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## WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

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### Wisconsin Shoreland Zoning Laws

Shoreland zoning was adopted in Wisconsin to protect state waters and uphold the state's Public Trust Doctrine<sup>1</sup>. In 1966, the Legislature gave counties the authority to zone shorelands while ensuring that minimum requirements set by the Wisconsin Department of Natural Resources (DNR) were met<sup>2</sup>. Generally, under Wisconsin law prior to the enactment of 2015 Wisconsin Act 55, a county could choose to set more restrictive shoreland zoning standards than the DNR through county shoreland zoning ordinances. Counties could also grant variances to the shoreland zoning ordinances, and the DNR's authority included the ability to review and appeal county decisions to grant variances.

Wisconsin shoreland zoning laws were significantly altered with the passage of certain legislative acts between 2011 and 2015. Very generally, the acts codified many shoreland zoning standards (previously contained in the administrative code in statute), limited the role of the DNR and counties, and changed the overall regulatory framework of shoreland zoning to favor private property rights. Notably, the changes also prohibited any county from creating a shoreland zoning standard that is more restrictive than a DNR standard. This Information Memorandum discusses Wisconsin's current shoreland zoning laws and how they relate to county zoning authority.

#### **SOURCES OF LAW**

Generally, there are three sources of shoreland zoning laws in Wisconsin: the Wisconsin state statutes, the DNR administrative code, and local zoning ordinances. First, the state statutes are binding on all shoreland areas in the state and supersede any contrary provisions in the administrative code or local ordinances. Second, the relevant DNR administrative code contains additional shoreland zoning standards. Any matter regulated in the administrative code or

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<sup>1</sup> Wisconsin's Public Trust Doctrine provides that navigable waters are held in trust by the state for the benefit of the public. The Wisconsin Supreme Court has interpreted the Public Trust Doctrine to encompass a broad range of public rights, including commercial and recreational navigation, water quality, fishing and hunting, other recreational uses, and enjoyment of natural scenic beauty.

<sup>2</sup> Paul G. Kent, *On the Waterfront: New Shoreland Zoning Laws*, Wis. Law., January 2017.

statutes may not be regulated more restrictively in a local ordinance. Finally, local county ordinances, including shoreland zoning ordinances, required by statute, and in some circumstances, ordinances adopted under general zoning authority may regulate matters not regulated by the state or DNR.

### ***STATE STATUTES, DNR RULES, AND COUNTY SHORELAND ZONING ORDINANCES***

Wisconsin law requires each county to adopt a shoreland zoning ordinance to zone all shorelands within unincorporated areas of the county. In the Wisconsin statutes, the Legislature has codified certain shoreland zoning standards and placed specific limitations on what rules the DNR may promulgate in the administrative code. Current law also provides that the DNR rules found in the administrative code are controlling over any matter not regulated by the statutes. Retaining language predating 2015 Wisconsin Act 55, DNR rules are characterized as “minimum zoning standards for shorelands.” The statutes prohibit a county shoreland zoning ordinance from regulating a matter more restrictively than the matter is regulated by statute and the DNR rules. Thus, a county shoreland zoning ordinance that contains provisions on a matter regulated by the DNR or the statutes must contain the same substantive standards that are provided by the state. However, a shoreland zoning ordinance may regulate any matter that is not regulated by the statutes or administrative code and which addresses the purposes of the shoreland zoning. The DNR has suggested such “other matters” may include: escarpment setbacks; wetland setbacks; standards for ridge and swale or dune complexes; and density and stormwater standards.<sup>3</sup> [s. 59.692 (1d) (a), (b), and (5m), Stats; s. NR 115.05, Wis. Adm. Code.]

### ***COUNTY GENERAL ZONING ORDINANCES AND COUNTY SHORELAND ZONING ORDINANCES***

County general ordinances are different than county shoreland zoning ordinances. Generally, county shoreland zoning ordinances create overlay districts that apply in addition to any general zoning provisions. Although a shoreland zoning ordinance must be consistent with any comprehensive zoning plan or general zoning ordinance so far as practicable, a county shoreland zoning ordinance supersedes any provision of a general zoning ordinance that relates to shorelands. Counties have authority to grant variances to shoreland zoning ordinances. The DNR may not appeal a decision of the county to grant a variance, but may issue an opinion on whether the variance should be granted or denied only if requested by the county. [s. 59.692 (4) and (5), Stats.]

## **STATE SHORELAND ZONING STANDARDS**

### ***PURPOSE***

As set forth in the statutes, the purpose of Wisconsin’s shoreland zoning law is to limit the direct and cumulative impacts of shoreland development on water quality; 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; reserve shore

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<sup>3</sup> Memorandum, from Kay Lutzke, Shoreland Policy Coordinator, DNR, *2015 Wisconsin Act 55 and Shoreland Zoning*, (October 1, 2015), available at: <https://dnr.wi.gov/topic/ShorelandZoning/documents/Act55-2015-10-01.pdf>.

cover and natural beauty; and promote the public health, safety, and general welfare by adopting zoning regulations for the protection of shorelands. County shoreland zoning ordinances give effect to the above purposes by regulating shorelands in unincorporated areas in accordance with state standards. [ss. 59.692 (1c) and 281.31 (1), Stats; s. NR 115.01, Wis. Adm. Code.]

### ***SCOPE***

A county shoreland zoning ordinance applies to the shorelands within the county's unincorporated areas<sup>4</sup> ("towns"). With some limited exceptions, towns do not have authority to enact their own shoreland zoning ordinances.

A shoreland is defined as the area within a certain distance from the ordinary high-water mark<sup>5</sup> (OHWM) of navigable waters<sup>6</sup>. The areas included in shorelands are as follows:

- One-thousand feet from the OHWM of a lake, pond, or flowage.
- Three-hundred feet from the OHWM of a river or stream or to the landward side of the floodplain, whichever distance is greater.

Shoreland zoning ordinances do not apply to lands adjacent to farm drainage ditches if the lands are not adjacent to a natural navigable stream or river, the drainage ditch was not previously a navigable stream, and the adjacent lands are maintained in nonstructural agricultural use. [s. 59.692 (1) (b), Stats; s. NR 115.02 (5), Wis. Adm. Code.]

### ***KEY REQUIREMENTS AND RESTRICTIONS***

As described above, a county shoreland zoning ordinance must meet certain requirements set forth by the state in the statutes and administrative code. Key requirements relate to setbacks, lot size, building height, vegetative buffers, impervious surfaces, and nonconforming structures.

#### ***Setbacks***

A county shoreland zoning ordinance must contain provisions related to setbacks. A shoreland setback area is the area in a shoreland that is within a certain distance of the OHWM in which

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<sup>4</sup> Generally, cities and villages are required to enact shoreland zoning ordinances in certain circumstances. However, a discussion of city and village zoning authority is outside the scope of this memorandum and any use of "shoreland zoning ordinance" hereinafter is in reference to a county shoreland zoning ordinance. [ss. 59.692 (2), 61.353 (2), and 62.233 (2), Stats.]

<sup>5</sup> "Ordinary high-water" mark means the point on the bank or shore up to which the presence and action of surface water is so continuous as to leave a distinctive mark such as by erosion, destruction or prevention of terrestrial vegetation, predominance of aquatic vegetation, or other easily recognized characteristic. [s. NR 115.03 (6), Wis. Adm. Code.]

<sup>6</sup> "Navigable waters" means Lake Superior, Lake Michigan, all natural inland lakes within this state and all streams, ponds, sloughs, flowages, and other waters within the territorial limits of this state, including the Wisconsin portion of boundary waters, which are navigable under the laws of this state. [s. 281.31 (2) (d), Stats.]

the construction or placement of a structure<sup>7</sup> has been limited or prohibited. However, a shoreland zoning ordinance must permit the construction of the following exempted structures within the setback area: boathouses; certain gazebo-like structures; certain fishing rafts; certain broadcast signal receivers; certain utility structures; and walkways, stairways, or rail systems less than 60 inches wide which are necessary to provide access to a shoreland. [s. 59.692 (1) (bn) and (1n) (d), Stats.]

Generally, the shoreland setback area must be 75 feet from the OHWM to the nearest part of a structure. However, the setback may be greater or less than 75 feet where certain principal structures are located within or beyond the shoreland setback area and exist on lots adjacent to a proposed principle structure. In these cases the setback may be calculated by:

- Averaging the setback distances of the existing structures, where there are two adjacent structures within 250 feet on either side of a proposed principle structure along the shoreline *within* the setback area.
- Averaging the required setback distances at the time the existing structures were built, where there are two adjacent structures within 200 feet on either side of a proposed principle structure along the shoreline *beyond* the setback area.
- Averaging the distance of an existing structure and 75 feet, where there is one adjacent structure within 250 feet of a proposed principle structure along the shoreline.

In any of these scenarios, the setback area may never be less than 35 feet from the OHWM. [s. 59.692 (1n), Stats.]

### ***Lot Size and Building Height***

Generally, the DNR sets a standard for minimum lot sizes and maximum building heights within shoreland areas. Any construction that results in a structure higher than 35 feet above grade level within 75 feet of the OHWM is prohibited. The minimum lot sizes are as follows:

- **Lots served by public sanitary sewer.** Lots served by a public sanitary sewer must have a minimum average width of 65 feet and a minimum area of 10,000 square feet.
- **Lots not served by public sanitary sewer.** Lots not served by a public sanitary sewer must have a minimum average width of 100 feet and a minimum area of 20,000 square feet.
- **Substandard lots.** A substandard lot is a legally created lot or parcel that met minimum area and minimum average width requirements when created, but does not meet current lot size requirements. A substandard lot may be used as a building site when all of the following apply:

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<sup>7</sup> A structure is defined as a principal structure or any accessory structure including a garage, shed, boathouse, sidewalk, stairway, walkway, patio, deck, retaining wall, porch, or fire pit. [s. 59.692 (1) (e), Stats.]

- The lot was never reconfigured or combined with another lot or parcel by plat, survey, or consolidation by the owner into one property tax parcel.
- The lot has never been developed with one or more of its structures placed partly on an adjacent lot or parcel.
- The lot is developed to comply with all other ordinance requirements.

[s. NR 115.05 (1) (a) and (f), Wis. Adm. Code.]

### ***Vegetative Buffers***

Generally, the DNR requires that counties designate the land extending 35 feet inland from the OHWM as a vegetative buffer zone and prohibit the removal of vegetation within the vegetative buffer zone. Although a shoreland zoning ordinance may require a person to maintain an existing vegetative buffer zone, it may not require a person to establish vegetative buffer zone on previously developed land or expand an existing vegetative buffer zone. [s. 59.692 (1f) (a), Stats; s. NR 115.05 (1) (c) (2), Wis. Adm. Code.]

A county may authorize additional vegetation management activities within the vegetative buffer zone by permit, so long as the permit meets certain requirements. In addition, the county must allow the following vegetation management activities:

- The routine maintenance of vegetation.
- The removal of trees and shrubs on certain forested parcels consistent with “generally accepted forestry management practices” as defined in s. NR 1.25 (2) (b), Wis. Adm. Code.
- The removal of vegetation creating an imminent safety hazard, provided that any removed vegetation be replaced as soon as practicable.
- The removal of vegetation to manage invasive species, damaged vegetation, or control disease, provided that any removed vegetation be replaced as soon as practicable.

[s. NR 115.05 (1) (c), Wis. Adm. Code.]

If a county shoreland zoning ordinance requires the maintenance of an existing vegetative buffer zone, it must also allow for the creation or maintenance of a viewing corridor. The ordinance must permit a viewing corridor to be at least 35 feet wide per 100 feet of shoreline, and viewing corridors must be allowed to run contiguously to each other. [s. 59.692 (1f) (b), Stats.]

### ***Impervious Surfaces***

Counties must establish impervious surface standards in shoreland areas to protect water quality and fish and wildlife habitats. These impervious surface standards apply to the construction, reconstruction, expansion, replacement, or relocation of any impervious surface that is or will be located within 300 feet of the OHWM. State law also provides that a surface must be considered pervious if its runoff is treated by a system or device or is discharged to an internally drained pervious area that allows the runoff to infiltrate the soil. In addition, public roadways or

sidewalks cannot be defined as impervious surfaces. [s. 59.692 (1k) (am), Stats; s. NR 115.05 (1) (e) (1), Wis. Adm. Code.]

Generally, where these standards apply, a maximum of 15% of the surface area of a lot or parcel may be impervious surface<sup>8</sup>. In certain highly developed shoreland areas, a county may allow up to 30% impervious surface for residential land uses and up to 40% impervious surface for commercial, industrial, or business land uses. In addition, a county may issue a permit to allow for greater impervious surface percentages than listed above if the permit has certain mitigation<sup>9</sup> requirements. [s. NR 115.05 (1) (e) (2), (2m), and (3), Wis. Adm. Code.]

For existing impervious surfaces that were lawfully placed when constructed but do not conform to current standards, a person may do all of the following so long as the total percentage of impervious surface does not increase:

- Maintain and repair all impervious surfaces.
- Replace existing impervious surfaces with similar surfaces within the building envelope.
- Relocate or modify existing impervious surfaces with similar or different impervious surfaces, provided that the relocation or modification meets building setback standards.

[s. NR 115.05 (1) (e) (4), Wis. Adm. Code.]

### ***Nonconforming Structures and Use***

Zoning ordinances typically regulate the types of permissible uses or activities, as well as the physical attributes and location of structures, in a particular area. A nonconforming structure is a dwelling or other building that existed lawfully before the current zoning ordinance was enacted or amended, but does not conform to the current zoning ordinance. A nonconforming use is the use of a structure or property that was lawful before the current zoning ordinance was enacted or amended, but does not conform to the current zoning ordinance. The statutes and administrative code place certain limitations on a county's ability to regulate nonconforming structures and uses.

### **Activities that Do Not Expand the Structure's Footprint**

Generally, if the activity does not expand the footprint of a structure, neither the DNR nor a county may establish a shoreland zoning standard that requires any approval, fees, or otherwise prohibits or regulates the maintenance, repair, replacement, restoration, rebuilding, or remodeling of all or any part of:

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<sup>8</sup> The DNR has determined a formula for calculating the percentage of impervious surface in an area. See, s. NR 115.05 (1) (e) (1m), Wis. Adm. Code.

<sup>9</sup> "Mitigation" means balancing measures that are designed, implemented, and function to restore natural functions and values that are otherwise lost through development and human activities. [s. NR 115.03 (4r), Wis. Adm. Code.]

- A nonconforming structure.
- A structure of which any part is legally located in the setback area because of a variance.
- A structure which has been in place for more than 10 years.
- Any exempted structure which is permitted to be in the setback area.

Additionally, a county may not prohibit the expansion of a structure's footprint if the expansion is necessary for the structure to comply with applicable state or federal law.

[s. 59.692 (1k) (a) (2) and (2m) and (b), Stats; s. NR 115.05 (1) (g) (4), Wis. Adm. Code.]

### **Activities that Expand the Structure's Footprint**

A nonconforming principal structure that exists **within** the shoreland setback area may be expanded laterally or vertically if all of the following apply:

- Use of the structure has not been discontinued for more than 12 months.
- The structure is at least 35 feet from the OHWM.
- Vertical expansion is limited so the structure is no higher than 35 feet.
- Lateral expansion is limited to a maximum of 200 square feet over the life of the structure.
- The county issues a permit that requires mitigation measures to offset the impacts of the permitted expansion on water quality, wildlife habitats, and natural scenic beauty.
- All other provisions of the shoreland zoning ordinance are met.

A nonconforming principal structure that exists **beyond** the shoreland setback area may be expanded horizontally, landward, or vertically if all of the following apply:

- The expanded area meets the building setback requirements.
- All other provisions of the shoreland zoning ordinance are met.

[s. NR 115.05 (1) (g) (5) and (5m), Wis. Adm. Code.]

### **Replacement or Relocation of Nonconforming Principle Structures**

A nonconforming principal structure may be replaced or relocated on the property if all of the following apply:

- Nonconforming use of the structure has not been discontinued for more than 12 months.
- The structure is at least 35 feet from the OHWM.
- No portion of the replaced or relocated structure will be closer to the OHWM than the closest point of the existing structure.

- The county determines that there is no other location on the property to build a principal structure of comparable size that will comply with the setback.
- The county issues a permit that requires a mitigation plan.
- All other provisions of the shoreland zoning ordinance are met.

[s. NR 115.05 (1) (g) (6), Wis. Adm. Code.]

### **Nonconforming Use**

Generally, a shoreland zoning ordinance may not prohibit the continued use of a building structure or property that was lawful immediately before a new ordinance or amendment takes effect, which is not in conformity with the current ordinance or amendment. However, continued use of a **temporary** structure may be prohibited, and if a nonconforming use is discontinued for 12 or more months, any future use must conform to the ordinance. [s. NR 115.05 (1) (g), Wis. Adm. Code.]

### ***Other Miscellaneous Provisions***

In addition to the requirements listed above, the statutes and administrative code contain certain other provisions related to shoreland zoning. A list of provisions related to property rights is below.

### **State and Local Permit Requirements**

The interests of a shoreland property owner may not be impaired by the establishment of any standard that requires any approval, imposes any fee or mitigation requirements, or otherwise prohibits or regulates, the maintenance, repair, replacement, restoration, rebuilding, or remodeling of certain nonconforming structures **if the activity does not expand the structure's footprint**. However, a county may still require permits for such activities under other enabling statutes (e.g. general zoning, floodplain zoning, sanitary codes, building codes, etc.). [s. 59.692 (1k) (a) (2), Stats.]

### **Outdoor Lighting**

State law prohibits the establishment of any standard that requires any approval or fee or that otherwise prohibits the installation or maintenance of outdoor lighting in shorelands that is intended for residential use. [s. 59.692 (1k) (a) (1), Stats.]

### **Inspection Before Sale or Transfer**

State law prohibits the establishment of any standard that requires the inspection or upgrade of a structure before the sale or transfer of the structure. [s. 59.692 (1k) (a) (3), Stats.]

### **Boathouses**

State law prohibits the use of a boathouse for human habitation, and construction of or placement of a boathouse beyond the OHWM is prohibited. However, the owner of a boathouse



may use the boathouse roof as a deck, if the roof has no side walls or screens. [s. 59.692 (10), Stats; s. NR 115.05 (1) (b) (3), Wis. Adm. Code.]

### **Construction and Maintenance of Certain Facilities**

The construction and maintenance of certain public or cooperative utility facilities is considered to satisfy all shoreland zoning requirements if the DNR has issued all required permits or approvals authorizing the construction or maintenance of the facility. [s. 59.692 (7), Stats.]

### **Filling, Grading, Lagooning, Dredging, Ditching, and Excavating**

Filling, grading, lagooning, dredging, ditching, and excavating may be permitted only in accordance with certain provisions and requirements and other state and federal laws where applicable, and only if done in a manner designed to minimize erosion, sedimentation, and impairment of fish and wildlife habitat and natural scenic beauty. [s. NR 115.05 (1) (d), Wis. Adm. Code.]

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Laina Stuebner, Intern, on November 15, 2018.

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