holding/Analysis: **The Court of Appeals held that: “Because the board acted outside its authority by adding a condition and subsequently revoking the Bettendorfs’ permit based upon**

an erroneous interpretation of the zoning ordinance, we reverse the judgment and remand with directions to dismiss the enforcement action that is the subject of this appeal.” *Bettendorf*, 224 Wis. 2d 735 at 742 (emphasis added). The Court of Appeals stated that: “The dispute before us is whether the board can add a condition as an alternative to revoking a conditional use permit with no conditions because the Bettendorfs allegedly used their adjoining property.” The St. Croix County Zoning Code provides that special exception permits that have been approved subject to specified conditions can be revoked after a hearing, if the permit conditions are not complied with. The BOA contended that when it accepted the certified survey map identifying the area of the commercial parcel at the time that it approved the permit, it adopted a specified condition: “that the permitted use could not spill over from that boundary.” The Court of Appeals disagreed, and refused to read even “implied conditions” into the permit. The Court of Appeals stated: **“The County has other appropriate remedies in this situation. It can, and recently did, commence an enforcement action in connection with the adjoining parcel. That property is zoned agriculture/residential; commercial activities are not permitted.”** *Bettendorf*, 224 Wis. 2d 735 at 741-742 (emphasis added).

Kraemer & Sons v. Sauk County Board of Adjustment, 183 Wis. 2d 1, 515 N.W.2d 256 (1994).

Holding/Analysis: **The Supreme Court upheld the board's decision to deny a special exception permit to a landowner who wanted to mine property in the Baraboo bluffs which was also part of the Ice Age Trail.** The Supreme Court held that the court of appeals had wrongly interpreted ordinance language to mean that it was the board's responsibility to fashion conditions so that it could grant the permit. **A special exception use is only a permitted use when the standards prescribed in the ordinance are met. The applicant, not the board, has the burden of showing that the permit meets these standards.** Here, the owner indicated that he was willing to convey an easement to a portion of the bluffs to an appropriate organization, but hadn't done so, thus the board did not have enough information in the record to grant the permit on the condition that the easement be conveyed.

Lessard, v. Burnett County Board of Adjustment, 2000 WI App , Wis.2d , N.W.2d .

Facts: For a summary of the facts and other issues decided in this case, see “Discontinuance/Abandonment” in this section.

Holding/Analysis: The Court of Appeal’s decision states that “. . . the Lessards complain that attaching the condition that the six sites within the seventy-five-foot setback be eliminated within five years is arbitrary and unreasonable. We disagree. ‘[T]he spirit of zoning is to restrict a nonconforming use and to eliminate such uses as quickly as possible.’ *Seitz*, 140 Wis. 2d at 116. It is up to the Lessards whether to accept the permit with its conditions. The board's decision to permit the proposed expansion upon the condition that the six sites within the setback be eventually eliminated is reasonably related to the legitimate goal to bring the campground into compliance with the land use ordinance.” (footnote omitted) *Lessard*, 2002 WI App , ¶ 31.

State ex rel. Skelly Oil Co. v. City of Delafield, 58 Wis. 2d 695, 701, 207 N.W.2d 585 (1973).

Facts: The owners of a property that is located on a service road that runs adjacent to and parallel with Interstate Highway I-94 in the city of Delafield, their real estate broker and the Skelly Oil Company commenced this action by filing a petition for a writ of certiorari to challenge the procedures involved in denying Skelly Oil Company’s request for a conditional use permit. Skelly Oil Company had entered into a contract with the property owners to purchase the property subject to the procurement of an appropriate conditional use permit from the city of Delafield that would allow them to construct and operate a service station and restaurant on the property. The Delafield zoning ordinances provided that “no use of a building or premises classified as a conditional use shall be undertaken without the prior approval of the city plan commission.” The city plan commission held a hearing on Skelly’s application for a conditional use permit and voted to deny the request. Skelly appealed the denial to

the common council. (The city ordinances provided that any person aggrieved by any decision of the plan commission could appeal to the Delafield common council.) The common council referred the matter back to the plan commission for further hearing. After another hearing, the plan commission again denied Skelly's application and Skelly again appealed to the common council. The common council affirmed the plan commission's denial. The property owners, their real estate broker and Skelly Oil Company then petitioned the circuit court for a writ of certiorari to challenge the action of the common council. They argued that under s. 62.23 (7)(e), Stats., the city's board of zoning appeals was the proper body to make determinations concerning whether a conditional use permit should be granted, not the common council.

Holding/Analysis: The Supreme Court held that s. 62.23 (7)(e), Stats., vested exclusive authority in the board of zoning appeals to hear applications for conditional use or special exception permits. [Note, however, that after this decision was handed down, the Wisconsin State Legislature amended both chapter 62 and chapter 59 of the Wisconsin Statutes, so that now, there is clear statutory authority for city councils, village boards and county boards and their plan commissions to retain the authority to hear conditional use or special exception permit applications.]

The *Skelly Oil Company* decision continues to be relevant today because, in its analysis of the issues, the Supreme Court defined conditional uses and summarized the reasons for creating conditional uses:

“Conditional uses or as they are sometimes referred to, special exception uses, enjoy acceptance as a valid and successful tool of municipal planning on virtually a universal scale. Conditional uses have been used in zoning ordinances as flexibility devices, which are designed to cope with situations where a particular use, although not inherently inconsistent with the use classification of a particular zone, may well create special problems and hazards if allowed to develop and locate as a matter of right in a particular zone. The Supreme Court of Minnesota in the case of *Zylka v. Crystal* (1969), 283 Minn. 192, 195, 167 N.W.2d 45, most aptly described this flexibility:

‘ . . . By this device, certain uses (e.g., gasoline service stations, electric substations, hospitals, schools, churches, country clubs, and the like) which may be considered essentially desirable to the community, but which should not be authorized generally in a particular zone because of considerations such as current and anticipated traffic congestion, population density, noise, effect on adjoining land values, or other considerations involving public health, safety, or general welfare, may be permitted upon a proposed site depending upon the facts and circumstances of the particular case.’ 16 N.W.2d at page 49.

While a variance authorizes a particular property owner to use his property in a manner which is *prohibited by the ordinance* when not to be able to do so would be a hardship, *State ex rel. Schleck v. Zoning Board of Appeals* (1948), 254 Wis. 42, 35 N.W.2d 312, a conditional use ‘ . . . allows him to put his property to a use which the ordinance expressly permits’ when certain conditions have been met.” *Skelly Oil*, 58 Wis. 2d 695 at 700-701.

The Supreme Court also observed at the end of the *Skelly Oil* decision:

“In making our ruling, we are mindful of the fact that while the retention of this authority by the city plan commission and the common council was in direct derogation of state law, it may well be that such procedure might be better suited to the complicated task of providing for effective city planning.

The merits of having the city plan commission and the common council pass on conditional uses is emphasized in Cutler, *Zoning Law and Practice in Wisconsin*, p.37, sec. 11, where it is stated:

‘In Wisconsin and elsewhere, it is more current usage for flexibility in the legislative provisions of the zoning ordinance to be accomplished by authorizing the planning commission or the elected governing body, rather than the board of zoning appeals, to determine whether a certain proposed use is consistent with the standards established in the ordinance. The reason for this more frequent reliance upon the plan commission or elected body is that they are continuously involved in the process of recommending legislative changes in the zoning ordinance and therefore more apt to be conversant with the “purpose and intent” of the ordinance than the board of zoning appeals whose primary function is the quasi-judicial one of granting variances from the express terms of the ordinance because hardship exists, rather than that such a deviation is explicitly authorized in the ordinance if certain standards are determined to have been met.’ (Emphasis added [by the Supreme Court].)

Regardless of the potential merits of such procedure, this court cannot amend the statute. Consequently, the judgment of the circuit court is reversed and the petitioners should seek their special exceptions from the board of zoning appeals.” *Skelly Oil Company*, 58 Wis. 2d 695 at 703 (emphasis in original).

Weber v. Town of Saukville, 209 Wis. 2d 214, 562 N.W.2d 412 (1997).

Facts: For a summary of the facts and other issues decided in this case, see “Public Hearing Notices.”

Holding/Analysis: The Supreme Court rejected the Court of Appeals narrow interpretation of the kinds of activities that were included as part of a “mineral extraction operation” conditional use. The Supreme Court stated: “We observe initially that **conditional use standards often lack specificity, since their purpose is to ‘confer a degree of flexibility in the land use regulations.’** *Edward Kraemer & Sons v. Sauk County Adjustment Board*, 183 Wis. 2d 1, 14, 515 N.W. 2d 256 (1994); see also *State ex rel. Skelly Oil Co. v. Common Council, City of Delafield*, 58 Wis. 2d 695, 700-01, 207 N.W.2d 585 (1973) (noting that **conditional uses are ‘flexibility devices’**).” *Weber*, 209 Wis. 2d 214 at 225-226 (emphasis added).

The Supreme Court quoted with approval from *Rathkopf’s The Law of Zoning and Planning*:

“[I]f it were possible to find a legislative draftsman capable of performing such a task – of drafting standards to govern the likely as well as all possible contingencies relating to a conditional use – there would be no need to make the use a conditional one. In that case they could be made part of the zoning ordinance proper requiring no exercise of discretion on the part of anyone [I]f the purposes of zoning are to be accomplished, the master zoning restrictions or standards must be definite while **the provisions pertaining to a conditional use . . . must of necessity be broad and permit an exercise of discretion.** 3 Edward H. Ziegler, Jr., *Rathkopf’s The Law of Zoning and Planning* s.41.11, at 49 (4th ed. 1996).” *Weber*, 209 Wis. 2d 214 at 226 (emphasis added).

Sufficiency of Permit Application

Weber v. Town of Saukville, 209 Wis. 2d 214, 562 N.W.2d 412 (1997).

Facts: For a summary of the facts and other issues decided in this case, see “Public Hearing Notices.”

Holding/Analysis: **The Supreme Court held that “unless a zoning ordinance provides to the contrary, a court should measure the sufficiency of a conditional use application at the time that notice of the final public hearing is first given. Such a rule ensures that interested individuals**

will have a meaningful opportunity to express informed opinions at the public hearings. Indeed, a contrary rule would create a damaging incentive for a conditional use permit seeker to withhold all controversial information from its application until during or after the public hearing.” *Weber*, 209 Wis. 2d 214 at 237-238 (emphasis added).

28 SPOT ZONING

Not Illegal Per Se; Must Be in the Public Interest and Consistent with Long-Range Plan

Bubolz v. Dane County, 159 Wis. 2d 284, 464 N.W.2d 67 (Ct. App. 1990).

Facts: Thomas and Linda Junck owned a lot in Horseshoe Bend subdivision in rural Dane County. Their deed contained a restrictive covenant that provided that not more than one single family residence could be constructed on the property. All of the lots in the Horseshoe Bend subdivision were zoned either R-1 (residential) or RH-1 (rural homes). In 1986, the Juncks applied to the town of Verona and to Dane County for a zoning change to LC-1 (limited commercial). Although the rezoning was opposed by a majority of the property owners in Horseshoe Bend, the measure was passed. Twelve of the other property owners in Horseshoe Bend brought suit to enforce the restrictive covenant and prevent the Juncks' commercial use of their lot. One of the arguments that the plaintiffs raised to challenge the rezoning of the Juncks property was that the town of Verona's rezoning of the Juncks' lot constituted illegal spot zoning.

Holding/Analysis: **The Court of Appeals concluded that the rezoning of the Juncks' lot was not illegal spot zoning.** The Court reiterated that:

“Judicial review of spot zoning determinations is limited to cases involving abuse of discretion, excess of power or error of law. *Buhler v. Racine County*, 33 Wis. 2d 137, 146, 146 N.W.2d 403, 408 (1966). As long as the legislative body acts within the sphere of its authority, its discretion is controlling. *Cushman v. City of Racine*, 39 Wis. 2d 303, 307, 159 N.W.2d 67, 69 (1968).”

Spot zoning is the practice of allowing a single lot or area special privileges which are not extended to other land in the vicinity in the same use district. *Howard v. Village of Elm Grove*, 80 Wis. 2d 33, 41, 257 N.W.2d 850, 854 (1977). Spot zoning is not per se illegal. *Ballenger v. Door County*, 131 Wis. 2d 422, 426, 388 N.W.2d 624, 627 (Ct. App. 1986). However, rezoning should be consistent with long-range planning and based on considerations which affect the whole community. *Bell v. City of Elkhorn*, 122 Wis. 2d 558, 568, 364 N.W.2d 144, 148 (1985). Thus, spot zoning should only be indulged in where it is in the public interest and not solely for the benefit of the property owner who request rezoning. *Cushman*, 39 Wis. 2d at 309, 159 N.W. 2d at 70-71.” *Bubolz*, 159 Wis. 2d 284 at 297.

The Court of Appeals held that:

“The trial court found that the Dane County Board exercised its discretion in determining that LC-1 zoning was appropriate for the Juncks' electrical business, even though Horseshoe Bend was a residential subdivision. In addition, the court found that the Juncks' electrical business provided a public service both to their immediate neighbors as well as to the entire town of Verona. We conclude these findings of fact are not clearly erroneous. See sec. 805.17 (2), Stats.

The trial court next determined that the rezoning was in the public interest and not solely for the benefit of the Juncks. See *Cushman*, 39 Wis. 2d at 309, 159 N.W.2d at 70. We agree and conclude the rezoning of the Juncks' lot was not illegal spot zoning.” *Bubolz*, 159 Wis. 2d 284 at 298.

Buhler v. Racine County, 33 Wis. 2d 137, 146 N.W.2d 403 (1966).

Facts: The plaintiffs, Walter Buhler, Louis Buhler and Amanda Muhlke, were the owners of land on the southwest corner of Highway 31 and County Trunk C in the Town of Mount Pleasant in Racine County, which was zoned residential in 1949 when Racine County adopted a zoning ordinance regulating the use of all unincorporated land in the county. At the time of the zoning, and at the time of the trial, there existed three nonconforming uses in the immediate vicinity on properties that were

also zoned residential: a dairy, a gasoline filling station and a grade school. In 1961, Buhler petitioned to rezone the land for commercial use but was denied by the Racine County Board. After another unsuccessful attempt to change the ordinance, the plaintiffs brought this action, to enjoin Racine County and its zoning administrator from enforcing the county ordinance as it applied to the plaintiffs' property. At the trial, varying testimony was given estimating the value of the property if sold for residential or commercial use, which established that the land was worth more if it were zoned commercial. The trial court ruled in favor of the plaintiffs, holding that Racine County acted arbitrarily, unreasonably and abused its discretion in refusing to rezone plaintiffs' property.

Holding/Analysis: **The Supreme Court reversed the trial court and held that the decision of the trial court had the effect of spot zoning.** "We would consider it discriminatory if the three nonconforming uses were zoned commercial and the Buhler land left residential. That obviously would be spot zoning. We would likewise consider zoning the Buhler land commercial and leaving the nonconforming uses unchanged to be spot zoning and undesirable, if not justified. The decision of the trial court has this effect. The basic question of whether this intersection should be zoned commercial or residential lies within the legislative discretion of the Racine county board . . . [and] should not be decided by the judicial process." Citing *State ex rel. American Oil Co. v. Bessent* (1965), 27 Wis. 2d 537, 135 N.W.2d 317. *Buhler*, 33 Wis. 2d at 145-146. "We do not hold the trial court was without jurisdiction to hear this case. We have held, and other jurisdictions have generally held, courts have the power to grant relief against zoning when it is unconstitutional, unreasonable or discriminatory. . . . However, since zoning is a legislative function, judicial review is limited and judicial interference restricted to cases of abuse of discretion, excess of power, or error of law." *Buhler*, 33 Wis. 2d at 146. The trial court cannot substitute its judgment for that of the county zoning authority in the absence of statutory authorization and such rule applies not only to the necessity and extent of zoning but also to rezoning, classification, establishment of districts, boundaries, uses, and whether or not the rezoning is warranted due to a change of conditions. Citing *La Crosse v. Elbertson* (1931), 205 Wis. 207, 237 N.W. 99; *State ex rel. Carter v. Harper* (1923), 182 Wis. 148, 196 N.W. 451; 8A McQuillin, Mun. Corp. (3d ed., 1965 rev.), p. 276, sec. 25.279.

Cushman v. City of Racine, 39 Wis. 2d 303, 159 N.W.2d 67 (1968).

Facts: A single parcel of land in the city limits was rezoned from a classification restricting land use to single-family dwellings to one permitting business use to enable the owners to operate a dental office.

Holding/Analysis: **The Supreme Court concluded that this rezoning was "spot zoning" and was unconstitutional because it was clearly arbitrary and unreasonable, with no substantial relation to public health, safety, morals, or general welfare.** "Spot zoning, when defined as 'the practice whereby a single lot or area is granted privileges which are not granted or extended to other land in the vicinity in the same use district,' is **not illegal per se in Wisconsin.** . . . Rezoning should, however, be consistent with long-range planning and be based upon considerations which affect the whole community." *Cushman*, 39 Wis. 2d 303 at 306-307 (emphasis added).

Heaney v. City of Oshkosh, 47 Wis. 2d 303, 117 N.W.2d 74 (1969).

Facts: A single parcel of land was rezoned by city ordinance from single-family residential to a restricted industrial classification in order to permit construction of an industrial laundry facility. The ordinance was an amendment to the city's comprehensive zoning ordinance. The rezoned property was located immediately adjacent to real estate owned by the plaintiff. The issue was whether the ordinance was null and void as illegal spot zoning.

Holding/Analysis: **The Supreme Court held that the ordinance amending the comprehensive zoning ordinance was void as arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare of the community.** "The standard to be applied in reviewing spot zoning was stated by Mr. Chief Justice CURRIE in his concurring opinion in *Buhler v.*

Racine County, supra [33 Wis. 2d 137 (1966)], pages 150, 151, and adopted as the rule in *Cushman v. Racine, supra* [39 Wis. 2d 303 (1968)], page 309: **‘Spot zoning to be accomplished through rezoning should only be indulged in where it is in the public interest and not solely for the benefit of the property owner requesting rezoning, absent any showing that a refusal to rezone will in effect confiscate his property by depriving him of all beneficial use thereof.’**” *Heaney*, 47 Wis.2d 303 at 308 (emphasis added). The Supreme Court concluded that the alleged changes in the locality since the adoption of the comprehensive ordinance (area around the rezoned property had not developed for residential purposes; land west of the property was rezoned to heavy industrial use; expansion of nearby airport; rerouting a state highway along the property) were not material or substantial enough to justify a spot zoning amendment.

State ex rel. Zupancic v. Schimenz, 46 Wis. 2d 22, 174 N.W.2d 533 (1970).

Facts: For a summary of the facts and other issues decided in this case, see “Contract Zonings” case summary in Section 7.

Holding/Analysis: “[L]andowners may make a contract which may legitimately be recognized by the zoning authorities as a motivation for rezoning but such zoning must meet the test of all valid zoning, i.e., must be for the safety, welfare, health of the community, sec. 67.23 (7), Stats. and should not constitute spot zoning. Spot zoning per se is not illegal and we do not consider the rezoning in this case to be illegal spot zoning because it was in the public interest and not solely for the benefit of the developer. See *Boersinger v. Elkay Enterprises, Inc.* (1966), 32 Wis. 2d 168, 145 N. W. 2d 108; *Cushman v. Racine* (1968), 39 Wis. 2d 303, 159 N. W. 2d 67.” *Zupancic*, 46 Wis. 2d 22 at 32.

Step Now Citizens v. Town of Utica PZC, 2003 WI App 109, 264 Wis. 2d 662, 663 N.W.2d 833.

Facts: Algoma Ethanol, LLC proposed to build a \$36 million plant for the production of ethanol on 24 acres in a predominantly rural, agricultural area in the Town of Utica. After holding three public informational meetings, the Town Board adopted an ordinance amendment to rezone the property from agricultural to industrial to allow the construction of the ethanol plant even though there was disagreement as to whether the rezoning was consistent with the Town Land Use Plan. The ordinance amendment contained the provision that the property would revert back to the agricultural district in the event that the approvals, permits and favorable test results are not obtained for the ethanol plant within 18 months. The Winnebago County Board also voted to approve of the rezoning. A citizen’s group, Step Now, filed a complaint in circuit court seeking a declaratory judgment that the rezoning constituted illegal spot zoning. The circuit court agreed with the plaintiffs, finding that the rezoning was unreasonable and unconstitutional because the area rezoned was too small; the creation of jobs and opportunities for citizens afforded by the plant was too little; the distance from an industrial area designated in the Town’s Land Use Plan was too great; and the distance from a private golf course and several residences was too little. The Town of Utica and Winnebago County appealed.

Holding/Analysis: **The Court of Appeals reversed the circuit court’s decision, holding that the rezoning did not constitute illegal spot zoning for two reasons: First, the court refused to substitute its opinion for the opinion of the zoning authority in what was a matter of legislative discretion, even though the rezoning was arguably not consistent with the Town’s Land Use Plan.** “While a court may differ with the wisdom and desirability of a zoning change, it cannot substitute its opinion for that of the zoning authority. The opinion of the zoning authority controls in the absence of abuse of discretion, excess of power or error of law.” (citations omitted) *Step Now Citizens*, 2003 WI App 109, ¶ 26. **Second, although the court found that the rezoning did fall within the definition of spot zoning, it did not find that it was illegal.** “. . . spot zoning is not *per se* illegal in Wisconsin. . . . The factors to be weighed in considering the validity and reasonableness of rezoning are several. The pertinent inquiries go to whether the rezoning is consistent with long-range planning and based upon considerations which affect the whole community. The nature and character

of the parcel, the use of the surrounding land and the overall scheme or zoning plan are also relevant. Finally, the interests of public health, morals and safety must also be considered, as well as the promotion of public welfare, convenience and general prosperity.” (citations omitted) *Step Now Citizens*, 2003 WI App 109, ¶ 30. “The standard which we must follow in determining whether a municipality’s action amounts to illegal spot zoning is as follows:

‘Spot zoning to be accomplished through rezoning should only be indulged in where it is in the public interest and not solely for the benefit of the property owner who requests rezoning, absent any showing that a refusal to rezone will in effect confiscate his property by depriving him of all beneficial use thereof . . .’ *Rodgers [v. Village of Menomonee Falls]*, 55 Wis. 2d [563] at 573 [201 N.W. 2d 29 (1972)].” *Step Now Citizens*, 2003 WI App 109, ¶ 31.

The court also disagreed with Step Now’s argument that the rezoning constituted illegal spot zoning because it was inconsistent with the Town’s Land Use Plan. “We conclude that a land use plan is not mandatory but merely advisory.” *Step Now Citizens*, 2003 WI App 109, ¶ 38. “The Wisconsin Supreme Court concluded [in *Bell v. City of Elkhorn*, 122 Wis. 2d 558, 564, 364 N.W.2d 144 (1985)] that a city need not adopt a separate comprehensive plan document as a condition precedent to enacting a zoning ordinance. If a comprehensive land use plan is not mandatory, then it stands to reason that once a comprehensive land use plan is enacted, the plan is merely advisory. In essence, a comprehensive plan is merely a guide to community development.” (citations omitted) *Step Now Citizens*, 2003 WI App 109, ¶ 45.

29 TAKINGS CASES

Public Benefit vs. Public Harm; Was Owner Deprived of All, or Practically All, Use?

Eberle v. Dane County Board of Adjustment, 227 Wis. 2d 609 (1999).

Facts: The Eberles are real estate developers and builders who own a tract of land in the Town of Verona in Dane County. In January of 1994, they divided the land into two parcels and requested that the land be rezoned to permit residential uses. Prior to the rezoning, Lots 1 and 2 could be accessed from either Coray Lane or Timber Lane. As a condition of the rezoning, the County (at the request of the Town) imposed a requirement that access to Lot 1 occur from Timber Lane. By recording the certified survey map that created Lots 1 and 2, the Eberles effectively agreed to this access restriction. In January of 1995, the Eberles petitioned the Dane County Board of Adjustment for a special exception permit to build a driveway connecting Lots 1 and 2 to Timber Lane. After several public hearings, the Board voted to deny the permit. The Board based the permit denial on its finding that the proposed driveway would cross a wetland and was not permitted by Dane County ordinances applicable to wetland zoning districts. The Eberles requested reconsideration, which the Board denied. The Eberles then sought certiorari review in Dane County circuit court. The Eberles claimed that the Board's improper denial of the special exception permit temporarily deprived them of the ability to access their property, and therefore constituted a regulatory taking.

Holding/Analysis: The Supreme Court observed that: "Takings which do not involve physical invasions of land are called 'regulatory takings.' See *Hoepker v. City of Madison Plan Comm'n*, 209 Wis. 2d 633, 651, 563 N.W.2d 145 (1997). Such takings are now well established in Wisconsin law. The rule applied by Wisconsin and federal courts is that a regulation or government action "must deny the landowner all or substantially all practical uses of a property in order to be considered a taking for which compensation is required." *Zealy*, 201 Wis. 2d at 374." *Eberle*, 227 Wis. 2d 609 at 622. **The Supreme Court held that: "Because the Eberles have alleged facts which, if proved, would show that the Board's denial of the special exception permit resulted in a legally imposed restriction which deprived the Eberles of all or substantially all practical use of Lot 1, we conclude that the Eberles have stated a valid claim for a temporary regulatory taking under Article I, § 13 of the Wisconsin Constitution."** *Eberle*, 227 Wis. 2d 609 at 629 (emphasis added). **However, the Court also held that the Eberles' temporary taking claims failed the second prong of a two-prong test for determining whether a regulatory taking claim is ripe for adjudication.** "A regulatory taking claim does not become ripe under the first element of this test 'until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.' *Hoepker*, 209 Wis. 2d at 651." *Eberle*, 227 Wis. 2d 609 at 638. "In regard to the second element, the United States Supreme Court has explained that 'because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied.' *Williamson County*, 473 U.S. at 194 n. 13. See *Hoepker*, 209 Wis. 2d at 652. '[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.' *Hoepker*, 209 Wis. 2d at 652." (some citations omitted) *Eberle*, 227 Wis. 2d 609 at 638.

[**Note:** In the *Eberle* decision, the Supreme Court overruled portions of the Court of Appeals decision in *Reel Enterprises v. City of La Crosse*, 146 Wis. 2d 662, 431 N.W.2d 743 (Ct. App. 1988): "...we overrule those portions of *Reel* which suggest that a decision by a governmental entity which is reversed by a court is not a legally imposed restriction which could be cognizable as a taking." *Eberle*, 227 Wis. 2d 609 at 635.]

Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

Facts: When property owners in a conservancy district were fined for filling wetlands on their land without the required conditional use permit, they claimed that the restrictions on their property imposed by the Marinette County Shoreland Zoning Ordinance were unconstitutional because they constituted a taking of land without just compensation.

Holding/Analysis: **The Supreme Court held that the Marinette shoreland zoning ordinance was constitutional, and that the prohibition contained in the ordinance against the filling of wetlands in the shoreland area was not a compensable taking because it preserved nature and natural resources as they were created, and to which the public had a present right.** The Court observed that: “The distinction between the exercise of the police power and condemnation has been said to be a matter of degree of damage to the property owner. In the valid exercise of the police power reasonably restricting the use of property, the damage suffered by the owner is said to be incidental. However, where the restriction is so great the landowner ought not to bear such a burden for the public good, the restriction has been held to be a constructive taking even though the actual use or forbidden use has not been transferred to the government so as to be a taking in the traditional sense. . . . Whether a taking has occurred depends upon whether ‘the restriction practically or substantially renders the land useless for all reasonable purposes.’” (citations omitted) *Just*, 56 Wis. 2d 7 at 15. “This case causes us to re-examine the concepts of public benefit in contrast to public harm and the scope of an owner’s right to use of this property. In the instant case we have a restriction on the use of a citizens’ property, not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizens’ property. We start with the premise that lakes and rivers in their natural state are unpolluted and the pollution which now exists is man made. The state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters. This is not, in a legal sense, a gain or a securing of a benefit by the maintaining of the natural *status quo* of the environment. What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty. Swamps and wetlands were once considered wasteland, undesirable, and not picturesque. But as the people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature.” *Just*, 56 Wis. 2d 7 at 16-17. “An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses.” *Just*, 56 Wis. 2d 7 at 17. “The active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation and scenic beauty. To further this duty, the legislature may delegate authority to local units of government, which the state did by requiring counties to pass shoreland zoning ordinances.” *Just*, 56 Wis. 2d 7 at 18. “Lands adjacent to or near navigable waters exist in a special relationship to the state. They have been held subject to special taxation, and are subject to the state public trust powers; and since the Laws of 1935, ch. 303, counties have been authorized to create special zoning districts along waterways and zone them for restrictive conservancy purposes.” (citations omitted) *Just*, 56 Wis.2d 7 at 18-19. “The Justs argue their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to the

public rights is not an essential factor or controlling.” *Just*, 57 Wis. 2d 7 at 23.

M & I Marshall & Ilsley Bank v. Town of Somers, 141 Wis. 2d 271, 414 N.W.2d 824 (1987).

Facts: Following the adoption of a general comprehensive and shoreland/floodplain zoning ordinance by Kenosha County (which was approved by the Town of Somers), the owners of four properties claimed that the town had "taken" their properties which were reclassified as C-1 Lowland Resource Conservancy by the ordinance. In affidavits filed in support of motions for summary judgment, the plaintiffs alleged that the tax assessed value of their properties had gone from \$29,700 to \$6,300; \$61,500 to \$9,600; \$23,400 to \$2,400; and \$25,000 to \$3,600.

Holding/Analysis: **In spite of the fact that the Supreme Court held that this case should be dismissed** (because Kenosha County, not the Town of Somers, was the proper defendant in an action based on the property owners' allegations that the repeal and reenactment of the Kenosha County General Zoning and Shoreland/Floodplain Zoning Ordinance constituted inverse condemnation of the plaintiffs' land because of the wetland conservancy restrictions contained in the county ordinance), **the Court went on to discuss the proper application of *Just v. Marinette County* to a takings claim.** The Court stated: "Although this court in *Just* noted the state's duty under the public trust doctrine to protect shoreland areas, we conclude that **the analysis outlined in *Just* is not limited to a situation where the lands involved are connected to the state's duty under the public trust doctrine.** While the public trust doctrine was a factor in the *Just* decision, the key to analyzing a claim that property has been taken without compensation is the determination of whether the ordinance prohibits a public harm or provides a public benefit." *M&I Marshall Bank*, 141 Wis. 2d 271 at 287-288. **"In analyzing any case in which it is claimed that land is taken without just compensation – whether the regulated land is a wetland within a shoreland area, or land within a primary environmental corridor, or an isolated swamp – the test to be applied is the same: public benefit versus public harm.** Where land is taken for the public benefit, the taking is compensable. However, if the land is regulated to avoid a public harm, then the regulation is not compensable unless the regulation results in a value diminution to the landowner which is so great as to amount to a confiscation. We note, further, that **a parcel of land which consists of continuing wetland which is partly within and partly outside a shoreland area should be treated as if the entire wetland was located within a shoreland area. There would be little value to the wetland within the shoreland if the part of the wetland outside the shoreland was allowed to be altered.**" *M&I Marshall Bank*, 141 Wis. 2d 271 at 288 (emphasis added).

(See also *Village of Sussex v. DNR*, 68 Wis. 2d 187, 228 N.W.2d 173 (1975).)

Reel Enterprises v. City of La Crosse, 146 Wis. 2d 662, 431 N.W.2d 743 (Ct. App. 1988), Sup. Ct. review denied, 147 Wis. 2d 887, 436 N.W.2d 29 (1988).

Facts: Property purchased for development in a commercial industrial park was placed within the floodway designation when the DNR initiated proceedings to adopt a floodplain zoning ordinance for the city. The owners claimed that the regulatory action constituted a compensable taking.

Holding/Analysis: **The Court of Appeals held that the actions of the DNR (other than denial of fill permits) did not impose a legally enforceable restriction because the intent to adopt a floodplain ordinance is not a legally enforceable restriction; the denial of a sewer extension was reversed and therefore not a legally enforceable restriction; the lis pendens filed provided notice that a proceeding is pending but is not a legally enforceable restriction.** The Court found that, although denial of fill permits was a legally enforceable restriction, there was no claim that the denial of the permit deprived the plaintiffs of all, or substantially all, of the use of their properties. The Court based its decision on precedents which established that, in the absence of its physical occupancy or

possession, private property can be taken for public use only by state, county, or municipal action which imposes a legally enforceable restriction on the use of the property. If a legally enforceable restriction is imposed on that use, then a taking occurs only if the restriction deprives the owner of all, or practically all, of the use.

[**Note:** The Court of Appeals apparent assumption in the *Reel* that a decision of a governmental entity is not “a legally enforceable restriction” if it is reversed on appeal was overruled by the Supreme Court in *Eberle v. Dane County Board of Adjustment*, 227 Wis. 2d 609 (1999).]

Zealy v. City of Waukesha, 201 Wis. 2d 365, 548 N.W.2d 528 (1996).

Facts: In 1985, the city changed the zoning on approximately 28.6 acres of land from residential to a conservancy district in order to protect wetlands. Included in the conservancy district were 8.2 acres of Zealy's 10.4 acre parcel. Before rezoning, the city assessed the value of the 10.4 acres at \$81,000; after the rezoning the property was assessed at \$57,000. Zealy claimed the value of the 8.2 acres, if developed for residential use, would be \$200,000. He brought an action for inverse condemnation, claiming that the city's rezoning of the land was a regulatory taking without compensation, and that the city should be equitably stopped from enforcing the zoning because of his reliance on the city's representations about future residential development on the property.

Holding/Analysis: **The Supreme Court held, citing *Just v. Marinette County*, that calculating the depreciated value of the land must be based on use of the land in its natural state (and not on what it would be worth if developed).** *Zealy*, 201 Wis. 2d 365 at 380. This decision of the Wisconsin Supreme Court analyzes U.S. Supreme Court decisions and other Wisconsin Supreme Court decisions on “takings”. The Court observed that the U.S. Supreme Court cases do not support the proposition that a contiguous property should be divided into discrete segments for purposes of evaluating a takings claim. *Zealy*, 201 Wis. 2d 365 at 375-76. Looking to a landowner's anticipated use of various parcels and subparcels in order to determine the extent of the parcel at issue would require ascertaining a landowner's subjective intent, confusing both the courts and the zoning agencies, and making the inquiry more difficult. **Here, the parcel viewed as a whole retains substantial uses (a combination of residential, commercial and agricultural), thus the city's rezoning did not deprive the owner of all, or substantially all, of the use of his land.** Regarding any vested rights generated by representations made by city officials when negotiating the easement, the court noted that **property owners obtain no vested rights in a particular type of zoning solely through reliance on the zoning.** Here, the owner had not submitted a application for a building permit proposing residential use of the land, and had not shown that he made any expenditures in reliance on the zoning.

Zinn v. State, 112 Wis. 2d 417, 334 N.W.2d 67 (1983)

Facts: The Department of Natural Resources (DNR) issued a ruling that effectively reset the ordinary highwater mark of a navigable lake to a location beyond the boundaries of Zinn's land. The ruling resulted in the statutory retitling of 200 acres of Zinn's land to the state in trust for the public and Zinn's loss of ownership of the riparian rights. The DNR granted Zinn's petition for rehearing and rescinded the ruling almost two years from the day it took effect, thus reinstating Zinn's ownership rights. Subsequently, Zinn filed a lawsuit against the state, alleging that the DNR's ruling, during the time period that it was in effect, constituted a taking of her land for public use requiring just compensation under Article I, § 13 of the Wisconsin Constitution.

Holding/Analysis: **The Supreme Court held that the DNR's ruling was a “legally imposed restriction on Zinn's property,”** citing *Howell Plaza, Inc. v. State Highway Comm'n*, 92 Wis. 2d 74, 284 N.W.2d 887 (1979) (emphasis added), **and rejected the position that a temporary governmental restraint on property could not be a taking.** The Court found that a decision of an administrative agency could constitute a taking, reasoning that the civil immunity of the individual

decision-makers did not alter the fact that just compensation is constitutionally due whenever a taking occurs. The Court concluded that in the absence of applicable legislatively prescribed procedures for obtaining just compensation, a claim for a taking may be brought directly under Article I, § 13 of the Wisconsin Constitution.

30 TOWN AUTHORITY

Town Authority to Require Public Improvements as a Condition of Plat Approval

Rogers Development, Inc. and Town of Beloit v. Rock County Planning and Development Committee and County of Rock, 2003 WI App 113, Wis. 2d , N.W.2d .

Facts: The Town of Beloit, pursuant to s. 236.45 (2) and s. 236.13 (2), Stats., and Rock County, pursuant to s. 236.45 (2), Stats., adopted requirements for the subdivision of land. Rogers Development, Inc. filed a preliminary plat for Glen Hills subdivision with the Town and the County in 1994. In 1994 and 1997, the Town and the County approved the first two phases of Glen Hills. Rogers Development later submitted the final plat for the third phase of Glen Hills, and the Town approved it. The County, however, issued a conditional approval subject to specific requirements for the size of cul-de-sacs, the length of street blocks and the location of town roads in the subdivision that were contrary to directives that the Town had made. Rogers Development filed suit against the County. The Town joined the lawsuit as a co-plaintiff. The circuit court granted judgment in favor of Rogers Development and the Town.

Holding/Analysis: **The Court of Appeals affirmed the circuit court's judgment**, after concluding that: ". . . land division regulations relating to the size of cul-de-sacs, the length of street blocks and the location of town roads constitute public improvement requirements. Because **WIS. STATS. § 236.13 (2)(a) grants only to a 'town or municipality' within which the plat lies the authority to require public improvements as a condition of plat approval**, and a county is not a municipality for purposes of ch. 236, we conclude that the County may not regulate the size of cul-de-sacs, the length of street blocks and the location of town roads when the plat is located within a town . . ." *Rogers Development*, 2003 WI App 113, ¶ 19.

The Court observed that: "Chapter 236 does not define 'public improvements,' and no Wisconsin case has addressed the precise scope of the statutory term in the context of ch. 236." *Rogers Development*, 2003 WI App 113, ¶ 12. ". . . **We conclude that the appropriate construction of the phrase 'public improvements' as used in ch. 236 is one that improves the value or utility of the subdivision and is made available for use by the public.** This construction is consistent with prior case law that has read public improvements to include the installation of sewerage facilities and water mains, furnishing potable water for home consumption, requiring asphalt for street surfacing and installation of surface drains with specific design requirements." *Rogers Development*, 2003 WI App 113, ¶ 13.

Town Zoning Authority Limited

Kenosha County v. Town of Paris, 148 Wis. 2d 175, 434 N.W.2d 801 (Ct. App. 1988).

Holding/Analysis: The Court of Appeals held that s. 889.04, Stats., applies only to irregularities in the ordinance adoption process and county board approval is not part of the ordinance adoption process.

M & I Marshall & Ilsley Bank v. Town of Somers, 141 Wis. 2d 271, 414 N.W.2d 824 (1987).

Facts: For a summary of the facts and other issues decided in this case, see "Takings" case summary in Section 23.

Holding/Analysis: **The Supreme Court held that the Town of Somers had no liability in an inverse condemnation action because of its approval of a new county zoning ordinance, which was enacted after the prior county zoning ordinance was repealed.** The Court stated: "In contrast to the power given a county, a town's authority to adopt zoning is limited. First and foremost, if the county has enacted a county zoning ordinance, a town is prohibited from adopting its own ordinance. . . . If the town is located in a county which has not adopted a county zoning ordinance, the town may

petition the county board to adopt a county zoning ordinance. Where the county board does not adopt a county zoning ordinance within the statutorily prescribed period, the town is then authorized to adopt its own ordinance. Section 60.74, Stats. (1981-82) [now numbered s. 60.61, Stats.] A town which has been granted the authority to exercise village powers may adopt its own zoning ordinance. However, where the county has adopted a county zoning ordinance, the town ordinance is effective only if it is approved by the county board. Section 60.74(7), Stats. (1981-82) [now numbered s. 60.62, Stats.]” *M & I Marshall Bank*, 141 Wis. 2d 271 at 282. **The court held that “the primary authority to enact, repeal, and amend a zoning ordinance was intended to be, and is, vested at the county level.”** *M & I Marshall Bank*, 141 Wis. 2d 271 at 282 (emphasis added). **In this case, the town did not have the ability to preserve the existing zoning ordinance. The town was left with the choice of approving the zoning or having no zoning. The town should not be responsible for any liabilities that may arise from the adoption of a countywide zoning ordinance.**

Stahl v. Town of Spider Lake, 149 Wis. 2d 230, 441 N.W 2d 250 (Ct. App. 1989).

Facts: In 1971, Sawyer County enacted a county zoning ordinance pursuant to s. 59.97, Stats. (now numbered s. 59.69, Stats.). The Town of Spider Lake adopted a more restrictive zoning ordinance for the Town in 1976, but never submitted the zoning ordinance to the County Board for approval (as required by s. 60.62 (3), Stats.). In 1987, Richard Titus submitted plans for the development of a seventy-five-unit subdivision and golf course to the town. The town approved the preliminary plat, a change in zoning designation, and a conditional use permit. The plaintiffs then brought an action in circuit court seeking a declaratory judgment that these acts by the town violated the Town ordinances and were therefore invalid. The town and Mr. Titus responded that the town ordinances were invalid because of procedural irregularities in their passage, and therefore the town need not comply with them.

Holding/Analysis: **The Court of Appeals held that s. 889.04, Stats., does not cure the town’s failure to obtain county board approval, and that portion of the town ordinance dealing with zoning was invalid.** “However, the town’s failure to publish the forfeiture provision of the subdivision control part of the ordinance is corrected by the sec. 889.04 presumption of regularity. Section 60.80 (1)(b) requires a town to publish or post an ordinance within thirty days after passage or adoption. However, sec. 60.80 (2) states that if an ordinance imposes a forfeiture, posting may not be used in lieu of publication under subsec. (1). The subdivision control part of the ordinance was apparently not published as required by sec. 60.80 (2) within thirty days after its passage. However, this is precisely the kind of procedural error that sec. 889.04 is intended to correct.” *Stahl*, 149 Wis. 2d 230 at 235.

31 UNEQUAL ENFORCEMENT

No Denial of Equal Protection

State ex rel. B'nai B'rith Foundation v. Walworth County Bd. of Adjustment, 59 Wis. 2d 296, 208 N.W.2d 113 (1973).

Facts: A religious organization acquired property with lake frontage that was zoned residential, intending to use the property for a recreational camp that would be used for adult religious conferences, leadership training centers and children's religious programs. The Walworth County zoning ordinances allowed only specified uses within residential districts, including schools and churches. The county planner denied the organization an occupancy permit on the basis that the main intended use was not permitted under the county ordinances. The county BOA agreed and their decisions were upheld by the circuit court. The B'nai B'rith Foundation appealed.

Holding/Analysis: Two issues were raised on appeal: (1) "Did the trial court err in its ruling that the evidenc established the use to which the appellant intended to put its property was not within either of the two Walworth county zoning ordinances?" and (2) "Do the Walworth county zoning ordinances violate appellant's rights under the United States and Wisconsin Constitutions?" **The Supreme Court held that the ordinance did not permit the intended use in a residential use district and that denial of usage was not shown to be arbitrary and unreasonable, thus there is no denial of the right to equal protection.** Under the terms of the zoning ordinance, the main contemplated use of the acreage was not for schools and churches. The meaning of these words was properly gleaned from the long and uninterrupted practice of the zoning officials. Nontechnical words ought to be construed according to the common and ordinary usage. The intent must be derived from the act as a whole, and here the ordinances were designed to preserve the residential quality of the area, and the traditional concepts of churches and schools that serve the neighborhood.

32 VARIANCES

Area Variances (Dimensional Variances)

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

Facts: The Miswalds owned three parcels of land on Lake Okauchee on which the county had imposed a deed restriction requiring that the three parcels be sold as a single unit. (The deed restriction arose as a condition of granting the Miswalds a variance to build a garage on one of the lots that was removed from the larger lot on which the principal residence was located.) When the Miswalds applied for a variance to build a larger residence, they requested that the three parcels be considered as one for purposes of the variance. The BOA calculated the allowable size of the Miswald's proposed residence based solely on the size of one residential lot, to the exclusion of the two other nearby lots, and granted a variance. The circuit court reversed the board's decision, and the Miswalds appealed.

Holding/Analysis: **The Court of Appeals held that the board's action was within its jurisdiction and decided under the correct theory of law.** When considering variance requests, the zoning authority is to make discretionary calls on a case-by-case basis as to whether, and if so by how much, governing rules are to be relaxed. The deed restriction relating to the earlier variance to build a garage served a different purpose than the variance now at issue. The Court also observed that the board was not bound to follow precedent of past BOA cases when those prior cases have somewhat different factual circumstances, or if the Board concludes that a position taken in a prior case was a mistake.

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

Facts: For a summary of the facts and other issues decided in this case, see "Standard of Review" in Section 3, "Erroneous or Unauthorized Acts" in Section 14, and "Financial Hardship or Loss of Profit", "Substandard Lots" and "Unnecessary Hardship" in this section.

Holding/Analysis: In its opinion, the Supreme Court stated: ". . . because sec. 59.99 (7)(c), Stats., [now numbered s. 59.694 (7)(c), Stats.] does not include the element of practical difficulty while the ordinance does, a question arises as to the relevance of appellant's arguments relating to claimed practical difficulty. However, **although the terms 'unnecessary hardship' and 'practical difficulty' are insusceptible to precise definition and are often stated disjunctively in zoning enactments, the authorities generally recognize that there is no practical difference between them.**" *Snyder*, 74 Wis.2d 468 at 472 (emphasis added).

"The problems involving the definition of these terms arise particularly from the fact that **the conditions upon which a landowner typically bases a claim for a use variance are more easily spoken of as imposing an unnecessary hardship, while the conditions prompting application for an area variance are more easily termed practical difficulties.** Therefore, the fact that area variances are considerably easier to obtain than use variances creates the impression that a minimal showing of difficulty will establish the element of practical difficulty and entitle the landowner to a variance. However, **area variances are not more easily obtained because practical difficulties are something much less severe than unnecessary hardship, but because area variances do not involve great changes in the character of neighborhoods as do use variances.** This relates to what hardships or practical difficulties may be considered unnecessary or unreasonable **in light of the purpose of the zoning law.**

The danger of discerning a significant difference between the terms unnecessary hardship and practical difficulties is that while the hardship required for a variance is qualified by the word 'unnecessary', the difficulties only need be 'practical'. The term practical difficulties encompasses virtually any problem, and thus grounds for a variance could be established by only a minimal showing.

Therefore, we think that there should be no significant practical distinction drawn between the terms unnecessary hardship and practical difficulties, and where it appears, the phrase 'practical difficulty or unnecessary hardship' should be construed as a whole, for where peculiar and exceptional practical difficulties, which justify a variance, exist, unnecessary hardship will also exist." *Snyder*, 74 Wis.2d 468 at 473-474 (emphasis added and citation omitted).

"**When considering an area variance**, the question of whether unnecessary hardship or practical difficulty exists is best explained as '[w]hether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.' 2 Rathkopf, *The Law of Zoning and Planning*, 45-28 (3d ed. 1972)." *Snyder*, 74 Wis.2d 468 at 474-475.

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

Facts: The plaintiffs in the *Ziervogel* case own a 1.4 acre parcel of land with 200 feet of frontage on Big Cedar Lake in the Town of West Bend in Washington County. A public highway divides their lot. The portion of the lot on the opposite side of the highway from the lake is in a floodplain. There is no location on the lot on which to build a home that would be setback 75 feet from the ordinary high-water mark of the lake, which is the minimum shoreland setback required under ch. NR 115, Wis. Adm. Code, and the Washington County shoreland zoning ordinance. The plaintiffs sought a variance to construct a 1200 square foot addition to their home that is located only 26 feet from the ordinary high-water mark. They propose to add an additional story within the footprint of the existing home in order to convert it from a seasonal residence to a year-round residence. The Washington County Board of Adjustment denied their variance request on the grounds that the plaintiffs already had reasonable use of their property without a variance. Both the Washington County Circuit Court and the Court of Appeals affirmed the Board's decision.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that the "no reasonable use" standard is no longer applicable in area variance cases and reaffirming the *Snyder* definition of unnecessary hardship for area variance cases. *Ziervogel*, ¶ 41.

It should be noted that the Supreme Court did not overrule *Kenosha County* in the *Ziervogel* decision. (For information on how the Supreme Court has reconciled its decision in *Kenosha County* with its decision in *Ziervogel*, see *State v. Waushara County Board of Adjustment*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.)

"By definition, all variances depart from the purpose of the zoning ordinance and implicate the public interest, because they permit something that is otherwise strictly prohibited. But they do so to varying degrees and levels of acceptability, depending on the type of variance requested and the nature of the zoning restriction in question. As such, courts have long recognized a distinction between use variances, which permit a landowner to put property to an otherwise prohibited use, and area variances, which provide exceptions from such physical requirements as setbacks, lot area, and height limits. *Snyder*, 74 Wis. 2d at 474-75; see also *Outagamie County*, 244 Wis. 2d 613, ¶¶ 34-36." *Ziervogel*, ¶ 21.

"... Use variances by their nature have the potential to bring about great changes in neighborhood character, but area variances usually do not have this effect. *Snyder*, 74 Wis. 2d at 473; see also *Outagamie County*, 244 Wis. 2d 613, ¶¶ 36-38. While area variances provide an increment of relief (normally small) from a physical dimensional restriction such as building height, setback, and so forth, use variances permit wholesale deviation from the way in which land in the zone used. Accordingly,

the measure of unnecessary hardship for use and area variances is different; ‘in most states, the courts will approve an area variance upon a lesser showing by the applicant than is required to sustain a use variance.’ 3 Young, *supra* [Anderson’s American Law of Zoning], § 20:48, at 580. Until *Kenosha County*, Wisconsin followed this general rule, pursuant to this court’s decision in *Snyder*.” *Ziervogel*, ¶ 23. (footnote omitted)

“*Snyder*’s less-stringent and more flexible definition of unnecessary hardship for area variances allows variance procedure to function as more than just a protection against unconstitutional takings of private property. It allows variance procedure to function as the regulatory ‘escape valve’ it was meant to be: ‘The purpose of variances in the broadest sense is the rendering of justice in unique and individual cases of practical difficulties or unnecessary hardships arising from literal application of zoning ordinances.’ 8 Quillin, *supra* [McQuillin, *Municipal Corporations*]§ 25.172, at 648.” *Ziervogel*, ¶ 25.

“*Kenosha County* blurred the distinction between use and area variances, by adopting the ‘no reasonable use of the property’ test from use variance analysis for area variance cases. *Kenosha County*, 218 Wis. 2d at 398, 413-14. This has had the effect of severely curtailing the discretion vested by the legislature in boards of adjustment.” *Ziervogel*, ¶ 27. (emphasis added and citations omitted)

“Applying the ‘no reasonable use’ standard to area variances is inconsistent with the purpose of area zoning, fails to recognize the lesser effect of area variances on the public interest, and very nearly extinguishes the statutory discretion of local boards of adjustment. Continuing to condition area variances upon a showing of ‘no reasonable use of the property’ makes variance procedure unworkable and unfairly forecloses almost all property owners from the opportunity to demonstrate hardship.” *Ziervogel*, ¶ 32.

“We therefore reinstate *Snyder*’s formulation of unnecessary hardship for area variance cases: ‘**[w]hether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.**’ ” *Snyder*, 74 Wis. 2d at 475 (quoting 2 Rathkopf, *The Law of Zoning and Planning* § 45-28 (3d ed. 1972)). *Snyder* also emphasized that variance requests are always evaluated in light of the purpose of the zoning ordinance and the public interests at stake. *Id.* at 473. Accordingly, **whether the *Snyder* standard is met in individual cases depends upon a consideration of the purpose of the zoning restriction in question, its effect on the property, and the effect of a variance on the neighborhood and larger public interest. The established requirements that the hardship be unique to the property and not self-created are maintained, and the burden of proving unnecessary hardship remains on the property owner.** *Id.* at 476-79; *see also Outagamie County*, 244 Wis. 2d 613, ¶¶ 24, 50.” *Ziervogel*, ¶ 33. (emphasis added)

(Note: For information on other issues discussed in *Ziervogel*, see Section 2 (“Burden of Proof” and “Discretionary Authority of BOAs”), Section 3 (“Presumption of Correctness and Validity,” “Standing to Appeal,” and “Standard of Review”), Section 9 (County Zoning Jurisdiction and Home Rule) and the following topics in this section: “Burden of Proof,” “Not Contrary to Public Interest,” “No reasonable use,” “Personal Inconvenience,” “Purpose of Variance Procedure,” “Purpose of Zoning Provision,” “Self-Created Hardship,” “Unique Physical Property Features,” “Unnecessarily Burdensome,” “Unnecessary Hardship,” and “Use Variances.”)

State v. Kenosha County Bd. of Adjustment, 218 Wis. 2d 396, 577 N.W.2d 813 (1998).

Facts: For a summary of the facts and other issues decided in this case, see "Unnecessary Hardship" in this section.

Holding: **The Supreme Court held that for area variances "when the record before the Board demonstrates that the property owner would have a reasonable use of his or her property without the variance, the purpose of the [shoreland zoning] statute takes precedence [over the burden on the applicant] and the variance request should be denied.** *Kenosha County*, 218 Wis. 2d 396 at 414 (emphasis added).

(See also "Not Contrary to Public Interest" in this section.)

State v. Outagamie Cty. Bd. of Adjustment, 2001 WI 78, 244 Wis. 2d 613, 628 N.W.2d 376.

Facts: For the facts of this case and other issues discussed in this case, see "Unnecessary hardship" in this section.

Holding/Analysis: **The Supreme Court held that "Wis. Admin. Code § NR 116.13 (2) conflicts with Wis. Stat. § 87.30 (1g) and is therefore invalid to the extent that it prohibits all variances for residential floors below the regional flood elevation," and reinstated the circuit court's decision affirming the Outagamie County BOA's issuance of a variance to the Warnings.**

The lead opinion in *Outagamie County*, written by Justice Sykes, stated that:

"Kenosha County's establishment of a single standard for measuring the 'unnecessary hardship' required for the issuance of both use *and* area variances has practically eliminated the efficacy of variance procedure as a remedy against individual injustices caused by sweeping land use regulations, as the Warnings' case vividly demonstrates. Such a radical change in variance law was unwarranted. **I would overrule the case and restore the distinction between use and area variances to the law of zoning in this state.** Two other members of the court join me in this conclusion." *Outagamie County*, 2001 WI 78, ¶ 5.

However, in a dissenting opinion in *Outagamie County*, Justice Abrahamson stated:

"The lead opinion would overrule *Kenosha County*, concluding that the decision prevents Wisconsin from joining other jurisdictions that distinguish area and use variances, subjecting the former to a lesser standard than the latter." (footnote and citation omitted) *Outagamie County*, 2001 WI 78, ¶133.

"I do not join the lead opinion in deviating from the plain language of the statute and adopting a distinction that has been created explicitly or implicitly by several courts. Without more guidance as to the workability of the differences these courts have articulated, I am not convinced that these courts represent such a compelling mainstream that this court should overrule recent precedent to join them." (footnote omitted) *Outagamie County*, 2001 WI 78, ¶135.

". . . the lead opinion's analysis begs a key question: what is the purpose of the floodplain zoning law at issue in this case, and to what standard should a variance from a floodplain zoning law be held?

. . . the lead opinion tells us that the purposes of the floodplain zoning laws are 'promoting public health and safety and protecting private property from flood damage.'

The lead opinion is thus implicitly concluding that variances from zoning laws that promote health and safety and protect private property from flood damage are subject to a less restrictive standard than zoning laws that preserve the character of the neighborhood. I cannot agree. . . . I could not conclude that future homeowners in the Warnings' position are subject to anything less than the no reasonable use standard. To conclude otherwise is to fail to promote health and safety and protect private property from flood damage." *Outagamie County*, 2001 WI 78, ¶ 144-¶ 146.

"So where does the law governing variances stand? Three members of this court want to

erect a binary standard that reflects an artificial distinction between area and use variances. Four members of the court read *Kenosha County* as permanently doing away with the artificial concepts of area and use variances. *Kenosha County* thus survives another day. To grant a variance, a County Board of Adjustment must conclude that the property owner has no reasonable use of the property, in light of the purpose of the applicable zoning regulations." *Outagamie County*, 2001 WI 78, ¶ 147.

It is interesting to note that in the lead opinion in the *Outagamie County* decision, Justice Sykes acknowledges that, in *State v. Winnebago County*, 196 Wis. 2d 836, 540 N.W.2d 6 (Ct. App. 1995), "the court of appeals had evaluated an area variance against the use variance test set out in *Snyder*. It did so, however, because the relief sought by the property owner, while implicating an area regulation (shoreland setback requirements), would have had the practical effect of changing the character of the neighborhood by permitting greater population density (a larger number of smaller lots). The court of appeals in *Kenosha County* properly saw *Winnebago County* as a case of a use variance masquerading as an area variance, and therefore distinguished it: . . ." (citation omitted) *Outagamie County*, 2001 WI 78, ¶ 40. It appears that Justice Sykes would agree with Justice Abrahamson that: ". . . A variance is not necessarily an 'area variance' simply because the relevant zoning regulations set forth dimensional limits. The classification between area and use variance is not clear." (footnote omitted) *Outagamie County*, 2001 WI 78, ¶ 140.

The dissenting opinion in *Outagamie County* pointed out:

"The lead opinion cogently recognizes the problems that arise when a use variance is 'disguised' as an area variance. Yet it inexplicably ignores the possibility that the variance at issue in this case is similarly disguised as an area variance. The variance in this case may be an area variance because it allows a deviation from the dimensions prescribed by the floodplain zoning regulations. Or it may be a use variance in that it allows the Warnings to use their property in a way that is compatible with a floodplain, namely, to improve a home that has a basement deeper than permitted by the ordinance. Or it may be a hybrid." (footnotes omitted) *Outagamie County*, 2001 WI 78, ¶ 141.

"The difficulty in categorizing area and use variances is precisely the problem that our decision in *Kenosha County* helps address: namely, how to move away from artificial labels and apply a standard for all variances that will appropriately reflect the underlying purpose of the zoning laws at issue. The lead opinion's call for an artificial distinction between use and area variances, unaccompanied by any guidance as to how to apply this distinction in a principled manner, itself defies practical workability." (footnote omitted) *Outagamie County*, 2001 WI 78, ¶ 142.

State of Wisconsin v. Waushara County Board of Adjustment and G. Edwin Howe and Suzanne Howe, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

Facts: The property owners in the *Waushara County* case own a .324 acre parcel of land with frontage on Silver Lake in Waushara County. Due to a 110-foot highway setback and the size of the lot, there is not enough room on the lot for a house to be built that complies with the 75-foot shoreland setback requirement in the Waushara County zoning ordinance. The Waushara County zoning ordinance allows for setback averaging, but under that provision, the property owners could build no closer than 35 feet from the ordinary high-water mark of Silver Lake. They have an existing two-story home on the lot that is between 30 and 34 feet from the ordinary high-water mark. The property owners applied for, and were granted, variances in 1989 and 1994 that allowed them to enlarge their home because they wanted to convert it to a year-round residence. In 2001, the property owners applied for a third variance to construct a 10-foot by 20.5-foot addition to their living room (with a full basement) and a 4-foot by 10-foot porch. The Waushara County Board of Adjustment granted the requested variance.

The State of Wisconsin, at the request of the Department of Natural Resources, appealed the Board's

variance decision on the grounds that the property owners already had reasonable use of their property without a variance. The Waushara County Circuit Court reversed the Board's decision and the Court of Appeals affirmed the circuit court's decision.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that “in evaluating whether to grant an area variance to a zoning ordinance, a board of adjustment should focus on the purpose of the zoning law at issue in determining whether an unnecessary hardship exists for the property owner seeking such variance.” *Waushara County*, ¶ 35.

In this case, the Supreme Court addressed the following issue: “. . . **what is the correct legal standard to be applied by a board of adjustment when considering whether to grant an area variance?** More specifically, is the correct legal standard whether the failure to receive the variance will create, for the property owner, an unnecessary hardship in light of the purposes of the zoning ordinance, or is it whether the owner will have no reasonable use of the property without a variance?” *Waushara County*, ¶ 1. (emphasis added)

“We conclude that, **in evaluating whether to grant an area variance to a zoning ordinance, a board of adjustment should focus on the purpose of the zoning law at issue in determining whether an unnecessary hardship exists for the property owner seeking such variance.** We further conclude that the facts of the case should be analyzed in light of that purpose, and that boards of adjustment must be afforded flexibility so that they may appropriately exercise their discretion. We also again emphasize and recognize the presumption that the board's decision is correct. **We reaffirm Snyder's definition of the statutory term ‘unnecessary hardship’ because it best encompasses the appropriate test for granting an area variance. ‘No reasonable use,’ as set forth in Kenosha County, is no longer applicable when an area variance is being considered.**” *Waushara County*, ¶ 2. (emphasis added)

“In this case, it is our intention to provide needed clarification for property law in Wisconsin, with respect to the granting of area variances. It is evident that there is some confusion over how to interpret and apply our decisions in *Snyder*, *Kenosha County*, and *Outagamie County*. We take this opportunity to explain the appropriate legal standard that should be used in deciding whether to grant area variances. In doing so, it is our goal to give boards of adjustment and Wisconsin courts sufficient guidance as to how to resolve these types of cases in the future.” *Waushara County*, ¶ 23. (footnotes and citation omitted)

“We conclude that the reasoning discussed herein provides the appropriate standard for determining whether an area variance should be granted. **Unnecessary hardship, as set forth in Wis. Stat. § 59.694 (7)(c), must be evaluated in light of the purpose of the zoning ordinance at issue.**” *Waushara County*, ¶ 34. (footnote omitted and emphasis added)

However, it is important to note that in a dissenting opinion written by Justice Bradley (and joined in by Justice Abrahamson), the dissenting justices argued:

“The majority's decision to resurrect and apply the area-use distinction in the context of shoreland regulation is a dangerous one. Shoreland regulations, after all, consist primarily of area, not use restrictions. Under the majority opinion, the shoreland setback requirement will always be subject to the lesser standard of ‘unnecessarily burdensome’ despite its central role in shoreland regulation.” *Waushara County*, ¶ 58.

determine unnecessary hardship when the variance involved does not implicate shorelands, a matter subject to specific legislative direction and constitutionally protected public interests. Perhaps in the non-shoreland context, there is even a place for distinguishing between area and use regulations. But those arguments have no place here, where the proposed variance would enlarge the existence of a nonconforming structure within the shoreland setback. In the context of environmental regulations such as shoreland zoning, the 'no reasonable use' rule simply makes more sense. See David M. Freibus, *A New Uncertainty in Local Land Use: A Comparative Institutional Analysis of State v. Outagamie County Board of Adjustment*, 2003 Wis. L. Rev. 571, 609." *Waushara County*, ¶ 61.

“ . . . By heralding the rights of individual property owners in the shorelands of this state, the majority is actually undermining the rights of the rest of the shoreland owners. The Wisconsin Association of Lakes advanced in its amicus brief that this court should retain the no reasonable use standard. That standard, it asserts, best protects the public resource while at the same time enhancing the economic value of their private land.” *Waushara County*, ¶ 63.

(**Note:** For information on other issues discussed in *Waushara County*, see Section 2 (“Authority of BOAs to Interpret Ordinances” and “Discretionary Authority of BOAs”), Section 3 (“Presumption of Correctness and Validity,” and “Standard of Review”), Section 26 (Shoreland Zoning) and the following topics in this section: “Not Contrary to Public Interest,” “No reasonable use,” “Purpose of Zoning Provision,” “Unnecessarily Burdensome,” and “Unnecessary Hardship.”)

Thalhofer v. Patri, 240 Wis. 404, 3 N.W.2d 761 (1942).

A variance for the construction of a flat-deck porch stoop was permitted (in order to meet building code standards when a single-family house was converted into three apartments) because: "Provisions in statutes and ordinances authorizing slight variations in the application of zoning laws are common, and have generally been upheld as against the contention that such a provision is an unlawful delegation of legislative power." *Thalhofer*, 240 Wis. 404 at 409. In defending its decision to uphold the issuance of a building permit for the stoop, the City of Oshkosh Board of Appeals argued that it was 'in harmony with the general purpose and intent of the ordinance'. . ." *Thalhofer*, 240 Wis. 404 at 408.

Burden of Proof

Arndorfer v. Sauk County Board of Adjustment, 162 Wis. 2d 246, 469 N.W.2d 831 (1991).

Facts: When the Arndorfers improved a 109-acre parcel, built living quarters and installed a sewage holding tank, they were denied a variance by the board of adjustment to allow them to use the holding tank, based on their failure to establish unnecessary hardship. The Arndorfers claimed that they would suffer unnecessary hardship if the variance was not granted, and they petitioned for certiorari review before the circuit court. The circuit court determined that the Arndorfers were entitled to a variance. However, the Court of Appeals reversed the circuit court. The issue before the Supreme Court was whether the Arndorfers had met their burden of proving unnecessary hardship.

Holding/Analysis: The Supreme Court found the record to be inadequate, reversed the Court of Appeals decision and remanded the case for proceedings consistent with its opinion. In its decision, the Supreme Court quoted from two zoning treatises: “See 3 Anderson, *American Law of Zoning* 402 (3d ed. 1986)(‘[I]t . . . [is] an established rule that a board of adjustment is empowered to grant a variance only where the applicant has proved that a literal application of the zoning regulations will result in unnecessary hardship.’) The necessity of placing the burden upon the applicant to prove unnecessary hardship is explained in McQuillin, *Municipal Corporations*, sec.

25.167 at 337 (3d ed. 1983): ‘A party applying or appealing for relief to a zoning board of adjustment

or review has the burden of proof of facts entitling him to that relief. Since a hearing before a board is not necessarily an adverse proceeding, the applicant is not entitled to have his petition allowed merely because no witnesses appear in opposition, but the applicant must comply with the proof required by statute and ordinance whether there is or is not opposition to his petition. . . . Unless an applicant is required to establish by proof all the essential elements of his right to relief, a board of review would have the power to nullify the zoning ordinance under the guise of exceptions or variances.’ (footnotes omitted)” *Arndorfer*, 162 Wis. 2d 246 at 253-254 (emphasis added). The Supreme Court went on to state: "The dispositive issue in this case is whether the Arndorfers have met their burden of proving unnecessary hardship, which includes the burden of proving 'uniqueness.'" *Arndorfer*, 162 Wis. 2d 246 at 254. "We cannot conclude from the record that the Arndorfers would suffer unnecessary hardship if the variance is not granted. The record provides no basis for concluding that the soil problems that have caused the Arndorfers' hardship are unique to their land. **Because the Arndorfers have not met their burden of establishing uniqueness, this court is not in a position to order the Board to grant their variance.**" *Arndorfer*, 162 Wis. 2d 246 at 258 (emphasis added).

(For a summary of other issues decided in this case, see "Inadequate Record," "Not Contrary to Public Interest" and "Unnecessary Hardship" in this section.)

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

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in Section 2 and "Area Variances" in this section.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that the "no reasonable use" standard is no longer applicable in area variance cases and reaffirming the *Snyder* definition of unnecessary hardship for area variance cases. *Ziervogel*, ¶ 41 In this decision, the Supreme Court stated: "**The following judicial rules of unnecessary hardship are well-established: . . . The property owner bears the burden of proving unnecessary hardship.**" *Arndorfer*, 162 Wis. 2d at 253; *see also Outagamie County*, 244 Wis. 2d 613, ¶ 50." *Ziervogel*, ¶ 20. (emphasis added)

Financial Hardship or Loss of Profit

State v. Winnebago County, 196 Wis. 2d 836, 540 N.W.2d 6 (Ct. App. 1995).

Facts: In 1965, the Thiels, who owned a 33.7 acre parcel with frontage on Lake Poygan dredged a channel along the parcel's boundary, intending to develop the shoreland area located between the lake and a road, with allowances made for shoreland setbacks and roadway width requirements in effect at that time. In 1993, the Thiels proposed to divide the property into eight units (although these lots had not been officially platted or recorded), but since an ordinance change (which increased the minimum width for private roads) had rendered some of the proposed lots unbuildable, the Thiels applied for and were granted a variance from the shoreland setback based on exceptional circumstances, preservation of property rights, and absence of detriment. The developer who proposed to build on the Thiels' land, Mark Showers, testified at the hearing before the Board.

Holding/Analysis: **The Court of Appeals found that the Board, in granting a variance for four of the eight or nine lots in question (there was some dispute as to the exact number of residential lots that could possible fit on the Thiels land), did not follow applicable law.**

“. . . During the hearings, Showers explained why the variance was needed. He stated how the property 'was more or less a long-term investment for [the Thiels], and without getting a variance, the land isn't worth anything compared to what it would be if we do get the variance.' These statements

seemed to have persuaded the Board as it concluded: ‘Without a variance these lots could not be developed to their highest and best use.’”

“We thus see that the **test used by the Board was whether the variance would maximize the economic value of the property. This is not the proper test.** There must be a showing that no feasible use can be made of the property. Since there is uncontroverted evidence that at least four units could be developed on the Thiels' land, we find it difficult to understand how this record translates into a 'no feasible use' situation. **Concerns over the most profitable use of a parcel are not proper grounds for granting variances.**” *State v. Winnebago County*, 196 Wis. 2d 836 at 844-845 (emphasis added and footnotes omitted).

(For a summary of other issues discussed in the *Winnebago County* case, see also “Unique Physical Property Features” and “Unnecessary Hardship” in this section.)

(**NOTE:** In a footnote, the Court of Appeals distinguishes this case from the situation in the *Zealy case* (See “Takings” cases in Section 24), noting that while the segmentation of parcels may be appropriate in certain types of legal analysis (e.g., to determine whether there is a taking of property), a board should consider the property as a whole when it reaches a conclusion about granting a variance.)

Inadequate Record

Arndorfer v. Sauk County Board of Adjustment, 162 Wis. 2d 246, 469 N.W.2d 831 (1991).

Facts: When the Arndorfers improved a 109-acre parcel, built living quarters and installed a sewage holding tank, they were denied a variance by the board of adjustment to allow them to use the holding tank based on their failure to establish unnecessary hardship. The Arndorfers claimed that they would suffer unnecessary hardship if the variance was not granted, and they petitioned for certiorari review of the board’s decision before the circuit court. The original taped recording of the board’s public hearing was unintelligible and no transcript of the hearing was available to serve as a basis for review of the board’s decision denying the variance. The parties to the appeal stipulated to the facts to reconstruct the record for the appeal. The circuit court reviewed the stipulated facts and the written documents introduced into evidence at the public hearing and determined that the Arndorfers were entitled to a variance. However, the Court of Appeals reversed the circuit court, finding that the board’s denial was not arbitrary, oppressive or unreasonable. The issue before the Supreme Court was whether the Arndorfers met their burden of overcoming the presumption of correctness accorded to the board’s decision and had established that they will suffer unnecessary hardship if a variance is not granted, including the burden of proving uniqueness.

Holding/Analysis: **The Supreme Court found the record to be inadequate, reversed the Court of Appeals decision and remanded the case for proceedings consistent with its opinion.** Since the original taped recording of the board proceedings was unintelligible, the Court stated that the use of a stipulation between the parties to reconstruct a missing or damaged record was an appropriate practice. However, the Court concluded that the record did not provide a rational basis for the board’s decision.

“... The Board may not deny a variance simply because it departs from the policy of the Sauk County Ordinance. See *Schalow v. Waupaca County*, 139 Wis. 2d 284, 288, 407 N.W.2d 316, 318 (Ct. App. 1987).” *Arndorfer*, 162 Wis. 2d 246 at 257.

[A summary of the *Schalow* case can be found under “Knowledge of Ordinance Does Not Constitute Self-Imposed Hardship” in this section.]

“We cannot conclude from the record that the Arndorfers would suffer unnecessary hardship if the variance is not granted. The record provides no basis of concluding that the soil problems that

have caused the Arndorfers' hardship are unique to their land. Because the Arndorfers have not met their burden of establishing uniqueness, this court is not in a position to order the Board to grant their variance.

We are reluctant, however, to affirm the Board's action by substituting our own reason for denying the variance where the Board has denied the variance request by citing reasons that are unsupported by the record. It is apparent that the limited facts introduced by the Stipulation may have contributed to the Board's inability to establish a rational basis for the Board's decision or to the Arndorfers' inability to establish uniqueness. Therefore, we conclude that **the equitable disposition of this case requires that the case be remanded to the Board to allow additional evidence to be introduced** and for the Board to determine whether the Arndorfers have met their burden of establishing unnecessary hardship." *Arndorfer*, 162 Wis. 2d at 258-259 (emphasis added).

(For a summary of other issues decided in *Arndorfer v. Sauk County Board of Adjustment*, see also "Burden of Proof," "Not Contrary to Public Interest" and "Unnecessary Hardship" in this section.)

Knowledge of Ordinance Does Not Constitute Self-Imposed Hardship

Schalow v. Waupaca County, 139 Wis. 2d 284, 407 N.W.2d 316 (Ct. App. 1987).

Facts: The board denied a variance application for a number of reasons when the Schalows knowingly purchased a substandard lot.

Holding/Analysis: **The Court of Appeals noted that denial of a variance because it is a departure from the ordinance is contrary to law. The purpose of the variance procedure is to obtain relief from ordinance requirements which cannot be complied with.** There was no evidence presented to the board that the proposed dwelling was too large, thus the determination of the board was not supported by evidence in the record. There was no testimony and no indication of concern about wetland vegetation, thus citing this reason was also contrary to law. It is a denial of procedural due process to base a decision upon a hidden reason, thus affording no opportunity for rebuttal. **Prior knowledge of ordinance regulations does not constitute self-imposed hardship because buyers do not lose the right to apply for variances.**

(**Note**: For a summary of other issues decided in the *Schalow* case, see also "Procedural Due Process" in Section 11.)

No Reasonable Use

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

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in Section 2 and "Area Variances" in this section.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that the "no reasonable use" standard is no longer applicable in area variance cases and reaffirming the *Snyder* definition of unnecessary hardship for area variance cases. *Ziervogel*, ¶ 41.

In this decision, the Supreme Court stated: " We now conclude that **the distinctions in purpose and effect of use and area zoning make the perpetuation of a single, highly-restrictive 'no reasonable use of the property' standard for all variances unworkable and unfair.** Use zoning regulates fundamentally how property may be used, in order to promote uniformity of land use within neighborhoods or regions. Area zoning regulates lot area, density, height, frontage, setbacks, and so forth, in order to promote uniformity of development, lot, and building size." *Ziervogel*, ¶ 4.

(emphasis added)

“Restricting the availability of variances to those property owners who would have ‘no reasonable use’ of their property without a variance may be justifiable in use variance cases, given the purpose of use zoning and the substantial effect of use variances on neighborhood character. But applying the same strict ‘no reasonable use’ standard to area variance applications is unjustifiable. The ‘no reasonable use’ standard is largely disconnected from the purpose of area zoning, fails to consider the lesser effect of area variances on neighborhood character, and operates to virtually eliminate the statutory discretion of local boards of adjustment to do justice in individual cases.” *Ziervogel*, ¶ 5.

“Applying the ‘no reasonable use’ standard to area variances is inconsistent with the purpose of area zoning, fails to recognize the lesser effect of area variances on the public interest, and very nearly extinguishes the statutory discretion of local boards of adjustment. Continuing to condition area variances upon a showing of ‘no reasonable use of the property’ makes variance procedure unworkable and unfairly forecloses almost all property owners from the opportunity to demonstrate hardship.” *Ziervogel*, ¶ 32.

State of Wisconsin v. Waushara County Board of Adjustment and G. Edwin Howe and Suzanne Howe, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in Section 2, and "Area Variances" in this section.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that “in evaluating whether to grant an area variance to a zoning ordinance, a board of adjustment should focus on the purpose of the zoning law at issue in determining whether an unnecessary hardship exists for the property owner seeking such variance.” *Waushara County*, ¶ 35.

In the majority opinion in this case, the Supreme Court stated: “ ‘**No reasonable use,**’ as set forth in *Kenosha County*, is no longer applicable when an area variance is being considered.” *Waushara County*, ¶ 2. (emphasis added)

“ . . . In the *Outagamie County* case, it was noted that the board in that case did not analyze the purpose underlying the ordinance in question. It was stated that *Kenosha County’s no reasonable use standard ‘should have been applied by the Board only after considering the purpose of the zoning ordinance, and the nature of the specific restriction at issue.’* ” *Waushara County*, ¶ 28. (emphasis added and citations omitted)

“In *Kenosha County*, we explained that our reason for adopting the State’s no reasonable use test was because it best took into account the purpose of the statute in question. We stated:

‘The fundamental difference between the parties’ definitions of the unnecessary hardship standard is the extent to which those definitions incorporate the purpose of the shoreland zoning regulations – to enforce a uniform setback that preserves the public’s interest in shoreland and the navigable waters of the state. Under the State’s definition, the issue is whether the Board and reviewing courts look first to the purpose of the shoreland zoning ordinance and then at the applicant’s request. The Board seems to argue that the reviewing bodies look at the applicant’s request primarily in terms of the burden on the applicant. In both our Snyder and Arndorfer decisions, we emphasized that the purpose of the zoning regulations, including uniformity, should not be lost in the determination of whether to grant a variance.’

Kenosha County, 218 Wis. 2d at 413.” *Waushara County*, ¶ 31.

“When we consider the emphasis on purpose that we find in *Kenosha County*, it appears that the no

reasonable use standard has been applied, since that case, in a very restrictive manner. **Although this court adopted the no reasonable use standard proffered by the State [in *Kenosha County*], we did so after considering the purpose of the zoning ordinance in question.** Insofar as it acknowledged that the purpose of the zoning ordinances must be taken into account when deciding whether to grant a variance, ***Kenosha County* is wholly consistent with the reasoning regarding a focus on the purpose of the ordinance set forth in *Snyder and Outagamie County*.** In light of the above-mentioned cases, it is evident that this court has consistently noted that the purpose of a zoning ordinance should not be lost sight of when determining whether the variance requested should be granted. **We find no need to accept the Howes’ invitation to overrule *Kenosha County*. Rather, the term ‘no reasonable use,’ as set forth in *Kenosha County*, is no longer applicable when consideration is being given to whether to grant an area variance.** We reaffirm *Snyder*’s definition of the statutory term ‘unnecessary hardship’ because it best encompasses the appropriate test for granting an area variance.” *Waushara County*, ¶ 32. (emphasis added; citations and footnote omitted) In a dissenting opinion, however, two Supreme Court justices argued that:
“ . . . In the context of environmental regulations such as shoreland zoning, the ‘no reasonable use’ rule simply makes more sense. See David M. Freibus, *A New Uncertainty in Local Land Use: A Comparative Institutional Analysis of State v. Outagamie County Board of Adjustment*, 2003 Wis. L. Rev. 571, 609.” *Waushara County*, ¶ 61.

Not Contrary to Public Interest

Arndorfer v. Sauk County Board of Adjustment, 162 Wis. 2d 246, 469 N.W.2d 831 (1991).

Facts: When the Arndorfers improved a 109-acre parcel, built living quarters and installed a sewage holding tank, they were denied a variance by the board of adjustment to allow them to use the holding tank, based on their failure to establish unnecessary hardship. The Arndorfers claimed that they would suffer unnecessary hardship if the variance was not granted, and they petitioned for certiorari review before the circuit court. The circuit court determined that the Arndorfers were entitled to a variance. However, the Court of Appeals reversed the circuit court. The issue before the Supreme Court was whether the Arndorfers had met their burden of proving unnecessary hardship.

Holding: The Supreme Court found the record of board’s decision to be inadequate, reversed the Court of Appeals decision and remanded the case for proceedings consistent with its opinion. In its decision, the Supreme Court observed that: “Unnecessary hardship also requires that the variance not be contrary to the public interest. . . . This requirement recognizes that some hardships are ‘necessary’ to protect the welfare of the community. See 3 Ziegler, *Rathkopf’s The Law of Zoning and Planning* 38-37-9 (4th ed. 1990); Anderson, [*American Law of Zoning*] 20.16 at 405-06.” *Arndorfer*, 162 Wis. 2d at 256.

(For a summary of other issues decided in *Arndorfer v. Sauk County Board of Adjustment*, see also “Burden of Proof,” “Inadequate Record” and “Unnecessary Hardship” in this section.)

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

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in Section 2 and “Area Variances” in this section.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that the “no reasonable use” standard is no longer applicable in area variance cases and reaffirming the *Snyder* definition of unnecessary hardship for area variance cases. *Ziervogel*, ¶ 41. In this decision, the Supreme Court stated: “**The following judicial rules of unnecessary hardship**

are well-established: . . . A variance cannot be contrary to the public interest. *Arndorfer*, 162 Wis. 2d at 256; *see also Outagamie County*, 244 Wis. 2d 613, ¶ 24.” *Ziervogel*, ¶ 20. (emphasis added)

State v. Kenosha County Bd. of Adjustment, 218 Wis. 2d 396, 577 N.W.2d 813 (1998).

Facts: The board claimed one of the reasons it granted Huntoon a variance was because the public interest is served when citizens are allowed a reasonable use of their property that does not cause harm to the public. For additional facts, see “Unnecessary Hardship” in this section.

Holding/Analysis: The Supreme Court stated that since the house had been used as a residence since it was built, Huntoon already had a reasonable use of the property without the variance. For the board to approve a variance for any of a number of reasonable uses, as long as it doesn't cause harm to the public, is too accommodating. Variance requests are to be considered in light of the purposes of shoreland protection statutes. **Only when the applicant has demonstrated he or she will have no reasonable use of the property, without a variance, is an unnecessary hardship present.**

(**Note**: For a summary of other issues discussed in the *Kenosha County* case, see also “Area Variances” and “Unnecessary Hardship” in this section.)

State of Wisconsin v. Waushara County Board of Adjustment and G. Edwin Howe and Suzanne Howe, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

Facts: For a summary of the facts and other issues decided in this case, see “Discretionary Authority of BOAs” in Section 2, and “Area Variances” in this section.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that “in evaluating whether to grant an area variance to a zoning ordinance, a board of adjustment should focus on the purpose of the zoning law at issue in determining whether an unnecessary hardship exists for the property owner seeking such variance.” *Waushara County*, ¶ 35.

In a dissenting opinion written by Justice Bradley (and join in by Justice Abrahamson), the dissenting justices argued:

“The threshold requirement for granting a variance is that it not be contrary to the public interest. The legislature has long recognized that strict regulation of buildings near shorelands is necessary to safeguard the constitutionally protected interests of the public in the state’s navigable waters. Wis. Const. Art. IX, § 1 (‘Jurisdiction on Rivers and Lakes; Navigable Waters’). *Waushara County*, ¶ 41. (Bradley, J., dissenting)(emphasis added and footnote omitted)

“To aid in the fulfillment of the state’s role as trustee of its navigable waters, the legislature directed the Department of Natural Resources to establish minimum standards for shoreland ordinances. Wis. Stat. § 281.31 (6). The shoreland setback is the centerpiece of those minimum standards. It protects the value and views of the lakeshore property. The setback further serves as a visual and ecological buffer between protected public rights in navigable waters and development in adjacent lands. See Tracy K. Kuczynski, *Wisconsin’s Shoreland Management Program: An Assessment With Implications for Effective Natural Resources Management and Protection*, 1999 Wis. L. Rev. 273, 283-84.” *Waushara County*, ¶ 43. (Bradley, J., dissenting)

State v. Winnebago County, 196 Wis.2d 836, 540 N.W.2d 6 (Ct. App. 1995).

Facts: In 1965, the Thiels, who owned a 33.7 acre parcel with frontage on Lake Poygan dredged a channel along the parcel’s boundary, intending to develop the shoreland area located between the lake and a road, with allowances made for shoreland setbacks and roadway width requirements in effect at that time. In 1993, the Thiels proposed to divide the property into eight lots, but since an ordinance

change had rendered some of the proposed lots unbuildable, the Thiels applied to the Winnebago County Board of Adjustment for, and were granted, a variance from the shoreland setback based on exceptional circumstances, preservation of property rights, and absence of detriment. The State of Wisconsin appealed the granting of the variance to the Winnebago County Circuit Court, arguing (among other things) that in issuing the variance, the Board of Adjustment had failed to consider whether the variance would be contrary to the public interest. After reviewing the record, the circuit court found that the Board of Adjustment had acted according to law and that there was sufficient evidence to support its conclusions. The State then challenged the circuit court's decision before the Court of Appeals.

Holding/Analysis: The Court of Appeals agreed with the State's arguments and remanded the case for further proceedings consistent with its decision. The Court of Appeals held: ". . .the State complains that the Board failed to consider whether the variance would be contrary to the public interest. The DNR approached the Board with its concerns about increased pollution in Lake Poygan. Although the Board made no specific findings on this issue, to support its decision the Board now asserts that the DNR did not provide an evidentiary basis for its recommendations. Such reasoning, however, overlooks the significance of the state legislature's findings which are the foundation of these shoreland ordinances. **The State of Wisconsin has determined that protecting navigable waters is in the public interest.** See § 144.26 (1) [now numbered § 281.31 (1)], STATS. **Moreover, in pursuit of this policy goal, the legislature has empowered the DNR to develop water conservation standards, § 144.26 (3) [now numbered § 28.31 (3)], and to disseminate these "general recommended standards and criteria" to local municipalities.** Section 144.26 (6) [now § 281.31 (6)]; see generally WIS. ADM. CODE § NR ch. 115. **These rules and regulations in no way suggest that the State must present specific factual findings to ensure compliance with shoreland setback requirements. Rather, the burden is shifted to the landowner to present evidence that the desired variance is not contrary to the public interest furthered by the shoreland ordinances.**" *Winnebago County*, 196 Wis. 2d at 846-847 (emphasis added and citations omitted).

Personal Inconvenience

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

Facts: For a summary of the facts and other issues decided in this case, see "Standard of Review" in Section 3, "Erroneous or Unauthorized Acts" in Section 14, and "Financial Hardship or Loss of Profit", "Substandard Lots" and "Unnecessary Hardship" in this section.

Analysis: In this case, the property owner argued that he needed a porch on his house to enjoy lake living, to accommodate this expanded family, and to increase the value of his land. In its opinion, the Supreme Court stated: "Outside of New York, where a minimal showing of practical difficulties will justify an area variance, the authorities indicate that **a showing of natural growth of a family and personal inconvenience do not constitute practical difficulties or unnecessary hardship which justify a variance.**" *Snyder*, 74 Wis. 2d 468 at 478.

"Practical difficulties or unnecessary hardship do not include conditions personal to the owner of the land, but rather to the conditions especially affecting the lot in question. '[I]t is not the uniqueness of the plight of the owner, but the uniqueness of the land causing the plight, which is the criterion.' 8 McQuillin, *Municipal Corporations*, sec. 25.167, at 544 (3d ed. 1965); See *Karasik v. City of Highland*, 130 Ill. App.2d 566, 572-73, 264 N.E.2d 215, 219 (1970)." *Snyder*, 74 Wis. 2d 468 at 479.

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

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority

of BOAs" in Section 2 and "Area Variances" in this section.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that the "no reasonable use" standard is no longer applicable in area variance cases and reaffirming the *Snyder* definition of unnecessary hardship for area variance cases. *Ziervogel*, ¶ 41.

In this decision, the Supreme Court stated: "**The following judicial rules of unnecessary hardship are well-established: The hardship must be based on conditions unique to the property rather than considerations personal to the property owner.** *Snyder*, 74 Wis. 2d at 479; *see also* 3 Kenneth H. Young, *Anderson's American Law of Zoning* § 20.35-20.40 (4th ed. 1996); 3 Edward H. Ziegler, Jr., *Rathkopf's Law of Zoning and Planning* § 58:18 (2003)." *Ziervogel*, ¶ 20. (emphasis added)

Practical Difficulty

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

Facts: For a summary of the facts and other issues decided in this case, see "Standard of Review" in Section 3, "Erroneous or Unauthorized Acts" in Section 14, and "Financial Hardship or Loss of Profit", "Substandard Lots" and "Unnecessary Hardship" in this section.

Holding/Analysis: In its opinion, the Supreme Court stated: ". . . because sec. 59.99 (7)(c), Stats., [now numbered s. 59.694 (7)(c), Stats.] does not include the element of practical difficulty while the ordinance does, a question arises as to the relevance of appellant's arguments relating to claimed practical difficulty. However, **although the terms 'unnecessary hardship' and 'practical difficulty' are insusceptible to precise definition and are often stated disjunctively in zoning enactments, the authorities generally recognize that there is no practical difference between them.**" *Snyder*, 74 Wis.2d 468 at 472 (emphasis added).

"The problems involving the definition of these terms arise particularly from the fact that **the conditions upon which a landowner typically bases a claim for a use variance are more easily spoken of as imposing an unnecessary hardship**, while the conditions prompting application for an area variance are more easily termed practical difficulties. Therefore, the fact that area variances are considerably easier to obtain than use variances creates the impression that a minimal showing of difficulty will establish the element of practical difficulty and entitle the landowner to a variance. However, **area variances are not more easily obtained because practical difficulties are something much less severe than unnecessary hardship, but because area variances do not involve great changes in the character of neighborhoods as do use variances.** This relates to what hardships or practical difficulties may be considered unnecessary or unreasonable **in light of the purpose of the zoning law.**

The danger of discerning a significant difference between the terms unnecessary hardship and practical difficulties is that while the hardship required for a variance is qualified by the word 'unnecessary', the difficulties only need be 'practical'. The term practical difficulties encompasses virtually any problem, and thus grounds for a variance could be established by only a minimal showing.

Therefore, we think that there should be no significant practical distinction drawn between the terms unnecessary hardship and practical difficulties, and where it appears, the phrase 'practical difficulty or unnecessary hardship' should be construed as a whole, for where peculiar and exceptional practical difficulties, which justify a variance, exist, unnecessary hardship will also exist." *Snyder*, 74 Wis.2d 468 at 473-474 (emphasis added and citation omitted).

"When considering an area variance, the question of whether unnecessary hardship or practical difficulty exists is best explained as '[w]hether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions

unnecessarily burdensome.' 2 Rathkopf, *The Law of Zoning and Planning*, 45-28 (3d ed. 1972)." *Snyder*, 74 Wis.2d 468 at 474-475.

State v. Kenosha County Board of Adjustment, 218 Wis. 2d 396, 577 N.W.2d 813 (1998).

Facts: For a summary of the facts and other issues decided in this case, see "Unnecessary Hardship" in this section.

Holding/Analysis: "Both the statute and the ordinance specify that a variance applicant show 'unnecessary hardship' to justify receiving the variance. Only the county ordinance defines that term:

UNNECESSARY HARDSHIP

The circumstances where special conditions, which were not self-created, affect a particular property and make strict conformity with restrictions governing dimensional standards (such as lot area, lot width, setbacks, yard requirements, or building height) unnecessarily burdensome or unreasonable in light of the purpose of this Ordinance.

Unnecessary hardship is present only where, in the absence of a variance, no feasible use can be made of the property.

Kenosha County Shoreland Ordinance, definitions.

While the county ordinance permits the granting of a variance upon the showing of either 'unnecessary hardship or practical difficulties,' this court has already decided that there is no significant distinction between the meaning of the two terms. See *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 474, 247 N.W.2d 98 (1976). As such, the Kenosha County Shoreland Ordinance does not actually impose a standard different than that imposed by the statute." *Kenosha County*, 218 Wis. 2d 396 at 409-410.

State v. Outagamie Cty. Bd. of Adjustment, 2001 WI 78, 244 Wis. 2d 613, 628 N.W.2d 376.

Facts: For the facts of this case and other issues discussed in this case, see "Unnecessary hardship" in this section.

Holding/Analysis: **The Supreme Court held that "Wis. Admin. Code § NR 116.13 (2) conflicts with Wis. Stat. § 87.30 (1g) and is therefore invalid to the extent that it prohibits all variances for residential floors below the regional flood elevation," and reinstated the circuit court's decision affirming the Outagamie County BOA's issuance of a variance to the Warnings.**

The lead opinion, written by Justice Sykes, stated that:

"Kenosha County's establishment of a single standard for measuring the 'unnecessary hardship' required for the issuance of both use and area variances has practically eliminated the efficacy of variance procedure as a remedy against individual injustices caused by sweeping land use regulations, as the Warnings' case vividly demonstrates. Such a radical change in variance law was unwarranted. I would overrule the case and restore the distinction between use and area variances to the law of zoning in this state. Two other members of the court join me in this conclusion." *Outagamie County*, 2001 WI 78, ¶ 5.

However, in a dissenting opinion, Justice Abrahamson stated:

". . . the lead opinion's analysis begs a key question: what is the purpose of the floodplain zoning law at issue in this case, and to what standard should a variance from a floodplain zoning law be held?

. . . the lead opinion tells us that the purposes of the floodplain zoning laws are 'promoting public health and safety and protecting private property from flood damage.'

The lead opinion is thus implicitly concluding that variances from zoning laws that promote health and safety and protect private property from flood damage are subject to a less restrictive standard than zoning laws that preserve the character of the neighborhood. I cannot agree. . . . I could not conclude that future homeowners in the Warnings' position are subject to anything less than the no

reasonable use standard. To conclude otherwise is to fail to promote health and safety and protect private property from flood damage." *Outagamie County*, 2001 WI 78, ¶ 144-¶ 146.

"So where does the law governing variances stand? Three members of this court want to erect a binary standard that reflects an artificial distinction between area and use variances. Four members of the court read *Kenosha County* as permanently doing away with the artificial concepts of area and use variances. *Kenosha County* thus survives another day. To grant a variance, a County Board of Adjustment must conclude tht the property owner has no reasonable use of the property, in light of the purpose of the applicable zoning regulations." *Outagamie County*, 2001 WI 78, ¶ 147.

Purpose of Variance Procedure

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

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in Section 2 and "Area Variances" in this section.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that the "no reasonable use" standard is no longer applicable in area variance cases and reaffirming the *Snyder* definition of unnecessary hardship for area variance cases. *Ziervogel*, ¶ 41.

In this decision, the Supreme Court stated: "Variance procedure in zoning law serves several essential purposes: to prevent otherwise inflexible zoning codes from precipitating regulatory takings; to provide a procedure by which the public interest in zoning compliance can be balanced against the private interests of property owners in individual cases; and, most broadly, to allow a means of obtaining relief from the strict enforcement of zoning restrictions where individual injustices might occasionally occur. *Outagamie County*, 244 Wis. 2d 613, ¶ 44-47. **Zoning variances 'are designed to afford a protective device against individual hardships, to provide relief against unnecessary and unjust invasions of the right to private property, and to provide a flexibility of procedure necessary to the protection of constitutional rights.'** 8 Eugene McQuillin, *Municipal Corporations* § 25.160, at 590-91 (Rev. ed. 2000) (internal citations omitted)." *Ziervogel*, ¶ 17. (emphasis added)

"*Snyder*'s less-stringent and more flexible definition of unnecessary hardship for area variances allows variance procedure to function as more than just a protection against unconstitutional takings of private property. It allows variance procedure to function as the regulatory 'escape valve' it was meant to be: 'The purpose of variances in the broadest sense is the rendering of justice in unique and individual cases of practical difficulties or unnecessary hardships arising from literal application of zoning ordinances.' 8 Quillin [sic], supra § 25.172, at 648." *Ziervogel*, ¶ 25.

Purpose of Zoning Provision

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

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in Section 2 and "Area Variances" in this section.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that the "no reasonable use" standard is no longer applicable in area variance cases and reaffirming the *Snyder* definition of unnecessary hardship for area variance cases. *Ziervogel*, ¶ 41.

“. . . Whether this standard [Snyder standard for area variances] is met in individual cases depends upon a consideration of the purpose of the zoning restriction in question, its effect on the property, and the effect of a variance on the neighborhood and the larger public interest.” *Ziervogel*, ¶ 7.

“. . . **The board of adjustment is to evaluate the hardship in light of the purpose of the zoning restriction at issue.** *Snyder*, 74 Wis. 2d at 473; *see also Outagamie County*, 244 Wis. 2d 613, ¶ 24; *Id.*, ¶ 74 (Crooks, J., concurring).” *Ziervogel*, ¶ 20. (emphasis added)

“Whether this standard [Snyder standard for area variances] is met in this case [involving an addition to a nonconforming building within the shoreland setback area] will depend upon the board of adjustment’s consideration of the purpose of the zoning restriction in question (including the important public purposes of shoreland zoning generally), the effect of the restriction on the property, and the effect of a variance on the neighborhood and the larger public interest.” *Ziervogel*, ¶ 42.

State of Wisconsin v. Waushara County Board of Adjustment and G. Edwin Howe and Suzanne Howe, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in Section 2, and "Area Variances" in this section.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that **“in evaluating whether to grant an area variance to a zoning ordinance, a board of adjustment should focus on the purpose of the zoning law at issue in determining whether an unnecessary hardship exists for the property owner seeking such variance.”** *Waushara County*, ¶ 35. (emphasis added)

“. . . boards must focus on the purpose of the ordinance or statute in question when deciding whether to grant a variance. More specifically, **boards must consider whether a property owner’s failure to receive a variance will cause the property owner an unnecessary hardship in light of the purpose of the ordinance.**” *Waushara County*, ¶ 26. (emphasis added)

“. . . **the facts of a particular case must be analyzed in light of the purpose of the statute.** In the *Outagamie County* case, it was noted that the board in that case did not analyze the purpose underlying the ordinance in question. It was stated that *Kenosha County’s no reasonable use standard ‘should have been applied by the Board only after considering the purpose of the zoning ordinance, and the nature of the specific restriction at issue.* It was further stated that because the board in that case did not evaluate the facts in light of the purpose of the ordinance in question, remand may have been appropriate. **In noting that facts must be analyzed in light of the purpose of the zoning ordinance, a new standard was not being created. Instead, the standard this court has elucidated in previous cases involving variances was merely being applied.**” *Waushara County*, ¶ 28. (citations omitted and emphasis added)

Self-Created Hardship

State ex rel. Markdale Corp. v. Bd. of Appeals of City of Milwaukee, 27 Wis. 2d 154, 133 N.W.2d 795 (1965).

Facts: The owners of a gas station leased a portion of their property to Modern Car Wash, Inc. Modern Car Wash constructed a building to house a carwash on the premises while an appeal was pending on a building permit that they had been erroneously granted by the city building inspector. The property owners applied for a variance after the building permit was revoked, that would allow

them to use an area zoned for parking to access the carwash. The Board of Appeals granted the variance and the owners of nearby properties appealed.

Holding/Analysis: **The Court of Appeals held that it was beyond the power of the Board of Appeals to grant a variance for a self-created hardship.** Actions taken in willful disregard of the requirements of an ordinance, in ignorance of an ordinance, in reliance upon assurances of a zoning official, or even in reliance upon a permit issued by a zoning official, all fall within the category of self-created hardship, according to the Court. (The Court had held in the prior proceedings related to the building permit that an agency or joint venture relationship existed between Cities Service and Modern Car Wash, and therefore, notice to Modern Car Wash was notice to Cities Service.)
". . . the authorities are practically unanimous to the effect that a hardship which has been self-created by the act of the property owner does not qualify as a hardship from which a board of appeals can grant relief by granting a variance." (citations omitted) *State ex rel. Markdale Corp.*, 27 Wis. 2d 154 at 159. "The building permit which was issued February 2, 1961, was contested by appeal to the board, and eventually held invalid. In spite of such pending appeal Cities Service proceeded with construction. In so doing it took whatever chances would result if the appeal were decided adversely to its agent or joint venturer, Modern Car Wash. . . . once Cities Service received notice of the appeal it proceeded at its peril in incurring expenditures in reliance on the permit." *State ex rel. Markdale Corp.*, 27 Wis. 2d 154 at 160. ". . . it is entirely immaterial whether Cities Service was entirely ignorant of the fact that its contemplated use of the south 60 feet of its premises to route cars into the auto laundry would constitute a zoning-ordinance violation. It was chargeable with knowledge of the provisions of the ordinance. The hardship to support a variance cannot arise from a condition which Cities Service created in ignorance of zoning regulations." (citations omitted) *State ex rel. Markdale Corp.*, 27 Wis. 2d 154 at 162.

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

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in Section 2 and "Area Variances" in this section.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that the "no reasonable use" standard is no longer applicable in area variance cases and reaffirming the *Snyder* definition of unnecessary hardship for area variance cases. *Ziervogel*, ¶ 41.

In this decision, the Supreme Court stated: "**The following judicial rules of unnecessary hardship are well-established: . . . The hardship cannot be self-created.** *Snyder*, 74 Wis. 2d at 476; *see also Outagamie County*, 244 Wis. 2d 613, ¶ 24; 3 Ziegler, *supra* [3 Edward H. Ziegler, Jr., *Rathkopf's Law of Zoning and Planning*] § 58:21; 3 Young, *supra* [3 Kenneth H. Young, *Anderson's American Law of Zoning*] § 20.44-47." *Ziervogel*, ¶ 20. (emphasis added)

" . . . The established requirements that the hardship be unique to the property and not self-created are maintained, and the burden of proving unnecessary hardship remains on the property owner. *Id.* [*Snyder*] at 476-79; *see also Outagamie County*, 244 Wis. 2d 613, ¶¶ 24, 50." *Ziervogel*, ¶ 33.

Substandard Lots (as a unique property feature)

Clark v. Waupaca County Bd. of Adjustment, 186 Wis. 2d 300, 519 N.W.2d 782 (Ct. App. 1994).

Facts: The owners of a small, pie-shaped lake lot (a 4,889 sq. ft. lot with 24 feet of frontage on Long Lake) proposed to build a dwelling slightly smaller than a conventional two-car garage (with only 570 sq. ft. of first floor living area) and were denied a variance.

Holding/Analysis: The Court of Appeals held that a board may deny a variance when a lot is too small for any kind of reasonable house, and the proposed dwelling would not conform to the surrounding dwellings in the neighborhood. Since the language of the ordinance and the statute is permissive, a variance may be granted based on unnecessary hardship, but proof of hardship does not entitle the owner to a variance.

(Note: For a summary of other issues discussed in the *Waupaca County* case, see also “Standard of Review” in Section 3.)

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

Facts: For a summary of the facts and other issues decided in this case, see “Standard of Review” in Section 3, “Erroneous or Unauthorized Acts” in Section 14, and “Financial Hardship or Loss of Profit”, “Practical Difficulty” and “Unnecessary Hardship” in this section.

Holding/Analysis: In this case, the Waukesha County ordinance allowed a proportionate method reduction of the offset requirement for substandard lots. Although a substandard lot’s size is often cited as grounds for a variance, here the ordinance takes into consideration the lot size, thus the offset requirement is not unique or peculiar to this property because it applies equally to all lots of similar size. The location of the porch was not due primarily to a peculiar or unique aspect of the lot, but more a matter of convenience, needed to enjoy lake living. **“Growth of a family and personal inconvenience do not constitute practical difficulties or unnecessary hardship which justify a variance. It is not the uniqueness of the plight of the owner, but uniqueness of the land which is the criterion.”** *Snyder*, 74 Wis. 2d 468 at 479 (1976) (emphasis added). The Supreme Court concluded that the owner's hardship claim was either self-created or no more than a personal inconvenience.

Unique Physical Property Features

Arndorfer v. Sauk County Board of Adjustment, 162 Wis. 2d 246, 469 N.W.2d 831 (1991).

Facts: For a summary of the facts and other issues decided in this case, see “Inadequate Record” and “Unnecessary Hardship” in this section.

Holding/Analysis: “The dispositive issue in this case is whether the Arndorfers have met their burden of proving unnecessary hardship, which includes the burden of proving 'uniqueness.'” *Arndorfer*, 162 Wis. 2d 246 at 254. “We cannot conclude from the record that the Arndorfers would suffer unnecessary hardship if the variance is not granted. The record provides no basis for concluding that the soil problems that have caused the Arndorfers' hardship are unique to their land. **Because the Arndorfers have not met their burden of establishing uniqueness, this court is not in a position to order the Board to grant their variance.**” *Arndorfer*, 162 Wis. 2d 246 at 258 (emphasis added).

“ . . . The 'uniqueness' element is necessary to prevent the purposes of the zoning regulations from being undermined by the granting of piecemeal exceptions to those regulations. As one commentator has explained:

Hardship is not peculiar to the applicant's land if it is shared by a neighborhood or an entire area; a shared hardship will not support the granting of a use variance to relieve it. Thus, traffic problems common to a neighborhood and soil deficiencies common to an area are shared hardships which are not unique. Where the hardship imposed upon an applicant's property is no greater than that suffered by nearby lands, the board of adjustment may not grant a variance to relieve it. To grant such relief would be unfair to owners who remain subject to the general restrictions of the zoning ordinance, and it would endanger the community plan by piecemeal exemption. (Footnotes omitted.) 3 Anderson, *American Law of Zoning* 474-76 (3d ed. 1986)’

Therefore, where the hardship imposed on the applicant's land is shared by nearby land, relief should be addressed through legislative, rather than administrative, means." *Arndorfer*, 162 Wis. 2d 246 at 255-256.

"Unnecessary hardship also requires that the variance not be contrary to the public interest. . . . This requirement recognizes that some hardships are 'necessary' to protect the welfare of the community." (citations omitted) *Arndorfer*, 162 Wis. 2d 246 at 256.

State ex rel. Spinner v. Kenosha County Bd. of Adjustment, 223 Wis. 2d 99, 588 N.W.2d 662 (1998).
Facts: Mr. George Wronowski owned a 1.3 acre lot with lake frontage on Lake George in the Town of Bristol, Kenosha County. A creek also runs through the lot. When the shoreland setback from both the lake and the creek were measured, it was calculated that there were only 1879 square feet of buildable space on the lot. In order to build a two-story residence with 2585 sq. ft. of living space, Mr. Wronowski sought a variance from the shoreland setback for both the lake and the creek. The Kenosha County Board of Adjustment granted the requested variance because of the "unique topography of Wronowski's property."

Holding/Analysis: **"The Board held that because of the unusualness of Wronowski's land – the fact that it is both lakefront property and also bisected by a creek – there is no feasible residential use of the land without a variance. We disagree.** The Board concluded that the unique topography of Wronowski's property created a need for the variance. On the contrary, however, this argument was rejected in *Kenosha County Board of Adjustment*. There, the board had found that the property's topography – its steep, and perhaps dangerous, slope to the lakeshore combined with shoreline loss due to soil erosion – created an unnecessary hardship. . . . The court responded that this unique topography alone did not create a hardship; it must be considered along with other factors. . . . Moreover, the court reasoned that the board was too accommodating and apparently willing to approve 'any of a number of reasonable uses, so long as it does not cause harm to the public.'" *Spinner*, 223 Wis.2d 99 at 106-107 (emphasis added and citations omitted).

"In the present case, there was no evidence presented that a different design of the house could not incorporate the setback requirement. Without such evidence, the applicant may still enjoy a reasonable use of the property without a variance. Kenosha County Board of Adjustment instructs that an 'unnecessary hardship' can be found only if the applicant has demonstrated that no reasonable use of the property exists without a variance. In other words, the burden is on the applicant to demonstrate through the evidence that without the variance he or she is prevented from enjoying any reasonable use of his or her property." *Spinner*, 223 Wis. 2d 99 at 107 (emphasis added). "Therefore, to meet the *Kenosha County Board of Adjustment* 'unnecessary hardship' test, Wronowski must present evidence demonstrating that no other home design could incorporate the setback requirement on this property. He failed to do so; therefore, a reasonable use of his property without a variance remains a possibility. Accordingly, we find that the Board failed to properly apply the no reasonable use standard to the evidence before it." 223 Wis. 2d 99 at 107–108.

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

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in Section 2 and "Area Variances" in this section.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that the "no reasonable use" standard is no longer applicable in area variance cases and reaffirming the *Snyder* definition of unnecessary hardship for area variance cases. *Ziervogel*, ¶ 41.

In this decision, the Supreme Court stated: **"The following judicial rules of unnecessary hardship are well-established: The hardship must be based on conditions unique to the property rather**

than considerations personal to the property owner. *Snyder*, 74 Wis. 2d at 479; *see also* 3 Kenneth H. Young, *Anderson's American Law of Zoning* § 20.35-20.40 (4th ed. 1996); 3 Edward H. Ziegler, Jr., *Rathkopf's Law of Zoning and Planning* § 58:18 (2003).” *Ziervogel*, ¶ 20. (emphasis added)

State v. Kenosha County Board of Adjustment, 218 Wis.2d 396, 577 N.W.2d 813 (1998).

Facts: For a summary of the facts and other issues decided in this case, see “Unnecessary Hardship” in this section.

Holding/Analysis: The Supreme Court stated that: “The Board may have also made a finding of uniqueness limitations because of the combination of the steep slope, which begins at the door facing the lake, and the estimated 15 feet of shoreline that has been lost since 1936 due to erosion. This combination of factors does not rise to the level of uniqueness to form an unnecessary hardship. As the court of appeals recently stated, **‘where the hardship imposed on the applicant’s land is shared by nearby land, relief should be addressed through legislative, rather than administrative means.’** *Winnebago*, 196 Wis.2d at 846, quoting *Arndorfer*.” *Kenosha*, 218 Wis.2d at 420 (emphasis added).

State v. Winnebago County, 196 Wis.2d 836, 540 N.W.2d 6 (Ct. App. 1995).

Facts: In 1965, the Thiels, who owned a 33.7 acre parcel with frontage on Lake Poygan dredged a channel along the parcel’s boundary, intending to develop the shoreland area located between the lake and a road, with allowances made for shoreland setbacks and roadway width requirements in effect at that time. In 1993, the Thiels proposed to divide the property into eight lots, but since an ordinance change had rendered some of the proposed lots unbuildable, the Thiels applied for and were granted a variance from the shoreland setback based on exceptional circumstances, preservation of property rights, and absence of detriment.

Holding/Analysis: **The Court of Appeals found that the board, in granting a variance for four of the eight or nine lots in question, did not follow applicable law. “The State primarily contends that shoreland setback requirements cannot result in an unnecessary hardship simply because they prevent the landowners from securing the highest and best use of the parcel. The State alternatively claims that the Board’s decision should be overturned because it lacks a reasonable evidentiary basis. We agree on both issues and remand for further proceedings consistent with our decision.”** *Winnebago County*, 196 Wis. 2d 836 at 838-839.

“ . . . Here, the Board reasoned that, unlike other parcels, the changing roadway and shoreland setback requirements uniquely affected the Thiels’ property because their initial capital investment was made thirty years ago. Indeed, during its deliberations, the Board appeared very sympathetic towards the Thiels because their long-term, ‘good faith’ efforts were being stalled by changing governmental regulations.”

“Nevertheless, the Board erred again because it looked at the effects of the hardship rather than its cause. **It is correct that county and statewide regulations interrupted the Thiels’ development plans. However, the environmental regulations merely place this land in a similar position to other shoreland property in Winnebago County which also has experienced a decrease in development capacity.**” *Winnebago County*, 196 Wis. 2d 836 at 845-846 (emphasis added).

The Court also held that the board erred in asserting that the DNR, expressing concern about increased pollution in Lake Poygan, failed to provide an evidentiary basis for its findings that a variance would be contrary to the public interest. See also *Arndorfer* under “Inadequate Record” in this section. The burden is shifted to the landowner to present evidence that the desired variance is not contrary to the public interest furthered by the shoreland ordinances. Also, given that evidence

presented raised questions about the accuracy of measurements of this property, the record was insufficient for the Board to make a reasonable determination about granting a variance.

(NOTE: In a footnote, the Court of Appeals distinguishes this case from the situation in the *Zealy case* (See “Takings” cases in Section 22), noting that while the segmentation of parcels may be appropriate in certain types of legal analysis (e.g., to determine whether there is a taking of property), a board should consider the property as a whole when it reaches a conclusion about granting a variance.)

Unnecessarily Burdensome

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

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in Section 2 and “Area Variances” in this section.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that the “no reasonable use” standard is no longer applicable in area variance cases and reaffirming the *Snyder* definition of unnecessary hardship for area variance cases. *Ziervogel*, ¶ 41.

“. . . Continuing to condition area variances upon a showing of ‘no reasonable use of the property’ makes variance procedure unworkable and unfairly forecloses almost all property owners from the opportunity to demonstrate hardship.” *Ziervogel*, ¶ 32.

“We therefore reinstate *Snyder’s* formulation of unnecessary hardship for area variance cases: ‘ “[w]hether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.” ’ Snyder also emphasized that variance requests are always evaluated in light of the purpose of the zoning ordinance and the public interest at stake. Accordingly, whether the Snyder standard is met in individual cases depends upon a consideration of the purpose of the zoning restriction in question, its effect on the property, and the effect of a variance on the neighborhood and larger public interest. The established requirements that the hardship be unique to the property and not self-created are maintained, and the burden of proving unnecessary hardship remains on the property owner.” *Ziervogel*, ¶ 33. (emphasis added and citations omitted)

“It is axiomatic that all zoning restrictions impose some burdensome effect on property and all variances run contrary to the purpose of the ordinance to some degree. The inquiry should focus on how they do so, and to what extent, in light of the circumstances of each individual case. **The board must determine whether a hardship unique to the property has been demonstrated and whether the relief requested is consistent with the public interest such that the variance should be granted, or whether a variance would subvert the purpose of the zoning restriction to such an extent that it must be denied.**” *Ziervogel*, ¶ 34. (emphasis added)

See also *Snyder v. Waukesha County Zoning Bd.*, 74 Wis. 2d 468, 247 N.W.2d 98 (1976) under “Practical Difficulty” and “Unnecessary Hardship” in this section.

See also *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396, 577 N.W.2d 813 (1998) under “Practical Difficulty” and “Unnecessary Hardship” in this section.

under “Practical Difficulty” and “Unnecessary Hardship” in this section.

See also ¶ 30 of *State of Wisconsin v. Waushara County Board of Adjustment and G. Edwin Howe and Suzanne Howe*, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514 that is summarized under “Area Variances” in this section. **Error! Bookmark not defined.**

Unnecessary Hardship

Arndorfer v. Sauk County Board of Adjustment, 162 Wis. 2d 246, 469 N.W.2d 831 (1991).

Facts: When the Arndorfers improved a 109-acre parcel, built living quarters and installed a sewage holding tank, they were denied a variance by the board of adjustment to allow them to use the holding tank, based on their failure to establish unnecessary hardship. The Arndorfers claimed that they would suffer unnecessary hardship if the variance was not granted, and they petitioned for certiorari review before the circuit court. The circuit court determined that the Arndorfers were entitled to a variance. However, the Court of Appeals reversed the circuit court. The issue before the Supreme Court was whether the Arndorfers had met their burden of proving unnecessary hardship.

Holding/Analysis: **Two of the criteria that an applicant for a variance must meet to show unnecessary hardship are "a unique condition affecting the owner's land" and the variance not being contrary to the public interest.**

" . . . The 'uniqueness' element is necessary to prevent the purposes of the zoning regulations from being undermined by the granting of piecemeal exceptions to those regulations. As one commentator has explained:

'Hardship is not peculiar to the applicant's land if it is shared by a neighborhood or an entire area; a shared hardship will not support the granting of a use variance to relieve it. Thus, traffic problems common to a neighborhood and soil deficiencies common to an area are shared hardships which are not unique. Where the hardship imposed upon an applicant's property is no greater than that suffered by nearby lands, the board of adjustment may not grant a variance to relieve it. To grant such relief would be unfair to owners who remain subject to the general restrictions of the zoning ordinance, and it would endanger the community plan by piecemeal exemption. (Footnotes omitted.) 3 Anderson, *American Law of Zoning* 474-76 (3d ed. 1986)'

Therefore, where the hardship imposed on the applicant's land is shared by nearby land, relief should be addressed through legislative, rather than administrative, means." *Arndorfer*, 162 Wis. 2d 246 at 255-256.

"Unnecessary hardship also requires that the variance not be contrary to the public interest. . . . This requirement recognizes that some hardships are 'necessary' to protect the welfare of the community." (citations omitted) *Arndorfer*, 162 Wis. 2d 246 at 256.

(For a summary of other issues decided in *Arndorfer v. Sauk County Board of Adjustment*, see also “Burden of Proof,” “Inadequate Record” and “Not Contrary to Public Interest” in this section.)

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

Facts: For a summary of the facts and other issues decided in this case, see “Standard of Review” in Section 3, “Erroneous or Unauthorized Acts” in Section 14, and “Financial Hardship or Loss of Profit”, “Practical Difficulty” and “Substandard Lots” in this section.

Holding/Analysis: “[T]he question of whether unnecessary hardship exists is best explained as '[w]hether compliance with the strict letter of the zoning restrictions governing area, setbacks,

frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conforming with such restrictions unnecessarily burdensome." *Snyder*, 74 Wis. 2d 468 at 475, citing 2 Rathkopf, *The Law of Zoning and Planning*, 45-28 (3d ed. 1972)

State ex rel. Markdale Corp. v. Bd. of Appeals of City of Milwaukee, 27 Wis. 2d 154, 133 N.W.2d 795 (1965).

Facts: For a summary of the facts and other issues decided in this case, see "Self-Created Hardship" in this section.

Holding/Analysis: **The Court of Appeals held that it was beyond the power of the Board of Appeals to grant a variance for a self-created hardship.** Since the hardship claimed in this case did not prevent the use of the applicant's property for any profitable purpose, "unnecessary hardship" was not established.

"A note entitled, 'Zoning Variances,' 74 Harvard Law Review (1961), 1396, 1401, suggests the following definition of 'unnecessary hardship' as used in zoning statutes and ordinances with respect to the power of appeal boards to grant variances:

'Since the main purpose of allowing variances is to prevent land from being rendered useless, 'unnecessary hardship' can best be defined as a situation where in the absence of a variance no feasible use can be made of the land.'

The hardship claimed here does not arise because the zoning of the south 60 feet has prevented its use for any profitable purpose. It is solely due to Cities Service having erected a building which cannot be used advantageously as an auto laundry since, as located, the south 60 feet of the premises will be required to be used as an integral part of the car-laundry operation.

For the reasons stated, we determine that the evidence establishes beyond dispute that the hardship relied upon for granting the variance was self-created. Therefore, under the cited authorities it was beyond the power of the board to grant the variance because of hardship." *State ex rel. Markdale Corp.*, 27 Wis. 2d 154 at 163.

State ex rel. Spinner v. Kenosha County Bd. of Adjustment, 223 Wis. 2d 99, 588 N.W.2d 662 (Ct. App. 1998).

Facts: Mr. George Wronowski owned a 1.3 acre lot with lake frontage on Lake George in the Town of Bristol, Kenosha County. A creek also runs through the lot. When the shoreland setback from both the lake and the creek were measured, it was calculated that there were only 1879 square feet of buildable space on the lot. In order to build a two-story residence with 2585 sq. ft. of living space, Mr. Wronowski sought a variance from the shoreland setback for both the lake and the creek. The Kenosha County Board of Adjustment granted the requested variance because of the "unique topography of Wronowski's property."

Holding/Analysis: **"In the present case, there was no evidence presented that a different design of the house could not incorporate the setback requirement. Without such evidence, the applicant may still enjoy a reasonable use of the property without a variance. Kenosha County Board of Adjustment instructs that an 'unnecessary hardship' can be found only if the applicant has demonstrated that no reasonable use of the property exists without a variance. In other words, the burden is on the applicant to demonstrate through the evidence that without the variance he or she is prevented from enjoying any reasonable use of his or her property."** *Spinner*, 223 Wis.2d 99 at 107 (emphasis added). "Therefore, to meet the *Kenosha County Board of Adjustment* 'unnecessary hardship' test, Wronowski must present evidence demonstrating that no other home design could incorporate the setback requirement on this property. He failed to do so; therefore, a reasonable use of his property without a variance remains a possibility. Accordingly, we find that the Board failed to properly apply the no reasonable use standard to the evidence before it."

223 Wis. 2d 99 at 107 –108.

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

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in Section 2 and "Area Variances" in this section.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that the "no reasonable use" standard is no longer applicable in area variance cases and reaffirming the *Snyder* definition of unnecessary hardship for area variance cases. *Ziervogel*, ¶ 41.

"The following judicial rules of unnecessary hardship are well-established: The hardship must be based on conditions unique to the property rather than considerations personal to the property owner.

The hardship cannot be self-created. The board of adjustment is to evaluate the hardship in light of the purpose of the zoning restriction at issue. A variance cannot be contrary to the public interest. The property owner bears the burden of proving unnecessary hardship. While these general principles help to guide the board's discretion, they do not establish the meaning of the term 'unnecessary hardship' or provide a legal standard for determining whether it has been proved." *Ziervogel*, ¶ 20. (citations omitted)

"... Continuing to condition area variances upon a showing of 'no reasonable use of the property' makes variance procedure unworkable and unfairly forecloses almost all property owners from the opportunity to demonstrate hardship." *Ziervogel*, ¶ 32.

"We therefore reinstate *Snyder's* formulation of unnecessary hardship for area variance cases: ' **"[w]hether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome."**' Snyder also emphasized that variance requests are always evaluated in light of the purpose of the zoning ordinance and the public interest at stake. Accordingly, whether the Snyder standard is met in individual cases depends upon a consideration of the purpose of the zoning restriction in question, its effect on the property, and the effect of a variance on the neighborhood and larger public interest. The established requirements that the hardship be unique to the property and not self-created are maintained, and the burden of proving unnecessary hardship remains on the property owner." *Ziervogel*, ¶ 33. (emphasis added and citations omitted)

State v. Kenosha County Board of Adjustment, 218 Wis. 2d 396, 577 N.W.2d 813 (1998).

Facts: Janet Huntoon owned a house on a parcel of land abutting Hooker Lake that was built by her grandfather in 1936 (before shoreland zoning was in effect in Kenosha County). The house, used for residential purposes since it was built, sat 78 feet from the ordinary high water mark. The Kenosha County shoreland zoning ordinance required that all structures (other than piers, boathouses, and boat hoists) be set back at least 75 feet from the OHWM. Ms. Huntoon applied for a variance to allow her to build a 14-foot by 23-foot deck between the house and the lake that would be set back only 64 feet from the OHWM. The variance was granted because the board determined that Ms. Huntoon would suffer unnecessary hardship if she were denied a variance to build the deck. At the Department of Natural Resources' request, the State initiated a certiorari proceeding in circuit court for review of the board's action. The circuit court upheld the board's decision, and the Court of Appeals affirmed.

Holding/Analysis: **The Supreme Court held that the Board did not properly apply the legal standard of unnecessary hardship and that the Board's decision to grant the variance was not reasonably based on the evidence.** The Court, therefore, reversed the decision of the Court of Appeals and remanded the case for further proceedings consistent with their opinion. The Supreme

Court stated that, "One of the purposes of zoning laws is that variances should be granted sparingly. . . . **Only when the applicant has demonstrated that he or she will have no reasonable use of the property, in the absence of a variance, is an unnecessary hardship present.**" *Kenosha County*, 218 Wis.2d 396 at 421 (emphasis added and citations omitted). The Board of Adjustment had argued that the standard for issuing an "area variance" was whether strict compliance with the ordinance would be "unnecessarily burdensome." Although the Supreme Court did not decide the question of whether a different standard should be applied to "use variances" (since that fact situation was not before them), **the Supreme Court reasoned that, for area variances "when the record before the Board demonstrates that the property owner would have a reasonable use of his or her property without the variance, the purpose of the [shoreland zoning] statute takes precedence [over the burden on the applicant] and the variance request should be denied."** *Kenosha County*, 218 Wis.2d 396 at 414 (emphasis added). The Supreme Court found that since Ms. Huntoon and her relatives have used the property for residential purposes for over 60 years, and since Ms. Huntoon did not establish that the property couldn't continue to be used safely as a residence if the variance were denied, there is no basis in the record to support a finding of hardship based upon safety concerns or to otherwise support the issuance of a variance. The court remanded the case to the circuit court for remand and rehearing before the board of adjustment consistent with the legal standard described in the court's decision.

State v. Outagamie Cty. Bd. of Adjustment, 2001 WI 78, 244 Wis. 2d 613, 628 N.W.2d 376.

Facts: The Warnings built a three bedroom, ranch-style house in the flood fringe of a 100-year flood plain in Outagamie County in 1984, after obtaining a building permit from the town building inspector. The town building inspector did not tell the Warnings that they also needed to obtain a zoning permit from the Outagamie County Zoning Department, and the Warnings did not do so (in spite of the fact that the Warnings had obtained a conditional use permit from the County Zoning Committee in 1980 that allowed them to place fill and a mobile home on their property within the flood fringe district). The basement of the Warnings home was constructed 3.7 feet below the regional flood elevation and 5.7 feet below the flood protection elevation, in violation of the County's floodplain zoning ordinance. In 1995, eleven years after their home was built, the Warnings applied for a building permit to add a sun porch to their home. The Outagamie County Zoning Administrator denied the Warnings' request because their home did not meet flood protection elevation requirements. The Warnings then applied to the Outagamie County Board of Adjustment for an after-the-fact variance for their nonconforming basement floor, so that they would then be eligible for a building permit for the sun porch that they proposed to construct on fill above the flood protection elevation. The BOA granted a variance to the Warnings, and the Wisconsin Dept. of Justice, at the request of the Wisconsin Department of Natural Resources, appealed the variance decision to the circuit court, arguing that the Warnings had not established that their property would have no reasonable use in the absence of a variance, and that the BOA decision violated Wis. Admin. Code § NR 116.13 (2). The Warnings argued that the "no reasonable use" standard should not apply to their variance request and that the State had waived the argument that the BOA's decision was contrary to Wis. Admin. Code § NR 116.13 (2) because the State had not raised this issue before the BOA. The Outagamie County Circuit Court upheld the BOA's decision to grant the variance and ruled that the State had waived the argument that the variance violated Wis. Admin. Code § NR 116.13 (2) because it was not raised at the hearing before the BOA. The Court of Appeals reversed the Circuit Court's decision and decided that (1) under the Huntoon case (*State v. Kenosha County Board of Adjustment*) the variance could not be granted since the Warnings had not established that their property would have "no reasonable use" without the variance; and (2) the variance was contrary to Wis. Admin. Code § NR 116.13 (2), which prohibited the granting of any variance that would allow a basement floor below the regional flood elevation. The Warnings appealed the Court of Appeals' decision to

the Supreme Court.

Holding/Analysis: The Supreme Court held that “Wis. Admin. Code § NR 116.13 (2) conflicts with Wis. Stat. § 87.30 (1g) and is therefore invalid to the extent that it prohibits all variances for residential floors below the regional flood elevation,” and reinstated the circuit court’s decision affirming the Outagamie County BOA’s issuance of a variance to the Warnings. The Supreme Court’s decision in the *Outagamie County* case is confusing because it consists of 4 separate opinions: (1) The lead opinion written by Justice Diane Sykes (Justices William Bablitch and David Prosser joined in the lead opinion in its entirety); (2) a concurring opinion written by Patrick Crooks (Justice Jon Wilcox joined in this concurring opinion); (3) a concurring opinion written by Justice David Prosser; and (4) a dissenting opinion written by Justice Shirley Abrahamson (Justice Ann Walsh Bradley joined in the dissenting opinion). The following table summarizes the position of the Justices on the major issues that were before the Court:

Number of Justices	Names of the Justices	Specific Issues
5	Justices Sykes, Bablitch, Prosser, Crooks and Wilcox	Agreed that the court of appeals decision should be reversed; reinstated the circuit court’s decision affirming the Board of Adjustment’s issuance of a variance.
5	Justices Sykes, Bablitch, Prosser, Crooks and Wilcox	Found NR 116.13 (2) invalid because it “conflicts with the discretionary authority over variances vested in local boards of adjustment by state statute.”
4	Justices Crooks, Wilcox, Abrahamson and Bradley	Held that there was no reason to overrule the unnecessary hardship standard that was established in <u>State v. Kenosha County BOA</u> .
3	Justices Sykes, Bablitch and Prosser	Would like to overrule the <u>Kenosha County</u> decision and “restore the distinction between use and area variances . . .”
3	Justices Sykes, Bablitch and Prosser	“It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency.” However, “the waiver rule is not an inflexible one.” There is an exception to the waiver rule “where all the facts are of record and the issue is a legal one of great importance.”
2	Justices Crooks and Wilcox	The Outagamie County BOA “proceeded on a correct theory of law in concluding, in effect, that it was estopped from” denying

		the variance due to the actions of the Town of Bovina’s building inspector and the inaction of the County.
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A majority of the Court agreed that the Court of Appeals’ decision should be reversed; and that the Circuit Court’s decision should be reinstated, affirming the Board of Adjustment’s decision to grant a variance. A majority of the Court also found s. NR 116.13(2) invalid, to the extent that it prohibits BOAs from granting variances from flood protection standards where the statutory standards for variances are otherwise met. The lead opinion (and Justice Prosser's concurring opinion) sought to overrule the unnecessary hardship standard that was established in *State v. Kenosha County BOA* (the Huntoon case). However, that effort failed for lack of a majority vote. A majority of the Court (two concurring Justices and two dissenting Justices) refused to overturn the unnecessary hardship standard that was established in the Huntoon decision.

In a concurring opinion written by Justice Patrick Crooks (joined in by Justice Jon Wilcox), Justice Crooks clarified that the “no reasonable use” standard that was established for shoreland zoning cases in the *Kenosha County* decision was arrived at after the Supreme Court had considered the “unnecessary hardship” analysis found in the Court’s decision in *Snyder v. Waukesha County Zoning Board of Adjustment*, 74 Wis. 2d 468 (1976). In *Snyder*, the Supreme Court had stated that “whether a particular hardship is unnecessary or unreasonable is judged against the purpose of the zoning law.” Justice Crooks stated in his concurring opinion in the *Outagamie County* decision that “I find no compelling reason to overrule *Kenosha County*. Instead, I read *Kenosha County* as applying the rule from *Snyder*, that the purpose of the ordinance guides the determination of whether there is an unnecessary hardship that would warrant a variance.”

State v. Ozaukee County Bd. of Adjustment, 152 Wis. 2d 552, 449 N.W.2d 47 (Ct. App. 1989).

Facts: The BOA granted variances to convert a mill building into a restaurant and shops in a floodway. The circuit court upheld the BOA's decision.

Holding/Analysis: The Court of Appeals reversed the circuit court's decision, holding that "the board acted outside its jurisdiction, granted the variances upon insufficient evidence, and reached decisions that represented its will and not its judgment." *Ozaukee County*, 152 Wis. 2d 552 at 555.

". . . Here, the board granted the variances to increase the county's tax base, increase property values in the area, and to further economic development. The variances were thus admittedly granted for the county's economic gain. Standing alone, that is an insufficient basis upon which to grant a variance.

The only other 'hardship' noted, beyond deprivation of revenue, is the deprivation of the prospective restaurant customers' spectacular view. Wisconsin law does not recognize this as a hardship. 'Practical difficulties or unnecessary hardship do not include conditions personal to the owner of the land, but rather to the conditions especially affecting the lot in question.'

Snyder, 74 Wis. 2d at 479, 247 N.W.2d at 104." *Ozaukee County*, 152 Wis. 2d 552 at 563 (emphasis added).

State of Wisconsin v. Waushara County Board of Adjustment and G. Edwin Howe and Suzanne Howe, 2004 WI 56, 271 Wis. 2d 547, 679 N.W.2d 514.

Facts: For a summary of the facts and other issues decided in this case, see "Discretionary Authority of BOAs" in Section 2, and "Area Variances" in this section.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that: “**Unnecessary hardship, as set forth in Wis. Stat. § 59.694 (7)(c), must be**

evaluated in light of the purpose of the zoning ordinance at issue.” *Waushara County*, ¶ 34. (emphasis added)

“We conclude that, in evaluating whether to grant an area variance to a zoning ordinance, a board of adjustment should focus on the purpose of the zoning law at issue in determining whether an unnecessary hardship exists for the property owner seeking such variance. We further conclude that the facts of the case should be analyzed in light of that purpose, and that boards of adjustment must be afforded flexibility so that they may appropriately exercise their discretion. We also again recognize and emphasize the presumption that the board’s decision is correct. We reaffirm *Snyder*’s definition of the statutory term ‘unnecessary hardship’ because it best encompasses the appropriate test for granting an area variance. ‘No reasonable use,’ as set forth in *Kenosha County*, is no longer applicable when an area variance is being considered.” *Waushara County*, ¶ 35.

State v. Winnebago County, 196 Wis. 2d 836, 540 N.W.2d 6 (Ct. App. 1995).

Facts: For a summary of the facts and other issues decided in this case, see “Financial Hardship or Loss of Profit” and “Unique Physical Property Features” in this section.

Holding/Analysis: **The Court of Appeals held that “the test used by the Board was whether the variance would maximize the economic value of the property. This is not the proper test. There must be a showing that no feasible use can be made of the property.”** *State v. Winnebago County*, 196 Wis. 2d 836 at 844. The Court stated in footnote 7: “In *DeLap v. Institute of America, Inc.*, 31 Wis. 2d 507, 512, 143 N.W.2d 476, 478 (1966), the supreme court considered the definition of ‘feasible’ and concluded that it meant ‘capable of being done.’ In the context of variances, we believe this translates into a determination of whether there can be any beneficial use of the property.” *Winnebago County*, 196 Wis. 2d 836 at 844, footnote 7.

Use Variances

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

Facts: For a summary of the facts and other issues decided in this case, see “Discretionary Authority of BOAs” in Section 2 and “Area Variances” in this section.

Holding/Analysis: The Supreme Court reversed the Court of Appeals decision and remanded the case, holding that the “no reasonable use” standard is no longer applicable in area variance cases and reaffirming the *Snyder* definition of unnecessary hardship for area variance cases. *Ziervogel*, ¶ 41.

“We now conclude that the distinctions in purpose and effect of use and area zoning make the perpetuation of a single, highly-restrictive ‘no reasonable use of the property’ standard for all variances unworkable and unfair. Use zoning regulates fundamentally how property may be used, in order to promote uniformity of land use within neighborhoods or regions. Area zoning regulates lot area, density, height, frontage, setbacks, and so forth, in order to promote uniformity of development, lot, and building size.” *Ziervogel*, ¶ 4.

“Restricting the availability of variances to those property owners who would have ‘no reasonable use’ of their property without a variance may be justifiable in use variance cases, given the purpose of use zoning and the substantial effect of use variances on neighborhood character.” *Ziervogel*, ¶ 5. (emphasis added)

“By definition, all variances depart from the purpose of the zoning ordinance and implicate the public interest, because they permit something that is otherwise strictly prohibited. But they do so to varying degrees and levels of acceptability, depending on the type of variance requested and the nature of the zoning restriction in question. As such, courts have long recognized a distinction

between use variances, which permit a landowner to put property to an otherwise prohibited use, and area variances, which provide exceptions from such physical requirements as setbacks, lot area, and height limits.” *Ziervogel*, ¶ 21 (citations omitted)

“ . . . Use variances by their nature have the potential to bring about great changes in neighborhood character, but area variances usually do not have this effect. *Snyder*, 74 Wis. 2d at 473; *see also Outagamie County*, 244 Wis. 2d 613, ¶¶ 36-38. While area variances provide an increment of relief (normally small) from a physical dimensional restriction such as building height, setback, and so forth, use variances permit wholesale deviation from the way in which land in the zone used. Accordingly, the measure of unnecessary hardship for use and area variances is different; ‘in most states, the courts will approve an area variance upon a lesser showing by the applicant than is required to sustain a use variance.’ 3 Young, *supra* [*Anderson’s American Law of Zoning*], § 20:48, at 580. Until *Kenosha County*, Wisconsin followed this general rule, pursuant to this court’s decision in *Snyder*.” *Ziervogel*, ¶ 23. (footnote omitted)

“*Kenosha County blurred the distinction between use and area variances, by adopting the ‘no reasonable use of the property’ test from use variance analysis for area variance cases.*” *Ziervogel*, ¶ 27. (emphasis added)

See also *Snyder v. Waukesha County Zoning Bd.*, 74 Wis. 2d 468, 247 N.W.2d 98 (1976) under “Practical Difficulty” and “Unnecessary Hardship” in this section.

See also *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396, 577 N.W.2d 813 (1998) under “Practical Difficulty” and “Unnecessary Hardship” in this section.

See also *State v. Outagamie Cty. Bd. of Adjustment*, 2001 WI 78, 244 Wis. 2d 613, 628 N.W.2d 376 under “Practical Difficulty” and “Unnecessary Hardship” in this section.

State v. Ozaukee County Bd. of Adjustment, 152 Wis. 2d 552, 449 N.W.2d 47 (Ct. App. 1989).

Facts: The BOA granted variances to convert a mill building into a restaurant and shops in a floodway.

Holding/Analysis: The Court of Appeals reversed the BOA and the trial court holding that the board acted outside its jurisdiction, granted the variances upon insufficient evidence, and reached decisions that represented its will and not its judgment. The Court stated: "As its name implies, a 'use' variance is one which permits a use of land other than that which is prescribed by the zoning regulations.

Alumni Control Bd. v. City of Lincoln, 137 N.W.2d 800, 802 (Neb. 1965); 82 Am.Jur. 2d *Zoning and Planning* sec. 256, at 792.

(**Note**: For a summary of other issues decided in the *Ozaukee County* case, see also “Unnecessary Hardship” in this section.)

Variations Generally Not Revocable

Goldberg v. Milwaukee Zoning Appeals Bd., 115 Wis. 2d 517, 340 N.W.2d 558 (Ct. App. 1983).

Facts: The zoning board granted a variance to convert a 4-family dwelling to a 6 family dwelling, then revised its decision without further hearing and added a condition that the variance was granted to the landowner personally. For a more detailed summary of the facts of the case, see “Reconsideration/Rehearing by BOAs” in Section 2.

Holding/Analysis: **Variations are generally not irrevocable. Zoning Boards are only able to revoke or modify preciously-granted variations when there is a mistake in the prior proceeding and “public necessity or other good cause” require revocation or modification.**

[**Note**: For a summary of other issues decided in the *Goldberg* case, see also “Variations Run with the Land/Vested Rights” in this section.]

Variations Run with the Land/Vested Rights

Goldberg v. Milwaukee Zoning Appeals Bd., 115 Wis. 2d 517, 340 N.W.2d 558 (Ct. App. 1983).

Facts: The zoning board granted a variance to convert a 4-family dwelling to a 6 family dwelling, then revised its decision without further hearing and added a condition that the variance was granted to the landowner personally. For a more detailed summary of the facts of the case, see “Reconsideration/Rehearing by BOAs” in Section 2.

Holding/Analysis: **“The overwhelming bulk of authority on variations makes it clear that variations run with the land: ‘A grant of a variance is not a personal license to the then owner, but a right that ordinarily runs with the land, so that one purchasing property is generally entitled to make use of a variance granted to his predecessor in title.’** (emphasis added) (citations omitted)” *Goldberg*, 115 Wis. 2d 517 at 523 (emphasis in original). Although the court noted that existing variations are considered to endow a subsequent purchaser with a vested right to the continuation of the variance, it cautioned in a footnote that owners do not acquire a vested right against rezoning based on their reliance upon the original zoning. Such an interpretation would prevent any changes made to adapt land use to changing times and environment.

(**Note**: For a summary of other issues discussed in the *Goldberg* case, see also “Variations Generally Not Revocable” in this section.)

(See also *Buhler v. Racine County*, 33 Wis. 2d 137, 148, 146 N.W.2d 403, 408 (1966).)

33 VESTED RIGHTS DOCTRINE

See *Lake Bluff Partners v. South Milwaukee*, 197 Wis. 2d 157, 540 N.W.2d 189 (1995) (“*Lake Bluff II*”) in Section 34, Writ of Mandamus.

34 WRIT OF MANDAMUS

Writ of Mandamus Not Granted Where No Vested Legal Right Existed

Lake Bluff Partners v. South Milwaukee, 197 Wis. 2d 157, 540 N.W.2d 189 (1995) (“*Lake Bluff II*”).

Facts: A developer of rental properties purchased a parcel of land along Lake Michigan shoreline, commissioned surveys and contracted with an architect to prepare plans, intending to construct a multi-family development. Before any building permits were issued, the city rezoned the property to allow only single-family housing and denied the developer’s application for a permit. Lake Bluff resubmitted its application for a building permit, and also filed a complaint seeking a writ of mandamus to compel issuance of the permit. The trial court granted the writ of mandamus and the Court of Appeals affirmed the circuit court.

Holding/Analysis: **The Supreme Court reversed the Court of Appeals decision and held that “Lake Bluff obtained no vested rights, because it never submitted an application for a building permit conforming to the zoning or building code requirements in effect at the time of application.”** *Lake Bluff*, 197 Wis.2d 157 at 182 (emphasis added). The Court stated that:

“Mandamus is an extraordinary legal remedy, available only to parties that can show that the writ is based on a ‘clear, specific legal right which is free from substantial doubt.’ . . . A party seeking mandamus must also show that the duty sought to be enforced is positive and plain; that substantial damage will result if the duty is not performed; and that no other adequate remedy at law exists.” (citations omitted) *Lake Bluff*, 197 Wis.2d 157 at 170. The Court held that: “Requiring an application for a building permit which conforms to applicable zoning or building code requirements in order to show a clear legal right also serves the goals of the vested rights doctrine. The theory behind the vested rights doctrine is that a builder is proceeding on the basis of reasonable expectation. . . . Vested rights should only be obtained on the basis of strict and complete compliance with zoning and building code requirements, because a builder’s proceeding in violation of applicable requirements is not reasonable.” *Lake Bluff*, 197 Wis.2d 157 at 175.

Vretenar v. Hebron, 144 Wis. 2d 655 (1988).

Facts: After several years of litigation between the Town of Raymond and Glenn Staege, the Racine County Circuit Court convicted Staege of violating town ordinances relating to operating a junk yard and a motor salvage business. The Court of Appeals confirmed the rubbish conviction but reversed the conviction on the salvage business charge. Shortly thereafter, Staege filed bankruptcy. The Town of Raymond attempted to declare fines nondischargeable but the federal bankruptcy court prohibited further proceedings to collect the forfeiture. The Vretenars sought a writ of mandamus to compel the Town of Raymond to enforce town ordinances and prosecute Staege for payment of fines.

Holding/Analysis: **The Supreme Court held that the prosecution and enforcement of municipal ordinance violations are discretionary and not ministerial duties, and therefore, they cannot be compelled through mandamus.** “Mandamus is an extraordinary legal remedy, and the petitioner in an action seeking this remedy must establish that is based on a clear, specific legal right which is free from substantial doubt. *Eisenberg v. ILHR Department*, 59 Wis. 2d 98, 101, 207 N.W.2d 874 (1973).” *Vretenar*, 144 Wis. 2d at 662.

(**Note**: Section 781.01, Wis. Stats., provides that the remedy available by a writ of mandamus may be granted by final judgment or allowed as a provisional remedy in an action or proceeding. The use of a writ is now unnecessary.)

35 DEFINITIONS

Certiorari. A writ of common law origin issued by a superior court to a lower court (or quasi-judicial body) requiring the latter to produce a certified record of a particular case. The writ is issued so that the superior court may inspect the proceedings and determine whether there have been any irregularities.

Defendant. The person defending or denying the plaintiff's allegations; the party against whom relief or recovery is sought.

Demurrer. An allegation of a defendant, that even if the facts alleged by the complaint are true, they are insufficient for the plaintiff to proceed further. Demurrers have been replaced by motions to dismiss for failure to state a claim on which relief may be granted.

De novo. Anew; afresh; a second time. An appellate court hears a matter de novo when the appellate court tries the matter as if it had not been heard before in the lower court.

Enjoin. To direct; require; demand. To require a person, by writ of injunction, to perform or abstain from some act.

Equal protection clause. The provision in the 14th Amendment of the U.S. Constitution that prohibits a state from denying to any person within its jurisdiction the equal protection of the laws. Equal protection means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons of other classes in similar circumstances.

Equitable estoppel. The doctrine by which a person may be precluded by his prior conduct or acts, or silence when it is his duty to speak, from asserting a right which he otherwise should have had.

Estop. To stop, bar, impede, prevent or preclude.

Estoppel. When a party is prevented by his own prior acts from claiming a right to detriment of the other party who was entitled to rely on such prior conduct and has acted accordingly.

Ex rel. An abbreviation for ex relatione which means "upon relation or information." Legal proceedings which are instituted by the attorney general or a district attorney in the name and on behalf of the state, but on the information and at the instigation of an individual who has a private interest in the matter, are said to be taken "on the relation" of such person, who is called the relator. In addition, a private individual who brings an action alleging violation of Wisconsin's Open Meeting Law under Wis. Stat. § 19.97 (4) must bring the action "on his or her relation in the name, and on behalf, of the state" and is called the relator.

Floodplain. The term "floodplain" is defined in s. NR 116.03 (16), Wisconsin Administrative Code, to mean: "the land which has been or may be covered by flood water during the regional flood. The floodplain includes the floodway, floodfringe, shallow depth flooding, flood storage and coastal floodplain areas."

Holding. The legal principle to be drawn from the decision of the court relating to a specific issue. There may be more than one holding in a court decision.

Laches. Laches is defined as neglect to assert a right or claim which, taken together with the passage of time and other circumstances causing prejudice to the adverse party or parties, operates as a bar in a court of equity.

Lis pendens. A pending lawsuit. The purpose of a notice of lis pendens is to notify prospective purchasers and others interested parties that any interest acquired by them in property in litigation is subject to the decision of the court.

Nonconforming structure. The term “nonconforming structure” can be used to refer to either a building (or other structure) that does not conform to the current dimensional requirements of a zoning ordinance, or to a building (or other structure) that is being used for a nonconforming use. (To make matters even more confusing, some ordinances have used the term “nonconforming use” to refer to dimensionally nonconforming structures as well as structures with nonconforming uses. See, however, the Supreme Court decision in *County of Sauk v. Trager*, 118 Wis. 2d 204, 346 N.W.2d 756 (1984) under “Discontinuance/Abandonment” in Section 16.) A nonconforming structure is considered a “legal, nonconforming structure” if it existed lawfully prior to the effective date of the ordinance or ordinance amendment that made the structure nonconforming.

Nonconforming use. A nonconforming use is a land use that does not comply with current use restrictions in a zoning ordinance. A nonconforming use is considered a “legal, nonconforming use” if it existed lawfully prior to the effective date of the ordinance or ordinance amendment that made the use nonconforming.

Plaintiff. The person who brings an action; the party who complains or sues in a civil action and is so named on the record. A person who seeks relief for an injury to his or her rights.

Pleading. The formal allegations by the parties to a lawsuit of their respective claims and defenses, with the intended purpose being to provide notice of what is to be expected at trial. Pleading basically consist of a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third party complaint, and a third party answer.

Precedent. A decision of a court that establishes a legal principle that is thereafter applied by that court, and by lower courts, to identical or similar questions of law in other cases.

Regional flood. The term “regional flood” is defined in s. NR 116.03 (41), Wisconsin Administrative Code, to mean: “a flood determined to be representative of large floods known to have occurred in Wisconsin or which may be expected to occur on a particular lake, river or stream once in every 100 years. Note: The regional flood is based upon a statistical analysis of lake level or streamflow records available for the watershed or analysis of rainfall and runoff characteristics in the watershed or both. The flood frequency of the regional flood is once in every 100 years. In any given year, there is a 1% chance that the regional flood may occur or be exceeded. During a typical 30-year mortgage period, the regional flood has a 26% chance of occurring.”

Shorelands. The term “shorelands” is defined in s. 59.692 (1)(b), Stats., to mean: “ the area within the following distances from the ordinary high-water mark of navigable waters, as defined in s. 281.31 (2)(d):

1. One thousand feet from a lake, pond or flowage. If the navigable water is a glacial pothole lake, this distance shall be measured from the high-water mark of the lake.

2. Three hundred feet from a river or stream or to the landward side of the floodplain, whichever distance is greater.”

Variance. In a zoning context, the term “variance” means permission to depart from the literal requirements of a zoning ordinance. Under s. 59.694 (7)(c), Stats., county boards of adjustment in Wisconsin are authorized to grant “variances from the terms of the ordinance that will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.” Under s. 62.23 (7)(e) 7, Stats., city and village boards of appeals in Wisconsin are authorized (with wording that is very similar to, but not exactly the same as, the variance authorization for county boards of adjustment) to grant “variances from the terms of the ordinance that will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in practical difficulty or unnecessary hardship, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done.”

Vested rights. A right that is complete and of such character that it cannot be divested without the consent of the person to whom it belongs. To be “vested,” a right must be more than a mere expectation. It must have become settled or fixed to the extent that the state or other governmental unit will recognize and protect it.

Wetland. Wetland is defined in s. 23.32 (1), Stats., to mean “an area where water is at, near, or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions.

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