

Conditional Uses, Variances, and Appeals

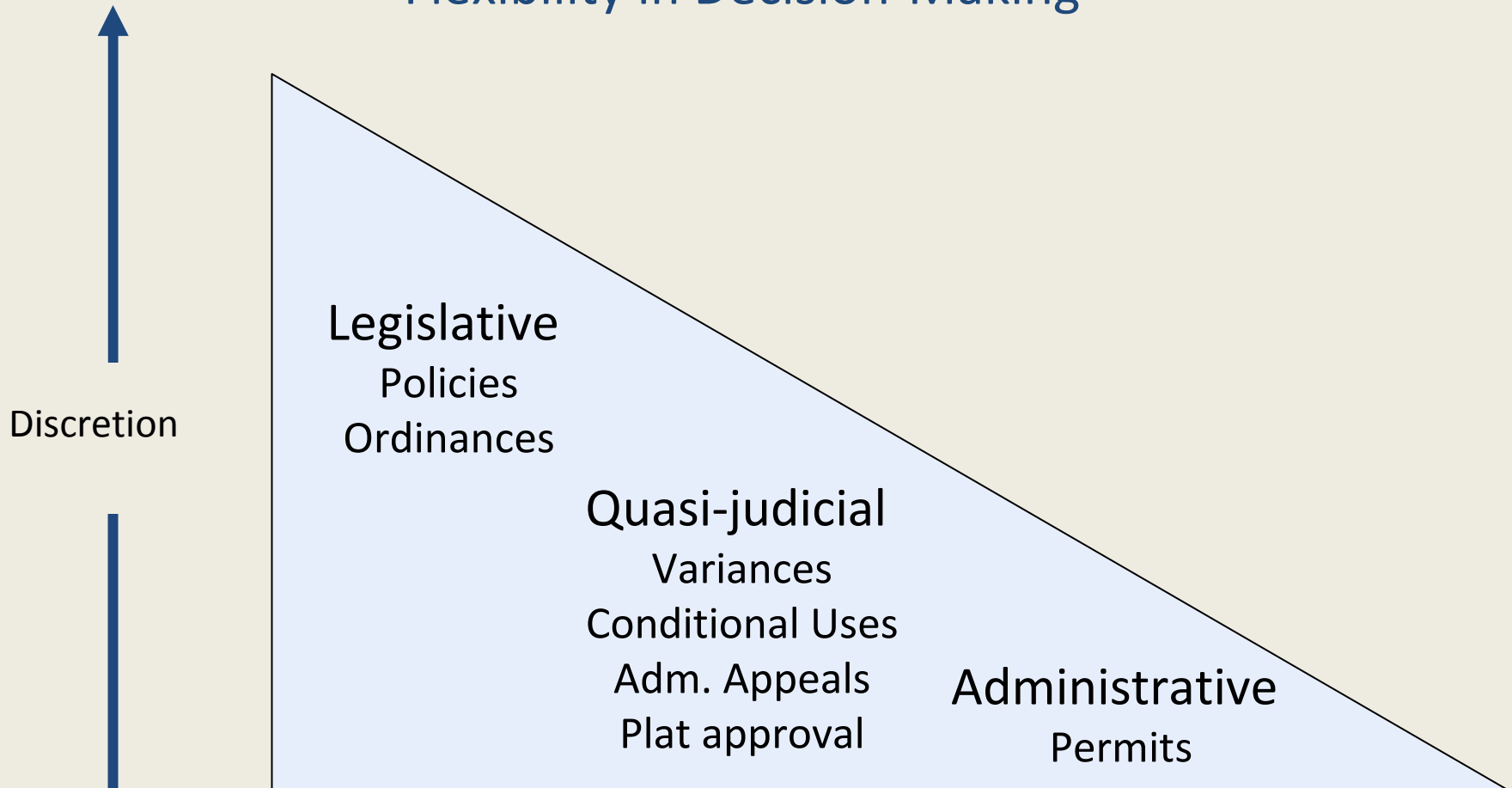
November 29, 2011

3 roles, 3 standards of conduct

- 1) Legislative: *policy-making*
- 2) Quasi-judicial: *application of laws*
- 3) Administrative: *ministerial duties*

Discretion:

Flexibility in Decision-Making



Conditional Uses

	Permitted uses	Conditional Uses
Where allowed	Everywhere in district	Tailored to site and neighboring uses
Who decides	Administrator	Commission/committee, BOA, governing body
Discretion	Must be granted if standards are met	May be granted or denied
Added conditions	Only as necessary to ensure ordinance compliance	Added conditions allowed (design and performance)
Appeal	BOA	Court or BOA

Conditional uses, continued...

Conditions must meet two tests:

1. Address expected harmful project impacts (“essential nexus”)
2. Proportional to the extent of those impacts (“rough proportionality”)

Variations

- Purpose: To preserve local regulatory standards, prevent regulatory takings and avoid unnecessary burdens on property owners.
- Variations are not meant to provide general flexibility in ordinances. Ordinances should provide a level of flexibility that preserves regulatory objectives and maintains community support.

Variances, continued...

- Use variances “permit a landowner to put property to an otherwise prohibited use.”
- Area variances “provide an increment of relief (normally small) from a physical dimensional restriction such as a building height, setback, and so forth.”

*Ziervogel v. Washington County BOA,
2004 WI Supreme Court*

Variances, continued...

An applicant has the burden of proof to show that all three statutory tests are met:

1. Unnecessary hardship
2. Due to unique property limitations
3. No harm to public interests

Variances, continued...

Unnecessary hardship for area variances:

Is the regulation unnecessarily burdensome considering:

1. The purposes of the regulation
2. The fact situation (project design, location, etc.)
3. The impact of the requested variance on ordinance objectives/purposes
4. Whether impacts can be adequately mitigated by conditions on the variance, and
5. The extent of the burden on the property owner.

Is the burden on the property owner of living without the variance necessary in order to achieve the purpose of the ordinance?

Variances, continued...

Unique property limitations test:

- Unique physical limitations of the property, such as steep slopes or wetlands, must prevent compliance with the ordinance
- Circumstances of an applicant such as family size or need for a larger garage should not be a factor in deciding variances.
- Limitations that prevent ordinance compliance and are common to a number of properties should be addressed by ordinance amendment.

Variances, continued...

Public interest test:

- A variance granted may not harm public interests but is not required to advance them.
- Look to the purpose statement for guidance regarding public interests.
- The effect of a variance on community interests must be considered, not public patrons or clientele.
- Short-term, long-term, and cumulative impacts of variance requests must be considered. Zoning staff should provide an impact analysis.

Variances, continued...

- A variance runs with the property.
- A variance does not create a nonconforming structure.
- Lack of objections from neighbors does not justify a variance, nor do nearby ordinance violations.

Administrative Appeals

Legal process to resolve disputes regarding:

- Ordinance interpretation (text, maps, jurisdiction, measurements, etc.)
- Reasonableness of zoning decision (zoning permit, conditional use permit)

Appeals, continued...

Who can file an appeal?

- Any aggrieved person
 - Appellant/applicant given unfavorable decision
 - Neighbors/property owners affected by decision
 - State program oversight agencies (DNR, DATCP, etc.)
- Any officer, department, board, or bureau of the municipality affected by a decision of an administrative officer

Appeals, continued...

When can an appeal be filed?

- Whenever there is an alleged error, procedural, substantive, or equitable.
- Time limits on an appeal:
 - State statutes specify only “reasonable”
 - Limits can be set by local ordinance or rule

Appeals, continued...

Procedure for appeal:

- Notice of appeal filed with administrative officer and BOA
- Action stayed
- BOA provided with record of decision
- Public notice

Appeals, continued...

- Conditional use permit decisions: “De novo” standard used by Door County (new hearing, BOA draws its own conclusions).
- Zoning administrator decisions: BOA’s role is to try to determine if the zoning administrator made an error.