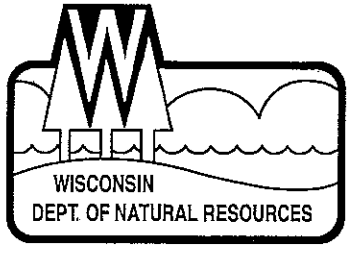


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State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

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April 10, 2006

Ms Sharon Christensen  
Deputy City Clerk, City of Madison  
210 Martin Luther King Jr. Blvd  
Madison, WI 53703-3342

RE: Administration of Floodplain, Shoreland and Shoreland-Wetland Zoning in Annexed Areas

Dear Ms. Christensen:

It has come to our attention that the City of Madison recently annexed lands with Ordinance No. 06-00018. The intent of this letter is to clarify the floodplain zoning, shoreland zoning and shoreland-wetland zoning responsibilities of the City, if the annexed lands include floodplain, shoreland or shoreland-wetland areas. If you have any questions after reading this letter, please do not hesitate to contact your region's DNR zoning specialists provided at the end of this letter.

General Zoning (Including Floodplain Zoning)

For lands which are subject to a county ordinance, s. 59.69(7), Wis. Stats., provides that whenever such an area petitions to become part of a city or village, the regulations imposed by the county ordinance shall continue in effect, without change, and shall be enforced by the city or village until the regulations have been changed by official action of the governing body of the city or village. These provisions would apply to lands that had been subject to a county floodplain zoning ordinance and were subsequently the subject of an annexation petition.

For a community to participate in the National Flood Insurance Program (NFIP), it must enforce its approved floodplain zoning ordinance in the entire community, including annexed areas. Failure to adopt, apply, or enforce NFIP requirements in any area under a community's jurisdiction will subject that community to FEMA enforcement and compliance actions, including probation and suspension from the NFIP. Property owners in communities on probation are subject to a \$50 surcharge on all new and renewed flood insurance policies in the community. If a community is suspended from the NFIP, flood insurance is no longer available anywhere in the community, nor is any form of federal financial assistance requiring the purchase of flood insurance, such as federally-connected loans, grants, federal flood disaster assistance, and similar funding. Please note that a community's participation in NFIP is voluntary.

Shoreland Zoning

Section 59.692(7)(a), Wis. Stats., provides that county shoreland zoning provisions that applied to an area prior to annexation are to continue in effect if the area was annexed after May 7, 1982. The annexing city or village has the following options:

1. the city or village that annexed the shoreland area may enforce the county shoreland zoning provisions that were in effect when the area was annexed,
2. after annexation, the city or village may request that the county continue to enforce the county shoreland ordinance in the annexed area, or



3. the city or village may adopt their own shoreland zoning ordinance for the annexed area provided that it complies with the shoreland zoning ordinance standards in NR 115, Wis. Admin Code, and is at least as restrictive as the county shoreland zoning ordinance.

The shoreland zone includes land within 1,000 feet of the ordinary high water mark of a navigable lake, pond or flowage, or within 300 feet of a navigable river or stream, or to the landward side of the floodplain, whichever distance is greater.

### Shoreland-Wetland Zoning

For shoreland-wetlands of 5 acres or larger that are annexed, s. 59.692 (7)(e), Wis. Stats., provides that the annexing city or village has to adopt shoreland-wetland zoning as required by either s. 61.351 or 62.231, Wis. Stats. That means that cities and villages only have to comply with the requirements in NR 117, Wis. Admin. Code, when they adopt shoreland-wetland zoning for wetlands of 5 acres or larger in an annexed shoreland area. Cities and villages do not have to adopt regulations that are as restrictive as the County's shoreland regulations for wetlands that are 5 acres or larger. If the annexing municipality has a shoreland-wetland zoning ordinance in place at the time of annexation, the ordinance and map need to be amended to include any shoreland-wetland areas located within the annexed area. An annexing municipality that previously did not have any shoreland-wetlands within its boundaries must adopt a shoreland-wetland zoning ordinance (in compliance with s. 61.351, Wis. Stats. or s. 62.231, Wis. Stats. and NR 117, Wis. Admin. Code.)

If the County has adopted any zoning restrictions applicable to shoreland-wetlands of less than 5 acres, the annexing city or village has to continue to enforce the County's regulations that apply to shoreland-wetlands of less than 5 acres unless the city or village adopts regulations of its own for shoreland-wetlands of less than 5 acres that are at least as restrictive as the County's shoreland-wetland regulations that were applicable to the annexed area at the time of annexation.

### DNR Zoning Specialists

Each region in the DNR has identified zoning specialists as the initial point of contact for floodplain, shoreland and shoreland-wetland questions. In your area, you can contact Pam Biersach at (608) 275-3282 with floodplain zoning questions or Dan Hunt at (920) 387-7878 with shoreland zoning and shoreland-wetland zoning questions

For your reference, a copy of Department guidance from April 3, 1996 is enclosed, which addresses "Shoreland Zoning Administration in Annexed and Newly Incorporated Areas". We look forward to the opportunity to work with the City on this issue.

Sincerely,



Dave O'Malley  
Shoreland Management Specialist  
Bureau of Watershed Management

cc: Pam Biersach – SCR  
Dan Hunt – Horicon  
Cami Peterson – SCR  
Mike Halsted – SCR  
Jeff Schure – SCR  
Sue Josheff – SCR  
Konny Margovsky – Dodgeville  
Pete Conrad – Dane County Zoning Administrator, City-County Building, Room 116, Madison, WI 53709

DATE: April 3, 1996

Shoreland Guidance Ref: 96-01

TO: District Directors

FROM: Margie Devereaux – WZ/6

Distribution: WRZ Program Staff  
County Zoning Administrators  
Municipal Clerks  
Legal Services  
Department of Justice – Environmental Unit

Insertion: Ch.4 Floodplain/Shoreland Mgt. Guidebook  
REPLACES 8/22/95 PROGAM GUIDANCE TITLED  
“SHORELAND ZONING ADMINISTRATION IN ANNEXED  
AREAS”

**SUBJECT: SHORELAND ZONING ADMINISTRATION  
IN ANNEXED AND NEWLY INCORPORATED AREAS**

**The purpose of this document is to provide guidance for understanding the provisions of s. 59.971(7), Stats. Regarding the applicability of *shoreland*\* zoning to annexed and newly incorporated shoreland areas and to provide recommendations for implementing those provisions. The statute only applies to shoreland annexed after May 7, 1982 or incorporated after April 30, 1994.**

Within s. 59.971(7), Wisconsin Statutes, paragraph (a) addresses annexed areas and Paragraph (ad) addresses newly incorporated areas. The requirements for annexed areas and newly incorporated areas are the same, with the exception of the effective date of the statutory requirements.

#### **Understanding the Statute.**

Section 59.971(7), Wis. Stats., says that those provisions of a county shoreland ordinance (e.g. structure setbacks from waterways, vegetation cutting restrictions, filling and grading provisions) in effect at the time of annexation/incorporation shall continue in effect and must be enforced by the annexing/incorporating city or village unless the city or village enacts, administers and enforces a zoning ordinance for the annexed/incorporated area that is *at least as restrictive* as the county shoreland zoning ordinance in effect at the time of annexation/incorporation. It is the city or village's responsibility to administer the provisions unless the municipality requests, and the county agrees, that the county will enforce the shoreland ordinance as it applies to the annexed/incorporated area.

In other words, the annexing/incorporating municipality essentially inherits the county's shoreland provisions for the annexed/incorporated area although after annexation/incorporation the city or village may request the county to amend the county shoreland zoning ordinance as it applies to the annexed/incorporated area to delete or modify certain provision. Only those provisions which

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\*land within 1,000 ft of the ordinary high water mark (OHWM) of a navigable lake, pond, or flowage or within 300 feet of the OHWM of a navigable stream or river or to the landward side of the floodplain, whichever distance is greater



establish specified land uses (include zoning districts) or requirements associated with those uses that are not necessary for the protection of navigable waters may be deleted or modified.

Wetlands within shorelands that are subject to zoning required by s. 61.351 or 62.231, Wis. Stats., are not subject to the statutory requirements discussed above (see s. 59.971(7)(e), Wis. Stats.). Requirements for shoreland-wetlands are discussed in some detail on p. 4.

**What does “at least as restrictive” mean?** The annexing/incorporating municipality has the option of either continuing to administer the provisions of a county shoreland ordinance or of enacting, administering and enforcing an ordinance which is **at least as restrictive** as the county shoreland zoning ordinance in effect at the time of the annexation. This means that the annexing/incorporating municipality must adopt provisions that are at least as restrictive as the county’s ordinance even if a county has adopted shoreland zoning provisions that are more restrictive than the minimum standards of NR 115, Wis. Adm. Code, (such as 100 ft. waterway setback instead of 75 ft.).

In the absence of a statutory definition of “as restrictive” we must rely on the dictionary definition of “restrictive” and on general zoning law. There are three general types of ordinance provision: dimensional standards, performance standards and use designations. Comparisons of dimensional standards and performance standards are straightforward (e.g. a 100 ft. setback is more restrictive than a 75’ setback; requiring zero increased discharge over undeveloped conditions is more restrictive than requiring zero increased discharge over current site conditions). An ordinance which allows fewer and less intensive uses is the more restrictive. Uses are generally ranked from least intensive to most intensive as follows: conservancy – residential – commercial – industrial.

Where a city or village chooses to adopt its own ordinance for annexed/incorporated areas, the adopted ordinance must contain a parallel provision that is at least as restrictive (by the tests above) as each provision of the county ordinance. Restrictions refer to the substantive provisions, e.g. 75 ft. setback or use designations (zoning districts). A city or village ordinance can be “as restrictive” as the county’s shoreland zoning ordinance even where the city or village does not utilize the same ordinance administration procedures as the county uses. However, the procedures must comply with the minimum requirements of the standards established in the NR 155, Wis. Adm. Code. For example, the annexing/incorporating municipality is required to provide notice to the Department in advance of public hearings, and of decisions made on proposed variances, special exceptions (conditional uses), appeals, and text and map amendments.

**Given the requirement of having to be “at least as restrictive” as the county’s shoreland ordinance, can the annexing/incorporating municipality change zoning districts within the shoreland after annexation/incorporation?** Land use designations adopted under the authority of s. 59.971, Stats. (Zoning of Shorelands on Navigable Waters) are assumed to be adopted to further the purposes of shoreland zoning. In order to be as restrictive as the county shoreland ordinance, the annexing/incorporating municipality is essentially locked into the shoreland use designations in place at the time of annexation/incorporation. The only way that the zoning district can be changed after annexation/incorporation is if the city or village is successful in its petition to the county requesting that the county shoreland zoning ordinance as it applies to the annexed/incorporated area be amended to change the land use district designation (see s. 59.971(7)(a)2. and (ag), Wis. Stats.) where the county determines that the district designation is not necessary to protect navigable waters. In cases where the use districts were adopted by the county under s. 59.971, Stats., and a use designation is not desirable or appropriate for the intended use of the parcel, it would be advantageous to apply to the

county to have the zoning changed prior to annexation/incorporation so that is not necessary to petition the county to amend the land use district after annexation/incorporation. Specified land uses (zoning districts) which were clearly adopted by the County under the general zoning provisions of s. 59.97, Stats. and not under s. 59.971, Stats. can be amended by the annexing/incorporating municipality after annexation/incorporation following a standard amendment process (without the county's involvement).

**How can a municipality be sure that what they've adopted is "as restrictive"?** Just as DNR is required to review shoreland, wetland and floodplain ordinances for compliance with state standards, the agency will review amended city or village ordinances for annexed/incorporated areas to assure that they are as restrictive as the county shoreland ordinance and that the amended ordinance complies with the shoreland zoning standards. ("Shoreland zoning standard" means a standard promulgated as rules by the Department (e.g. NR 115). See s. 59.971(1)(c)). If an amended ordinance for an annexed/incorporated area does not comply with the appropriate requirements and the municipality does not voluntarily alleviate the problem, DNR will initiate procedures to reinstate the county shoreland zoning provisions. (See s. 59.971(1)(c), Wis. Stats.) Statutes require that the DNR charge the municipality for the costs of reinstatement and that cities and villages administer the reinstated provisions (See s. 87.30(1)(c), Wis. Stats.)

**If the county did not have the area identified as shoreland on its zoning maps, is the annexing municipality still required to adhere to the annexed/incorporated shoreland provisions?**

Although the county may not have been aware of the navigability of the waterway, or did not have the shoreland zone mapped, this does not change the applicability of the county shoreland zoning provisions to the parcel. All counties have adopted shoreland zoning ordinances, but very few of them have adopted county zoning maps showing the boundaries of the shoreland area nor have they identified all of their navigable waterways. Many navigability determinations and associated shoreland zones are not identified until such time as a development is being proposed. If the site in fact meets the definition of shoreland (see definition on p. 1), the requirements of s. 59.971(7), Wis. Stats., apply.

**What provisions apply to the shoreland-wetlands in the annexed/incorporated area?** Due to the exemption in s. 59.971(7)(e), Wis. Stats., the county's regulations governing shoreland-wetlands do not apply to wetlands in the annexed or incorporated shoreland area that are subject to zoning required by s. 61.351 or 62.231, Wis. Stats. All shoreland-wetland areas within the municipal boundary of a city or village are subject to the provisions of NR 117, Wis. Adm. Code and s. 62.231 or 61.351, Stats. If a municipality has a shoreland-wetland ordinance in place at the time of annexation, the ordinance and map would have to be amended to include any additional shoreland-wetland(s) located within the annexed area. An annexing municipality that previously did not have any shoreland-wetlands and newly-incorporated areas containing shoreland-wetlands must adopt a shoreland-wetland zoning ordinance (pursuant to s. 61.351 Wis. Stats. or 62.231, Wis. Stats. and NR 117, Wis. Adm. Code).

**What about annexed floodplain areas?** When a city or village annexes/incorporates land, all of the county's zoning ordinance regulations continue in effect, without change, and must be enforced by the annexing/incorporating village or city until such time as the regulations are officially changed by the municipal governing body (See s. 59.97(7), Wis. Stats., and s. 66.012(7), Wis. Stats.) If there is a floodplain area present within the annexed/incorporated parcel, the annexing/incorporating municipality essentially inherits the county's floodplain zoning regulations until the municipality adopts and enforces its own ordinance which meets the requirements of Ch. NR 116, Wis. Adm. Code.

## Considerations for Adopting Shoreland Ordinance Provisions for Annexed/Incorporated Areas

1. It is important to remember that s. 59.971(7), Stats. requires that the shoreland zoning provisions in place at the time of annexation be enforced by the annexing municipality. Therefore, later annexations may be subject to county ordinance provisions different from those of earlier annexations. This must be accounted for when creating zoning districts. Thus, it is generally not an acceptable approach to create only one shoreland zoning district to cover all shoreland annexations because the applicable county provisions may change for subsequent annexations. In theory, new zoning districts would only have to be formed if the county shoreland ordinance has been amended to be more restrictive since the last annexation. However, it may be easier administratively to simply create a new district if there has been an amended county shoreland ordinance since your last annexation. This will prevent the need to evaluate the relative restrictiveness of the new provisions by incorporating the appropriate county shoreland requirements of their entirety. For a streamlined option, rather than repeating the entire text of the shoreland provisions, subsequent districts can reference all of the applicable regulations in the initial district(s) but must include any different regulations that were a result of a change to the county shoreland ordinance since the creation of the previous shoreland zoning districts.
2. Administrative provisions of your existing ordinances may be incorporated into a new shoreland ordinance by reference. **However, be sure that all the required notices to DNR are included in these sections.** The county shoreland ordinance should have provisions (required by NR 115.05(6)(h)) for written notice to DNR “at least 10 days prior to hearings on variances, special exceptions (conditional uses), appeals for map or text interpretations, and map or text amendments” and submittal to DNR of “copies of decisions on variances, special exceptions (conditional uses), appeals for map or text interpretations, and map or text amendments within 10 days after they are granted or denied.” These notice provisions must be included in ordinances adopted for annexed/ incorporated areas.
3. Land division review and sanitary regulations that are part of a county shoreland zoning ordinance must be incorporated into the city or village ordinance unless the county amends the ordinance as it applies to the annexed/incorporated area. If the city or village has more restrictive provisions, they also apply.
4. Any city or village zoning provisions adopted pursuant to s. 62.23 Wis. Stats., which are applicable to shoreland areas and which differ from but are more restrictive than the county shoreland zoning provisions are applicable to annexed areas to the extent of the greater restrictions. For example, if the county’s setback averaging provisions would allow a structure to be placed 52 ft. from the ordinary high water mark but the municipality has a 60 ft. minimum waterway setback requirement, the 60 ft. setback would apply.
5. Under s. 66.30, Wis. Stats., municipalities may enter into cooperative agreements for the provision of services. This would allow cities and villages to contract with the county or town governments for some administrative components of the shoreland zoning program, for example permit issuance and inspection. However, such a cooperative agreement may not include enforcement or quasi-judicial decisions (variances, appeals, conditional use permits). The city or village must provide for its own Board of Appeals to decide appeals and variance requests, and either a Board of Appeals or Zoning Agency to handle applications for special

exception (conditional use) permits unless the requirements in s. 59.97(7)(a)3 are satisfied, in which case the County Board of Adjustment could decide appeals and variance requests for the annexed/incorporated shoreland area and the County zoning agency, County Board or the County Board of Adjustment could handle applications for special exception (conditional use) permits.

Drafted by: Kate Fitzgerald  
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