

SEVEN YEARS AFTER ... What's the Latest?

An Update on Act 55 That Re-Wrote the Law on Shoreland Zoning

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The entire concept behind Wisconsin's shoreland zoning was "designed to use local governments' traditional zoning authority over land use but allow the state to ensure that minimum standards were in place to protect the waters of the state."¹

Following the passage of Act 55 in 2015, questions remain as to the exact scope of a county's authority to enforce zoning regulations within shoreland areas. This article will discuss a case involving Waupaca County, currently on appeal in District IV, that may shed light on the interplay between a county's zoning authority under Wis. Stat. 59.69 and Wis. Stat. 59.692, respectively.

► **Background**

Counties possess general planning and zoning authority pursuant to the authority granted in Wis. Stat. 59.69. There, a county may "direct the preparation of a county development plan or parts of the plan for the physical development of the unincorporated territory within the county and areas within incorporated jurisdictions whose governing bodies by resolution agree to having their areas included in the county's development plan."² The list of purposes is long and includes, among other purposes, "to promote the public health, safety, convenience and general welfare; to encourage planned and orderly land use development; to protect property values and the property tax base; [and] to permit the careful planning and efficient maintenance of highway systems."³ However, shoreland areas are unique and treated a bit differently. In 1966, the Wisconsin Legislature required that counties

zone shorelands in accordance with minimum standards established by the Wisconsin Department of Natural Resources.⁴ A shoreland zone is defined as the area within 1,000 feet from the ordinary high-water mark of a lake, pond or flowage or 300 feet from the ordinary high-water mark of a river or stream (or to the landward side of a floodplain, whichever distance is greater).⁵

Section 59.692 specifically addresses a county's authority to zone shorelands on navigable water. Significant changes were made to county shoreland zoning authority in Act 55, the 2015-17 biennial budget. The changes prevent counties from developing or enforcing shoreland ordinances that are more restrictive than the shoreland zoning standards contained in Chapter NR 115 of the state's administrative code — in other words, the regulatory framework flipped from "not less restrictive" to "not more restrictive." Specifically, an ordinance enacted under Wis. Stat. 59.592 "may not regulate a matter more restrictively than the matter is regulated by a shoreland zoning standard."⁶ Shoreland zoning standard is defined as "a standard for ordinances enacted under [the] section that is promulgated as rule by the department."⁷ That rule is NR 115.

Outside of the changes brought about by Act 55, since 1966, the section has made clear "[a]n ordinance enacted under [the] section supersedes all provisions of an ordinance enacted under s. 59.69 that relate to shorelands."⁸ However, at the same time, Act 55 clarified that Wis. Stat. 59.692(1d)(a) "did not prohibit a county from enacting a shoreland zoning ordinance that regulates a matter that is not regulated by a shoreland zoning standard."⁹

► Litigation

Recent litigation addresses the unique interplay between Wis. Stat. 59.69 and 59.692. In *Waupaca County v. Deann R. Golla and Dawn M Zeinert*, the court of appeals has been asked whether the county can enforce general zoning standards authorized under Wis. Stat. 59.69 (i.e., applicable to ALL properties in the county otherwise subject to county zoning) on shoreland property that is also subject to the shoreland standards enacted by the county under Wis. Stat. 59.692. The appellants own property within 1,000 feet of Dake Lake in Waupaca County. The county sought to enforce a side yard setback ordinance under the county's general zoning ordinance which the county argues applies to all residential properties in the county pursuant to the county's authority under Wis. Stat. 59.69. The county never alleged any violation of the county's shoreland protection ordinance.

After the trial court granted summary judgment in favor of the county, the appellants appealed and argued the county's enforcement of a side yard setback ordinance creates an "absurd result" because the property is located within the shoreland setback area. The county has responded that appellants misunderstand and misconstrue the relationship between Wis. Stat. 59.69 and 59.692. First, the county emphasized that because a general side yard setback ordinance enacted under Wis. Stat. 59.69 is clearly not enacted under Wis. Stat. 59.692, a plain reading of Wis. Stat. 59.692 does not support a conclusion that the Legislature intended to revoke a county's authority to exercise its valid general zoning authority to establish side yard setbacks under Wis. Stat. 59.69 through its adoption of a shoreland zoning ordinance under Wis. Stat. 59.692.¹⁰ The county also highlighted the fact that Wis. Stat. 59.692(5) has been part of the shoreland zoning statute

since it was enacted in 1966 and since that time, no court has interpreted it to prevent provisions of general zoning or other overlay zoning provisions from applying just because the lands to which the general or overlay ordinance provisions also happen to be within a shoreland area.

With respect to the restrictions enacted by Wis. Stat. 59.692(1k), the county has argued that the restrictions are inapplicable to the county's side yard setback in the general zoning ordinance. On its face, Wis. Stat. 59.692(1k)(a) does not prevent counties from exercising their authority under Wis. Stat. 59.69 to enact general zoning ordinances designed to protect persons and property through the enforcement of regulations such as side yard setbacks.¹¹ Indeed, in ruling in the county's favor, the trial court found that "[j]ust because a property falls within the shoreland zoning area, that doesn't negate the enforceability of other general zoning ordinances that are not inconsistent."¹²

► What does this mean for counties?

A decision from the court of appeals affirming the trial court would affirm what has been the standard since 1966 — Wis. Stat. 59.692 and the changes brought about by Act 55 did not create a "super" class of properties to which zoning simply does not apply. Instead, such a decision would simply confirm that a county may not regulate shoreland properties by enforcing a shoreland standard greater than that allowed in NR 115 and Wis. Stat. 59.692. Put differently, an affirmation would make clear that counties retain the authority to implement county zoning ordinances enacted under other statutes such as Wis. Stat. 59.69 (general zoning), Wis. Stat. 91.30 (farmland preservation zoning), Wis. Stat. 87.30 (floodplain zoning), and Wis. Stat. 30.27 (St. Croix Riverway zoning).

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regulating the safe and responsible use of Wisconsin's navigable waters by enforcing shoreland zoning regulations. While the court of appeals decision in the Waupaca County case will not change a county's role, it would be highly beneficial for a court to recognize a county's role in both general and shoreland zoning to avoid further disputes surrounding an issue most, if not all, counties believe to be clear.

Counties should continue to work with corporation

counsel to ensure shoreland zoning ordinances comply with applicable state statute and administrative code. If you have questions surrounding this complex framework of statutes, regulations and case law, please do not hesitate to contact the association or the authors at aphillips@attolles.com or jcurtis@attolles.com. ■

Attolles Law, s.c. works on behalf of Wisconsin counties, school districts and other public entities across the state of Wisconsin. Its president and CEO, Andy Phillips, has served as outside general counsel to the Wisconsin Counties Association for nearly 20 years.

1. Paul G. Kent, *On the Waterfront: New Shoreland Zoning Laws*. Wis. Law. Jan. 2017.
2. Wis. Stat. § 59.69(3).
3. Wis. Stat. § 59.69(1).
4. Paul G. Kent, *On the Waterfront: New Shoreland Zoning Laws*. Wis. Law. Jan. 2017.
5. Wis. Stat. § 59.692(1)(b).
6. Wis. Stat. § 59.692(1d)(a).
7. Wis. Stat. § 59.692(1)(c).
8. Wis. Stat. § 59.692(5).
9. Wis. Stat. § 59.692(1d)(b).
10. Brief of Respondent, Case 2021AP001076, Nov. 10, 2021 at pg. 13.
11. *Id.*, pg. 15.
12. *Id.*, pg. 17.

