

Addendum No. 2

to June 15, 1998

Wisconsin Lake Planning Grant Report

HALF MOON LAKE

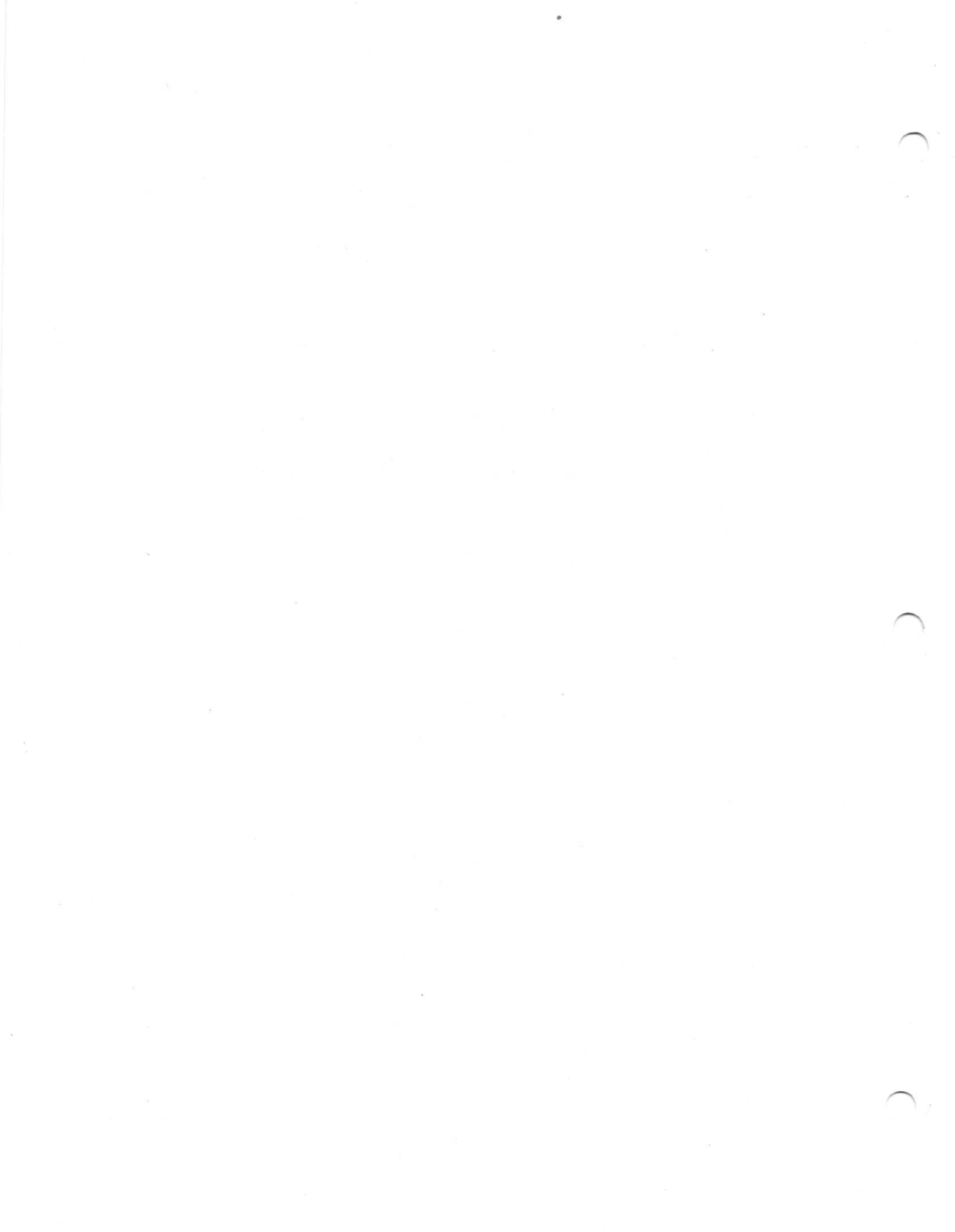
Polk County, Wisconsin

Prepared for

Half Moon Lake Protection & Rehabilitation district

December 28, 1998

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December 28, 1998

HALF MOON LAKE DISTRICT
c/o Attorney David J. Butler
Butler & O'Brien
6625 Lyndale Avenue South
Richfield, MN 55423

Re: Half Moon Lake Study

Dear Mr. Butler:

This letter is intended to provide our advice and opinion regarding means of protecting certain environmentally sensitive areas on Half Moon Lake, Polk County, Wisconsin. The report is intended to supplement the June 15, 1998 Half Moon Lake Wisconsin Lake Planning Grant Report prepared for the Half Moon Lake Protection & Rehabilitation District.

The Report identifies four wetlands areas within or adjacent to Half Moon Lake. According to the report, three of these wetlands include floating peatland ecosystems which are unique and worthy of protection for conservation purposes. The District has requested this report to address mechanisms to protect these wetlands from damage resulting from the construction of piers and related upland structures intended to moor watercraft and provide access to Half Moon Lake. The District is concerned that the development of such facilities may be detrimental to these wetlands and the water quality, habitat and aesthetic benefits they provide to Half Moon Lake and its ecosystem.

This letter report is intended to provide advice and direction for the District regarding legal mechanisms to protect the environmentally sensitive shorelands identified in the lake study. Copies of the Wisconsin Statutes and administrative code provisions cited in the report are attached for reference.

SUMMARY OF RECOMMENDATIONS

The Half Moon Lake District does not have regulatory authority over structures above or below the ordinary high water mark of Half Moon Lake. However, the District could recommend actions to the Town of Milltown and Polk County to exercise regulatory authority of those governmental units to address these concerns.

We recommend that the District consider two general approaches to the protection of the environmentally sensitive areas identified in the report. First, the District could pursue the adoption of a local ordinance regulating the placement of piers. Second, the District could work to ensure that existing zoning provisions are applied to any future proposals to construct upland walkways over designated areas. Finally, the District could seek the amendment of the Polk County Shoreland Protection Zoning Ordinance or the enactment of a town zoning ordinance provision to specifically address construction of such walkways.

REGULATION OF STRUCTURES BELOW THE ORDINARY HIGH WATER MARK

The Half Moon Lake Study indicates that the potential placement of piers presents a serious threat to certain wetland areas composed of floating bog vegetation. The reasonable right to place a pier in the water in order to gain access for navigation is recognized as a riparian right under Wisconsin law. However, Wisconsin Courts have recognized that this right is subject to regulation by the Legislature. Stoesser v. Shore Drive Partnership, 172 Wis.2d 660 (1993).

State regulation of lakes and lakebeds in Wisconsin is rooted in the public Trust Doctrine set forth in Article IX, Section 1 of the Wisconsin Constitution.¹ The Wisconsin Supreme Court has summarized the Public Trust Doctrine as follows:

[T]he state holds the beds underlying navigable waters in trust for all its citizens. Muench v. Public Service Commission, 261 Wis. 492, 501, 53 N.W.2d 514 (1952).

In fulfillment of this trust duty, the Legislature has delegated jurisdiction over public waters (and their shorelands) to state agencies and local governments. Some of these powers are concurrent, others have been delegated exclusively to state agencies or local units of government

Most of the standards regulating the placement of piers and other structures in public waters originate in decisions of the Wisconsin Supreme Court and Court of Appeals, including allocation of riparian frontage among adjoining owners, interference with

navigation, enclosure of public waters and other matters. These general standards protect other riparian owners from intrusion by neighbors and safeguard the public interest in navigable waters.

Section 30.12 of the Wisconsin Statutes generally prohibits the placement of structures on the beds of navigable waterways, unless the owner first obtains a permit from the Wisconsin Department of Natural Resources. The Wisconsin Supreme Court has recognized this statutory requirement as a codification of the public trust duties of the state over navigable waters and the beds of navigable lakes. State v. Trudeau, 139 Wis.2d 91 (1987). Under the Wisconsin statutes, piers may only be placed by riparian owners and only if they do not interfere with "public rights in navigable waters."² The Courts have held that these public rights include navigation, fishing and hunting, swimming, recreation and enjoyment of natural scenic beauty. State v. Bleck, 114 Wis.2d 454 (1983).

Although they are clearly "structures on the beds of navigable waters", most piers are placed in Wisconsin waters without a permit under an exception provided in Sec. 30.13, Wis. Stats. That section allows a riparian owner to place a pier, provided that it does not interfere with public or private rights and does not violate local ordinances.

Enforcement of both of these sections is generally handled through a complaint process under Sec. 30.14, Wis. Stats. If a pier (or other structure) is placed which a local government or citizen believes to violate state standards, the Wisconsin Department of Natural Resources is required to investigate and may hold a hearing on the challenged structure. Unfortunately, this remedy does not prevent structures before they are placed.

The Department of Natural Resources has promulgated administrative rules that set standards for piers in Wis. Admin. Code, Ch. NR 326. These standards apply to piers permitted under Sec. 30.12, Wis. Stats., and to piers placed in reliance on the exception granted by 30.13, Wis. Stats. These statewide standards address construction materials, general configuration and overall size of piers (especially length) and other matters. They do not address specific local conditions.

The only effective way to address the impacts of piers in a particular location is through the enactment of a local ordinance, which is authorized under Sec. 30.13(2), Wis. Stats. That section

provides:

Section 30.13(2). A municipality may enact ordinances not inconsistent with this section regulating the construction and placement of wharves, piers and swimming rafts located within or attached to land within that municipality.

For purposes of Chapter 30, a "municipality" includes both counties and towns.³ Pier is defined in Sec. 30.01(5), Wis. Stats., as:

Any structure extending into navigable waters from the shore with water on both sides, built or maintained for the purpose of providing a berth for watercraft or for loading or unloading cargo or passengers onto or from watercraft.

Under this authority, the Town of Milltown or Polk County could enact and enforce an ordinance to regulate the placement of structures in designated areas where they could be detrimental to public rights in water. The aquatic habitat values provided by the floating peatland documented in the lake study provide substantive legal support for reasonable restrictions on the placement of piers.

The local authority to regulate piers has not been used extensively in Wisconsin, although the use of the authority as increased markedly in recent years. Some ordinances require permits for all piers, in part to establish records of the location, configuration and size of piers. Other ordinances are chiefly aimed at reducing conflict between neighbors on highly developed lakes through establishment of setbacks from lot boundaries.

In the last couple of years some communities have established pier regulations aimed expressly at the protection of significant environmental features. For example, we assisted the Jefferson County Town of Oakland in its development of a 1995 pier ordinance to protect a sensitive spawning area of Lake Ripley. That ordinance defines and delineates certain "ecologically significant areas"⁴ and prohibits the placement of piers in those areas unless a permit has been issued by the Wisconsin Department of Natural Resources under Sec. 30.12, Wis. Stats. The ordinance "grandfathers" existing piers.

Alternatively, a local ordinance could require that a riparian obtain a local permit before placing a pier in designated "ecologically significant areas." That type of ordinance would require an application and review process with appropriate standards for approval of applications. We are currently working with a town government in Northern Wisconsin which is considering an ordinance following this approach.

Finally, an ordinance could directly prohibit the placement of piers in designated areas where their presence would be detrimental to the public interest. I would recommend that any town pier ordinance address non-conforming structures and authorize removal of unlawful piers by the town (after notice) and recovery of the costs of the removal from the owner through a statutory process for abatement of public nuisances.

Regulation under this authority involves somewhat less burdensome procedures than some other ordinance authority such as zoning. However, it can only address the placement of structures on the bed of Half Moon Lake, not access walkways constructed above the ordinary high water mark.

ZONING REGULATION OF UPLAND STRUCTURES

The foregoing discussion addresses only piers, which generally extend from shoreland into the water. It does not address the question of pierlike walkways built in upland areas to gain access to a pier. Although an effective prohibition on piers built into the water from the designated zones may limit pressure for construction of upland access walkways, it may not eliminate it.

These walkways are not embraced by the definition of "piers" and therefore cannot be regulated by the town under Sec. 30.13(2), Wis. Stats. Conversely, these structures are subject to the setbacks for buildings and other structures established under Wisconsin's Shoreland Zoning law, which generally makes a setback exception for piers.

Section 59.692 of the Wisconsin Statutes requires that each county enact and enforce a shoreland zoning ordinance affecting lands located within 1000 feet of a navigable lake. Standards for these ordinances are set forth in Wis. Admin. Code, Ch. NR 115. Among other things, that regulation requires that County Shoreland Zoning Ordinances establish minimum lot sizes and building setbacks and regulate grading, filling and the removal of shoreland vegetation.⁵ Wis. Admin. Code §115.05(3)(b)1 requires that these ordinances prohibit buildings and structures within 75 feet of the ordinary high water mark of navigable waters, except piers, boat hoists and boathouses. Accordingly, §7.2(A) of the Polk County

Shoreland Protection Zoning Ordinance provides that:

All buildings and structures, except piers, boat hoists and boathouses which may require a lesser setback, shall be set back at least 75 feet from the ordinary high-water mark of navigable waters.

Article IV of the Polk County Shoreland Protection Zoning Ordinance defines a "structure" as:

Anything constructed or erected, intended for the protection, shelter, enclosures or support of persons, animals, or property at any time of the year

These provisions could be construed to prohibit the placement of pierlike walkways within 75 feet of the ordinary high water mark of Half Moon Lake, including the areas which the District's lake study targets for protection. However, I am aware that the Wisconsin Department of Natural Resources and some counties have authorized the construction of such walkways, in spite of the fairly clear language of the administrative code and county zoning ordinances. This interpretation is grounded on the concept that a waterfront owner's riparian rights include the right of access to the water. Where a "walkway" or stairway is needed to gain access based on site conditions, the Department and the Counties sometimes acquiesce in the placement of these structures.

Notwithstanding the above, I believe the District could take actions designed to prevent construction of such walkways (within the 75 foot shoreyard) under existing law. The first step would be to discuss the matter with the County Zoning Administrator to determine if he or she understands the setback requirements to exempt such structures and generally sensitize the county staff to this issue. It may be possible to convince the staff and the zoning committee that these walkways are structures subject to the shoreland setbacks.

A second possible step would be to monitor these shoreland areas to ensure that unpermitted construction of walkways does not occur. In the event that the District determines that construction is imminent, the District could take steps to halt the construction. The first recourse in that situation would be to report the violation to the Zoning Administrator. If that is not effective, the District could pursue legal remedies to prevent that construction. Under Wisconsin law, the county and any "owner of real estate within the [zoning] district affected by" the zoning regulation have statutory standing to enforce the zoning ordinance by injunction.⁶ It is not certain that the District itself would have standing to bring such an action, so it would be wise to

include an owner of property within the zoning district as a party plaintiff in such an action.

A third approach to the potential development of these upland walkway structures would be to pursue amendment of local zoning requirements to expressly address the potential construction of walkways in these areas. Because the state requirements are only minimum standards, this could be done by an amendment to the County Shoreland Protection Zoning Ordinance specifying that these structures as subject to the 75 foot setback or prohibiting these structures within designated portions of the shoreland zone.

Alternatively, the zoning ordinance could be amended to require permits for such structures throughout the entire 1000 foot shoreland zone surrounding lakes in the county. Such a provision should include appropriate procedures and standards for review and consideration of permit requests. A similar provision could be included in the County General Zoning Ordinance to address lands which merit protection but which are not located within the 1000 foot shoreland zone.

Finally, the District could consider requesting the Town of Milltown to enact a town zoning ordinance regulating the placement of walkways in specified areas. Under Wisconsin law, the powers of towns are limited to those expressly granted by statutes. However, town meeting may authorize the town board to exercise the powers of a village board. Sec. 60.10(2)(c), Wis. Stats. We are not aware of whether the town meeting has so authorized the Mill Town Board.

If the town board has been authorized to exercise village powers under that section, the town would have the authority to adopt zoning ordinances under Sec. 60.62, Wis. Stats. Town zoning ordinances under these sections are subject to two restrictions. First, the town board's exercise of authority to enact a zoning ordinance requires approval by the annual meeting or by a referendum. Second, the ordinance must be approved by the county board. Although these procedures and approvals may make this approach unworkable, it may be even more difficult to obtain approval of a county zoning ordinance which would apply in specified areas of the entire county.

SUMMARY

Based on our understanding of the situation, we recommend that the District propose that the town board adopt an ordinance regulating the placement of piers in designated areas, work with county zoning staff to ensure that the existing shoreland zoning ordinance is effectively enforced with respect to upland walkways and systematically monitor development in these areas. If the

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District considers it feasible, you could also pursue enactment of a town zoning ordinance or amendment to the county zoning ordinances to expressly regulate upland walkways in the areas the District aims to protect.

I have not drafted a proposed pier ordinance or language for a proposed zoning amendment pending your review of this letter report. We would be happy to provide suggested ordinance language if that would assist the District. We could also provide supporting materials to assist the District's efforts to win adoption of these by the town or county boards.

Please feel free to contact me so that we can discuss the suggestions in our report.

Very truly yours,

WHEELER, VAN SICKLE & ANDERSON, S.C.



William P. O'Connor

Enclosures: Sections 30.12, 30.13, 30.01(4), 30.01(5), 59.692, 59.69(11), 60.10 and 60.62, Wis. Stats. Wis. Admin. Code, Ch. 115

NOTES

1. Article IX, Section 1 of the Wisconsin Constitution provides:

The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefore.

2. Secs. 30.12 and 30.13, Wis. Stats.

3. Section 30.01(4), Wis. Stats., defines "municipality" as a "town, village, city or county in this state."

4. Where site specific regulations are included in a local ordinance, a clearly delineated zone boundary is needed. Some communities have done this through surveys. Others have set markers using mapped GPS points.

5. A redrafting of certain portions of NR 115 is presently underway. The DNR Secretary has appointed an Advisory Committee consisting of legislators, local zoning administrators and representatives of affected groups to assist in the development of proposed revisions focussed on the setback requirements.

6. Sec. 59.69(11), Wis. Stats.

public benefit. The board of commissioners of public lands shall include in the lease such limitations on final use as is determined by the department.

Upon the complaint of any person to the department that current use made of rights leased under s. 24.39 (4) is inconsistent with both its original findings and the public interest, the department shall hold a public hearing thereon after the publication of a class 2 notice, under ch. 985. If the department finds that the present use conforms neither to its original finding nor to the present public interest, it shall submit its findings to the governor. The governor may cause the attorney general or the district attorney of the proper county to bring action in the name of the state in a court of competent jurisdiction to declare the lease terminated and to institute appropriate action for removal of structures or cessation of practices in violation of such lease.

(6) **SHORELINE NOT INVALIDATED.** A shoreline lawfully established before January 1, 1960, is a lawfully established bulkhead line.

History: 1987 a. 374; 1991 a. 32.

A bulkhead line is not merely the natural shoreline but one legislatively established by a municipality, hence it may differ from the existing shoreline and is also distinguishable from the low- and high-water marks as heretofore judicially defined. *State v. McFarren*, 62 W (2d) 492, 215 NW (2d) 459.

The private right to fill lakebeds granted under this section does not preempt the zoning power of a county over shorelands under s. 59.971. *State v. Land Concepts*, Ltd. 177 W (2d) 24, 501 NW (2d) 817 (Ct. App. 1993).

Where a bulkhead line has been established, a riparian owner must nonetheless obtain a permit or contract pursuant to 30.20 prior to removing material from the bed of a navigable water landward of the bulkhead line, but within the original ordinary high water mark. 63 Atty. Gen. 445.

A bulkhead line is not legally established until filing requirements of (3) are met. A bulkhead line established by a town on lands subsequently annexed to a municipality which has not established such line, remains in effect. 64 Atty. Gen. 112.

30.12 Structures and deposits in navigable waters prohibited; exceptions; penalty. (1) GENERAL PROHIBITION. Except as provided under sub. (4), unless a permit has been issued by the department pursuant to statute or the legislature has otherwise authorized structures or deposits in navigable waters, it is unlawful:

(a) To deposit any material or to place any structure upon the bed of any navigable water where no bulkhead line has been established; or

(b) To deposit any material or to place any structure upon the bed of any navigable water beyond a lawfully established bulkhead line.

(2) **PERMITS TO PLACE STRUCTURES OR DEPOSITS IN NAVIGABLE WATERS; GENERALLY.** The department, upon application and after proceeding in accordance with s. 30.02 (3) and (4), may grant to any riparian owner a permit to build or maintain for the owner's use a structure otherwise prohibited under sub. (1), if the structure does not materially obstruct navigation or reduce the effective flood flow capacity of a stream and is not detrimental to the public interest. The procedures in this subsection do not apply to permits issued under sub. (3).

(3) **PERMITS TO PLACE CERTAIN STRUCTURES OR DEPOSITS IN NAVIGABLE WATERS.** (a) The department, upon application, may grant to a riparian owner a permit to:

1. Place a layer of sand or similar material on the bed of a lake adjacent to the owner's property for the purpose of improving recreational use.

2. Place a fish crib, spawning reef, wing deflector or similar device on the bed of navigable waters for the purpose of improving fish habitat.

2m. Place a bird nesting platform, a wood duck house or similar structure on the bed of a navigable water for the purpose of improving wildlife habitat.

3. Place riprap or similar material on the bed and bank of navigable waters adjacent to an owner's property for the purpose of protecting the bank and adjacent land from erosion.

4. Place crushed rock or gravel, reinforced concrete planks, adequately secured treated timbers, cast in place concrete or simi-

lar material on the bed of a navigable stream for the purpose of developing a ford if an equal amount of material is removed from the stream bed.

5. Place crushed rock or gravel, reinforced concrete planks, cast in place concrete or similar material on the bed of navigable waters adjacent to the owner's property for the purpose of building a boat landing.

6. Place a permanent boat shelter adjacent to the owner's property for the purpose of storing or protecting watercraft and associated materials, except that no permit may be granted for a permanent boat shelter which is constructed after May 3, 1988, if the property on which the permanent boat shelter is to be located also contains a boathouse within 75 feet of the ordinary high-water mark of if there is a boathouse over navigable waters adjacent to the owner's property.

7. Place an intake structure and pipe on the bed of a navigable water for the purpose of constructing a dry fire hydrant to supply water for fire protection.

8. Drive a piling into the bed of a navigable water adjacent to the owner's property for the purpose of deflecting ice, protecting an existing or proposed structure, or providing a pivot point for turning watercraft.

(b) A person who seeks to place structures or deposits under par. (a) shall apply to the department for a permit. The department may disapprove the application if it finds that the proposed structure or deposit will materially impair navigation or be detrimental to the public interest. The department shall issue the permit or notify the applicant in writing of the disposition of the application.

(bn) A riparian owner is exempt from the permit requirements under sub. (2) and this subsection for a structure specified under par. (a) 2m. if the riparian owner places the structure in conformance with the standards established under par. (d) and if the riparian owner notifies the department in writing of the location of the structure at least 10 working days before it is placed.

(c) The department may promulgate rules deemed necessary to carry out the purposes of par. (a) 6., including rules to establish minimum standards to govern the architectural features of boat shelters and the number of boat shelters that may be constructed adjacent to a parcel of land. The rules may not govern the aesthetic features or color of boat shelters. The standards shall be designed to assure the structural soundness and durability of a boat shelter. A municipality may enact ordinances not inconsistent with this section or with rules promulgated under this section regulating the architectural features of boat shelters.

(d) For purposes of par. (bn), the department shall promulgate rules to establish standards governing the placement of structures specified in par. (a) 2m.

(4) **DEPARTMENT OF TRANSPORTATION ACTIVITIES; EXEMPTION; INTERDEPARTMENTAL COORDINATION OF ENVIRONMENTAL PROTECTION MEASURES.** (a) Activities affecting waters of the state as defined in s. 281.01 (18) that are carried out under the direction and supervision of the department of transportation in connection with highway and bridge design, location, construction, reconstruction, maintenance and repair are not subject to the prohibitions or permit or approval requirements specified under this section or s. 29.29, 30.11, 30.123, 30.195, 30.20, 59.692, 61.351, 62.231 or 87.30 or chs. 281 to 285 or 289 to 299, except s. 281.48. However, at the earliest practical time prior to the commencement of these activities, the department of transportation shall notify the department of the location, nature and extent of the proposed work that may affect the waters of the state.

NOTE: Par. (a) is shown as affected by two acts of the 1995 legislature and as merged by the revisor under s. 13.93 (2) (c).

(b) The exemption under par. (a) does not apply unless the activity is accomplished in accordance with interdepartmental liaison procedures established by the department and the department of transportation for the purpose of minimizing the adverse environmental impact, if any, of the activity.

30.79	Local water safety patrols; state aids.
30.80	Penalties.
30.81	Local regulations on icebound inland waters.
30.90	Public access to Lake Lions.

30.92	Recreational boating projects.
30.93	Fox River management.
30.94	Fox-Winnebago regional management commission.
30.99	Parties to a violation.

SUBCHAPTER I

GENERAL PROVISIONS

30.01 Definitions. In this chapter:

(1b) "Authorized base level of water loss" has the meaning given under s. 281.35 (1) (b).

(1c) "Boat shelter" means a structure in navigable waters designed and constructed for the purpose of providing cover for a berth place for watercraft, which may have a roof but may not have walls or sides. Such a structure may include a boat hoist.

(1d) "Boathouse" means a structure used for the storage of watercraft and associated materials which has one or more walls or sides.

(1g) "Bridge" means a structure used to convey people, animals and vehicles over navigable waters and includes pipe arches and culverts.

(1j) "Department" means the department of natural resources.

(1m) "Designated mooring area" means a mooring area designated by a municipality under s. 30.773 (2) and (3), approved by the department and marked as a mooring area.

(1p) "Fishing raft" means any raft, float or structure, including a raft or float with a superstructure and including a structure located or extending below or beyond the ordinary high-water mark of a water, which is designed to be used or is normally used for fishing, which is not normally used as a means of transportation on water and which is normally retained in place by means of a permanent or semipermanent attachment to the shore or to the bed of the waterway. "Fishing raft" does not include a boathouse or fixed houseboat regulated under s. 30.121 nor a wharf or pier regulated under s. 30.13.

(1r) "Fixed houseboat" means a structure not actually used for navigation which extends beyond the ordinary high-water mark of a navigable waterway and is retained in place either by cables to the shoreline or by anchors or spudpoles attached to the bed of the waterway.

(1t) "Flotation device" means any device used to provide flotation for a fishing raft, including each individual barrel or styrofoam coffin.

(2) "Governing body" means a town board, a village board of trustees, a city council or a county board.

(3) "Harbor facility" means every facility useful in the maintenance or operation of a harbor, including transportation facilities of all types, terminal and storage facilities of all types, wharves, piers, slips, basins, ferries, docks, bulkheads and dock walls, and floating and handling equipment, power stations, transmission lines and other facilities necessary for the maintenance and operation of such harbor facilities.

(3e) "Mooring" when used as a noun means a mooring anchor and mooring buoy together with attached chains, cables, ropes and pennants and related equipment, unless the term is qualified or restricted.

(3m) "Mooring anchor" means any anchor or weight which is designed to rest on the bed or to be buried in the bed of a navigable water, which is designed to be attached by a chain, cable, rope or other mechanism to a mooring buoy and which is designed to be left in position permanently or on a seasonal basis.

(3s) "Mooring buoy" means any float or marker which is attached to a mooring anchor and either is suitable for attachment to a boat through the use of a pennant or other device or facilitates the attachment of the boat to the mooring anchor.

(3w) "Motor vehicle" has the meaning designated under s. 340.01 (35) except that this term does not include snowmobiles.

(4) "Municipality" means any town, village, city or county in this state.

(4m) "Navigable waters" or "navigable waterway" means any body of water which is navigable under the laws of this state.

(4r) "Outlying waters" has the meaning designated in s. 29.01 (11).

(5) "Pier" means any structure extending into navigable waters from the shore with water on both sides, built or maintained for the purpose of providing a berth for watercraft or for loading or unloading cargo or passengers onto or from watercraft. Such a structure may include a boat shelter which is removed seasonally.

(5m) "Piling" means a group of piles.

(6) "Secretary" means the secretary of natural resources.

(6b) "Substantive written objection" means a written statement giving specific reasons why a proposed project under ss. 30.02 to 30.38 may violate the statutory provisions applicable to the project and specifying that the person making the objection will appear and present information supporting the objection in a contested case hearing.

(6d) "Surplus water" means any water of a stream that is not being beneficially used, as determined by the department.

(6e) "Swimming raft" means a floating platform without railings, roof or walls that is adequately anchored to the bed of navigable waters and is designed for swimming, diving and related activities.

(7) "Watercraft" means any device used and designed for navigation on water.

(7m) "Water loss" has the meaning given under s. 281.35 (1) (L).

(8) "Wharf" means any structure in navigable waters extending along the shore and generally connected with the uplands throughout its length, built or maintained for the purpose of providing a berth for watercraft or for loading or unloading cargo or passengers onto or from watercraft.

(9) "Withdrawal" has the meaning given under s. 281.35 (1) (m).

(10) "Wolf River municipality" means any city, village or town which adjoins or includes any part of the Wolf River or its stream tributaries from the Shawano dam downstream to Lake Poygan.

History: 1983 a. 189; 1985 a. 243, 332; 1987 a. 374 ss. 1 to 9, 25, 34, 35, 46 to 49, 70, 76; 1987 a. 403; 1989 a. 56; 1993 a. 236; 1995 a. 227.

No threshold showing that a waterway is actually navigated for commercial or recreational purposes is necessary in order to prove that the waterway is navigable. *City of Oak Creek v. DNR*, 185 W (2d) 424, 518 NW (2d) 276 (Ct. App. 1994).

30.02 General provision for notice and hearing. (1) In any proceeding under this chapter where public notice is required, the department shall follow the procedures in subs. (3) and (4).

(2) In any proceeding under this chapter where public notice is not required, the department shall follow the procedures in subs. (3) and (4) if it determines that substantial interests of any party may be adversely affected by the proceeding.

(3) Upon receipt of a complete permit application, the department shall either schedule a hearing or provide notice stating that it will proceed on the application without a hearing if no substantive written objection to issuance of the permit is received within 30 days after publication of the notice. The notice shall be provided to the clerk of each municipality in which the project is located and to any other person required by law to receive notice.

(c) If the department determines that there is reasonable cause to believe that an activity being carried out under this subsection is not in compliance with the environmental protection requirements developed through interdepartmental liaison procedures, it shall notify the department of transportation. If the secretary and the secretary of transportation are unable to agree upon the methods or time schedules to be used to correct the alleged noncompliance, the secretary, notwithstanding the exemption provided in this subsection, may proceed with enforcement actions as the secretary deems appropriate.

(d) The department of transportation and the department shall exchange information and cooperate in the planning and carrying out of such activities in order to alleviate, to the extent practical under the circumstances, any potential detrimental encroachment on the waters of the state.

(e) Except as may be required otherwise under s. 1.11, no public notice or hearing is required in connection with any interdepartmental consultation and cooperation under this subsection.

(f) This subsection does not apply to activities in the Lower Wisconsin State Riverway, as defined in s. 30.40 (15).

(5) **PENALTY.** Any person violating this section or any term or condition of a permit issued pursuant thereto shall be fined not more than \$1,000 or imprisoned not more than 6 months or both.

History: 1975 c. 250, 421; 1977 c. 130, 447; 1981 c. 226, 330; 1981 c. 390 s. 252; 1987 a. 374; 1989 a. 31; 1993 a. 132, 151, 236, 491; 1995 a. 27, 201, 227; s. 13.93 (2) (c).

In a state proceeding to enforce a department order requiring an owner of land abutting a navigable lake to remove a quantity of fill, the burden of proof is on the state to establish the nonexistence of a bulkhead line. *State v. McFarren*, 62 W (2d) 492, 215 NW (2d) 459.

Sub. (1)(a) was not intended to apply to conduct which only indirectly and unintentionally results in deposits on lake beds. *State v. Deetz*, 66 W (2d) 1, 224 NW (2d) 407.

Where DNR decision prohibited structure under this section and riparian owner did not seek review under s. 227.20, 1983 stats., [now 227.57], trial court had no jurisdiction to hear action by owner seeking declaration that structure was a permitted "pier" under s. 30.13. *Kosmatka v. DNR*, 77 W (2d) 558, 253 NW (2d) 887.

"Navigable waters" under this section are waters that are navigable in fact. Ski jump was "structure" under this section. Public trust doctrine discussed. *State v. Bleck*, 114 W (2d) 454, 338 NW (2d) 492 (1983).

See note to 66.24, citing *Cassidy v. Dept. of Natural Resources*, 132 W (2d) 153, 390 NW (2d) 81 (Ct. App. 1986).

Area need not be navigable to be lakebed. Ordinary high water mark was determinative. *State v. Trudeau*, 139 W (2d) 91, 408 NW (2d) 337 (1987).

Holder of easement doesn't qualify as riparian owner. *de Nava v. DNR*, 140 W (2d) 213, 409 NW (2d) 151 (Ct. App. 1987).

See note to 30.11, citing 63 Atty. Gen. 445.

30.121 Regulation of boathouses and houseboats.

(2) **PROHIBITIONS.** After December 16, 1979 no boathouse or fixed houseboat may be constructed or placed beyond the ordinary high-water mark of any navigable waterway.

(3) **MAINTENANCE.** The riparian owner of any boathouse or fixed houseboat extending beyond the ordinary high-water mark of any navigable waterway may repair and maintain the boathouse or fixed houseboat if the cost of the repair or maintenance does not exceed 50% of the equalized assessed value of the boathouse or fixed houseboat. If the boathouse or fixed houseboat is not subject to assessment, the owner may make repairs if the cost of the repair or maintenance does not exceed 50% of the current fair market value of the boathouse or fixed houseboat.

(3m) **EXCEPTION; CERTAIN SINGLE-STORY BOATHOUSES.** Notwithstanding subs. (2) and (3), a person may construct, repair or maintain a single-story boathouse over an authorized waterway enlargement if:

- (a) The boathouse does not extend beyond the ordinary high-water mark as it existed prior to the creation of the enlargement;
- (b) The boathouse covers the entire enlargement; and
- (c) Living quarters or plumbing fixtures are not constructed in the boathouse.

(3r) **EXCEPTION; DAMAGES AFTER JANUARY 1, 1984.** Subsections (2) and (3) do not apply to the repair or reconstruction of a damaged boathouse if the boathouse was damaged by violent

wind, vandalism or fire and if the damage occurs after January 1, 1984.

(4) **MAJOR REPAIR, ABANDONED STRUCTURES AND OBSTRUCTIONS TO NAVIGATION.** The owner of a boathouse or a fixed houseboat which extends beyond the ordinary high-water mark of any navigable waterway and which is in a major state of disrepair or is a material obstruction to navigation may be ordered by the department to remove the structure from the waterway. The department shall follow the procedures set forth in s. 30.03 (4) (a) for ordering removal of a structure. If such a structure is abandoned and the department, after due diligence, cannot locate the owner, the department shall utilize the procedures set forth in s. 31.187 (1) for removing the abandoned structure.

(5) **APPLICABILITY.** Boathouses or fixed houseboats owned by the state or by local units of government shall comply with this section. This section does not apply to any structure listed on the national register of historic places in Wisconsin or the state register of historic places.

(6) **RULES.** The department may promulgate rules deemed necessary to carry out the purposes of this section. The rules may not govern the aesthetic features or color of boathouses.

(7) **PENALTIES.** Any person who constructs, owns or maintains a boathouse or fixed houseboat in violation of this section or in violation of any order issued under this section shall forfeit not less than \$10 nor more than \$50 for each offense. Each day a structure exists in violation of this section constitutes a separate offense.

History: 1979 c. 101; 1981 c. 117; 1983 a. 27 s. 2202 (38); 1987 a. 374, 395; 1995 a. 27.

Boathouse on navigable artificially created waterway maintained over private property with waters from a natural waterway is subject to regulation. *Klingeisen v. DNR*, 163 W (2d) 921, 472 NW (2d) 603 (Ct. App. 1991).

Administrative rule permitting repairs not authorized by this section was invalid. *Oneida County v. Converse*, 180 W (2d) 120, 508 NW (2d) 416 (1993).

30.122 Unauthorized structures. All permanent alterations, deposits or structures affecting navigable waters, other than boathouses, which were constructed before December 9, 1977 and which did not require a permit at the time of construction, shall be presumed in conformity with the law, unless a written complaint is filed within 180 days of December 9, 1977. Upon the filing of a complaint, the department shall proceed with an action to enforce the applicable statutes.

History: 1977 c. 189.

30.123 Bridge construction and maintenance; permit.

(1) Municipalities which construct or reconstruct highway bridges shall not be required to obtain permits under this section or s. 30.10 or 30.12 for such construction or reconstruction. All municipal highway bridges shall be constructed or reconstructed in accordance with standards developed under s. 84.01 (23).

(2) Except as provided in sub. (1) and s. 30.12 (4), no person may construct or maintain a bridge in, on or over navigable waters unless a permit has been issued by the department under this section. The application for a permit shall contain the applicant's name and address, the proposed location of the bridge, a cross section and plan view of the navigable waters and adjacent uplands, a description of materials to be used in construction of the bridge, plans for the proposed bridge, evidence of permission to construct the bridge from the riparian owners and any other information required by the department.

(3) Upon receipt of a complete application, the department shall follow the notice and hearing provisions of s. 30.02 (3) and (4), except that no notice or hearing is required for proposed bridges which would cross navigable waters less than 35 feet wide.

(4) The department shall review the plans for the proposed bridge to determine whether the proposed bridge will be an obstruction to navigation or will adversely affect the flood flow capacity of the stream. The department shall grant the permit if the proposed bridge will not materially obstruct navigation,

section shall forfeit not less than \$10 nor more than \$250 for each offense. Each day of violation constitutes a separate offense.

(b) *Violation of municipal ordinance or order.* A person who violates any ordinance adopted or order issued by the municipality under this section is subject to the penalty established by ordinance. A Wolf River municipality may not establish this penalty at a level which is less severe than the penalty established under par. (a).

History: 1983 a. 100; 1987 a. 374; 1995 a. 27 ss. 1658, 9116 (5).

30.13 Regulation of wharves, piers and swimming rafts; establishment of pierhead lines. (1) **CONSTRUCTION ALLOWED WITHOUT PERMIT UNDER CERTAIN CIRCUMSTANCES.** A riparian proprietor may construct a wharf or pier in a navigable waterway extending beyond the ordinary high-water mark or an established bulkhead line in aid of navigation without obtaining a permit under s. 30.12 if all of the following conditions are met:

(a) The wharf or pier does not interfere with public rights in navigable waters.

(b) The wharf or pier does not interfere with rights of other riparian proprietors.

(c) The wharf or pier does not extend beyond any pierhead line which is established under sub. (3).

(d) The wharf or pier does not violate any ordinances enacted under sub. (2).

(e) The wharf or pier is constructed to allow the free movement of water underneath and in a manner which will not cause the formation of land upon the bed of the waterway.

(1m) **SWIMMING RAFTS ALLOWED WITHOUT PERMIT UNDER CERTAIN CIRCUMSTANCES.** A riparian proprietor may place a swimming raft in a navigable waterway for swimming and diving purposes without obtaining a permit under s. 30.12 if all of the following conditions are met:

(a) The swimming raft does not interfere with public rights in navigable waters.

(b) The swimming raft does not interfere with rights of other riparian proprietors.

(c) The swimming raft is placed within 200 feet of shore.

(2) **WHARVES, PIERS AND SWIMMING RAFTS REGULATED.** A municipality may enact ordinances not inconsistent with this section regulating the construction and location of wharves, piers and swimming rafts located within or attached to land within that municipality.

(3) **ESTABLISHMENT OF PIERHEAD LINES.** (a) Any municipality authorized by s. 30.11 to establish a bulkhead line may also establish a pierhead line in the same manner as it is authorized to establish a bulkhead line, except that a metes and bounds legal description is not required nor is the map required to be prepared by a registered land surveyor and except that if the municipality has created a board of harbor commissioners the municipality must obtain the approval of the board concerning the establishment of the pierhead line in addition to obtaining the approval of the department.

(b) Any pierhead line established by a municipality shall be established in the interest of the preservation and protection of its harbor or of public rights in navigable waters.

(4) **UNLAWFUL OBSTRUCTION.** (a) *Interferes with public rights.* A wharf or pier which interferes with public rights in navigable waters constitutes an unlawful obstruction of navigable waters unless a permit is issued for the wharf or pier under s. 30.12 or unless authorization for the wharf or pier is expressly provided.

(b) *Interferes with riparian rights.* A wharf or pier which interferes with rights of other riparian proprietors constitutes an unlawful obstruction of navigable waters unless a permit is issued for the wharf or pier under s. 30.12 or unless authorization for the wharf or pier is expressly provided.

(c) *Extends beyond pierhead line; exception.* A wharf or pier which extends into navigable waters beyond any pierhead line

established under sub. (3) constitutes an unlawful obstruction of navigable waters unless a valid permit, license or authorization for the wharf or pier is granted or unless it is a permissible preexisting wharf or pier. A wharf or pier is a permissible preexisting wharf or pier if it existed prior to the establishment of the pierhead line, if it is not extended or expanded after that date and if the ownership of the land to which it is attached did not change after that date except that a wharf or pier continues its status as a permissible preexisting wharf or pier for one year after the date the change of ownership is recorded. The seasonal removal of a wharf or pier does not affect its status as a permissible preexisting wharf or pier if it is reestablished in substantially the same form. Status as a permissible preexisting wharf or pier does not imply that authorization for the wharf or pier is provided for the purposes of par. (a) or (b). The owner of a wharf or pier may submit evidence to the municipality that it is a permissible preexisting wharf or pier at any time after the municipality establishes the pierhead line.

(d) *Violates regulations.* A wharf or pier which violates the regulations contained in sub. (2) or in any ordinance enacted under sub. (2) constitutes an unlawful obstruction of navigable waters.

(5) **REMOVAL OF WHARVES AND PIERS EXTENDING BEYOND PIERHEAD LINE.** The governing body of a city, village or town may remove a wharf or pier which constitutes an unlawful obstruction of navigable waters under sub. (4) as provided under s. 66.0495.

(6) **DOCK LINE NOT INVALIDATED.** A dock line lawfully established before January 1, 1960, is a lawfully established pierhead line.

History: 1981 c. 252; 1987 a. 374.

See note to 30.12, citing *Kosmatka v. DNR*, 77 W (2d) 558, 253 NW (2d) 887.

30.131 Wharves and piers placed and maintained by persons other than riparian owners. (1) Notwithstanding s. 30.133, a wharf or pier of the type which does not require a permit under ss. 30.12 (1) and 30.13 that abuts riparian land and that is placed in a navigable water by a person other than the owner of the riparian land may not be considered to be an unlawful structure on the grounds that it is not placed and maintained by the owner if all of the following requirements are met:

(a) The owner of the riparian land or the owner's predecessor in interest entered into a written easement that was recorded before December 31, 1986, and that authorizes access to the shore to a person who is not an owner of the riparian land.

(b) The person to whom the easement was granted or that person's successor in interest is the person who places and maintains the wharf or pier.

(c) The placement and maintenance of the wharf or pier is not prohibited by and is not inconsistent with the terms of the written easement.

(d) The wharf or pier has been placed seasonally in the same location at least once every 4 years since the written easement described in par. (a) was recorded.

(e) The wharf or pier is substantially the same size and configuration as it was on April 28, 1990, or during its last placement before April 28, 1990, whichever is later.

(f) The placement of the wharf or pier complies with the provisions of this chapter, with any rules promulgated under this chapter and with any applicable municipal regulations or ordinances.

(2) Notwithstanding s. 30.133, an easement under sub. (1) may be conveyed if it is conveyed at the same time, and to the same person, that the land to which the easement is appurtenant is conveyed.

History: 1989 a. 217; 1993 a. 167.

General discussion of application of s. 30.131. *Godfrey Co. v. Lopardo*, 164 W (2d) 352, 474 NW (2d) 786 (Ct. App. 1991).

30.133 Prohibition against conveyance of riparian rights. (1) Beginning on April 9, 1994, no owner of riparian land that abuts a navigable water may convey, by easement or by a similar conveyance, any riparian right in the land to another person, except for the right to cross the land in order to have access

to the navigable water. This right to cross the land may not include the right to place any structure or material in the navigable water.

(2) This section does not apply to riparian land located within the boundary of any hydroelectric project licensed or exempted by the federal government, if the conveyance is authorized under any license, rule or order issued by the federal agency having jurisdiction over the project.

History: 1993 a. 167.

30.14 Reports of and hearings on violations.

(1) MUNICIPALITIES TO REPORT VIOLATIONS. The governing body of each municipality shall promptly report to the department every violation of s. 30.12 or 30.13 which occurs or which it has reason to believe is likely to occur within the municipal boundaries.

(2) HEARINGS BY DEPARTMENT. Upon complaint by any person to the department that any wharf, pier or other structure exists in navigable water in violation of s. 30.12 or 30.13 or that any wharf, pier or other structure proposed to be built in navigable water will violate s. 30.12 or 30.13, the department shall investigate and may hold a hearing to determine whether the wharf, pier, or other structure is or would be in violation of those sections. If no hearing is held, the complainant shall be informed of the results of the investigation.

History: 1987 a. 374.

30.15 Penalty for unlawful obstruction of navigable waters.

(1) OBSTRUCTIONS PENALIZED. Any person who does any of the following shall forfeit not less than \$10 nor more than \$500 for each offense:

(a) Unlawfully obstructs any navigable waters and thereby impairs the free navigation thereof.

(b) Unlawfully places in navigable waters or in any tributary thereof any substance that may float into and obstruct any such waters or impede their free navigation.

(c) Constructs or maintains in navigable waters, or aids in the construction or maintenance therein, of any boom not authorized by law.

(d) Constructs or places any structure or deposits any material in navigable waters in violation of s. 30.12 or 30.13.

(3) EACH DAY A SEPARATE VIOLATION. Each day during which an obstruction, deposit or structure exists in violation of sub. (1) is a separate offense.

History: 1987 a. 374.

Where bridge obstructing navigation was necessary, reasonable, and existing before plaintiff moved into area, defendant city need not abate the nuisance. *Capt. Soma Boat Line v. Wisconsin Dells*, 79 W (2d) 10, 255 NW (2d) 441.

If the unattended and anchored boat is left on navigable water for an unreasonable length of time, it constitutes a violation. 63 Atty. Gen. 601.

30.16 Removal of obstructions to navigation.

(1) WATERCRAFT AND FLOATS. (a) *Removal*. The governing body of any municipality in this state may cause to be removed to a convenient and safe place any watercraft or float obstructing or interfering with the free navigation of any river, canal, water channel or slip within its harbor after having given reasonable notice to the master or owner or the agent of the master or owner, if known and a resident of this state, or to the person in charge thereof, to so remove such watercraft or float. The governing body of the municipality by ordinance or resolution may authorize any harbor master or other public officer over whom it has jurisdiction to remove such obstruction, and may prescribe the officer's duties with respect thereto and the mode of carrying them into effect and may prescribe penalties for violation of such ordinance or resolution.

(b) *Costs of removal*. All costs, charges and expenses of such removal are a first lien on such watercraft or float, which lien may be enforced in the manner provided by law. The owner of any such watercraft or float is also personally liable for such costs, charges and expenses, to be recovered by the municipality by a personal action.

(2) REMOVAL OF OBSTRUCTIONS TO NAVIGATION; WHARVES AND PIERS; ALTERNATIVE. As an alternative to the procedure specified under sub. (1), the governing body of a city, village or town may remove that portion of a wharf or pier which constitutes an unlawful obstruction to navigation as provided under s. 66.0495.

History: 1981 c. 252; 1991 a. 316; 1993 a. 246.

30.18 Diversion of water from lakes and streams.

(2) PERMIT REQUIRED. (a) *Streams*. No person may divert water from a stream in this state without a permit under this section if the diversion meets either of the following conditions:

1. The diversion is for the purpose of maintaining or restoring the normal level of a navigable lake or the normal flow of a navigable stream, regardless of whether the navigable lake or navigable stream is located within the watershed of the stream from which the water is diverted.

2. The diversion is for the purpose of agriculture or irrigation.

(b) *Streams or lakes*. No person, except a person required to obtain an approval under s. 281.41, may divert water from any lake or stream in this state without a permit under this section if the diversion will result in a water loss averaging 2,000,000 gallons per day in any 30-day period above the person's authorized base level of water loss.

(3) APPLICATION FOR PERMIT. (a) *Application; streams*. 1. Except as provided in par. (b), an applicant for a permit required under sub. (2) (a) shall file the application with the department setting forth the name and post-office address of the applicant, the name of the stream from which the water will be diverted, the point in the stream from which it is proposed to divert the water, the name of the lake or stream or the location and riparian status of the land to which the water is to be diverted, the location and description of the canal, tunnel or pipes and other works through which the water is to be diverted, the amount of water to be diverted, the periods of time when it is proposed to divert such water, the time required for the completion of the canal and other structures necessary for the completed project and, if required by the department, 4 copies of plans showing cross sections and profiles for any canal, tunnel, pipes or other diversion works and any dam and control works at the point of diversion and at the point of discharge.

2. For a diversion under sub. (2) (a) 1., a map or maps shall accompany the application with a scale of not less than one inch per 2,000 feet, showing the land topography and the probable course of the proposed diversion canal and other works, and the ownership of all lands upon which will be located the canal, tunnel, pipes and all other works for the completed project.

3. For a diversion under sub. (2) (a) 2., the application shall include written statements of consent to the diversion from all riparian owners who are making beneficial use of the water proposed to be diverted.

4. The department may require such additional information as may be pertinent.

(b) *Application; streams or lakes*. An application for a permit required under sub. (2) (b) shall be submitted in the form required under s. 281.35 (5) (a). If the diversion also meets either condition specified under sub. (2) (a), the application shall also comply with par. (a).

(4) NOTICE OF HEARING ON APPLICATION. (a) Upon receipt of a complete application, the department shall follow the notice and hearing procedures under s. 30.02 (3) and (4). In addition to the notice requirements under s. 30.02 (3) and (4), the department shall mail a copy of the notice to every person upon whose land any part of the canal or any other structure will be located, to the clerk of the next town downstream, to the clerk of any village or city in which the lake or stream is located and which is adjacent to any municipality in which the diversion will take place and to each person specified in s. 281.35 (5) (b) or (6) (f), if applicable.

(b) If a hearing on the application for a permit is conducted as a part of a hearing under s. 293.43, the notice and hearing provi-

becomes effective and notify the town clerk of all towns affected by such ordinance of such effective date and also make such report to the county board, which report shall be printed in the proceedings of the county board.

7. When any lands previously under the jurisdiction of a county zoning ordinance have been finally removed from such jurisdiction by reason of annexation to an incorporated municipality, and after the regulations imposed by the county zoning ordinance have ceased to be effective as provided in sub. (7), the board may, on the recommendation of its zoning agency, enact amendatory ordinances that remove or delete the annexed lands from the official zoning map or written descriptions without following any of the procedures provided in subds. 1. to 6., and such amendatory ordinances shall become effective upon enactment and publication. A copy of the ordinance shall be forwarded by the clerk to the clerk of each town in which the lands affected were previously located. Nothing in this paragraph shall be construed to nullify or supersede s. 80.64.

(6) **OPTIONAL ADDITIONAL PROCEDURES.** Nothing in this section shall be construed to prohibit the zoning agency, the board or a town board from adopting any procedures in addition to those prescribed in this section and not in conflict therewith. Such procedures may, but are not required to, provide for public hearings before the county board. The public hearing provided by sub. (5) (a) and (e) 2. is deemed to be sufficient for the requirements of due process whether or not the county board holds a further public hearing thereafter.

(7) **CONTINUED EFFECT OF ORDINANCE.** Whenever an area which has been subject to a county zoning ordinance petitions to become part of a city or village, the regulations imposed by the county zoning ordinance shall continue in effect, without change, and shall be enforced by the city or village until the regulations have been changed by official action of the governing body of the city or village, except that in the event an ordinance of annexation is contested in the courts, the county zoning shall prevail and the county shall have jurisdiction over the zoning in the area affected until ultimate determination of the court action.

(8) **EXCHANGE OF TAX DEEDED LANDS.** When a county acquires lands by tax deeds, the board may exchange such lands for other lands in the county for the purpose of promoting the regulation and restriction of agricultural and forestry lands and may exchange such lands for other lands for the purpose of creating a park or recreational area.

(9) **ZONING OF COUNTY-OWNED LANDS.** (a) The county board may by ordinance zone and rezone lands owned by the county without necessity of securing the approval of the town boards of the towns wherein the lands are situated and without following the procedure outlined in sub. (5), provided that the county board shall give written notice to the town board of the town wherein the lands are situated of its intent to so rezone and shall hold a public hearing on the proposed rezoning ordinance and give notice of the hearing by posting in 5 public places in the town.

(b) This subsection does not apply to land that is subject to a town zoning ordinance which is purchased by the county for use as a solid or hazardous waste disposal facility or hazardous waste storage or treatment facility, as these terms are defined under s. 289.01.

NOTE: Par. (b) is shown as affected by two acts of the 1995 legislature and as merged by the revisor under s. 13.93 (2) (c).

(10) **NONCONFORMING USES.** (a) An ordinance enacted under this section may not prohibit the continuance of the lawful use of any building or premises for any trade or industry for which such building or premises is used at the time that the ordinances take effect, but the alteration of, or addition to, or repair in excess of 50% of its assessed value of any existing building or structure for the purpose of carrying on any prohibited trade or new industry within the district where such buildings or structures are located, may be prohibited. The continuance of the nonconforming use of a temporary structure may be prohibited. If the nonconforming

use is discontinued for a period of 12 months, any future use of the building and premises shall conform to the ordinance.

(b) 1. Except as provided under subd. 2., the board shall designate an officer to administer the zoning ordinance, who may be the secretary of the zoning agency, a building inspector appointed under s. 59.698 or other appropriate person.

2. Notwithstanding subd. 1. and s. 59.698, in a county with a county zoning agency and a county executive or county administrator, the county executive or county administrator shall appoint and supervise the head of the county zoning agency and the county building inspector, in separate or combined positions. The appointment is subject to confirmation by the board unless the board, by ordinance, elects to waive confirmation or unless the appointment is made under a civil service system competitive examination procedure established under s. 59.52 (8) or ch. 63. The board, by resolution or ordinance, may provide that, notwithstanding s. 17.10 (6), the head of the county zoning agency and the county building inspector, whether serving in a separate or combined position, if appointed under this subdivision, may not be removed from his or her position except for cause.

3. The officer designated under subd. 1. or 2. shall cause a record to be made immediately after the enactment of an ordinance or amendment thereto, or change in district boundary, approved by the town board, of all lands, premises and buildings in the town used for purposes not conforming to the regulations applicable to the district in which they are situated. The record shall include the legal description of the lands, the nature and extent of the uses therein, and the names and addresses of the owner or occupant or both. Promptly on its completion the record shall be published in the county as a class 1 notice, under ch. 985. The record, as corrected, shall be on file with the register of deeds 60 days after the last publication and shall be prima facie evidence of the extent and number of nonconforming uses existing on the effective date of the ordinance in the town. Corrections before the filing of the record with the register of deeds may be made on the filing of sworn proof in writing, satisfactory to the officer administering the zoning ordinance.

(c) The board shall prescribe a procedure for the annual listing of nonconforming uses, discontinued or created, since the previous listing and for all other nonconforming uses. Discontinued and newly created nonconforming uses shall be recorded with the register of deeds immediately after the annual listing.

(d) Paragraphs (b) and (c) shall not apply to counties issuing building permits or occupancy permits as a means of enforcing the zoning ordinance or to counties which have provided other procedures for this purpose.

(11) **PROCEDURE FOR ENFORCEMENT OF COUNTY ZONING ORDINANCE.** The board shall prescribe rules, regulations and administrative procedures, and provide such administrative personnel as it considers necessary for the enforcement of this section, and all ordinances enacted in pursuance thereof. The rules and regulations and the districts, setback building lines and regulations authorized by this section, shall be prescribed by ordinances which shall be declared to be for the purpose of promoting the public health, safety and general welfare. 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.

(12) **PRIOR ORDINANCES EFFECTIVE.** Nothing in this section shall invalidate any county zoning ordinance enacted under statutes in effect before July 20, 1951.

(13) **CONSTRUCTION OF SECTION.** The powers granted in this section shall be liberally construed in favor of the county exercising them, and this section shall not be construed to limit or repeal any powers now possessed by a county.

(14) **LIMITATION OF ACTIONS.** A landowner, occupant or other person who is affected by a county zoning ordinance or amend-

ordinance for the county. As far as possible, s. 87.30 shall apply to this subsection.

(7) (a) Provisions of a county shoreland zoning ordinance that are enacted under this section that were applicable, prior to annexation, to any shoreland area annexed by a city or village after May 7, 1982, shall continue in effect and shall be enforced after annexation by the annexing city or village unless any of the following occurs:

1. The city or village enacts, administers and enforces a zoning ordinance, for the annexed area, that complies with the shoreland zoning standards and that is at least as restrictive as the county shoreland zoning ordinance.

2. After annexation, the city or village requests the county to amend the county shoreland zoning ordinance as it applies to the annexed area to delete or modify provisions that meet the specifications under par. (ag), the county enacts the amendment and the city or village administers and enforces the amended ordinance as it applies to the annexed area.

3. After annexation, the city or village requests that the county shoreland zoning ordinance, as it applies to the annexed area, continues to be in effect and enforced by the county and the county agrees to enforce the ordinance.

(ad) Provisions of a county shoreland zoning ordinance that are enacted under this section that were applicable, prior to incorporation, to any shoreland area that is part of a town that incorporates as a city or village under s. 66.012, 66.014, 66.018 or 66.019 after April 30, 1994, shall continue in effect and shall be enforced after incorporation by the incorporated city or village unless any of the following occurs:

1. The city or village enacts, administers and enforces a zoning ordinance that complies with the shoreland zoning standards and that is at least as restrictive as the county shoreland zoning ordinance.

2. After incorporation, the city or village requests the county to amend the county shoreland zoning ordinance as it applies to the incorporated area to delete or modify provisions that meet the specifications under par. (ag), the county enacts the amendment and the city or village administers and enforces the amended ordinance.

3. After incorporation, the city or village requests that the county shoreland zoning ordinance, as it applies to the incorporated area, continues to be in effect and enforced by the county and the county agrees to enforce the ordinance.

(ag) For purposes of pars. (a) 2. and (ad) 2., the types of provisions that may be deleted or modified are those that establish specified land uses or requirements that are associated with those uses and that are not necessary to effect the purposes of s. 281.31 (1) that relate to the protection of navigable waters.

NOTE: Par. (ag) is shown as affected by two acts of the 1995 legislature and as merged by the revisor under s. 13.93 (2) (c).

(ar) The county may not enact an amendment under par. (a) 2. or (ad) 2. that is less restrictive than the shoreland zoning standards.

(aw) Any amendment enacted under par. (a) 2. shall apply only to the annexed area of the city or village requesting the amendment.

(b) If the department determines that a zoning ordinance enacted by a city or village under par. (a) 1. or (ad) 1. does not meet the shoreland zoning standards or is not as restrictive as the county shoreland zoning ordinance, the department shall, after providing notice and conducting a hearing on the matter, either issue an order declaring the city or village ordinance void and reinstating the applicability of the county shoreland zoning ordinance to the annexed or incorporated area or issue an order declaring the city or village ordinance void and adopting an ordinance for the annexed or incorporated area for the city or village that does meet the shoreland zoning standards and that is at least as restrictive as the county shoreland zoning ordinance.

(c) If the department determines that an amendment enacted by a county under par. (a) 2. or (ad) 2. does not meet the shoreland zoning standards, the department, after providing notice and conducting a hearing on the matter, shall issue an order declaring the amendment void and shall reinstate the applicability of the county shoreland zoning ordinance, that was in effect before amending the ordinance, to the annexed or incorporated area.

(d) As far as applicable, the procedures set forth in s. 87.30 apply to this subsection.

(e) Paragraphs (a) and (ad) do not apply to wetlands in shorelands that are governed by the provisions in s. 61.351 or 62.231.

History: 1979 c. 233; 1981 c. 330; 1983 a. 189 s. 329 (23); 1991 a. 39; 1993 a. 329; 1995 a. 201 s. 476; Stats. 1995 s. 59.692; 1995 a. 227; s. 13.93 (2) (c).

The DNR, as trustee of navigable waters in the state, has standing to appeal shoreland zoning decisions. DNR v. Walworth County Board of Adjustment, 170 W (2d) 406, 489 NW (2d) 631 (Ct. App. 1992).

The private right to fill lakebeds granted under s. 30.11 does not preempt the zoning power of a county over shorelands under this section. State v. Land Concepts, Ltd., 177 W (2d) 24, 501 NW (2d) 817 (Ct. App. 1993).

County floodplain zoning ordinances may be adopted under s. 59.971 [now 59.692] and do not require the approval of town boards in order to become effective within the unincorporated areas of the county. 62 Atty. Gen. 264.

Counties may zone lands located within 300 feet of an artificial ditch that is navigable in fact. 63 Atty. Gen. 57.

County shoreland zoning of unincorporated areas adopted under s. 59.971 [now 59.692] is not superseded by municipal extraterritorial zoning under 62.23 (7a). Sections 59.971, 62.23 (7), (7a) and 144.26 discussed. Municipal extraterritorial zoning within shorelands is effective insofar as it is consistent with, or more restrictive than, the county shoreland zoning regulations. 63 Atty. Gen. 69.

The necessity of zoning variance or amendments notice to the Wisconsin department of natural resources under the shoreland zoning and navigable waters protection acts. Whipple, 57 MLR 25.

59.693 Construction site erosion control and storm water management zoning. (1) DEFINITION. In this section, "department" means the department of natural resources.

(2) AUTHORITY TO ENACT ORDINANCE. To effect the purposes of s. 281.33 and to promote the public health, safety and general welfare, a county may enact a zoning ordinance, that is applicable to all of its unincorporated area, except as provided in s. 60.627 (2) (b), for construction site erosion control at sites where the construction activities do not include the construction of a building and for storm water management. This ordinance may be enacted separately from ordinances enacted under s. 59.69.

NOTE: Sub. (2) is shown as affected by two acts of the 1995 legislature and as merged by the revisor under s. 13.93 (2) (c).

(4) APPLICABILITY OF COUNTY ZONING PROVISIONS; TOWN APPROVAL. (a) Except as otherwise specified in this section, s. 59.69 applies to any ordinance or amendment to an ordinance enacted under this section, but an ordinance or amendment to an ordinance enacted under this section does not require approval and is not subject to disapproval by any town or town board.

(b) Variances and appeals regarding construction site erosion control and storm water management regulations under this section are to be determined by the board of adjustment for that county. Procedures under s. 59.694 apply to these determinations.

(c) An ordinance enacted under this section supersedes all provisions of an ordinance enacted under s. 59.69 that relate to construction site erosion control or storm water management regulation.

(6) APPLICABILITY OF COMPREHENSIVE ZONING PLAN OR GENERAL ZONING ORDINANCE. Ordinances 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.

(7) APPLICABILITY OF LOCAL SUBDIVISION REGULATION. All powers granted to a county under s. 236.45 may be exercised by the county with respect to construction site erosion control at sites where the construction activities do not include the construction of a building or with respect to storm water management regulation, if the county has or provides a county planning agency as defined in s. 236.02 (1).

(8) APPLICABILITY TO LOCAL GOVERNMENTS AND AGENCIES. An ordinance that is enacted under this section is applicable to activi-

pality shall provide at least 30 days' notice to the licensed adult family home or the community living arrangement that such a hearing will be held. At the hearing, the licensed adult family home or the community living arrangement may be represented by counsel and may present evidence and call and examine witnesses and cross-examine other witnesses called. The common council or village or town board may call witnesses and may issue subpoenas. All witnesses shall be sworn by the common council, town board or village board. The common council or village or town board shall take notes of the testimony and shall mark and preserve all exhibits. The common council or village or town board may, and upon request of the licensed adult family home or the community living arrangement shall, cause the proceedings to be taken by a stenographer or by a recording device, the expense thereof to be paid by the municipality. Within 20 days after the hearing, the common council or village or town board shall mail or deliver to the licensed adult family home or the community living arrangement its written determination stating the reasons therefor. The determination shall be a final determination.

History: 1971 c. 40 s. 93; 1971 c. 86, 224; 1973 c. 274; 1977 c. 205; 1979 c. 233 ss. 2 to 5, 7 and 8; 1979 c. 323; 1981 c. 341, 354, 374; 1983 a. 192 s. 303 (1); 1983 a. 410; 1983 a. 532 s. 36; 1985 a. 29, 136, 196, 281, 316; 1987 a. 161, 395; 1989 a. 80, 201; 1991 a. 255, 269, 316; 1993 a. 16, 27, 246, 327, 400, 446, 491; 1995 a. 27 ss. 9130 (4), 9126 (19); 1995 a. 201 s. 475; Stats. 1995 s. 59.69; 1995 a. 225 s. 174; 1995 a. 227; s. 13.93 (2) (c).

A zoning ordinance may distinguish between foster homes and therapeutic homes for the care of children. *Browndale International v. Board of Adjustment*, 60 W (2d) 182, 208 NW (2d) 121.

Plaintiff is not required to exhaust administrative remedies when his claim is that a zoning ordinance is unconstitutional; he may ask for a declaratory judgment. An ordinance classifying land as agricultural when it is unfit for agriculture is unreasonable and amounts to a taking of the land without compensation. *Kniec v. Town of Spider Lake*, 60 W (2d) 640, 211 NW (2d) 471.

A property owner does not acquire a "vested interest" in the continuance of a non-conforming use, and such status will be denied if the specific use was casual and occasional, or if such a use was merely accessory or incidental to the principal use. *Walworth County v. Hartwell*, 62 W (2d) 57, 214 NW (2d) 288.

Under s. 59.97 [now s. 59.69] (5) (c), a county zoning ordinance becomes effective in a town upon approval of the text by the town board and the filing of the approving resolution with the town clerk and not when it merely adopts a zoning map. *Racine County v. Alby*, 65 W (2d) 574, 223 NW (2d) 438.

Zoning ordinances, being in derogation of common law, are to be construed in favor of free use of private property. *Cohen v. Dane Co. Bd. of Adjustment*, 74 W (2d) 87, 246 NW (2d) 112.

Municipality is not required to show irreparable injury before obtaining injunction under s. 59.97 [now s. 59.69] (11). *County of Columbia v. Bylewski*, 94 W (2d) 153, 288 NW (2d) 129 (1980).

Under s. 59.97 [now s. 59.69] (9) county may rezone county-owned land contrary to town zoning laws and without town approval. *Town of Ringle v. County of Marathon*, 104 W (2d) 297, 311 NW (2d) 595 (1981).

Environmental zoning discussed. *M & I Marshall Bank v. Town of Somers*, 141 W (2d) 271, 414 NW (2d) 824 (1987).

For purposes of determining a nonconforming use of a quarry site, all land is used which contains the mineral and which is integral to the operation although a particular portion may not be under actual excavation. *Smart v. Dane County Bd. of Adjustment*, 177 W (2d) 445, 501 NW (2d) 782 (1993).

The power to regulate nonconforming uses includes the power to limit the extension or expansion of the use if it results in a change in the character of the use. *Waukesha County v. Pewaukee Marina, Inc.* 187 W (2d) 18, 522 NW (2d) 536 (Ct. App. 1994).

Where a zoning ordinance is changed, a builder may have a vested right, enforceable by mandamus, to build under the previously existing ordinance if the builder has submitted, prior to the change, an application for a permit in strict and complete conformance with the ordinance then in effect. *Lake Bluff Housing Partners v. South Milwaukee*, 197 W (2d) 157, 540 NW (2d) 189 (1995).

The fact that a county is within a regional planning commission does not affect county zoning power. 61 Atty. Gen. 220.

Authority of a county to regulate house trailers or mobile homes under this section, and other zoning questions discussed. 62 Atty. Gen. 292.

See note to 62.23, citing 63 Atty. Gen. 34.

Under s. 59.97 [now s. 59.69] (5) (c), town board approval of a comprehensive county zoning ordinance must extend to such ordinance in its entirety and may not extend only to parts of such ordinance. 63 Atty. Gen. 199.

County which has enacted countywide comprehensive zoning ordinance under this section may not authorize withdrawal of town approval of the ordinance or exclude any town from the ordinance. 67 Atty. Gen. 197.

Effect of 91.73 (4) on procedures to amend county comprehensive zoning ordinance under s. 59.97 [now s. 59.69] (5) (e) discussed. 67 Atty. Gen. 290.

The office of county planning and zoning commission member is incompatible with the position of executive director of the county housing authority. 81 Atty. Gen. 90.

An amendment to a county zoning ordinance adding a new zoning district does not necessarily constitute a comprehensive revision requiring town board approval of the entire ordinance under s. 59.97 [now s. 59.69] (5) (d). 81 Atty. Gen. 98.

Architectural Appearances Ordinances and the 1st Amendment. *Rice*. 76 MLR 439 (1992).

59.692 Zoning of shorelands on navigable waters.

(1) In this section:

(a) "Department" means the department of natural resources.

(b) "Shorelands" means the area within the following distances from the ordinary high-water mark of navigable waters, as defined under s. 281.31 (2) (d):

NOTE: Par. (b) is shown as affected by two acts of the 1995 legislature and as merged by the revisor under s. 13.93 (2) (c).

1. One thousand feet from a lake, pond or flowage. If the navigable water is a glacial pothole lake, this distance shall be measured from the high-water mark of the lake.

2. Three hundred feet from a river or stream or to the landward side of the floodplain, whichever distance is greater.

(c) "Shoreland zoning standard" means a standard for ordinances enacted under this section that are promulgated as rules by the department.

(1m) To effect the purposes of s. 281.31 and to promote the public health, safety and general welfare, each county shall zone by ordinance all shorelands in its unincorporated area. This ordinance may be enacted separately from ordinances enacted under s. 59.69.

NOTE: Sub. (1m) is shown as affected by two acts of the 1995 legislature and as merged by the revisor under s. 13.93 (2) (c).

(1r) An ordinance enacted under this section may not prohibit the maintenance of stairs, platforms or decks that were constructed before August 15, 1991, and that are located in any of the following shorelands:

(a) The shoreland of Lake Wissota in Chippewa county.

(b) The shorelands of Lake Holcombe in Chippewa and Rusk counties.

(2) (a) Except as otherwise specified, all provisions of s. 59.69 apply to ordinances and their amendments enacted under this section whether or not enacted separately from ordinances enacted under s. 59.69, but the ordinances and amendments shall not require approval or be subject to disapproval by any town or town board.

(b) If an existing town ordinance relating to shorelands is more restrictive than an ordinance later enacted under this section affecting the same shorelands, it continues as a town ordinance in all respects to the extent of the greater restrictions, but not otherwise.

(c) Ordinances 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.

(3) All powers granted to a county under s. 236.45 may be exercised by it with respect to shorelands, but the county must have or provide a planning agency as defined in s. 236.02 (3).

(4) (a) Section 66.30 applies to this section, except that for the purposes of this section an agreement under s. 66.30 shall be effected by ordinance. If the municipalities as defined in s. 281.31 are served by a regional planning commission under s. 66.945, the commission may, with its consent, be empowered by the ordinance of agreement to administer each ordinance enacted hereunder throughout its enacting municipality, whether or not the area otherwise served by the commission includes all of that municipality.

NOTE: Par. (a) is shown as affected by two acts of the 1995 legislature and as merged by the revisor under s. 13.93 (2) (c).

(b) Variances and appeals regarding shorelands within a county are for the board of adjustment for that county under s. 59.694, and the procedures of that section apply.

(5) An ordinance enacted under this section supersedes all provisions of an ordinance enacted under s. 59.69 that relate to shorelands.

(6) If a county does not enact an ordinance by January 1, 1968, or if the department, after notice and hearing, determines that a county has enacted an ordinance that fails to meet the shoreland zoning standards, the department shall adopt such an

town was organized shall deliver, if removable, all of his or her official papers and files pertaining to the new town and a certified copy of all relevant official records, papers and files not removable to the office of the clerk of the new town. Any record, paper or file delivered to the office of the clerk of a new town under this section shall have the same effect as if originally filed there.

History: 1983 a. 532.

60.09 When a county constitutes a town. (1) **GENERALLY.** If a county is not divided into towns, it shall, for purposes of town government, be considered one town.

(2) **MENOMINEE COUNTY.** The county of Menominee consists of one town, known as the town of Menominee.

History: 1983 a. 532.

SUBCHAPTER III

TOWN MEETING

60.10 Powers of town meeting. (1) **DIRECT POWERS.** The town meeting may:

(a) *Raise money.* Raise money, including levying taxes, to pay for expenses of the town, unless the authority has been delegated to the town board under sub. (2) (a).

(b) *Town offices and officers.* 1. Fix the compensation of elective town offices under s. 60.32, unless the authority has been delegated to the town board under sub. (2) (k).

2. Combine the offices of town clerk and town treasurer under s. 60.305 (1).

2m. In a town with a population of 2,500 or more, provide for the appointment by the town board of the town clerk, town treasurer, or both, or of the combined office of town clerk and town treasurer under s. 60.305 (1), at a level of compensation to be set by the board that may not be reduced during the term to which the person is appointed.

3. Combine the offices of town assessor and town clerk under s. 60.305 (2).

4. Establish or abolish the office of town constable and establish the number of constables. Abolition of the office is effective at the end of the term of the person serving in the office.

5. Designate the office of town clerk, town treasurer or the combined office of clerk and treasurer as part-time under s. 60.305 (1) (b).

6. Designate town board supervisors as full-time officers.

(c) *Election of town officers.* 1. Adopt a plan under s. 5.60 (6) to elect town board supervisors to numbered seats.

2. Provide under s. 8.05 (3) (a) for the nomination of candidates for elective town offices at a nonpartisan primary election.

(d) *Public waterways.* Appropriate money for the improvement and maintenance of a public waterway under s. 81.05.

(e) *Cemeteries.* Authorize the acquisition and conveyance of cemeteries under s. 157.50 (1) and (3).

(f) *Administrator agreements.* Approve agreements to employ an administrator for more than 3 years under s. 60.37 (3) (d).

(2) **DIRECTIVES OR GRANTS OF AUTHORITY TO TOWN BOARD.** Except as provided under par. (c), directives or grants of authority to the town board under this subsection may be general and continuing or may be limited as to purpose, effect or duration. A resolution adopted under this subsection shall specify whether the directive or grant is general and continuing or whether it is limited as to purpose, effect or duration. A resolution that is continuing remains in effect until rescinded at a subsequent town meeting by a number of electors equal to or greater than the number of electors who voted for the original resolution. This subsection does not limit any authority otherwise conferred on the town board by law. By resolution, the town meeting may:

(a) *Raise money.* Authorize the town board to raise money, including levying taxes, to pay for expenses of the town.

(b) *Membership of town board in populous towns.* In a town with a population of 2,500 or more, direct the town board to increase the membership of the board under s. 60.21 (2).

(c) *Exercise of village powers.* Authorize the town board to exercise powers of a village board under s. 60.22 (3). A resolution adopted under this paragraph is general and continuing.

(d) *General obligation bonds.* Authorize the town board to issue general obligation bonds in the manner and for the purposes provided by law.

(e) *Purchase of land.* Authorize the town board to purchase any land within the town for present or anticipated town purposes.

(f) *Town buildings.* Authorize the town board to purchase, lease or construct buildings for the use of the town, to combine for this purpose the town's funds with those of a society or corporation doing business or located in the town and to accept contributions of money, labor or space for this purpose.

(g) *Disposal of property.* Authorize the town board to dispose of town property, real or personal, other than property donated to and required to be held by the town for a special purpose.

(h) *Exercise of certain zoning authority.* In a town located in a county which has enacted a zoning ordinance under s. 59.69, authorize, under s. 60.62 (2), the town board to enact town zoning ordinances under s. 61.35.

(i) *Watershed protection and soil and water conservation.* Authorize the town board to engage in watershed protection, soil conservation or water conservation activities beneficial to the town.

(j) *Appointed assessors.* Authorize the town board to select assessors by appointment under s. 60.307 (2).

(k) *Compensation of elective town officers.* Authorize the town board to fix the compensation of elective town officers under s. 60.32 (1) (b).

(3) **AUTHORIZATION TO TOWN BOARD TO APPROPRIATE MONEY.** The town meeting may authorize the town board to appropriate money in the next annual budget for:

(a) *Conservation of natural resources.* The conservation of natural resources by the town or by a bona fide nonprofit organization under s. 60.23 (6).

(b) *Civic functions.* Civic and other functions under s. 60.23 (3).

(c) *Insects, weeds and animal diseases.* The control of insect pests, weeds or plant or animal diseases within the town.

(d) *Rural numbering systems.* Posting signs and otherwise cooperating with the county in the establishment of a rural numbering system under s. 59.54 (4) and (4m).

(e) *Cemetery improvements.* The improvement of the town cemetery under s. 157.50 (5).

History: 1983 a. 532; 1991 a. 39; 1995 a. 34, 201.

The terms "authorize" and "direct" in sub. (2) are not used interchangeably. A town meeting which "authorize(s)" an act gives the town board permission to do the act within its discretion, but if it "direct(s)" that an act be done the action is mandatory. *Graziano v. Town of Long Lake*, 191 W (2d) 813, 530 NW (2d) 55 (Ct. App. 1995).

60.11 Annual town meeting. (1) **REQUIREMENT.** Each town shall hold an annual town meeting, as provided in this section.

(2) **WHEN HELD.** (a) Except as provided in par. (b), the annual town meeting shall be held on the 2nd Tuesday of April.

(b) The annual town meeting may set a date different than provided under par. (a) for the next annual town meeting if the date is within 10 days after the 2nd Tuesday of April.

(3) **WHERE HELD.** (a) The annual town meeting may be held in the town or in any village or city within or adjoining the town.

(b) The annual town meeting shall be held at the location of the last annual town meeting unless the location is changed by the town board. If the town board changes the location, it shall publish a class 2 notice under ch. 985 stating the location of the meeting, not more than 20 nor less than 15 days before the date of the meeting.

its own motion. The decision of the board concerning errors or omissions is final.

(c) Immediately after the record of nonconforming uses is filed with the town clerk, the clerk shall furnish the town assessor the record of nonconforming uses within the town. After the assessment for the following year and each succeeding assessment, the town assessor shall file a written report, certified by the board of review, with the town clerk listing all nonconforming uses which have been discontinued since the prior assessment. The town clerk shall record discontinued nonconforming uses as soon as reported by the assessor. In this paragraph, "town assessor" includes the county assessor assessing the town under s. 70.99.

(d) Paragraphs (b) and (c) do not apply to towns issuing building permits as a means of enforcing the zoning ordinance or of identifying nonconforming uses or to towns which have established other procedures for this purpose.

(6) ENFORCEMENT. The town board may by ordinance provide for the enforcement of all ordinances adopted under this section. The board may impose forfeitures and other penalties for violation of ordinances adopted under this section. To enforce compliance with ordinances adopted under this section, the town or the owner of real estate within a district affected by the ordinance may seek a court order.

History: 1983 a. 532, 538; 1985 a. 136, 316; 1991 a. 255; 1993 a. 246, 301, 400, 414, 491; 1995 a. 27 s. 9130 (4); 1995 a. 201.

60.62 Zoning authority if exercising village powers.

(1) Subject to subs. (2) and (3), if a town board has been granted authority to exercise village powers under s. 60.10 (2) (c), the board may adopt zoning ordinances under s. 61.35.

(2) If the county in which the town is located has enacted a zoning ordinance under s. 59.69, the exercise of the authority under sub. (1) is subject to approval by the town meeting or by a referendum vote of the electors of the town held at the time of any regular or special election.

(3) In counties having a county zoning ordinance, no zoning ordinance or amendment of a zoning ordinance may be adopted under this section unless approved by the county board.

History: 1983 a. 532; 1995 a. 201.

An amended PUD ordinance which allowed the placement of a PUD in any district, subject only to the approval of the town board as a conditional use, was invalid as it allowed the town to rezone without county board approval. *City of Waukesha v. Town of Waukesha*, 198 W (2d) 592, 543 NW (2d) 515 (Ct. App. 1995).

Judicial review of county board's legislative decision concerning approval or disapproval of town zoning ordinances submitted under (3) is limited to cases of abuse of discretion, excess of power or error of law. 79 Atty. Gen. 117.

60.627 Town construction site erosion control and storm water management zoning. (1) DEFINITION. In this section, "department" means the department of natural resources.

(2) AUTHORITY TO ENACT ORDINANCE. (a) To effect the purposes of s. 281.33 and to promote the public health, safety and general welfare, if a town board may enact zoning ordinances under s. 60.62, the town board may enact a zoning ordinance, that is applicable to all of its area, for construction site erosion control at sites where the construction activities do not include the construction of a building and for storm water management. This ordinance may be enacted separately from ordinances enacted under s. 60.62.

(b) A county ordinance enacted under s. 59.693 does not apply and has no effect in a town in which an ordinance enacted under this section is in effect.

(4) APPLICABILITY OF VILLAGE ZONING PROVISIONS. (a) Except as otherwise specified in this section, the provisions of s. 61.35, as they apply to villages, apply to any ordinance or amendment to an ordinance enacted under this section.

(b) Variances and appeals regarding a construction site erosion control and storm water management ordinance under this section are to be determined by the board of appeals or similar agency for the town. To the extent specified under s. 61.35, procedures under s. 62.23 (7) (e) apply to these determinations.

(c) An ordinance enacted under this section supersedes all provisions of an ordinance enacted under s. 60.62 that relate to construction site erosion control at sites where the construction activities do not include the construction of a building or to storm water management regulation.

(5) APPLICABILITY OF COMPREHENSIVE ZONING PLAN OR GENERAL ZONING ORDINANCE. An ordinance enacted under this section shall accord and be consistent with any comprehensive zoning plan or general zoning ordinance applicable to the enacting town, so far as practicable.

(6) APPLICABILITY OF LOCAL SUBDIVISION REGULATION. All powers granted to a town under s. 236.45 may be exercised by it with respect to construction site erosion control at sites where the construction activities do not include the construction of a building or with respect to storm water management regulation, if the town has or provides a planning commission or agency.

(7) APPLICABILITY TO LOCAL GOVERNMENTS AND AGENCIES. An ordinance enacted under this section is applicable to activities conducted by a unit of local government and an agency of that unit of government. An ordinance enacted under this section is not applicable to activities conducted by an agency, as defined under s. 227.01 (1) but also including the office of district attorney, which is subject to the state plan promulgated or a memorandum of understanding entered into under s. 281.33 (2).

(8) INTERGOVERNMENTAL COOPERATION. (a) Except as provided in par. (c), s. 66.30 applies to this section, but for the purposes of this section any agreement under s. 66.30 shall be effected by ordinance.

(b) If a town is served by a regional planning commission under s. 66.945 and if the commission consents, the town may empower the commission by ordinance to administer the ordinance enacted under this section throughout the town, whether or not the area otherwise served by the commission includes all of that town.

(c) If a town is served by the Dane county lakes and watershed commission, and if the commission consents, the town may empower the commission by ordinance to administer the ordinance enacted under this section throughout the town, whether or not the area otherwise served by the commission includes all of that town. Section 66.30 does not apply to this paragraph.

(9) VALIDITY UPON ANNEXATION. An ordinance enacted under this section by a town continues in effect in any area annexed by a city or village after the effective date of that ordinance unless the city or village enacts, maintains and enforces a city or village ordinance which complies with minimum standards established by the department and which is at least as restrictive as the town ordinance enacted under this section. If, after providing notice and conducting a hearing on the matter, the department determines that an ordinance enacted by a city or village which is applicable to an area annexed after the effective date of the town ordinance does not meet these standards or is not as restrictive as the town ordinance, the department shall issue an order declaring the city or village ordinance void and reinstating the applicability of the town ordinance to the annexed area.

History: 1993 a. 246; 1995 a. 201, 227.

60.63 Community and other living arrangements. For purposes of s. 60.61, the location of a community living arrangement, as defined in s. 46.03 (22), a foster home, as defined in s. 48.02 (6), a treatment foster home, as defined in s. 48.02 (17q), or an adult family home, as defined in s. 50.01 (1), in any town shall be subject to the following criteria:

(1) No community living arrangement may be established after March 28, 1978 within 2,500 feet, or any lesser distance established by an ordinance of the town, of any other such facility. Agents of a facility may apply for an exception to this requirement, and such exceptions may be granted at the discretion of the local town. Two community living arrangements may be adjacent

tract may borrow money from such village accordingly and give its note therefor. No such loan shall be made to extend beyond August 30 next following the making thereof or in an amount exceeding one-half of the estimated receipts for such district as certified by the state superintendent of public instruction and the local school clerk. The rate of interest on any such loan shall be determined by the village board.

(5) CONSTRUCTION OF POWERS. For the purpose of giving to villages the largest measure of self-government in accordance with the spirit of article XI, section 3, of the constitution it is hereby declared that this chapter shall be liberally construed in favor of the rights, powers and privileges of villages to promote the general welfare, peace, good order and prosperity of such villages and the inhabitants thereof.

History: 1983 a. 192; 1987 a. 395; 1995 a. 27, 378.

Cross-reference: See s. 118.105 for control of traffic on school premises.

See note to 66.30, citing Village of McFarland v. Town of Dunn, 82 W (2d) 469, 263 NW (2d) 167.

See note to 30.77, citing State v. Village of Lake Delton, 93 W (2d) 78, 286 NW (2d) 622 (Ct. App. 1979).

Delegation of village powers to non-governmental entity discussed. See Elkhart Lake v. Elkhart Lake Village, 181 W (2d) 778, 512 NW (2d) 202 (Ct. App. 1993).

The state regulatory scheme for tobacco sales preempts municipalities from adopting regulations which are not in strict conformity with those of the state. U.S. Oil, Inc. v. City of Fond du Lac, 199 W (2d) 333, 544 NW (2d) 589 (Ct. App. 1995).

State statutory enabling legislation is required to authorize enactment of typical rent control ordinances. 62 Atty. Gen. 276.

Local units of government may not create and accumulate unappropriated surplus funds. 76 Atty. Gen. 77.

Ordinance authorizing placement of immobilization device on automobile is invalid. 77 Atty. Gen. 73.

Conflicts between state statute and local ordinance in Wisconsin. 1975 WLR 840.

61.342 Direct legislation. The provisions of s. 9.20, relating to direct legislation, shall be applicable to villages.

History: 1989 a. 273.

61.345 Recycling or resource recovery facilities. A village may establish and require use of facilities for the recycling of solid waste or for the recovery of resources from solid waste as provided under s. 287.13.

History: 1983 a. 27; 1989 a. 335 s. 89; 1995 a. 227.

61.35 Village planning. Section 62.23 applies to villages, and the powers and duties conferred and imposed by s. 62.23 upon mayors, councils and specified city officials are hereby conferred upon presidents, village boards, and village officials performing duties similar to the duties of such specified city officials, respectively. Any ordinance or resolution passed prior to May 30, 1925, by any village board under s. 61.35, 1923 stats., shall remain in effect until repealed or amended by such village board.

History: 1981 c. 390.

61.351 Zoning of wetlands in shorelands. (1) DEFINITIONS. As used in this section:

(a) "Shorelands" has the meaning specified under s. 59.692 (1) (b).

(b) "Wetlands" has the meaning specified under s. 23.32 (1).

(2) FILLED WETLANDS. Any wetlands which are filled prior to the date on which a village receives a final wetlands map from the department of natural resources in a manner which affects their characteristics as wetlands are filled wetlands and not subject to an ordinance adopted under this section.

(2m) CERTAIN WETLANDS ON LANDWARD SIDE OF AN ESTABLISHED BULKHEAD LINE. Any wetlands on the landward side of a bulkhead line, established by the village under s. 30.11 prior to May 7, 1982 and between that bulkhead line and the ordinary high-water mark are exempt wetlands and not subject to an ordinance adopted under this section.

(3) ADOPTION OF ORDINANCE. To effect the purposes of s. 281.31 and to promote the public health, safety and general welfare, each village shall zone by ordinance all unfilled wetlands of 5 acres or more which are shown on the final wetland inventory maps prepared by the department of natural resources for the village under s. 23.32, which are located in any shorelands and which are within its incorporated area. A village may zone by ordinance

any unfilled wetlands which are within its incorporated area at any time.

(4) VILLAGE PLANNING. (a) Powers and procedures. Except as provided under sub. (5), s. 61.35 applies to ordinances and amendments enacted under this section.

(b) Impact on other zoning ordinances. If a village ordinance enacted under s. 61.35 affecting wetlands in shorelands is more restrictive than an ordinance enacted under this section affecting the same lands, it continues to be effective in all respects to the extent of the greater restrictions, but not otherwise.

(5) REPAIR AND EXPANSION OF EXISTING STRUCTURES PERMITTED. Notwithstanding s. 62.23 (7) (h), an ordinance adopted under this section may not prohibit the repair, reconstruction, renovation, remodeling or expansion of a nonconforming structure in existence on the effective date of an ordinance adopted under this section or any environmental control facility in existence on the effective date of an ordinance adopted under this section related to that structure.

(6) FAILURE TO ADOPT ORDINANCE. If any village does not adopt an ordinance required under sub. (3) within 6 months after receipt of final wetland inventory maps prepared by the department of natural resources for the village under s. 23.32, or if the department of natural resources, after notice and hearing, determines that a village adopted an ordinance which fails to meet reasonable minimum standards in accomplishing the shoreland protection objectives of s. 281.31 (1), the department of natural resources shall adopt an ordinance for the village. As far as applicable, the procedures set forth in s. 87.30 apply to this subsection.

History: 1981 c. 330; 1995 a. 201, 227.

61.354 Construction site erosion control and storm water management zoning. (1) DEFINITION. As used in this section, "department" means the department of natural resources.

(2) AUTHORITY TO ENACT ORDINANCE. To effect the purposes of s. 281.33 and to promote the public health, safety and general welfare, a village may enact a zoning ordinance, that is applicable to all of its incorporated area, for construction site erosion control at sites where the construction activities do not include the construction of a building and for storm water management. This ordinance may be enacted separately from ordinances enacted under s. 61.35.

(4) APPLICABILITY OF VILLAGE ZONING PROVISIONS. (a) Except as otherwise specified in this section, s. 61.35 applies to any ordinance or amendment to an ordinance enacted under this section.

(b) Variances and appeals regarding construction site erosion control and storm water management regulations under this section are to be determined by the board of appeals or similar agency for that village. To the extent specified under s. 61.35, procedures under s. 62.23 (7) (e) apply to these determinations.

(c) An ordinance enacted under this section supersedes all provisions of an ordinance enacted under s. 61.35 that relate to construction site erosion control at sites where the construction activities do not include the construction of a building or to storm water management regulation.

(5) APPLICABILITY OF COMPREHENSIVE ZONING PLAN OR GENERAL ZONING ORDINANCE. Ordinances enacted under this section shall accord and be consistent with any comprehensive zoning plan or general zoning ordinance applicable to the enacting villages, so far as practicable.

(6) APPLICABILITY OF LOCAL SUBDIVISION REGULATION. All powers granted to a village under s. 236.45 may be exercised by it with respect to construction site erosion control at sites where the construction activities do not include the construction of a building or with respect to storm water management regulation, if the village has or provides a planning commission or agency.

(7) APPLICABILITY TO LOCAL GOVERNMENTS AND AGENCIES. An ordinance enacted under this section is applicable to activities conducted by a unit of local government and an agency of that unit of government. An ordinance enacted under this section is not applicable to activities conducted by an agency, as defined under



Chapter NR 115

WISCONSIN'S SHORELAND MANAGEMENT PROGRAM

NR 115.01 Purpose
NR 115.02 Applicability
NR 115.03 Definitions

NR 115.05 Shoreland regulation standards and criteria
NR 115.06 Department duties

Note: Chapter NR 115 as it existed on July 31, 1980, was repealed and a new chapter NR 115 was created effective August 1, 1980.

NR 115.01 Purpose. (1) Section 59.971, Stats., requires counties to adopt zoning and subdivision regulations for the protection of all shorelands in unincorporated areas by January 1, 1968, and provides that if the department of natural resources determines, after notice and hearing, that a county has not adopted a shoreland ordinance by January 1, 1968, or that a county has adopted an ordinance which fails to meet reasonable minimum standards in accomplishing the shoreland protection objectives found in s. 144.26, Stats., the department is to adopt a shoreland ordinance to be administered by that county.

(2) Section 114.26, Stats., provides that shoreland subdivision and zoning regulations shall: "further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty."

(3) It is the responsibility of the department of natural resources, in the discharge of its mandate under ss. 59.971 and 144.26, Stats., to require adherence to specific standards and criteria for navigable water protection regulations and their administration. Section 144.26, Stats., provides that: "Such standards and criteria shall give particular attention to safe and healthful conditions for the enjoyment of aquatic recreation; the demands of water traffic, boating and water sports; the capability of the water resource; requirements necessary to assure proper operation of septic tank disposal fields near navigable waters; building setbacks from the water; preservation of shore growth and cover; conservancy uses for low lying lands; shoreland layout for residential and commercial development; suggested regulations and suggestions for the effective administration and enforcement of such regulations."

History: Cr. Register, July, 1980, No. 295, eff. 8-1-80; reprinted to correct error, Register, December, 1980.

NR 115.02 Applicability. The provisions of this chapter are applicable to county regulation of the use and development of unincorporated shoreland areas. Unless specifically exempted by law, all cities, villages, towns, counties and, when s. 13.48 (13), Stats., applies, state agencies are required to comply with, and obtain all necessary permits under, local shoreland ordinances. The construction, reconstruction, maintenance and repair of state highways and bridges, carried out under the direction and supervision of the Wisconsin department of transportation are

not subject to local shoreland zoning ordinances, if s. 30.12 (4) (a), Stats., applies.

History: Cr. Register, July, 1980, No. 295, eff. 8-1-80; am. Register, October, 1980, No. 298, eff. 11-1-80.

NR 115.03 Definitions. For the purpose of this chapter.

(1) "Boathouse" means a permanent structure used for the storage of watercraft and associated materials and includes all structures which are totally enclosed, have roofs or walls or any combination of these structural parts.

(2) "County zoning agency" means that committee or commission created or designated by the county board under s. 59.97 (2) (a), Stats., to act in all matters pertaining to county planning and zoning.

(3) "Department" means the department of natural resources.

(4) "Flood plain" means the land which has been or may be hereafter covered by flood water during the regional flood. The flood plain includes the floodway and the flood fringe as those terms are defined in ch. NR 116.

(5) "Navigable waters" means Lake Superior, Lake Michigan, all natural inland lakes within Wisconsin and all streams, ponds, sloughs, flowages and other waters within the territorial limits of this state, including the Wisconsin portion of boundary waters, which are navigable under the laws of this state. Under s. 144.26 (2) (d), Stats., notwithstanding any other provision of law or administrative rule promulgated thereunder, shoreland ordinances required under s. 59.971, Stats., and this chapter do not apply to lands adjacent to farm drainage ditches if:

(a) Such lands are not adjacent to a natural navigable stream or river;

(b) Those parts of such drainage ditches adjacent to such lands were nonnavigable streams before ditching or had no previous stream history; and

(c) Such lands are maintained in nonstructural agricultural use.

Note: In *Muench v. Public Service Commission*, 261 Wis. 492 (1952), the Wisconsin Supreme Court held that a stream is navigable in fact if it is capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes. In *DeGayner and Co., v. Department of Natural Resources*, 70 Wis. 2d 936 (1975), the court also held that a stream need not be navigable in its normal or natural condition to be navigable in fact. The *DeGayner* opinion indicates that it is proper to consider artificial conditions, such as beaver dams, where such conditions have existed long enough to make a stream useful as a highway for recreation or commerce, and to consider ordinarily recurring seasonal fluctuations, such as spring floods, in determining the navigability of a stream.

(6) "Ordinary high-water mark" means the point on the bank or shore up to which the presence and action of surface water is so continuous as to leave a distinctive mark such as by erosion, destruction or prevention of terrestrial vegetation, predominance of aquatic vegetation, or other easily recognized characteristic. Where the bank or shore at any particular place is of such character that it is difficult or impossible to ascertain where the point of ordinary high-water mark is, recourse may be had to the opposite bank of a stream or to other places on the shore of a lake or flowage to determine whether a given stage of water is above or below the ordinary high-water mark.

(7) "Regional flood" means a flood determined to be representative of large floods known to have generally occurred in Wisconsin and which may be expected to occur on a particular stream because of like physical characteristics once in every 100 years.

Note: The regional flood is based upon a statistical analysis of stream-flow records available for watershed and/or an analysis of rainfall and runoff characteristics in the general watershed region. The flood frequency of the regional flood is once in every 100 years. In any given year, there is a 1% chance that the regional flood may occur. During a typical 30-year mortgage period, the regional flood has a 26% chance of occurring.

(8) "Shorelands" means lands within the following distances from the ordinary high-water mark of navigable waters: 1,000 feet from a lake, pond or flowage; and 300 feet from a river or stream or to the landward side of the flood plain, whichever distance is greater.

(9) "Shoreland-wetland zoning district" means a zoning district, created as a part of a county shoreland zoning ordinance, comprised of shorelands that are designated as wetlands on the Wisconsin wetland inventory maps prepared by the department.

(10) "Special exception (conditional use)" means a use which is permitted by a shoreland zoning ordinance provided that certain conditions specified in the ordinance are met and that a permit is granted by the board of adjustment or, where appropriate, the planning and zoning committee or county board.

(11) "Unnecessary hardship" means that circumstance where special conditions affecting a particular property, which were not self-created, have made strict conformity with restrictions governing area, setbacks, frontage, height or density unnecessarily burdensome or unreasonable in light of the purposes of the zoning ordinance.

(12) "Variance" means an authorization granted by the board of adjustment to construct, alter or use a building or structure in a manner that deviates from the requirements of a shoreland zoning ordinance.

(13) "Wetlands" means those areas where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation, and which have soils indicative of wet conditions.

History: Cr. Register, July, 1980, No. 295, eff. 8-1-80; renum. (2) to (12) to be (3) to (13), cr. (2), r. and recr. (7), am. (11) and (13), Register, October, 1980, No. 298, eff. 11-1-80.

NR 115.05 Shoreland regulation standards and criteria. (1) ESTABLISHMENT OF APPROPRIATE ZONING DISTRICTS. Counties shall adopt shoreland ordinances that include, at a minimum, zoning regulations for shoreland-wetland zoning districts. Other types of districts (such as general pur-

pose, agricultural, industrial, commercial, residential, recreational, conservancy, or wetlands districts) may be created in addition to shoreland-wetland zoning districts.

(2) **ESTABLISHMENT AND REGULATION OF SHORELAND-WETLAND ZONING DISTRICTS. (a) County review of preliminary wetland inventory maps.** Before the department prepares final Wisconsin wetland inventory maps:

1. The department shall transmit to the county zoning agency designated under s. 59.97 (2) (a), Stats., copies of preliminary wetland inventory maps for that county.

2. The county zoning agency shall have 90 days to review the preliminary maps unless the review period is extended by written approval of the department, but in no case shall the review period extend for more than 180 days.

3. The county zoning agency shall hold a public hearing to solicit public comments on the preliminary wetland inventory maps. Notice of the time and place of the hearing shall be mailed to the town clerk of each town in the county and shall be published as a class 1 notice, under ch. 985, Stats.

4. On or before the last day of the review period, the county zoning agency shall return the preliminary maps to the department. If the county zoning agency believes that the preliminary maps are inaccurate, discrepancies shall be noted on the maps with an accompanying narrative explaining the problem areas.

5. The department shall schedule a meeting with the county zoning agency within 30 days of the return of the preliminary maps if the county zoning agency has indicated that they believe that there are inaccuracies on the maps.

6. After meeting with the county zoning agency to discuss apparent map inaccuracies, the department shall, at department expense, consult available soil survey maps and conduct on-site inspections, if appropriate, in order to evaluate the county recommendations, and shall then prepare the final Wisconsin wetland inventory maps for that county.

7. The adoption of a final Wisconsin wetland inventory map is a final decision of the department and may be reviewed as provided in ch. 227, Stats.

(b) **County adoption of shoreland-wetland zoning.** 1. Each county shall, within 6 months after receipt of final Wisconsin wetland inventory maps for that county from the department, zone all shorelands within the county that are designated as wetlands on the Wisconsin wetland inventory maps, in a shoreland-wetland zoning district.

2. Ordinance text and map amendments creating shoreland-wetland zoning districts shall be referred to the county zoning agency for public hearing as required by s. 59.97 (5) (e) 3., Stats.

3. The appropriate district office of the department shall be provided with a copy of the proposed text and map amendments and with written notice of the public hearing at least 10 days prior to such hearing.

(c) **Permitted uses in shoreland-wetland zoning districts.** Within shoreland-wetland zoning districts, counties shall

permit the following uses subject to the general requirements of sub. (3), the provisions of chs. 30 and 31, Stats., and other state and federal laws, if applicable:

1. Hiking, fishing, trapping, hunting, swimming and boating.

2. The harvesting of wild crops, such as marsh hay, ferns, moss, wild rice, berries, tree fruits and tree seeds, in a manner that is not injurious to the natural reproduction of such crops and that does not involve filling, flooding, draining, dredging, ditching, tiling or excavating.

3. The practice of silviculture, including the planting, thinning and harvesting of timber, provided that no filling, flooding, draining, dredging, ditching, tiling or excavating is done except as required to construct and maintain roads which are necessary to conduct silviculture activities, which cannot as a practical matter be located outside the wetland, and which are designed and constructed to minimize the adverse impact upon the natural functions of the wetland, or except as required for temporary water level stabilization measures to alleviate abnormally wet or dry conditions which would have an adverse impact on the conduct of silvicultural activities if not corrected.

Note: Local units of government, in the development and application of ordinances which apply to shoreland areas, must consider other programs of statewide interest and other state regulations affecting the lands to be regulated, i.e. regulations and management practices applicable to state and county forests and lands entered under the forest cropland and woodland tax law programs.

4. The pasturing of livestock and the construction and maintenance of fences, provided that no filling, flooding, draining, dredging, ditching, tiling or excavating is done.

5. The cultivation of agricultural crops if cultivation can be accomplished without filling, flooding or artificial drainage of the wetland through ditching, tiling, dredging or excavating except that flooding, dike and dam construction, and ditching shall be allowed for the purpose of growing and harvesting cranberries. The maintenance and repair of existing drainage systems (such as ditching and tiling) shall be permitted. The construction and maintenance of roads shall be permitted if the roads are necessary for agricultural cultivation, cannot as a practical matter be located outside the wetland, and are designed and constructed to minimize the adverse impact upon the natural functions of the wetland.

6. The construction and maintenance of duck blinds provided that no filling, flooding, draining, dredging, ditching, tiling or excavating is done.

7. The construction and maintenance of nonresidential buildings used solely in conjunction with the raising of waterfowl, minnows, or other wetland or aquatic animals, or used solely for some other purpose which is compatible with wetland preservation if such building cannot as a practical matter be located outside the wetland, not to exceed 500 square feet, provided that no filling, flooding, draining, dredging, ditching, tiling or excavating is done.

8. The construction and maintenance of piers, docks and walkways, including those built on pilings, provided that no filling, flooding, dredging, draining, ditching, tiling or excavating is done.

9. The establishment and development of public and private parks and recreation areas, boat access sites, natural and outdoor education areas, historic and scientific areas, wildlife refuges, game preserves and private wildlife habitat areas, provided that no filling is done and that any private wildlife habitat area is used exclusively for that purpose. The owner or operator of a new private recreation or wildlife area to be located in a shoreland-wetland zoning district shall be required to notify the county zoning agency of the proposed project before beginning construction. Ditching, excavating, dredging, dike and dam construction shall be allowed in wildlife refuges, game preserves, and private wildlife habitat areas for the purpose of improving wildlife habitat or to otherwise enhance wetland values.

10. The construction and maintenance of electric, gas, telephone water and sewer transmission and distribution lines, and related facilities, by public utilities and cooperative associations organized for the purpose of producing or furnishing heat, light, power or water to their members, which cannot as a practical matter be located outside the wetland, provided that any filling, excavating, ditching or draining necessary for such construction or maintenance is done in a manner designed to minimize flooding and other adverse impacts upon the natural functions of the wetland.

Note: Major electrical generating facilities and high-voltage transmission lines that have obtained a certificate of public convenience and necessity under s. 196.491, Stats., are not subject to the requirements of local ordinances.

11. The construction and maintenance of railroad lines which cannot as a practical matter be located outside the wetland, provided that any filling, excavating, ditching or draining necessary for such construction or maintenance is done in a manner designed to minimize flooding and other adverse impacts upon the natural functions of the wetland.

12. The maintenance, repair, replacement, and reconstruction of existing town and county highways and bridges.

(d) *Prohibited uses in shoreland-wetland zoning districts.* Any use not permitted in par. (c) is prohibited in a shoreland-wetland zoning district unless the wetland or portion thereof is rezoned by amendment of the county shoreland zoning ordinance in accordance with s. 59.79 (5) (e), Stats., and the procedures outlined in par. (e).

(e) *Rezoning of shoreland-wetland zoning districts.* 1. Official ordinance amendments are required for any change in shoreland-wetland zoning. Such amendments shall be made upon petition in accordance with provisions of s. 59.97 (5) (e), Stats.

2. The county clerk shall submit a copy of every petition for an amendment to a shoreland-wetland zoning district to the appropriate district office of the department within 5 days of the filing of such petition with the clerk.

3. All proposed text and map amendments to shoreland-wetland zoning districts shall be referred to the county zoning for a public notice and hearing as required by s. 59.907 (5) (e) 3., Stats. The appropriate district office of the department shall be provided with written notice of the public hearing at least 10 days prior to such hearing.

4. In order to ensure that the shoreland protection objectives found in s. 144.26, Stats., will be accomplished by the county shoreland ordinance, a county shall not rezone a shoreland-wetland zoning district, or portion thereof, if the proposed rezoning may result in a significant adverse impact upon any of the following:

- a. Storm and flood water storage capacity;
- b. Maintenance of dry season stream flow, or the discharge of groundwater to a wetland, the recharge of groundwater from a wetland to another area, or the flow of groundwater through a wetland;
- c. Filtering or storage of sediments, nutrients, heavy metals or organic compounds that would otherwise drain into navigable waters;
- d. Shoreline protection against soil erosion;
- e. Fish spawning, breeding, nursery or feeding grounds;
- f. Wildlife habitat; or
- g. Areas of special recreational, scenic or scientific interest, including scarce wetland types.

5. If the department determines that the proposed rezoning may have a significant adverse impact upon any of the criteria listed in subd. 4, the department shall notify the county zoning agency of its determination either prior to or during the public hearing held on the proposed amendment.

6. As soon as possible after holding a public hearing, the county zoning agency shall submit its written findings and recommendations to the county board. Said findings shall outline the reason for the agency's recommendations. After receipt of the county zoning agency's findings and recommendations, the board may approve or disapprove of the proposed amendment.

7. The appropriate district office of the department shall be provided with:

- a. A copy of the county zoning agency's findings and recommendations on the proposed amendment within 10 days after the submission of those findings and recommendations to the county board; and
- b. Written notice of the board's decision on the proposed amendment within 10 days after it is issued.

8. If the county board approves of the proposed amendment and the department determines, after review as required by s. NR 115.06 (2) (c), that the county shoreland zoning ordinance if so amended would no longer comply with the requirements of s. 59.971, Stats., and this chapter, the department shall, after notice and hearing, adopt a complying ordinance for the county, under s. 59.971 (6), Stats.

9. If the department has notified the county zoning agency that a proposed amendment may have a significant adverse impact upon any of the criteria listed in subd. 4., that proposed amendment, if approved by the county board, shall not become effective until more than 30 days have elapsed since written notice of the county board's approval was mailed to the department, as required by subd. 7. If within the 30-day period the department notifies the county board that the department in-

tends to adopt a superseding shoreland zoning ordinance for the county under s. 59.971 (6), Stats., the proposed amendment shall not become effective while the ordinance adoption procedure is proceeding, but shall have its effect stayed until the s. 59.971 (6), Stats., procedure is completed or otherwise terminated.

(3) ESTABLISHMENT OF ZONING REGULATIONS FOR SHORELAND AREAS. The shoreland zoning ordinance adopted by each county shall provide sufficient control of the use of shorelands to afford the protection of water quality as specified in chs. NR 102 and 103. At a minimum, the ordinance shall include the following provisions:

(a) *Minimum lot sizes.* Minimum lot sizes in the shoreland area shall be established to afford protection against danger to health, safety and welfare, and protection against pollution of the adjacent body of water.

1. Lots served by public sanitary sewer shall have a minimum average width of 65 feet and a minimum area of 10,000 square feet.

2. Lots not served by public sanitary sewer shall have a minimum average width of 100 feet and a minimum area of 20,000 square feet.

(b) *Building setbacks.* Permitted building setbacks shall be established to conform to health, safety and welfare requirements, preserve natural beauty, reduce flood hazards and avoid water pollution.

1. Unless an existing development pattern exists, a setback of 75 feet from the ordinary high-water mark of an adjacent body of water to the nearest part of a building or structure, shall be required for all buildings and structures, except piers, boat hoists and boathouses.

2. Buildings and structures to be constructed or placed in a flood plain shall be required to comply with any applicable flood plain zoning ordinance.

3. The use of boathouses for human habitation and the construction or placing of boathouses beyond the ordinary high-water mark of any navigable waters shall be prohibited.

(c) *Trees and shrubbery.* The cutting of trees and shrubbery shall be regulated to protect natural beauty, control erosion and reduce the flow of effluents, sediments and nutrients from the shoreland area.

1. In the strip of land 35 feet wide inland from the ordinary high-water mark, no more than 30 feet in any 100 feet shall be clear-cut.

2. In shoreland areas more than 35 feet inland, trees and shrub cutting shall be governed by consideration of the effect on water quality and consideration of sound forestry practices and soil conservation practices.

3. The tree and shrubbery cutting regulations required by this paragraph shall not apply to the removal of dead, diseased or dying trees or shrubbery.

(d) *Filling, grading, lagooning, dredging, ditching and excavating.* Filling, grading, lagooning, dredging, ditching and excavating may be permitted only in accordance with the provisions of sub. (2), the requirements of ch. 30, Stats., and other state and federal laws where applicable, and only if done in a manner designed to minimize ero-

sion, sedimentation and impairment of fish and wildlife habitat.

(e) *Nonconforming uses.* 1. Under s. 59.97 (10), Stats., the continuation of the lawful use of a building, structure or property, existing at the time an ordinance or ordinance amendment takes effect, which is not in conformity with the provisions of the ordinance or amendment, including routine maintenance of such a building or structure, shall not be prohibited, but the alteration of, addition to, or repair, over the life of the building or structure, in excess of 50% of the equalized assessed value of an existing nonconforming building or structure may be prohibited. If a county prohibits alteration, addition or repair in excess of 50% of the equalized assessed value of an existing nonconforming building or structure, the property owner may either appeal the decision to the county board of adjustment and seek court review if the board's determination is unfavorable, under s. 59.99 (4) and (10), Stats., or petition to have the property rezoned under sub. (2) (e) and s. 59.97 (5) (e), Stats.

2. The continuance of the nonconforming use of a temporary structure may be prohibited.

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

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

(4) **ESTABLISHMENT OF LAND DIVISION REVIEW.** Each county shall review, pursuant to s. 236.45, Stats., all land divisions in shoreland areas which create 3 or more parcels or building sites of 5 acres each or less within a 5-year period. In such review the following factors should be considered:

(a) Hazards to the health, safety or welfare of future residents.

(b) Proper relationship to adjoining areas.

(c) Public access to navigable waters, as required by law.

(d) Adequate storm drainage facilities.

(e) Conformity to state law and administrative code provisions.

(5) **ESTABLISHMENT OF SANITARY REGULATIONS.** Each county shall adopt sanitary regulations for the protection of health and the preservation and enhancement of water quality.

(a) Where public water supply systems are not available, private well construction shall be required to conform to ch. NR 812.

(b) Where a public sewage collection and treatment system is not available, design and construction of private sewage disposal systems shall, prior to July 1, 1980, be required to comply with ch. ILHR 83, and after June 30, 1980, be governed by a private sewage system ordinance adopted by the county under s. 59.065, Stats.

(6) **ADOPTION OF ADMINISTRATIVE AND ENFORCEMENT PROVISIONS.** The shoreland ordinance adopted by each county shall provide for:

(a) The appointment of an administrator and such additional staff as the workload may require.

(b) The creation of a zoning agency, as authorized by s. 59.97, Stats., a board of adjustment, as authorized by s. 59.99, Stats., and a county planning agency, as defined in s. 236.02 (1), Stats., and required by s. 59.971 (3), Stats.

(c) A system of permits for all new construction, development, reconstruction, structural alteration or moving of buildings and structures. A copy of all applications shall be required to be filed in the office of the county zoning administrator.

(d) Regular inspection of permitted work in progress to insure conformity of the finished structures with the terms of the ordinance.

(e) A variance procedure which authorizes the board of adjustment to grant such variance from the terms of the ordinance as will not be contrary to the public interest where, owing to special conditions and the adoption of the shoreland zoning ordinance, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, as long as the granting of a variance does not have the effect of granting or increasing any use of property which is prohibited in that zoning district by the shoreland zoning ordinance.

(f) A special exception (conditional use) procedure for uses presenting special problems.

(g) The county shall keep a complete record of all proceedings before the board of adjustment, zoning agency and planning agency.

(h) Written notice to the appropriate district office of the department at least 10 days prior to hearings on proposed variances, special exceptions (conditional uses), appeals for map or text interpretations, and map or text amendments, and submission to the same office of the department of copies of decisions on variances, special exceptions (conditional uses), appeals for map or text interpretations, and map or text amendments within 10 days after they are granted or denied.

(i) Mapped zoning districts and the recording, on an official copy of such map, of all district boundary amendments.

(j) The establishment of appropriate penalties for violations of various provisions of the ordinance, including forfeitures. Compliance with the ordinance shall be enforceable by the use of injunctions to prevent or abate a violation, as provided in s. 59.97 (11), Stats.

(k) The prosecution of violations of the shoreland ordinance.

History: Cr. Register, July, 1980, No. 295, eff. 8-1-80; r. and recr. (2) (a) 3., am. (2) (a) 6., (2) (c) 3., 5., 7., 9., 10., (3) (d), (3) (e) 1. and cr. (2) (c) 11. and 12., Register, October, 1980, No. 298, eff. 11-1-80; correction in (5) (a) made under s. 13.93 (2m) (b) 7., Stats., Register, September, 1995, No. 477.

NR 115.06 Department duties. (1) **ASSISTANCE TO COUNTIES.** To the full extent of its available resources, the department shall provide advice and assistance to counties

NR 115.06

in the development, adoption, administration and enforcement of their shoreland zoning and land division ordinances, seeking the highest practicable degree of uniformity consistent with the shoreland protection objectives found in s. 144.26, Stats. As a part of this effort, the department shall prepare a model shoreland zoning ordinance which counties may use in meeting the requirements of s. 59.971, Stats., and this chapter.

(2) REVIEW AND APPROVAL OF SHORELAND ZONING AND LAND DIVISION ORDINANCES. (a) Compliance with the requirements of s. 59.971, Stats., will be determined by the department by comparing the shoreland zoning and land division ordinance that has been enacted by a county with the minimum standards for shoreland regulation contained in s. NR 115.05. The department shall issue a certificate of compliance when a county has, in the opinion of the department, complied with s. 59.971, Stats., and this chapter.

(b) The department shall periodically reevaluate shoreland zoning and land division ordinances to ascertain their continuing compliance with s. NR 115.05. A county shall keep its shoreland ordinance current, effective and workable to retain its status of compliance.

(c) The department shall review all proposed amendments to shoreland wetland zoning districts pursuant to NR 115.05 (2) (e) 5., to ensure that an ordinance which is amended as proposed will retain its status of compliance with s. 59.971, Stats., and this chapter.

(3) DETERMINATION OF NONCOMPLIANCE. (a) Counties which do not have a shoreland zoning and land division ordinance in effect shall be deemed to be in noncompliance with s. 59.971, Stats., and this chapter. The department shall, pursuant to s. 59.971 (6), Stats., adopt an ordinance, after notice and hearing, if a county fails to either:

1. Proceed with the drafting and enactment of shoreland regulations within a given time period, or,

2. Contact with a consultant to draft the regulations within a given time period, or,

3. Cooperate with the staff of the department to draft the shoreland ordinance to be enacted by the county within a given time period. All costs for such action by the department shall be borne by the noncomplying county.

(b) Counties which have shoreland zoning and land division ordinances that do not meet the minimum standards contained in s. NR 115.05 shall be deemed to be in noncompliance with the requirements of s. 59.971, Stats., and this chapter. If a county fails to modify its ordinance to meet the minimum standards within 6 months after receipt of final Wisconsin wetland inventory maps for that county, the department shall adopt an ordinance for the county, after notice and hearing, pursuant to s. 59.971 (6), Stats.

(4) MONITORING. It is the responsibility of the department, to aid in the fulfillment of the state's role as trustee of its navigable waters, to monitor the administration and enforcement of shoreland zoning and land division ordinances. In so doing, the department:

(a) Shall review decisions granting special exceptions (conditional uses), variances and appeals to ensure compliance with the applicable shoreland zoning ordinances and this chapter;

(b) May appeal the actions of county zoning officials to county boards of adjustment, under s. 59.99 (4), Stats.; and

(c) May seek court review of the decisions of boards of adjustment, under s. 59.99 (10), Stats.

History: Cr. Register, July, 1980, No. 295, eff. 8-1-80; am. (3) (b), Register, October, 1980, No. 298, eff. 11-1-80.

Chapter NR 326

PIERS AND BOAT SHELTERS IN NAVIGABLE WATERWAYS

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NR 326.01 Purpose. (1) These rules are promulgated under ss. 30.03, 30.12, 30.13, 30.14, 30.15, and 227.11, Stats., in order to provide consistency in the application of ss. 30.12 and 30.13, Stats., to the construction of piers, boat shelters and similar structures on the beds of navigable waterways as aids to navigation.

(2) A secondary purpose of this chapter is to define terms set forth in ss. 30.12, 30.13, 30.14, and 30.15, Stats.

History: Cr. Register, March, 1981, No. 303, eff. 4-1-81; am. Register, August, 1991, No. 428, eff. 9-1-91.

NR 326.02 Applicability. (1) This chapter shall apply to all piers and boat shelters constructed or maintained by riparians on the beds of navigable waterways for the purpose of providing improved navigation access to those waterways.

(2) The department shall apply this chapter only in response to:

(a) Complaint by a riparian, municipality, or any other person that a pier or boat shelter exists in navigable waters in violation of s. 30.12 or 30.13, Stats.;

(b) Complaint by a riparian that an adjacent riparian's pier or boat shelter interferes with access to navigable water;

(c) Complaint by a riparian or any other person that a pier or boat shelter interferes with rights of navigation;

(d) Request by a riparian for information regarding standards to be applied to pier or boat shelter construction;

(e) Application by a riparian for authority to construct a solid pier, any other pier requiring a permit or a permanent boat shelter under s. 30.12, Stats.

History: Cr. Register, March, 1981, No. 303, eff. 4-1-81; am. Register, August, 1991, No. 428, eff. 9-1-91.

NR 326.03 Definitions. (1) "Boat shelter" as defined in s. 30.01 (1c), Stats., means a structure in navigable waters designed and constructed for the purpose of providing cover for a berth place for watercraft, which may have a roof but may not have walls or sides. Such a structure may include a boat hoist.

(2) "Department" means the department of natural resources.

(3) "Line of navigation" means the 3 foot depth contour or a greater depth contour if required for boats in use or appropriate for use on the waterway, based on the normal summertime low levels on the waterway or summer minimum levels where established by department order.

(4) "Littoral drift" means the sedimentary material which moves in the zone of waves breaking on the shore because of waves and current.

(5) "Ordinary highwater mark" has the definition contained in s. NR 320.03 (4).

(6) "Outlying waters" as defined in s. 29.01 (4), Stats., means Lakes Superior and Michigan, Green Bay, Sturgeon Bay, Sawyer's harbor, and the Fox river from its mouth up to the dam at DePere.

(7) "Pier" as defined in s. 30.01 (5), Stats., means any structure extending channelward from the shore with water on both sides, built or maintained for the purpose of providing a berthing or mooring place for watercraft or for loading or unloading cargo or

passengers onto or from watercraft. Such a structure may include a boat shelter which is removed seasonally.

(8) "Pierhead line" means a line established in the water adjacent to and roughly parallel to the shoreline under s. 30.13, Stats., by municipalities, and subject to approval by the department, for the purpose of creating uniformity in the length of piers extending from the shoreline into the waterway.

(9) "Riparian" means an owner of land adjacent to navigable waters.

(10) "Solid pier" means a structure, not allowing for the free flow of water beneath, extending into the water from the shore to serve as an aid to navigation. For the purposes of this chapter, the term solid pier does not include piers that utilize rock filled cribs or similar types and size devices as foundation. Such foundations require permits under s. 30.12, Stats.

(11) "Visually intrusive" means clearly standing out from the shoreline background because of color or reflectivity when viewed from out on the water during the time when leaves are on deciduous trees.

History: Cr. Register, March, 1981, No. 303, eff. 4-1-81; renum. (1) to (9) to be (2) to (10) and am. (7) and (9), cr. (1) and (11), Register, August, 1991, No. 428, eff. 9-1-91.

NR 326.04 Pier standards. (1) Except as provided in sub. (2) or (8), piers shall not extend into the water from the shoreline beyond the line of navigation or the length of the boat using the pier unless a need can be demonstrated by the riparian that boats using the pier require a greater depth of water. The depth of water necessary for nonfixed keel sailboats shall be measured with the centerboard or dagger boards raised.

(2) Piers may extend out to any pierhead line.

(3) (a) Solid piers may be permitted under s. 30.12 (2), Stats., only on the following waters:

1. Outlying waters;
2. Harbors connected to outlying waters;
3. Fox river from the DePere dam to Lake Winnebago;
4. Lake Winnebago; and
5. Mississippi river.

(b) Solid piers shall be provided with a sufficient opening to provide for the passage of littoral drift. The opening size shall be adequate to prevent the deposition of littoral drift considering wave energy, littoral drift supply and near-shore water depths.

(4) A pier shall not totally enclose any portion of a navigable waterway.

(5) Piers shall not unreasonably obstruct navigation or otherwise interfere with public rights in navigable waters.

(6) Piers shall not interfere with the rights of other riparians.

(7) Piers shall not interrupt the free movement of water nor cause the formation of land by deposition of littoral drift upon the bed of the water.

(8) Piers associated with marinas and other similar mooring facilities shall not extend into the water from the shoreline beyond the line of navigation unless a permit is obtained under s. 30.12 (2), Stats. Such marinas shall be open to the public. Use of the fa-

cility by the public may be conditioned only on the payment of a reasonable mooring or anchoring fee.

Note: As an example, the use of such an extended pier shall not be conditioned upon membership in a private club or organization, purchase of a parcel or property, or purchase of a boat.

(9) Piers shall not be constructed or maintained with a screen or in any other manner which would trap or accumulate aquatic plants.

History: Cr. Register, March, 1981, No. 303, eff. 4-1-81.

NR 326.05 Permits required. Riparians intending to construct solid piers, rock-filled cribs or similar types and size devices used as foundations, piers which extend beyond established pierhead lines, or piers not conforming to s. NR 326.04 (1) or (9), shall apply for permits under s. 30.12 (2), Stats.

History: Cr. Register, March, 1981, No. 303, eff. 4-1-81.

NR 326.055 Boat shelter standards. Boat shelters shall comply with the standards in this section.

(1) GENERAL STANDARDS FOR PERMANENT AND SEASONAL BOAT SHELTERS. (a) A boat shelter may be placed and maintained only by a riparian.

(b) A boat shelter may not interfere with public rights and may not have an unreasonable adverse effect on aquatic habitat.

(c) A boat shelter may not interfere with the rights of other riparians and shall comply with the provisions of s. NR 326.07.

(d) A boat shelter shall allow the free movement of water underneath and may not cause formation of land on the bed of the waterway.

(e) A boat shelter shall comply with applicable provisions of any municipal ordinances adopted under s. 30.12 (3) (a) 6. and (c), Stats.

(2) LOCATION AND DESIGN STANDARDS FOR PERMANENT AND SEASONAL BOAT SHELTERS. (a) Except for designations under s. 30.275, Stats., a boat shelter may not be placed in any waterway designated by federal, state or local government as having outstanding scenic values.

(b) A boat shelter may not be visually intrusive as viewed against the shoreline. A seasonal boat shelter which was originally placed prior to September 1, 1991 and which is visually intrusive, but is otherwise in compliance with this section, may continue to be placed seasonally until January 1, 1996. Any seasonal boat shelter placement after January 1, 1996 shall comply with this section.

Note: For example a white shelter viewed against similarly colored structural development on or near the shoreline would comply with this subsection. The same shelter viewed against a naturally vegetated shoreline would not comply.

(c) All boat shelters shall be designed and used exclusively for the berthing of a single watercraft. Any boat shelter originally placed or permitted after September 1, 1991 may not exceed an outside dimension of 12 feet wide by 24 feet long on waters under 1000 acres in size and may not exceed an outside dimension of 14 feet wide by 24 feet long on waters 1000 acres and larger in size. The burden of proving that a boat shelter was placed prior to September 1, 1991 shall be on the owner. A seasonal boat shelter originally placed prior to September 1, 1991 and which does not comply with this subsection may not be expanded in size.

(d) A boat shelter shall be connected to adjacent uplands by a pier.

(e) A boat shelter may include a roof but may not include walls, sides or equivalent construction. A boat shelter roof shall be pitched not less than 1 foot nor more than 2.5 feet from the roof peak to the bottom of the eaves. Only the size and number of vertical components required to support the watercraft and any roof are permitted.

(f) Storage facilities may only be included above the eaves of a boat shelter.

(g) A boat shelter may include only a single sign necessary to identify the property and may only include lighting essential for safety and mooring.

(h) The number of boat shelters placed adjacent to a property is limited to one permanent and one seasonal shelter or 2 seasonal shelters for the first 100 feet or lesser amount of shoreline frontage. One additional seasonal shelter may be placed for each additional 50 feet of shoreline frontage in common ownership. For the purpose of this subsection, shoreline shall be measured along a straight line connecting points where property lines meet the ordinary high water mark. This subsection shall apply to all permanent shelters and seasonal shelters originally placed after September 1, 1991.

(i) Permanent and seasonal boat shelters shall be placed as close together as practicable at a single location adjacent to each property. Adjacent lots in common ownership shall be considered a single property for the purpose of this subsection.

(3) SEASONAL BOAT SHELTERS. (a) A boat shelter which is completely removed from the waterway between December 1 and April 1 annually and which complies with subs. (1) and (2) and this subsection may be placed by a riparian without a permit from the department.

(b) A seasonal shelter may not extend beyond the line of navigation or an approved pierhead line.

(4) PERMANENT BOAT SHELTERS. (a) A boat shelter which is not removed seasonally as provided in sub. (3) may be authorized by the department upon application by a riparian if the construction complies with subs. (1) and (2) and the requirements of this subsection.

(b) No permit may be granted for a permanent boat shelter constructed after May 3, 1988 if the owner's riparian property also contains a boathouse over navigable waters or within 75 feet of the ordinary high water mark. Each permit issued for a permanent boat shelter shall contain a condition which provides that the permit becomes void if there is any subsequent construction of a boathouse over navigable waters adjacent to the owner's property or within 75 feet of the ordinary high water mark on the owner's property.

(c) A permit may not be granted for a permanent boat shelter to be placed on lakes or flowages of less than 500 acres or on rivers except the Mississippi river, the Wolf river from Lake Butte des Morts to the upstream limits of the village of Fremont, and the Fox river from the DePere dam to Lake Winnebago. For the purpose of this subsection a series of lakes or flowages which have a connection which is commonly navigated by motorized craft and which have a common water level shall be considered a single lake or flowage. Artificial mooring basins and navigation channels and reaches of rivers where water levels are controlled by a dam are considered part of the lake or flowage to which they are connected for the purpose of this subsection.

(d) No more than one permanent boat shelter may be permitted for each riparian property. Contiguous lots in common ownership shall be considered one property for the purpose of this subsection.

(e) A permanent boat shelter may not extend more than 30 feet from the shoreline or to the line of navigation, whichever is less, on rivers named in par. (c) and on waters between 500 and 1000 acres in size and may not extend more than 50 feet from the shoreline or to the line of navigation, whichever is less, on waters 1000 acres and larger in size. For the purpose of this subsection the shoreline shall be established at normal summer low water levels.

(f) Permits for permanent boat shelters may only be granted for locations adjacent to developed shorelines. Developed shorelines are those where there are at least 5 principal structures including at least one on the applicant's property which are located within

500 feet of the proposed shelter site and which are visually intrusive as viewed from a location on the water.

History: Cr. Register, August, 1991, No. 428, eff. 9-1-91.

NR 326.06 Complaints. (1) Upon receipt of a complaint by any municipality or person under s. 30.14, Stats., the department shall investigate the pier, boat shelter or related structure mentioned in the complaint to determine if it conforms with applicable provisions of s. 30.12 or 30.13, Stats., and this chapter, and shall provide all known parties with the results of the investigation. The department may request such additional information as may be required from the complainant.

(2) Upon completion of the investigation, the department may conduct a hearing under s. 30.14, Stats.

(3) The burden of proving that a pier or boat shelter is in violation of s. 30.12 or 30.13, Stats., and this chapter, is ordinarily on the complainant.

(4) This section does not limit in any manner the authority of the department to bring any enforcement action alleging that a pier or boat shelter adversely affects public rights in navigable waters.

History: Cr. Register, March, 1981, No. 303, eff. 4-1-81; am. Register, August, 1991, No. 428, eff. 9-1-91.

NR 326.07 Riparian rights determinations. (1) In order to determine whether a pier or boat shelter interferes with the rights of an adjacent riparian, the department shall use the method outlined in this subsection which it determines most fully meets the Wisconsin supreme court ruling in *Rondesvedt v. Running*, 19 Wis. 2d 614 (1962), that "... each must have his due proportion of the line bounding navigability and a course of access to it from the shore exclusive of every other owner, and that all rules for apportionment or division are subject to such modification as may be necessary to accomplish substantially this result."

(2) The alternative methods of apportionment include:

(a) *Apportionment of the line of navigation.* The general procedure for the apportionment of the line of navigation is to measure the whole shoreline of the cove or bay and the line of navigation in front of the shoreline and to apportion the line of navigation among the riparians in proportion to the length of their respective

holdings on the shoreline. The area of water within which each riparian may place a pier to reach the line of navigation is determined by drawing straight lines between the corresponding points of division on the shoreline and the line of navigation.

(b) *Coterminous riparian rights lines.* Chords are drawn to connect points established at the intersection of each lot line with the ordinary highwater mark. The lines which bisect the angle formed by adjacent chords are the coterminous riparian rights lines. The extension of the coterminous riparian rights lines to the line of navigation describes the portion of the water within which each riparian may place a pier to gain access to the line of navigation. If the coterminous riparian rights lines intersect before the line of navigation is reached, another method of apportionment will be used.

(c) *Extended lot lines.* Under the extended lot line method the area of water within which each riparian may place a pier to reach the line of navigation is determined by extending the lot lines along the same alignment from the upland to the line of navigation.

(d) *Other method.* Any other method for determining the rights of riparians to gain access to the line of navigation that is compatible with the general rule adopted in sub. (1).

(3) To provide each riparian with sufficient room to place a pier and moor a boat along the common line between adjacent riparians the following technique will be used:

(a) Each riparian shall back their respective pier away from the common line or point of intersection of that line with the line of navigation in proportion to the riparian's share of the 2 adjacent shoreline lengths until sufficient room is provided to moor each riparian's boat at their respective pier and to provide safe maneuvering room for each boat to approach or leave the respective pier.

(b) If a riparian cannot move sufficiently from one side without violating the rule on the other side, then the riparian shall position the pier in that location which best satisfies the rule on both sides and each riparian shall then move far enough to the side regardless of shoreline proportions to afford the necessary clearance.

History: Cr. Register, March, 1981, No. 303, eff. 4-1-81; reprinted to correct error, Register, May, 1981, No. 305; am. (1), Register, August, 1991, No. 428, eff. 9-1-91.

