

DATE: April 25, 2012

TO: Wisconsin County Code Administrators, Wisconsin League of Municipalities

FROM: Heidi Kennedy, Shoreland Policy Coordinator

SUBJECT: 2011 Wisconsin Act 170 and Nonconforming Structures

On April 2, 2012, Governor Walker signed 2011 Wisconsin Act 170 (Act 170), which modifies the regulation of nonconforming structures in s. 59.69(10) and s. 59.692 of the Wisconsin Statutes. Act 170 represents a significant change in statewide policy governing nonconforming structures, and reduced the flexibility counties had in the development of a shoreland ordinance that more stringently regulated nonconforming structures and substandard lots in shoreland zones. In fulfillment of its duty, under s. 281.31, Wis. Stats, the department has developed this memo to provide general recommendations for counties to utilize in their shoreland zoning ordinance, and to answer questions that have arisen regarding interpretation and implementation of Act 170 as it relates to Wisconsin's shoreland protection program.

Summary of Act 170 and Suggestions for Implementation

Act 170 provides that ordinances enacted by a county, city, village or town, under its general planning or zoning authority, may not prohibit or limit, based on cost, the repair, maintenance, renovation or remodeling of a nonconforming structure in existence on the effective date of an ordinance. These provisions apply to not only structures that do not conform to the standards in a shoreland zoning ordinance, but any nonconforming structure in the community. Further, Act 170 prohibits counties, cities and villages from enacting or enforcing provisions, within its shoreland zoning ordinance, regulating nonconforming structures or substandard lots in a more restrictive manner than the state shoreland zoning standards set by the department under Ch. NR 115, Wis. Adm. Code (NR 115). To review the specific language in Wisconsin Act 170 please see <https://docs.legis.wisconsin.gov/2011/related/acts/170.pdf>.

It is important to note that Act 170 does not contain a delayed effective date. Therefore, the provisions in Act 170 went into effect on April 17, 2012, the day after it was published. The lack of a delayed effective date raises particular concerns as we enter construction season and the busy season for zoning departments. Consequently, it is the department's recommendation that each county, city and village review the nonconforming structure provisions in its general ordinance and shoreland ordinance relatively soon and determine how to implement Act 170 in the near term, in other words before an ordinance is amended or revoked, and in the future.

While counties, cities and villages could no longer limit based upon cost or prohibit the maintenance, repair, renovation or remodeling of a nonconforming structure under its general planning zoning authority, it appears that communities may still limit or prohibit these activities based upon some other criteria. For those counties, cities and villages whose ordinances currently prohibit or limit the alteration of a nonconforming structure based upon cost or the assessed value of the structure, municipalities may wish to consider other approaches to regulating nonconforming structures, which have been adopted by other communities, and reviewing Zoning Nonconformities, published by the Center for Land Use Education which may be found at <http://www4.uwsp.edu/cnr/landcenter/Publications/NonconformitiesHandbook.pdf>. For guidance on which communities may have developed an approach, based on something other than cost, for regulating nonconforming structures, see Chapters 6 and 11 of "Creating an Effective Shoreland Zoning Ordinance",

which provides a summary of each county's standards for nonconforming structures and accessory structures. To access this publication please see <http://dnr.wi.gov/waterways/shoreland/creating.htm>.

Below you will find questions and answers to some general implementation questions. The department also plans on developing and distributing a Frequently Asked Questions document in the near future to answer more program specific questions.

General Implementation Questions

1) Does s. 59.69(10), Stats., apply to shoreland and non-shoreland properties?

Yes, s. 59.69 of the Wisconsin Statutes pertains to the general planning and zoning authority for counties. Therefore, the maintenance, repair, renovation or remodeling of a nonconforming shoreland structure cannot be prohibited or limited based on cost for shoreland or non-shoreland properties. In addition, for shoreland properties, Act 170 added a provision to s. 59.692, Stats., that limits a counties ability to be more restrictive than NR 115, in regulating nonconforming structures and substandard lots.

2) When does Act 170 take effect?

Act 170 went into effect on April 17, 2012.

a) Do counties have to amend their shoreland ordinances immediately to comply with the new standards in ss. 59.69(10e) and 59.692(2m), Stats.?

Act 170 is in effect and municipalities must implement the legislation. However, each municipality should discuss with its corporation counsel whether their ordinances must be amended to implement the legislation.

b) Will the DNR modify its model shoreland zoning ordinance to reflect this new legislation?

The current model shoreland zoning ordinance already contains model language for substandard lots and expansion, reconstruction or relocation of nonconforming principal structures that are located within the setback. The model ordinance can be found at <http://dnr.wi.gov/waterways/shoreland/local.htm>.

c) Since the DNR extended the timeline for counties to adopt the standards under NR 115, do counties have to adopt or revise their ordinances now to comply with this legislation?

Act 170 did not contain a delayed effect date and took effect immediately the day after publication. Counties should discuss with its corporation counsel whether it may implement the legislation without amending its ordinances. Even if counties decide to implement the legislation without amending its ordinance, counties are required to amend or adopt a new shoreland zoning ordinance that complies with the current NR 115, by February 1, 2014.

3) Act 170 specifies that counties, cities and villages may not adopt or enforce more restrictive standards for nonconforming structure or substandard lot standards, than the standards in NR 115.

a) What standards in NR 115 are now considered the maximum requirements under Act 170? May the ordinance be less restrictive than NR 115?

Act 170 limits the ability of counties to be more restrictive than NR 115 for substandard lots and nonconforming structures. The department has established standards under NR 115.05(1)(a)3. that identify when a substandard lot may be utilized as a building site and have established standards for expansion, replacement, and relocation of nonconforming principal structures that are within the shoreland setback under NR 115.05(1)(g).

b) May counties be less restrictive than NR 115?

Act 170 established maximum standards for substandard lots and nonconforming structures, but is silent on whether counties may be less restrictive than NR 115, which establishes the minimum standards for shoreland zoning. Counties are not required to adopt the new standards in NR 115 until February 1, 2014. Consequently, a county could adopt or amend its shoreland ordinance to create standards that are less stringent than the current standards in NR 115 for substandard lots and nonconforming structures, but that comply with Act 170. However, the county would then have to revise its shoreland ordinance again to comply with NR 115, prior to the February 1st 2014 deadline. Ch. NR 115.06(3)(b) requires that counties adopt or amend a shoreland ordinance to comply with the minimum standards in NR 115 or the county will be deemed noncompliant under s. 59.692, Stats. The department is then required under, s. 59.692(6), Stats., to adopt a superseding ordinance for the county, after notice and hearing.

It is important to note, that if counties decide to revise their shoreland zoning ordinance to be less restrictive than current standards for nonconforming structures and substandard lots in NR 115, the county's ordinance must be at least as stringent as the minimum shoreland zoning standards in the previous version of NR 115, which I have attached to this memo. I have also attached a copy of an attorney general opinion discussing the nonconforming structure provisions in NR 115 to aid counties in the development of their ordinances.

c) How do the changes to s. 59.692, Stats., affect cities and villages?

Cities and villages are not required to adopt a shoreland zoning ordinance for areas, within the shoreland zone, that were annexed before May 7, 1982 or incorporated before April 30, 1994. Therefore, lands that were incorporated or annexed prior to the dates in the statute may adopt more or less restrictive standards for nonconforming structures and substandard lots, than the standards in NR 115.

For lands that were annexed after May 7, 1982 or incorporate after April 30, 1994 the department has determined that cities and villages could not adopt or enforce any provision in its shoreland zoning ordinance, relating to substandard lots and nonconforming structures, that is more restrictive than the current standards in NR 115. However, under s. 59.692(7)(a) and (ad), Stats., cities and villages are also required to adopt and enforce a shoreland zoning ordinance that is at least as restrictive as the county shoreland zoning standards and the standards in NR 115 that were in place at the time of annexation and incorporation. Therefore, it is the department's recommendation that cities and villages review their shoreland zoning ordinances and determine whether the standards for substandard lots and nonconforming structures and determine whether those standards are more restrictive than NR 115. If the standards are less restrictive than NR 115, cities and villages will not need to do anything. However, if the standards for substandard lots and nonconforming structures is more restrictive than NR 115, in a city or villages shoreland ordinance then cities and villages should revise their shoreland ordinances to comply with Act 170 but may not amend any other provisions of their shoreland ordinance such that the

result would be less restrictive standards than the county's shoreland zoning ordinance at the time of annexation or incorporation.

4) Are there any instances where counties, cities and villages could prohibit or limit repair, maintenance, renovation or remodeling of a nonconforming structures based upon cost?

Yes, Act 170 did not prohibit communities from limiting or prohibiting maintenance, repair, renovation or remodeling of nonconforming structures that are within the floodplain or for structures that are a nonconforming use. So if there is a nonconforming structure that is also a nonconforming use, communities may limit maintenance, repair, renovation or remodeling of that structure based upon the cost of the proposed work. Further, Act 170 did not modify s. 87.30, Stats., which contains the statutory provisions for floodplain zoning. Therefore, under s. 87.30, Stats., counties, cities and villages may not permit the repair, reconstruction or improvement of a nonconforming building if it does not comply with one or more of the minimum requirements applicable to such nonconforming buildings under 42 USC 4001 to 4129 of federal law.

5) If a home or property received permits or variances that limited the alteration or expansion of the structure based upon cost, can those properties alter or expand under the new statutory provisions?

It is the department's recommendation that communities discuss with their corporation counsel the legal ramifications of Act 170 on past permits or variances that limited the alteration or expansion of a nonconforming structures, based on cost.

a) If counties, cities and villages have a pending variance request or current enforcement proceedings for nonconforming structures, what should communities do?

It is the department's recommendation that communities review their ordinances, the nonconforming structure provisions in NR 115 and Act 170 to determine the impact of Act 170 on the proposed variance or the subject of the enforcement action. Then communities should discuss with their corporation counsel the impact of Act 170 on those pending variances or enforcement proceedings to determine the best course of action in these circumstances.

9) May counties utilize the grant money they received from the department to modify their ordinances to comply with Act 170?

Counties that received a grant from the department to update their ordinances consistent with NR115, may make claims to receive payment for work that is consistent with agreement signed, with the department, at the time the grant was awarded. If a county only adopts some of the shoreland zoning standards in NR 115, but does not adopt an ordinance that fully complies with the standards in NR 115, which was part of the agreement with the department, the county might not be able to receive payment for the full amount of the grant.