

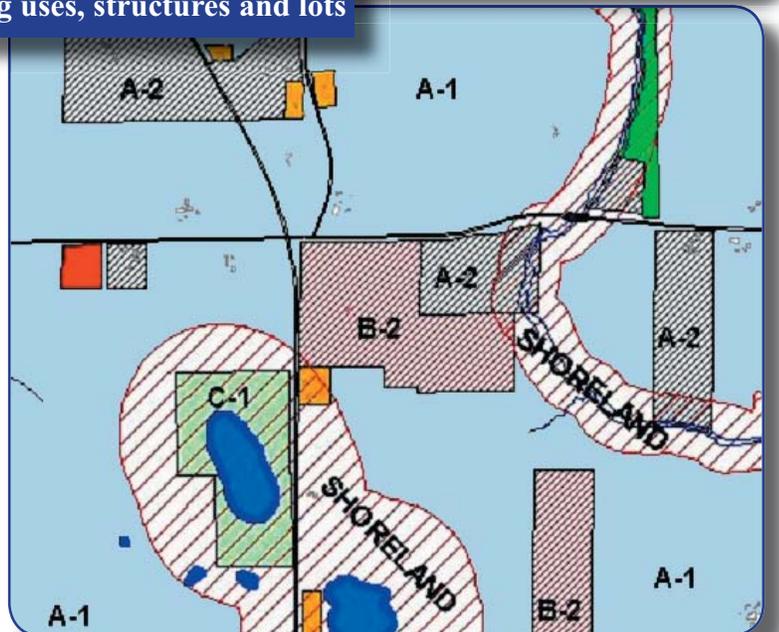
# Zoning Nonconformities

Application of new rules to existing development

A guide to developing policies for nonconforming uses, structures and lots

Written by  
Lynn Markham  
and  
Diane Milligan, J.D.

January 2005



Center for Land Use Education

## The Balancing Act for Treating Nonconformities



“The expectation seems to have been that existing nonconforming uses would be of little consequence and that they would eventually disappear. The contrary appears to be the case.”

From Cases and Materials on Land Use by David L. Callies and Robert H. Freilich, page 137.

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### Disclaimer

The law regarding nonconforming uses, structures and lots is complex and constantly changing. This publication should not be relied upon as a substitute for legal advice with respect to the application of any of the rules, regulations or cases discussed. Any errors are the full responsibility of the authors.

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# 1. INTRODUCTION

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Zoning nonconformities are existing uses, structures or lots that were legally established prior to a change in zoning provisions and which do not comply with new ordinance standards. As communities revise land use policies and zoning regulations in response to Wisconsin's comprehensive planning law they will be faced with questions regarding the continued use, replacement or expansion of such nonconformities. How they answer these questions will affect political acceptance of new zoning standards and whether local land use objectives can be fully realized.

This guide is intended to assist local officials, land use planning professionals, and citizens in finding an appropriate balance between private rights in continued use of existing development and the public purposes of new land use regulations.

The guide addresses complex and controversial questions that confront communities when zoning regulations change:

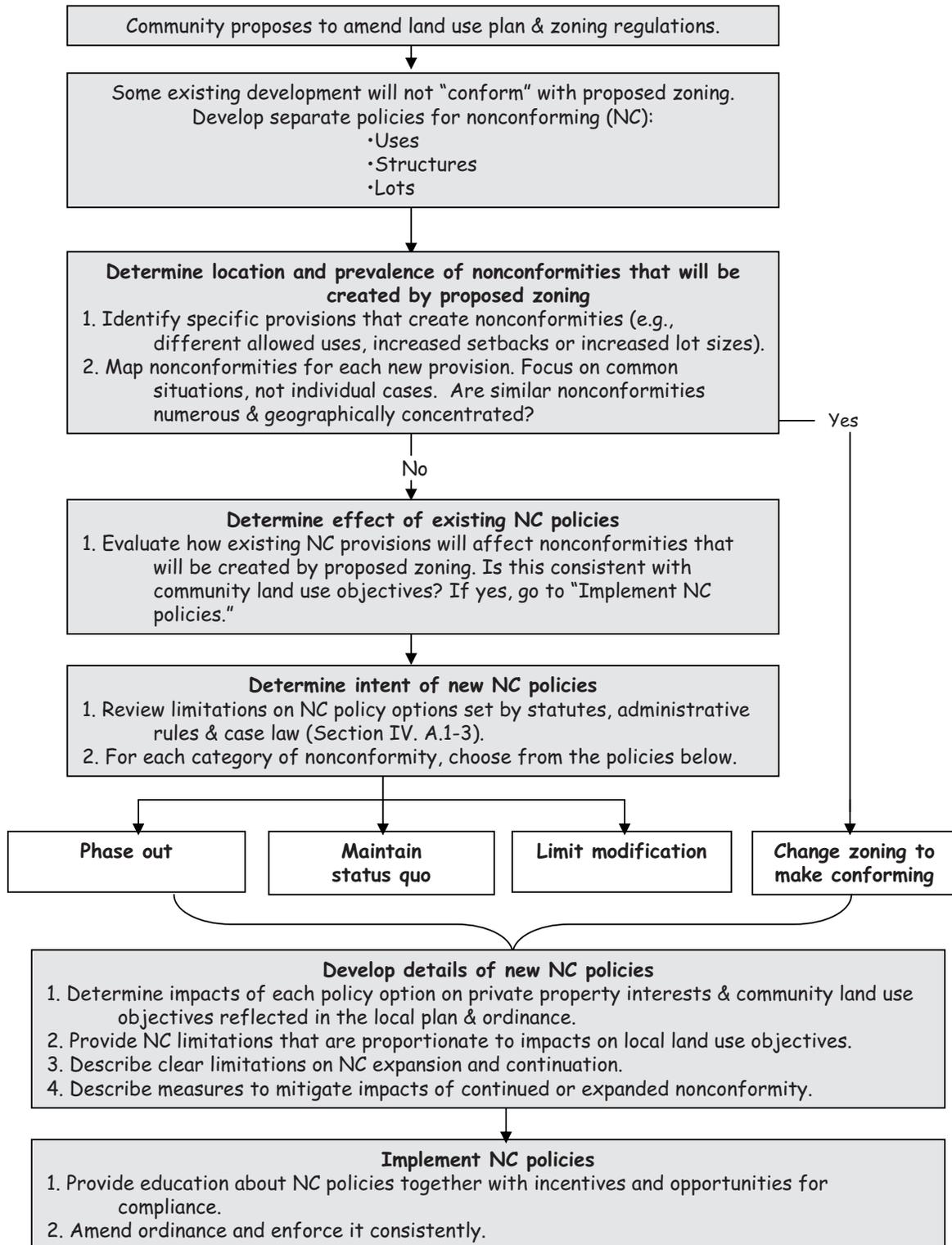
- How can a community avoid conflict between uses in a zoning district when some existing uses, structures and lots do not conform with new district regulations?
- How can nonconformities be limited or phased out in a way that is fair and that respects rights of property owners?
- Conversely, how can a community justify allowing "special treatment" for existing uses or structures that have

been determined to conflict with public interests and community land use plans?

Wisconsin, like many other states, specifically allows the continuation of most nonconforming uses in its zoning enabling statutes. Wisconsin statutes are silent on most other aspects related to zoning nonconformity. As a result, local ordinances generally permit continued use of other classes of nonconformity (structures and lots) and vary greatly in their treatment of structural repair or addition, use modification or expansion and permitted development of nonconforming parcels. While some states support aggressive time limits on nonconformities in order to eliminate them, Wisconsin's approach appears to protect existing nonconformities when they are left relatively unchanged. With this protection come restrictions and limitations. Generally, if a nonconforming use is changed, if it is not used for a year, or if it costs more than half its value to repair, it is no longer protected.

This guide provides options and examples for communities involved in updating local zoning provisions treating nonconformities. It provides an analysis of related state and local laws, including how the laws have been interpreted by Wisconsin courts and administered by local zoning officials. The flowchart on the following page describes a generalized process that communities may use to analyze and modify nonconformity policies and zoning provisions.

## General Policy Development Process for Zoning Nonconformities

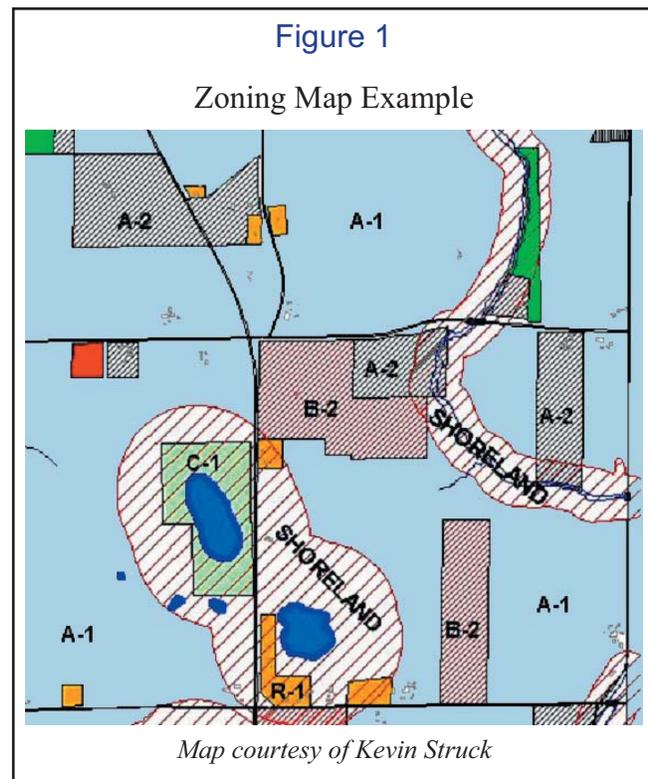


## 2. ZONING BASICS

Communities implement land use plans using a variety of strategies including regulations, public investment, education, incentives and technology. Zoning is one of the regulatory tools available. Land division ordinances, site planning and design standards, environmental standards and special natural hazard zoning are among other local regulatory programs in this state.

As shown in Figure 1, zoning separates land into distinct zones or districts designated for specific uses such as residential, commercial, industrial or agricultural uses. Zoning districts are mapped based on land suitability, avoidance of conflict with nearby uses, protection of environmental features, economic factors such as efficient provision of public services and infrastructure and other locally determined land use objectives articulated in a community plan. Zoning sets minimum development standards and is intended, generally, to prevent harm to public interests and those of district residents. Other plan implementation strategies, such as incentive based programs, may be more effective in achieving optimal location and design of new development in terms of compatibility with public interests. In contrast to zoning, public investment and capital improvement programs can provide public benefits such as parklands

and related recreational facilities or transportation infrastructure.<sup>1</sup> State statutes provide authority and procedures for Wisconsin towns, villages, cities and counties to adopt zoning ordinances.<sup>2</sup>



<sup>1</sup> *Just v. Marinette County*, 56 Wis. 2d 7 (1972); *Marshall & Ilsley Bank v. Town of Somers*, 141 Wis. 2d 271 (1987).

<sup>2</sup> Counties governed by Wis. Stat. §§ 59.69 and 59.692; Towns without village powers governed by Wis. Stat. § 60.61; Towns with village powers governed by Wis. Stat. §§ 61.35 and 61.351, which gives them the powers under Wis. Stat. § 62.23; Cities and villages governed by Wis. Stat. §§ 62.23(7) and 62.231.

## PURPOSE

Courts have accepted zoning as a valid use of police power intended to protect public health, safety and welfare. Some specific reasons for zoning include:

- ensuring that new development and redevelopment are located according to the community plan;
- matching development to the environmental limitations of the landscape;
- promoting quality development to maintain property values and the quality of life by stabilizing the character of neighborhoods and business districts;
- controlling development densities to avoid overcrowding and promote land conservation;
- providing predictability and efficiency related to demands for public services and facilities; and
- moving traffic safely and efficiently based on road standards and layout.<sup>3</sup>

Local communities decide whether to adopt general zoning, also known as comprehensive zoning. Wisconsin statutes, however, require communities to administer certain types of zoning as described below.

- **Shoreland zoning** provides development

### Police Power

The right of government to restrict an individual's conduct or use of property in order to protect public health, safety and welfare.

standards near waterways to protect water quality, aquatic and wildlife habitat, shore cover and natural scenic beauty. It is required of counties.

- **Shoreland-wetland zoning** generally prohibits or severely restricts development in wetlands near waterways. It has the same objectives as shoreland zoning and is required of counties, cities and villages that have received wetland maps from the state.
- **Floodplain zoning** provides location and development standards to protect human life, health and property from flooding. It is required of communities that have been issued maps designating flood prone areas.
- **Exclusive agricultural zoning** provides property tax relief and zoning standards for farmlands.
- **Extraterritorial zoning** allows a city or village to influence land use activities in an adjacent town, often in anticipation of annexation.

<sup>3</sup> Thomas L. Daniels, John W. Keller and Mark B. Lapping, *The Small Town Planning Handbook*. 2nd Ed., 1995, p. 158; Albert Solnit, *The Job of the Planning Commissioner*. 1987, 3rd Ed., pp.109-110; Mark A. Wyckoff, *Administering Township Zoning: A Basic Guide for Citizens and Local Officials*. 1996, 2nd Ed., pp. 2-3. See Appendix C for ordering information.



## ZONING ORDINANCE STRUCTURE

A zoning ordinance has two parts – a written text and a map. The text describes the purposes, uses and dimensional and construction standards for each district, as well as administrative and enforcement procedures. Maps illustrate zoning district boundaries.

Generally, two categories of land use are allowed and listed for each zoning district: permitted uses and conditional uses. A **permitted use** is allowed by right at all locations in a district provided it complies with development standards applicable to all districts, standards unique to the district in which it is located, and any overlay district standards. If a permitted use proposal meets applicable standards, the zoning department staff must authorize it with a simple zoning or building permit. Zoning department staff may not impose additional limitations on design or construction of permitted uses unless they are required as a result of review under site plan or design review ordinances.<sup>4</sup>

The terms **special exception** and **conditional use** are used synonymously in Wisconsin.<sup>5</sup> Conditional uses are listed in the ordinance for a particular zoning district. They are intended to be generally compatible with its designated permitted uses but require additional scrutiny and modification to assure that they can be adapted to the limitations of the proposed site and adjacent land uses. Conditional uses may include both uses of land (e.g. a public safety facility in a residentially zoned area) and specified construction activities (e.g. filling and grading in excess of 10,000 square feet adjacent to water bodies).

If ordinance standards are met, the conditional use must be granted. The conditional use standards define the extent of discretion the board or committee has in granting these permits. The decision-making body has less discretion if the standards are specific and measurable (e.g. the project will not increase stormwater discharge from the site), and more discretion if the standards are general (e.g. the project will not adversely impact adjacent properties).<sup>6</sup>

<sup>4</sup> Michael D. Dresen and Lynn Markham, *Zoning Board Handbook For Zoning Boards of Adjustment/Appeals*. 2001, p. 18.

<sup>5</sup> *State ex rel. Skelly Oil Co. v. City of Delafield*, 58 Wis.2d 695 (1973) (conditional uses and special exceptions can be distinguished when they are separately defined in an ordinance); *Fabyan v. Waukesha County Bd. of Adjustment*, 246 Wis. 2d 814 (Ct. App. 2001) (they are also treated separately by the zoning enabling statutes: generally, Boards of Appeals or Boards of Adjustment are empowered to grant special exceptions; municipal boards and zoning committees are empowered to grant conditional use permits and special exceptions); Wis. Stat. §§ 59.69 (2), 59.694 (1) and (7), 60.65 (3), and 62.23(7)(e)1.

<sup>6</sup> *Edward Kraemer & Sons, Inc. v. Sauk County Bd. of Adjustment*, 183 Wis. 2d 1 (1994) (general ordinance standards requiring board to consider “public health, safety, and welfare” do not constitute an overly-broad delegation of legislative authority; board must consider them in addition to use-specific criteria).



## 3. NONCONFORMITY BASICS

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### DEFINITIONS

It is important to keep the three classes of nonconformities separate, since different rules apply.<sup>7</sup>

**Nonconforming use.** A use which existed lawfully prior to the adoption, amendment or comprehensive revision of a zoning ordinance, which does not comply with present zoning provisions.<sup>8</sup>

A use permitted by zoning statutes or ordinances to continue notwithstanding that similar uses are no longer permitted in the area in which it is located.<sup>9</sup>

**Nonconforming structure.** A structure which was legal prior to the adoption, amendment or comprehensive revision of a zoning ordinance, but which now violates

the size, location or dimensional limits of its zoning district.<sup>10</sup>

**Nonconforming lot.** A lot which had legal dimensions or square footage prior to the adoption, amendment or comprehensive revision of a zoning ordinance, but which now fails to conform to the requirements of its zoning district.<sup>11</sup>

**All of the preceding definitions have the following in common:**

- Each must have existed in some tangible way.
- Each must have been legal before the ordinance change.
- Each could not be created by right today.

---

<sup>7</sup> McQuillin, *Municipal Corporations*, 3d ed., § 25.180.50. It is especially important to keep the nonconformities distinct when a two or more types of nonconformities are manifested on the same property. Equating a use exception with a structure exception tortures an ordinance's plain and ordinary meaning. *County of Lake v. Courtney*, 451 N.W.2d 338, 341 (Minn. App. 1990); see also *State ex rel. Ziervogel v. Washington County Bd. of Adjust.*, 2004 WI 23.

<sup>8</sup> *Black's Law Dictionary* 1051 (6th ed. 1990).

<sup>9</sup> *Ibid.* at 1052.

<sup>10</sup> *Ibid.* at 1051.

<sup>11</sup> *Ibid.*

## EQUITABLE AND CONSTITUTIONAL ISSUES

Zoning ordinances often provide for continuing nonconforming uses, structures and lots because requiring that they be immediately eliminated can be a hardship for property owners. Requiring immediate elimination may also provoke challenges based on interpretations of the Fifth and First Amendments to the U.S. Constitution.

### BALANCING PRIVATE PROPERTY RIGHTS AND PUBLIC INTEREST: TAKINGS AND AMORTIZATION

The power to zone is constitutional. However, the Fifth Amendment prohibits taking private property for a public purpose without just compensation. This can limit local government power to immediately suppress or remove from a particular zoning district an existing structure or use that is otherwise lawful. Whether a community can amortize (phase out) a nonconformity in a prescribed time frame may depend on the reasonableness of the amortization scheme. As one court noted when it upheld a five-year amortization scheme:

*The distinction between an ordinance restricting future uses and one requiring the termination of present uses within a reasonable period of time is merely one of degree, and constitutionality depends on the relative importance to be given to the public gain and to the private loss.*

*Zoning as it affects every piece of property is to some extent retroactive in that it applies to property already owned at the time of the effective date of the ordinance. The elimination of existing uses within a reasonable time does not amount to a taking of property nor does it necessarily restrict the use of property so that it cannot be used for any reasonable purpose.<sup>12</sup>*

### THE FIRST AMENDMENT

When local governments regulate signage, billboard or sign companies may challenge those laws as unconstitutional limitations on free speech. This argument may come up when communities seek to amortize and otherwise regulate nonconforming signs. Courts have generally upheld local regulation of signage based on location and features of sign construction other than content or message. Although Wis. Stat. § 84.30(5) requires certain nonconforming signs visible from interstate and state trunk highways to be removed within five years after they become nonconforming,<sup>13</sup> this provision has not been fully implemented because the promised federal funding has not been provided. If local governments choose to amortize nonconforming signs, just compensation must be provided.<sup>14</sup>

<sup>12</sup> *City of Los Angeles v. Gage*, 274 P.2d 34 (1954).

<sup>13</sup> Wis. Stat. § 84.30(5).

<sup>14</sup> Wis. Stat. § 84.30(6) and Wis. Adm. Code § Trans 201.21.



## THE POLICE POWER, AS THE BASIS FOR ZONING AND LAND REGULATION, IS MORE POWERFUL THAN ANY VESTED INTEREST IN A NONCONFORMITY

A vested property right is a right to use land that is fixed, settled, complete. Rights are “vested” when the present or future right to their enjoyment has become the legal property of a particular person or persons. Mere expectancy of future benefits, or an interest based on the anticipated continuance of existing laws, does not make a right vested.<sup>15</sup> In Wisconsin, the right to develop a property according to the requirements of a zoning ordinance vests after the property owner submits an application that complies with all applicable regulations in effect at that time.<sup>16</sup>

A property owner must have a vested right in the nonconformity for that nonconformity to be considered a legal nonconformity. However, a property owner does not acquire a “vested interest” in that nonconformity’s continuation, regardless of its nature and extent.<sup>17</sup> In other words, vesting gets you in the door, but it does not necessarily keep you at the table forever. The requirements that must be met for a vested right to continue are discussed in more detail on page 13.

## NUISANCE LAW TRUMPS ANY RIGHT OF A NONCONFORMITY TO CONTINUE

Arguably, all nonconformities are harmful to the extent that they contradict ordinance objectives. Occasionally, however, a nonconformity may endanger or injure public health, safety or welfare in a way that directly harms the community, rising to the level of a “public nuisance.” When a nonconforming use constitutes a public nuisance, a community may prohibit that use, regardless of its duration or legal status as a nonconformity.<sup>18</sup>

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<sup>15</sup> *Black’s Law Dictionary* 1563 (6th ed. 1990).

<sup>16</sup> *Lake Bluff Partners v. South Milwaukee*, 197 Wis.2d 157 (1995).

<sup>17</sup> *Walworth County v. Hartwell*, 62 Wis. 2d 57 (1974).

<sup>18</sup> *Town of Delafield v. Sharpley*, 212 Wis. 2d 332 (Ct. App. 1997).

## GENERAL POLICY OPTIONS

The first step in all policy development is to decide on the policy's intended results. Questions in the "Policy Option" sections of the following chapters about nonconforming uses, structures and lots will help guide you and your community in deciding upon the intended results of your nonconformity policies.

While local zoning ordinances vary considerably in how they treat nonconformities, there are four general options:

- Phase them out over time.
- Maintain the status quo.
- Allow limited modification and expansion.
- Change zoning standards to make certain uses, structures or lots conforming.

The appropriate policy option for a given class of nonconformity depends on how much it will compromise the land use objectives expressed in the community plan and how easy it would be to change or eliminate existing nonconforming development. Nonconformity policies must also be in compliance with statutes, administrative rules and case law.

A community may phase out nonconformities that seriously compromise its land use objectives and are relatively easy to eliminate. For instance, it may require removal of a large billboard from an area designated for scenic beauty. On the other hand, it may choose to allow limited expansion for nonconformities with a lesser impact on community objectives and a significant vested interest. For example, it may allow a house that does not meet a sideyard setback to expand as long as it does not encroach further into the sideyard.

If a nonconformity will have no impact on future land use objectives, it is reasonable to question why there are provisions that make it nonconforming, and to change them if possible.



## 4. GENERAL ZONING

### GENERAL ZONING - NONCONFORMING USES

#### **Nonconforming Use**

A lawful use of a structure or property existing on the effective date of a zoning ordinance or ordinance amendment and continuing since that time which does not comply with the specific terms of the ordinance.



#### **STATUTORY & ADMINISTRATIVE RULE PROVISIONS**

Enabling statutes for general zoning grant nonconforming uses a qualified right to continue in all types of Wisconsin municipalities. Each statute provides that nonconforming uses lose their protected status if they have been discontinued for at least 12 months.

However, cities, villages, counties and towns have differing powers to regulate nonconforming uses.

Table 1 on the next page compares and highlights aspects of nonconforming development that different levels of government are authorized or mandated

to regulate under Wisconsin law. Towns may adopt zoning using either town or village powers. This choice of authority has implications for town options in regulating nonconformity. The full text of each zoning enabling statute is in Appendix B.

**Table 1**

	<b>City / Village Powers<sup>19</sup></b>	<b>County Powers<sup>20</sup></b>	<b>Town Powers<sup>21</sup></b>
<b>Type of use that may or must be protected by law.</b>	<b>Any</b> lawful use of a building or premises <u>may</u> be continued.	Continuance of any lawful use of <u>any</u> building or premises for any <b>trade or industry</b> <u>may not</u> be prohibited by ordinance.	Continued use of a building or premises for <b>trade or industry</b> <u>may not</u> be prohibited by ordinance.
<b>Extension allowed?</b>	<b>No.</b> Nonconforming uses may not be extended.	Not mentioned.	Not mentioned.
<b>Additions allowed?</b>	Not mentioned.	May prohibit addition for the purpose of carrying on any prohibited trade or new industry.	May prohibit alteration of or addition to any existing building or structure.
<b>Alterations limited?</b>	<b>Yes.</b> Structural repairs or alterations shall be limited to 50% of the assessed value of the building, <u>during its life</u> , unless the use is made to conform.	<b>May prohibit</b> alteration for the purpose of carrying on any <b>prohibited trade or new industry</b> .	<b>May prohibit</b> alteration of or addition to any existing building or structure.
<b>Structural repairs limited?</b>	<b>Yes.</b> Structural repairs or alterations shall be limited to 50% of the assessed value of the building, <u>during its life</u> , unless the use is made to conform.	<b>May prohibit</b> repairs in excess of 50% of a building or structure’s assessed value for the purpose of carrying on any <b>prohibited trade or new industry</b> .	Not mentioned.
<b>12 month discontinuation destroys right to nonconforming use</b>	Yes	Yes	Yes

**Comments about trade and industry**  
 County and town zoning protection of nonconforming uses is required for trade and industry. In theory, because of the wording in their enabling legislation, counties and towns could prohibit continued

nonconforming use other than for trade and industry as long as they did not violate the property owner’s constitutionally protected property rights. In practice, however, most zoning ordinances allow continuation of all legal nonconforming principal uses.<sup>22</sup>

<sup>19</sup> Wis. Stat. § 62.23(7)(h).

<sup>20</sup> Wis. Stat. § 59.69(10)(a).

<sup>21</sup> Wis. Stat. § 60.61(5)(a); Towns that adopt village powers may adopt ordinances under Wis. Stat. § 61.35, which gives them city powers under Wis. Stat. § 62.23.

<sup>22</sup> See *principal vs. incidental* use of property on page 14.

## CASE LAW SUMMARY<sup>23</sup> & ATTORNEY GENERAL OPINIONS

This section groups case law for nonconforming uses into the following categories:

- Establishing nonconforming use status
- Keeping nonconforming use status
- Losing nonconforming use status
- Requiring eventual compliance with the ordinance
- Limiting alteration of buildings housing nonconforming uses
- Public nuisance law trumps nonconforming status

### Establishing nonconforming use status

If the legality of a nonconforming use is challenged, the following legal issues may apply.

- *Burden of proof.* When a property owner claims that the standards of the zoning ordinance should not apply to a property because of its nonconforming status, the property owner bears the burden of proving he or she has a legal nonconforming use.
- *Standard of proof.* The property owner must prove legal nonconformity by the greater weight of the credible evidence.

Proving a legal nonconformity differs with each case. Witnesses, photos, tax records and receipts may show when a use began and that it has continued without significant interruption.

- *Demonstrating a vested right to continue use.*
  - ◆ *Preexistence.* The alleged nonconforming use of the property must have predated the ordinance or ordinance change that rendered it nonconforming.<sup>24</sup>
  - ◆ *Legal use.* The nonconforming use must have been legal prior to the ordinance or ordinance change that rendered it nonconforming.<sup>25</sup> A previously prohibited therefore illegal use cannot be made retroactively legal by the granting of a permit.<sup>26</sup>
  - ◆ *Active use.* The use must be sufficiently active so as to give rise to a vested right in its continuance.<sup>27</sup>
  - ◆ *Principal or primary use.* Casual, accessory or occasional uses do not give rise to vested rights.<sup>28</sup> Activities that are essential to the maintenance or economic viability of the principal use are protected.

<sup>23</sup> For full Wisconsin case citation and additional summary information regarding each case, see Appendix A. In this section, names are used for identification and dates are used for context.

<sup>24</sup> *Town of Yorkville v. Fonk*, (1958).

<sup>25</sup> *David A. Ulrich, Inc. v. Town of Saukville*, (1959) (owner who failed to obtain a trailer camp license prior to the adoption of the zoning ordinance cannot claim his trailer camp is a nonconforming use).

<sup>26</sup> *Foresight v. Babl*, (Ct. App. 1997).

<sup>27</sup> *Gabe v. City of Cudahy*, (1971) (sporadic removal of sand and topsoil from a farm prior to zoning ordinance enactment in 1957 cannot justify sand and gravel operation that did not begin in earnest until the late 1960s).

<sup>28</sup> *Sohns v. Jensen*, (1960) (auto repair service predated ordinance, but use of the property as a wrecking yard did not. No income was reported from salvage until after the ordinance took effect); *County of Walworth v. Hartwell* (1974) (occasional and sporadic use of a farm for motorcycle races did not create a vested right to continue that incidental use).

- ◆ *A valid permit*, if one had been required. For a developer's right to vest, he or she must have submitted a valid and complete application for a building permit that conforms to zoning and building code requirements in effect when the application was submitted.<sup>29</sup> Property owners obtain no vested rights in a particular type of zoning through reliance on the zoning designation alone.<sup>30</sup>
- ◆ *The use has not moved*. Even if a landowner acquires a vested right to continue a particular use, that right cannot be shifted to another location.<sup>31</sup>

### Keeping nonconforming use status

General zoning enabling legislation protects legal uses that meet the criteria described above. They can continue indefinitely if they are not modified. But what counts as modification? Extensive case law explains permissible modification and defines the line between keeping and losing nonconforming use status. Among the primary points are the following principles:

- *Only the original use is protected*. The activity that predated adoption of the zoning ordinance or amendment that caused nonconformity is protected.<sup>32</sup>
- *Incidental uses terminate with abandonment of original use*. Nonconforming incidental uses associated with the original nonconforming principal use are not protected once that original use is abandoned.<sup>33</sup>
- *The current use must be the same or substantially related to the original use in order to be protected*.<sup>34</sup>
- *Normal increase of business volume is acceptable*. Increase in volume or intensity of the original use is acceptable.<sup>35</sup> However, the line between business increase and expansion may sometimes be difficult to determine.
- *In general, a nonconforming use is limited to the area it covers at the time it becomes nonconforming and cannot later be expanded to a larger land area*.<sup>36</sup>

<sup>29</sup> *Lake Bluff Housing Partners v. South Milwaukee*, 197 Wis.2d 157 (1995).

<sup>30</sup> *Zealy v. City of Waukesha*, (1995).

<sup>31</sup> *Town of Yorkville v. Fonk*, (1958) (trailer park had 23 spaces completed and 24 partially completed when the town passed an ordinance limiting trailer parks to 25 spaces. Though the court did not address whether the partially completed spaces had a vested right, it held that when the owner abandoned the 24 and attempted to build 18 new lots on land acquired after the ordinance was passed, he violated the ordinance); *Jefferson County v. Timmel* (1952)(selling surplus gas from farm pumps does not entitle landowner to later sell off nearby land for a mini-mart gas station).

<sup>32</sup> *State ex rel. Brill v. Mortenson*, (1959)(original and later abandoned nonconforming use was cabinetmaking; state statutes allowing continuation do not protect subsequent paint spraying and enameling business, regardless of substitution provisions in local ordinance).

<sup>33</sup> *Village of Menomonee Falls v. Veierstahler*, (1994)(after liquor license was denied for a nonconforming tavern, incidental sales of cigarettes and soda did not continue the nonconforming use status in order to allow conversion of the space into a nonalcoholic social club with those same incidental sales).

<sup>34</sup> *Waukesha County v. Seitz*, (1987) (boat rental and storage, fuel and bait sales and cottage rentals all had synergistic value as one business).

<sup>35</sup> *Waukesha County v. Seitz*, (1987).

<sup>36</sup> *Lessard v. Burnett Cty. Bd. of Adjustment*, (2002) (County ordinance allows campgrounds as a conditional use. A conditional use permit was necessary to expand a campground that existed prior to the ordinance from 21 to 44 sites).



- *The geographic extent of nonconformity for mineral extraction may be broad.* With respect to “diminishing assets,” such as sand and gravel, lands containing that asset are considered part of a nonconforming quarrying operation if they constitute an “integral part of the operation,” even if they were not under excavation or registered when the ordinance was enacted.<sup>37</sup>

### **Losing nonconforming use status**

Zoning ordinances strive to limit the duration of, and ultimately eliminate, nonconforming uses.<sup>38</sup> The courts have enforced a hard line requiring elimination of nonconforming uses that exceed their protected status.

- *Changing use destroys protected status.* Expansion due to normal increase in business volume of a nonconforming business use is protected.<sup>39</sup> Use changes and expansions beyond expansion for increased business destroy nonconforming use status.<sup>40</sup>

- *Use variances not recommended.* It is difficult to legally justify a “use variance” because it would require an owner to demonstrate that, based on physical characteristics of a lot, only a nonconforming use is feasible: the landowner would have no reasonable use of the property absent the variance.<sup>41</sup> Many applications for use variances are actually administrative appeals where the zoning board is asked to determine whether a proposed use is included within the meaning of a particular permitted or conditional use or whether it is sufficiently distinct as to exclude it from the ordinance language. Such a decision is not a use variance but an appeal of the zoning administrator’s interpretation of the text.<sup>42</sup>

- *Putting new products into the stream of commerce changes use* and forfeits nonconforming status; changing the technology or process used to produce the same product may not.<sup>43</sup>
- *Adding a different use to a nonconforming use invalidates the original nonconforming use.*<sup>44</sup>

<sup>37</sup> *Schroeder v. Dane County Bd. of Adjustment*, (1999).

<sup>38</sup> *Village of Menonomee Falls v. Veierstahler*, (1994).

<sup>39</sup> *Waukesha County v. Seitz*, (1987) (expanding dry-docking facilities from 5 to 54 boats, pier length from 80 to 192 feet, allowing for wet-docking of up to 35 boats was an acceptable expansion due to increased business volume).

<sup>40</sup> *Waukesha County v. Pewaukee Marina, Inc.*, (1994) (expanded identifiable business activities, including a new retail store, lounge, and sales of boats, boat lifts and piers, exceed the permitted expansion of a historically allowed use, thus destroying nonconforming use status).

<sup>41</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, ¶ 27, citing *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d at 398.

<sup>42</sup> Michael D. Dresen and Lynn Markham, *Zoning Board Handbook: for Zoning Boards of Adjustment/Appeals*. 2001, pp. 24-25.

<sup>43</sup> *Racine County v. Cape*, 2002 WI App. 19, 250 Wis. 2d 44 (Ct. App. 2001).

<sup>44</sup> *Village of Menonomee Falls v. Preuss*, (1999) (existing residence in area rezoned to industrial was nonconforming, but when an illegal commercial garage was added to that residence, the residential use became illegal).

- *Twelve-month discontinuation invalidates a nonconforming use.*

- ◆ *Burden of proof.* The proponent of a legal nonconforming use has the burden to prove by the greater weight of the credible evidence that a legal nonconforming use of the property was not discontinued for a twelve-month period.<sup>45</sup>
- ◆ *Intent to abandon is irrelevant.* The twelve-month period is what matters, not the intentions of the owner.<sup>46</sup>
- ◆ *The continual use must be active.*<sup>47</sup>
- ◆ *Change of ownership* during the twelve-month period is irrelevant.<sup>48</sup>

### **Seeking eventual compliance with the ordinance**

The “common law” allows communities to limit expansion and alteration of nonconforming uses in order to phase them out over time.<sup>49</sup>

### **Limiting alteration of buildings housing nonconforming uses**

Communities may seek eventual compliance by limiting repairs or alterations to the buildings that house nonconforming uses. Statutes determine which classes of municipalities must limit alterations (see Table 1).

- *Statutory guidance by type of municipality*
  - ◆ *Cities, villages and towns with village powers must limit.* State statutes mandate that zoning ordinances adopted with city or village powers prohibit the structural alteration of a structure containing a nonconforming use if alteration exceeds 50% of the structure’s assessed value.
  - ◆ *Counties may limit.* State statutes allow counties to prohibit the structural alteration of a structure containing a nonconforming use if that alteration exceeds 50% of a structure’s value. Counties are free to regulate nonconforming uses by imposing other limitations.
  - ◆ *Town powers silent.* There is no specific statutory guidance about how zoning ordinances adopted under town powers should go about limiting structural alterations.

<sup>45</sup> *Gabe v. City of Cudahy*, (1971).

<sup>46</sup> *State ex rel. Peterson v. Burt*, (1969).

<sup>47</sup> *Kraemer Co. v. Sauk County Bd. of Adjustment*, (2001) (at issue was whether the mineral extraction activities had been discontinued during a continuous twelve-month period since 1986. The company argued that maintaining stockpiles, marketing and selling product and attempting to sell the quarry operation were “mineral extraction activities.” However, the record showed no appreciable marketing or selling of product or quarrying occurred between October 3, 1988 and October 6, 1989).

<sup>48</sup> *State ex rel. Peterson v. Burt*, (1969).

<sup>49</sup> *Waukesha County v. Seitz*, (1987); *Waukesha County v. Pewaukee Marina*, (1994).



● *What is limited?*

◆ *“Ordinary maintenance” must be allowed; “structural repairs” are limited.* Prohibited structural repairs in the case of a city include work that would:

- “convert an existing building into a new or substantially different building,”
- “affect the structural quality of the building” or
- “contribute to the longevity or permanence of the building”.

Such activities would be contrary to the policy encouraging gradual elimination of nonconformities.<sup>50</sup>

◆ *Modernization and maintenance*, while they may extend a structure’s life, are not considered “structural repairs” which are to be limited.<sup>51</sup> Since nonconforming uses are allowed to continue as they existed when the ordinance was adopted “to protect ownership rights,” those improvements that allow this continuation must be permitted.<sup>52</sup> It may be difficult to distinguish “modernization” that allows a nonconforming use to continue from prohibited “structural repairs” that significantly extend the life of a nonconforming structure and use.

● *The “50% rule”*

Many communities use the “50% Rule” to allow limited expansion. Case law helps to describe and define the application of this rule.<sup>53</sup>

◆ *Baseline calculation – Buildings to be included.* When a use consists of a number of buildings, the baseline for the 50% rule may include the total value of all of the buildings essential to the principal use of the property, not only the one building that needs reconstruction.<sup>54</sup>

However, it is not appropriate to measure the value of a worthless building or one that is not essential to the nonconforming principal use as a percent of all other buildings on the lot in order to save that building.<sup>55</sup>

◆ *Baseline calculation – Determination of value.* The city and village enabling statute requires using the assessed value as the baseline value. Communities that choose to severely limit the expansion or alteration of structures with nonconforming uses have adopted ordinances that use the “value at the time of becoming nonconforming” as the basis for the 50% valuation cap. Many counties allow perpetuation of nonconforming

<sup>50</sup> *Marris v. City of Cedarburg*, (1993).

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> Communities have developed other “50% Rules”, such as for area caps. The statutory valuation rule is the most common, so we will refer to it as “The 50% Rule.” The other 50% rules will be described more specifically.

<sup>54</sup> *State ex rel. Covenant Harbor Bible Camp v. Steinke*, (1959) (main building destroyed by fire housed offices and the majority of the bed space for the camp; prohibiting its reconstruction might result in a substantial loss in investment in the camp out of proportion to the value of the building destroyed).

<sup>55</sup> *Village of Elm Grove v. T.V. John & Son, Inc.*, (1992) (dilapidated storage building containing prohibited materials in the floodplain was a public nuisance that should be razed when the cost to repair it (\$8000) exceeded its value (\$0)).

structures by using current fair market value (or equalized assessed value) as the basis for applying the 50% valuation cap. These approaches are explained in detail under Policy Options in the section dealing with nonconforming structures. Stipulations between litigants can bypass valuation disputes, but stipulated values can be grossly erroneous and difficult to defend.<sup>56</sup> Local ordinances should provide a detailed description of methods employed in value calculation.

### **Public nuisance law trumps law of nonconformities**

If the use of a property constitutes a public nuisance, its potential status as a nonconforming use is irrelevant.<sup>57</sup>

### **Attorney General opinions**

The Attorney General's Office has expressed the following informal opinions.

- *Equal protection is required by the United States Constitution and the Wisconsin Constitution.* “While a legal nonconforming status reasonably supports different treatment from new uses or structures, that status does not reasonably support no regulation or limitation.”<sup>58</sup>
- *Eventual compliance required.* “Zoning ordinances must limit, so as quickly to eliminate, nonconforming uses and structures because they would violate equal protection if they did not.”<sup>59</sup>

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<sup>56</sup> *State ex rel. Home Ins. Co. v. Burt*, (1964).

<sup>57</sup> *Town of Delafield v. Sharpley*, (1997) (notwithstanding the landowners' arguments that their use of their property as a junkyard for over 90 vehicles legally predates the zoning ordinance, the town's police power justifies prohibiting that use because it constitutes a public nuisance).

<sup>58</sup> Kloppenburg, JoAnne F.; Assistant Attorney General, “Review of Nonconforming Zoning Law”, March 24, 2003, p. 12.

<sup>59</sup> Kloppenburg, JoAnne F.; Assistant Attorney General, “Review of Nonconforming Zoning Law”, March 24, 2003, p. 12.



## SYNTHESIS OF LEGAL GUIDANCE

### General policy

Wisconsin law protects existing legal nonconforming principal uses of buildings or premises if those uses continue, generally unchanged, without year-long breaks, and if buildings housing those uses are maintained but not altered so as to unduly extend the building's life. What constitutes "undue expansion or modification" can vary by jurisdiction. At the same time, the common law requires that communities strive for eventual compliance with their zoning ordinances by seeking to eliminate nonconforming uses.

### Policy variation among types of municipalities

- *Zoning ordinances adopted with city/village powers.*
  - ◆ A nonconforming use may not be extended, no matter what it is.
  - ◆ Structural repairs to a building housing a nonconforming use must be subject to a lifetime limitation of 50% of the building's assessed value unless the use changes to conform with the ordinance.
- *County zoning ordinances.*
  - ◆ Under general zoning, use of property for trade or industry must be allowed to continue; noncommercial uses can be prohibited subject to constitutional concerns discussed on page 11.
  - ◆ The nonconforming use of a temporary structure may be prohibited.
- ◆ Alteration of, or addition to, structures containing nonconforming uses for the purpose of carrying on any prohibited trades or prohibited new industries may be prohibited.
- ◆ If a structure containing a nonconforming use undergoes structural repairs of more than 50% of the structure's assessed value, for the purpose of carrying on any prohibited trades or prohibited new industries, that use may be prohibited.
- ◆ The common law policy behind zoning suggests that counties should phase out nonconforming uses in some manner, even if they do not adopt a 50% valuation rule.
- *Zoning ordinances adopted with town powers.*
  - ◆ Protected uses may be limited to trade or industry; noncommercial uses can be eliminated subject to constitutional concerns discussed on page 8.
  - ◆ Expansion or alteration of structures containing nonconforming uses for the purpose of carrying on prohibited trades or prohibited new industries may be limited to 50% of the structure's assessed value.
  - ◆ Though the statutes are silent with respect to structural alterations, the common law policy behind zoning suggests that towns should phase out nonconforming uses in some manner, even if they do not adopt a 50% valuation rule.

## POLICY OPTIONS

### Commentary --

#### **Reconciling competing public policies: Protecting vested rights versus eliminating nonconforming uses**

Wisconsin Statutes specifically protect the continuation of some existing nonconforming uses, but the common law policy behind nonconforming uses seeks to eventually eliminate them. Many zoning ordinances provide that nonconforming structures can be maintained, but they limit expansion and structural alterations. In apparent contrast to the policy aimed at phasing out or gradually eliminating nonconforming uses, Wis. Stats. §§ 59.692(1s) and 87.30(1d) allow complete rebuilding of certain nonconforming structures and buildings when they are destroyed by natural disasters or vandalism.

How can these policies be reconciled? One can argue that protecting vested rights in continuation of a use or structure protects only landowners who are good stewards of their property:

- If the landowner allows deterioration, he or she loses the right to continuation.<sup>60</sup>
- If the landowner tries to change the use of the property, he or she is overreaching beyond the entitled continuation.<sup>61</sup>
- The case law also suggests that nonconformities must be restricted and watched.<sup>62</sup>
- But, if acts outside the control of the landowner destroy the building, the landowner's right to reconstruct the

structure should be honored.<sup>63</sup>

One can also explain policy differences in political terms. Junkyards have a five-year action period written into the statutes. "Every nonconforming junkyard shall be screened, relocated, removed or disposed of within five years after it becomes nonconforming."<sup>64</sup> "Wet boathouses," on the other hand, can be rebuilt over the water if they are destroyed by violent wind, vandalism, or fire under Wis. Stat. § 30.121(3r). Do we hope to save our boathouses while we want our junk to disappear? Some of our statutory provisions can be explained as the result of political lobbying by special interest groups or as a response to constituent concerns, rather than extensions and clarifications of legal principles or well-reasoned public policy.

In light of this inherent conflict between protecting vested rights and eliminating nonconformities, communities should engage in comprehensive planning to find the appropriate local balance between these two forces.

The flowchart on the facing page describes a process your community can use to assess the impacts of nonconforming uses and to develop related policies. See the sections on Shoreland Zoning (page 61), Shoreland-Wetland Zoning (page 71) and Floodplain Zoning (page 73) for additional information that must be considered when developing policies for these areas.

<sup>60</sup> *Village of Elm Grove v. T.V. John*, 173 Wis. 2d 170 (Ct. App. 1992).

<sup>61</sup> *Waukesha County v. Pewaukee Marina, Inc.*, (1994).

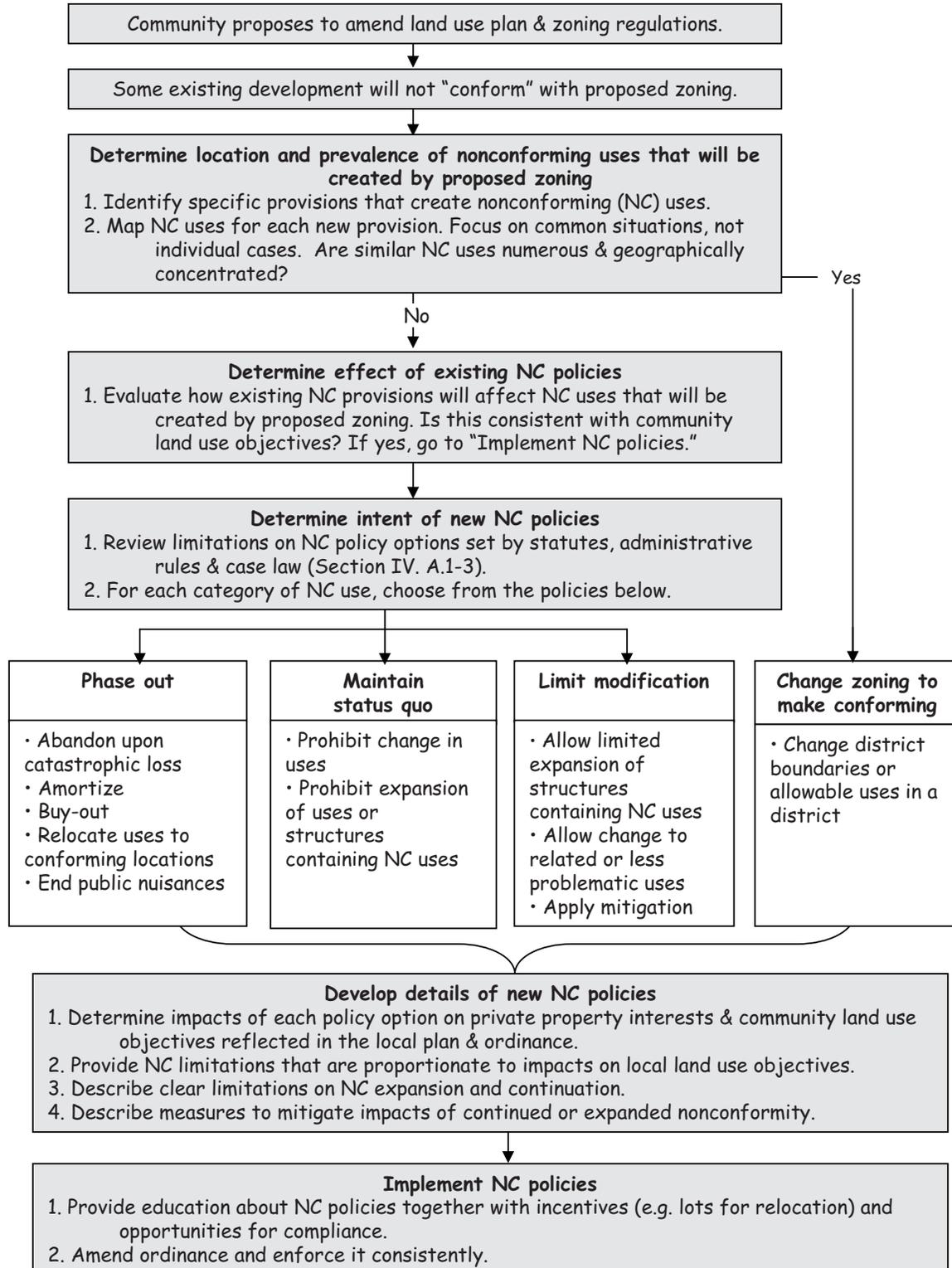
<sup>62</sup> *City of Lake Geneva v. Smuda*, 75 Wis.2d 532 (1977); *Waukesha County v. Pewaukee Marina, Inc.*, (1994).

<sup>63</sup> Wis. Stat. § 87.30(1)(d).

<sup>64</sup> Wis. Stat. § 84.31.



## Policy Development Process - Nonconforming Uses



The following discussion provides details regarding implementation of each of the general policy options, shown as white boxes, in the flow chart on the previous page. Keep in mind that documentation of the extent of original nonconformity and of permitted expansion or alteration is the key to implementing any policy on nonconformity. All communities can require registration of nonconforming uses including extent and location, systematically inspect them, track changes and eliminate nonconforming uses which:

- have not established nonconforming status,
- have changed the original use, unless the ordinance allows substitution with similar uses,
- have changed location,
- have been discontinued for more than one year, or
- are a public nuisance.

### ***Policy Option - Phase Out***

#### **Abandon upon catastrophic loss**

Communities may require that nonconforming uses be abandoned if the structures housing the uses are destroyed beyond a defined threshold that would require significant rebuilding with statutory exceptions related to structures in shorelands and floodplains. For instance, the Columbia County Zoning Code states:

*When a nonconforming structure or building containing a nonconforming use is damaged by fire, explosion,*

*act of God or the public enemy to the extent of more than fifty percent (50%) of its current equalized assessed value as determined by the local assessor, it shall not be restored except in conformity with the regulations of the district in which it is located.<sup>65</sup>*

#### **Amortize**

Towns and counties may amortize uses that do not qualify as “trade or industry.” Wisconsin statutes currently require nonconforming junkyards to be screened, relocated, removed or disposed of within five years after becoming nonconforming.<sup>66</sup>

#### **Buy-out**

Communities may use available funding to buy properties with or structures containing nonconforming uses from willing sellers.

#### **Relocate uses to conforming locations**

Similarly, public subsidies or other incentives can encourage relocation of nonconforming uses, often nonconforming industry or businesses, to conforming locations. A municipality, for example, may offer the owner of a nonconforming use free land and infrastructure in the local industrial or business park.

#### **End public nuisances**

When a nonconforming use constitutes a public nuisance, a community may prohibit that use, regardless of its duration or legal status as a nonconforming use.<sup>67</sup>

<sup>65</sup> Section 16-1-13 (a)(6)(d), <http://www.co.columbia.wi.us/ord/title16-1.pdf> 4/23/03.

<sup>66</sup> Wis. Stat. § 84.31(4)(c).

<sup>67</sup> *Town of Delafield v. Sharpley*, (1997).



### ***Policy Option - Maintain the Status Quo***

Though common law promotes phasing out nonconforming uses, they can continue indefinitely if maintained and not modified. To ensure that nonconforming uses are not changed or expanded, communities can require registration of nonconforming uses, documenting their extent and location and can systematically inspect them to confirm compliance with local policies.

#### **Prohibit change in uses**

This policy can be accomplished by remaining silent in the ordinance regarding this issue. Alternatively, the ordinance may explicitly state that a nonconforming use may not be converted to a different nonconforming use as the City of Madison does:

*Building Designed or Intended for a Nonconforming Use. The nonconforming use of a building, all or substantially all of which is designed or intended for a use not permitted in the district in which it is located, shall be utilized only for such nonconforming use and shall not be changed to any use other than a use permitted in the district in which such building is located.*<sup>68</sup>

Remember that property owners have the burden of proof regarding the establishment and continuation of nonconforming uses.

<sup>68</sup> Section 28.05(3)(g), <http://www.ci.madison.wi.us> 4/23/03.

<sup>69</sup> Section 28.05(3)(e), <http://www.ci.madison.wi.us> 4/23/03.

<sup>70</sup> Section 16-1-13(a)(6)(a), <http://www.co.columbia.wi.us/ord/title16-1.pdf> 4/23/03.

### **Prohibit expansion of nonconforming uses**

The City of Madison Zoning Ordinance states:

*The nonconforming use of part of a building, all or substantially all of which is designed or intended for a use not permitted in the district in which it is located, shall not be expanded or extended into any other portion of such building. ... The nonconforming use of land shall not be expanded or extended beyond the area it occupies.*<sup>69</sup>

Registration of nonconforming uses and inspection of buildings to monitor their expansion requires significant administrative resources and is usually confined to larger cities.

### **Prohibit expansion of structures containing nonconforming uses**

Municipalities may prohibit all additions to structures containing nonconforming uses. This approach is simple from an administrative standpoint and is fairly typical. For instance, the Columbia County Zoning Code states:

*The existing lawful use of a building or premises at the time of the enactment of this Ordinance or any amendment thereto may be continued although such use or structure does not conform with the provisions of this Ordinance for the district in which it is located, but no building or premises containing a nonconforming use shall be enlarged or extended.*<sup>70</sup>

### ***Policy Option - Limit Modification***

Cities and villages must limit expansion of nonconforming uses as described on page 12. Counties and towns may choose to limit nonconforming uses to their current extent or allow them to expand. The appropriate approach can be determined by examining the extent to which these nonconforming uses will detract from ordinance objectives.

#### **Allow limited expansion of structures containing nonconforming uses**

The discussion about limiting the alteration of buildings housing nonconforming uses on page 17 describes how the 50% valuation rule applies to structures containing nonconforming uses. Although counties and towns can choose to not adopt a 50% valuation rule, the common law policy behind zoning dictates that they should phase out nonconforming uses in some manner. The discussion of valuation caps and alternative methods for limiting additions to structures begins on page 39.

#### **Allow change to related or less problematic uses**

Some ordinances provide that nonconforming uses may be changed to substantially related but less intensive nonconforming uses. While allowing some flexibility for changes in use, this approach may decrease the ability of a community to eliminate nonconforming uses over time. An example of this policy is found in the Columbia County Zoning Code:

*If no structural alterations are made, a nonconforming use of a building may be changed to another nonconforming use of a more restricted classification. Whenever a nonconforming use has been changed to a more restricted nonconforming use or a conforming use, such use shall not thereafter be changed to a less restricted use. A nonconforming use shall not be changed to another nonconforming use of the same classification unless and until a permit therefore shall first have been secured from the Board of Adjustment.<sup>71</sup>*

This provision raises the question: which nonconforming uses are more restricted than others? Some ordinances specify that the replacement use must be substantially more compliant or provide less conflict with uses permitted in the zoning district. In the provision cited above, it is arguable that the zoning committee rather than the zoning board of adjustment should make such determinations since the committee is the body that makes recommendations to the local governing body regarding compatible uses and zoning district designations.

#### **Apply mitigation**

In exchange for expanding or changing a nonconforming use, communities may require landowners to mitigate the impacts of development on neighbors and public resources. See page 59 for a discussion of mitigation options.

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<sup>71</sup> Section 16-1-13(a)(6)(b), <http://www.co.columbia.wi.us/ord/title16-1.pdf> 4/23/03.

### ***Policy Option – Change Zoning to Make Conforming***

#### **Change district boundaries or allowable uses in a district**

If consistent with state law, the community plan and ordinance objectives, a community may rezone parcels containing nonconforming uses to a district where they are permitted (a zoning map amendment) or change allowable uses in a zoning district to accommodate them (text amendment). For example, if existing neighborhood businesses are compatible with residential development in an area restricted to residential development, a community could either rezone the area to a neighborhood business district or allow businesses as a permitted or conditional use in residential districts.

To modify ordinance language to convert a nonconforming use to a permitted use

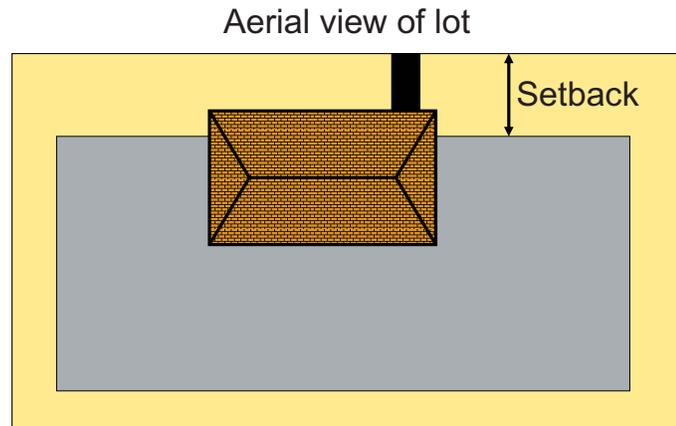
in a district, a community would need to conclude that the use is permissible throughout the district in every location and is not significantly at odds with ordinance objectives. There would be no opportunity to custom tailor a previously nonconforming use to a specific location. See page 5 for further discussion of permitted and conditional uses.

To convert a nonconforming use to a conditional use, a community should determine that, while not permissible throughout a district, the use may be tailored to specific locations in a district by limitations on design or operation of facilities. Decisions to grant or deny conditional use permits (CUPs) are discretionary. In other words, a permit may be denied if the project cannot be tailored to a site without significant harm to ordinance objectives.

## GENERAL ZONING - NONCONFORMING STRUCTURES

### Nonconforming Structure

A building or other structure, lawfully existing prior to the passage of a zoning ordinance or ordinance amendment, which fails to comply with current dimensional standards of the ordinance such as setbacks, lot coverage, and height. The definition of "structure" varies by ordinance and may include fences, decks, playhouses, pools and other major, minor, permanent and temporary constructed objects in addition to buildings.



Nonconforming structures are typically allowed to remain, unchanged throughout the remainder of their useful lives. Virtually all ordinances permit ordinary maintenance of such structures but may limit structural repairs and improvements so as to phase them out and achieve compliance over time.

Ordinances differ in the extent to which additions to nonconforming structures are permitted. Some prohibit additions; some limit the size of additions; some allow additions as long as they do not encroach (or encroach further) into required setbacks. Variances seeking to increase the nonconformity of such structures may raise complex administrative and legal questions.

### STATUTORY & ADMINISTRATIVE RULE PROVISIONS

General zoning statutes in Wisconsin do not specifically address nonconforming structures, only structures housing nonconforming uses. However, many communities have applied the 50% statutory limit applicable to some nonconforming uses to nonconforming structures as well. See page 17 for discussion of the 50% rule.

The authority to impose dimensional standards that may cause a structure to become nonconforming stems from the general authority to zone: to protect public health, safety and welfare by generally providing for adequate light, air, access, aesthetic qualities, water quality, aquatic habitat, flood impact minimization, and economical use of public funds.<sup>72</sup>

<sup>72</sup> General county zoning governed by Wis. Stat. §§ 59.69(1); general town zoning governed by 60.61(1); general city and village zoning governed by 62.23(7)(a) .



## CASE LAW SUMMARY<sup>73</sup> & ATTORNEY GENERAL OPINIONS

While an extensive body of case law addresses issues associated with nonconforming uses, the same does not exist for nonconforming structures. Instead, most case law related to nonconforming structures is derived from cases about zoning variances or administrative appeals. While these cases have produced resolutions for many individual disputes, they have provided only a few general rules for treatment of nonconforming structures.

This section describes those general rules, relevant case law holdings and Attorney General opinions. The Policy Option section (starting on page 32) presents a range of options for managing impacts of nonconforming structures.

### Attorney General opinions

The Attorney General's Office has expressed the following informal opinions.

- *Equal protection is required by the United States Constitution and the Wisconsin Constitution.* “While a legal nonconforming status reasonably supports different treatment from new uses or structures, that status does not reasonably support no regulation or limitation.”<sup>74</sup>
- *Eventual compliance required.* “The courts in Wisconsin, and in other states,

have held it is reasonable for a property owner with an existing nonconforming structure to be allowed to continue to use the structure for a reasonable period of time after the ordinance that makes it nonconforming takes effect, but after that time the property is to be brought into compliance with the zoning ordinance.”<sup>75</sup>

### General rules from case law

- *Laws applying to nonconforming uses can be specifically applied to nonconforming structures.* County ordinances can apply a 50% value limitation to structural alterations of nonconforming structures.<sup>76</sup>
- *Ordinances regulating nonconforming structures must specifically say so.* Though courts and ordinances often use “nonconforming use” to refer to nonconforming structures as well, courts strictly interpret ordinances based on their explicit language.<sup>77</sup>

### Little case law directly addresses nonconforming structures

Surprisingly, very few published cases address nonconforming structure status. Instead, the published cases involving nonconforming structures have holdings that articulate variance standards or enforcement powers.

<sup>73</sup> For full Wisconsin case citation and additional summary information regarding each case, see Appendix A. In this section, names are used for identification and dates are used for context.

<sup>74</sup> Kloppenburg, JoAnne F.; Assistant Attorney General, “Review of Nonconforming Zoning Law,” March 24, 2003, p. 12.

<sup>75</sup> Kloppenburg, JoAnne F.; Assistant Attorney General, “Review of Nonconforming Zoning Law,” March 24, 2003, p. 13.

<sup>76</sup> *Klinger v. Oneida County*, (1989) (mobile home violated setback provisions).

<sup>77</sup> *County of Sauk v. Trager*, (1984) (County's 12-month discontinuation rule for nonconforming uses does not apply to nonconforming structures).

### **Discussion: Relevant variance case law holdings**

Property owners often seek variances to allow nonconforming structures to encroach equally or further into required yards or setbacks if other locations are not available or convenient. The courts have provided extensive guidance regarding proper standards for granting variances. To obtain a variance, an applicant<sup>78</sup> must prove:

- 1) Unnecessary hardship would result from literal enforcement of the ordinance;
- 2) Unnecessary hardship is *due to* unique property limitations;<sup>79</sup>
- 3) A variance will not be contrary to the public interest, *and*
- 4) A variance is consistent with the spirit of the ordinance and achieves “substantial justice.”<sup>80</sup>

There are two types of variances: area variances and use variances. Area variances provide an increment of relief (normally small) from a physical dimensional restriction such as a building height, setback, and so forth,<sup>81</sup> while use variances permit a landowner to put property to an otherwise prohibited use.<sup>82</sup>

It may not always be easy to determine if an applicant is seeking an area variance or a use variance. It is arguable that a large deviation from a dimensional standard, or multiple deviations from several dimensional standards on the same lot, may constitute a use variance instead of an area variance. For example, allowing significantly reduced setbacks could have the same effect as changing the zoning from one residential zoning district that requires significant setbacks and open space to a second residential zoning district that has minimal setbacks and open space.<sup>83</sup>

### **Unnecessary hardship standard**

For a use variance, unnecessary hardship exists only if the property owner shows that they would have no reasonable use of the property without a variance.

The test for determining unnecessary hardship in area variance cases is whether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.<sup>84</sup>

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<sup>78</sup> *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d at 420 (1998); *Arndorfer v. Board of Adjustment*, 162 Wis. 2d at 254 (1991); *State ex rel. Spinner v. Kenosha County Bd. of Adjustment*, 223 Wis. 2d 99 (Ct. App. 1998) (ordinance left owner with less buildable land than he wanted for his desired residence at his desired location, but owner failed to provide evidence that no other home design could incorporate setback requirements).

<sup>79</sup> See, e.g., Wis. Stat. § 59.694 (7)(c).

<sup>80</sup> *Ibid.*

<sup>81</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, ¶ 23.

<sup>82</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, ¶ 21.

<sup>83</sup> Markham, Lynn. Wisconsin Supreme Court Distinguishes Between Area and Use Variances and Changes the Standard for Area Variances, *Land Use Tracker*, Volume 4, Issue 1, Summer 2004, available at <http://www.uwsp.edu/cnr/landcenter/tracker/summer2004/variances.html>

<sup>84</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, ¶ 33 and *State v. Waushara County Board of Adjustment*, 2004 WI 56, ¶ 26.



The board of adjustment or board of appeals must evaluate variance requests in light of the purpose of the zoning restriction sought to be relaxed, the effect of the restriction on the property, and the effect of a variance on the neighborhood and the larger public interest.<sup>85</sup> Generally, public interests are articulated in the purpose statement of an ordinance. The hardship must be unique to the property, unnecessary hardship must be due to unique limitations of the property such as steep slopes, wetlands or other site conditions that prevent compliance with the ordinance,<sup>86</sup> and the hardship cannot be self-imposed.<sup>87</sup>

- *Whole parcel must be considered.* When determining whether unnecessary hardship exists, the property as a whole is considered rather than a portion of the parcel.<sup>88</sup>
- *No self-imposed hardship.* An applicant may not claim hardship because of conditions that are self-imposed.<sup>89</sup>

- *Economic concerns do not justify a variance.* Economic loss or financial hardship does not justify a variance. The test is not whether a variance would maximize economic value of a property.<sup>90</sup>
- *Accessory structures not eligible.* Decks and other accessory structures not essential to the reasonable use of property are not eligible for variances.<sup>91</sup>
- *Minimum variance authorizes specific construction.* A zoning board may grant only the minimum variance that remedies or mitigates the unnecessary hardship.<sup>92</sup> Further, a variance does not create a new dimensional standard for a parcel (e.g. setback line). It permits only the project authorized by the specific terms of the variance granted.
- *Variance to meet building code.* Variances to allow a structure to be brought into compliance with building code requirements have been upheld by the courts.<sup>93</sup>

<sup>85</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23 and *State v. Waushara County Board of Adjustment*, 2004 WI 56.

<sup>86</sup> *State ex rel. Spinner v. Kenosha County Bd. of Adjustment*, 223 Wis. 2d 99, 105-6 (1998); *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396 (1998); *Arndorfer v. Board of Adjustment*, 162 Wis. 2d 246, 255-56 (1991); *Snyder v. Waukesha County Zoning Bd.*, 74 Wis. 2d 468, 478 (1976).

<sup>87</sup> *Ibid.*

<sup>88</sup> *State v. Winnebago County*, 196 Wis. 2d 836, 844-45 n.8 (Ct. App. 1995).

<sup>89</sup> *State ex rel. Markdale Corp. v. Bd. of Appeals of City of Milwaukee*, 27 Wis. 2d 154, 163 (1965); *Snyder v. Waukesha County Zoning Bd.*, 74 Wis. 2d 468, 479 (1976).

<sup>90</sup> *State v. Winnebago County*, 196 Wis. 2d 836, 844-45 (Ct. App. 1995) (landowners had dredged channel 30 years earlier, and required setback from channel and road now limit their ability to develop their property into 8 lots. One of the Board's justifications in granting a variance was "preservation of property rights: without a variance, these lots could not be developed to their highest and best use." This is not an appropriate standard); *State v. Ozaukee County Bd. of Adjustment*, 152 Wis. 2d 552, 563 (Ct. App. 1989) (increasing the county's tax base and furthering economic development could not be the basis for granting a variance; deprivation of restaurant customers' spectacular views is not a 'hardship' justifying a variance).

<sup>91</sup> *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396, 413-414 (1998).

<sup>92</sup> Anderson, *American Law of Zoning 3d*, (1986) Vol. 3, s. 20.86, pp. 624-25.

<sup>93</sup> *Thalhofer v. Patri*, 240 Wis. 404 (1942); *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396, 419-420 (1998).

### **Hardship due to unique property limitations**

Unnecessary hardship must be due to unique limitations of the property such as steep slopes, wetlands or other site conditions that prevent compliance with the ordinance.<sup>94</sup>

- *Circumstances of an applicant do not justify a variance.* The situation of an applicant such as a growing family or desire for a larger garage are not factors in deciding variances.<sup>95</sup>

### **No harm to public interests**

A variance may not be granted which results in harm to public interests.<sup>96</sup> Generally, public interests are articulated in the purpose statement of an ordinance.

### **Other considerations**

- *Ordinance violations.* Ordinance violations, even if nearby and similar to the requested variance, do not provide grounds for granting a variance.<sup>97</sup>
- *Objections from neighbors.* A lack of objections from neighbors does not provide a basis for granting a variance.<sup>98</sup>

## **THE VARIANCE – NONCONFORMITY RELATIONSHIP**

The model zoning enabling act provided for variances to alleviate “unnecessary hardship,” which generally refers to hardship inherent in the physical characteristics of a parcel, when granting such a variance would not harm the public interest.<sup>99</sup> For example, the owner of an oddly shaped lot or a very steep lot might request a deviation from setback requirements when locating a building. It is important to understand that a structure built under the authority of a variance does not assume the designation or status of a nonconforming structure. A variance provides a relaxation of a standard to allow a specific project. Previous to the 2004 Ziervogel case,<sup>100</sup> once a landowner had obtained a variance allowing reasonable use of his or her property it was very difficult to logically argue for later variances to allow additional construction since reasonable use of the property has been provided by the original variance (the “unnecessary hardship” test cannot be met). Future case law will determine if this standard still holds.

Variance requests are common with respect to nonconforming structures and

<sup>94</sup> *State ex rel. Spinner v. Kenosha County Bd. of Adjustment*, 223 Wis. 2d 99, 105-6 (1998); *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396 (1998); *Arndorfer v. Board of Adjustment*, 162 Wis. 2d 246, 255-56 (1991); *Snyder v. Waukesha County Zoning Bd.*, 74 Wis. 2d 468, 478 (1976).

<sup>95</sup> *Snyder v. Waukesha County Zoning Bd.*, 74 Wis. 2d 468, 478-79(1976); *County of Sawyer Zoning Bd. v. Department of Workforce Development*, 231 Wis. 2d 534 (Ct. App. 1999) (State DWD cannot order the county to grant a variance as part of administering the Fair Housing Act).

<sup>96</sup> *State v. Winnebago County*, 196 Wis. 2d 836, 846-47 (Ct. App. 1995); *State v. Kenosha County Board of Adjustment*, 218 Wis. 2d 396, 407-8 (1998).

<sup>97</sup> *Von Elm v. Board of Appeals*, 258 App. Div. 989 (N.Y. 1940).

<sup>98</sup> *Arndorfer v. Board of Adjustment*, 162 Wis. 2d 246, 254 (1991).

<sup>99</sup> Eric Damian Kelley, “Zoning,” in *The Practice of Local Government Planning*, 2<sup>nd</sup> ed., p. 259.

<sup>100</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23.



nonconforming lots. It is difficult to legally justify a “use variance” because it would require an owner to demonstrate that, based on physical characteristics of a lot, only a nonconforming use is feasible: the landowner would have no reasonable use of the property absent the variance.<sup>101</sup>

Wisconsin courts have published very few cases involving use variances.<sup>102</sup> Problems associated with nonconforming uses are generally resolved by a rezoning request to change the zoning district designation to a district where the proposed use is permitted, or by an ordinance text amendment to add the proposed use to those allowable in the current classification.

### Variations Versus Administrative Appeals

Zoning enabling legislation in Wisconsin empowers zoning boards to decide variances, special exceptions, and appeals of administrative decisions.<sup>103</sup>

These are distinct powers that are occasionally mixed or confused. As mentioned above, landowners apply for variances to build or expand structures in ways that would otherwise violate dimensional standards. Administrative appeals are challenges to an administrative official’s interpretation of an ordinance. These two processes are described and distinguished in the *Zoning Board Handbook*.<sup>104</sup>

As an example, when a landowner’s proposal to expand a nonconforming structure requires a variance from dimensional standards, and the zoning administrator takes the position that the addition would exceed a 50% valuation limit (“50% Rule”), the landowner may have two issues to address. One is an appeal of the determination of the value of the addition and the other is a variance

to the dimensional standard that prevents its construction. They are separate issues.

Valuation appeal: A landowner may appeal a zoning administrator’s interpretation of a 50% Rule, if the landowner contends that proper interpretation would allow the expansion. This should be decided as an administrative appeal based on whether the zoning administrator properly determined the baseline value for the existing structure and the estimated value for the proposed improvement.

Dimensional variance: The landowner would also need to seek a variance from dimensional standards as a separate request to the Zoning Board, and he or she must show that all three variance criteria are met. Application of the valuation calculation is not the proper subject of a variance request because the 50% valuation cap is not a dimensional standard.

<sup>101</sup> *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, ¶ 27, citing *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d at 398.

<sup>102</sup> *State ex rel. Markdale Corp. v. Bd. of Appeals of City of Milwaukee*, 27 Wis.2d 154 (1965) (hardship was self-created when landowner sought variance to have cars access his un-permitted car wash through a parking district).

<sup>103</sup> See, e.g., Wis. Stat. § 59.694(7), Powers of County Board of Adjustment.

<sup>104</sup> Michael D. Dresen and Lynn Markham, *Zoning Board Handbook: For Zoning Boards of Adjustment/Appeals*. 2001. See Appendix C for ordering information.

The line between a use variance and a dimensional or area variance can be blurred. In floodplain zoning, for example, most types of structures are not allowed in floodplains. Floodplain rules require nonconforming homes (a use classification) to be phased out or elevated and flood-proofed. However, storage structures (for benign materials) are allowed in floodplains. Is the home a nonconforming use because it is not an allowable use, or is it a nonconforming structure because its lowest floor is below the flood protection elevation? Is it both? The special issues associated with floodplain zoning nonconformities subsequently are addressed beginning on page 73.

## SYNTHESIS OF LEGAL GUIDANCE

- Ordinances can adapt their nonconforming use provisions to apply them to nonconforming structures with conforming uses, but if they do so, their language must be explicit.
- Landowners who desire to structurally alter a nonconforming structure usually must seek a variance in order to do so. To obtain a variance, the landowner must show that the ordinance unreasonably prevents him or her from using the property for a permitted use or that complying with the regulation is unnecessarily burdensome, considering the purposes of the restriction and the effect of the variance on the property, the neighborhood and the larger public interest.<sup>105</sup>

## POLICY OPTIONS

Communities have developed a wide range of policies dealing with nonconforming structures. The controversial nature of the subject, the complex issues involved and limited legal guidance have all contributed to this result. However, one common element among most policies is that nonconforming structures are typically allowed to remain, if unchanged, throughout the remainder of their useful lives.

Ordinances differ regarding modifications and additions to nonconforming structures. Some prohibit additions. Others allow additions as long as they do not encroach further into required setbacks, or violate other dimensional standards. Landowners seeking greater flexibility than a local ordinance allows may apply for a variance.

Some property owners express concern about having their home labeled a “nonconforming structure.” Generally, they are reacting to misinformation about the consequences of this designation. To address the concern, some communities use alternative terms such as “legal preexisting structure”. Regardless of the term used, the explicit provisions of local ordinances (as limited by common law, statutes and rules) determine the effect of the designation. Another common property owner concern is the status of structures built on a nonconforming lot. Structures do not become nonconforming because they are located on a nonconforming lot. A structure becomes nonconforming if the

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<sup>105</sup> Ibid.



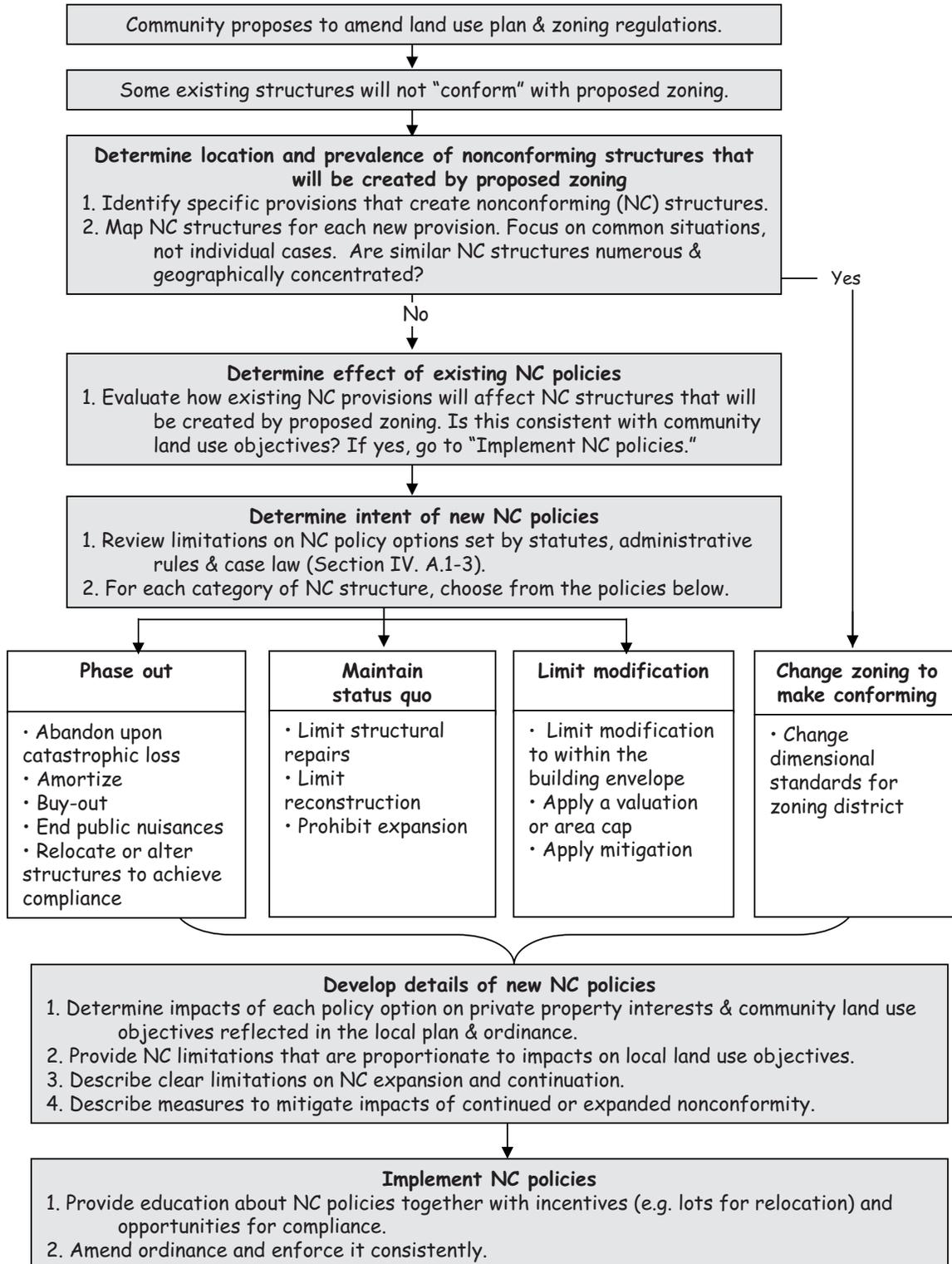
structure itself does not comply with current dimensional requirements and predates adoption of requirements with which it does not comply.

Although local zoning policies vary in how they treat nonconforming structures, the four general options for communities to choose from are:

- phase them out,
- maintain the status quo,
- limit modifications and additions, or
- change zoning to make some or all conforming.

A community may apply different policies to distinct classes of nonconforming structures. The flowchart on the following page describes a process that your community can use to assess the prevalence and impacts of nonconforming structures and to develop effective objectives and policies. See the sections on Shoreland Zoning (page 61), Shoreland-Wetland Zoning (page 71) and Floodplain Zoning (page 73) for additional information that must be considered when developing policies for these areas.

## Policy Development Process - Nonconforming Structures



The following discussion, organized according to the flow chart on the facing page, describes each general policy option. After determining the intent of your policy for a class of nonconforming structures, follow the remaining steps in the diagram to develop a framework for its implementation. The notation “S\*” indicates there is additional shoreland-specific information about this policy option in the shoreland zoning section.

### ***Intent And Objective***

The first step in developing a nonconforming structure policy is to determine its general intent and specific objectives. Determinations should be based on an assessment of the impacts of continued existence and use of nonconforming structures on community interests, whether such impacts could be mitigated and the extent of property owner investment in or reliance on nonconforming structures. Related decisions and supporting documentation should be included in the community plan. Following is an example from the Langlade County zoning ordinance:

*It is the intent of these provisions to balance the public objectives of this ordinance with the interests of owners of nonconforming structures by:*

- 1. treating structures which are most nonconforming and therefore most contrary to the objectives of this*

- ordinance more restrictively than structures which are more nearly in compliance with ordinance provisions; and by*
- 2. allowing for the improvement or expansion of principal structures essential to the reasonable use of a property provided the adverse effects of such improvement or expansion are adequately mitigated.*<sup>106</sup>

### ***Policy Option - Phase Out***

Zoning enabling legislation for cities and villages in Wisconsin states that ordinances may not “prohibit the continuance” of nonconforming uses (interpreted by some to include structures). Only structures that are not used for trade or industry, such as residential development, may be legally discontinued by counties or towns (subject to constitutional constraints). The authors are not aware of any nonconforming homes in Wisconsin that have been phased out by ordinance. However, homes built illegally have been removed.

### ***Abandon upon catastrophic loss***

Many communities require nonconforming structures to be abandoned or brought into compliance if they are damaged beyond a defined threshold. Allowing substantially damaged nonconforming structures to be rebuilt in their former location (or otherwise not in compliance with zoning standards) is inconsistent with common law aimed at eventual compliance. Rebuilding that

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<sup>106</sup> Section 17.12(3)(a).

complies with dimensional requirements is permitted. For instance, the Columbia County Zoning Code states:

*When a nonconforming structure or building containing a nonconforming use is damaged by fire, explosion, act of God or the public enemy to the extent of more than fifty percent (50%) of its current equalized assessed value as determined by the local assessor; it shall not be restored except in conformity with the regulations<sup>107</sup> of the district in which it is located.*

State statutes currently require exceptions to this abandonment principal in shoreland and floodplain zoning ordinances. (See pages 64 and 75, respectively.)

### **Amortize**

Amortization is generally applied to minor or accessory structures. Using amortization, nonconforming structures are required to be removed after their value has been partially recovered, or used up, over a specified period of time. The rationale for determining what phase out period is appropriate should be well thought out and documented. There are three basic approaches to this problem:

- 1) divide the cost of the structure by an established annual rental value to determine the remaining structure life;
- 2) establish a sunset date after which a class of structures must be removed; and
- 3) require compliance when ownership changes (see s. 30.13(4)(c), Wis.

Stats. for an example relating to nonconforming piers).

Amortization was curtailed to some degree in relation to billboards when the 1965 Highway Beautification Act was amended to require both state and local governments to provide cash compensation to remove nonconforming billboards from interstate and state trunk highways covered by the 1965 act.<sup>108</sup>

Some nonconforming structures are difficult to amortize. When they cause considerable harm to public interests or significantly impair community plan implementation, a community may choose to limit repairs as well as additions. This policy is intended to encourage their elimination over time.

### **Buy-out**

In unusual cases, some communities, occasionally with financial assistance from state or federal agencies, have offered buy-out programs or relocation incentives to encourage abandonment of nonconforming structures. For example, buyouts in frequently flooded areas may provide long-term public savings considering costs of emergency services and publicly subsidized flood insurance.

### **End public nuisances**

Regardless of zoning ordinance provisions, structures may be removed if they constitute a public nuisance.<sup>109</sup>

<sup>107</sup> Section 16-1-12(a)(6)(d), <http://www.co.columbia.wi.us/ord/title16-1.pdf> 4/23/03.

<sup>108</sup> Wis. Stat. § 84.30(6) and Wis. Adm. Code § Trans 201.21.

<sup>109</sup> *Village of Elm Grove v. T.V. John & Son, Inc.* (1992).



### **Relocate or alter structures to achieve compliance**

Another option for phasing out nonconforming structures is to physically relocate structures to comply with dimensional requirements. Some property owners choose this option for small structures that can be easily relocated on the same parcel. In some cases structures may be physically modified to achieve compliance (reduce height of tower, remove deck, etc.). Also see “Abandon upon catastrophic loss” on page 35.

### ***Policy Option - Maintain The Status Quo***

#### **Limit structural repairs that perpetuate nonconforming structures S\***

Communities commonly allow ordinary maintenance and repair of nonconforming buildings while disallowing repairs that are more substantial or “structural” when their policy objective is to preserve current levels of structural nonconformity. To avoid confusion, ordinances should define “structural modification,” “maintenance and repair,” or both.

*Marris v. City of Cedarburg* (1993) provides the following guidance to differentiate between ordinary “maintenance and repair” and “structural repairs” with examples added by the Court. Structural repairs include work that would:

- “convert an existing building into a new or substantially different building,” (e.g., reconstruction of a substantial portion of the building) or
- “affect the structural quality of the

building” (e.g., replacing foundations, beams, columns, joists or rafters) or

- “contribute to the longevity or permanence of the building” (e.g., structural changes or significant additions).

Maintenance, repair and modernization, including installing acoustical ceilings, heating, electricity, plumbing, plumbing fixtures, or insulation, may extend a structure’s life. They are categorized as ordinary “maintenance and repair,” however, rather than “structural repairs” to encourage buildings to be maintained in safe and sanitary condition.<sup>110</sup>

The Columbia County Zoning Code defines “structural alterations” as:

*Any change in the supporting member of a structure such as bearing walls, columns, beams or girders, footings, and piles.*<sup>111</sup>

#### **Limit reconstruction of nonconforming structures S\***

As noted above under “Abandon upon catastrophic loss,” many communities do not allow reconstruction of nonconforming structures that have been substantially destroyed by a natural disaster unless they are brought into compliance with ordinance standards. To encourage significantly damaged, dilapidated or voluntarily demolished nonconforming structures to be relocated, communities have set thresholds beyond which reconstruction must comply with ordinance standards. Setting an easily

<sup>110</sup> *Marris v. City of Cedarburg* (1993).

<sup>111</sup> Section 16-1-21(77), <http://www.co.columbia.wi.us/ord/title16-1.pdf> 4/23/03.

measured damage or replacement threshold is an important and, to date, elusive feature of such ordinance provisions. Communities have used a percentage of a structure's value, footprint, habitable area, perimeter or structural components to define the compliance threshold. The goal is to prevent the scenario where all except one wall of a nonconforming structure is demolished and then a new structure is built in the same nonconforming location. For instance, the Dane County Ordinance states:

*A building or structure is considered to be demolished and nonexistent if during the course of restoration, enlargement or other improvement, more than 50% of the pre-existing structure is removed or must be replaced to maintain structural integrity. Continuation of the construction or repair shall be subject to the entire structure being in compliance with current zoning regulations based on the parameters for entirely new construction and disregarding any nonconforming status.<sup>112</sup>*

### **Prohibit expansion of nonconforming structures S\***

This approach is comparatively simple to administer because the extent of allowable expansion does not need to be measured. This option is used in the Waupaca County Shoreland Ordinance, which states:<sup>113</sup>

*A principal structure which is nonconforming as to shoreline*

*setback and which is located within 50 feet of the ordinary high water mark may be improved internally subject to the limitation of Section 8.31(2)(a) but may not be expanded. Such improvement shall be confined to enclosed portions of the building envelope which existed at the time the structure became nonconforming and shall not include new basements or additional stories. However the following modifications are permitted:*

- (a) Replacement of siding and upgrading of insulation;*
- (b) Replacement of roofing and modification of roof pitch provided modification does not exceed a 6:12 (rise to run) roof pitch; and*
- (c) Replacement and modification of windows provided no more than 50% of the waterward façade is converted to glass.*

*Modifications to roof pitch and window placement permitted in Sections 8.32(1b&c) shall require 2 points of mitigation consistent with the provisions of Section 8.32(4).*

<sup>112</sup> Section 10.23(4), <http://www.co.dane.wi.us/ord/dcord.htm> 4/23/03.

<sup>113</sup> Section 8.32(1), <http://www.co.waupaca.wi.us/zoning/2002%20Shoreland%20Ordinance.pdf> 4/18/04.



### ***Policy Option - Limit Modification***

Cities and villages must adopt a 50% valuation limit on replacement and additions to structures housing nonconforming uses. They may legally adopt additional requirements for structures housing nonconforming uses, and different requirements for nonconforming structures with conforming uses.

Counties and towns are free to adopt a wide range of limitations on modifications to nonconforming structures. Some ordinances permit limited modification of a nonconforming structure if the addition itself can comply with all other regulations.

Communities should assess the impacts of limits on modification of nonconforming structures on both property owners and public interests to determine appropriate limits. Percentage of a structure's value, footprint or habitable area have all been employed to define limits on modifications to such structures.

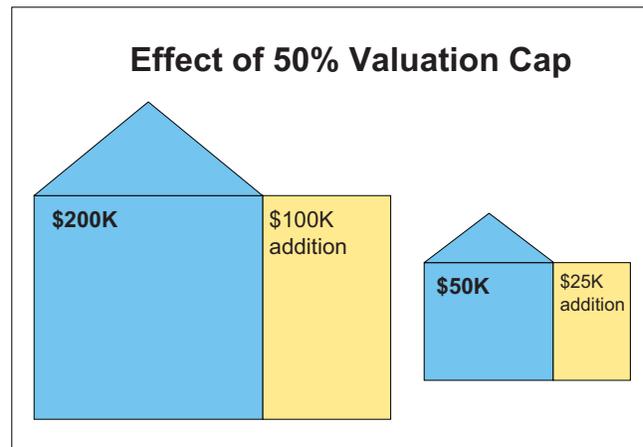
#### **Limit modifications to within the building envelope S\***

Some communities allow improvements beyond "ordinary maintenance and repair" provided they are located within the existing building envelope, typically including roofing, siding, doors and windows, while excluding new basements, additional stories and lateral expansion. In theory, this approach tends to encourage upkeep of existing substantial structures while encouraging abandonment of those with insufficient space for the future needs of the owner.

### **Apply a valuation or area cap**

#### Valuation Caps

A common approach to limiting nonconforming structures is to impose a lifetime 50% valuation cap that prohibits structural repairs, alterations or additions to nonconforming structures when the cost exceeds 50% of the value of the structure. This policy obviously allows valuable homes to add more value and area than more modest homes. For example, a \$200,000 home would be allowed \$100,000 in expansions, while a \$50,000 home would be allowed \$25,000 in expansions. For that reason it has been viewed as unfair where greater modification or expansion results in



greater adverse impacts on public interests. In theory the effect of a 50% valuation cap is to cause an owner of a nonconforming structure to take a long-term view and either:

- 1) keep the structure well maintained and limit expansion so as not to exceed the 50% lifetime limit, or
- 2) plan for eventual structure replacement that complies with regulations.

Implementing a 50% valuation cap can be administratively complex. Determination of the value, rather than cost, basis of the original structure and of the proposed improvements may be difficult. Options for determining the cost basis of the original structure include:

- a. current assessed value (not recommended due to potential inaccuracy and assessment variability among municipalities);
- b. current equalized assessed value;
- c. current appraised fair market value (in theory the same as equalized assessed value); or
- d. assessed value at the time the structure became nonconforming.

Option “d” results in the most significant limit on modifications.

Another issue concerns what changes to a structure are counted toward the valuation cap. Typically, structural repairs are counted toward the cap while maintenance and non-structural repairs are not. The previous section, entitled “Limit structural repairs that perpetuate nonconforming

structures,” summarizes legal guidance on this matter (page 37).

An additional issue involves how to assign value to modifications counted toward the cap. Options include:

- the value of construction calculated using the fair market value of all labor and materials (recommended method based on equity and administrative feasibility),
- the cost of construction (problematic because labor and materials may be donated or bartered resulting in a cost that is not an accurate reflection of the value of modifications), or
- the change in the value of the nonconforming structure due to alterations or additions (difficult to get accurate estimates of the change in value prior to construction).

Lastly, changes to a nonconforming structure are difficult to track over time without meticulous record keeping.

Table 2 illustrates application of a 50% valuation limit using the value of the structure at the time of proposed

Table 2

<b>Example: 50% Rule for Limited Expansion of Nonconforming Structures and Structures with Nonconforming Uses<sup>114</sup></b>					
Year	Current value of structure	Value of proposed addition	% Proposed addition is of current value	% Lifetime additions are of current value	Addition allowed (50% or less)
1950	\$10,000	(new)			
1970	\$40,000	\$10,000	25%	25%	Yes
1980	\$80,000	\$16,000	20%	45%	Yes
1992	\$110,000	\$16,500	15%	60%	No

<sup>114</sup> Adapted from Michael D. Dresen and Rita Kozak. *Law of the Land: A Citizen's Guide...Influencing Local Land Use Decisions that Affect Water Quality*. No date. p. 26.

modification as the basis for the cap. In this case the additions in 1970 and 1980 are allowed but the addition proposed in 1992 is over the 50% lifetime limit and would be prohibited.

If the value of the structure at the time it became nonconforming in 1950 provides the basis for the 50% cap rather than current value, the 1970 addition would be prohibited because it is over the 50% lifetime limit.

Difficulties in administering valuation caps have prompted numerous counties in Wisconsin to adopt area caps to limit the reconstruction and expansion of

nonconforming structures. The following section describing area caps relates issues that should also be addressed in ordinances using valuation caps.

#### Area caps

Since zoning ordinances need not employ a 50% valuation cap to deal with all nonconforming structures, communities have developed alternatives such as area caps. Area caps are simpler to explain, measure and enforce than valuation caps. They rely on physical measurements of a building rather than more complex value estimates. The following diagram illustrates three area cap options.

## Expansion Options for Nonconforming Structures Aerial View

No expansion OR Existing house	Option #1 50% area expansion cap	Option #2 1500 sq. ft. cap	Option #3 50% area cap AND 1500 sq. ft. cap
<div style="border: 1px solid black; width: 60px; height: 40px; background-color: orange; margin: 0 auto; display: flex; align-items: center; justify-content: center;">500 sq. ft.</div>	<div style="border: 1px solid black; width: 60px; height: 40px; background-color: orange; margin: 0 auto; display: flex; align-items: center; justify-content: center;">500 sq. ft.</div> <div style="border: 1px solid black; width: 60px; height: 30px; margin: 5px auto; display: flex; align-items: center; justify-content: center;">250 sq. ft. addition</div>	<div style="border: 1px solid black; width: 60px; height: 40px; background-color: orange; margin: 0 auto; display: flex; align-items: center; justify-content: center;">500 sq. ft.</div> <div style="border: 1px solid black; width: 120px; height: 40px; margin: 5px auto; display: flex; align-items: center; justify-content: center;">1000 sq. ft. addition</div>	<div style="border: 1px solid black; width: 60px; height: 40px; background-color: orange; margin: 0 auto; display: flex; align-items: center; justify-content: center;">500 sq. ft.</div> <div style="border: 1px solid black; width: 60px; height: 30px; margin: 5px auto; display: flex; align-items: center; justify-content: center;">250 sq. ft. addition</div>
<div style="border: 1px solid black; width: 120px; height: 80px; background-color: orange; margin: 0 auto; display: flex; align-items: center; justify-content: center;">2000 sq. ft.</div>	<div style="border: 1px solid black; width: 120px; height: 30px; margin: 0 auto; display: flex; align-items: center; justify-content: center;">1000 sq. ft. addition</div> <div style="border: 1px solid black; width: 120px; height: 80px; margin: 5px auto; background-color: orange; display: flex; align-items: center; justify-content: center;">2000 sq. ft.</div>	<div style="border: 1px solid black; width: 120px; height: 80px; background-color: orange; margin: 0 auto; display: flex; align-items: center; justify-content: center;">2000 sq. ft.</div>	<div style="border: 1px solid black; width: 120px; height: 80px; background-color: orange; margin: 0 auto; display: flex; align-items: center; justify-content: center;">2000 sq. ft.</div>

*Option 1. Percentage expansion approach.*

An area cap can limit expansion to some percentage (50% commonly) of the area present when a structure became nonconforming. Technically this approach requires a property owner to document the area of the structure as of the date it became nonconforming, which may prove difficult. Accurate records of building dimensions may not be available in all municipalities. The policy also suffers from the same defect as valuation caps by allowing more expansion for larger structures which may conflict with public interests in reducing impacts of nonconforming structures.

*Option 2. Numeric area cap.*

Alternatively, an area cap can limit nonconforming structures to a maximum area that includes both the existing structure and proposed expansions. Administration of this approach requires only measurement of the existing structure and proposed

addition. Implementing this approach requires a community to make a judgment about the maximum size of a nonconforming structure that considers both property owner interests in continued use and public interests in minimizing impacts of nonconforming structures.

*Option 3. Hybrid of percentage expansion and numeric area cap approaches.*

These two approaches can be hybridized as in the following example.

*Expansion of nonconforming structures is allowed provided:*

- a. The footprint of the expansion does not exceed 50% of the footprint of the structure at the time it became nonconforming; AND*
- b. The total of existing and proposed enclosed space does not exceed 1500 square feet.*

Simply stated expansion is limited to the lesser of 50% of the original structure area or a combined total of 1500 square feet, whichever is less. This option both provides a total area cap to address public interests and encourages replacement of small structures by limiting their expansion to a percentage of their current area.

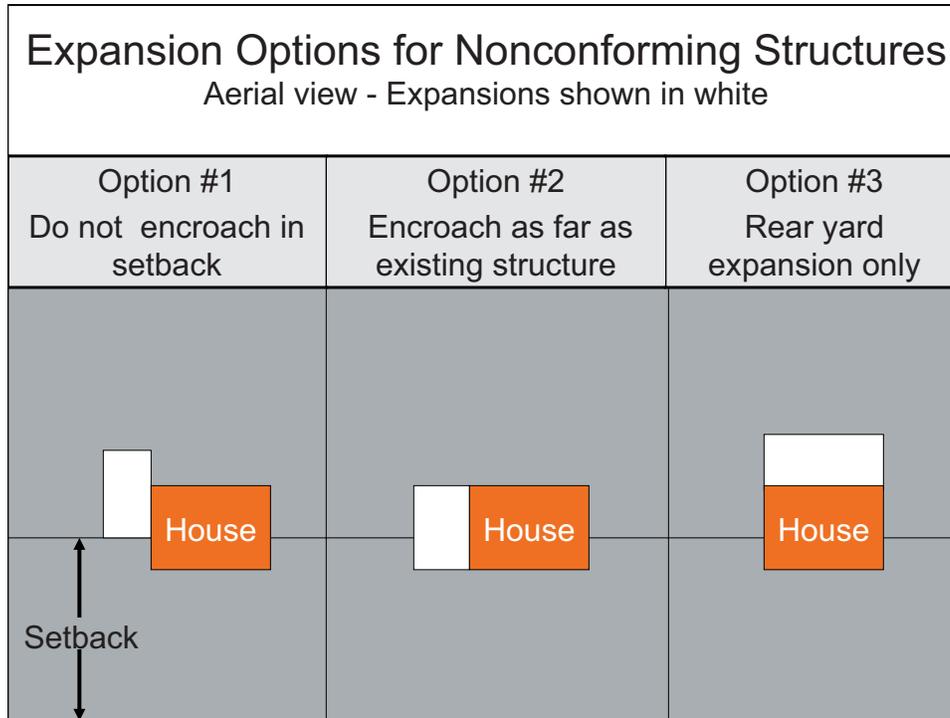
All three options require clarification about whether expansion or total area is limited based on the footprint of a structure, total enclosed space or some other measurement. Using “total living space” or “habitable area” as a basis for regulation have proven somewhat subjective and may vary as owners convert storage, basement or attic space to living area. “Enclosed space” is recommended as an alternative.

**Area caps should address the following four issues:**

- *Which nonconforming structures are allowed to expand?*
  - ◆ *Accessory structures* that are incidental to the use of property may be treated more restrictively than principal structures that are essential to reasonable use of property. For example a shed may be limited to ordinary maintenance and repair, but the house could be expanded within limits.

- ◆ *Structures that are seriously nonconforming* as to dimensional standards may be treated more restrictively than those that are almost compliant. For example, a structure that encroaches less than 10 feet into a setback may be allowed limited expansion while one that encroaches farther may be limited to its current size.
- ◆ *Structures that are more easily relocated* such as those that lack a basement or frost walls may be limited to their existing size to encourage relocation to a compliant location.
- ◆ *Small structures* that are less than a designated size (e.g., 600 square feet or below the minimum size for residential structures specified by local ordinance) may be limited to their existing size. Smaller structures represent a smaller investment, and may be more easily relocated or replaced than a larger structure, but this approach also results in preferential treatment for large structures.
- ◆ *Structures that pose a public safety hazard*, such as a building in a road intersection vision triangle or highway right-of-way, might be more severely limited than those not posing a similar hazard.

- *Where can expansions be located?*



This figure shows three options for the location of permitted additions to nonconforming structures. Ordinance language and illustrations should clarify permissible locations for additions. Option #2 may further compromise setback objectives and arguably increases nonconformity. Some communities limit expansions to locations that minimize impacts on ordinance objectives as shown in option #3. Option #1 is used in the Dane County Zoning Ordinance, which states:

*Any building lawfully erected prior to the adoption of this ordinance which does not conform to the requirements of this ordinance as to setback, side yards or rear yards, may be continued*

*in use, but any future additions or structural alterations shall conform to the provisions of this ordinance.*<sup>115</sup>

- *What areas count toward the area cap basis?* Are attached garages, basements, upper stories, decks, porches, and roof overhangs counted toward the area of the initial structure? Are these areas counted for permissible expansion? Consistency in the answers to these two questions makes an ordinance more understandable and more easily administered.
- *Are nonconforming structures allowed multiple expansions?* Some communities have adopted a one-time expansion policy allowing nonconforming

<sup>115</sup> Section 10.21(1)(d)(2), <http://www.co.dane.wi.us/ord/dcord.htm> 4/23/03.

structures a single expansion. This provision in the Vilas County shoreland ordinance is intended to encourage landowners to plan for the future use of buildings and to eliminate administrative costs related to permitting and tracking multiple expansions.<sup>116</sup>

### **Apply mitigation**

Communities may require landowners to mitigate the impacts of additions to nonconforming structures on neighbors and public interests in ordinance objectives. See page 63 for a discussion of mitigation options.

### ***Policy Option - Change Zoning Standards***

Dimensional standards have the greatest impact when they are put in place before development or redevelopment occurs. Maintaining dimensional standards in an area where most development does not comply and where little redevelopment is expected does not advance ordinance objectives. Requiring mitigation or publicly subsidizing mitigation of the impacts of nonconforming structures already in place may be more effective in the long term.

### **Change dimensional standards for zoning district**

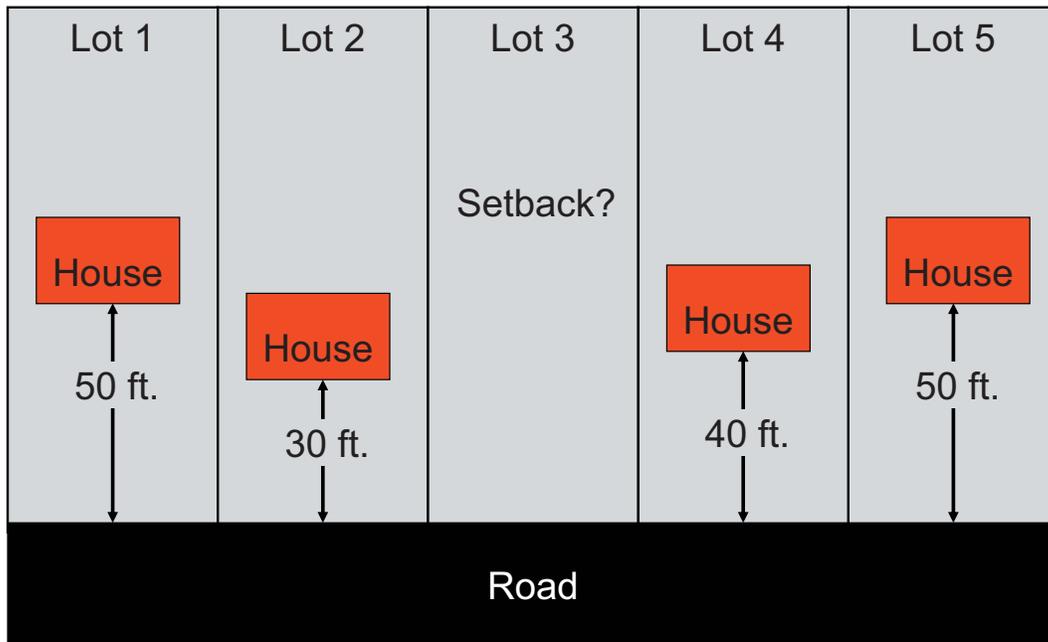
If many similar nonconforming structures are concentrated in one geographic area, a community may decide to change the dimensional standards for a zoning district, or a portion of a district, to accommodate the continuance and perhaps limited expansion of the nonconforming structures. This is a rational policy choice provided the change is consistent with state law, community plan objectives and ordinance purposes.

An obvious way to change the dimensional standards is to simply modify the numerical measurement in an ordinance for a setback, height or lot coverage based on the ordinance objectives. A new dimensional standard may be applied to an entire zoning district or to a specified portion of a district where it is necessary due to small lot sizes or existing development. Other alternatives for changing dimensional standards are described below.

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<sup>116</sup> Section 6.4A(1)(a).

## Roadway Setback Averaging



### *Setback averaging S\**

Setback averaging is a common approach to determine setbacks for new structures where there is an existing pattern of development that does not comply with current regulatory standards. Generally, the setbacks of existing structures on adjacent lots are averaged to produce a setback for a vacant lot. The figure above illustrates some of the issues that should be considered in constructing a setback averaging policy.

Resolve the following questions when adopting setback averaging provisions:

- *Which structures should be used to calculate the average?*  
This decision may be determined by considering the objectives of the related regulation. For example, a few buildings may obstruct view corridors

along highway right of ways. If there is little likelihood that the buildings will be removed in the foreseeable future, allowing similar encroachment by new construction between the existing nonconforming structures may not adversely affect public safety. However, the water quality benefits of buffer areas accumulate lot by lot and adoption of a similar setback averaging policy regarding shoreline setbacks would detract from public natural resource protection objectives.

- *Do you want to use setback averaging if development exists on only one adjacent lot?*  
This approach will extend a pattern of substandard setbacks.
- *Do you want to maintain a minimum setback distance that must be met*



*regardless of the setbacks of nearby structures, i.e. averaging would not apply if the result were less than the established minimum?*

- *Do you want to include only principal structures or all structures in setback averaging calculations?*

Generally, accessory and minor structures can be more easily relocated to compliant locations, thereby reversing a pattern of nonconformity over time.

- *Does setback averaging apply to building new structures, expanding existing structures or both?*

Again, a review of regulatory objectives and a balancing of property owner and public interests will point to an appropriate determination on this issue.

The following example of setback averaging language is from the Oconto County zoning ordinance:

*Front (road) setbacks and water front setbacks may be reduced on the approval of the zoning administrator where there are principal buildings already located on adjoining lots, where such buildings are within 200 feet of a common lot line and where such buildings are located closer to the road or water body than the present ordinance would allow. However, in no*

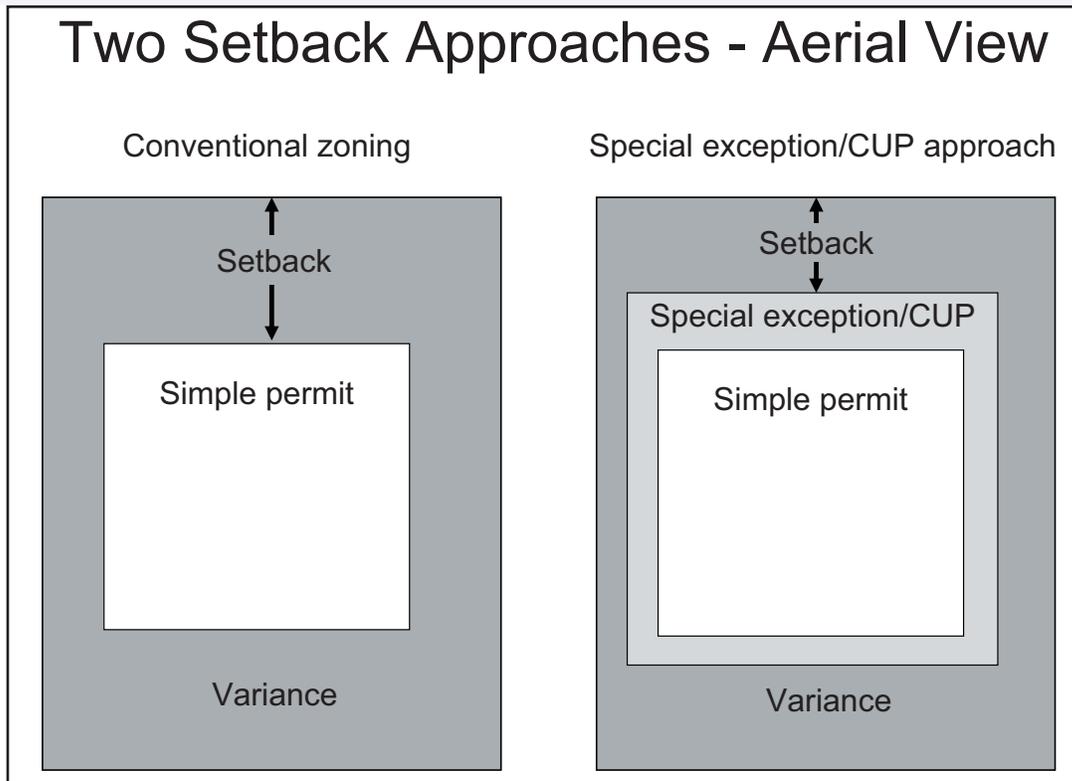
*case may averaging reduce the setback below 40 feet, and averaging may only be used if the required setback can not be achieved without the use of averaging. The administrator shall add the actual setback of non-conforming neighboring principal structures plus the required setback and divide by the number of items added to calculate the reduced setback line for the subject property. Where there is only one neighboring principal structure, averaging can not take place. Measurement is to be done from the nearest straight bearing wall to the setback line in question. Averaging can not be done using decks, patios, or any similar objects, or using accessory structures.<sup>117</sup>*

*Special exceptions to dimensional standards*  
Some communities use the special exception process (also known as the conditional use permit or CUP process) to provide flexibility in applying dimensional standards. The process provides notice to the public and affected neighbors, a public hearing and discretion for a decision making body that bases its determinations on site conditions, specific ordinance standards and potential for mitigation of adverse impacts.

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<sup>117</sup> Section 14.410(4).

## Two Setback Approaches - Aerial View



The City of Madison, for example, uses a special exception process to consider requests for additions to structures that encroach in required setback areas.<sup>118</sup> Such requests are common in its downtown area where older and historic residential development occupies very small lots.

This figure illustrates two approaches for providing flexibility in applying setback standards. Conventional zoning provides only two options:

- A proposed structure that complies with dimensional standards may be authorized by a simple building or land use permit.
- A proposed structure that does not comply with dimensional requirements requires a variance from the local zoning board which may be granted if the

owner's documentation satisfies legal standards.

Madison's special exception approach defines a third area where buildings or additions may be allowed if they meet ordinance standards for special exceptions. This approach might be described as requiring increasing regulatory standards and scrutiny as greater relaxation of the setback standard is requested.

The City of Madison uses the special exception approach in a zoning district that contains many different-sized lots that were developed over the course of at least 60 years.<sup>119</sup> In this particular district, the city had applied 1960s-era suburban setbacks to old urban neighborhoods, making all structures on entire blocks nonconforming.

<sup>118</sup> Section 28.08(3)(d), City of Madison Code of Ordinances, <http://www.ci.madison.wi.us> 4/23/03.

<sup>119</sup> Section 28.08(3)(d), City of Madison Code of Ordinances, <http://www.ci.madison.wi.us> 4/23/03.



At the same time, the type of nonconformity varied, so new standards would not solve the problem. Before the special exception standards were adopted, people who wanted to add a porch like their neighbors' would need a variance, and would be unlikely to get one, since they already had reasonable use of their property and could not meet the unnecessary hardship test required to obtain a variance. The special exception procedure allows the city to approve additions within the designated special exception area that meet new ordinance standards. However, a proposed addition too close to a front lot line might still require a variance and a special exception that would interfere with neighbors' rights might be denied.

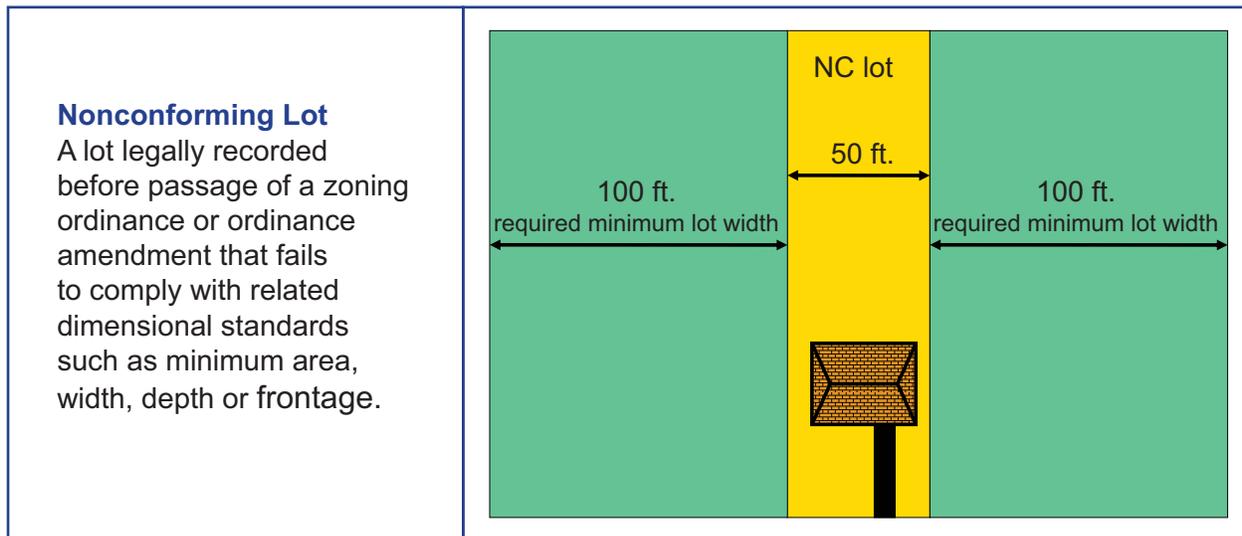
Madison's approach is currently in the initial stages of implementation. Another community's use of special exceptions to provide flexibility has been recently upheld by a state appellate court.<sup>120</sup>

If your community is considering this type of ordinance change, your corporate counsel should make sure it fits with the law of special exceptions and is not just an attempt to circumvent variance law. In addition, while such flexibility may be appropriate in general zoning ordinances, it cannot be used to alter minimum standards provided by state statute or rules such as shoreland, floodplain or shoreland-wetland zoning.

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<sup>120</sup> *Fabyan v. Waukesha County Bd. of Adjustment*, 246 Wis. 2d 814 (Ct. App. 2001) (neighbor challenged issuance of special exception to allow deviation from floor area ratio requirement, claiming it was a disguised grant of a variance. The court noted the difference between variances and special exceptions: "A variance authorizes a landowner to establish or maintain a use which is prohibited by the zoning regulations. A special permit authorizes a use that is permitted by the zoning regulations, subject to the issuance of such a permit. Thus, a variance results in a deviation from the literal import of the ordinance; a special permit results in the establishment or maintenance of a use in the location and under the circumstances mandated by the ordinance." *Fabyan* at ¶ 40, citing 3 Robert M. Anderson, *American Law of Zoning* § 20.03 at 416, § 21.02 at 695 (4<sup>th</sup> ed. 1996). The court found the permit issuance in line with ordinance and state statutes).

## GENERAL ZONING - NONCONFORMING LOTS



Nonconforming lots are also known as “substandard lots.” It is important to note that a house or structure does **not** become nonconforming because it is located on a nonconforming lot.

Local ordinances vary greatly in how they treat nonconforming lots. The Policy Options section starting on page 55 outlines the range of alternatives.

### STATUTORY & ADMINISTRATIVE RULE PROVISIONS

Wisconsin Statutes regulate new subdivisions (defined as the division of a lot, parcel or tract of land with contiguous ownership to create five parcels or building sites of 1.5 acres or less, either at one time or over a period of five years)<sup>121</sup> and establish minimum width and area requirements for residential subdivision lots.<sup>122</sup> They also permit municipalities to adopt subdivision or land division ordinances that are more restrictive and comprehensive than state standards. This includes the ability to regulate creation of fewer than five parcels and of parcels larger than 1.5 acres.<sup>123</sup> As a result, all

<sup>121</sup> Wis. Stat. Chapter 236.

<sup>122</sup> Wis. Stat. § 236.16.



new parcels can be regulated for their compliance with state statutes, local ordinances, land use plans, and official maps.<sup>124</sup>

Local subdivision ordinances do not apply to the sale or exchange of parcels of land between adjacent owners if additional lots are not created and if resulting lots are not reduced below the minimum lot size required by state or local law.<sup>125</sup>

Parcels created prior to adoption of municipal subdivision regulations may be addressed by local ordinances but are not addressed by state statutes.

Wis. Adm. Code § NR 115.05(3)(c) establishes minimum lot width and area requirements for shoreland areas (see page 62).

## CASE LAW SUMMARY<sup>126</sup> & ATTORNEY GENERAL OPINIONS

### **Undeveloped nonconforming lots**

Some states provide relief to owners of undeveloped nonconforming lots, but Wisconsin courts have not granted a vested right to build on an undeveloped parcel. To have a vested right to build on a lot, a developer must have submitted a valid and complete application for a building or zoning permit that conforms to zoning and building code requirements in effect at that time.<sup>127</sup> (See discussion of vested rights on page 9.) While some ordinances do provide relief to owners of nonconforming lots, communities can also be quite restrictive.

*Purchasing a nonconforming lot does not limit a landowner's right to apply for a variance*<sup>128</sup>

Though the landowners bought a known nonconforming lot and proposed building a house that would need a variance from every setback requirement, they have no greater or lesser rights to a variance than their predecessors.<sup>129</sup>

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<sup>123</sup> Wis. Stat. § 236.45.

<sup>124</sup> In order to make sure that newly created lots do not bypass scrutiny, communities should make sure that their land division ordinances cover all new lots that are smaller than the largest minimum lot size allowed in the ordinance. For example, if a county has exclusive agricultural zoning with a 40-acre minimum lot size as its largest-lot zoning district, its land division ordinance should require certified surveys or subdivision plats for all new lots smaller than 40 acres.

<sup>125</sup> Wis. Stat. § 236.45(2)(a)3.

<sup>126</sup> For full Wisconsin case citations and additional summary information regarding each case, see Appendix A. In this section, names are used for identification and dates are used for context.

<sup>127</sup> *Lake Bluff Housing Partners v. South Milwaukee*, 197 Wis.2d 157 (1995)(the last zoning/building permit application prior to the city's rezoning of the parcel in question failed to comply with zoning and building requirements. As a result, the developer did not have a vested right to build its desired project when the zoning change removed it from the list of permitted uses).

<sup>128</sup> *Schalow v. Waupaca County* (1987).

<sup>129</sup> *Ibid.*

*Lots that are illegally created or unrecorded do not provide vested development rights*  
If a lot is illegally created outside the county subdivision ordinance process, a subsequent owner of the lot cannot claim his property rights were “taken” when his request to rezone the land for building purposes was denied.<sup>130</sup>

The owner of three contiguous 80-foot wide lots in an unrecorded plat was denied a variance to build three houses because the ordinance now requires 100 feet of frontage, allowing for only two buildable lots.<sup>131</sup>

#### **Developed nonconforming lots**

The fact that a developed lot may be nonconforming in its area or dimensions is irrelevant except to the extent that additional construction may be unable to comply with setback or other requirements.

A house or structure does not become nonconforming because it is located on a nonconforming lot. Therefore, increasing minimum lot size requirements does not affect whether a structure is conforming.

Increasing setback requirements or other dimensional standards, however, may cause a structure to become nonconforming. (Also see Nonconforming Structures discussion starting on page 28.)

#### **Safeguards for new lots**

Communities have considerable power to control the creation of new lots and parcels. Municipalities can adopt and enforce more than one land division ordinance. Land division and subdivision ordinances can be adopted to enhance the quality of a subdivision and can require availability of specified municipal services and infrastructure such as sewer service.<sup>132</sup>

In regulating minimum lot sizes, a plan commission authorized to review plats is limited only by its own powers. It is not limited by zoning regulations. Zoning regulations and subdivision controls are administered by separate bodies and subject to separate rules.<sup>133</sup>

Where subdivision regulations adopted under Wis. Stat. § 236.45 conflict, a plat must comply with the most restrictive requirements.<sup>134</sup> For example, a town and county can both adopt subdivision regulations. The unit of government with the more restrictive requirements has the ability to trump the other’s requirements.

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<sup>130</sup> *Peterson v. Dane County*, (1987).

<sup>131</sup> *State ex rel. Elko v. Bd. of Adjustment of Oconto County*, (1981) (unpublished opinion with no precedential value - cited for fact scenario only).

<sup>132</sup> *Manthe v. Town of Windsor*, 204 Wis.2d 546 (Ct. App. 1996).

<sup>133</sup> *Lake City Corp. v. City of Mequon*, 207 Wis.2d 155 (1997) (though zoned for the desired 56 houses, developer’s preliminary plat was denied because it conflicted with a newly adopted land use map that designated the land for lower density housing).

<sup>134</sup> 61 OAG 289, (1972).



## SYNTHESIS OF LEGAL GUIDANCE

Communities should use their subdivision review powers to assure that new lots conform to all zoning ordinances and land use plans.

A house or structure does *not* become nonconforming because it is located on a nonconforming lot. Increasing lot size requirements does not affect whether a structure is conforming.

The simple platting of a lot does not establish an owner's right to develop the lot for a particular purpose (insufficient "investment backed expectations"). As previously noted, an owner does not obtain the right to develop a lot until he or she

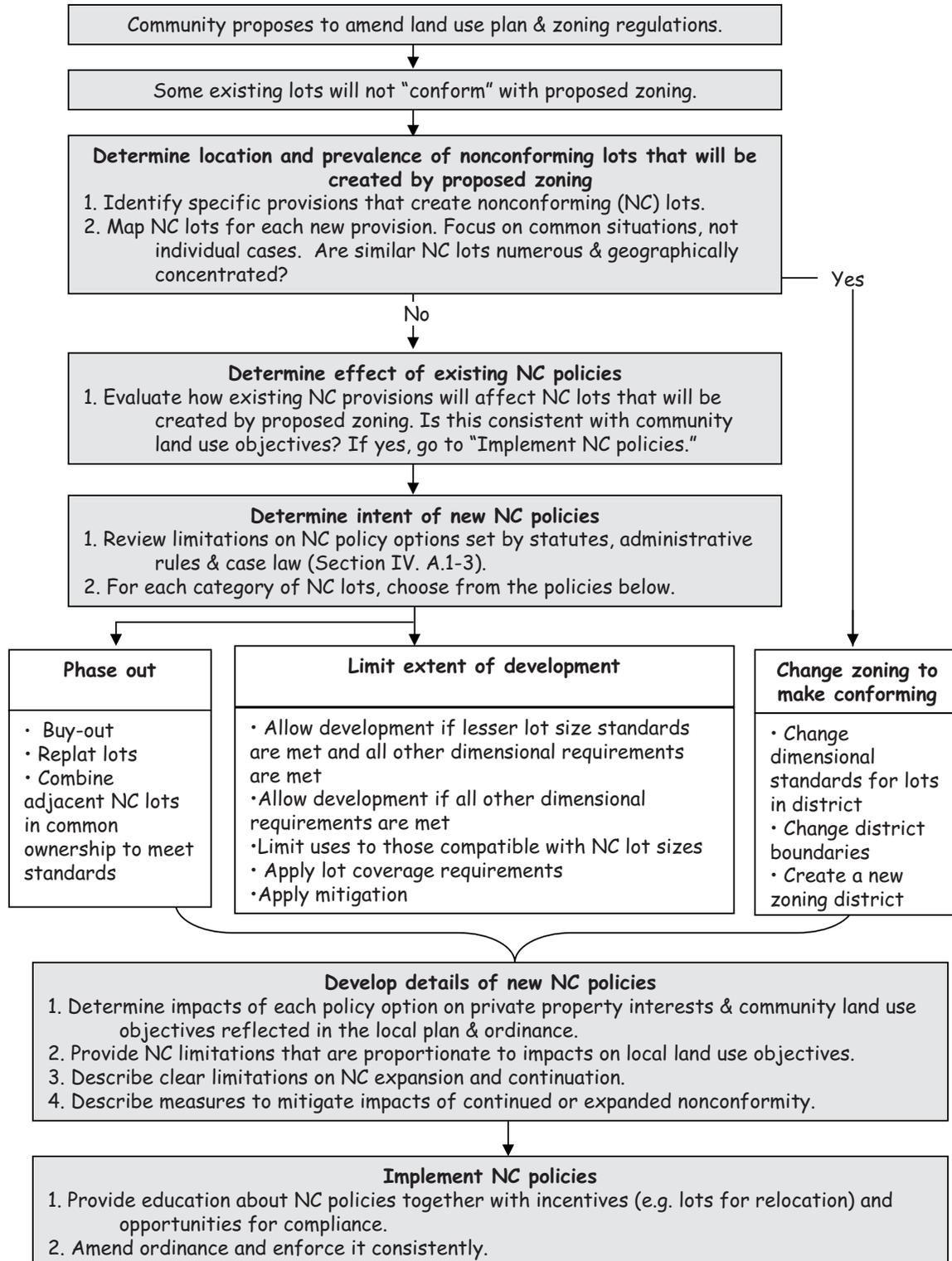
has submitted an application that complies with all applicable zoning and building code requirements.<sup>135</sup> Many communities, however, allow development on some nonconforming lots if it complies with all other ordinance requirements. Regardless of which policy a local community adopts, landowners always have the right to a variance if ordinance standards prevent reasonable use of a parcel and other legal criteria are met (see the description of variance criteria on page 28.).

There is very little case law addressing nonconforming lots. Instead, communities should look for guidance in the policies being successfully implemented by others.

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<sup>135</sup> *Lake Bluff Partners v. South Milwaukee*, 197 Wis.2d 157 (1995).

## Policy Development Process - Nonconforming Lots



## POLICY OPTIONS

The flow chart on the facing page provides a process to help your community to assess and develop its policies related to nonconforming lots. See the sections on Shoreland Zoning (page 61), Shoreland-Wetland Zoning (page 71) and Floodplain Zoning (page 73) for additional information that must be considered when developing policies for these areas.

The following discussion is organized according to the flow chart on the facing page. It provides further detail about each policy option, illustrated with a white box.

The notation “S\*” indicates that there is additional shoreland-specific information on this policy option in the shoreland zoning section.

### ***Policy Option - Phase Out***

#### **Buy-out**

A community, that does not want nonconforming lots to remain available as building sites, can purchase them for public use or to recombine them for resale.

#### **Replat lots S\***

A replat generally involves going through the formal plat approval process to redraw lot lines. Replatting lots may be desirable if:

- existing lots do not provide building sites or cannot comply with sanitary or well codes because of limiting conditions (wetlands, floodplains, steep slopes, etc.),
- the size of proposed buildings and development is out of scale with existing

small lots, or

- existing building or road locations conflict with platted lot lines.

To avoid the first concern, some municipalities require that each lot on new plats and certified survey maps contains a specified square footage of buildable area that complies with setbacks and other requirements.

### **Combine adjacent nonconforming lots in common ownership to meet standards**

In this case, abutting nonconforming lots with the same owner are required to be recombined prior to development. The rationale is that since platting does not create a vested development right and there is no hardship that would qualify the owner for a variance (since he or she owns adjacent lots and can recombine them to create a compliant lot), the lots should be recombined. Here are two examples of this policy:

*A lot which is nonconforming as to lot dimension or area may be used for any use permitted in the district in which it is located provided... it is in separate ownership from adjacent parcels (if adjacent nonconforming parcels are commonly owned, they may only be developed in conformity with current requirements of this ordinance).<sup>136</sup>*

*If two or more substandard lots with continuous frontage have the same ownership as of the effective date of this ordinance, the lots involved shall be considered to be an individual*

<sup>136</sup> Section 17.12(6) of the Lantlade County ordinance.

*parcel for the purposes of this ordinance.*<sup>137</sup>

A modification of this policy known as the “one free bite” approach allows an owner of two or more adjacent recorded nonconforming lots to sell one nonconforming lot for modest personal gain, while preventing unlimited development of substandard lots. Lots beyond the “one free bite” would need to be combined with an adjacent lot or replatted to meet current standards.

#### ***Policy Option - Limit Extent of Development***

##### **Allow development of nonconforming lots if lesser lot size standards are met and all other dimensional requirements are met**

This approach avoids the variance process if lots comply with lesser lot size standards and development complies with all other dimensional standards, such as setbacks, height limits and lot coverage. For instance, Waushara County Zoning Ordinance, which requires 10,000 square feet in area and 65 feet in width at the building setback line and waterline for shoreland lots served by a public sanitary sewer, states:<sup>138</sup>

*A substandard lot served by a public sanitary sewer which is at least 7,500 square feet in area and is at least 50 feet in width at the building setback line and at least 50 feet in width at the waterline may be used*

*as a building site for a single family dwelling upon issuance of a land use permit if it meets all of the following requirements:*

- (1) Such use is permitted in the zone.*
- (2) The lot was on record in the county Register of Deeds office prior to the effective date of this ordinance.*
- (3) The lot was in separate ownership from abutting lands prior to the effective date of this ordinance. If abutting lands and the substandard lot were owned by the same owner as of the effective date of this ordinance, the substandard lot shall not be sold or used without full compliance with the terms of this ordinance, including minimum area and width requirements of the respective zones.*
- (4) All the dimensional requirements of this ordinance (including side yard and setback requirements) will be complied with in so far as practical.*

##### **Allow development of nonconforming lots if all other dimensional requirements are met**

This approach treats conforming and nonconforming lots the same and avoids the variance process. If development complies with all other dimensional standards, such as setbacks, height limits and lot coverage, a small lot size does not matter. Because setbacks and lot coverage standards must be met, this policy often results in

<sup>137</sup> Section 8.0 4.2(5)(b) of the Douglas County Zoning Ordinance, <http://www.douglascountywi.org/countydepartments/zoning/ordinances.htm>, 4/28/03.

<sup>138</sup> Section 2.11(3), <http://www.1waushara.com/Zoning/ORD76MAY03.pdf>



smaller structures on smaller lots. This concept is illustrated by the Barron County ordinance.<sup>139</sup>

*An undeveloped lot which is nonconforming as to lot dimensions or area may be used for any use permitted in the district in which it is located provided it was legally created and recorded prior to November 14, 2000, and the development complies with all other ordinance requirements.*

Flexibility regarding setbacks to allow development on all but the smallest nonconforming lots can be introduced using any of the following approaches:

- Setback averaging (page 46)
- Special exceptions (page 47)
- Setback reduction formula (page 66)

#### **Limit uses to those compatible with nonconforming lot sizes**

For instance, only a subset of uses allowed in a zoning district might be permitted, such as light industrial activities in an area zoned for general industry. Another example would be allowing only single-family dwellings on nonconforming lots in a multi-family district.

#### **Apply lot coverage requirements**

Lot coverage requirements scale development to the size of a lot, preventing what some people perceive as “overbuilt” lots. For example, Waukesha County uses this approach for conforming and nonconforming lots with a 10% maximum

floor area ratio (total floor area of all buildings on the lot may equal up to one-tenth of the lot area) in some rural zoning districts; and a 15% maximum floor area ratio in others.<sup>140</sup>

#### **Apply mitigation**

A community may require a landowner to minimize or eliminate to the extent possible impacts of development on neighbors and public resources. Dimensional standards or performance based standards can be employed. See the mitigation discussion on page 59.

#### ***Policy Option - Change Zoning***

In considering changing zoning to accommodate nonconforming lots, more developed areas should retain the basic standards that applied when they were developed if possible and more restrictive standards should be reserved for largely undeveloped areas.

If zoning districts containing both old and current development patterns are the source of conflict, consider creation of new districts that address the unique needs of each separately. Land management tools other than zoning (such as education, incentives, technical assistance or public investment) can be more effective in resolving land use issues in developed areas.

<sup>139</sup> Section 17.41(11)(c), [http://www.co.barron.wi.us/forms/zoning\\_landuse\\_ord.pdf](http://www.co.barron.wi.us/forms/zoning_landuse_ord.pdf), 4/28/03.

<sup>140</sup> Waukesha County Shoreland and Floodplain Protection Ordinance, Sections 7 to 11, <https://secure.waukeshacounty.gov/filelibrary/Files/shoreland.pdf>.

### **Change dimensional standards for lots in district**

Minimum lot sizes can be decreased to minimize the number of nonconforming lots.

### **Change district boundaries**

Communities may change district boundaries on the zoning map so lots are in a district where they would comply with the dimensional requirements. Avoid illegal spot zoning where a single property is granted privileges not granted to similar

land in the same district.<sup>141</sup> Spot zoning is not illegal per se, and may be approved where it is in the public interest, such as for a fire station or school, not solely for the benefit of a property owner, and consistent with the community plan.

### **Create a new zoning district**

If the nonconforming lots do not meet the dimensional requirements of any existing zoning district, consider creating a new zoning district such that existing lots are in compliance.

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<sup>141</sup> *Cushman v. City of Racine*, 39 Wis. 2d 303 (1968); *Heaney v. City of Oshkosh*, 47 Wis. 2d 303 (1969).



## MITIGATION

Mitigation refers to activities or practices required to reduce or eliminate adverse impacts of development on neighbors, public interests in natural resources, efficient development or other community objectives. It can be applied on a case-by-case basis as when a zoning committee or board grants a conditional use permit or variance. Mitigation requirements can also be standardized, included in the ordinance and applied to classes of construction activities or development. In the context of our discussion of nonconformities, communities may require mitigation to compensate for the effects of:

- changing or expanding nonconforming structures or uses,
- building in ways that do not comply with dimensional requirements such as setbacks, or
- building on nonconforming lots.

The main effects of development that mitigation attempts to address are:

- noise,
- bad smells and odors as well as other forms of air pollution,
- pollution of water and soil,
- heavy traffic,
- loss of valued buildings, views, parks, natural areas and access to sun and sky,
- obnoxious signs and lighting, and
- change in scale.

Mitigation practices may include:

- planting trees and shrubs to screen development and noise,

- installing other noise barriers within buildings or on the property,
- detaining, infiltrating or treating stormwater on-site,
- removing nonconforming accessory structures,
- upgrading septic systems,
- using natural or earth-toned building materials,
- dedicating open space,
- shielding or reducing artificial lighting,
- constructing roadway or other infrastructure improvements required by development, or
- other activities designed to minimize the adverse effects of development.

The mitigation practices required must address impacts associated with the type of development proposed<sup>142</sup> and must be roughly proportional to the extent of impacts.<sup>143</sup> Communities can require specific mitigation practices for all similar development or they can provide a menu of mitigation options for landowners to choose from. Where properties currently meet mitigation standards, landowners may receive credit for mitigation already in place. For instance, a landowner who has maintained trees and shrubs that screen noise may receive the same credit as a landowner who planted trees and shrubs for the same purpose. Policies may include a point system that requires more extensive mitigation as the scale of proposed development increases or as the sensitivity of the public resources increases.

<sup>142</sup> *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

<sup>143</sup> *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

Mitigation provisions in an ordinance should address the following steps:

**1. Mitigation plan development**

The landowner, developer, or his or her agent (for simplicity these three groups will be referred to as “landowner”) typically produces a plan based on ordinance requirements describing the location, design, installation schedule and maintenance of mitigation practices. Some municipalities provide technical assistance for plan design and may charge a fee for the service. Standardized, well-illustrated application forms and instructions are an important tool in achieving compliance with mitigation policy objectives.

**2. Plan submittal and approval standards**

An ordinance may require conference between local government staff and the landowner to clarify requirements and provide advice about effective practices prior to preparing the mitigation plan. The appropriate office for plan submittal and standards for plan approval should be clearly described.

**3. Documentation of installation**

There are essentially three options for inspection to confirm completion of mitigation activities:

- Inspection by local government staff

which may exceed local personnel resources;

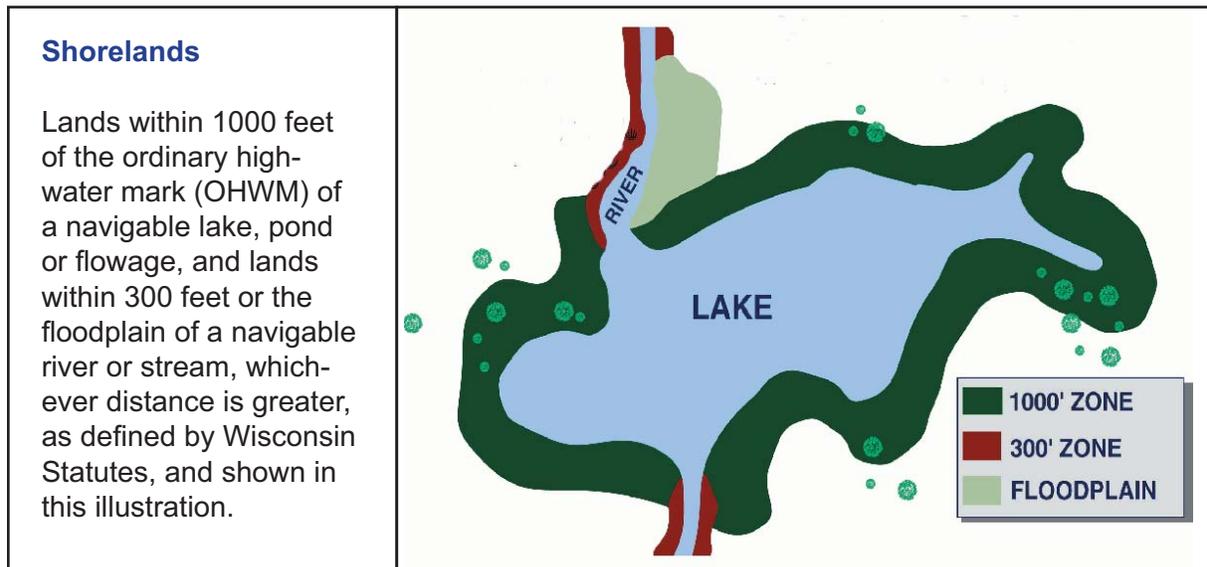
- Third party professional inspection and reporting financed by fees paid by the landowner; or
- Self-reporting by the landowner which may require submitting photos and/or certifying completion.

**4. Notification to subsequent owners**

For mitigation to be effective it must remain intact over time and when a property changes hands. Notifying prospective buyers of site-specific zoning and mitigation maintenance requirements prior to purchase of a property helps to avoid unpleasant surprises for the landowner and the potential for costly enforcement actions later on. There are two principle mechanisms for providing this notification:

- *Affidavit*  
An affidavit is a legal document that gives notice of a requirement that applies to a property or a pending legal action against it. Affidavits may be recorded by the zoning office or property owner with the County Register of Deeds.
- *Deed restriction*  
A deed restriction imposes a limitation on the use of the property and must be signed by the current property owner before it is recorded by the County Register of Deeds.

## 5. SHORELAND ZONING



The state requires counties to adopt and administer development standards for shorelands in *unincorporated* areas.<sup>144</sup> Unlike general county zoning, towns may not opt out of county shoreland zoning.<sup>145</sup> While cities and villages are not required to adopt shoreland zoning, shorelands within their municipal boundaries may be subject to shoreland zoning in three cases:<sup>146</sup>

- 1) Where official state maps describe wetlands within shoreland areas.
- 2) Where a city or village has annexed unincorporated shorelands.<sup>147</sup>
- 3) Where cities or villages have voluntarily enacted their own shoreland zoning requirements.

Shoreland zoning seeks to protect public rights in navigable waters related to fishing, swimming, boating, other recreation and enjoyment of scenic beauty. To achieve these goals the state sets minimum building setbacks, restrictions on shoreline vegetation removal and minimum lot sizes to limit the density of development. These standards are described generally in the diagram on the next page.

Nonconforming uses, structures and lots in shoreland areas compromise water quality, fish and wildlife habitat and natural scenic beauty. The effects of nonconformity, though they may be imperceptible on an individual site, accumulate lot by lot

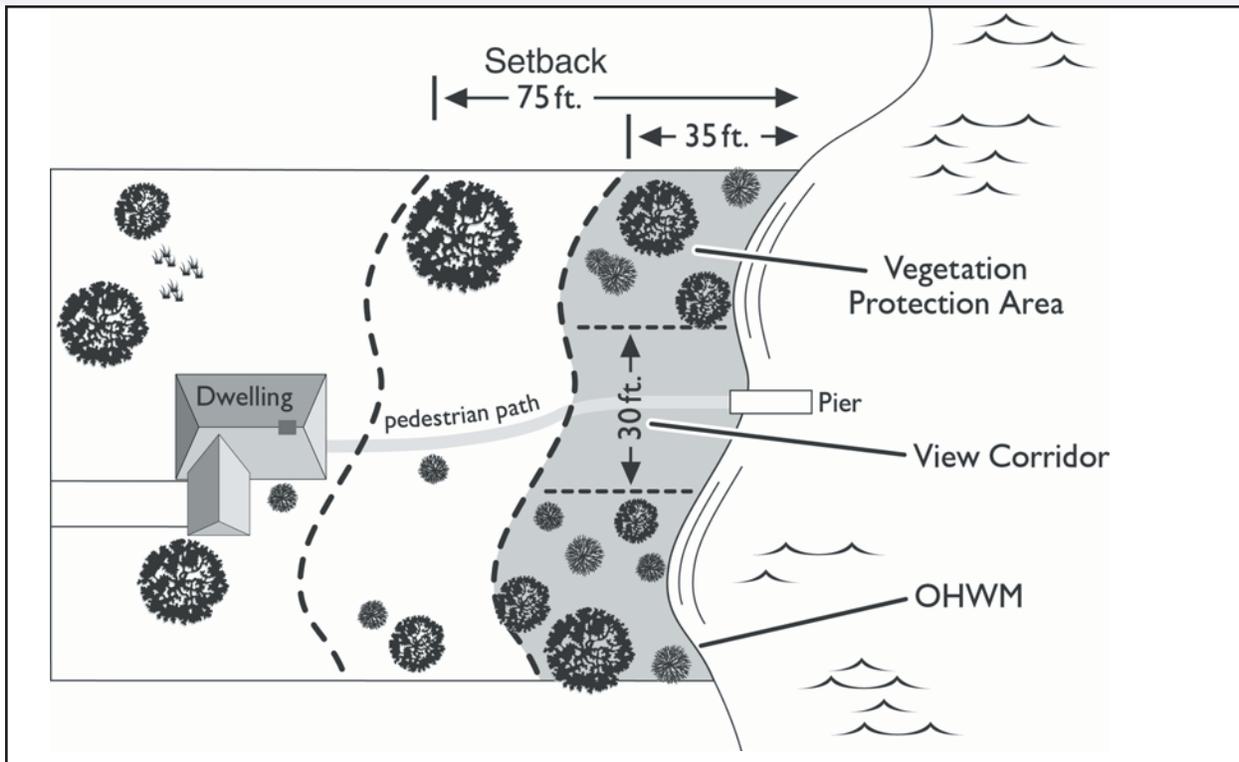
<sup>144</sup> Wis. Stat. § 59.692; Wis. Admin. Code ch. NR115.

<sup>145</sup> Wis. Stat. § 59.692(2)(a).

<sup>146</sup> Paul G. Kent and Tamara A. Dudiak. *Wisconsin Water Law: A Guide to Water Rights and Regulations*, 2nd Ed., 2001, p. 38.

<sup>147</sup> Wis. Stat. § 59.692(7)(a).

<sup>148</sup> Figure created by Jeffrey Strobel, Environmental Resources Center, for *Wisconsin Water Law: A Guide to Water Rights and Regulations*, 2nd Ed., 2001.



**Limited removal of shoreline vegetation** – In the 35-foot strip adjacent to the OHWM, no more than 30 ft. in any 100 ft. may be clear cut.<sup>149</sup>

**Building setbacks** – Unless a development pattern exists, a setback of 75 ft. from the OHWM is required for structures except piers, boat hoists and boathouses.<sup>150</sup> A limited exception is available for certain minor structures in exchange for shoreline revegetation.<sup>151</sup>

**Minimum lot sizes** – 100 ft. minimum average width and 20,000 square ft. for unsewered lots; 65 ft. minimum average width and 10,000 square ft. for sewerd lots.<sup>152</sup>

throughout the shoreland. For instance, runoff from structures located too close to the shore quickly carries nutrients and sediment to a lake or stream with little opportunity for a shoreland buffer to

filter contaminants or infiltrate runoff. Consequently, communities limit nonconformities to minimize impacts on public waters.<sup>153</sup>

<sup>149</sup> Wis. Admin. Code § NR 115.05 (3)(c).

<sup>150</sup> Wis. Admin. Code § NR 115.05 (3)(b).

<sup>151</sup> Wis. Stat. § 59.692(1v).

<sup>152</sup> Wis. Admin. Code § NR 115.05 (3)(a).

<sup>153</sup> Creating an Effective Shoreland Zoning Ordinance: A Summary of Wisconsin Shoreland Zoning Ordinances, 2000, DNR publication #WT-542-00. See Appendix C for ordering information.

## NONCONFORMING USES IN SHORELANDS

### STATUTORY & ADMINISTRATIVE RULE PROVISIONS

State law does not proscribe or limit the types of uses allowed in shorelands except where there are mapped shoreland-wetlands in which case state standards limit uses of shoreland wetlands.<sup>154</sup> Instead, the underlying general zoning, if any, determines what uses are available in the shoreland area.

Counties are encouraged to restrict nonconforming uses in shoreland areas. The state administrative rule allows counties to enact a 50% rule with respect to all nonconforming shoreland uses or structures, not just those used for a prohibited trade or new industry as is the case under general zoning statutes.<sup>155</sup>

#### **Temporary structures**

As with general zoning, counties may prohibit continued nonconforming use of a temporary structure.<sup>156</sup>

### ATTORNEY GENERAL OPINIONS

A 1997 Wisconsin Attorney General's opinion states: "A county may enact a shoreland zoning ordinance with no 50% rule, but should, and has a broad authority to, restrict nonconforming uses or structures in some manner to bring them ultimately into compliance with the ordinance."<sup>157</sup> Also see the Attorney General opinions regarding nonconforming structures on page 18.

### POLICY OPTIONS

The policy options for treating nonconforming uses that were previously described for general zoning also apply to shoreland zoning (see discussion beginning on page 20).

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<sup>154</sup> See wetland provisions of Wis. Adm. Code ch NR 115 & 117.

<sup>155</sup> Wis. Adm. Code NR § 115.05(3)(e).

<sup>156</sup> Wis. Adm. Code NR § 115.05(3)(e).

<sup>157</sup> OAG 02-97.

## NONCONFORMING STRUCTURES IN SHORELANDS

### STATUTORY & ADMINISTRATIVE RULE PROVISIONS

Counties are encouraged to restrict nonconforming structures in shoreland areas. State administrative code allows counties to enact a 50% rule with respect to all nonconforming shoreland uses and structures.<sup>158</sup>

#### **Recently damaged structures**

Counties may not impose any limitations on the cost of repairing or replacing nonconforming structures in the shoreland setback area (including boathouses) that are damaged or destroyed by fire, flood, violent wind or vandalism after October 14, 1997. Counties must allow those structures to be restored to the same size and at the same location and use. They must also allow other improvement if required by state or federal laws.<sup>159</sup>

#### **Structures that escape scrutiny**

If a structure in violation of shoreland zoning standards has existed for 10 years or more, neither the county nor the DNR may commence an enforcement action against the building owner.<sup>160</sup>

#### **Wet boathouses**

DNR regulates maintenance and repair of fixed houseboats and "wet" boathouses (those located at least in

part below the ordinary highwater mark) under compliance with Wis. Stat. § 30.121. This rule imposes a 50% value limitation on repairs but damage caused by wind, fire or vandalism after the 1983 effective date of the legislation is exempted from the limit.<sup>161</sup>

### ATTORNEY GENERAL OPINIONS

A 1997 Attorney General opinion states "A county may enact a shoreland zoning ordinance with no 50% rule, but should, and has a broad authority to, restrict nonconforming uses or structures in some manner to bring them ultimately into compliance with the ordinance."<sup>162</sup> Also see the Attorney General opinions regarding nonconforming structures on page 27.

### POLICY OPTIONS

The policy options presented in this section supplement those provided for nonconforming structures on page 32.

#### ***Intent***

The following example of intent regarding treatment of nonconforming structures is provided from the Vilas County Shoreland Ordinance:<sup>163</sup>

<sup>158</sup> Wis. Adm. Code NR § 115.05(3)(e).

<sup>159</sup> Wis. Stat. § 59.692(1s).

<sup>160</sup> Wis. Stat. § 59.692(1t).

<sup>161</sup> Wis. Adm. Code § NR 115.05(3)(e)4, Wis. Stat. § 30.121, Wis. Adm. Code § NR 325.065, and 81 OAG 56 (1993).

<sup>162</sup> OAG 02-97.

<sup>163</sup> Section 6.2, <http://www.co.vilas.wi.us/landconv/zoning/ord2.pdf>, 4/28/03.



*It is the intent of this Article to balance the public objectives of this ordinance with the interests of owners of existing structures located closer than seventy-five feet from the ordinary high water mark by:*

*A. Treating smaller, more readily moveable structures more restrictively than larger, more permanent principal structures (Smaller structures are easier to move or remove, but this approach also results in preferential treatment for large structures – editor’s note);*

*B. Allowing for maintenance, repair, and internal improvement of existing structures essential to the continued reasonable use of a property;*

*C. Treating structures located closer to navigable waterways within seventy-five feet of the ordinary high water mark more restrictively than structures which are more nearly in compliance with the seventy-five foot minimum setback;*

*D. Allowing for limited expansion of a principal structure provided the adverse effects of such improvement or expansion are mitigated;*

*E. Limiting the extent of expansion of principal structures vertically and to the side to minimize adverse water quality, shoreland buffer zone, aesthetic and other impacts from such*

*expansion, and to provide incentive for property owners seeking major expansions to consider relocation of the principal structure beyond seventy-five feet from the ordinary high water mark.*

*F. Encouraging removal of non-principal structures from the seventy-five foot setback area to promote better buffer areas and decrease runoff to the water body.*

### ***Policy Option - Maintain Status Quo***

#### **Differentiate between “ordinary maintenance and repair” and the modification threshold that triggers compliance**

The Polk County Shoreland Protection Zoning Ordinance,<sup>164</sup> defines “ordinary maintenance and repair” as:

*...those activities necessary to maintain the structural integrity and current function of the existing structure. Ordinary maintenance and repair may include replacement of windows, doors, siding, insulation, roofing, and roof replacement provided the pitch does not exceed the pitch necessary to match the existing roof.*

Ordinance provisions must specify how much modification of a nonconforming structure is permissible before an owner is required to bring it into compliance. Failure to provide clear guidelines may result in essentially total demolition and replacement

<sup>164</sup> Article 4, <http://www.polkshore.com/Ordinance-Revised.htm> 4/28/03.

at the original noncompliant location. The Waupaca County Shoreland Ordinance,<sup>165</sup> states:

*Nonconforming principal structures (buildings) may be improved internally or expanded provided that:*

- a) modification or replacement involves no more than 25 percent of the perimeter of the structure or one wall, whichever is greater and...*

### **Policy Option - Limit Modification**

#### **Limit modification to internal improvements where structures are significantly nonconforming**

This approach is used by Langlade County, whose ordinance states:

*Nonconforming principal structures less than 50 feet from the ordinary highwater mark are permitted ordinary maintenance and repair. Such structures may be improved internally... Internal improvement does not include the following construction:*

- *New basements*
- *Additional stories and*
- *Lateral expansion or accessory construction outside of the perimeter of the existing enclosed dwelling space.*

*Internal improvement may include:*

- *Replacement of windows, doors, roofing and siding;*
- *Upgrading of insulation;*
- *Repair but not replacement of an existing foundation including raising an existing basement to no more than*

*nine feet in total height;*

- *Replacement of roof trusses with a maximum 8:12 pitch; and*
- *Additions of 100 square feet or less on the landward side of the structure.*<sup>166</sup>

### **Policy Option - Change Zoning**

#### **Setback averaging**

Many counties have adopted or modified provisions from state model ordinances that were intended to allow averaging adjacent nonconforming shoreline setbacks to allow infill development where a pattern of substandard setbacks predated shoreland zoning requirements. See the discussion of setback averaging on page 49 which includes a diagram and example ordinance language. Ordinances that failed to limit the extent of setback reduction (e.g. “no averaging that results in a setback of less than 50 feet”) or that reached well beyond the proposed construction site (e.g. “average setbacks on all lots within 400 feet of building site”) simply extended substandard setback patterns to the detriment of shoreline buffers that are essential to achieving the purposes of shoreland zoning. The setback reduction formula, described below, is an alternative.

#### **Setback reduction formula**

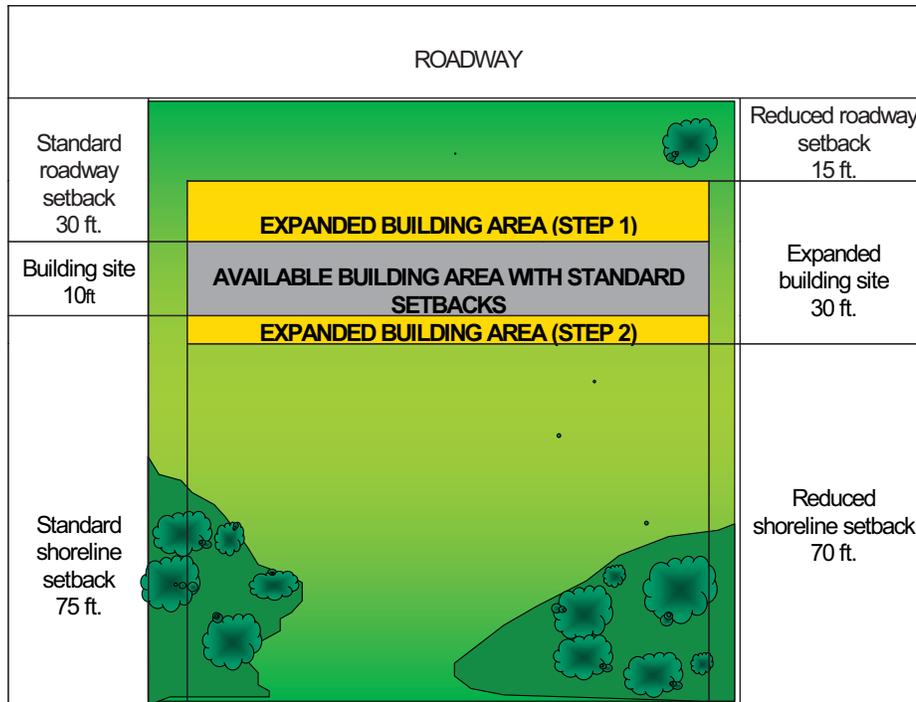
Where lots were recorded prior to current shoreline setback requirements and are not deep enough to accommodate them, a setback reduction formula can describe a building site of reasonable size and maximize the available shoreline setback and buffer. The formula allows limited reduction first of a roadway or rear yard

<sup>165</sup> Section 8.31, <http://www.co.waupaca.wi.us/zoning/2002%20Shoreland%20Ordinance.pdf>, 4/28/03.

<sup>166</sup> Section 17.12(3)(c)2.



## SETBACK REDUCTION FORMULA



setback, and then of the shoreland setback to provide a 30-foot deep building site on a lot. The policy is usually linked to mitigation requirements. In many cases this policy allows landowners to avoid the cost, delay and uncertainty of applying for a variance.

The Washburn County Shoreland ordinance uses this approach as follows:

*Reduced Roadway and Shoreline Setbacks for Undeveloped Nonconforming Lots*

*a. The roadway setback for an undeveloped nonconforming waterfront lot may be reduced until a 30 foot deep building site is established provided the resulting road setback is not less than two*

*thirds (2/3) of the required road setback. In such case no doorway may open toward and no parking area may be located in the reduced roadway setback area.*

*b. If the roadway setback reduction in Section 271.2(3)(a) does not provide a 30 foot deep building site, the shoreline setback may then be reduced until a 30 foot deep building site is established provided the resulting shoreline setback is no less than seventy-five (75) feet. In such case the water quality, habitat and natural beauty protection functions of the remaining shoreline buffer area shall be reestablished or enhanced to compensate for the setback reduction.<sup>167</sup>*

<sup>167</sup> Section 271.2(3), <http://www.polkshore.com/Washburn%20County%20ordinance.htm>, 4/28/03.

## NONCONFORMING LOTS IN SHORELANDS

### STATUTORY & ADMINISTRATIVE RULE PROVISIONS

Statutes and administrative rules do not specifically address nonconforming lots in shoreland areas. They may be treated in the same manner as those under general zoning.

### POLICY OPTIONS

#### **Designate a buildable area on each lot**

To avoid the creation of lots without suitable building sites, some communities require designation of a compliant building area for each lot on a plat or survey. Such

areas generally exclude topographic site limitations like steep slopes and wetlands and consider required infrastructure and regulatory requirements such as setbacks. The Cass County, Minnesota Land Use Ordinance requires a specified buildable area for each shoreland lot, ranging from 12,000 to 80,000 square feet. “Buildable area” is defined as:

*the minimum required area remaining on a newly created parcel of land or platted lot after all public road rights-of-way, setbacks, bluffs, and wetlands are subtracted.*<sup>168</sup>

<sup>168</sup> Sections 400 and 1401, [http://www.co.cass.mn.us/esd/pdfs/ordinance/land\\_use\\_ord\\_2003.pdf](http://www.co.cass.mn.us/esd/pdfs/ordinance/land_use_ord_2003.pdf), accessed 4/23/04.



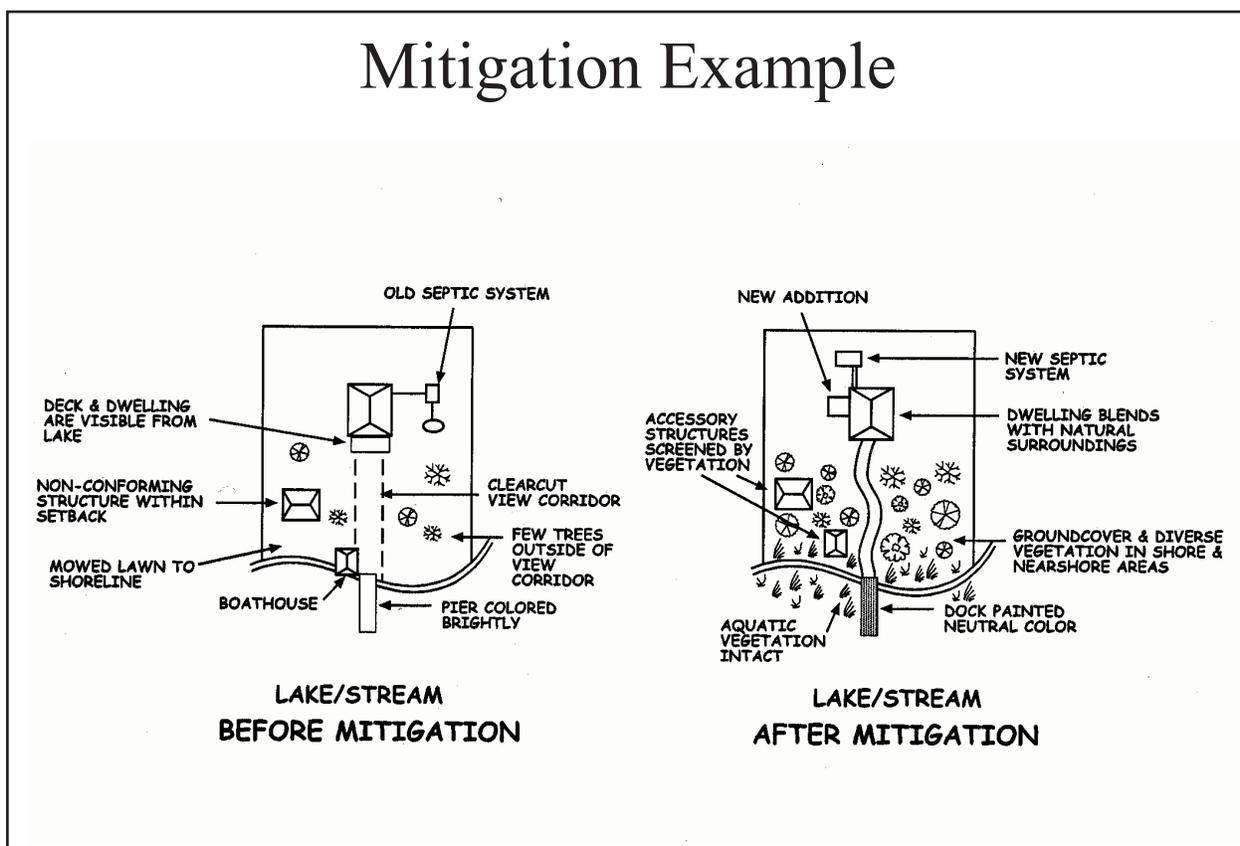
## MITIGATION IN SHORELANDS

Because mitigation must be tailored to ordinance purposes, shoreland mitigation requirements have focused on protecting water quality, wildlife and aquatic habitat and natural scenic beauty. The diagram below illustrates a proposed addition to a nonconforming structure and a variety of mitigation measures that may be required to compensate for the impacts of the expanded nonconforming structure.<sup>169</sup> Mitigation measures may include:

- Restoring diverse vegetation and

groundcover in the buffer zone to curb runoff pollution, provide habitat for wildlife, and enhance natural scenic beauty.

- Promoting building materials that are unobtrusive and blend in with the natural surroundings.
- Evaluating septic systems and upgrading or replacing the systems if necessary to meet the current septic code so that nutrient delivery to the adjacent lake or stream is limited.



<sup>169</sup> Bob Young and Christopher Meyer. Mitigation, fact sheet #18 of the Shoreland Management and Lake Classification Series. Available from the Wisconsin Lakes Partnership at 715-346-2116 or on-line at <http://www.uwsp.edu/cnr/uwexlakes/Fact-SheetList.htm>.

In the following example, the Waupaca County shoreland ordinance blends two approaches to mitigation requirements. It provides a suite of required practices and a second suite from which an owner must select a specified point value. The latter category provides choices for land owners and greater opportunity to tailor practices to site conditions. Here mitigation is required when a nonconforming structure within the shoreline setback is improved or expanded. Note that these provisions use a deed restriction to inform future owners of the mitigation requirements.

*The following mitigation practices are mandatory for all such projects:*

- *The associated privately owned wastewater treatment system must be evaluated and upgraded as appropriate [DCOMM 83.055(3)(b)(1&3)]; and*
- *Standard erosion & storm water runoff control measures must be implemented and all mitigation activities shall comply with Section 6.0 regarding land disturbing activities.*

*In addition, a property owner shall choose at least four points from among the following mitigation practices: The property owner can use current equal practices to obtain the necessary 4 points.*

- *Restore and maintain native vegetation and water quality protection functions of the shore buffer area within 25 ft. of the ordinary High Water mark [1 point].*

- *Restore and maintain native vegetation and water quality protection functions of the shore buffer area within 50 ft. of the ordinary High Water mark [2 points].*
- *Restore and maintain native vegetation and water quality protection functions of the shore buffer area within 75 ft. of the ordinary High Water mark [3 points].*
- *Restore and maintain native vegetation and water quality protection functions of both sideyards [1 point].*
- *Remove nonconforming accessory buildings from the shoreline setback area [1 point per building of <100 sq. ft., 2 points per building of 100-400 sq. ft. and 3 points per building of >400 sq. ft.]. If there are currently no accessory structures within the shoreline setback, property owner receives 1 point.*
- *Use exterior building materials that blend with the natural vegetation in the vicinity of the construction [1/2 point].*
- *Other practices as agreed upon by the Zoning Department [as determined by the Zoning Department].  
Examples may include replacement of seawalls for shoreline protection with bioengineering techniques or removal of artificial sand beaches.*

*A deed restriction describing the agreed upon mitigative measures and requiring compliance by subsequent owners shall be executed and recorded by the property owner before the applicable building permit may be issued.<sup>170</sup>*

<sup>170</sup> Section 8.32(4), <http://www.co.waupaca.wi.us/zoning/2002%20Shoreland%20Ordinance.pdf>, accessed 4/28/03.



## 6. SHORELAND-WETLAND ZONING

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Cities, villages and counties are required to regulate development of mapped wetlands within shorelands. Permitted and prohibited uses and structures are listed in Wis. Adm.

Code § NR 117.05 for cities and villages and in § NR 115.05 for unincorporated areas.

### CITY & VILLAGE SHORELAND-WETLAND ZONING

#### NONCONFORMING USES – STATUTORY & ADMINISTRATIVE RULE PROVISIONS

##### **Uses in city and village shoreland-wetlands are limited**

The only new structures that cities and villages may permit in shoreland-wetlands are small nonresidential buildings used for raising waterfowl, minnows or other aquatic animals, provided that no filling, draining, etc., is done in conjunction with such buildings. Pre-existing buildings used for any other purpose are nonconforming uses.<sup>171</sup>

##### **Discontinuation of nonconforming uses requires conformity**

City and village shoreland-wetland ordinances must require that a property be brought into compliance with the ordinance if a nonconforming use is discontinued for 12 months or longer.<sup>172</sup>

**Legal nonconforming uses may be continued, though they may not be extended<sup>173</sup>**

#### NONCONFORMING STRUCTURES – STATUTORY & ADMINISTRATIVE RULE PROVISIONS

##### **Regulatory power in shoreland-wetland ordinances is limited**

Ordinances adopted under Wis. Stats. § 61.351 or § 62.231 (shoreland wetland zoning authorities) may not prohibit the repair, reconstruction, renovation, remodeling or expansion of nonconforming structures in existence on the effective date of those shoreland-wetland ordinances.<sup>174</sup> Cities and villages may only regulate the repair, reconstruction, renovation, remodeling or expansion of nonconforming structures in shoreland-wetland areas in their general zoning ordinances adopted under Wis. Stat. § 62.23.

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<sup>171</sup> Wis. Adm. Code § NR 117.05(2).

<sup>172</sup> Wis. Adm. Code § NR 117.05(5)(c)1.

<sup>173</sup> Wis. Adm. Code § NR 117.05(5)(c)2.

<sup>174</sup> Wis. Adm. Code NR 117.05(5)(a) and (b).

### **Discontinuation of use of nonconforming structures requires conformity**

City and village shoreland-wetland ordinances must require that a property be brought into compliance if the use of a nonconforming structure is discontinued for 12 months or longer.<sup>175</sup>

### **Wet boathouses in shoreland-wetland areas are subject to Wis. Stat. § 30.121**

Shoreland-wetland ordinances must regulate maintenance and repair of “wet” boathouses in compliance with Wis. Stat. § 30.121, which imposes a 50% value limit on repairs but exempts damage by wind, fire or vandalism after 1983.<sup>176</sup>

## **COUNTY SHORELAND-WETLAND ZONING**

### **NONCONFORMING USES – STATUTORY & ADMINISTRATIVE RULE PROVISIONS**

Land uses in mapped shoreland-wetlands in unincorporated areas are limited to those specified by administrative rule.<sup>177</sup>

The only buildings permitted in shoreland-wetlands are small nonresidential buildings used for raising waterfowl, minnows or other aquatic animals, provided that no filling, draining, etc., is done in conjunction with such buildings. Pre-existing buildings for any other use would be nonconforming.<sup>177</sup>

### **NONCONFORMING STRUCTURES – STATUTORY & ADMINISTRATIVE RULE PROVISIONS**

#### **State regulations do not limit county authority to regulate nonconformities**

Unlike city/village rules (NR 117) that prohibit municipal value limits on

modifications to nonconforming structures, counties may treat nonconformities in shoreland-wetland areas in generally the same manner as other shoreland nonconformities.

#### **If a county uses a 50% rule, landowners have options**

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 zoning administrator’s decision to the county board of adjustment and seek court review if the board’s determination is unfavorable, or the owner may petition the local governing body to have the property rezoned consistent with rule criteria for rezoning shoreland-wetlands.<sup>178</sup>

<sup>175</sup> Wis. Adm. Code § NR 117.05(5)(c)1.

<sup>176</sup> Wis. Adm. Code § NR 117.05(5)(d).

<sup>177</sup> Wis. Adm. Code § NR 115.05(2)(c).

<sup>178</sup> Wis. Adm. Code § NR 115.05(3)(e).



## 7. FLOODPLAIN ZONING

A community that has been issued official flood plain maps by DNR must adopt and administer a floodplain zoning ordinance.<sup>179</sup> As a consequence, citizens in the community become eligible to apply for federal flood insurance. A state administrative rule (NR 116) sets minimum standards for local ordinances including

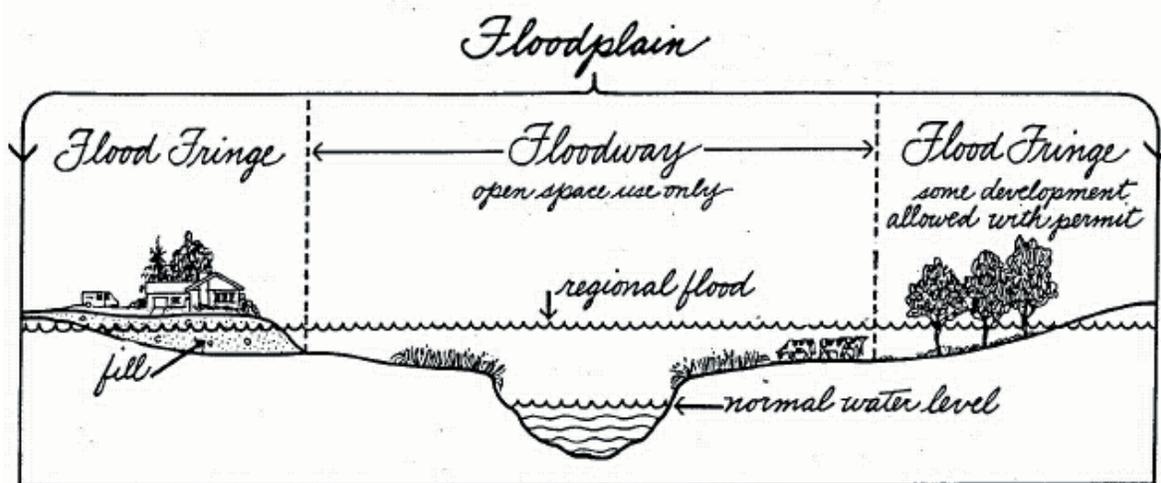
provisions for treatment of nonconformities. Many of the rule standards are based on Federal Emergency Management Agency (FEMA) standards. State standards must conform to the federal ones in order for local communities to qualify for federal flood insurance.

### STATUTORY & ADMINISTRATIVE RULE PROVISIONS

#### DEFINITIONS

The **floodplain** consists of lands that are subject to flooding during the regional flood. The floodplain includes floodway and flood fringe zones. Regional flood elevations are calculated by hydraulic models that consider the size of a drainage basin, amount of precipitation and land characteristics. They are also based on evidence of previous flooding.

The **floodway** consists of the channel of a river or stream, and those portions of the floodplain adjoining the channel that are required to carry the regional flood discharge. The floodway is the most dangerous part of the floodplain. It is characterized by deeper moving water.



<sup>179</sup> Wis. Stat. § 87.30(1).

The **floodfringe** is the portion of the floodplain landward of the floodway. It is generally associated with standing water rather than flowing water and with shallower depths.

**Nonconforming building** means an existing lawful building that is not in conformity with the dimensional or structural requirements of the floodplain zoning ordinance for the floodplain zone which it occupies.<sup>180</sup>

**Nonconforming use** means an existing lawful use or accessory use of a structure, building or development that is not in conformity with the provisions of the floodplain zoning ordinance for the floodplain zone it occupies.<sup>181</sup>

## GENERAL PROVISIONS FOR THE ENTIRE FLOODPLAIN

### **Floodplain zoning must cover both buildings and uses**

State statutes and administrative rules regulating floodplains are more precise than general zoning statutes in that they specifically refer to both nonconforming uses and nonconforming buildings.

### **Floodplain zoning must regulate all modifications to buildings and uses**

Floodplain zoning standards apply to the modification of, or addition to, any nonconforming building and to the use of any such building or premises.<sup>182</sup>

<sup>180</sup> Wis. Adm. Code § NR 116.03(33).

<sup>181</sup> Wis. Adm. Code § NR 116.03(34).

<sup>182</sup> Wis. Adm. Code § NR 116.15(1).

<sup>183</sup> Wis. Adm. Code § NR 116.15(1)(a).

<sup>184</sup> Wis. Adm. Code § NR 116.15(1)(b).

### **Nonconforming uses and nonconforming buildings may be maintained, however:**

1. **No extension** of a nonconforming use, or modification or addition to any building with a nonconforming use or to any nonconforming building, **may be permitted unless** they are made in conformity with state floodplain standards.
  - “Modification” and “addition” include, without limitation, any alteration, addition, modification, rebuilding or replacement of any such existing building, accessory building or accessory use.
  - Ordinary maintenance and repair are those not considered structural repairs, modifications or additions. These include internal and external painting, decorating, paneling; the replacement of doors, windows and other nonstructural components; and the maintenance, repair or replacement of existing private sewage systems, water supply systems or connections to public utilities.<sup>183</sup>
2. **Discontinuation requires conformity.** If a nonconforming use or the use of a nonconforming building is discontinued for 12 consecutive months, it is no longer permitted and any future use of the building shall conform with the appropriate provisions contained in §§ NR 116.12, 116.13 and 116.14.<sup>184</sup>



3. **Modifications limited: 50% rule.**

No modification or addition to any nonconforming building or any building with a nonconforming use, which over the life of the building would exceed 50% of its present equalized assessed value, may be allowed unless the entire building is permanently changed to a conforming building with a conforming use.<sup>185</sup>

4. **Damage or destruction.** If any nonconforming building or any building with a nonconforming use is destroyed or is so badly damaged that restoration would exceed 50% of the present equalized assessed value, it cannot be replaced, reconstructed or rebuilt unless the provisions of §§ NR 116.12, 116.13 and 116.14 are met.<sup>186</sup>

**Statutory exception for non-flood disasters**

Floodplain zoning ordinances must permit the repair, reconstruction or improvement of floodplain nonconformities that are damaged or destroyed by a non-flood disaster, such as **fire, ice storm, tornado, windstorm, mudslide or other non-flood destructive act of nature**, except when such repair, reconstruction or improvement, will fail to meet one or more of the minimum requirements applicable to such a nonconforming building under federal floodplain regulations.<sup>187</sup>

**ADDITIONAL REQUIREMENTS IN FLOODWAYS**

**Nonconforming uses**

The following uses must be regulated as nonconforming uses in floodway areas if they were legal when the floodplain ordinance was adopted:

- Structures designed for human habitation;
- Structures associated with high flood damage potential;
- Structures not associated with permanent open space use;
- Structures that store buoyant, flammable, explosive or injurious materials;
- Most wells, wastewater treatment facilities, sewage treatment systems and sewer or water lines;
- Solid and hazardous waste disposal; and
- Certain agricultural and open space uses which do not meet floodplain zoning standards.<sup>188</sup>

**Nonconforming buildings**

Any modification or addition must meet the general requirements starting on page 82 and requires local approval (a permit, special exception, conditional use or variance). The approval must include a determination that the modification will not increase obstruction to flood flows and that additions are flood-proofed to the flood protection elevation.<sup>189</sup>

<sup>185</sup> Wis. Adm. Code § NR 116.15(1)(c).

<sup>186</sup> Wis. Adm. Code § NR 116.15(1)(d).

<sup>187</sup> Wis. Stat. § 87.30(1d); 42 USC 4001 et seq.

<sup>188</sup> Wis. Adm. Code § NR 116.12(1) and (2).

<sup>189</sup> Wis. Adm. Code § NR 116.15(2)(a).

### **Requirements regarding wells and septic systems**

No new private sewage system or wells, or addition to an existing private sewage system, may be allowed in a floodway area. Any maintenance, repair or replacement of a private sewage system or well in a floodway area shall meet the applicable requirements of all municipal ordinances and state regulations.<sup>190</sup>

### **ADDITIONAL REQUIREMENTS AND LIMITATIONS FOR FLOODFRINGE AREAS**

#### **Nonconforming uses**

Nonconforming uses are not designated by state rule for floodfringe areas.

#### **Nonconforming buildings**

Any modifications or addition must meet the general requirements starting on page 82 and requires approval (a permit, special exception, conditional use or variance). The approval must assure that the modification will be placed on fill or, if the fill requirements are precluded by existing streets or sewer line elevations, the modification must be flood-proofed.<sup>191</sup>

*Exception for certain storage buildings:*

If the building:

1. will not be used for human habitation,
2. will not be associated with a high flood damage potential, and
3. if filling or floodproofing would result in unnecessary hardship, the county

board of adjustment or the city or village board of appeals is empowered to grant a variance for modifications or additions protected to elevations lower than the flood protection elevation if it finds that:

- A. Human lives will not be endangered;
- B. Water or private sewage systems will not be installed;
- C. Flood depths will not exceed 2 feet;
- D. Flood velocities will not exceed 2 feet per second; and
- E. The building will not be used for storage of prohibited materials.<sup>192</sup>

*Exception for one-time additions:*

An addition to an existing room in a nonconforming building or a building with a nonconforming use may be allowed in a floodfringe area one time only if:

1. The addition has been granted by permit, special exception, conditional use or variance;
2. The addition does not exceed 60 square feet in area; and
3. The addition, in combination with other modifications or additions to the building, does not exceed 50% of the present equalized assessed value of the building.<sup>193</sup>

#### **Requirements regarding wells and septic systems**

New wells and private sewage systems, or additions to, maintenance, repair or replacement of wells or private sewage system, in a floodfringe zone must comply

<sup>190</sup> Wis. Adm. Code § NR 116.15(2)(b).

<sup>191</sup> Wis. Adm. Code § NR 116.15(3)(a).

<sup>192</sup> Wis. Adm. Code § NR 116.15(3)(b).

<sup>193</sup> Wis. Adm. Code § NR 116.15(3)(c).



with related municipal ordinances and state regulations.<sup>194</sup>

#### REQUIREMENT FOR OTHER FLOODPLAIN AREAS

In a **shallow depth flooding area, flood storage area or coastal floodplain area**, no structural repairs that cost over 50% of the present equalized assessed value over the life of the existing building may be allowed unless the entire building is permanently changed to conform with state standards.<sup>195</sup>

#### RECORDKEEPING REQUIREMENTS

Zoning administrators must maintain records relating to nonconformities:

- A. Nonconforming buildings, their present equalized assessed value and a list of the costs of those activities associated with permitted changes to those buildings;
- B. Any changes to, all water surface profiles, floodplain zoning maps, floodplain zoning ordinances;
- C. Nonconforming buildings and nonconforming uses; and
- D. The official records of all permit applications, permits, appeals, variances and amendments related to the floodplain zoning ordinance.<sup>196</sup>

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<sup>194</sup> Wis. Adm. Code §§ NR 116.15(3)(d) and (e).

<sup>195</sup> Wis. Adm. Code §§ NR 116.15(4), (5) and (6).

<sup>196</sup> Wis. Adm. Code § NR 116.15(7)(b).

## CASELAW SUMMARY

### **Floodplain rule provision limiting some variances invalidated.**

State administrative rules may not prohibit boards of adjustment from granting variances from flood protection standards where the statutory standards for variances are otherwise met. The prohibition against the granting of a variance from flood

protection standards in Wis. Adm. Code § NR 116.13(2) is invalid because it “conflicts with the discretionary authority over variances vested in local boards of adjustment by state statute.”<sup>197</sup>

## SYNTHESIS OF LEGAL GUIDANCE

- Habitable structures – and most other structures – are prohibited in floodways and are subject to elevation, floodproofing and access requirements in floodfringe areas. As a result, many structures in floodplains are regulated as nonconforming uses.
- Additions and modifications to such buildings are subject to special permitting requirements, and generally must be floodproofed and engineered so as not to exacerbate flood damage.
- Modifications may not exceed 50% of a building’s assessed value over the building’s lifetime unless the structure is brought into compliance with state floodplain development standards. This often means moving or elevating the building.

## POLICY OPTIONS

Nonconformity policy options for floodplain zoning are much more limited than for shoreland zoning. Floodplain standards are required to comply with

National Flood Insurance Program requirements, statutes and administrative rules.

<sup>197</sup> *State v. Outagamie County Board of Adjustment*, 244 Wis. 2d 613 (2001).



## FLOODPLAIN MITIGATION

The Federal Emergency Management Agency (FEMA) administers the Flood Mitigation Assistance Program which provides funding to assist States and communities in implementing measures to reduce or eliminate the long-term risk of flood damage to buildings, manufactured homes, and other structures insurable under

the National Flood Insurance Program. There are three types of grants available under the Flood Mitigation Assistance Program: Planning, Project, and Technical Assistance Grants. Further details about these grants are available on-line at <http://www.fema.gov/fima/mitgrant.shtm>.



## APPENDIX A: NONCONFORMITY CASE LAW SUMMARIES - PUBLISHED OPINIONS

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**Listed alphabetically by case name; only those facts and discussion relevant to nonconformities are summarized.**

*City of Lake Geneva v. Smuda*, 75 Wis. 2d 532 (1977).

The city sought to restrain the Smudas from using their building as a duplex, since it was in an area zoned for single-family residences. Smudas alleged that their duplex was a legal nonconforming use: it had been used as a duplex since 1947, two years prior to the adoption of the city ordinance. Witness testimony contradicted this contention, so Smudas failed to meet their burden of proof. Between 1947 and 1955, the then-owner's daughter said that they used the building as a house when she summered there – sometimes she or her brothers slept upstairs, sometimes down. The next-door neighbor said the upstairs had not been rented out during the relevant time period.

*City of Los Angeles v. Gage*, 274 P.2d 34 (1954). (not precedent for Wisconsin)

In 1930, Gage bought 2 adjacent lots and built a duplex on one. He operated a plumbing supply business from an office in the downstairs apartment of the duplex, and used the second lot for storage of plumbing supplies. In 1946, the city rezoned the properties to a multi-family dwelling zone. The ordinance at that time required that any nonconforming commercial uses in residential zones be discontinued within 5 years. Though the trial court found that Gage's right to use the property for his plumbing business had vested, the higher court found that the city was reasonably exercising its police power. The only way to ensure nonconforming uses are terminated is by amortizing them, and 5 years is reasonable.

*County of Sauk v. Trager*, 118 Wis. 2d 204 (1984).

In 1960, Trager and his father installed a garage foundation 33 feet from the centerline of a town road. In 1974, Trager connected electricity to the garage, and in 1978, he began framing the garage without a permit. In 1970, the town adopted the county zoning ordinance requiring a 63 foot setback from town roads and requiring building permits. In 1978, the county informed Trager that he needed to move the garage or obtain a variance to continue construction. At hearing, the county asserted that the garage was a nonconforming use that had been discontinued for more than 12 months. The Board denied his setback variance and concluded that an ordinance provision excepting from permit requirements buildings valued over \$500 prior to 1970 did not apply. The courts included labor in the value, bringing it over \$500. The parties then argued about whether adding superstructure prolonged the permanency of the foundation; the court held that it would not. Last, the county wanted its 12 month discontinuation clause for nonconforming uses to apply. The court distinguished between nonconforming uses and nonconforming structures, then pointed out that the ordinance did not. Instead, the ordinance language specifically referred to uses of buildings. Since garages

are an allowed use in the district, the garage is not a nonconforming that the ordinance's discontinuation clause could apply to.

*David A. Ulrich, Inc. v. Town of Saukville*, 7 Wis. 2d 173 (1959).

The town passed a trailer park ordinance in 1953. In the fall of 1957, while the town was in the process of adopting its own zoning ordinance, plaintiff's agent made inquiries into the ordinance and discussed plaintiff's plans to build homes on property it might buy. Plaintiff then purchased a parcel and made plans to operate a trailer camp there. While Ulrich was planning improvements to the park, the town adopted its zoning ordinance, which limited use of the land to residences. In 1954, plaintiff applied for a trailer camp license and was denied. It proceeded to place trailers on the property, and there were 9 trailers renting space when its case went to trial. The plaintiff had wanted the court to declare its vested right to operate a trailer camp prior to the effective date of the zoning ordinance. Though plaintiff had made considerable investments in its park, it did so before obtaining a license for it. The park was not lawful prior to adoption of the zoning ordinance, so it could not be a vested nonconforming use.

*Foresight v. Babl*, 211 Wis.2d 599 (Ct. App. 1997).

Western Disposal wanted to use a former gravel pit to dump construction waste and demolition materials. When the land was zoned Ag/Residential, the town granted Disposal a permit to dump certain materials, but not others. Disposal dumped what it wanted. The town rezoned the land to Residential Estate, then a city annexed the land, zoning it R-1. Foresight bought the land next door to develop it, and wanted the city to make Disposal comply with the R-1 zoning. Disposal claimed to have a permitted nonconforming use, citing the town's permit and zoning ordinance. However, neither the town ordinance nor the town permit allowed use of the property as a disposal site, so the use is not a legal nonconforming use under the city ordinance. To be a legal nonconforming use, it must have been legal under the town's zoning. The town permit was not legal, because waste disposal was not a listed conditional use in the A/R district. Permits issued for prohibited uses are illegal per se, so the permit was void.

*Gabe v. City of Cudahy*, 52 Wis. 2d 13 (1971).

Prior to the city's enactment of a zoning ordinance in 1957, Gabe had sporadically removed sand and gravel from his property. There was no evidence showing that any excavation or sales were made in 1957, nor were there any business records or witnesses testifying to any commercial excavation use in 1957. As a result, Gabe had failed to meet his burden of showing that his commercial sand and topsoil operation was a legal nonconforming use.

*Jefferson County v. Timmel*, 261 Wis. 39 (1952).

Prior to the enactment of the county zoning ordinance in 1938, the landowner (Perry) had sold people surplus gas from his farm pump. In 1947, the county adopted zoning amendments providing that the lands along the highway, including the land at issue, could only be used for residences, home occupations and farming. In 1949, Perry was denied a permit to build a retail store. He filed a second application for a house with the same dimensions, which was approved



“only for a residence.” When the building was erected, two underground gas tanks were installed alongside it. The new gas pumps were 50-75 feet away from where the farm pump had been. The building was 50-60 feet from the garage where the Perry had once repaired an occasional vehicle. Perry did not use the building as a residence, but rather for sales of gas, oil, tobacco, cigarettes and pop. He sold this building and some adjacent land to Timmel. Timmel later learned that it violated the zoning ordinance. He sold the same items, plus items, and obtained a beer license to sell beer from a bar inside the building. He and his family also lived in the building. The county sued. There were many issues on appeal, but relevant to us are two: first, the right to assert nonconformity may have been waived when Perry applied for a building permit for a residence, a conforming use. Second, occasional sales of surplus gas does not entitle a landowner to erect a service station 50-75 feet away: this is unprotected enlargement.

*Jones v. City of Los Angeles*, 295 P.14 (Cal. 1930). (Not precedent for Wisconsin)

An ordinance that was not part of a comprehensive zoning law prohibiting the maintenance of sanitariums in residential districts and not providing any exception for existing sanitariums was not upheld – it was too drastic a blow to private property rights.

*Klinger v. Oneida County*, 146 Wis. 2d 158 (Ct. App. 1988), aff'd 149 Wis. 2d 838 (1989).

Klinger's property had a 1963 trailer house 22 feet from the lake. In 1984, he obtained a building permit to replace the walls, roof and windows at a cost of \$1300. In 1987, he applied for a second permit to remodel at a cost of \$2100. Since the fair market value of the trailer was about \$2900 in 1986, his permit request was denied. When he appealed this denial, the Board inspected the property and found the trailer had deteriorated: the roof leaked, the window frames and floor were rotten. The Board also found that Klinger was building a new structure around the mobile home, consisting of new foundation, walls and a roof. Klinger admitted he intended to entirely replace the mobile home by converting the shell into a new house. He amended his application to request \$7000 in repairs. At the hearing, Klinger admitted that the trailer was worthless and uninhabitable, and that the value of the shell far exceeded the \$1300 in his permit. The Board denied his request (which he'd amended to ask for a variance). Their denial was based on the fact that he was building a new home, not repairing a nonconforming one, and that the cost exceeded 50% of the structure's fair market value. The mobile home did not meet setback requirements. On review, the trial court took evidence and decided the case without deference to the Board, ordering the variance. The court of appeals reversed, since the trial court should have limited itself to reviewing the Board's decision, and since granting the variance would defeat the ordinance policy of protecting the environment. The supreme court affirmed the court of appeals.

*Kraemer Company v. Sauk County Bd. of Adjustment*, 2001 WI App 254.

Baraboo Quartzite owned and operated a nonmetallic mineral extraction site prior to the 1986 adoption of a provision of the county ordinance prohibiting mineral extraction activities on property in an agricultural district without a special exception permit. In 1989, Kraemer bought

the property and obtained a 5-year special exception permit to operate the quarry. The permit was extended from 1994 to 1996. In 1996, renewal application was denied. Kraemer sued the company alleging that the denial was arbitrary and unreasonable. Kraemer later amended its complaint to allege that the quarry was a nonconforming use that was exempt from the special exception permit requirement. When the case was remanded to the county, the parties agreed that the property was operated as a mineral extraction site before 6/97 and after 1/90.

At issue was whether the quarry was non-operative for a consecutive 12-month period, causing it to lose nonconforming use status. The parties disagreed about what constituted quarry operation: Kraemer argued that maintaining and marketing stockpiles and attempting to sell the quarry as an ongoing operation qualified as “quarrying.” The county argued that more active efforts are required to constitute quarrying. The court said that it did not need to fully resolve the debate about “quarrying,” since the record failed to show that any appreciable marketing or selling occurred between 10/88 and 10/89. Evidence from the quarry’s records and testimony from neighbors showed that nothing was happening. Furthermore, mere stockpiling fell short of the company’s definition of quarrying and such a definition would render the ordinance meaningless.

*Lessard v. Burnett County Board of Adjustment*, 2002 WI App 186.

The owners of a campground that predated the zoning ordinance applied for a conditional use to increase the number of campsites from 21 to 44. The property was zoned Residential-Recreational with campgrounds listed as a conditional use. The campground had no conditional use permit.

The County granted the conditional use permit for the new campsites. The campground sued asserting that the County had no zoning jurisdiction over the expansion. They argued that the County had no jurisdiction over a non-structural expansion. The court held that the County ordinance permitted the continuation of pre-existing uses but this did not include the expansion of those uses to additional land area, regardless of whether a structure is involved. The campsite owners also argued that under *Waukesha County v. Seitz*, 140 Wis. 2d 111, 409 N.W. 2d 536 (1994), a nonconforming use may be expanded to accommodate increased volumes of demand. The court rejected this argument as well holding that *Seitz* sanctioned only increased volume and frequency of use, not physical expansion of a nonconforming use.

*Marris v. City of Cedarburg*, 176 Wis. 2d 14 (1993).

Dispute over whether total lifetime structural repairs exceeded 50% of the property’s current assessed value. The property was zoned residential. It contains two buildings, a residence in front and another building in back, which is the subject of the dispute. Prior to purchase by Marris, the building was used as a flower shop, which had legal nonconforming use status. Before that, it was a beer distributor’s warehouse. The city granted Marris permission to substitute two offices for the legal nonconforming use. Without seeking the proper permits, Marris began converting the building to three offices, and a neighbor complained. After



inspections and a hearing, the Board of Zoning Appeals decided the property had lost its legal nonconforming use status. The reviewing court sent the case back to the Board for further findings. The chair had made negative comments about Marris, but refused to recuse himself. The Board then found that lifetime structural repairs exceeded 50% of the property's value and denied legal status. The court affirmed this decision, which Marris appealed all the way to the Supreme Court.

The court spent considerable time discussing prejudice associated with the chair's potential personal bias against Marris: Marris' arguments were a "loophole" in need of "closing" and that the Board and assistant city attorney should try to "get her on the Leona Helmsley rule." Only after the second remand did the Board hire valuation experts to calculate the 50% valuation. The court did not think the Board's interpretation of the city ordinance was reasonable, and went on to try to distinguish between structural repairs and ordinary maintenance in a way that balanced the right to continue a use with the policy of gradually eliminating those uses.

*Peterson v. Dane County*, 136 Wis. 2d 501 (Ct. App. 1987).

Peterson purchased lot not knowing that it did not comply with the subdivision ordinance: it was a two acre parcel that had been illegally divided from a 10 acre parcel; both were zoned A-1 Agriculture (Exclusive). Peterson then applied to have his parcel rezoned for residential use. His rezoning was denied, and he claimed this "took" his property. Most of the opinion addresses the constitutionality of zoning, but the court also noted: "A landowner who subdivides so as to create a substandard lot creates his own hardship and cannot successfully attack zoning restrictions on constitutional grounds."

*Racine County v. Cape*, 2002 WI App. 16, 250 Wis. 2d 44 (Ct. App. 2001).

Cape is in the road construction industry, and as part of its operations it recycles, stockpiles and crushes road materials. In 1970, this operation became a nonconforming use. In 1993, Cape began using a portable concrete crusher to complement its more rudimentary crushing methods such as dropping 2-7 ton balls from a crane. The court held that a nonconforming use can sometimes modernize its technology as long as the essential character of the nonconforming use has not changed. As a result, the operation could continue.

*Schalow v. Waupaca County*, 139 Wis. 2d 284 (Ct. App. 1987), rev. denied 140 Wis. 2d 874 (1987).

Schalows' lot was created prior to adoption of the county zoning ordinance. It is 6240 square feet, 1/3 of the required lot size (20,000 sq. ft.). They sought a variance from all of the required setbacks so that they could build an 840 square foot house. In denying the variance request, the Board said the house was "too large to be accommodated on the lot." This conclusion is not supported by the evidence, so the court remanded the case. Further, the court noted that purchasing a lot known to be nonconforming does not limit their right to apply for a variance. The Schalows have no greater or lesser rights to a variance than their predecessors.

*Schroeder v. Dane County Bd. of Adjustment*, 228 Wis. 2d 324 (Ct. App. 1999).

The Kaupanger brothers operated a quarry since at least 1966. In 1968, the county adopted an ordinance allowing for the registration of existing quarries as nonconforming uses. (In contrast to the Sauk County ordinance in Kraemer, registered quarries are not considered discontinued if they are inactive for one year). The Kaupangers registered a 2 acre parcel in one of their quarter-quarter sections as the quarry in 1969. In 1997, Halverson purchased parts of five quarter-quarters from Kaupangers, including the registered area. The county issued a stop-work order when it found Halverson quarrying north of the “registered 40.” The county argued that the “diminishing asset rule” applied to the registered 40; Halverson argued it applied to the whole property. The “diminishing asset rule” considers an enterprise to be “using” all the land that contains the asset, even if all of the land is not being actively used. The court interpreted the ordinance to apply to more land than that actually being worked, since it acknowledged inactive sites, and it saw “use” to be hinging on intent of the registering landowner, which can’t necessarily be confined to the registered 40.

*Snyder v. Waukesha County Zoning Board of Adjustment*, 74 Wis. 2d 468 (1976).

In 1972, Snyder obtained a building permit to construct an addition to his lake house. When the town building inspector inspected the addition a year later, Snyder said he wanted to add a porch to his permit, and the building inspector said he’d take care of getting the permit. They later discussed the porch dimensions, and there was a misunderstanding as to how close to the property line the porch would be. When a neighbor complained, it was measured at 4 to 6’ from the property line instead of the 13’4” required. Snyder sought a variance from the setback requirement and the floor area to lot area ratio. He argued that since his lot was substandard, he suffers hardship or practical difficulty. The court did not agree, noting that his argument ignores the special compromise the ordinance makes for nonconforming lots (his sideyard was reduced from 20’ in proportion to his lot width). “The offset requirement placed on [his] lot is not unique to his property, for it applies equally to all lots of similar size,” so he can’t use lot size to justify the variance.

*Sohns v. Jensen*, 11 Wis. 2d 449 (1960).

Prior to the adoption of the zoning ordinance, Jensen operated an auto repair shop. Though he might have occasionally salvaged some auto parts, he did not show income from salvaged vehicles until 6 years after the ordinance became effective. His limited salvage use did not establish legal nonconforming use status for his automobile salvage business.

*State ex. rel Brill v. Mortenson*, 6 Wis. 2d 325 (1959).

Brill owned a building that had been used as a woodworking shop prior to the county’s adoption of its zoning ordinance, which zoned his land residential. He wanted to use the building for meat processing and distribution. The county, in denying a use/occupancy permit, alleged that the right to a nonconforming use was lost if the use was discontinued for twelve or more months, per the county ordinance. Brill argued that state statutes did not authorize the 12-month discontinuation clause, but the supreme court held that the power to restrict nonconforming uses



is clearly implied by state statutes whose purpose it to protect only the “original nonconforming use.” (State statutes have since been modified to require a 12-month discontinuation clause).

*State ex rel. Covenant Harbor Bible Camp v. Steinke*, 7 Wis. 2d 275 (1959).

In 1947 a church organization bought a 53-acre estate that contained a 26-room house and six guest houses. They built a dining hall and additional cabins before the zoning ordinance changed, making the camp a nonconforming use. When the big house burned down, the camp sought to replace it with 6 cabins which would house the same number of people as the big house. The city said it was barred from rebuilding the house by the 50% valuation rule. The camp alleged it was one use; the city argued that the big house contained a nonconforming use and should be viewed individually. The court saw this as a special situation where disallowing rebuilding of the big house would negatively impact the entire camp, where each building is essential to the whole operation. It remanded the case to the trial court to hear evidence on the value of all structures containing nonconforming uses.

*State ex rel. Home Ins. Co. v. Burt*, 23 Wis. 2d 231 (1964).

When a nonconforming three-family dwelling (sideyard area too small) was damaged in a fire, the owner’s insurance company estimated that it would cost \$6337 to fix it. The city refused to issue a permit for repairs, since the repair estimate exceeded 50% of the assessed value (\$10,100). The fair market value, however, was at least \$24,000. Assessed value is supposed to equal fair market value, but there is no safeguard in the city ordinance for when it does not. By relying on an assessed value that undervalues the property, the city is arbitrarily administering its ordinance, contrary to the due process and equal protection requirements of the 14th Amendment. The court held that the city should have granted a variance entitling the property owners to rebuild.

*State ex rel. Morehouse v. Hunt*, 235 Wis. 358 (1940).

Building built as a fraternity house has been a nonconforming use in a single family residential district. It was used as a fraternity house from 1922 to 1932, when the frat moved out. The company that held the mortgage on the property foreclosed, took possession, and rented it as a boarding house until 1934. Under the city ordinance, one nonconforming use could be substituted for another in the same classification. During 1934 through 1938, the building was rented out as a residence: first to a family and their servants (1 year) then as a duplex for 5-7 unrelated people, though it had been designed for 20-25. The court credited the depression for the building’s underuse and failure to sell.

When a fraternity wanted to buy the building, the city denied a certificate for nonconforming use because it had been used as a residence for a year. The owners argued that residential use was temporary and incomplete, and they should be allowed to use it as a fraternity. The neighbors argued that it would be worth more as a big house, and incompatible if it was a frat house due to increased traffic and noise. The city’s zoning Board sided with the owners: residential use was a stop-gap measure; it did not constitute abandonment. The court deferred

to the Board because it felt that the Board understood the situation. It held that discontinuation requires intentional abandonment of a use. Three justices dissented, asserting that abandonment in fact was the test, not intent. Their view subsequently prevailed.

*State ex rel. Peterson v. Burt*, 42 Wis. 2d 284 (1969).

Two houses in an area that had been rezoned for manufacturing had been vacant for over a year, beginning when the city building inspector's office declared them uninhabitable until modifications were made. At issue was whether the 12-month discontinuation clause required intent to abandon, or whether the state zoning enabling statute, as modified in 1941, was objective. The court held that no intent to abandon is required by the statute; the spirit of zoning aimed at restricting nonconforming uses is supported by the objective time-based standard.

*State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23.

Couple sought a variance to convert 1600 square foot vacation home into year-round residence by constructing a 1200 square foot addition over the existing home. The home had a setback of 26 feet from the ordinary high water mark of a lake, making it a legal nonconforming structure in the shoreland area. The county denied the variance request, reasoning that since the couple had a reasonable use of the property without the variance; they had not proven "unnecessary hardship" as defined by existing case law. The Supreme Court held that while the "no reasonable use" standard is appropriate in use variance cases, unreasonable hardship in area variances cases is best explained as

'whether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.' Snyder, 74 Wis. 2d at 475 (quoting 2 Rathkopf, *The Law of Zoning & Planning*, § 45-28, 3d ed. 1972).

Whether this standard is met in an individual case requires "individualized balancing of public and private interests" through the consideration of the purposes of the zoning restriction in question and the effect of the variance on the property, the neighborhood and the larger public interest.

*State v. Outagamie County Board of Adjustment*, 244 Wis. 2d 613 (2001).

See Text.

*State v. Waushara County Board of Adjustment*, 2004 WI 56 (2004).

The property owners had a .324 acre parcel of land on Silver Lake in Waushara County. The lot is not large enough for a house to be built that conforms to both the 75-foot water setback and the 110-foot highway setback required by the Waushara County Ordinance. The Waushara County Ordinance allows for setback averaging, but under that provision, the owners could build no closer than 35 feet from the ordinary highwater mark of Silver Lake. The owners have an existing two-story home on the lot, which they have used as a second home, that is between



30 and 34 feet from Silver Lake. This home has a footprint of approximately 1,300 square feet. In 2001, the owners applied for a third variance to construct a 10-foot by 20.5-foot addition to their living room (with a full basement) and to build a 4-foot by 10-foot porch.

The Supreme Court made several points consistent with its decision in *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, including:

- A distinction between area variances and use variances should be made, and in so doing, the applicability of the Kenosha County “no reasonable use” standard for determining “unnecessary hardship” is limited to use variance situations.
- The definition of the statutory term ‘unnecessary hardship’ from Snyder best encompasses the appropriate test for granting an area variance.
- A Board of Adjustment should focus on the purpose of the zoning law at issue in determining whether an unnecessary hardship exists.

*Town of Delafield v. Sharpley*, 212 Wis. 2d 332 (Ct. App. 1997).

A father and son lived on adjacent parcels totaling 9.5 acres where they have kept and maintained a variety of equipment and vehicles. Over the years, the town received numerous complaints about junk and junked vehicles on the property. The town gave notice that the Sharpleys did not comply with several ordinances. When they did not comply with the ordinances by a deadline, the town inspected the properties and found more than 90 junked vehicles, car parts, appliances, and a school bus that appeared to be lived in. One refrigerator had the door on it still, and several vehicles had hornets nests in them, raising safety issues for the children from an adjacent subdivision who might wander onto the property.

At trial, the Sharpleys claimed that their junkyard was a legal nonconforming use predating the town ordinances. The court of appeals held that whether they had a nonconforming use or not was irrelevant: their use of the properties constituted a public nuisance and could be prohibited or restricted by the town.

*Town of Yorkville v. Fonk*, 3 Wis. 2d 371 (1958).

At the time when the town passed an ordinance restricting trailer camps to 25 spaces, the trailer camp had completed 23 spaces and had substantially completed 24 spaces. After the ordinance change, they moved the equipment from the 24 spaces to a new parcel of land where he was installing 18 spaces. They had converted the 24 started spaces to a recreation area. When the town sought to enforce its ordinance, they argued that he had a vested right to 47 trailers. The court disagreed. They were not continuing a use they’d already undertaken when the ordinance passed, but rather were expanding the use to a new property. They were “attempting to transfer their right to operate trailer spaces in that location to another locality. Their nonconforming use is not ambulatory.”

*Village of Elm Grove v. T.V. John & Son, Inc.*, 173 Wis. 2d 170 (Ct. App. 1992).

A construction company’s storage structure was built in 1957. The village’s 1982 floodplain zoning ordinance classified its location as floodway. In 1990, the village notified TV John that the shed could not be rebuilt in compliance with the floodplain ordinance, so it must be

removed. TV John appealed the village's enforcement actions to the circuit court, which found that the assessed value of the shed was \$0 and the repair costs would be \$8000. It further found the structure was nonconforming and the raze order was reasonable. TV John had argued that the structure was conforming, since the ordinance allows uses and structures that are accessory to open space uses, and the shed stored items for their yard, not their business. The appellate court found it inappropriate to divide the construction company's uses into numerous individual uses, and pointed to the open space use definition – uses having a low flood damage potential and not involving structures. The court also noted that the shed failed to comply with another ordinance provision – that buoyant or otherwise harmful materials not be stored in floodways where they could harm those downstream. Last, TV John lost its argument about the 50% rule. Since Covenant Harbor Bible Camp had the total value of its buildings taken into effect when the court allowed reconstruction of the main building, they argued that their structures should be taken together. Since the value of this shed was relatively low, they should be able to fix it. The court distinguished *Covenant Harbor* based on that case's emphasis on the reasonable result in light of nonconforming use policy. Not allowing the primary building to be reconstructed might have brought down the entire bible camp, while here, this dilapidated shed is not essential to the continuation of the contracting business.

*Village of Menonomee Falls v. Preuss*, 225 Wis. 2d 746 (Ct. App. 1999).

Preuss' residence preceded the industrial zoning of his neighborhood and was therefore a nonconforming use. He began to add a commercial garage to the house for his electrical business before he had obtained a permit to do so. The village made him stop working on it, and filed a complaint alleging various code violations. This case resulted in a stipulated order whereby Preuss agreed to various conditions placed on his garage permit. When Preuss failed to comply with some of the conditions, the village moved to reopen its case and sought judgment requiring Preuss to remove the garage and terminate his nonconforming residential use.

The trial court ordered removal of the garage, but not discontinuation of the residential use. The court of appeals said that the trial court lacked the discretion to allow continuation of the nonconforming use. The village is entitled, as a matter of law, to have the prior legal nonconforming use terminated.

*Village of Menonomee Falls v. Veierstahler*, 183 Wis. 2d 96 (Ct. App. 1994).

In 1982, Veierstahler bought a parcel with two structures: one was used for auto repair, the other contained apartments upstairs and a tavern downstairs. The Village rezoned the property to a multi-family residential zoning district, rendering the tavern and auto repair nonconforming uses. In 1989, the Village refused to renew the tavern's liquor license. Veierstahler continued to conduct limited retail activities in the tavern: "the serving of lunches two days a week, the occasional cashing of checks for former patrons of the tavern, and the occasional selling of cigarettes or soda." Over a year after the liquor licenses had expired, Veierstahler rented the space to someone who operated a nonalcoholic social club there. The Village issued a zoning



citation alleging that this use was not permitted.

At trial, Veierstahler argued that his auto repair and apartment uses maintained a nonconforming commercial use on the property. He also argued that the incidental sales from the tavern space perpetuated its nonconforming use status. The courts denied these arguments. Zoning ordinances regulate specific uses, and seek to eliminate nonconforming uses as speedily as possible. Allowing a lapsed nonconforming use to be revived or a new nonconforming use to be commenced just because another nonconforming use remains in effect contradicts these policies. The apartment and auto repair uses have no bearing on the tavern's use. Though nonconforming uses can be allowed to naturally expand without changing, the reduction to an ancillary use can't save a terminated primary use. This is consistent with the law holding that ancillary activities cannot become vested nonconforming uses, only principal uses can.

*Walworth County v. Hartwell*, 62 Wis. 2d 57 (1974).

Hartwell owned a 223 acre farm that had been in his family since 1842. A portion of the farm had been used for motorcycle racing between 1937 and 1974. When the county charged Hartwell with violating the zoning ordinance, he alleged that the racing constituted a valid nonconforming use, since the racing predated the 1948 ordinance. The decisive issue on appeal was whether Hartwell had a valid nonconforming use. The standard for establishing a valid nonconforming use is that the use of the property was so active and actual before the ordinance that the owner acquires a vested right. While one track was actively used from 1937 to 1963, its use had been discontinued for more than a year since 1948. The other track had not been used before 1948, so he had no vested right to use the property for motorcycle racing.

*Waukesha County v. Seitz* (Seitz I), 140 Wis.2d 111 (Ct. App. 1987).

In 1969, Seitz purchased a lakefront resort which consisted primarily of cottage rentals and secondarily of a boat livery, fuel and bait sales, and motor repairs. The county's 1970 shoreland-floodplain zoning ordinance made his resort nonconforming. Over the next 17 years, Seitz expanded his docking from 3-5 boats to 54. He expanded his pier from 80 to 120 feet, then to 192 feet, so he can wet-dock 35 boats. The county accused him of illegally operating a boat livery, and alleged that his expansion was an impermissible expansion of his nonconforming use.

The court looked at two issues: First, did Seitz establish a vested right to continue his boat-related activities, or were they merely accessory to his nonconforming resort? The court held that they operated synergistically as a business, and he had acquired a vested interest in their continuance. Second, had he impermissibly expanded the use, thus invalidating his nonconforming use status? The court said no: Dry docking changes and wet-docking extensions were mere increases brought on by a change in volume, frequency or intensity of the nonconforming business.

*Waukesha County v. Pewaukee Marina, Inc.* (Seitz II), 187 Wis. 2d 18 (Ct. App. 1994).

After Seitz I was decided in his favor, Mr. Seitz added new business ventures to his dock: a



retail store, a place for lounging and entertainment, boat sales, pier sales and boat lift sales. The county asserted that these were new uses that invalidated his nonconforming use status. The courts agreed. Seitz had first argued that since state statutes provide two ways nonconforming uses can be invalidated: 12 month discontinuation and the 50% valuation rule, expansion cannot be a reason for invalidation. The court, citing Brill, referred back to the purpose of nonconforming use regulations: to protect the original use but closely limit that use and prohibit its enlargement contrary to the zoning scheme. Seitz then argued that he did not change his use, he only expanded it, as was allowed in Seitz I. The court distinguished between mere increases in the historically allowed use and identifiable changes in use: the former is acceptable, the latter is not. Adding a lounge and retail store goes beyond any definition of “marina activities.” As a remedy, the court upheld the invalidation of the nonconforming use as well as removal of the illegal expansion.

*Zealy v. City of Waukesha*, 201 Wis. 2d 365 (1996).

Zealy’s parents owned a 250 acre farm, zoned for farming. 10.4 acres were annexed to the city and rezoned residential. A small portion was rezoned for business use. Zealy sold all but the 10.4 acres, which he used for peat mining. In 1982, Zealy, his mother and brother granted an easement to the city for construction of storm and sanitary sewers on the property. They thought the sewers were connected with city plans to let them develop the property. In 1985, the city zoned 8.2 acres of the Zealy property for conservancy use (C-1), leaving 2.1 zoned residential and .57 zoned business. The C-1 district allows agricultural use. Zealy asserted that the downzoning was a taking. However, he had not obtained any permits or spent any money to actualize his development plans. He had no vested rights. The court held that the parcel must be taken as a whole when considering whether a regulation took all the property’s value. He still had developable lands, and the rezoning allowed his current use.



# APPENDIX B: RELEVANT STATUTORY & ADMINISTRATIVE CODE PROVISIONS

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## ZONING ENABLING LEGISLATION

**Counties** – Wis. Stat. § 59.69(10)(a). Nonconforming Uses. 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. (emphasis added.)

**Towns** – Wis. Stat. § 60.61(5)(a). An ordinance adopted under this section [town zoning] may not prohibit the continued use of any building or premises for any trade or industry for which the building or premises is used when the ordinance takes effect. An ordinance adopted under this section may prohibit the alteration of, or addition to, any existing building or structure used to carry on an otherwise prohibited trade or industry within the district. If a use that does not conform to an ordinance adopted under this section is discontinued for a period of 12 months, any future use of the land, building or premises shall conform to the ordinance. (emphasis added.)

(Towns that adopt village powers may adopt ordinances under Wis. Stat. § 61.35, which gives them the city powers under Wis. Stat. § 62.23.)

**Cities/villages** – Wis. Stat. § 62.23(7)(h). Nonconforming use. The lawful use of a building or premises, existing at the time of the adoption or amendment of a zoning ordinance may be continued although such use does not conform to the provisions of the ordinance. Such nonconforming use may not be extended. The total structural repairs or alterations in such a nonconforming building shall not during its life exceed 50 per cent of the assessed value of the building unless permanently changed to a conforming use. If such nonconforming use is discontinued for a period of 12 months, any future use of the building and premises shall conform to the ordinance.”

## VARIANCES, SPECIAL EXCEPTIONS AND APPEALS.

### **Powers of County Boards of Adjustment.** Wis. Stat. § 59.694(7).

The board of adjustment shall have all of the following powers:

- (a) To hear and decide appeals where it is alleged there is error in an order, requirement, decision or determination made by an administrative official in the enforcement of s. 59.69 or of any ordinance enacted pursuant thereto.
- (b) To hear and decide special exceptions to the terms of the ordinance upon which the board is required to pass under such ordinance.
- (c) To authorize upon appeal in specific cases variances from the terms of the ordinance that would not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.
- (d) To grant special exceptions and variances for renewable energy resource systems.

### **Powers of City/Village Boards of Appeals.** Wis. Stat. § 62.23(7)(e).

1. The council which enacts zoning regulations pursuant to this section shall by ordinance provide for the appointment of a board of appeals, and shall provide in such regulations that said board of appeals may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained. Nothing in this subdivision shall preclude the granting of special exceptions by city plan commissions or the common council in accordance with the zoning regulations adopted pursuant to this section which were in effect on July 7, 1973 or adopted after that date.
  
7. The board of appeals shall have the following powers: to hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of this section or of any ordinance adopted pursuant thereto; to hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance; to authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in practical difficulty or unnecessary hardship, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done. The board may permit in appropriate cases, and subject to appropriate conditions and safeguards in harmony with the general purpose and intent of the ordinance, a building or premises to be erected or used for such public utility purposes in any location where it is reasonably necessary for the public convenience and welfare.



## FLOODPLAIN ZONING REQUIREMENTS

### STATUTES

#### **87.30(1d) Improvements to nonconforming buildings in Floodplains.**

- (a) 1. Nonconforming building” has the meaning specified by rule by the department for purposes of floodplain zoning under this section and includes a building with a nonconforming use.  
2. “Nonconforming use” has the meaning specified by rule by the department for purposes of floodplain zoning under this section.
- (b) For nonconforming buildings that are damaged or destroyed by a nonflood disaster a floodplain zoning ordinance shall permit the repair, reconstruction or improvement of any such nonconforming building, in order to restore it after the nonflood disaster except as provided in par. (c).
- (c) A floodplain zoning ordinance may not permit the repair, reconstruction or improvement of a nonconforming building if the nonconforming building, after repair, reconstruction or improvement, will fail to meet one or more of the minimum requirements applicable to such a nonconforming building under 42 USC 4001 to 4129 or under the regulations promulgated thereunder.

#### **42 USC Sec. 4022. State and local land use controls**

- (a) Requirement for participation in flood insurance program
  - (1) In general. After December 31, 1971, no new flood insurance coverage shall be provided under this chapter in any area (or subdivision thereof) unless an appropriate public body shall have adopted adequate land use and control measures (with effective enforcement provisions) which the Director finds are consistent with the comprehensive criteria for land management and use under section 4102 of this title.
  - (2) Agricultural structures.
    - (A) Activity restrictions. Notwithstanding any other provision of law, the adequate land use and control measures required to be adopted in an area (or subdivision thereof) pursuant to paragraph (1) may provide, at the discretion of the appropriate State or local authority, for the repair and restoration to predamaged conditions of an agricultural structure that -
      - (i) is a repetitive loss structure; or

- (ii) has incurred flood-related damage to the extent that the cost of restoring the structure to its predamaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred.
- (B) Premium rates and coverage. To the extent applicable, an agricultural structure repaired or restored pursuant to subparagraph (A) shall pay chargeable premium rates established under section 4015 of this title at the estimated risk premium rates under section 4014(a)(1) of this title. If resources are available, the Director shall provide technical assistance and counseling, upon request of the owner of the structure, regarding wet flood-proofing and other flood damage reduction measures for agricultural structures. The Director shall not be required to make flood insurance coverage available for such an agricultural structure unless the structure is wet flood-proofed through permanent or contingent measures applied to the structure or its contents that prevent or provide resistance to damage from flooding by allowing flood waters to pass through the structure, as determined by the Director.
- (C) Prohibition on disaster relief. Notwithstanding any other provision of law, any agricultural structure repaired or restored pursuant to subparagraph (A) shall not be eligible for disaster relief assistance under any program administered by the Director or any other Federal agency.
- (D) Definitions. For purposes of this paragraph –
  - (i) the term “agricultural structure” means any structure used exclusively in connection with the production, harvesting, storage, raising, or drying of agricultural commodities; and
  - (ii) the term “agricultural commodities” means agricultural commodities and livestock.

(b) Community rating system and incentives for community floodplain management

- (1) Authority and goals. The Director shall carry out a community rating system program, under which communities participate voluntarily -
  - (A) to provide incentives for measures that reduce the risk of flood or erosion damage that exceed the criteria set forth in section 4102 of this title and evaluate such measures;
  - (B) to encourage adoption of more effective measures that protect natural and beneficial floodplain functions;



(C) to encourage floodplain and erosion management; and

(D) to promote the reduction of Federal flood insurance losses.

§ 4023. Properties in violation of State and local law. No new flood insurance coverage shall be provided under this chapter for any property which the Director finds has been declared by a duly constituted State or local zoning authority, or other authorized public body, to be in violation of State or local laws, regulations, or ordinances which are intended to discourage or otherwise restrict land development or occupancy in flood-prone areas.

#### ADMINISTRATIVE RULES (UNDERLINING ADDED FOR EMPHASIS)

**NR 116.03(33)** “Nonconforming building” means an existing lawful building which is not in conformity with the dimensional or structural requirements of the floodplain zoning ordinance for the area of the floodplain which it occupies.

**NR 116.03(34)** “ Nonconforming use” means an existing lawful use or accessory use of a structure, building or development which is not in conformity with the provisions of the floodplain zoning ordinance for the area of the floodplain which it occupies.

#### **NR 116.15 Nonconforming Uses and Nonconforming Buildings.**

##### *(1) General.*

Insofar as the standards in this section are not inconsistent with the provisions of ss. 59.97 (10) and 62.23(7)(h), Stats., they shall apply to all uses and buildings that do not conform to the provisions contained within a floodplain zoning ordinance. These standards apply to the modification of, or addition to, any building and to the use of any building or premises which was lawful before the passage of the ordinance. The existing lawful use of a building or its accessory use which is not in conformity with the provisions of a floodplain zoning ordinance may be continued subject to the following conditions:

- (a) No extension of a nonconforming use, or modification or addition to any building with a nonconforming use or to any nonconforming building, may be permitted unless they are made in conformity with the provisions of this section. For the purposes of this section, the words “modification” and “addition” shall include, but not be limited to, any alteration, addition, modification, rebuilding or replacement of any such existing building, accessory building or accessory use. Ordinary maintenance repairs are not considered structural repairs, modifications or additions; such ordinary maintenance repairs include internal and external painting, decorating, paneling, the replacement of doors, windows and other nonstructural components; and the maintenance, repair or replacement of existing private sewage systems, water supply systems or connections to public utilities;

- (b) If a nonconforming use or the use of a nonconforming building is discontinued for 12 consecutive months, it is no longer permitted and any future use of the building shall conform with the appropriate provisions contained ss. NR 116.12, 116.13 and 116.14;
- (c) No modification or addition to any nonconforming building or any building with a nonconforming use, which over the life of the building would exceed 50% of its present equalized assessed value, may be allowed unless the entire building is permanently changed to a conforming building with a conforming use in compliance with the applicable requirements of this chapter; and
- (d) If any nonconforming building or any building with a nonconforming use is destroyed or is so badly damaged that it cannot be practically restored, it cannot be replaced, reconstructed or rebuilt unless the provisions ss. NR 116.12, 116.13 and 116.14 are met. For the purpose of this subsection, restoration is deemed impracticable where the total cost of such restoration would exceed 50% of the present equalized assessed value of the building.

(2) *Floodway Areas.*

- (a) No modifications or addition to any nonconforming building or any building with a nonconforming use in a floodway area may be allowed, unless such modification or addition has been granted by permit, special exception, conditional use or variance and meets all of the requirements of sub. (1) and the following criteria:
  1. The modification or addition to a building may not increase the amount of obstruction to flood flows; and
  2. Any addition to a building shall be floodproofed in accordance with the requirements of s. NR 116.16, by means other than the use of fill, to the flood protection elevation.
- (b) No new private sewage system, or addition to an existing private sewage system, may be allowed in a floodway area. Any maintenance, repair or replacement of a private sewage system in a floodway area shall meet the applicable requirements of all municipal ordinances and COMM 83.
- (c) No new well, or modifications to an existing well, which is used to obtain water for ultimate human consumption may be allowed in the floodway area. Any maintenance, repair or replacement of an existing well in a floodway area shall meet the applicable requirements of all municipal ordinances and chs. NR 811 and 812.

(3) *Floodfringe Areas.*

- (a) Except as provided in par. (b) or (c), no modification or addition to any nonconforming building or any building with a nonconforming use in the floodfringe area may be allowed unless such modification or addition has been granted by permit, special exception,



conditional use or variance and the modification or addition is placed on fill or is floodproofed in compliance with the applicable regulations contained s. NR 116.13 (2).

- (b) If compliance with the fill or floodproofing provisions of par. (a) would result in unnecessary hardship, and only if the building will not be used for human habitation and will not be associated with a high flood damage potential, the county board of adjustment or the city or village board of appeals, using the procedures established in s. NR 116.21(4), may grant a variance for modifications or additions which are protected to elevations lower than the flood protection elevation if:
1. Human lives will not be endangered;
  2. Water or private sewage systems will not be installed;
  3. Flood depths will not exceed 2 feet;
  4. Flood velocities will not exceed 2 feet per second; and
  5. The building will not be used for storage of materials described in NR 116.13(6).
- (c) An addition to an existing room in a nonconforming building or a building with a nonconforming use may be allowed in a floodfringe area on a one time basis only if:
1. The addition has been granted by permit, special exception, conditional use or variance;
  2. The addition does not exceed 60 square feet in area; and
  3. The addition, in combination with other modifications or additions to the building, does not exceed 50% of the present equalized assessed value of the building.
- (d) All new private sewage systems, or additions to, maintenance, repair or replacement of a private sewage system, in a floodfringe area shall meet the applicable requirements of all municipal ordinances and COMM 83.
- (e) All new wells, or additions to, replacement, repair or maintenance of a well, in a floodfringe area shall meet the applicable requirements of all municipal ordinances and chs. NR 811 and 812.

*(4) Shallow Depth Flooding Area.*

No structural repairs, modifications or additions to an existing building, the cost of which exceeds, over the life of the existing building, 50% of its present equalized assessed value, may be allowed in a shallow depth flooding area unless the entire building is permanently changed to conform with the standards prescribed in NR 116.14(1).

*(5) Flood Storage Area.*

No structural repairs, modifications or additions to an existing building, the cost of which exceeds, over the life of the existing building, 50% of its present equalized assessed value, may be allowed in a flood storage area unless the entire building is permanently changed to conform with the standards prescribed in NR 116.14(2).

*(6) Coastal Floodplain Area.*

No structural repairs, modifications or additions to an existing building, the cost of which exceeds, over the life of the existing building, 50% of its present equalized assessed value, may be allowed in a coastal floodplain area unless the entire building is permanently changed to conform with the standards prescribed in NR 116.14(3).

*NR 116.15(7) Municipal Responsibilities.*

- (a) Municipal floodplain zoning ordinances shall regulate nonconforming uses and nonconforming buildings in a manner consistent with this section and the applicable state statutes. These regulations shall apply to the modification or addition of any building or to the extension of the use of any building or premises that was lawful before the passage of the floodplain zoning ordinance or any amendment thereto.
- (b) As permit applications are received for modifications or additions to nonconforming buildings in the floodplain, municipalities shall develop a list of those nonconforming buildings, their present equalized assessed value and a list of the costs of those activities associated with changes to those buildings enumerated in sub. (2) (a) or (3) (a), (b) and (c).
- (c) Zoning Administrators must keep the official records of, and any changes to, all water surface profiles, floodplain zoning maps, floodplain zoning ordinances, nonconforming buildings and nonconforming uses and the official records of all permit applications, permits, appeals, variances and amendments related to the floodplain zoning ordinance;



## SHORELAND ZONING

### COUNTY SHORELAND ZONING STATUTES

Wis. Stat. § 59.692(1s)

- (a) Restrictions that are applicable to damaged or destroyed nonconforming structures and that are contained in an ordinance enacted under this section may not prohibit the restoration of a nonconforming structure if the structure will be restored to the size, subject to par. (b), location and use that it had immediately before the damage or destruction occurred or impose any limits on the costs of the repair, reconstruction or improvement if all of the following apply:
  - 1. The nonconforming structure was damaged or destroyed after October 14, 1997.
  - 2. The damage or destruction was caused by violent wind, vandalism, fire or a flood.
- (b) An ordinance enacted under this section to which par. (a) applies shall allow for the size of a structure to be larger than the size it was immediately before the damage or destruction if necessary for the structure to comply with applicable state or federal requirements.
- (1t) A county or the department may not commence an enforcement action against a person who owns a building or structure that is in violation of a shoreland zoning standard or an ordinance enacted under this section if the building or structure has been in place for more than 10 years.

### ADMINISTRATIVE CODE

NR 115.05(3)(e) Nonconforming Uses.

- 1. Under s. 59.69 (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. 59.694 (4) and (10), Stats., or petition to have the property rezoned under sub. (2) (e) and s. 59.69 (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 boathouses which extend beyond the ordinary high water mark of any navigable waters shall be required to comply with s. 30.121, Stats.



## CITY AND VILLAGE SHORELAND-WETLAND ZONING

### STATUTES

61.351(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.

### ADMINISTRATIVE CODE

NR 117.05(5) Nonconforming Uses and Structures.

- (a) Notwithstanding s. 62.23 (7) (h), Stats., an ordinance or amendment adopted under s. 61.351, Stats., may not prohibit the repair, reconstruction, renovation, remodeling or expansion of a legal nonconforming structure, or environmental control facility related to a legal nonconforming structure, in existence on the effective date of the shoreland-wetland zoning ordinance or amendment.
- (b) Notwithstanding s. 62.23(7)(h), Stats., an ordinance or amendment adopted under s. 62.231, Stats., may not prohibit the repair, reconstruction, renovation, remodeling or expansion of a legal nonconforming structure in existence on the effective date of the shoreland-wetland zoning ordinance or amendment, or of any environmental control facility in existence on May 7, 1982 related to that structure. Section 62.23 (7) (h), Stats., shall apply to any environmental control facility that was not in existence on May 7, 1982, but which was in existence on the effective date of the shoreland-wetland zoning ordinance or amendment.
- (c) Every shoreland-wetland ordinance or amendment adopted under s. 62.231 or 61.351, Stats., and this chapter shall provide that:
  1. If a nonconforming use or the use of a nonconforming structure is discontinued for a period of 12 months, any future use of the property or structure shall conform to the requirements of the ordinance or amendment; and
  2. Any legal nonconforming use of property which does not involve the use of a structure and which exists at the time of the adoption or amendment of an ordinance adopted under s. 62.231 or 61.351, Stats., and this chapter may be continued although such use does not conform with the provisions of the ordinance. However, such nonconforming use may not be extended.
- (d) The maintenance and repair of nonconforming boathouses which extend beyond the ordinary high-water mark of any navigable waters shall be required to comply with s. 30.121, Stats.



## APPENDIX C: RELEVANT RESOURCES

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*Administering Township Zoning: A Basic Guide for Citizens and Local Officials.* 2nd Ed., 1996, 52 pp., Extension Bulletin E-1408

Mark A. Wyckoff

Source: Michigan State University Bulletin Office, (517) 355-0240

Cost: \$4.50

*Center for Land Use Education.*

Website contains fact sheets about planning and zoning issues.

<http://www.uwsp.edu/cnr/landcenter/pubs.html>

*Creating an Effective Shoreland Zoning Ordinance: A Summary of Wisconsin Shoreland Zoning Ordinances.* 2000

DNR Publication #WT-542-00

Source: Wisconsin Department of Natural Resources Dam Safety/Floodplain/Shoreland Section, (608) 266-8030 or at <http://www.dnr.state.wi.us/org/water/wm/dsfm/shore/creating.htm>

Cost: Free. Limited number of copies available.

*Guide to Community Planning in Wisconsin.* 1999, 275 pp.

Brian W. Ohm

Source: UW-Extension Publishing, (608) 262-2655 or at

<http://www.lic.wisc.edu/shapingdane/resources/planning/library/book/contents.htm>

Cost: \$20.00

*The Job of the Planning Commissioner.* 3rd Ed., 1987, 198 pp.

Albert Solnit

Source: APA Planners Press. May be ordered at libraries and bookstores or at

<http://www.planning.org/store/overview.htm>

Cost: \$27.95

*Plan Commission Handbook.* 2002

Source: Center for Land Use Education, (715) 346-3783

Cost: \$4.00

*The Small Town Planning Handbook*. 2nd Ed., 1995, 305 pp.

Thomas L. Daniels, John W. Keller and Mark B. Lapping

Source: APA Planners Press. May be ordered at libraries and bookstores or at

<http://www.planning.org/store/overview.htm>

Cost: \$43.95

*Local Government Center, University of Wisconsin Extension.*

Website contains fact sheets about planning and zoning issues.

<http://www.uwex.edu/lgc/program/pubs.htm>

*Wisconsin County Planning and Zoning Departments.*

Website contains the names, addresses, phone, fax, email and website information and on-line zoning ordinances (where available) for county planning and zoning departments.

<http://www.dnr.state.wi.us/org/water/wm/dsfm/shore/county.htm#d>

*Wisconsin Water Law: A Guide to Water Rights and Regulations*. 2nd Ed., 2001, 212 pp.,

University of Wisconsin-Extension publication G3622

Paul G. Kent & Tamara A. Dudiak

Source: Cooperative Extension Publications, (608) 262-3346

Cost: \$15.00

*Zoning Board Handbook For Zoning Boards of Adjustment/Appeals*. 2001, 50 pp.

Michael D. Dresen & Lynn Markham

Source: Center for Land Use Education, (715) 346-3783 or at <http://www.uwex.edu/ces/landcenter/pubs.html>

Cost: \$3.00

*Zoning Case Law in Wisconsin :Cases Relevant to Shoreland and Floodplain Zoning in Wisconsin, Published Decisions of the Wisconsin Supreme Court and Court of Appeals*. 2004

Source: Wisconsin Department of Natural Resources Bureau of Legal Services

This case law summary has been distributed to county, city and village zoning offices around the state by the Dam Safety, Floodplain and Shoreland Section and is also available at <http://dnr.wi.gov/org/water/wm/dsfm/shore/documents/zoning-case-law-2004.pdf>

If it is not available through these venues, contact DNR at (608) 266-8030.



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