



WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director

TO: REPRESENTATIVE ADAM JARCHOW

FROM: Larry A. Konopacki, Principal Attorney

RE: LRB-1919/1, Relating to Shoreland Zoning

DATE: May 18, 2015

You have asked for a general description of LRB-1919/1 (the bill), relating to standards and ordinances for shoreland zoning and costs and attorney fees allowed against a county board of adjustment. This memorandum provides background information about shoreland zoning laws in Wisconsin, lists the changes to current law that would be made under the bill, and generally discusses the steps that the Department of Natural Resources (DNR) and the counties would have to follow if the bill were to be enacted.

SHORELAND ZONING BACKGROUND

Shoreland zoning in Wisconsin is primarily a tool for regulating the use of land in areas near the shores of navigable waters.¹ The Wisconsin statutes direct counties to adopt ordinances to zone all shorelands in unincorporated² areas in order “to effect the purposes of s. 281.31, Stats.,³ and to promote the public health, safety and general welfare.” [s. 59.692 (1m), Stats.] A

¹ “Shoreland” is the land up to 1,000 feet from a navigable lake, pond, or flowage, or up to 300 feet from a navigable river or stream (or to the landward side of the floodplain of a river or stream, whichever distance is greater). Measurement is from the ordinary high-water mark.

² A county’s shoreland zoning ordinance may also apply to portions of villages and cities depending on when those portions were incorporated or annexed.

³ Section 281.31, Stats., the state’s “navigable waters protection law,” provides as follows: “to aid in the fulfillment of the state’s role as trustee of its navigable waters and to promote public health, safety, convenience and general welfare, it is declared to be in the public interest to make studies, establish policies, make plans and authorize municipal shoreland zoning regulations for the efficient use, conservation, development and protection of this state’s water resources. The regulations shall relate to lands under, abutting or lying close to navigable waters. The purposes of the regulations shall be 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.”

county's shoreland zoning ordinance must meet statewide shoreland zoning standards promulgated by rule by DNR.⁴ [s. 59.692 (1) (c) and (6), Stats.] Those shoreland zoning standards are contained in ch. NR 115, Wis. Adm. Code (NR 115).

The statewide shoreland zoning standards in NR 115 are referred to as "minimum standards." For the most part, county shoreland zoning ordinances are allowed to be more restrictive than the standards in NR 115. However, there are some provisions that expressly limit the authority of counties to impose more restrictive ordinance provisions on shorelands than those provided in NR 115. [See, for example, s. NR 115.05 (1) (a) 3., (b) 1m., (e) 4., and (g) 1., 4., 5., 5m., and 6., Wis. Admin. Code.]

A significant set of revisions to NR 115 went into effect on February 1, 2010. Counties were initially required to modify their shoreland zoning ordinances to comply with these changes by early 2012. [s. NR 115.06 (2) (b) 1. a., Wis. Adm. Code.] In 2011, the DNR announced that it would be promulgating additional changes to NR 115, and extended the deadline for county compliance to early 2014. As that date approached, the compliance deadline was extended again, to May 1, 2016. [See, s. NR 115.06 (3) (c), Wis. Adm. Code.] The additional changes to NR 115 that were promulgated by the DNR went into effect on October 1, 2014. Because of the changes that were made to NR 115 and the changes to the county compliance deadlines, most county shoreland zoning ordinances are currently in transition.

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This bill makes a number of changes to the laws regulating shoreland zoning including specifying that NR 115 and county shoreland zoning ordinances must meet all of the following requirements:

1. Under the bill, county shoreland zoning ordinances may not regulate a matter more restrictively than the matter is regulated under a shoreland zoning standard in NR 115. As noted above, this is the opposite of the general rule under current law. As an example, NR 115 requires county shoreland zoning ordinances to impose a 75-foot setback requirement for structures, measured from the ordinary high-water mark. Some counties have imposed setback requirements that are more than 75 feet. This bill would prohibit a county from doing so. The bill also expressly allows a county to regulate matters not addressed in NR 115, which is consistent with how current law is administered.
2. The bill prohibits county shoreland zoning ordinances from requiring a person to establish a vegetative buffer zone on previously developed land or to expand an existing vegetative buffer zone, but allows counties to require a person to maintain an existing buffer zone. Currently, under NR 115, county shoreland zoning ordinances

⁴ The statutes also provide for exemptions from shoreland zoning ordinances or specific treatment under the ordinances for certain activities and land uses. [See, s. 59.692 (1r), (1s), (1t), and (1v), Stats.]

are required to include provisions related to buffer zones, and these provisions vary around the state.

3. If a vegetative buffer zone is required under a county shoreland zoning ordinance, the bill requires that the ordinance must allow a landowner to create a viewing corridor in the vegetative buffer zone that is at least 35 feet in width for every 100 feet of shoreline frontage and the viewing corridor must be allowed to run contiguously for the entire allowable width. Currently, under NR 115, a county may allow creation of access or viewing corridors if they are no more than 30% of the shoreline frontage or 200 feet, whichever is less.
4. The bill provides that NR 115 and county shoreland zoning ordinances may not prohibit or regulate outdoor lighting designed for residential use. No provision specific to lighting is in NR 115, but some counties may have such provisions in their shoreland zoning ordinances.
5. Under the bill, NR 115 and county shoreland zoning ordinances may not prohibit or regulate the maintenance, repair, replacement, restoration, rebuilding, or remodeling of all or any part of a nonconforming structure if the activity does not expand the structure's footprint (unless footprint expansion is required under state or federal law). Currently, under NR 115, a person must be allowed to conduct maintenance and repair, interior remodeling, exterior remodeling, and the replacement or enhancement of plumbing or electrical systems, insulation, windows, doors, siding, or the roof with respect to a principal structure. There is also a statutory provision under current law that allows restoration of structures damaged by certain natural causes.
6. The bill prohibits NR 115 and county shoreland zoning ordinances from requiring the inspection or upgrade of a structure before it is sold or transferred. NR 115 is currently silent regarding such requirements. Apparently, at least some counties impose some inspection or upgrade requirements prior to allowing a transfer of shoreland property, such as requirements related to private onsite wastewater treatment systems.
7. Under the bill, NR 115 and county shoreland zoning ordinances may not prohibit or regulate, with certain exceptions, the vertical expansion of a nonconforming structure if the expansion would result in the structure being not more than 35 feet above grade. Currently, under NR 115, some vertical expansion of nonconforming principal structures up to 35 feet above grade is allowed.
8. If NR 115 and county shoreland zoning ordinances contain impervious surfaces standards for shoreland parcels, the bill provides that they must define surfaces as pervious if the runoff from the surface is treated by a device or system, or is discharged to an internally drained pervious area, that retains the runoff on or off the parcel to allow infiltration into the soil. County shoreland zoning ordinances are currently allowed, but are not required, to include this type of provision.

This bill also makes a number of other changes to laws regulating shorelands, including all of the following:

1. The bill specifies that certain city or village ordinances applicable to shorelands to which NR 115 and county shoreland zoning ordinances formerly applied must meet all of the above requirements.
2. The bill would remove DNR authority to appeal a county's decision to grant or deny a variance with respect to a county shoreland zoning ordinance requirement, but would allow the DNR to provide an opinion as to whether the variance request should be granted.
3. The bill provides that shoreland zoning ordinances, construction site erosion control ordinances, storm water management zoning ordinances, and wetland zoning ordinances do not apply to lands adjacent to farm drainage ditches if such ditches are not adjacent to a natural navigable stream or river and the ditches were not navigable streams before ditching, regardless of whether the adjacent lands are maintained in nonstructural agricultural use. The bill also includes a new provision specifying that these types of ordinances do not apply to lands adjacent to an artificially constructed drainage ditch, pond, or storm water retention basin if that ditch, pond, or basin is not hydrologically connected to a natural navigable water body.

Finally, the bill also makes changes to current law relating to costs that may be awarded to a prevailing party in an appeal of a zoning decision made by a county board of adjustment. Under current law, costs related to such an appeal may only be assessed against the board of adjustment if the court finds that the board acted with gross negligence, in bad faith, or with malice. The bill provides that a person who prevails in a challenge to such a decision generally must be awarded costs, and reasonable attorney fees not to exceed \$10,000. If the court finds that the board of adjustment acted with gross negligence, in bad faith, or with malice, it may award attorney fees of up to \$30,000. These changes apply to all appeals of zoning decisions made by a board of adjustment, not just to decisions relating to shoreland zoning ordinances.

DNR AND COUNTY COMPLIANCE

The bill specifies that any provision in a county shoreland zoning ordinance that is inconsistent with the requirements listed above would be invalidated and may not be enforced beginning on the effective date of the enactment of this bill. Similarly, a number of provisions in NR 115 are inconsistent with the above requirements and would no longer be enforceable. The DNR with respect to NR 115, and the counties with respect to their shoreland zoning ordinances, would have to make changes to the administrative code and county shoreland zoning ordinances, respectively, to comply with these new requirements, but the requirements themselves would take effect immediately.

Note that the changes relating to NR 115 and county shoreland zoning ordinances listed above in 1. through 8. would only apply to shoreland zoning requirements. They would not apply to other state or municipal authority such as general local government powers to zone

within their geographic boundaries, building permit requirements, zoning of wetlands in shorelands, or generally applicable requirements adopted under local police powers.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

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