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# Shoreland Zoning Glossary

The following terms are frequently referred to in discussions of shoreland zoning:

- **Board of Adjustment:** A county zoning board that considers applications for variances and hears appeals when a property owner disagrees with a zoning administrator's decision. Cities and villages generally have a Board of Appeals that performs similar functions.
- **Conditional Use Permit:** Zoning ordinances generally list the uses permitted for the land in a particular zoning district (permitted uses). Conditional uses are land uses that the local government decided were not well suited to all locations within the zoning district. Such uses must be custom tailored to the specific site. After a public hearing, the local zoning authority will issue a conditional use permit if the conditional use is granted.
- **Floodplain:** "Floodplain" means land that has or may be covered by flood water during the regional flood. The "regional flood" means a flood statistically determined to be representative of large floods known to have generally occurred in Wisconsin and which may be expected to occur on a particular water body, based on similar physical, rainfall and runoff characteristics, once in every 100 years.
- **Navigable Waters:** Wisconsin statutes define navigable waters as those waters with a bed differentiated from the adjacent uplands and with enough water to allow navigation by a recreational craft of the shallowest draft (a canoe, for example) on at least an annually recurring basis. Navigable waters include Lake Superior, Lake Michigan, all inland lakes, streams, ponds, sloughs, flowages and other waters within the state which are so "navigable," with the exception of some farm drainage ditches.
- **Ordinary High Water Mark (OHWM):** The OHWM defines the bed of a lake, stream or river. It is the point on the bank or shore up to which the presence and action of surface waters is so continuous as to leave a distinct mark by erosion; the destruction or prevention of terrestrial vegetation; the predominance of aquatic vegetation; or other easily recognizable characteristics.
- **Public Trust Doctrine:** A state constitutional provision granting the state the authority to hold the beds of navigable waters in trust for all its citizens. The state is obligated to protect public rights in navigable waters.
- **Shoreland:** Shoreland includes lands within 1,000 feet of the OHWM of navigable lakes, ponds and flowages, and lands either within the floodplain or within 300 feet of the OHWM, whichever is greater, of navigable rivers and streams.
- **Variance:** A relaxation of the dimensional standards (e.g., setback, height, area, etc.) found in zoning ordinances. A variance may be granted if there is a way to preserve private property rights while still protecting the public interests. To qualify for a variance, a property owner generally must show that strict application of the zoning ordinance will cause unnecessary hardship, that the hardship is caused by unique physical limitations of the property, and that granting the variance will not harm the public interests.
- **Wetlands:** Wisconsin statutes define a wetland as an area where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic ('water-loving') vegetation and which has soils indicative of wet conditions. This definition includes areas such as swamps, bogs, deep and shallow marshes, sedge and fresh wet meadows, low prairies and seasonally flooded basins. A tip-off for Wisconsin licensees that an area is a wetland is the presence of lily pads or cattails, as well as the presence of standing water or other marsh land indicators.
- **Wisconsin Wetland Inventory (WWI) Maps:** The Wisconsin Department of Natural Resources (DNR) classifies and maps wetlands throughout the state. These maps identify wetlands down to 5 or 2 acres, depending upon the county.

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navigable waters. This is based upon provisions found in the Northwest Ordinance of 1787, and later repeated in 1848 in Article IX, Section 1 of the Wisconsin Constitution, requiring that all navigable waters flowing into the Mississippi and St. Lawrence Rivers remain free public highways. From this foundation, the public trust doctrine in Wisconsin has evolved in the opinions of the Wisconsin Supreme Court.

***Muench v. Public Service Commission, 261 Wis. 492, 53 N.W.2d 514 (1952). Early Development of Public Trust Doctrine, PSC Overlooks Impact of Dam on Recreational Use of River.***

The Public Service Commission (PSC) had approved a hydroelectric dam on the Namekagon River, acting on the basis of the county board's approval, and without taking into account the public's rights in the river. Muensch, a private citizen, and the attorney general both brought an action against the PSC. The trial court held that the dam permit was not subject to review and that Muensch had no standing to sue because he was not an aggrieved party. Muensch appealed to the Wisconsin Supreme Court.

Finding in favor of Muensch, the supreme court relied on the public trust doctrine: the state holds the beds of navigable waters in trust for all citizens, and riparian\* owners hold title to the beds of navigable streams, subject to the rights of the public. The court stated that this doctrine applies to all navigable waters, which was defined as water capable of floating any boat, skiff, canoe, or the shallowest draft used for recreation purposes, on a regularly recurring basis.

\*Riparian: Relating to waterfront property. A riparian owner is one who holds title to land abutting a body of water.

## Wisconsin's Shoreland Program

The name Wisconsin is said to mean "gathering of the waters." This is appropriate since Wisconsin has over 50,000 miles of rivers and streams, more than 15,000 inland lakes, over 1,000 miles of Great Lakes shoreline, and approximately 5.3 million acres of wetlands. This incredible wealth of water resources provides us with fish and wildlife, natural beauty and serenity and numerous opportunities for outdoor recreation. Maintaining the quality of these waters and the beauty of their shorelines supports our tourism, homebuilding, and recreation industries.

## Public Trust Doctrine

Wisconsin's history of protecting its waters extends back over 200 years to the origins of the public trust doctrine. Wisconsin's public trust doctrine is a body of constitutional, common (from the court cases), and statutory law establishing the rights of the public in our navigable waters and the state's obligation to protect those public rights. These rights include commercial navigation, recreational boating, fishing and hunting, swimming, ice skating, enjoyment of scenic beauty, and any other recreational activities on water or ice.

Under the public trust doctrine, the state holds the beds of navigable waters in trust for all its citizens and is obligated to protect public rights in

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The court found the public trust doctrine protected the public's rights in commerce, recreation, and the enjoyment of scenic beauty. Furthermore, the public has the right to challenge actions adversely affecting their rights in navigable waters in court, and they need not demonstrate a monetary loss before doing so. The state also has the duty to intervene on behalf of its citizens to protect public rights in navigable waters.

Applying the doctrine, the court held that both Muensch and the state had standing to challenge the impact of the dam upon boating and recreation in the river. Furthermore, a county board provision directing the PSC to disregard the public's rights in the dam permit process when the affected counties had already approved the dam was held to be unconstitutional. The public's rights in navigable waters were found to be a statewide concern that can never be completely delegated to the counties. Thus the PSC was ordered to reconsider the dam permit and to make findings consistent with the rights of the public.

ý The public trust doctrine not only creates substantial duties for the state to protect the public interest, but it also may be asserted by private citizens to protect their rights in navigable waters.

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## History of Shoreland Zoning in Wisconsin

Wisconsin has a long history of protecting its lakes, rivers, and streams. The county zoning structure established in 1923 laid the foundation for the later shoreland and floodplain zoning regulations. In

1935, county zoning powers were expanded to include the power to regulate land uses along natural water courses. The Water Resources Act established in 1966 created one of the first shoreland zoning programs in the United States.

To ensure this protection, the Legislature authorized the development of uniform water conservation standards that may be implemented by the local municipalities. These standards were the predecessor of the minimum shoreland zoning regulations today found in Chapter NR 115 of the Wisconsin Administrative Code. Local governments were given the responsibility to adopt, administer, and enforce minimum shoreland zoning regulations beginning in 1968. A model shoreland ordinance was developed to aid counties in adopting an appropriate ordinance.

By 1971, all counties in Wisconsin had adopted and were administering shoreland zoning ordinances. Although counties at that time were not required to zone wetlands in conservancy districts, many had adopted shoreland zoning ordinances that referenced the U.S. Geological Survey Maps to designate the wetlands comprising conservancy districts. Also during that time, the Wisconsin Supreme Court decided the landmark case of *Just v. Marinette*. This case involved a challenge to the constitutionality of shoreland zoning.

***Just v. Marinette*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). Substitution of Deck for Patio Without Prior Variance, Challenge to Constitutionality of Shoreland Zoning.**

The Justs challenged the Marinette County Shoreland Zoning

Ordinance, which required, among other things, that permits be obtained before engaging in certain activities on lands near navigable waters. The Justs had just filled a wetland area on their property adjacent to Lake Noquebay without first obtaining a permit. Under the Marinette County Shoreland Zoning Ordinance, a conditional use permit was required for any filling or grading within a conservancy district. This portion of the Justs' land was designated as swamps or marshes on the United States Geological Survey Map which caused it to be assigned to a conservancy district for purposes of the shoreland zoning ordinance.

The Justs sought a declaratory judgment stating that the Marinette shoreland zoning ordinance was unconstitutional, that the Justs' property was not wetlands, as defined in the ordinance; and that the prohibition against filling wetlands was unconstitutional. The Justs challenged the shoreland zoning ordinance on the grounds that it amounted to a constructive taking of their property without compensation.

Marinette County, on the other hand, sought an injunction to stop the Justs from filling the wetland areas of their property without first obtaining a conditional use permit; and for a forfeiture for having already done so. Marinette County asserted that the shoreland zoning ordinance was a proper exercise of the state's police powers and therefore no compensation need be provided to the Justs.

The trial court held the shoreland zoning ordinance was valid, the Justs' property was wetlands, the Justs had violated the ordinance, and the Justs were subject to a \$100 forfeiture. The Justs appealed to the Wisconsin Supreme Court.

The court indicated that compensation

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is required only when restrictions are placed on a property to create a public benefit. Compensation is not required when the purpose is to prevent a public harm. Applying this test to the Justs, the court found compensation was not due to the Justs because the purpose of the shoreland zoning ordinance, and its prohibition against filling wetlands without a conditional use permit, was the protection of public rights. The shoreland zoning ordinance was viewed as an exercise of police power through which the state fulfilled its public trust duties.

The court remarked: “Is the ownership of a parcel of land so absolute that man can change its nature to suit any of his purposes? ... An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others ... It is not an unreasonable exercise of the [police power] to prevent harm to public rights by limiting the use of private property to its natural uses.”

There was no unreasonable taking or restriction of private property, given the important interconnection between the wetland resource and wise water resource management. Swamps and wetlands, the court noted, were once considered undesirable wasteland. Swamps and wetlands actually serve a vital role in nature and are essential to the purity of the water in our lakes and streams.

► This case upheld the constitutionality of Wisconsin’s shoreland zoning. While the public trust traditionally referred to navigable waters up to the ordinary high water mark, this case suggests that the public trust also applies to non-navigable wetlands near navigable waters because of their impact upon navigable waters.

By 1980, 54 counties had conservancy district zoning in their shoreland ordinances, but wetland zoning standards were not uniformly applied. Accordingly, the DNR produced wetland inventory maps for use in identifying shoreland-wetland areas, and Chapter NR 115 was amended to create minimum standards for zoning shoreland-wetlands (wetlands in the shoreland zone). Legislation was passed requiring cities and villages to protect shoreland-wetlands within their boundaries with zoning restrictions. Chapter 117 of the Wisconsin Administrative Code was adopted in 1983 to establish minimum standards for shoreland-wetland zoning in cities and villages.

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## Shoreland Zoning Standards

The purpose of shoreland zoning is to maintain safe and healthful water conditions; prevent and control water pollution; protect fish, spawning grounds, and aquatic life; control building sites, placement of structures, and land uses; and preserve shore cover and natural beauty. The basic purpose of a shoreland zoning ordinance is to protect navigable waters and the public’s rights therein from the degradation and deterioration that results from the unbridled use and development of shore lands.

### Municipal Regulation

The current shoreland zoning standards found in Chapter NR 115 have virtually remained unchanged for 30 years, except for the addition of the shoreland-wetlands standards in 1980. Shoreland zoning is administered locally by the counties, cities, villages, and sometimes towns.

### Counties

Counties are required to adopt, administer, and enforce both general development standards (e.g., construction activities, structure setbacks, permits for filling & grading), and wetland protection standards for shorelands. The minimum standards for county shoreland zoning ordinances are found in Wis. Admin. Code Chapter NR 115. Counties, however, may enact more restrictive ordinances. The DNR oversees administration and enforcement of these ordinances and may appeal local decisions to the board of adjustments or the circuit court.

### Cities and Villages

Cities and villages must adopt similar wetland protection regulations for the protection of wetlands located within the shoreland that are larger than 5 acres based upon the Wisconsin Wetland Inventory Maps. The minimum standards for city and village shoreland-wetlands zoning ordinances are found in Wis. Admin. Code Chapter NR 117.

Cities and villages, however, are not required to adopt general development standards. Many municipalities do adopt shoreline setbacks, lot size restrictions, and other regulations pertaining to construction activities and the removal of vegetation along the shoreline.

Shorelines that are annexed by a city or village must continue to comply with the county shoreland and wetland zoning regulations that were in effect on the date of annexation unless the city or village adopts shoreland zoning that is at least as restrictive. Newly incorporated cities and villages must continue the shoreland zoning that was in effect for the land prior to incorporation or adopt an ordinance that is at least as restrictive.

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## **Towns**

Under certain conditions, towns may also adopt and administer a shoreland zoning ordinance that is at least as restrictive as the county ordinance.

The following case illustrates the DNR's authority to oversee and enforce municipal shoreland zoning ordinances:

### ***DNR v. Walworth County Board of Adjustment*, 170 Wis. 2d 406, 489 N.W.2d 631 (Ct. App. 1992). DNR's Standing to Appeal Local Shoreland Zoning Decisions.**

The court of appeals begins their opinion by remarking: "This is another case in which a landowner and the DNR do battle over the state's shoreland zoning policies." The landowner, Linda Friedman, asserted that the DNR had no standing to appeal local shoreland zoning decisions to the board of adjustment or the circuit court.

Friedman owned a campground on Turtle Lake. The campground was in an area regulated by the Walworth County Shoreland Zoning Ordinance. In 1967, the circuit court had issued a judgement finding that the campground was a legal nonconforming use under the shoreland zoning ordinance. In 1990, Friedman decided to make major changes to the campground, including the removal of existing cottages and the building of new ones. The local zoning administrator determined that Friedman needed to obtain sewer, erosion control, and building permits, but did not need a zoning permit because the circuit court's judgement of a legal nonconforming use was still in effect.

The DNR and the Town of Richmond appealed this decision to the Walworth County Board of Adjust-

ment, arguing that Friedman's plans involved the enlargement, extension, or substitution of a nonconforming use. The board upheld the zoning administrator so the DNR and the town appealed to the circuit court. The court held that Friedman would need a permit to continue with her plans.

Friedman appealed to the court of appeals, contending, among other things, that the DNR did not have standing to appeal the zoning administrator's decision because it is not a "person aggrieved" as required by the applicable statute. The court, however, concluded that the DNR does have standing to appeal shoreland zoning decisions. The court reasoned that the DNR is a person aggrieved by a local decision affecting the shorelands because it is the trustee of Wisconsin's navigable waters. Accordingly, the state has the right to appeal decisions that violate the public trust. Further, the court declared, the DNR has the duty to appeal decisions that it believes do not comply with shoreland zoning requirements.

► This case emphasizes the DNR's authority to oversee the enforcement of the local shoreland zoning ordinances.

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## **Defining Shorelands**

The following lands are considered shorelands subject to shoreland zoning:

- Lands within 1,000 feet of the ordinary high water mark (OHWM) of a navigable lake, pond, or flowage
- Lands within 300 feet of the

OHWM of a navigable river or stream, or to the landward side of the floodplain, if that is greater

Generally speaking, a waterway is considered navigable if it has a bed and banks, and if it is possible to float a canoe or other small craft on it regularly at some time of the year, even if it is only during spring thaw. Naturally non-navigable streams may become navigable as the result of natural obstructions such as a beaver dam. Navigability is determined on a case-by-case basis. Navigable waterways are public waterways, available to the public for recreation, and subject to the state's regulatory and enforcement jurisdiction.

The OHWM is the point on the bank or shore where water is present often enough so that the upland begins to look different from the lake or stream bed. Specifically, the OHWM is the point on the bank or shore up to which the water, by its presence, wave action, or flow, leaves a distinct mark on the shore or bank. Erosion, destruction or change in vegetation, or other easily recognizable characteristics may indicate the OHWM. The dividing line between public and private ownership of land on natural lakes is determined by the OHWM. The citizens of the state of Wisconsin own the beds of natural lakes that are held in trust by the state. Riparian landowners own the land above the OHWM on lakes. On streams and rivers, the riparian owner owns the bed to the center of the stream. In both cases, the water is held by the state, in public trust, and the public has the right to use the water for activities such as boating, swimming, and fishing. The OHWM is determined on a case-by-case basis.

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# Shoreland Zoning Minimum Standards

The minimum standards that counties must include in their shoreland zoning ordinances are found in Wis. Admin. Code Chapter NR 115 while the minimum standards that cities and villages must include in their ordinances are found in Wis. Admin. Code Chapter NR 117. The Chapter NR 115 requirements are summarized as follows:

## Shoreland-Wetlands.

Counties, cities, and villages must regulate wetlands that are within shorelands and that are shown on the Wisconsin Wetland Inventory Maps. Often the shoreland-wetlands districts are overlays onto existing zoning districts and supersede any less restrictive zoning requirements. Permitted uses in county shoreland-wetlands districts are limited to:

- Hiking, fishing, trapping, hunting, swimming, and boating
- Harvesting wild crops
- Forestry
- Pasturing of livestock
- Cultivation of agricultural crops
- Construction and maintenance of duck blinds
- Construction and maintenance of certain non-residential buildings essential to wetland-dependent activities
- Construction and maintenance of piers, docks, and walkways, provided that no filling, flooding, dredging, draining, ditching, or excavating is done
- Establishment and development

of public and private parks, recreation areas, and boat access sites

- Construction of electric, gas, or other utility lines
- Construction and maintenance of railroad lines
- Maintenance and repair of existing town and county highways and bridges

All other uses are prohibited. Similar limitations apply to shoreland-wetlands in cities and villages.

Shoreland-wetland areas can be rezoned to allow otherwise prohibited uses by removal from the wetland-zoning district. The rezoning procedure requires notice, a public hearing, and development of written findings supporting the need for a zoning change. Rezoning proposals must also be reviewed by the DNR for consistency with Chapter NR 115 or 117. Rezoning is prohibited if it results in a significant adverse impact upon any of the following:

- Storm and flood storage capacity
- Maintenance of dry season stream flow
- Discharge of groundwater to wetland
- Filtering or storage of sediments, nutrients, or contaminants
- Shoreline protection against soil erosion
- Fish spawning, breeding, nursery, or feeding grounds
- Wildlife habitat
- Areas of special recreational, scenic, or scientific interest

The following case involved a dispute over whether a fee-fishing business constituted a permitted use in a shoreland-wetland (conservancy)

district:

***County of Adams v. Romeo, 191 Wis. 2d 379, 258 N.W.2d 418 (1995). Conservancy District Fishing Business.***

The Adams County Shoreland Protection Ordinance lists several uses that are permitted in areas designated as conservancy districts. The Romeos owned land in a conservancy district where they raised fish and stocked them in ponds. For a fee, the public was allowed to fish in the ponds and to purchase the fish that they caught and have them cleaned. The cleaning took place in a non-residential building on the premises where the Romeos also sold fresh and smoked fish and jams. Signs were posted advertising this business to the public.

Adams County issued citations to the Romeos for allegedly engaging in activities that are prohibited under the shoreland zoning ordinance. The county subsequently filed suit in circuit court seeking a judgement against the Romeos and an injunction ordering them to cease commercial activities associated with the raising of fish within a conservancy district. The circuit court ruled that the following activities were illegal within the conservancy district pursuant to the Adams County ordinance: 1. Running a business charging a fee for fishing, 2. Selling fresh fish, smoked fish, and jams from a building located on the premises and 3. Using signs to advertise this operation. The Romeos were ordered to pay a \$393 forfeiture and were ordered to cease engaging in the prohibited activities. The Romeos appealed to the court of appeals.

The court of appeals held that the Adams County ordinance prohibited the operation of a commercial fee-fishing business and the retail sale of

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fish and other products from a building located within the conservancy district. The court noted that the Romeos might use their building solely in conjunction with the raising of fish. Selling fish and other products from the building transformed the building's use from agricultural to commercial. To the extent the building's use was commercial, the use was prohibited under the ordinance.

The Romeos appealed to the Wisconsin Supreme Court. The court identified the following issues: 1. Whether the Adams county ordinance prohibits the Romeos from charging a fee to fish from ponds located in the conservancy district and 2. Whether the ordinance prohibits the Romeos from using a non-residential building located in the conservancy district to sell fish and jams.

The court noted the ordinance expressly permitted fishing, and reasoned that charging a fee did not alter the meaning of the word "fishing." Fishing is the capture of fish, regardless if the angler fishes for free or pays a fee. The court refused to draw a distinction between commercial and non-commercial activities as urged by the county because the ordinance does not make such a distinction. In addition, there was no evidence that paying a fee to fish created a greater risk of harm to the water or the land than fishing for free. Accordingly, the court held that the Romeos could charge the public to fish on their property.

With respect to the use of the building, the Romeos asserted that the language in the ordinance permitting the "cultivation of agricultural crops" permitted them to raise and sell fish. The court, however, drew a distinction between "agriculture" and "aquaculture," particularly because the latter involves the use of the conservancy

district waters. While the building could be used in conjunction with the "raising" of fish, this did not authorize the cleaning and selling of fish. In this context, "raise" means to breed and promote the growth of fish. The cleaning and selling of fish does not assist in the breeding and growth of fish. Accordingly, these activities are prohibited within the conservancy district. The court ordered that all signs relating to prohibited activities be removed from the Romeos' property and that they cease using the building on their property for cleaning fish and for selling fish and jams.

► This case demonstrates the unpredictable nature of statutory interpretation. While plausible arguments could be made for prohibiting fee fishing, a 6-3 majority accepted the argument that it was permitted. Possibly other factors were in operation behind the scenes.

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## General Development Standards

The following are the minimum standards set forth in Chapter NR 115. Counties may adopt more restrictive standards in their shoreland zoning ordinances.

**Minimum Lot Sizes.** Minimum lot sizes are established for the shoreland areas to protect health, safety, and welfare, and to guard against pollution of the adjacent water body. Lots served by a public sanitary sewer must have a minimum average width of 65 feet and a minimum area of 10,000 square feet. Lots not served by a public sanitary sewer must have a minimum average width of 100 feet and a minimum area of 20,000 square feet.

**Structure Setbacks.** Building and structure setbacks are established to conform to health, safety, and welfare requirements; preserve natural beauty; reduce flood hazards; and avoid water pollution. All buildings and structures, except piers, boathouses, and boathouses, must be set back 75 feet from the OHWM. Decks, gazebos, screen porches, and other accessory structures also must be set back. If an existing pattern of development is present, some counties may allow lesser setbacks using setback averaging.

**Vegetative Cutting.** Vegetative cutting standards are required to protect natural beauty; control erosion and reduce the flow of pollutants, sediments, and nutrients; and protect fish and aquatic life. In the strip of land extending 35 feet in from the OHWM, no more than 30 feet out of every 100 feet of shoreline may be clear-cut of trees and shrubbery. Further inland, vegetative cutting is governed by the potential effect on water quality and by sound forestry and conservation practices.

**Filling, Grading, Lagooning, Ditching and Excavating.** These activities are permitted in a shoreland zoning area only with the appropriate state permits, compliance with the county shoreland-wetland zoning requirements, and any needed local approvals. Such activities are tightly controlled to ensure that there is a minimal impact on erosion, sedimentation, and fish and wildlife habitat.

**Nonconforming Uses.** Chapter 115 specifically allows for the continued lawful use of existing buildings, structures, or other improvements that predate the enactment of the shoreland zoning ordinance or amendment even if they do not conform to the new ordinance. The county may, however, limit the ability of owners to alter, repair or construct additions to these non-conforming buildings or

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structures. If the total cost of the work goes over 50% of the equalized assessed value of the property, the legal non-conforming status will be lost and the use of the building will have to cease or be changed to a permitted use. Also, if the activity that is protected as a non-conforming use stops for 12 months, the legal non-conforming status will be lost.

**Subdivision Review.** The county must review any land divisions in a shoreland area which create three or more parcels or building sites of 5 acres or less within a five-year period. County review includes review of plans for public roads, utilities, stormwater drainage, erosion control, etc., to manage the environmental effects of higher density residential development and, in many counties, single lots as well. Subdivisions abutting navigable waters must meet statutory requirements for providing public access to those waters.

**Sanitary Codes.** Each county must adopt sanitary regulations to protect health and preserve and enhance water quality. Where a public sewer is not available, the private sewage disposal system must conform to a county private sewage system ordinance. Where public water is not available, private wells must conform to state private well construction standards.

The operation of the shoreland zoning general development standards is illustrated in the following recent cases:

***Thompson v. La Crosse County Board of Adjustment, (Ct. App. 1996, Case No. 94-2281, unpublished).* Substitution of Deck for Patio Without Prior Variance Violates Zoning Code.**

Thompson constructed a deck that encroached upon the seventy-five foot setback requirement set forth in

the La Crosse Shoreland Zoning Ordinance (SZO). After the deck was built, Thompson's builder (Builder) applied for a variance. Although he had substituted the deck, without prior City approval, for a patio that had been specified in the original plans, Builder argued that he did not know that a permit was necessary because the deck had the same dimensions as the patio. The Zoning Board denied the request and ordered those portions of the deck that extended beyond the setback line to be removed. Thompson appealed the board's decision to the circuit court.

At trial, Thompson argued that although the deck was in technical violation of the SZO, it was within the building setback line established by the adjacent homes. In addition, Thompson alleged that the Zoning Board had improperly denied their request for a variance because the board did not act on the merits of the request but did solely "to teach [Builder] a lesson."

A member of the Zoning Board testified that Thompson's deck extended eight feet beyond the building setback line established by the other homes and, therefore, was in violation of SZO under both the seventy-five foot setback requirement and the building setback line test. In addition, the Zoning Board denied that their decision was based upon any prejudice that they might have had against Builder.

To obtain a variance, the law states that an applicant must show that he or she will suffer an unnecessary hardship if a variance is not granted. To determine whether an unnecessary hardship exists, the applicant must show that the restrictions imposed by the zoning ordinance will unreasonably prevent him or her from using the property for a permitted purpose and would render conformity with such restrictions unnecessarily burdensome.

The trial court and the court of appeals both affirmed the Zoning Board's denial of the variance, determining that the zoning supervisor's interpretation of the building setback line was reasonable and that the motives of the members of a quasi-judicial body are irrelevant to the decision itself.

In addition, the court concluded that Builder was aware of the setback requirements before constructing the deck, and that Thompson was aware that Builder was well known for his practice of "build first, then ask" approach. The court concluded, therefore, that Thompson did not suffer from an unnecessary hardship.

► This case shows that precision is the rule when dealing with shoreland zoning variances, and that the "build first, ask later" approach can have serious consequences.

***State v. Kenosha County Board of Adjustment, (1998, Case No. 96-1235).* Misapplication of Unnecessary Hardship Standard for Variance from Shoreland Zoning.**

Landowner wanted to add a 14' x 23' deck to her lakefront house. The house was set back 78 feet from the lake, but the deck would intrude 11 feet into the 75-foot shoreland zoning setback.

The Board of Adjustment granted Landowner's petition for an area or setback variance. The board reasoned that other homes on the lake extend further into the 75-foot setback, that to deny the variance would reduce the value of the home, that the property had unique limitations due to the steep slopes which caused a safety problem and the loss of 15 feet of shoreline through erosion, and that the public interest is best served when citizens are permitted to use their

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property in a reasonable manner that is not harmful to the public. The trial court and the court of appeals affirmed the board's decision.

The Wisconsin Supreme Court rejected all of these reasons and confirmed that a variance from Wisconsin shoreland zoning laws is granted only under very limited circumstances: when the property owner demonstrates that they have no reasonable use of the property without a variance. This is the proper legal test for determining unnecessary hardship.

The high court stated that it is not sufficient for an applicant to show that the shoreland zoning ordinances are "unnecessarily burdensome," as the trial court and court of appeals had allowed. Additionally, the court noted that Landowner and her representative had not presented any proof at the hearings to support the board's findings, and had not even raised loss of value or safety as issues.

Because her home had been used as a residence for over 60 years without a desk, the court concluded that Landowner had a reasonable use for the property. Thus Landowner had failed to show an unnecessary hardship, and the court reasoned that Landowner had sought a variance for reasons of personal convenience only.

► Although Wisconsin's strict variance standards are not anything new, it appears that the boards of adjustment and the courts occasionally lose sight of the proper legal test. Remember that the legal standard of unnecessary hardship requires proof that there is no reasonable use without a variance. Petitioners for variances must be prepared to give proof of the assertions they make.

**Laing v. Adams County Planning and Development Department, and Board of Adjustment, (Ct. App. 1995, No. 95-0476, unpublished). Refusal to Grant Variance; Unequal Enforcement; Unnecessary Hardship.**

In the Laing case, the Laings decided to build a gazebo and patio by the lake at their lakefront summer home so that the owner's two brothers, one who uses a wheelchair, and the other who uses crutches, could have access to the lake and be protected from the sun. The Town of Rome advised that there were no shoreland protection ordinances affecting their plans because the previous ordinance was being revised. The gazebo was built within 12 feet of the ordinary high water mark and the patio was built at the water's edge.

The Laings, however, later received an order from the county informing them that the patio and gazebo violated the Adams County Shoreland Protection Ordinance and must be removed within 30 days. The Ordinance required a 75-foot setback from the ordinary high water mark for all buildings and structures. The Laings appealed and sought a variance, but their requests were denied.

On appeal, the trial court determined that the gazebo and patio were structures which violated the ordinance, that the ordinance was not being selectively enforced, and that the county's refusal to grant a variance was not arbitrary, oppressive, or unreasonable, and did not deny them the equal protection of the law.

The court of appeals affirmed the decision of the trial court that the gazebo and patio must be removed. The court observed that the gazebo and patio were structures because they had been constructed or built and

they were "more or less permanent," as required by the ordinance.

The Laings had also pointed out that there were at least 21 other patios or gazebos within 75 feet of Sherwood Lake alone, and that the county has never, over the past 24 years, ordered that any of these structures be removed, even though the county did have knowledge that they were there. The court observed that the fact that the County has enforced an ordinance in one instance and not in the other does not alone establish a violation of the Equal Protection Clause. A showing of intentional, systematic, and arbitrary discrimination must also be shown. An area newsletter had, in fact, recently indicated that the County was aware of numerous ordinance violations and was initiating a new enforcement program. Selective enforcement may be justified when a test case is needed to test the validity of a new ordinance, or when an example is being made to deter other violators as part of a bona fide rational pattern of general enforcement. There has been no demonstration that other owners will not also be ordered to remove their offending structures in the future and no evidence of an intent to discriminate.

In order to be granted a variance, the Laings must demonstrate that (1) a hardship is present, (2) the hardship is unique to the property and not a condition personal to the landowner, and (3) the variance is not contrary to public interest. Unnecessary hardship may be best described as a situation where no feasible use may be made of the land without the variance. In the Laing's situation, however, there are other locations on their property where the structures could have been constructed without violating the shoreline protection ordinance.

► Although the court's reasoning may appear debatable to some, one clear message from this case is that a

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landowner cannot rely upon a lack of enforcement with respect to other owners' violations of an ordinance as a sign that the local zoning authority won't or can't enforce the ordinance against you! The hardship required to obtain a variance is judged by pretty steep standards: the hardship generally must be caused by geography or topography, no matter how sympathetic the underlying personal situation may be.

***Oneida County v. Converse, 173 Wis. 2d 78, 496 N.W.2d 124 (Ct. App. 1992). Nonconforming Use; Boathouse Destroyed in Tornado.***

A tornado destroyed the Converse's boathouse on Tomahawk lake in Oneida County. The Converses were advised they did not need a state permit to rebuild a boathouse damaged by violent winds. They did, however, need a permit from Oneida County pertaining to the Oneida County Shoreland Zoning Ordinance. Oneida County denied their permit application because the boathouse would extend into the lake beyond the OHWM. The Converses appealed to the Oneida County Board of Adjustment, but their appeal was denied. Rather than appeal to the circuit court, the Converses rebuilt the boathouse without the permit.

Oneida County brought an action against the Converses for violation of the shoreland zoning ordinance. The ordinance provides that "No part of any boathouse shall extend into the lake or stream beyond the ordinary high water mark." The ordinance also had a nonconforming use provision that allowed pre-existing structures not in conformance with the ordinance to remain in place, provided that: "No structural alteration, addition or repair to any nonconforming building or structure, over the life of the building or

structure, shall exceed fifty percent (50%) of its estimated fair market value at the time of its becoming a nonconforming use, unless it is permanently changed to a conforming use." Because the entire boathouse was destroyed by the tornado, the cost of rebuilding exceeded 50% of its value. Thus it could not be rebuilt under the county shoreland zoning ordinance on the same site.

The Converses challenged the Oneida County ordinance on the basis that there is no state statute authorizing a county to regulate the building of boathouses beyond the OHWM. The court reaffirmed that the state has an affirmative obligation to protect and preserve navigable waters for fishing, hunting, recreation, and scenic beauty. Title to navigable waters is vested in the state in trust for the benefit of the public. The state may delegate this authority to local units of government in furtherance of the public trust. The court also noted that the state statutes do authorize municipal shoreland zoning ordinances relating to "lands under, abutting or lying close to navigable waters."

The Converses also argued that Wis. Admin. Code § NR 325.065, as authorized by Wis. Stat. § 30.121(6), preempted the county from regulating the rebuilding of wind-destroyed boathouses. § NR 325.065 says that: "the limitation on repairing only 50% of the . . . value of a boathouse . . . shall not be applicable to any such structure damaged by violent wind, vandalism or fire." This regulation would permit the Converses to rebuild their nonconforming boathouse.

In determining whether the state regulation invalidates the county ordinance, the court applied the three-pronged test established by the Wisconsin Supreme Court. A local ordinance is invalid if either: (1)

express language in a statute has withdrawn, revoked or restricted the municipality's power to issue such an ordinance, (2) the challenged order is logically inconsistent with state legislation, or (3) the challenged ordinance infringes the spirit of a state law or policy.

The court found that the Oneida shoreland ordinance is logically inconsistent with state regulations. § NR 325.065 provides an exemption for structures damaged by the wind from the 50% requirement for rebuilding nonconforming structures. Denying the wind, vandalism and fire exemption is not a case where the municipality has enacted a stricter ordinance; rather it runs counter to the state regulation and disallows what the state has permitted. Accordingly, the court found that the Oneida County Shoreland Zoning Ordinance is invalid to the extent that it denies the § NR 325.065 wind, vandalism and fire exemption.

► This case illustrates the application of the shoreland zoning provisions for nonconforming uses and the preemption of municipal regulations by the state (DNR).

***Forest County v. Goode, (1998, Case No. 96-3592). Court's Discretion to Deny Injunction Compelling Relocation of Home Built Within Shoreland Zoning Setback.***

The issue in *Forest County v. Goode* was whether a circuit court retains the equitable power to deny an injunction requested after a shoreland zoning violation has been proven. Forest County sought a forfeiture and an injunctive order compelling Goode to relocate his house to comply with a 50-foot setback requirement of the Forest County Zoning Ordinance.

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When Goode applied for a building permit for his lots on Ground Hemlock Lake, the zoning administrator had met with Goode and helped measure and stake a distance of 50 feet from the ordinary high water mark (OHWM). Before the concrete was poured, the builder had remeasured and restaked the property, apparently erroneously. A year later in response to a citizen complaint, the zoning administrator again measured the 50-foot setback only to find that one corner of Goode's \$170,000 home was only 35 feet from the OHWM.

Goode requested a variance that was denied by the zoning committee. The county sought a forfeiture and an injunction requiring Goode to comply with the setback requirement. The circuit court denied the injunction because Goode's violation was unintentional, the cost to move the house would be very high (it would cost \$130,000 to move and restore the house and Goode could get about \$54,000 if he demolished the house and sold the lot), and no property owners were harmed by allowing the house to remain where it was. A forfeiture of \$8,540 was imposed.

When the county appealed to the court of appeals, the court held that it was an improper exercise of the trial court's discretion to deny the county's request for an injunction requiring compliance with the 50-foot setback requirement. Goode appealed this holding to the Wisconsin Supreme Court.

The court reviewed the statute that describes the procedure for enforcing a county zoning ordinance. The court stated that whether the circuit court has equitable power to deny injunctive relief once a zoning ordinance violation is proven is a question of statutory interpretation. Wis. Stat. § 59.69(11) in relevant part

states that: "The ordinances shall be enforced by appropriate forfeitures. Compliance with such ordinances may also be enforced by injunctive order at the suit of the county or an owner of real estate within the district affected by the regulation."

The court agreed with the court of appeals' assessment of the statute. The court of appeals had undertaken a plain meaning evaluation of the statute and had concluded that the only discretion permitted by the statute is that of the county or resident deciding whether to seek injunctive relief. However, the statute is silent regarding whether the traditional equitable power of the circuit court to deny injunctions in their discretion remains or has been eliminated. This, the court remarked, renders the statute ambiguous. Well-informed persons could reasonably read the statute as no restrictions on the courts' traditional equitable powers while others may believe the statute requires the circuit court to issue an injunction once a zoning violation is proven.

The court disagreed with the county's contention that the statute permitting the board of adjustment to grant a variance would be nullified if the circuit court could decline to order compliance. If a property owner is denied a variance and the county brings an enforcement action, the property owner may remain indefinitely in non-compliance if the court orders a forfeiture but does not grant an injunction ordering compliance. Consequently, the circuit courts must not lose sight of the rights of the public and to indiscriminately allow property owners to purchase a variance for the price of a forfeiture.

To eliminate the courts' traditional equitable powers could lead to unjust results. For example, if proof of a shoreland zoning violation would

automatically entitle a petitioning citizen to an injunction ordering compliance, there could be situations where citizens could use the shoreland zoning law to seek vengeance against their neighbors. Complaints filed for extremely minor violations (your garage is two inches over the 75-foot setback) would automatically result in severe consequences (demolish or move the garage) even though it cannot be honestly said that the public's interest is in jeopardy.

Traditionally, the circuit courts have the discretion to decide whether to grant requested injunctive relief, and if so, in what form. A suit for injunctive relief is addressed to the discretion of the court and requires a balancing of the competing equities and interests. This traditional equitable jurisdiction cannot be denied or limited without a clear legislative directive. Because § 59.69(11) contains no such limitation on the court's exercise of its equity powers, the circuit courts retain their power to responsibly fashion equitable remedies based upon the facts and circumstances in an individual case.

The court concluded that Wis. Stat. § 59.69(11), the zoning enforcement statute, does not eliminate the traditional equitable power of the circuit court. Accordingly, it was within the power of the circuit court to deny the county's request for an injunction compelling compliance with the 50-foot setback.

► The court always has the power to order you to bring your property into compliance with the applicable shoreland zoning ordinance so a violation should never be taken lightly. At the same time, the court does have the power to deny a request for such an order when the result would be absurd. You are at the

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mercy of the court in the exercise of its equitable powers.

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## Costs and Benefits of Shoreland Zoning

The natural qualities of Wisconsin's waterways play a significant role in the state's economy and in the special character of our state. Given public concern in maintaining the ecology and natural character of Wisconsin lakes and streams, and the state's legal duty to protect the public interest in navigable waterways, reasonable regulation of shoreline property appears to be essential. In setting reasonable shoreland regulations, the public and private benefits of maintaining water quality, habitat, and natural beauty must be balanced against the degree of restriction the regulations impose on individual property owners and developers. This has become critical given the scarcity of available waterfront properties in Wisconsin and the skyrocketing prices of those waterfront properties that are available.

### Private Costs

Shoreland zoning limits the use of private property. Some costs are not easily measured such as the loss of anticipated benefits such as not being able to build a gazebo within 75 feet of the OHWM. Given our nation's strong tradition of individual freedom, reactions can be especially strong if the owner was not aware of the shoreland zoning ordinance when the property was purchased or when neighboring properties are not in compliance. Property owners who believe strongly in private property rights may view shoreland zoning restrictions as unfair or

unconstitutional. Some may demand compensation for the constructive taking of their property.

Other costs which may result from shoreland zoning are the costs of removing structures that are not in compliance, typically the misfortune of an owner who did not acquaint him or herself with applicable shoreland zoning requirements before building. Lot size restrictions limit the number of lots and homes that can be placed along the shoreline, reducing the profits of developers who have larger shoreline parcels.

### Public Costs

This same reduction in the number of lots and residences decreases the potential tax revenue from shoreline areas. This may be offset, however, by the higher assessed value of the existing lakefront homes. The public must also bear the cost of administering shoreland zoning ordinances.

### Private Benefits

Private waterfront owners are often appreciative of the limits on disturbances of the natural shoreland and near shore waters. The private owner consequently enjoys more privacy and a more peaceful and natural atmosphere on the lake. Shoreland zoning helps maintain good water quality and clarity that in turn help maintain property values.

### Public Benefits

Clear water may also translate into steady property values and a solid tax base. Protecting natural beauty, habitat, and water quality help avoid other costs such as lost or degraded swimming, fishing, and other recreational activities. Fishermen, boaters, vacationers, and tourists appreciate the natural qualities of undisturbed shoreline.

Obviously, shoreland zoning is the outcome of a balancing of interests, one that will never completely satisfy every segment of society. Arguably, there are no rights or wrongs, only public policy decisions that hopefully produce benefits commensurate with the costs imposed.

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## Conclusion

Shoreland zoning plays an important role in all transactions involving waterfront properties.

By acquainting all parties with the applicable ordinances, REALTORS® can help avoid the frustrations experienced by uninformed owners. This, in turn, will lead to successful transactions and satisfied buyers.

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