

State Budget Bill Makes Significant Changes to County Shoreland Zoning Authority

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Practice Area: County and Municipal Governance & Government Law

In the state's biennial budget bill, 2015 Wisconsin Act 55 (Act 55), the Legislature made several revisions to the authority of the Department of Natural Resources (DNR), counties, cities and villages' ability to regulate land use within shoreland areas. This article summarizes the changes to shoreland zoning authority of counties under Act 55 and analyzes the impact of those changes on counties. As set forth below, Act 55 makes significant changes to county shoreland zoning authority including, but not limited to, prohibiting counties from enacting or enforcing ordinances that are more restrictive than DNR shoreland zoning standards promulgated by administrative rule. We recommend that counties review current shoreland zoning ordinances to identify areas where the ordinance is more restrictive than DNR shoreland zoning standards and areas that are now prohibited subjects of regulation under Act 55. Once the DNR promulgates new shoreland zoning standards to be consistent with Act 55, counties should revise their shoreland zoning ordinances accordingly.

Summary of Act 55 Revisions to County Shoreland Zoning Authority

Changes Regarding DNR and County Shoreland Zoning Authority.

Act 55 prohibits any DNR shoreland zoning standard¹ or a county shoreland zoning ordinance from impairing a landowner's interest in shoreland property with regard to the following aspects of land use:

1. Lighting. No DNR standard or county shoreland zoning ordinance may: (a) require approval to install or maintain outdoor lighting in shorelands; (b) impose any fee or mitigation requirement to install or maintain outdoor lighting in shorelands; or (c) otherwise prohibit or regulate outdoor lighting in shorelands if the lighting is designed or intended for residential use.
2. Nonconforming Structures. Prior to Act 55, a county could not regulate the location, maintenance, expansion, replacement, repair, or relocation of a nonconforming structure² if that provision is more restrictive than the shoreland zoning standards for nonconforming structures promulgated by the DNR. Wis. Stat. § 59.692(2m)(b)1 (Rev. Stats. 2013-14).

Act 55 specifies that DNR standards or a county shoreland zoning ordinance may not require approval for, or impose a fee or mitigation requirement for, or otherwise prohibit or regulate, the maintenance, repair, replacement, restoration, rebuilding or remodeling of all or any part of a nonconforming structure if the activity does not expand the existing footprint of the nonconforming structure.³ Act 55 requires a county shoreland zoning ordinance to allow a footprint expansion of a nonconforming structure if the expansion is necessary for the structure to comply with applicable state or federal requirements.⁴

Additionally, DNR standards or a county shoreland zoning ordinance may not require any approval for, or impose any fee or mitigation requirement for, or otherwise prohibit or regulate, the vertical expansion of a nonconforming structure unless the vertical expansion would extend for more than 35 feet above grade level. A county may enact a shoreland zoning ordinance that allows for the vertical or lateral expansion of a nonconforming structure if the ordinance does not conflict with DNR shoreland zoning standards.

3. Inspections or Upgrades. Under Act 55, DNR standards or a county shoreland zoning ordinance may not require any inspection or upgrade of a structure before the sale or transfer of the structure.

4. Impervious Surfaces. Act 55 specifies that DNR standards or a county shoreland zoning ordinance may not establish standards for impervious surfaces, unless the standards provide that a surface is considered pervious if the runoff from the surface is treated by a device or system, or is discharged to an internally drained pervious area, that retains the runoff on or off the parcel to allow infiltration into the soil.

County Shoreland Zoning Restrictions.

1. Consistency with State Standards. Act 55 prohibits a county shoreland zoning ordinance from regulating a matter more restrictively than the matter is regulated by a shoreland zoning standard promulgated as an administrative rule by the DNR. However, Act 55 does not prohibit a county from enacting a shoreland zoning ordinance to regulate a matter that is not covered by a DNR-promulgated shoreland zoning standard and not otherwise prohibited by Wis. Stat. § 59.692. In other words, if the DNR does not promulgate an administrative rule regarding the subject, then the county is able to regulate the subject unless otherwise prohibited by law (such as prohibitions on requiring approval of outdoor lighting as set forth above).

Act 55 voids any provision in a county ordinance that is in effect on or after July 14, 2015 (Act 55's effective date) that is inconsistent with any of the provisions of Wis. Stat. § 59.692 as affected by Act 55. Such inconsistent ordinances may not be enforced on or after July 14, 2015.⁵

2. Vegetative Buffers. Act 55 prohibits a county shoreland zoning ordinance from requiring a person to establish a vegetative buffer zone on previously developed land or expand an existing vegetative buffer zone. However, on or after July 14, 2015, a county shoreland zoning ordinance may require a person to maintain a vegetative buffer zone existing on that date if the ordinance: (a) allows the buffer zone to contain a viewing corridor at least 35 feet wide for every 100 feet of shoreline frontage; or (b) allows the viewing corridor to run contiguously for the entire maximum width allowed in the ordinance.

3. Substandard Lots. Act 55 specifies that a county shoreland zoning ordinance may not regulate the construction of a structure on a substandard lot in a manner more restrictive than DNR standards governing structures on substandard lots.

Appeals to County Boards of Adjustment.

Act 55 provides that the DNR may not appeal a county's decision to grant or deny a shoreland zoning variance under Wis. Stat. § 59.692 to a board of adjustment. However, the DNR may, upon request of a county board of adjustment, issue an opinion on whether a variance should be granted or denied.

Counties should review their shoreland zoning ordinances and identify areas where the ordinance is no longer valid.

Applicability of Certain Ordinances.

Act 55 specifies that county shoreland zoning ordinances, construction site erosion control and storm water management zoning ordinances, or wetland zoning ordinances do not apply to lands adjacent to artificially constructed drainage ditches, ponds or storm water retention basins that are not hydrologically connected to a natural navigable body of water.

Definitions Under Wis. Stat. § 59.692.

Prior to Act 55, the term “shoreland setback area” was defined by Wis. Stat. § 59.692(1) (bn) as “an area in a shoreland that is within a certain distance of the ordinary high-water mark in which the construction or placement of buildings or structures has been limited or prohibited under an ordinance enacted under this section.” Act 55 deletes the reference to “buildings” in the definition of “shoreland setback area.” Act 55 also adds a definition for “structure” under Wis. Stat. § 59.692(1)(e) to mean “a principal structure or any accessory structure including a garage, shed, boathouse, sidewalk, stairway, walkway, patio, deck, retaining wall, porch, or fire pit.” The new definition of “structure” provides additional definitional guidance as to the meaning of “shoreland setback area.”

Analysis of Act 55's Impact on Counties and Recommendations Going Forward

Act 55 has a significant impact on county shoreland zoning authority. Prior to Act 55, counties generally had the authority to enact zoning ordinances that were more restrictive than shoreland zoning standards established by the DNR under Wis. Admin. Code Chapter NR 115.⁶ See Wis. Admin. Code § NR 115.01 (“Nothing in this rule shall be construed to limit the authority of a county to enact more restrictive shoreland zoning standards under s. 59.69 or 59.692, Stats., to effect the purposes of s. 281.31, Stats.”). On or after July 14, 2015, county shoreland zoning ordinances cannot regulate a matter more restrictively than DNR shoreland zoning standards. In addition, there are several new matters within shoreland areas where counties no longer have the authority to regulate, such as requiring a person to establish a vegetative buffer zone on previously developed land.

Going forward, we recommend that counties review their shoreland zoning ordinances and identify areas where the ordinance is no longer valid, such as areas where the ordinance is more restrictive than DNR standards under NR 115 or areas where counties no longer have the authority to regulate under Act 55. It is important for counties not to enforce sections of ordinances that are no longer valid. If the county board of adjustment bases a decision on an invalid ordinance provision, the decision is likely to be subject to considerable scrutiny by a court on certiorari review because the board of adjustment proceeded on an incorrect theory of law. See Wis. Stat. § 59.694(10); see also *Kapischke v. Cnty. of Walworth*, 226 Wis. 2d 320, 327, 595 N.W.2d 42 (Ct. App. 1999) (standard of certiorari review includes whether the board proceeded on a correct theory of law).

Once the DNR promulgates new rules under NR 115 to be consistent with Act 55, counties should revise their shoreland zoning ordinances so the ordinances are not more restrictive than the NR 115 standards. We also recommend a prefatory statement at the beginning of the county's shoreland zoning ordinance that says the ordinance will be interpreted and applied consistent with sec. 59.692, NR 115 and any other applicable law.

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¹ “Shoreland zoning standard” means a standard for ordinances enacted under sec. 59.692 that is promulgated as a rule by the DNR. Wis. Stat. § 59.692(1)(c). The DNR's shoreland zoning standards are promulgated in Wis. Admin. Code Chapter NR 115.

² A “nonconforming structure” was defined by Wis. Stat. § 59.692(2m)(a)2 to mean “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 shoreland zoning ordinance.” Section 59.692(2m)(a) was repealed by Act 55.

³ The DNR’s standards for nonconforming structures are found in Wis. Admin. Code § NR 115.05(1)(g). These standards will have to be revised in light of Act 55.

⁴ Prior to Act 55, a county shoreland zoning ordinance had to allow a nonconforming structure damaged or destroyed by natural causes to be restored to larger a size than it was immediately before the damage or destruction if necessary for the structure to comply with applicable state or federal requirements. See Wis. Stat. § 59.692(1s)(b) (Rev. Stats. 2013-14).

⁵ Despite Act 55’s changes to county shoreland zoning authority, counties are still required to zone by ordinance all shorelands in its unincorporated areas and such ordinances are not subject to town approval. See Wis. Stat. § 59.692(1m) (renumbered as sec. 59.692(1c) by Act 55); see also *Hegwood v. Town of Eagle Zoning Bd. of Appeals*, 2013 WI App 118, ¶ 16, 351 Wis.2d 196, 839 N.W.2d 111. Cities and villages are required to enact shoreland zoning ordinances affecting shorelands in unincorporated areas that are annexed by the city or village. See 2013 WI Act 80.

⁶ Prior to Act 55 there were two matters where a county shoreland zoning ordinance could not be more restrictive than DNR shoreland zoning standards:

1. Regulations regarding the location, maintenance, expansion, replacement, repair, or relocation of a nonconforming structure; and
2. Regulations regarding the construction of a structure or building on a substandard lot.
See Wis. Stat. § 59.692(2m) (2013-14 Rev. Stats.).

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