

DATE: May 17, 2012
TO: Wisconsin County Code Administrators, Wisconsin League of Municipalities
FROM: Heidi Kennedy, Shoreland Policy Coordinator
SUBJECT: Wisconsin Act 170 and Shoreland Zoning

**Common Questions & Answers
Regarding Act 170 and NR 115**

1) Does the new language in s. 59.69(10e) conflict with the new language in s. 59.692(2m) and NR 115.05(1)(g), such that it is much more restrictive than the shoreland zoning provisions?

No, Act 170 created a new statutory provision in s. 59.69(10e) that pertains to maintenance repair, renovation and remodeling of nonconforming structures. The scope of the new provisions in s. 59.69(10e) would not include proposals to expand, reconstruct, or relocate nonconforming structures. Although counties may have to define or determine the limits of a renovation or remodeling project, NR 115 does contain standards for the expansion, relocation, and reconstruction or otherwise known as replacement of nonconforming principal structures within the shoreland setback.

2) Do the standards for nonconforming structures under s. 59.69(10e) and s. 59.692(2m) conflict with the substandard lot standards in NR 115.05(1)(a)(3) and planned unit development standards in NR 115.05(1)(a)(4) ?

No. The substandard lot and planned unit development standards allow development on lots that do not meet the minimum lot size requirements in NR 115.05(1)(a). Structures built on a substandard lot or constructed as part of a planned unit development may meet all of the other shoreland zoning standards or development regulations, ie. Setbacks, height, etc., required in the county ordinance and therefore could be considered conforming structures.

3) Section 59.692(2)(c) states, “[o]rdinances that are enacted under this section shall accord and be consistent with any comprehensive zoning plan or general zoning ordinance applicable to the enacting counties, so far as practicable” and s. 59.692(5) states that “[a]n ordinance enacted under this section supersedes all provisions of an ordinance enacted under s. 59.69 that relate to shorelands.”

a) Can a county create a comprehensive plan or shoreland zoning ordinance, under s. 59.692, that essentially trumps the new provisions in s. 59.69(10e) that states that counties cannot prohibit or limit, based upon the cost, the repair, maintenance, renovation or remodeling of a nonconforming structure?

Although the provisions in a shoreland zoning ordinance may supersede an ordinance created under the counties general planning and zoning authority under s. 59.69, counties cannot create a comprehensive plan or adopt ordinances that could trump statutory requirements.

b) If a county has not yet adopted a comprehensive plan, will any revised ordinance be invalid or subject to a legal challenge?

Under s. 66.1001 a comprehensive plan is required for the enactment or enforcement of ordinances relating to a county's general zoning authority, subdivision ordinances or official mapping. Therefore, counties may still enact and enforce shoreland and floodplain zoning ordinances and without a comprehensive plan, as required under s. 66.1001, Wis. Stats. However, a county should speak with their corporation counsel regarding possible implications in amending its general zoning ordinance to comply with Act 170, if it has not adopted a comprehensive plan.

For more information about s. 66.1001 Wis. Stats and comprehensive planning please see <http://www.doa.state.wi.us/category.asp?linkcatid=743&linkid=128&locid=9>

4) During the legislative process, an amendment to the bill, which was passed, specifically struck the word "reconstruction" from the proposed language inserted into s. 59.69(10e).

a) Does this mean that the legislature did not intend for the terms "maintenance, repair, renovation or remodeling" to include reconstruction and therefore counties may not allow reconstruction or does that mean that the legislature intended to allow counties to continue to regulate reconstruction based upon cost and the 50% rule?

The legislature specifically struck the term "reconstruction" from the proposed language in s. 59.69(10e) as a result of an amendment, adopted during the legislative process. By striking the term "reconstruction", the legislature expressed its intent that the terms maintenance, repair, renovation and remodeling in s. 59.69(10e) were not intended to include the term reconstruction. However, Act 170 also prohibits a county from enacting or enforcing nonconforming structure provisions, in its shoreland zoning ordinance, that are more restrictive than NR 115. In the current NR 115 there are provisions for the "replacement" of nonconforming principal structures within the building setback. The term replacement is synonymous with reconstruction. Therefore, counties may not restrict replacement of a nonconforming structure within the setback, in a manner that is more restrictive than NR 115.

b) Could counties define the terms renovation and remodeling to include reconstruction?

Counties must either define or determine at what point renovation and remodeling becomes reconstruction. In striking the word reconstruction, the Legislature made it clear that it did not intend to include reconstruction in s. 59.69(10e)(b). Therefore, it is department's recommendation that if counties do not currently have definitions for renovation or remodeling or have not established standards that identify the point at which a building is being reconstructed, then counties should speak to either their building inspector to determine if there are any standards in the Uniform Dwelling Code that may be of assistance or possibly review other county ordinances that might currently address this issue..

6) The nonconforming structure provisions in NR 115.05(1)(g), pertain to vertical expansion, expansion beyond the setback and replacement or relocation, all state that the structure “does not comply with the required building setback under par. (b)1.”. Paragraph (b)1. requires that structures be setback 75 feet from the OHWM unless the county utilizes setback averaging.

a) Can a county still require larger setbacks from the OHWM, such as 100 feet, in its shoreland zoning ordinance?

Yes, because Act 170 does not say that counties may not create or enforce a shoreland setback that is more restrictive than NR 115. Further, NR 115.01 clearly states that the purpose of NR 115 is to establish minimum standards and that nothing in the rule is to be construed as limiting the authority of counties to enact more restrictive standards.

b) If a county ordinance does require a larger setback and a structure is located further than 75 feet from the OHWM, but within the required county setback, is it still a nonconforming structure such that the provisions in NR 115.05(1)(g) may still apply or is the county violating the new language in Act 170 by being more restrictive than NR 115? In other words, can a county still limit vertical expansion, expansion beyond the setback and replacement or relocation, utilizing the standards in NR 115, for structures that are beyond the 75 foot setback, but within the county’s required shoreland setback?

Yes, a structure that is located within a counties required shoreland setback is still a nonconforming structure because counties may create and enforce more restrictive standards than NR 115. Act 170 merely limits a county’s ability to enact or enforce nonconforming structure standards that are more restrictive than the nonconforming structure standards in NR 115. A structure that is located within a required shoreland setback, regardless of whether the structure is within the require 75 foot setback, a reduced setback or a larger setback required under a county ordinance, is still a nonconforming structure.

i) Can counties prohibit setback averaging or is it is now required by Act 170?

Counties may still prohibit setback averaging. Under NR 115.05(1)(b)1. counties may reduce the average shoreland setback for a principal structure. The nonconforming structure standards for expansion, replacement and relocation, under NR 115.05(1)(g), are only meant to address those principal structures that do not meet whatever shoreland setback is identified in the county ordinance.

ii) If counties allow setback averaging, do counties have to first determine the average setback of the structure before it applies the nonconforming structure standards in NR 115?

Yes it should. If a county allows setback averaging and the principal structure meets the average setback then the structure is considered a conforming structure as it relates to the shoreland setback.

c) If a county has enacted development regulations in its shoreland zoning ordinance that go above and beyond NR 115, for example requiring building setbacks from wetlands, bluffs or a side yard, and a structure is nonconforming to one or more of those setbacks, which are not specified in NR 115, a) can the county still enforce those provisions because it is more restrictive than NR 115 and if so, b) do they have to apply the nonconforming structure standards under NR 115.05(1)(g)?

Counties may still enforce standards, other than the standards for nonconforming structures and substandard lots, that are more restrictive than NR 115. Act 170 limits a county's ability to regulate, in a more restrictive manner than NR 115, the maintenance, expansion, replacement, repair or relocation of nonconforming structures. Further, it defines nonconforming structures to be a dwelling or building that was constructed lawfully before the current zoning ordinance but does not comply with the development regulations in the current shoreland zoning ordinance. Development regulations are defined as part of a shoreland zoning ordinances that applies to elements including setback, height, lot coverage and side yard.

The nonconforming structure standards in NR 115.05(1)(g) pertain to the maintenance, repair, expansion, replacement or relocation of a principal structure that does not comply with the required shoreland setback. Therefore, if a nonconforming structure is considered a nonconforming structure because it does not meet the

- 1) county's shoreland setback*
 - a. Counties may not regulate that nonconforming structure in a more restrictive manner than NR 115.05(1)(g)*
- 2) county's shoreland setback and other development regulations as required in the county's shoreland zoning ordinance*
 - a. Counties may not regulate that nonconforming structure in a more restrictive manner than NR 115.05(1)(g)*
 - b. If the other development regulations were adopted under the counties authority under s. 59.69 or as part of a comprehensive ordinance see d) below.*
- 3) other development regulations required in the county's shoreland zoning ordinance but it does meet the county's shoreland setback*
 - a. The counties may be more restrictive than NR 115.05(1)(g) but must also comply with s. 59.69(10e) and may not prohibit or limit maintenance, repair, renovation or remodeling of the nonconforming structure based upon cost.*

d) Do the answers to a), b) and c) change if the county has adopted the standards under the counties general zoning authority under s. 59.69 Wis. Stats.?

Yes, if a county adopts more restrictive standards for nonconforming structures under their general zoning authority in s. 59.69, Wis. Stats., then counties could still enforce those standards and may develop an alternative method of regulating structures that are nonconforming to those standards. However, counties would need to apply the nonconforming structure standards in NR 115, for any structure that is nonconforming to the shoreland setback.

7) Does Act 170 pertain to both principal and accessory structures?

The provisions in Act 170 do not differentiate between principal or accessory structures. Therefore counties cannot prohibit or limit, based on cost, the maintenance, repair, renovation or remodeling of nonconforming principal or accessory structures under s. 59.69(10e). Further, counties cannot develop more restrictive standards, than NR 115, for nonconforming principal or accessory structures under s. 59.692(2m). Given that the nonconforming structure provisions in NR 115 only pertain to nonconforming principal structures within the shoreland setback, and do not contain standards for nonconforming accessory structures, counties have flexibility to create standards that would regulate expansion, relocation or reconstruction of nonconforming accessory structures.

a) The new definition of a nonconforming structure in s. 59.69(10e) and in s. 59.692(2m) refers to a nonconforming structure as being a “dwelling or building” and does not define these terms or refer to them as structures. Does that mean that nonconforming accessory structures, such as decks porches and retaining walls, are exempt from these provisions?

While it may depend upon a county’s definition of a building, it would appear that structures, such as decks, porches, retaining walls and other structures would not have to comply with s. 59.69(10e) or s. 59.692(2m).

b) Can communities prohibit or limit expansion of nonconforming accessory structures based upon cost?

Unless the definitions for remodeling and renovation in a county ordinance would somehow allow expansion, then yes, because s. 59.69(10e) only applies maintenance, repair, renovation or remodeling.

c) Boathouses are exempt from the shoreland setback and would only be nonconforming due to size or lot width or because of some other limitation in a county ordinance. Therefore, would Act 170 apply to boathouses?

Act 170 created s. 59.69(10e) and would apply to boathouses if the boathouses are considered a nonconforming structure under the county’s ordinance. The new provision in s. 59.69(10e) states that counties can’t limit the maintenance, repair, renovation or remodeling of nonconforming structures based upon cost. Therefore, counties could limit the maintenance, repair, renovation or remodeling of these structures based upon something other than cost. NR 115 allows boathouses within the setback, but counties could establish standards to regulate these structures.

8) Act 170 also prohibits counties from regulating the “construction of a structure or building on a substandard lot if that provision is more restrictive than the shoreland zoning standards for substandard lots” in NR 115. Under NR 115.05(1)(a), there are minimum standards for the area and width of sewer and unsewered lots and standards for when someone may build on a substandard lot.

a) May counties still require wider or a larger area for sewer and unsewered lots? Does the answer change depending upon whether the counties have a stand alone shoreland ordinance and the county adopted these provisions under s. 59.692 or if a county has a comprehensive ordinance and adopted these standards under its general zoning authority under s. 59.69?

Yes counties may require larger sewer or unsewered lots regardless of whether the county has a stand alone shoreland ordinance or a comprehensive ordinance. The only provisions in NR 115 that pertain to substandard lots are found in NR 115.05(1)(a)3.

b) If a county has established, in its ordinance, a process that reduces multiple setback requirements until a minimum size administrative building envelope is created for construction on a substandard lot, does Act 170 prohibit the use of such process?

No, Act 170 does not prohibit the use of an administrative process that would create a minimum size building envelope for construction on a substandard lot. The substandard lot standards in NR 115.05(1)(a), merely identify the criteria that must be present for a substandard lot to be considered buildable. The criteria to build on a substandard lot, under NR 115, require that the lot was not once combined with another parcel or had structures built on another parcel and then reconfigured or divided into a separate parcel and that the parcel must be developed to comply with all other requirements in the county ordinance. Act 170 prohibits counties from being more restrictive than these criteria. Once the county determines that the substandard lot meets the criteria listed in NR 115.05(1)(a), then the county may utilize whatever method it has developed to handle these scenarios in its ordinance.

9) If more than 30% of a property is in impervious surfaces, which exceed the maximum impervious surface standards under NR 115.05(e)3., are all of the structures on the property considered nonconforming structures, such that the new language in s. 59.69(10e) and the nonconforming structure provisions in NR 115.05(1)(g), apply to the alteration or expansion of these structures?

The nonconforming structure provisions in NR 115.05(1)(g) would only apply to nonconforming principal structures that are within the shoreland setback. Therefore, if a property owner, whose land has more than 30% of its area in impervious surfaces, proposes to expand, replace or relocate a principal structure within the setback then the county should apply both the nonconforming structure provisions in NR 115.05(1)(g) 5., 5m. or 6. and the “Existing impervious surfaces” standard in NR 115.05(1)(e)4. If the principal structure is outside of the setback, then the county would apply the Existing impervious surface standard in NR 115.05(1)(e)4. and any other applicable provisions in the county’s ordinance.

If the property owner wishes to alter or expand a nonconforming accessory structure then the county should apply the “Existing impervious surfaces” standard in NR 115.05(1)(e)4. and any nonconforming accessory structure provisions in the county ordinance..

a) Does Act 170 apply to legal nonconformities that result because of a county's impervious surface standards? Would those counties be required to apply the provisions of NR 115 to those legal nonconformities?

Until February 1, 2014, counties would only have to ensure that these legal nonconformities and the application of the county's nonconforming structure provision would not be more restrictive than NR 115.05(1)(g). Consequently, the provisions in NR 115.05(1)(g) would only apply to these legal nonconformities if they are principal structures within the setback. After February 1, 2014, the county would have to apply the impervious surface standards in NR 115.05(1)(e) and the nonconforming structure standards under NR 115.05(1)(g) if it is a principal structure within the setback.

10) May counties continue to develop a waterbody classification system that creates different development standards based upon the characteristics of the waterbody?

Yes, counties may continue to develop a waterbody classification system that creates different development standards, within its shoreland zoning ordinance, based upon the characteristics of the waterbody. Act 170 only restricted counties from adopting or enforcing an ordinance that more restrictively regulates the expansion, replacement, repair or relocation of a nonconforming structure than NR 115. While counties may have to adopt standards, similar to NR 115

11) Can a county require mitigation if it does not already have mitigation standards adopted in its ordinance?

The county should discuss with its corporation counsel whether it can apply mitigation standards if it has not yet adopted mitigation as part of its ordinance and if there would be legal ramifications for requiring mitigation without first amending the county ordinance.

12) Can counties require a conditional use permit for the expansion, relocation or replacement of nonconforming structures under NR 115.05(1)(g)?

Yes. NR 115 does not specify the administrative method in which counties must enforce the provisions in NR 115, particularly as it relates to nonconforming structures.