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2015 Legislative Changes Affecting Wisconsin's Shoreland

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Two recent laws, 2015 Wisconsin Act 41 and 2015 Wisconsin Act 55, significantly impact county authority to adopt shoreland zoning ordinances under Wisconsin Statutes, section 59.692, and the authority of towns to enact general zoning ordinances that relate to the shoreland area. Act 55 also made some changes related to shoreland zoning requirements for certain city and village areas. These changes are discussed below.

County Shoreland Zoning Ordinances

For almost fifty years, Wisconsin law has required that counties adopt county shoreland zoning ordinances to regulate development within the shoreland area¹ of the unincorporated areas of the county. Act 55 changed the status of county shoreland zoning ordinances adopted to comply with the requirements of Wisconsin's shoreland zoning law codified at Wis. Stat. §59.692. Under prior law, the Wisconsin Department of Natural Resources ("DNR") rules

governing Wisconsin's Shoreland Protection Program established minimum standards that counties were required to follow for the unincorporated areas of the county (the areas outside the boundaries of cities and villages). The rules are found in Wisconsin Administrative Code, ch. NR 115. As stated in NR 115.01 "Nothing in this rule shall be construed to limit the authority of a county to enact more restrictive shoreland zoning standards under s. 59.69 or 59.692, Stats. . . ."² Many Wisconsin counties used this authority to innovate and adopt shoreland zoning ordinances that were more protective of lakes and rivers than the DNR rules.

Act 55 eliminated the authority of counties to exceed the DNR requirements. Act 55 added language to the Wisconsin Statutes that states a county shoreland zoning ordinance adopted under Wis. Stat. §59.692 "may not regulate a matter more restrictively than the matter is regulated by a shoreland zoning standard."³ A "shoreland zoning standard" is defined in the Statutes to mean "a standard for ordinances enacted under [Wis. Stat. §59.692] that is

¹ Under state law, the shoreland area is defined as the areas within 1000 feet from the ordinary high water mark of navigable lakes, ponds, or flowages, or 300 feet from the ordinary high water mark of a navigable river or stream of to the landward side of the floodplain, whichever distance is greater. Wis. Stat. 59.691(1)(b).

² The reference in NR 115.01 to Wis. Stat. §59.69 is the enabling law for county *general* zoning. County general zoning follows different procedures and requirements than shoreland zoning.

³ Wis. Stat. §59.692(1d).

promulgated as a rule by the [DNR].”⁴ Act 55 also prohibits county shoreland zoning ordinances from regulating the construction of a structure on a substandard lot in a manner that is more restrictive than the DNR’s shoreland zoning standards for substandard lots.⁵ NR 115 no longer establishes the minimum requirements for county shoreland zoning ordinances. Now the standards in NR 115 are the only standards that county shoreland zoning ordinances enacted under Wis. Stat. §59.692 can follow.

Nothing in Act 55 directly modifies the above-quoted language in NR 115 that counties can enact more restrictive shoreland zoning standards under county general zoning authority enabled by Wis. Stat. §59.69. Nonetheless, preexisting law stated that county shoreland zoning ordinances shall be consistent with any general zoning ordinance applicable to the county⁶ but also stated that a county shoreland zoning ordinance “supersedes all provisions of an ordinance enacted under s. 59.69 that relate to shorelands.”⁷ While the county or the town general zoning ordinances can apply within the shoreland area, the shoreland zoning ordinance and the statewide shoreland zoning standards would seem to be the controlling ordinance.

While Act 55 prohibits county shoreland zoning ordinances from being more restrictive than the DNR shoreland zoning standards, Act 55 also states that counties are not prohibited from “enacting a shoreland zoning ordinance that regulates a matter that is not regulated by a shoreland zoning standard.”⁸ This allows counties some flexibility to establish standards for matters not regulated in NR 115 such as setbacks from wetlands and bluffs. NR 115 also does not designate the appropriate uses of property within the shoreland area such as agricultural, residential, commercial, etc. The designation of the appropriate land use is often made in the county or a town’s general zoning ordinance.

⁴ Wis. Stat. § 59.692(1)(c).

⁵ Wis. Stat. §59.692(2m).

⁶ Wis. Stat. §59.692(2c).

⁷ Wis. Stat. §59.692(5).

⁸ Id.

For example, the designation of the use of land in the county or a town general zoning ordinance for agricultural purposes and requiring larger lot sizes and larger setbacks are based on matters not regulated by a shoreland zoning standard. This is especially true in cases where the larger agricultural lot size or the setback in the general zoning ordinance is required to comply with the State’s farmland preservation law or the livestock siting law. The State’s farmland preservation law does not recognize county shoreland zoning ordinances.⁹

In addition to prohibiting counties from exceeding the shoreland zoning standards found in NR 115, Act 55, also states that a county shoreland zoning ordinance may not require the establishment of a vegetative buffer zone on previously developed land nor the expansion of an existing vegetative buffer zone. A county shoreland zoning ordinance can only require the maintenance of a vegetative buffer zone that existed on July 14, 2015, if the ordinance allows the buffer zone to contain a viewing corridor that is at least 35 feet wide for every 100 feet of shoreline frontage that can run contiguously for the entire maximum width (if there is 200 feet of shoreline frontage, the viewing corridor can run 120 feet).

Expanding the impact beyond just county shoreland zoning ordinances, Act 55 also created section 59.692(1k) of the Wisconsin Statutes that prohibits the DNR and counties from establishing shoreland zoning standards/ordinances that do any of the following:

1. *Requires the installation or maintenance, imposes a fee or mitigation requirement, or prohibits or regulates outdoor lighting for residential use;*
2. *Regulates the maintenance, repair, replacement, restoration, rebuilding, or remodeling of all or any part of a nonconforming structure¹⁰ if the activity does not expand the footprint of the nonconforming structure;¹¹*

⁹ Wis. Stat. §91.30.

¹⁰ “Nonconforming structure” is defined elsewhere in the statutes as “a dwelling or other building that existed lawfully before the current zoning ordinance was enacted or amended, but that does not conform with one or more of the development regulations in the current zoning ordinance,” though the statutes

3. Requires any inspection or upgrade of a structure¹² before the sale or other transfer of the structure may be made;

4. Regulates the vertical expansion of a nonconforming structure unless the vertical expansion would extend more than 35 feet above grade level;¹³

5. Establishes standards for impervious surfaces unless the standards provide that a surface is considered 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.

City and Village Shoreland Zoning Ordinances

Act 55 has some impact on certain cities and villages. Under preexisting law, cities and villages are required to adopt shoreland zoning ordinances that apply to shoreland annexed to cities and villages after May 7, 1982 and cities and villages incorporated after April 30, 1994.¹⁴ These ordinances need to comply with standards outlined in the statutes. As a result of Act 55, these ordinances cannot be more restrictive than DNR's shoreland zoning standards and the other limitations discussed above for county shoreland zoning ordinances.¹⁵

limit the application of that definition to that particular subsection of the Statutes. See, e.g., Wis. Stat. 59.69(10e)(a)2. Act 55 introduced the following definition of "structure" which applies to shoreland zoning ordinances: "a principal structure or any accessory structure including a garage, shed, boathouse, sidewalk, stairway, walkway, patio, deck, retaining wall, porch, or fire pit." Wis. Stat. § 59.692(1)(e). This definition would be used to understand what is meant by a nonconforming "structure."

¹¹ If the expansion is necessary to comply with applicable state or federal requirements, the ordinance shall allow the expansion of the footprint of the nonconforming structure to comply with that requirement. Wis. Stat. § 59.692(1k)(b).

¹² The new definition of "structure" introduced by Act 55 does not include a septic system so a requirement to upgrade a failing septic system before a sale or transfer of a house would be allowed.

¹³ Act 55 allows the DNR to develop standards that allow for the vertical or lateral expansion of a nonconforming structure and counties can allow for similar expansions if it does not conflict with standards established by DNR. Wis. Stat. §59.692(1k)(c).

¹⁴ See Wis. Stat. §62.233 for cities and Wis. Stat. §61.353.

¹⁵ Act 55 created an interesting issue for cities and villages due to the fact that the shoreland standards in NR 115 require a 75

Act 55 Limitations Related to Farm Drainage Ditches and Artificially Constructed Drainage Ditches, Ponds, or Storm water Retention Basins

Finally, Act 55 amended Wis. Stat. 281.31(2m) which prohibits county shoreland zoning ordinances, county, city, village, and town construction site erosion control and storm water management zoning ordinances,¹⁶ or city or village wetland zoning ordinances¹⁷ from applying to lands adjacent to farm drainage ditches (if the lands are not adjacent to a natural navigable stream or river and those parts of the drainage ditches adjacent to these lands were non-navigable streams before ditching) and to lands adjacent to artificially constructed drainage ditches, ponds, or storm water retention basins that are not hydrologically connected to a natural navigable water body.

Town General Zoning Authority

While Act 55 did not directly alter town zoning authority, another law, Act 41, expanded the authority of towns to apply general zoning ordinances within the shoreland area.¹⁸ In the 2013 case *Hegwood v. Town of Eagle Zoning Board of Appeals*,¹⁹ the Wisconsin Court of Appeals addressed the issue of whether towns had concurrent zoning authority with the county in the shoreland area in light of state law requiring counties to adopt shoreland zoning ordinances regulating the shoreland area within towns.

foot setback but Wis. State. §62.233(3)(a) allows for a 50 foot setback.

¹⁶ Authorized under Wis. Stat. §59.693 for counties, Wis. Stat. §60.627 for towns, Wis. Stat. §61.354 for villages, and Wis. Stat. §62.234 for cities.

¹⁷ Required under Wis. Stat. §61.351 for villages and 62.231 for cities.

¹⁸ Towns that are not under county zoning have the authority to adopt general zoning ordinances under Wis. Stat. § 60.61 (for towns located in counties that do not have a county general zoning ordinance) or Wis. Stat. § 60.62 (for towns exercising village powers).

¹⁹ 351 Wis.2d 196, 839 N.W.2d 111, 2013 WI App 118 (2013).

The Court in *Hegwood* held that towns did not have any zoning jurisdiction within the shoreland area unless the town had an existing town ordinance relating to shorelands that was more restrictive than the county's subsequently adopted shoreland zoning ordinance as provided in Wis. Stat. 59.691(2)(b). Many town zoning ordinances were adopted after the county shoreland zoning ordinance and therefore those town ordinances no longer applied after the *Hegwood* decision. The sudden absence of town general zoning in the shoreland area created problems in counties that had relied on town zoning to designate districts regulating the use of property and other standards. In these counties, county shoreland zoning was often considered an overlay ordinance that complied with the DNR requirements in NR 115 for the protection of navigable waters and the town general zoning ordinance provided the underlying (or base) zoning that determined the use of the property (residential, commercial, etc.). *Hegwood* eliminated the applicability of these town general zoning ordinances in the shoreland area.

In response to the *Hegwood* case, the Wisconsin Legislature passed 2015 Wis. Act 41. This law attempts to undue the *Hegwood* case. Act 41 reestablishes the ability of towns to have concurrent authority with the county in the shoreland area with certain limitations. Under Act 41, a town can adopt a general zoning ordinance under 60.61 or 60.62 that applies in the shoreland area. However, Act 41 states that the town zoning ordinance "may not impose restrictions or requirements in shorelands with respect to matters regulated by a county shoreland zoning ordinance enacted under 59.692." Act 41 does not affect town zoning ordinances related to the shoreland area that the town had in effect prior to the adoption of the county shoreland zoning ordinance as long as the town's ordinance is more restrictive than the county shoreland zoning ordinance. The law took effect July 3, 2015.

As a result of Act 41, towns wanting to make changes to their general zoning ordinances that apply within the shoreland area need to explore whether the county shoreland zoning ordinance includes

regulations covering matters the town may want to regulate. At a minimum, the county shoreland zoning ordinance will regulate the shoreland area following the shoreland zoning standards contained in NR 115. While county shoreland zoning ordinances cannot be more restrictive than these state standards and since Act 41 prohibits towns from regulating matters covered in the county's shoreland zoning ordinance, the town general zoning ordinances cannot address the state standards. Act 55 allows the county's shoreland zoning ordinance to regulate matters that are not regulated by state shoreland standards. If the county does have regulations addressing other matters, Act 41 would also prohibit a town from adopting similar regulations in the town's general zoning ordinance for the shoreland area.

Act 41 only relates to the application of town general zoning ordinances in the shoreland area. It does not address other authorities towns have to adopt other types of ordinances such as driveway ordinances, nuisance ordinances, subdivision ordinances, and licensing ordinances. These other ordinances were not at issue in the *Hegwood* case. These other tools are alternative means that town can explore using to address issues in the shoreland area.

Act 41 and Act 55 raise many unanswered questions for local governments seeking to apply these two laws. Answers will need to come from future legislation or court cases.

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