Legal Nonconforming Uses, Structures, and Lots . . .
After 2011 Wisconsin Act 170

Extension Report 2013-02 *

July, 2013

Brian W. Ohm, J.D.
UWEX Planning Law Specialist
Legal Nonconforming Uses, Structures, and Lots . . .
After 2011 Wisconsin Act 170

Extension Report 2013-02 *

July, 2013

Brian W. Ohm, J.D.
UWEX Planning Law Specialist

*Originally presented at the 34th Annual Wisconsin Town Lawyers Conference organized by the Continuing Legal Education for Wisconsin program of the University of Wisconsin Law School, April 26, 2013.
Legal Nonconforming Uses, Structures, and Lots ... After 2011
Wisconsin Act 170

Prepared by
Brian W. Ohm, J.D.
Professor
Department of Urban & Regional Planning
University of Wisconsin-Madison/Extension

I. Overview of 2011 Wisconsin Act 170 Changes

2011 Wisconsin Act 170, which became effective April 17, 2012, amended the nonconforming use section of the general zoning enabling statutes for counties, cities, villages, and towns and the nonconformity provisions in the state shoreland zoning program. The Act amended the general zoning enabling statutes to specify that a county, city, village, or town may not enact an ordinance that prohibits, or limits, based on cost, the repair, maintenance, renovation or remodeling of a nonconforming structure. The Act also amended the shoreland zoning law to specify that a county, city, or village may not enforce a provision in a county shoreland zoning ordinance that is more restrictive than the rules promulgated by the Wisconsin Department of Natural Resources (DNR) regulating nonconforming structures and construction of structures on a substandard lot. These changes are explored in more detail below.

II. Changes to General Zoning

Nonconformities arise when local governments amend the applicable zoning ordinance so existing development no longer conforms to the requirements of the amended zoning ordinance. Wisconsin's general zoning enabling statutes for counties, cities, villages, and towns have always focused on nonconforming uses of structures and specified that local zoning ordinances may not prohibit the use of buildings existing at the time a new zoning ordinance is adopted even though the use does not conform to the provisions of the new ordinance. Allowing these uses to continue is sometimes referred to as “grandfathering in.” While these uses can continue, the statutes have always placed limitations on the expansion, repair, and alteration of these buildings. Act 170 removes these limitations as they apply to nonconforming structures.

A. Nonconforming Structures Versus Nonconforming Uses

2011 Wisconsin Act 170 amended the general zoning enabling statutes to
introduce statutory definitions for “nonconforming use” and “nonconforming structure.” Prior to this, these terms were not defined in the statutes. The Act defines a “nonconforming use” as “a use of land, a dwelling, or a building that existed before the current zoning ordinance was enacted or amended, but does not conform with the use restrictions in the current ordinance.” The Act defines “nonconforming structure” as “a dwelling or other building that existed lawfully before the current zoning ordinance was enacted, but does not conform with one or more of the development regulations in the current zoning ordinance.” The term “development regulations” means “the parts of a zoning ordinance that applies to elements including setback, height, lot coverage, and side yard.”

These definitions build on the historic distinctions between the concepts of nonconforming use and nonconforming structures. While the general zoning enabling statutes only explicitly applied to nonconforming uses of buildings, local zoning ordinances expanded the protections to other types of nonconformities such as nonconforming structures and lots. While nonconformities generally fall into three general categories (nonconforming uses, nonconforming structures, and nonconforming lots), some local governments also have provisions for other types of nonconformities that may arise such as nonconforming signage, parking standards, etc. The 1966 law creating the state’s shoreland zoning program also explicitly referred to “nonconforming structures.” This was appropriate given that shoreland zoning does not focus on the use of land, but rather how far structures are setback from the state’s waterways.

As explained below, Act 170 impacts how local governments can regulate nonconforming structures.

B. The Prohibition of Cost-Based Limitations on the Repair/Remodeling of Nonconforming Structures

Based on these definitions distinguishing between nonconforming uses and structures, 2011 Wisconsin Act 170 states that zoning ordinances “may not prohibit, or limit based on cost, the repair, maintenance, renovation, or remodeling of a nonconforming structure.” The prohibition on cost-based limitations on the repair of nonconforming structures relates to the provision in the Wisconsin Statutes sometimes referred to as the “50 percent rule.” Under the Wisconsin zoning enabling statutes followed by cities, villages, and towns with general zoning ordinances through village powers, the total structural repairs or alterations of the nonconforming use of a building shall not during the life of the building exceed 50 percent of the assessed value of the building unless it is permanently changed to a conforming use. Act 170 eliminates the application of the 50 percent rule to nonconforming structures. However, the 50 percent rule still applies to nonconforming uses.
The general zoning enabling authority for counties also includes the 50 percent rule though the statutory wording is different. While the language for cities, villages, and towns exercising zoning through village powers states that repairs or alterations “shall not" exceed 50 percent of assessed value, the county zoning enabling statutes state that “the alteration of, or addition to, or repair in excess of 50% of its assessed value of any existing building, premises, structure or fixture for the purpose of carrying on any prohibited trade or new industry within the district where such buildings, premises, structures, or fixtures are located, may be prohibited.” (Emphasis added.) A 1997 Opinion of the Wisconsin Attorney General interpreted the use of the term “may” as giving counties the discretion as to whether they use the 50 percent rule or not. As a result, not all counties use the 50 percent rule. A 2000 study of county shoreland zoning ordinances prepared by the DNR found that 44 of Wisconsin’s 72 counties used the 50 percent rule. The remaining 28 counties used other standards. The impact of 2011 Wisconsin Act 170 on county zoning will therefore vary depending on whether the county followed the 50 percent rule or not.

III. Nonconforming Structures and Lots Under Shoreland Zoning: Counties Prohibited from Being More Restrictive than DNR Rules

2011 Wisconsin Act 170 also amends the statutes related to county shoreland zoning to prohibit counties, cities, and villages from enacting shoreland zoning provisions regulating nonconforming structures that are more restrictive than the provisions adopted by the Wisconsin Department of Natural Resources for nonconforming structures or for the construction of structures on substandard lots contained in Ch. NR 115, Wis. Adm. Code. A revised NR 115 went into effect in November of 2010. All counties are required to amend their shoreland zoning ordinances to reflect the new provisions in NR 115 by February 1, 2014.

If a county, city, or village has not yet amended its shoreland zoning ordinance to reflect the revised NR 115, and the current ordinance provisions are more restrictive than the new minimum standards in NR 115, the regulating body must either apply the minimum standards for nonconforming structures and substandard lots found in the revised NR 115 or adopt a non-cost alternative regulation for nonconforming structures in the shoreland zone and use the substandard lot provisions in the new NR 115. In March 2012, Governor Walker and the Natural Resources Board began the process to revise NR 115 yet again. The proposed changes will address issues related to the implementation of the new rule including some of the nonconforming structure standards. Since that

---

2Wisconsin Department of Natural Resources, County Shoreland Zoning Nonconforming Structures Issues Summary (2000).
process is currently ongoing, we do not know what the final re-revised rule will include. It is not anticipated at this time that there will be changes to the substandard lot standards in NR 115.

A. NR 115’s Nonconforming Structure Standards\(^3\)

Counties, cities, and villages cannot enforce ordinances that are more restrictive than the following standards in the current NR 115 for nonconforming structures:

a. An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under NR 115\(^4\) may be maintained and repaired within its existing building envelope. Maintenance and repair includes such activities as interior remodeling, plumbing, insulation, and replacement of windows, doors, siding, or roof.

b. An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under NR 115 may be expanded vertically, provided that all of the following requirements are met:
   i. The use of the structure has not been discontinued for a period of 12 months or more.
   ii. The existing principal structure is at least 35 feet from the ordinary high-water mark.
   iii. Vertical expansion is limited to 35 feet within 75 feet of the ordinary high-water mark of navigable waters.
   iv. The county shall issue a permit that requires a mitigation plan that shall be approved by the county and implemented by the property owner by the date specified in the permit. The mitigation plan shall include enforceable obligations of the property owner to establish or maintain measures that the

---

\(^3\) Wis. Admin Code § NR 115.05(1)(g).

\(^4\) The building setback required under the current NR 115 is as follows: a setback of 75 feet from the ordinary high-water mark of any navigable waters to the nearest part of a building or structure shall be required for all buildings and structures. Where an existing development pattern exists, the shoreland setback for a proposed principal structure may be reduced to the average shoreland setback of the principal structure on each adjacent lot, but the shoreland setback may not be reduced to less than 35 feet from the ordinary high-water mark of any navigable waters. Wis. Admin Code § NR 115.05(1)(b)). These are minimum setback standards. Counties can require greater setbacks. In the case of nonconforming structures, however, the standards of NR 115 will apply.
county determines adequate to offset the impacts of the permitted expansion on water quality, near-shore aquatic habitat, upland wildlife habitat and natural scenic beauty. The mitigation measures shall be proportional to the amount and impacts of the expansion being permitted. The obligations of the property owner under the mitigation plan shall be evidenced by an instrument recorded in the office of the County Register of Deeds.

v. All other provisions of the shoreland ordinance shall be met.

c. An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under NR 115, may be expanded horizontally, landward or vertically provided that the expanded area meets the building setback requirements in NR 115, and that all other provisions of the shoreland ordinance are met. A mitigation plan is not required solely for expansion under this paragraph, but may be required under other parts of NR 115.

d. An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under NR 115 may be replaced or relocated on the property provided all of the following requirements are met:

i. The use of the structure has not been discontinued for a period of 12 months or more.

ii. The existing principal structure is at least 35 feet from the ordinary high-water mark.

iii. No portion of the replaced or relocated structure is located any closer to the ordinary high-water mark than the closest point of the existing principal structure.

iv. The county determines that no other location is available on the property to build a principal structure of a comparable size to the structure proposed for replacement or relocation that will result in compliance with the shoreland setback requirement in NR 115.

v. The county shall issue a permit that requires a mitigation plan that shall be approved by the county and implemented by the property owner by the date specified in the permit. The mitigation plan shall include enforceable obligations of the property owner to establish or maintain measures that the county determines are adequate to offset the impacts of the permitted expansion on water quality, near-shore aquatic habitat, upland wildlife habitat and natural scenic beauty. The
mitigation measures shall be proportional to the amount and impacts of the replaced or relocated structure being permitted. The obligations of the property owner under the mitigation plan shall be evidenced by an instrument recorded in the office of the County Register of Deeds.

vi. The county shall issue a permit that requires that all other structures on the lot or parcel that do not comply with the shoreland setback requirement in NR 115 and are not exempt under NR 115 to be removed by the date specified in the permit.

vii. All other provisions of the shoreland ordinance shall be met.

e. The maintenance and repair of nonconforming boathouses which extend beyond the ordinary high-water mark of any navigable waters shall be required to comply with s. 30.121, Stats.

B. NR 115's Substandard Lot Standards

Counties, cities, and villages cannot enforce ordinances that are more restrictive than the standards in the current NR 115 for substandard lots (nonconforming lots). NR 115 now allows development on substandard lots under certain conditions. Under the current NR 115, “[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, may be used as a building site if all of the following apply:

a. The substandard lot or parcel was never reconfigured or combined with another lot or parcel by plat, survey, or consolidation by the owner into one property tax parcel.

b. The substandard lot or parcel has never been developed with one or more of its structures placed partly upon an adjacent lot or parcel.

c. The substandard lot or parcel is developed to comply with all other ordinance requirements.

The current minimum lot size requirements included in NR 115 are lots served by public sanitary sewer shall have a minimum average width of 65 feet and a minimum area of 10,000 square feet. Lots not served by public sanitary sewer shall have a minimum average width of 100 feet and a minimum area of 20,000 square feet. These are minimum lot size standards. Counties are still

---

5 Wis. Admin Code § NR 115.05 (a)3.
6 Wis. Admin Code ch. NR 115 also allows for the creation of lots that do not meet these standards if they are created as a planned unit development, if the planned unit development contains at least
permitted to develop more restrictive lot size standards. Act 170 did not change this. However, under Act 170, a substandard lot even under a more restrictive county standard may be buildable if it meets the three conditions outlined above.

C. NR 115’s Standards for Nonconforming Uses

NR 115 also includes some standards for nonconforming uses. These standards are not affected by 2011 Wisconsin Act 170. In other words, local governments can enact more restrictive standards for nonconforming uses. The nonconforming use standards are:

a. The continuance of the nonconforming use of a temporary structure may be prohibited.\(^7\)

b. If a nonconforming use is discontinued for a period of 12 months, any future use of the building, structure or property shall conform to the ordinance.

IV. Nonconformities – Understanding the Historical Context

To understand the nonconforming use/nonconforming structure distinction, it is helpful to place the concept of nonconforming uses within the historical context of zoning. The historical focus was on addressing nonconforming uses. The first zoning ordinances had few standards related to setbacks and things normally found in zoning ordinances today.

Zoning is a 20th century phenomenon in this country. It has European origins and was developed in this country in a piecemeal fashion. Zoning was heavily promoted in the 1920s with the publication of two model acts (the Standard Zoning Enabling Act and the Standard City Planning Enabling Act) by the United States Department of Commerce under Herbert Hoover who was the Secretary of the Department at the time.

Some form of the Standard Zoning Enabling Act was adopted by all the states including Wisconsin. Wisconsin’s zoning enabling law for cities still closely follows the provisions of the Standard Act.

Early zoning was intended to divide a community into districts, each of which was characterized by one particular type of land use. Homogeneity was the goal. The primary purpose of zoning was to protect classes of development from

\(^2\) acres or 200 feet of frontage, and if the reduced non-riparian lot sizes are allowed in exchange for larger shoreland buffers and setbacks on those lots adjacent to navigable waters that are proportional to and offset the impacts of the reduced lots on habitat, water quality and natural scenic beauty. Wis. Admin Code § NR 115.05(1)(a)4.

\(^7\) Wis. Admin Code § NR 115.05(1)(g)2.
encroachment by undesirable uses that could lower property values. Zoning placed single-family residences at the top of the developmental hierarchy and received the greatest protections. In particular, single family residential areas were to be protected from industries as well as high density apartment buildings and tenements which housed large numbers of immigrants and racial minorities.

The communities on which zoning was superimposed, however, had not followed a neat arrangement of development. Uses were in fact mixed. Since the purpose of zoning was to insure that all uses in a particular district were similar to each other, existing dissimilar uses detracted from that purpose, just as much as new dissimilar uses prohibited under the zoning ordinance, thus undermining the justification for zoning. It therefore became important for the proponents of zoning to get rid of these “nonconforming” uses.

The zoning proponents Alfred Bettman and Edward Bassett—two lawyers who were the principle authors of the models acts, recognized that, from a political standpoint, eliminating existing land uses would raise such public opposition that it would jeopardize the public acceptance of any zoning at all. Bettman and Bassett were willing to do battle with the owners of vacant land if they could appease the owners of existing buildings.

While Bettman and Bassett did not include any mention of nonconforming uses in their model zoning act, they suggested an approach whereby land uses that were inconsistent with zoning regulations would be allowed to continue, but they would be subject to restrictions that would limit their expansion and cause them to disappear gradually. Local governments followed this suggestion and zoning ordinances began to appear which regulated nonconforming uses by restricting (1) change of use, (2) alteration, repair or restoration of structures, and (3) restoration of a use after abandonment or discontinuance. Statutory definitions of a nonconforming use were added later. The concept of nonconforming use is the result of a political compromise. It is not firmly rooted in any constitutional doctrine as is commonly assumed.

Difficulties arose during the 1930s and 1940s because nonconforming uses did not disappear. Then beginning in the 1950s and continuing to today, zoning became more complex. Originally, zoning codes included 3 or 4 districts and minimal standards for things such as setback and square footage requirements. With the development issues that arose following the Second World War, zoning was asked to do more and more. Many more zoning districts were added. Communities may now have 10, 20, 30 or more districts with very detailed standards. With the added complexity of zoning, defining “nonconforming use” became more complicated. For example, should a commercial use be a nonconforming use if it differs from what could be newly constructed because it provides too few parking spaces?
Local governments and the courts were reluctant to exert strong pressure on nonconforming uses. Also issues of equity arose in situations where local governments frequently granted variances for new uses which are inconsistent with the zoning ordinance. How could the local government justify eliminating existing uses which are similarly inconsistent with the zoning ordinance?

At a general level, the decisions of the Wisconsin courts reflect the historic aversion to nonconforming uses. The general policy rationale followed by the courts, however, is not totally consistent with the protections afforded nonconforming uses by the statutes and in local ordinances.

V. Life After 2011 Wisconsin Act 170

In response to 2011 Wisconsin Act 170, numerous local governments across the state have amended their zoning ordinances to reflect the new state law. These amendments often involve just the simple elimination of the use of the 50 percent rule for nonconforming structures. Some local governments have also added new language that attempts to limit the expansion of nonconforming structures through other metrics, such as adding square footage. Examples of some of the approaches followed by local governments in response to Act 170 are included in Appendix A. In light of the changes due to Act 170 plus other changes by the Legislature over the past several sessions, Appendix B provides a summary (with citations) of the current state of nonconformity law in Wisconsin related to general zoning.

It is important to remember that Act 170 does not change the ability of local governments to limit the repair or remodeling of nonconforming uses based on cost. In addition, the 50 percent rule as it applies to nonconforming structures has not been totally eliminated. Act 170 did not make any changes to the nonconformity provisions under floodplain zoning, another special type of zoning. Floodplain zoning, still applies the 50 percent rule to the extension, modification or addition of nonconforming structures. However, the 50 percent rule under floodplain zoning does not apply to ordinary maintenance repairs including internal and external painting, decorating, paneling, the replacement of doors, windows and other nonstructural components, and the maintenance, repair or replacement of existing private sewage systems, water supply systems or connections to public utilities.

Under county shoreland zoning, the overlapping types of zoning

---

8 See, e.g., Village of Menomonee Falls v. Feierstahler, 183 Wis.2d 96, 98, 515 N.W.2d 290, 292 (Ct. App. 1994) (“The law seeks to restrict rather than increase nonconforming uses and to eliminate such uses as speedily as possible.”).
10 Wis. Admin Code § NR 116.15(2)(a)
authorities can also result in standards different than the requirements of Act 170. For example, as noted in the previous paragraph, the nonconforming structure provisions of floodplain ordinances are not affected by Act 170. In addition, the prohibition on counties from enforcing more restrictive nonconforming structure and substandard lot standards than found in NR 115 (under Wisconsin Statute sec. 59.692), does not apply to other districts created under county general zoning authority under Wisconsin Statutes sec. 59.69. Counties do need to proceed with caution, however, since Wisconsin Statutes sec. 59.692(5) states that the county shoreland zoning ordinance “supersedes all provisions of an ordinance enacted under s. 59.69 that relate to shorelands.”

Towns that exercise their own general zoning ordinances either under Wisconsin Statutes sec. 60.61 or Wisconsin Statutes sec. 62.23 (village powers), however, may also have general zoning requirements applicable to shoreland districts that are more restrictive than the NR 115 rules for substandard lots and nonconforming structures. The prohibition on more restrictive standards in Act 170 only applies of county shoreland zoning ordinances under Wisconsin Statutes sec. 59.692, not to town general zoning. However, town general zoning is prohibited by Act 170 from using cost as a basis for limiting the repair of nonconforming structures.

Finally, it is important to remember that Act 170 does not apply to other police power regulations. These include licensing ordinances, nuisance ordinances, and subdivision regulations. These ordinances may have provisions that are more restrictive than NR 115.
APPENDIX A

Examples of Recent Ordinance Amendments in Response to Act 170

City of Platteville – general zoning
Douglas County – general zoning
Bayfield County – Shoreland zoning
22.12 NONCONFORMING USES, STRUCTURES, AND LOTS.

(B) EXISTING NONCONFORMING STRUCTURES

(1) Any lawful nonconforming structure existing at the time of the adoption or amendment of this ordinance may be continued although its size and/or location does not conform to the lot width, area, yard, height, parking, loading, and access provisions of this ordinance.

(2) Existing nonconforming structures shall not be extended, enlarged, reconstructed, moved, or structurally altered except when required to do so by law or so as to comply with the provisions of this ordinance.

(3) Notwithstanding the above, an existing nonconforming principal structure in the R-1, R-2, and R-3 districts which is used for any specified or conditional use, may be extended, reconstructed, moved, or structurally altered, but only if such change does not result in an increase to the nonconforming nature of the structure. No such change may increase the parking requirements for the use unless on-site parking spaces can be provided in accordance with Section 22.09.

(4) When a nonconforming structure is damaged by fire, explosion, flood, violent wind, vandalism, ice, snow, mold, or infestation the public enemy or other calamity it may be reconstructed if such change does not result in an increase to the nonconforming nature of the structure. To the extent of more than 50% of its equalized value at the time such event occurred, it shall not be restored except so as to comply with the provisions of this ordinance.
Notice of Public Hearing
Douglas County Planning & Zoning Committee

A Public Hearing will be held by the Douglas County Planning & Zoning Committee at 10:00 a.m. Wednesday, May 9, 2012 in the Government Center Board Room, Second Floor, 1316 North Street, Superior, Wisconsin to hear the following:

1)

Proposed Amendment to Ordinance 8.0 Zoning Ordinance

SECTION II. DEFINITIONS

2.1

Add definitions and renumber as required

ORDINARY MAINTENANCE AND REPAIR: Ordinary and routine actions necessary to continue or restore the safe and healthy use of a structure which has been damaged or has deteriorated through natural aging and wear and which does not result in a substantial structure improvement or a significant increase in value. Such actions may include, but are not limited to, painting, staining, and the repair of the following; exterior windows, skylights, doors, vents, siding, insulation, shutters, gutters, flooring, shingles, roofing materials, walls or the foundation, internal improvements within the structural envelope without doing a structural alteration.

STRUCTURAL ALTERATION: Any activity not considered ordinary maintenance and repair results in a change to the integral framework, or the exterior silhouette or footprint of a structure.

SECTION IX. NONCONFORMING STRUCTURES AND USES

Present uses of principal or accessory buildings, signs and premise may be continued even though they do not conform to the restrictions - development regulations of this ordinance. The ordinance maintenance, repair, renovation or remodeling of a nonconforming structure is allowed with the issuance of a land use permit. However, structural repairs or alterations of such buildings, signs or premises, shall not exceed 50 percent of their assessed value at the time of the repair or alteration requiring the issuance of a land use permit, shall not exceed 33% of the structure members of existing roof, walls and foundation. Expansion of a nonconforming structure is not exceed 50% of the enclosed building area and may not increase the nonconformity with the approval of a variance by the Board of Adjustment unless a building, sign or premise conforming to the development regulations of this ordinance results. Nonconforming main accessory structures (such as decks and porches) may not be expanded or replaced without variance. Any nonconforming use that is abandoned for one year shall be discontinued permanently unless this restriction is waived by the Douglas County Board. Any expansion of an existing nonconforming use must not change the use. Any change of an existing nonconforming use another use requires compliance with the development regulations within that zoning district.
County of Bayfield Ordinance

AN ORDINANCE AMENDING SECTIONS 13-1-4, 13-1-22, 13-1-26, 13-1-32 AND 13-1-40, CODE OF ORDINANCES, BAYFIELD COUNTY, WISCONSIN.

WHEREAS, Wisconsin Statute §59.69 (5) authorizes the County Board to adopt a zoning ordinance and §59.692 mandates the county to zone by ordinance all shorelands in its unincorporated area; and

WHEREAS, Wisconsin Statute §59.69(5)(e) authorizes the County Board to amend an ordinance and Wisconsin Statute §59.692(2)(a) states that the powers of §59.69 apply to ordinances and their amendments enacted under §59.692; and

WHEREAS, Section 13-1-104 Code of Ordinances, Bayfield County, Wisconsin authorizes the County Board to make amendments to Title 13, Chapter 1 of the Code of Ordinances, Bayfield County, Wisconsin pursuant to Wisconsin Statute §59.69; and

WHEREAS, 2011 Wisconsin Act 170 prohibits Bayfield County from enforcing a provision in its shoreland zoning ordinance that regulates the location, maintenance, expansion, replacement, repair or relocation of a nonconforming structure in a way that is more restrictive than the shoreland zoning standard for nonconforming structures promulgated in NR 115.05, Wisconsin Administrative Code; and

WHEREAS, it is deemed in the best interest of the County of Bayfield to amend Section 13-1-40 Code of Ordinances, Bayfield County, Wisconsin, pertaining to nonconforming uses and structures, to conform with the requirements of 2011 Wisconsin Act 170; and

WHEREAS, it is deemed in the best interest of the County of Bayfield to also amend Section 13-1-40 Code of Ordinances, Bayfield County, Wisconsin to create a value cap for the expansion of nonconforming uses pursuant to Wisconsin Statute §59.69(10)(am); and

WHEREAS, it is deemed in the best interest of the County of Bayfield to amend Section 13-1-26 Code of Ordinances, Bayfield County, Wisconsin, pertaining to substandard shoreland lots of record, to conform with the requirements of 2011 Wisconsin Act 170; and

WHEREAS, it is deemed in the best interest of the County of Bayfield that the Code of Ordinances, Bayfield County, Wisconsin be further modified and amended in the manner hereinafter set forth;

NOW, THEREFORE, the Bayfield County Board of Supervisors does hereby ordain as follows:
Section 1. Subsection (a) [The following terms used in this Chapter have the meanings indicated:] of Section 13-1-4 [Definitions] of Article A [Introduction and Definitions] of Chapter 1 [Zoning Code] of Title 13 [Zoning] of the Code of Ordinances, Bayfield County, Wisconsin is hereby amended to read as follows, with additions highlighted by the double underline feature (additions) and deletions highlighted by the strike out feature (deletions):

Sec. 13-1-4 Definitions.

(a) The following terms used in this Chapter have the meanings indicated:

(29) Impervious Surface. A surface consisting of asphalt, concrete, roofing material, brick, paving block, plastic, or other similar material which does not readily absorb water. An area that releases as runoff all or a majority of the precipitation that falls on it. "Impervious surface" excludes, among other things, frozen soil and decks that have at least a ¼ inch space between deck boards with a pervious surface below. "Impervious surface" includes, among other things, rooftops, sidewalks, driveways, parking lots, streets, shingles, concrete and asphalt.

(45a) Nonconforming Uses or Structures. Any structure, land or water lawfully used, occupied, or erected at the time of the effective date of this Chapter or amendments thereto which does not comply with this Chapter. Any such structure not conforming in respect to frontage, width, height, area, yard or distance requirements shall be considered a nonconforming structure and not a nonconforming use. A use of land, a dwelling, or a building that existed lawfully before the current zoning ordinance was enacted or amended, but that does not conform with the use restrictions in the current ordinance.

(45b) Nonconforming structure. A dwelling or other building, structure or accessory 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.

Section 2. Paragraph (6) [Boathouses.] of Subsection (a) [Shoreline Setbacks] of Section 13-1-22 [Setbacks and Height Restrictions.] of Article B [General Provisions] of Chapter 1 [Zoning Code] of Title 13 [Zoning] of the Code of Ordinances, Bayfield County, Wisconsin is hereby amended to read as follows, with additions highlighted by the double underline feature (additions) and deletions highlighted by the strike out feature (deletions):
Sec. 13-1-22 Setbacks and Height Restrictions.

(a) Shoreline Setbacks.

(6) Boathouses. No boathouse may be constructed closer to a navigable body of water than the applicable setback after the effective date of this provision. Any existing boathouse between the applicable setback and the ordinary high water mark shall be subject to Section 13-1-40(e)(2) Section 13-1-40(f)(2-3). Any existing boathouse extending beyond the ordinary high water mark shall be subject to Sec. 30.121, Wis. Stats.

Section 3. Subsection (d) [Common Ownership] of Section 13-1-26 [Substandard Lots of Record.] of Article B [General Provisions] of Chapter 1 [Zoning Code] of Title 13 [Zoning] of the Code of Ordinances, Bayfield County, Wisconsin is hereby amended to read as follows, with additions highlighted by the double underline feature (additions) and deletions highlighted by the strike out feature (deletions):

Sec. 13-1-26 Substandard Lots of Record.

(d) Common Ownership. If a substandard lot is in common ownership with abutting lands, the contiguous lots shall be considered a single parcel under the terms of this ordinance, except for the purposes of paragraph (e) below, and such standard lots shall not be transferable unless re-divided to conform to the provisions of this ordinance and the Bayfield County Subdivision Control Ordinance, provided that this provision shall not apply to lots described in subsection (b) above in common ownership of record with abutting lands prior to December 12, 2000.


Sec. 13-1-26 Substandard Lots of Record.

(e) Buildings Sites on Substandard Shoreland Lots. 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, may be used as a building site if all of the following apply:

(1) The substandard lot or parcel was never reconfigured or combined with another lot or parcel by plat, survey, or consolidation by the owner into one property tax parcel.
(2) The substandard lot or parcel has never been developed with one or more of its structures placed partly upon an adjacent lot or parcel.

(3) The substandard lot or parcel is developed to comply with all other Bayfield County Zoning Ordinance requirements.


Section 6. Subsections (g) [Shoreland Lighting.] and (h) [Relationship to Other Provisions.] of Section 13-1-32 [Inland Lake Classification and Shoreland Lot Development Requirements.] of Article B [General Provisions] of Chapter 1 [Zoning Code] of Title 13 [Zoning] of the Code of Ordinances, Bayfield County, Wisconsin are renumbered as Subsections (f) and (g) respectively.


Sec. 13-1-40 Nonconforming Uses and Structures.

(a) General Provision. The lawful use of a building, structure or property which existed at the time this Chapter, or an applicable amendment to this Chapter, took effect and which is not in conformity with the provisions of this Chapter, including the routine maintenance of such a building or structure, may be continued, subject to the following conditions subsections (b) – (h).

(b) Definitions. In this section, the following terms are defined as follows:

(1) “Impervious Surface.” An area that releases as runoff all or a majority of the precipitation that falls on it. “Impervious surface” excludes, among other things, frozen soil and decks that have at least a ¼ inch space between deck boards with a pervious surface below. “Impervious surface” includes, among other things, rooftops, sidewalks, driveways, parking lots, streets, shingles, concrete and asphalt.

(2) “Nonconforming use” means a use of land, a dwelling, or a building that existed lawfully before the current zoning ordinance was
enacted or amended, but that does not conform with the use restrictions in the current ordinance.

(3) "Nonconforming structure" means a dwelling or other building, structure or accessory 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.

(b) (c) Non-Shoreland Nonconforming Uses.

(1) Burden of Proof. A property owner claiming a nonconforming use and exemption from application regulations shall prove by a preponderance of the evidence that:

a. The use was legally established.

b. The use predated zoning provisions with which it does not comply.

c. The use was active and actual prior to adoption of such provisions and not merely casual and occasional or incidental to the principal use of the property in which case no vested right to continue use shall have been acquired.

(2) No-Expansion. Prohibited Expansion. A nonconforming use of a structure or premises shall not be expanded or enlarged. No such use shall be expanded within a structure which, on the date the use became nonconforming, was only partially devoted to such use. The alteration of, or addition to, or repair in excess of fifty percent (50%) of the assessed value of any non-shoreland existing building, premises, structure or fixture for the purpose of carrying on a nonconforming use is prohibited. (see Sec. 59.69 (10) (am) Wis. Stats.)

(4)(3) Allowable-Standard. Exceptions to Prohibited Expansion. If the alteration, addition or repair of a non-shoreland building or structure with a nonconforming use is prohibited because it is in excess of fifty percent (50%) of the assessed value of the existing building, premises, structure or fixture, the property owner may still make the proposed alteration, addition or repair if:

a. A nonconforming use is permanently changed to a conforming use.
b. The property owner appeals the determination of the Zoning Administrator(s) and County Board of Adjustment or the Circuit Court finds in favor of the property under Sec. 59.694(4) or 59.597(10), Wis. Stats.

c. The property owner successfully petitions to have the property rezoned by amendment of this Chapter and Sec. 59.69(5)(e), Wis. Stats.

(3)(4) **Discontinuance.** If a nonconforming use is discontinued for twelve (12) consecutive months, any future use of the building, structure or property shall conform to this Chapter.

(4)(5) **Temporary Structures.** If the nonconforming use of a temporary structure is discontinued, such nonconforming use may not be recommenced.

(5)(6) **Nuisances.** Uses that are nuisances shall not be permitted to continue as nonconforming uses.

(e)(d) **Non-Shoreland Nonconforming Buildings and Structures.**

(1) **Intent.** As specified in the following paragraphs, it is the intent of these provisions to balance the public objectives of this Chapter with the interests of owners of nonconforming buildings and structures by:

a. Treating buildings and structures, which are most nonconforming and therefore most contrary to the objectives of this Chapter, more restrictively than buildings and structures which are more nearly in compliance with the provisions of this Chapter.

b. By allowing the improvement or limited expansion of principal buildings and structures essential to the reasonable use of a property provided the adverse effects of such improvements or expansion are adequately mitigated.

(2) **Nonconforming Accessory Buildings and Structures and Nonconforming Principal Buildings and Structures of Less than 600 Square Feet.** Except as provided in paragraph (6) below regarding reconstruction of damaged or destroyed structures, nonconforming accessory buildings and structures and nonconforming principal buildings and structures of less than six hundred (600) square feet of footprint are limited to ordinary maintenance and repair and shall not be expanded.
(3) Nonconforming Principal Buildings and Structures of 600 Square Feet or Larger. Except as further restricted by the provisions of paragraphs (4) and (6) below, nonconforming principal buildings and structures of 600 square feet or larger may be improved internally, externally, or expanded provided that:

(A) 12/13/11

(2) Improvement or Expansion of Non-Shoreland Nonconforming Structures. Non-shoreland nonconforming structures may be improved internally, externally, or expanded provided that:

a. A structure that is nonconforming as to structural or dimensional standards may not be expanded or enlarged so as to increase its dimensional nonconformity.

b. Where practicable, additions to non-shoreland nonconforming structures shall conform to all applicable provisions of this Chapter.

c. Except as provided in paragraph (4)d. below, the lifetime total of all expansions shall not exceed fifty percent (50%) of the structure's footprint that existed at the time the structure became nonconforming; an owner shall provide documentation of the footprint of a structure at the time it became nonconforming, and any expansion shall be documented by recorded affidavit; and

d. The structure may not be substantially reconstructed by replacement of exterior walls constituting more than twenty five percent (25%) of the perimeter of the initial structure over the life of the structure. The owner shall provide documentation of the perimeter of the structure at the time this provision took effect and any reconstruction shall be documented by recorded affidavit.

(3) Non-shoreland Nonconforming Buildings and Structures in Planned Unit Developments, Condominium Developments, or other Developments. Nonconforming buildings and structures in planned unit developments, condominium developments, or other developments, including multiple unit dwellings, hotels, motels and resorts, that are not on shoreland lots shall be subject to paragraphs (d)(1) and (d)(2) above.

(e) Shoreland Nonconforming Uses.
(1) Compliance with Nonconforming Structure Provisions. Any shoreland building, structure, premises or fixture that constitutes a nonconforming use and is also a nonconforming structure must adhere to the provisions set forth in subsection (f) for nonconforming shoreland structures.

(2) Prohibited Expansion. The alteration of, or addition to, or repair in excess of fifty percent (50%) of the assessed value of any existing building, premises, structure or fixture for the purpose of carrying on a nonconforming use is prohibited. (see 59.69 (10) (am) Wis. Stats.)

(3) Exceptions to Prohibited Expansion. If the alteration, addition or repair of a shoreland building or structure with a nonconforming use is prohibited because it is for the purpose of carrying on a nonconforming use and is in excess of fifty percent (50%) of the assessed value of the existing building, premises, structure or fixture, the property owner may still make the proposed alteration, addition or repair if the property owner meets all provisions set forth in subsection (f) for nonconforming shoreland structures and:
   a. The alteration, addition or repair is not for the purpose of carrying on a nonconforming use.
   b. A nonconforming use is permanently changed to a conforming use.
   c. The property owner appeals the determination of the Zoning Administrator(s) and County Board of Adjustment or the Circuit Court finds in favor of the property under Secs. 59.694(4) or 59.597(10), Wis. Stats.
   d. The property owner successfully petitions to have the property rezoned by amendment of this Chapter and Sec. 59.69(5)(e), Wis. Stats.

(4) Discontinuance. If a shoreland nonconforming use is discontinued for twelve (12) consecutive months, any future use of the building, structure or property shall conform to this Chapter.

(5) Temporary Structures. If the shoreland nonconforming use of a temporary structure is discontinued, such nonconforming use may not be recommenced.

(6) Nuisances. Uses that are nuisances shall not be permitted to continue as nonconforming uses.
(4) **Additional Requirements for Nonconforming Buildings and Structures on Shoreland Lots.** Except as otherwise provided in paragraphs (4a), (4b), and (6) nonconforming buildings and structures on shoreland lots shall be subject to paragraphs (c)(2) and (3) of this Section, and in addition thereto, principal buildings and structures on such lots of six hundred (600) square feet of enclosed dwelling space or larger shall be subject to the following provisions of this paragraph: ((A)12/13/11)

(f) **Shoreland Nonconforming Structures.**

(1) **Shoreland Setback.** Except as provided in paragraphs (f)(5) (f)(6a) and (f)(6b) above, a setback of seventy-five (75) feet from the ordinary high water mark of any navigable waters to the nearest part of a building or structure shall be required for all buildings and structures.

(a) (2) **Nonconforming Structures Located Less than Thirty-five (35) Feet from the Ordinary High Water Mark.** With respect to such structures located less than forty (40) thirty-five (35) feet from the ordinary high water mark:

1. a. Internal improvements shall be confined to the An existing structure that was lawfully placed when constructed but that is located within the shoreland setback may be maintained and repaired within its existing building envelope and. Such internal improvements may be constructed without a land use permit.

2. b. Except as provided in subparagraph b., No new foundations of any kind, additional stories, other expansion, or accessory construction shall be permitted. For the purpose of this section of the Chapter, repair of 25% or more of the lineal perimeter of the foundation shall be considered a replacement or new foundation and not a repair.

3. c. Exterior improvements shall be limited to those which do not change the size or shape of the structure, except that a flat roof may be replaced by a pitched roof provided that the additional space under the pitched roof may not be used for living area, storage, or other purpose. Maintenance and repair includes such activities as interior remodeling, plumbing, insulation, and replacement of windows, doors, siding, or roof. A flat roof may be replaced with a pitched roof subsequent to a land use permit and mitigation applies.
4. d. Repair or replacement of a foundation or wall(s) which requires any land disturbance in the vegetation protection area shall require a land use permit.

5. e. The mitigation requirements of paragraph (5) (11) below are complied with.

b. With respect to structures located twenty (20) or more feet but less than forty (4) feet from the ordinary high water mark:

1. A lifetime maximum of one hundred seventy-five (175) square feet of enclosed dwelling space. (A-10/25/2010)

2. Shall be located on the landward side of the structure (A-10/26/2010)

3. Shall be permitted if the resulting structure's resulting height does not exceed twenty-six (26) feet. (A-10/26/2010)

4. Its footprint does not exceed one thousand five hundred (1,500) square feet, its roof overhang does not exceed one thousand nine hundred (1,900) square feet, and its enclosed dwelling space does not exceed two thousand five hundred (2,500) square feet, and (A-10/26/2010)

5. A plan meeting all of the following requirements shall be submitted to and approved by the Bayfield County Zoning Department and is fully implemented and complied with: (A-10/26/2010)


b. Water runoff from the structure shall be handled in accordance with best management practices. (A-10/26/2010)

c. A shoreline vegetation protection area shall be established and maintained for at least one-half of the distance from the ordinary high water mark to the structure. Any natural
vegetation located closer to the structure than one-half the distance from the ordinary high water mark shall also be maintained.\((A)\, 10/26/2010\)

d. The mitigation requirements of paragraph (5) below are complied with.\((A)\, 10/26/2010\)

e. (3) With respect to structures located forty (40) or more feet but less than seventy-five (75) feet from the ordinary high water mark. Nonconforming Structures Located Thirty-five (35) Feet or More but less than Seventy-five (75) Feet from the Ordinary High Water Mark. A nonconforming structure located thirty-five (35) or more feet but less than seventy-five (75) feet from the ordinary high water mark may be expanded vertically, provided that:

1. a. The resulting structure shall not exceed twenty-six (26) thirty-five (35) feet in height, as defined in Section 13.1-22(h), ch. NR 115.05(1)(f), Wisconsin Administrative Code.

2. The addition shall be within the existing footprint or landward thereof and

a. Shall not increase the existing footprint by more than fifty percent (50%)

b. Shall not increase the resulting footprint (of the existing structure and addition combined) beyond one thousand five hundred (1,500) square feet.\((A)\, 10/26/2010\)

e. May have a vertical addition (i.e. 2\textsuperscript{nd} story) provided the existing structure's integrity and load-bearing capacity is verified (in writing) by a structural engineer.\((A)\, 10/26/2010\)

d. May have a horizontal/lateral addition if the expanded area meets the building setback requirements provided all the provisions of paragraph (4)e. are complied with.\((A)\, 10/26/2010\)

3. The resulting structure shall not exceed one thousand nine hundred (1,900) square feet of roof overhand (measured in a horizontal plane);
4. The resulting structure shall not exceed two thousand five hundred (2,500) feet of enclosed dwelling space (measured for all stories excluding the basement);

5. No new or raised foundation for the existing structure or any attached accessory structure shall be permitted, though a foundation may be constructed under a permitted lateral addition; and [(A) 10/26/2010]

6. Any expansion or exterior improvement shall require a land use permit, and the mitigation requirements of paragraph (5) shall apply.

7. Repair of 25% or more of the lineal perimeter of the foundation shall be considered a replacement or new foundation and not a repair; [(A) 10/26/2010]
   
   b. The property owner obtains a land use permit and fulfills the mitigation requirements of paragraph (11) below.
   
   c. All other provisions of the Bayfield County Shoreland Zoning Ordinance shall be met.
   
   d. If use of the structure has been discontinued for a period of twelve (12) months or more, any further use of the structure shall conform to this chapter.

4. Nonconforming Structures Located Seventy-five (75) Feet or More from the Ordinary High Water Mark. Except as provided in subs. (f) paragraphs (5), (6a) and (6b) below, an existing structure that was lawfully placed when constructed but that does not comply with the required building setback under subs. (f)(1) may be expanded horizontally, landward or vertically provided that the expanded area meets the building setback requirements in subs. (f)(1) and that all other provisions of the Bayfield County Shoreland Zoning Ordinance are met.

d. (5) Nonconforming Structures Located on Class 3 Lakes or on Lots Adjoining or Including Rivers or Streams. Nonconforming principal buildings and structures located on lots on Class 3 lakes which are set back at least seventy-five (75) feet but less than one hundred (100) feet from the ordinary high water mark and nonconforming principal buildings and structures located on lots adjoining or including rivers or streams which are set back at least seventy-five (75) feet but less than one hundred (100) feet from the
ordinary high water mark, may be improved and expanded upon
the issuance of a land use permit to the same extent as if they were
conforming structures provided that:

1. a. The mitigation requirements of paragraph (6) (11) below are
complied with; and

2. b. Any addition is located no closer to the ordinary high water
mark than the existing structure; and

3. c. Such structures shall be subject to paragraph (7) of this
subsection. If use of the structure has been discontinued for
a period of twelve (12) months or more, any further use of
the structure shall conform to this chapter.

4a) (6a) Additional Requirements for Nonconforming Buildings and
Structures in Planned Unit Developments and Other Multiple
Unit Developments.

a. General Setback Requirements. Except as otherwise
provided in paragraph (4b), nonconforming Buildings and
structures in planned unit developments, condominium
developments, or other developments, including a multiple
unit dwellings, hotels, motels or resorts, shall be subject to
paragraphs (c)(2) and (3) of this section, and the provisions
of Section 13-1-40(e)(4) a, b, and c, (but not d) shall apply to
such buildings and structures which are nonconforming with
respect to shoreline setback, except that 13-1-40(e)(4) c
which are nonconforming with respect to shoreline setback
shall be subject to the provisions of 13-1-40 (f) (1), (2) and
(3) above, except that:

1. 13-1-40 (f) (3) shall apply to such structures located
40 thirty-five (35) or more feet but less than two
hundred (200) feet from the ordinary high water mark;

2. The expansions and improvements permitted under
said provisions shall be permitted even if the
development is nonconforming with respect to open
space requirements;

3. Mitigation measures described in 13-1-40 (e) (5) e, 1,
2, and 3 13-1-40(f)(11) d, 1, 2, and 3 shall be applied
to the percentage of a development's shoreline equal
to the percentage interest in the development owned
by the owner of the expanded structure, either in front
of the expanded structure or spread out over other portions of the shoreline.

b. **Lots in Planned Unit Developments.** A non-riparian lot may be created provided that:

1. A plat or certified survey map including that lot within the planned unit development has been approved and recorded by the county;

2. The planned unit development contains at least two (2) acres or two hundred (200) feet of frontage; and

3. The reduced non-riparian lot sizes are allowed in exchange for larger shoreland buffers and setbacks on those lots adjacent to navigable waters that are proportional to and offset the impacts of the reduced lots on habitat, water quality and natural scenic beauty.

e. New structures added to a development existing as of September 25, 2001, after such date shall meet the requirements applicable to new developments contained in 13.1.32(e).

(4b) (6b) **Additional Requirements for Certain Nonresidential Buildings on Shoreland lots.** A nonconforming building or portion thereof which is not used for human habitation or a use ancillary thereto is subject to the provisions of subs. (f) paragraphs (1-4), may be expanded up to 50% of the square footage of such building or such portion existing at the time the building became nonconforming provided that:

a. The building is at least 40 feet from the ordinary high water mark.

b. The expansion has been authorized by the issuance of a conditional use permit.

c. The expansion does not expand any space used in such building for human habitation (including transient habitation) or a use ancillary thereto.

d. The expansion does not increase the building’s nonconformity with respect to a setback or height
requirement and complies with the provisions of this Ordinance in all other respects.

e. The mitigation requirements of paragraph (5) below are complied with.

(7) Replacement or Relocation of Nonconforming Structure. An existing structure that was lawfully placed when constructed but that does not comply with the required building setback under subs. 

(f) paragraph (1) may be replaced or relocated on the property provided all of the following requirements are met:

a. The use of the structure has not been discontinued for a period of twelve (12) months or more.

b. The existing structure is at least thirty-five (35) feet from the ordinary high-water mark.

c. No portion of the replaced or relocated structure is located any closer to the ordinary high-water mark than the closest point of the existing principal structure.

d. The county determines that no other location is available on the property to build a structure of a comparable size to the structure proposed for replacement or relocation that will result in compliance with the shoreland setback requirement in subs. (f) paragraph (1).

e. The mitigation requirements of paragraph (11) below are complied with.

f. The county shall issue a permit that requires all other structures on the lot or parcel that do not comply with the shoreland setback requirement in subs. (f) paragraph (1) and are not exempt under NR 115.05(1)(b)1m. Wisconsin Administrative Code to be removed by the date specified in the permit.

g. All other provisions of the Bayfield County Shoreland Zoning Ordinance shall be met.

(4)e. (8) Wetland and Stream Setbacks. A nonconforming building or structure whose only nonconformity is its setback from a wetland not adjoining or constituting a part of a navigable water or from an intermittent stream may be improved and expanded upon the
issuance of a land use permit to the same extent as if it were a conforming structure provided that:

(2) a. Such structure shall be subject to paragraph 7 of this subsection. The use of the structure has not been discontinued for a period of twelve (12) months or more.

(4) b. The addition or expansion does not increase the nonconformity.

(4)f. (9) Class 2 or Class 3 Lakeshore Lots with Side Yard Setbacks. A building or structure located on a Class 2 or Class 3 lakeshore lot which is greater than ten (10) feet from a side yard setback but less than the distance from a side yard boundary required under Section 13-1-32(b)(1), and which is a nonconforming structure solely for that reason, may be improved and expanded upon the issuance of a land use permit to the same extent as if it were a conforming structure, provided that;

a. and such building or structure shall be subject to paragraph (7) of this subsection. The use of the structure has not been discontinued for a period of twelve (12) months or more.

b. any expansion must not The addition or expansion does not increase the nonconformity.

(4)g. (10) Compliance with Most Restrictive Zone Standards. Nonconforming buildings and structures which are located in more than one setback zone shall comply with the standards of the more restrictive zone.

(5) (11) Mitigation Measures. As specified in the following provisions, the objective of these mitigation requirements is to compensate for adverse environmental effects when development is permitted to occur within designated shoreline setback areas. A site plan and implementation schedule describing any required mitigation shall be submitted by the property owner or owner’s authorized agent and approved by the Planning and Zoning Department and/or Land and Water Conservation Department prior to issuance of the related land use permit(s). Mandatory mitigation measures shall include:

a. Evaluation and upgrading of any existing sanitary system on the subject property to comply with COM 83, Wis. Adm. Code, and the Bayfield County Sanitary and Private Sewage Ordinance.
b. Implementation of erosion and storm water runoff control measures in accordance with best management practices.

c. The obligations of the property owner under the mitigation plan shall be evidenced by an instrument recorded in the office of the Bayfield County Register of Deeds.

d. The mitigation measures shall be proportional to the amount and impacts of the activity being permitted. In some circumstances, a storm water management plan may be the only and most critical mitigation measure.

e. Accumulating at least four (4) points from among the following proposed or current practices:

1. Restoration or maintenance of a shoreline vegetation protection area within twenty-five (25) feet of the ordinary high water mark (OHWM) (1 point).

2. Restoration or maintenance of a shoreline vegetation protection area within forty (40) feet of the OHWM (2 points).

3. Restoration or maintenance of a shoreline vegetation protection area within seventy-five (75) feet of the OHWM (3 points).

4. Restoration of native vegetation along both side yards (1 point).

5. Removal of nonconforming accessory buildings from the shore setback area (1 point per building)

6. Use of exterior building materials or treatments that are inconspicuous and blend with the natural setting of the site (1/2 point).

7. Compliance with Sec. 13-1-32(g) shoreland lighting requirements (1/2 point).

8. Other practices agreed upon by the Zoning Department (seawall removal, removal of excessive dockage and mooring, removal of artificial sand beaches, etc.) (Points as determined by the Zoning Department).
(6) (g) **Damaged or Destroyed Nonconforming Structures.** Except as provided in paragraph (7) of this subsection, Nonconforming buildings and structures that are damaged or destroyed by a natural event, including, but not limited to, violent wind, vandalism, fire, flood, ice, snow, mold or infestation may be reconstructed provided that:

a. Damage which is due to an intentional act of the owner or his or her agent may only be repaired in conformity with this Chapter; 

(A) 12/3/11

(1) The use of the building or structure which is nonconforming as to shoreland zoning provisions was not discontinued for a period of twelve (12) months or more;

b. (2) Repair and reconstruction shall be limited to that part of a structure and its specific improvements which are actually damaged or destroyed by a natural event and similar building materials shall be utilized;

e. (3) The owner has the burden to establish that the damage or destruction to a nonconforming structure or part thereof was actually caused by a natural event and to establish the specific extent to which said damage or destruction occurred;

d. (4) The structure or part thereof that has actually been damaged or destroyed shall be reconstructed to the size, including the footprint and total square footage, location, and use that it had immediately before the damage or destruction occurred, subject to paragraph (6);

e. (5) The owner shall bear the burden of proof as to the size, location, and use of a damaged or destroyed nonconforming structure or part thereof immediately before the damage or destruction occurred;

f. (6) The size of the nonconforming structure can be larger than the size it was immediately before the damage or destruction if it is necessary to comply with applicable local, state or federal requirements;

g. (7) Repair and reconstruction shall be in compliance with all other provisions of applicable ordinances;

a. (8) Damage which is due to an intentional act of the owner or his or her agent may only be repaired in conformity with this Chapter; and
(7) **Discontinued Use of Nonconforming Structures.** If the use of a building or structure which is nonconforming as to shoreland zoning provisions is discontinued (as that term is used in Sec. 59.69(10)(a), Wis. Stats., and NR 115.05(3)(e), Wis. Admin. Code) for a period of twelve (12) months, any future use of the structure shall conform to this Chapter.

(8) **Location of Accessory Structures.** An accessory structure to a nonconforming principal structure on a shoreland lot shall comply with the applicable setback set forth in Section 13-1-32 and shall be located at least 10 feet from the principal structure.

(h) **Impervious Surface Standards.** The construction, reconstruction, expansion, replacement or relocation of any impervious surface within 300 feet of the ordinary high-water mark of any navigable waterway must meet the following requirements:

(1) **Lots or Parcels with 15% or Less Impervious Surface.** Up to 15% of the portion of a lot or parcel that is within 300 feet of the ordinary high-water mark may consist of impervious surface without the need for mitigation.

(2) **Lots or Parcels with More than 15% but no More than 30% Impervious Surface.** Between 15% and 30% of the portion of a lot or parcel that is within 300 feet of the ordinary high-water mark may consist of impervious surface provided that the landowner obtains a permit and provided that the mitigation measures of subsection (f) paragraph (11) shall apply.

(3) **Lots or Parcels with More than 30% Impervious Surface.** No more than 30% of the portion of a lot or parcel that is within 300 feet of the ordinary high-water mark may consist of impervious surface.

(4) **Existing Impervious Surfaces.** For existing impervious surfaces that were lawfully placed when constructed but that do not comply with the standards in paragraphs (1) through (3) above, the property owner may do any of the following:

a. Maintenance and repair of all impervious surfaces;

b. Replacement of existing impervious surfaces with similar surfaces within the existing building envelope;
c. Relocation or modification of existing impervious surfaces with similar or different impervious surfaces, provided that the relocation or modification does not result in an increase in the percentage of impervious surface that existed at the effective date of the Bayfield County Shoreland Zoning Ordinance, and meets the applicable setback requirements in s. NR 115.05 (1) (b), Wisconsin Administrative Code.

Section 8. Except as specifically modified and amended by this ordinance, the Bayfield County Code of Ordinance shall remain in force and effect exactly as originally adopted and previously amended. All ordinances or parts of ordinances inconsistent with or in contravention of the provisions of this ordinance are hereby repealed.

Section 9. SEVERABILITY. If a court of competent jurisdiction adjudges any section, clause, provision, or portion of this ordinance unconstitutional or invalid, the remainder of this ordinance shall not be affected thereby.

Section 10. EFFECTIVE DATE. This ordinance shall take effect and be in full force from and after its passage.
APPENDIX B


2011 Wisconsin Act 170 added some important provisions to Wisconsin’s zoning enabling statutes to clarify the distinction between some of the different categories of nonconformities. These and other changes to the statutes related to nonconformities over several recent legislative sessions have significantly changed the law of nonconformities in Wisconsin. The following section repeats the discussion of the 2011 Wisconsin Act 170 changes for general zoning plus it pulls together the other changes over the past ten years to provide a more complete overview of the current state of the law related to nonconformities in Wisconsin.

1. Definitions

2011 Wisconsin Act 170 added three definitions related to nonconformities. The law defines “nonconforming use” as “a use of land, a dwelling, or a building that existed lawfully before the current zoning ordinance was enacted or amended, but that does not conform with the use restrictions in the current ordinance.”\(^\text{11}\) The law also defines “nonconforming structure” 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.”\(^\text{12}\) Finally, the law defines “development regulations” as “the part of a zoning ordinance enacted under this section that applies to elements including setback, height, lot coverage, and side yard.”\(^\text{13}\)

The general zoning enabling statutes do not define nonconforming lots. Nonconforming lots involve a legally recorded lot that existed at the time of the passage of a zoning ordinance but fails to meet square footage or other spatial requirements for the zoning district within which it is located.

Local zoning ordinances should classify nonconformities according to

\(^{11}\) Wis. Stat. § 59.69(10)(ab) (for counties); Wis. Stat. § 60.61(5)(ab) (for towns zoning without village powers); Wis. Stat. § 62.23(7)(ab) (for cities, villages, and towns zoning with village powers).

\(^{12}\) Wis. Stat. § 59.69(10c)(a)2 (for counties); Wis. Stat. § 60.61(5e)(a)2 (for towns zoning without village powers); Wis. Stat. § 62.23(7)(hb)1.b (for cities, villages, and towns zoning with village powers).

\(^{13}\) Wis. Stat. § 59.69(10e)(a)1 (for counties); Wis. Stat. § 60.61(5e)(a)1 (for towns zoning without village powers); Wis. Stat. § 62.23(7)(hb)1.a (for cities, villages, and towns zoning with village powers).
nonconforming lots, nonconforming structures, and nonconforming uses. This classification of nonconformities allows the varying problems associated with each to be treated differently. Those nonconformities that present the most serious problems to the community can be identified, and enforceable regulations can be enacted.

2. Statutory Protection of Nonconforming Uses

Until the additions of 2011 Wisconsin Act 170 related to nonconforming structures, the general zoning enabling statutes focused primarily on nonconforming uses which lead to confusion in this area. A nonconforming use relates to a use not permitted by the zoning ordinance and reflects the original concept of nonconforming use developed in the 1920s. The statutes differ depending upon the enabling law a community follows. Nonconforming uses have certain legal protections afforded directly by the Wisconsin Statutes with which local ordinances cannot interfere. The statutes prohibit local zoning ordinances from eliminating certain nonconforming uses. These prohibitions are explored below.

The zoning enabling statutes for cities, villages, and towns exercising zoning under village powers, states: “The continued lawful use of a building, premises, structure, or fixture existing at the time of the adoption or amendment of a zoning ordinance may not be prohibited although the use does not conform to the provisions of the ordinance.”

The zoning enabling statutes for counties has the following prohibition: “[A zoning] ordinance ... may not prohibit the continuance of the lawful use of any building, premises, structure, or fixture for any trade or industry for which such building, premises, structure, or fixture is used at the time [zoning] ordinances take effect.”

The county zoning enabling statute also provides that the continuance of the nonconforming use of a temporary structure may be prohibited. However, court cases hold that to continue a nonconforming use is to engage in the use actively and constantly, as the principal use of the building or land, such that the owner continually exhibits a serious vested interest in its perpetuation. This is not at odds with the allowance in county law of a forced halt in use of a temporary

---

14 It is possible to have various combinations of these concepts such as buildings that are nonconforming as to both structure and use, or a conforming structure and a nonconforming use, etc.
15 Wis. Stat. § 62.23(7)(h). “Premises” is ordinarily defined to include land and structures attached to the land. Jack P. Friedman, Jack C. Harris, & J. Bruce Lindeman, Dictionary of Real Estate Terms (1987).
16 Wis. Stat. § 59.69(10)(am).
17 Wis. Stat. § 59.69(10)(am).
structure.

Finally, the zoning enabling law for towns zoning without village powers states: “[T]he continued use of any building or premises for any trade or industry for which the building or premise is used when the ordinance takes effect.”^{19}

Note that the protection granted by county and town law is to “trade or industry.” Surprisingly, no court case has reached the Wisconsin Supreme Court on the question of whether uses other than “trade or industry” have statutory rights not to be prohibited. In practice, most county ordinances give equal treatment to all preexisting situations, regardless of the category of land use in question. An early Attorney General’s Opinion suggested that agricultural uses could be halted because they were not trade or industry where such a halt was justified in careful investigations of conditions.^{20} Courts have held that the statutes protect only the precise use that predated the code and other very similar uses.^{21}

3. Statutory Limitation on Expansions or Alterations of Nonconforming Uses

While the statutes allow certain nonconforming uses to continue, the statutes place limits on the ability of a property owner to expand, alter, and reconstruct nonconforming uses. These statutory sections are highlighted below. It is important to note that these limits are placed on nonconforming uses. As a result of Act 170, zoning ordinances may not prohibit, or limit based on cost, the repair, maintenance, renovation, or remodeling of nonconforming structures.^{22}

^{19}Wis. Stat. § 60.61(5).
^{21}State ex rel. Briff v. Mortenson, 6 Wis.2d 125, 96 N.W.2d 603 (1959).
^{22}A pre-Act 170 court case that draws upon the distinction between nonconforming uses and nonconforming structures is Hillis v. Village of Fox Point Bd. Of Zoning App., 2005 WI App 106, 281 Wis. 2d 147, 697 N.W.2d 636. The Hillises live next door to the McGees. The McGees applied for a permit to construct an addition on the south side of their house, the side nearest the Hillises. The Hillises objected to the proposed addition. The Hillises did not allege that the proposed addition violated any ordinances as to use (residential), setbacks (front or side), or area (ratio of floor of house to lot size). Rather, they argued that the McGees’ house is a nonconforming property because it extends over a bluff line, which is in violation of the Village’s bluff protection ordinance that prohibited the construction of any structure on lake bluffs and ravines in the Village. Therefore, they contended, the McGees are subject to a limit on the cost of additions or modifications of 50 percent of the assessed value. The Hillises asserted that because the cost of the proposed addition exceeds 50 percent of the house’s assessed value, the addition should not be allowed.

The Village of Fox Point Zoning Code defines a “nonconforming use” as “[a]ny use of a building or premises which does not conform with the regulations of the district in which it is situated as provided for by this chapter.” The Code did not have any clear provisions related to nonconforming structures though it provided that “nonconforming buildings ... may be altered or
The zoning enabling law for cities, villages, and towns exercising zoning under village powers states: "The nonconforming use may not be extended. The total structural repairs or alterations in such a nonconforming building, premises, structure, or fixture shall not during its life exceed 50 percent of the assessed value of the building, premises, structure, or fixture unless permanently changed to a conforming use."

The zoning enabling law for counties states: "[T]he alteration of, or addition to, or repair in excess of 50 percent of its assessed value of any existing building, premises, structure or fixture for the purpose of carrying on any prohibited trade or new industry within the district where such buildings, premises, structures, or fixtures are located, may be prohibited." 24

Finally, the zoning enabling laws for towns zoning without village powers states: "[A zoning ordinance] may prohibit the alteration of, or addition to, any existing building or structure used to carry on an otherwise prohibited trade or industry within the district." 25

The 50 percent rule has led to numerous practical difficulties in its application. One issue relates to what is meant by "structural repairs." Often local communities may include a definition of "structural repairs" in their zoning ordinances. This means that nonconforming use issues need to be resolved within the context of the exact wording of the local ordinance. In one case, the Wisconsin Supreme Court held that "structural repairs" includes "work that would convert an existing building into a new or substantially different building, ... work that would affect the structural quality of the building and work that would contribute to the longevity or permanence of the building." 26 The Court went on to say that structural repairs did not include efforts to modernize structures (such as adding acoustical tiles and installing heating, electricity, plumbing or insulation) and those repairs necessary to prevent deterioration of the structure. 27

Another issue concerns the problems associated with the use in the statutes of the term "assessed value." Assessed value may not always be an accurate measure of fair market value. Different values will affect the amount of repairs

---

23Wis. Stat. § 62.23(7)(h).
24Wis. Stat. § 59.691(10)(am).
25Wis. Stat. § 60.61(5).
26Marris v. City of Cedarburg, 176 Wis.2d 14, 498 N.W.2d 842 (1993).
27Marris v. City of Cedarburg, 176 Wis.2d 14, 498 N.W.2d 842 (1993).
that can be done to a structure.\textsuperscript{28}

Enlargements or extensions of a nonconforming use cannot change the use of the property.\textsuperscript{29} However, the mere increase in the volume, intensity or frequency of a nonconforming use is not sufficient to prove an impermissible expansion of a nonconforming use.\textsuperscript{30} For example, an increase in business activity for a business that is a valid nonconforming use is not prohibited.\textsuperscript{31} Rather, proof of structural alterations or repairs in violation of any statute or ordinance are required to prove the impermissible expansion of a nonconforming use.\textsuperscript{32}

The penalty for illegally expanding a nonconforming use is severe. An illegal expansion or enlargement of a nonconforming use invalidates the legal nonconforming use as well as the illegal change.\textsuperscript{33}

4. Discontinuance of Nonconforming Uses

The zoning enabling statutes for cities and villages, counties, and towns all provide that if a nonconforming use is discontinued for a period of 12 months, any future use of the building and premises must conform to the zoning ordinance.\textsuperscript{34} Legal nonconforming uses run with the land and not the owner. Sale of a nonconforming use does not result in discontinuance of the nonconforming use.

5. Protection of Nonconforming Structures

2011 Wisconsin Act 170 protects nonconforming structures from the application of the 50 percent rule discussed above. According to the law, a city/village/town/county general zoning ordinance “may not prohibit, or limit based on cost, the repair, maintenance, renovation, or remodeling of a nonconforming structure.”\textsuperscript{35}

\textsuperscript{28}See \textit{State ex rel. Home Ins. Co. v. Burt}, 23 Wis.2d 231, 127 N.W.2d 270 (1964) in which the Court found that the cost of repairing a structure damaged by a fire was 26% of the fair market value but over 50% of the assessed value. The Court ordered a variance to be granted for the repairs.
\textsuperscript{29}\textit{Waukesha County v. Pewaukee Marina, Inc.}, 187 Wis.2d 18, 522 N.W.2d 536 (Cl. App. 1994).
\textsuperscript{31}\textit{Waukesha County v. Seitz}, 140 Wis.2d 111, 409 N.W.2d 403 (Cl. App. 1987).
\textsuperscript{32}\textit{Waukesha County v. Seitz}, 140 Wis.2d 111, 409 N.W.2d 403 (Cl. App. 1987).
\textsuperscript{33}\textit{Waukesha County v. Pewaukee Marina, Inc.}, 187 Wis.2d 18, 522 N.W.2d 536 (Cl. App. 1994).
\textsuperscript{34}Wis. Stat. § 62.23(7)(h) (cities and villages); Wis. Stat. § 59.69(10)(am) (counties); Wis. Stat. § 60.61(5) (towns). The statutes do not say if the 12-month period must be consecutive.
\textsuperscript{35} Wis. Stat. § 59.69(10)(e)(b) (for counties); Wis. Stat. § 60.61(5e)(b) (for towns zoning without village powers); Wis. Stat. § 62.23(7)(hh)2 (for cities, villages, and towns zoning with village powers).
In addition to prohibiting the application of the 50 percent rule to nonconforming structures, the law also prohibits restrictions that are applicable to damaged or destroyed nonconforming structures that are contained in local ordinances that prohibit the restoration of a nonconforming structure if the structure will be restored to the size, location, and use that it had immediately before the damage or destruction occurred, or impose any limits on the costs of the repair, reconstruction, or improvement if all of the following apply: The nonconforming structure was damaged or destroyed on or after March 2, 2006; and the damage or destruction was caused by violent wind, vandalism, fire, flood, ice, snow, mold, or infestation. The ordinance must allow for the size of a structure to be larger than the size it was immediately before the damage or destruction if necessary for the structure to comply with applicable state or federal requirements.36

6. Amortization Ordinances Prohibited

Counties, cities, villages, and towns are prohibited from enacting amortization ordinances. The statutes define an “amortization ordinance” as an ordinance that allows the continuance of the lawful use of a nonconforming building, premises, structure, or fixture that may be lawfully used, but only for a specified period of time, after which the lawful use of such building, premises, structure, or fixture must be discontinued without the payment of just compensation.37 There are, however, a few provisions in Wisconsin Statutes where amortization is expressly allowed in Wisconsin.38

7. County and Town Record Keeping

Counties and towns exercising zoning without village powers are required to keep a record after the enactment of an ordinance or amendment to a zoning ordinance of all lands, premises and buildings in the towns under county zoning used for purposes not conforming to the regulations applicable to the district in which they are situated. The record shall include the legal description of the lands, the nature and extent of the uses therein, and the names and addresses of the owner or occupant or both. The record must be published in the county as a class 1 notice and filed with the register of deeds. The record is prima facie evidence of the extent and number of nonconforming uses existing on the

36 Wis. Stat. §§ 59.69(10m), 60.61(5m), 61.351(5m), 62.23(7)(hc), and 62.231(5m).
37 Wis. Stat. §§ 59.69(10)(e) and 62.23(7)(hg).
38 Wharfs and piers—1 year amortization period after change in ownership (Wis. Stat. § 20.13(4)(C)); signs—5 year amortization period (Wis. Stat. § 84.30(5)); junkyards—5 year amortization period (Wis. Stat. § 84.31(4)).
effective date of the ordinance in the towns.\textsuperscript{39}

8. Other Nonconforming Use Basics

The property owner has the burden to prove by a preponderance of the evidence the nonconforming use status.\textsuperscript{40} The nonconforming use must have been in existence at the time the ordinance that now prohibits that use was passed.\textsuperscript{41} The use must be lawful. It must not contravene prior zoning or other ordinances.\textsuperscript{42} The use must be the same or a “related use” as existed when the ordinance came into effect.\textsuperscript{43} The use must have been active and actual and not occasional or sporadic so that the property owner acquired a “vested interest” in its continuance.\textsuperscript{44} The use must be more than merely accessory or incidental to the principal use,\textsuperscript{45} although the nonconforming use need not have been the most substantial use.\textsuperscript{46}

When adopting or amending a zoning ordinance, the number and type of nonconforming uses that exist or are likely to be created should be identified. The existing or proposed regulations for nonconforming uses should be studied in light of this information to determine the net effect of any action. The nonconforming zoning regulations should be strong enough to eliminate those nonconformities that threaten the health, safety, and general welfare of the community, and yet at the same time, be flexible enough to be enforceable over a broad range of circumstances. When drafting zoning ordinances, the community should also pursue efforts not to create nonconforming uses in the first place.

If a community wants to eliminate troublesome nonconforming uses, it

\textsuperscript{39}Wis. Stat. § 59.69(10)(b)(3); Wis. Stat. § 60.61(5)(b).
\textsuperscript{40}Walworth County v. Hartwell, 62 Wis.2d 57, 60, 214 N.W.2d 288, 289-90 (1974).
\textsuperscript{41}Walworth County v. Hartwell, 62 Wis.2d 57, 60, 214 N.W.2d 288, 289-90 (1974); Town of Yorkville v. Fonk, 3 Wis.2d 371, 88 N.W.2d 319 (1958).
\textsuperscript{42}City of Lake Geneva v. Smuda, 75 Wis.2d 532, 249 N.W.2d 783 (1977). The issuance of a permit allowing the use does not establish legality. The use may have not been legal even under the prior ordinance. A permit issued for a use prohibited by a zoning ordinance is illegal. Foresight, Inc. v. Babl, 211 Wis.2d 279, 565 N.W.2d 279 (Cl. App. 1997).
\textsuperscript{43}Village of Menomonee Falls v. Veiershahler, 183 Wis.2d 96, 98, 515 N.W.2d 290, 292 (Cl. App. 1994) (conversion of a tavern to a nonalcoholic social club was deemed to be an abandonment of the prior nonconforming use).
\textsuperscript{44}City of Lake Geneva v. Smuda, 75 Wis.2d 532, 249 N.W.2d 783 (1977) (casual and occasional use of an upstairs apartment as a separate dwelling); Walworth County v. Hartwell, 62 Wis.2d 57, 60, 214 N.W.2d 288, 289-90 (1974).
\textsuperscript{45}Walworth County v. Hartwell, 62 Wis.2d 57, 214 N.W.2d 288 (1974); see also Sahas v. Jensen, 11 Wis.2d 449, 105 N.W.2d 818 (1960), in which an automobile repair garage owner sought nonconforming use status for the operation of an automobile salvage yard. The Court found that prior to the enactment of the ordinance, the automobile salvage operations were merely incidental to the operation of the repair service.
\textsuperscript{46}Waukesha County v. Seitz, 140 Wis.2d 111, 409 N.W.2d 403 (Cl. App. 1987) (the operation of boat rentals, boat storage, fuel and bait sales, cottage rental, pier and mooring facilities all helped constitute the overall business that was given nonconforming status).
can also explore applying other techniques. For example, a community may need to eliminate a nonconforming use by using the power of eminent domain to buy the property. The community may also bring a nuisance action. Long before the concept of zoning, courts upheld regulations requiring the immediate discontinuance of uses and structures that had adverse affects upon public health, safety, or morals as a nuisance. Zoning did not replace nuisance law. Nuisance law still provides a viable alternative for dealing with unwanted land uses such as junk yards, automobile wrecking yards, billboards, etc., that often are the least susceptible to the discontinuance and 50 percent rules of the nonconforming use statutes.

In addition, while preexisting nonconforming uses are protected from zoning ordinances, they are generally not granted immunity from ordinances enacted under other statutory provisions and police power regulations governing the manner or operation of use. For example, a quarry may have the protected status of a nonconforming use but it can still be subject to licensing or special permit requirements. According to one court, “[n]either the defendants’ original nonconforming use, nor their expansion of it, excuses them from the licensing ordinance. A regulatory ordinance is not encumbered by a nonconforming use provision.”

---

47See Town of Delafield v. Sharpley, 212 Wis. 2d 332, 569 N.W.2d 779 (1997) as an example of a successful effort by a community to prohibit a junkyard as a public nuisance. The junkyard owner claimed that the junkyard was a valid and legal nonconforming use because it predated the adoption of the town’s zoning ordinance. The Court of Appeals found the valid nonconforming use status of the property was irrelevant. According to the Court of Appeals, “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.”

48Chapter 823 of the Wisconsin Statutes allow the state, counties, cities, villages, towns, as well as individuals, to bring a lawsuit in court to abate, or stop, public nuisances. A nuisance is an unreasonable activity or use of property that substantially interferes with comfortable enjoyment of life, health, safety or another or others. State v. Quality Egg Farm, Inc., 104 Wis.2d 506, 311 N.W.2d 650 (1981). Determining what constitutes a public nuisance depends on the facts of the specific situation. What may be a nuisance in one situation may not be a nuisance in another situation. The statutes, however, attempt to define certain uses as nuisances such as “bawdyhouses,” dilapidated buildings, and dilapidated wharves and piers in navigable waters. Wis. Stat. §§ 823.09, 21, and 215.

49E.g., the regulation of billboards for towns does not fall within the zoning enabling statutes. Wis. Stat. § 60.23(29).