☞ **03hr_JCR-AR_Misc_pt27**

☞ Details: Emergency Rules by Department of Natural Resources

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2003-04
(session year)

Joint
(Assembly, Senate or Joint)

Committee for Review of Administrative Rules...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (August 2012)

CORRESPONDENCE/MEMORANDUM

State of Wisconsin

DATE: April 29, 2003

TO: Members, JCRAR

FROM: Al Shea, Director, Bureau of Watershed Management

SUBJECT: Background Information Related to Non-Conforming Structures and Implementation of the American's With Disabilities Act

This is to provide the members of JCRAR with information regarding the Department's activities related to revisions of NR 115 and NR 116 that have occurred since the January 23 hearing related to floodproofing. Richard Wedepohl, Chief of the Dam Safety/Floodplain/Shoreland Section will be at the April 30, 2003 hearing to answer any questions members may have.

Attached are the following:

The Rules Agenda/Board Action Checklist
This document identifies that the Department is scheduled to request approval from the Natural Resources Board at its May or June meeting to hold public hearings regarding changes to NR 116 that would clearly identify that municipalities could exempt floodproofing costs from the 50% rule regarding expansions to non-conforming structures located in mapped floodways.

Letter to Crawford County Describing Ordinance Changes that Would Allow Elevation of Structures In the Floodway Under the Existing Rule
A letter describes how a municipality could change its floodplain ordinance to exempt costs associated with floodproofing from the 50% rule if certain conditions are met.

Materials Describing the Process Being Used to Revise NR115
This package of materials includes the front page of the web site describing the NR115 revision process, the list of Advisory Committee Members, and a March 18th News Release that describes discussion related to changes associated with the regulation of non-conforming structures as applied in NR115, NR116, and NR118.

Letter to Senator Russ Feingold Responding to a Constituent's Letter (Mr. Mike McQuin) on the Issue of Adding a Deck to a Non-Conforming House Located in the Floodway of the Mississippi River
Department response to an inquiry by Senator Russ Feingold requesting how the department understands concerns raised by a constituent, Mr. McQuin, who requested the Senator's assistance in being allowed to construct a deck on his home in Trempealeau County.

Guidance On Implementing Requirements of the Americans With Disabilities Act
Description of procedures municipalities can use to meet requirements of the Americans With Disabilities Act and the Wisconsin Fair Housing Act.

Cc: Paul Heinen
Elizabeth Kluesner
Todd Ambs

CORRESPONDENCE/MEMORANDUM

State of Wisconsin

DATE: March 24, 2003

FILE REF: NR 116

TO: Trygve A. Solberg, Chair, Natural Resources Board
Stephen D. Willett, Vice Chair, Air, Waste and Water Management Committee

FROM: Scott Hassett

SUBJECT: Rule Agenda/Board Action Checklist - Revisions to Chapter NR 116, Wis. Admin. Code, pertaining to costs of floodproofing nonconforming structures

The Bureau of Watershed Management has submitted a Rule Agenda/Board Action Checklist seeking approval to proceed with revisions to Chapter NR 116, Wis. Admin. Code, pertaining to costs of floodproofing nonconforming structures. This request is in response to a motion passed in February by the Joint Committee for Review of Administrative Rules (JCRAR), requesting that the Department amend NR 116 to provide that ordinary maintenance and repairs, in a floodplain, to a nonconforming building or a building with a nonconforming use includes floodproofing. In response to the motion, the Department has agreed to begin the rule revision process.

Current Department policy does not include costs associated with floodproofing a nonconforming floodplain structure as "ordinary maintenance and repair." These costs have always been considered to be structural modifications and as such, have been limited to 50% of the assessed value of the structure, which is consistent with how other structural modifications, repairs and additions have been treated.

In response to the JCRAR motion, the Department will hold public hearings to solicit input on whether floodproofing costs should be excluded from the definition of structural repairs and modifications and not be counted against the 50% limit which is imposed on nonconforming structures.

CORRESPONDENCE/MEMORANDUM

State of Wisconsin

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TO: Trygve A. Solberg, Chair, Natural Resources Board
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In response to the JCRAR motion, the Department will hold public hearings to solicit input on whether floodproofing costs should be excluded from the definition of structural repairs and modifications and not be counted against the 50% limit which is imposed on nonconforming structures.

State of Wisconsin
Department of Natural Resources
P.O. Box 7921, Madison WI 53707-7921

Rule Agenda/Board Action Checklist

Form 1000-006 (R 9/00)

Natural Resources Board Order Number (If Applicable)	Bureau
	Watershed Management
☑ Original ☐ Amended	Date 03/18/2003

1. Subject of the administrative code action/nature of board action.

Proposed revisions to Chapter NR 116, Wis. Admin. Code - Wisconsin's Floodplain Management Program

2. Description of policy issues to be resolved, include groups likely to be impacted or interested in the issue.

Pursuant to a motion approved by the Joint Committee for Review of Administrative Rules (JCRAR), the Department is proposing to modify NR 116 to identify that costs associated with floodproofing a nonconforming structure in the floodplain are not considered structural modifications and would not count against the 50% value limitation for legal nonconforming floodplain structures. The Department would also propose criteria for structures to be floodproofed under these provisions.

Persons impacted by these rules would include floodplain property owners, local zoning and building code officials, building contractors, insurance and real estate agents, river protection organizations, floodplain management organizations and other environmental organizations.

3. Does rule/board action represent a change from past policy? ☑ Yes ☐ No Explain the facts that necessitate the proposed change.

Property owners in floodplain zones along the Mississippi River are concerned that nonconforming use regulations, particularly the 50% rule, hinder their efforts to floodproof their structures. After the 2001 flood event on the Mississippi, a number of property owners applied for permits to floodproof their structures and some were turned down since the costs of floodproofing exceeded the 50% of assessed value they were allowed to spend to modify a nonconforming structure.

In response to these concerns, the JCRAR adopted a motion asking DNR to adopt rule changes excluding the costs of floodproofing a nonconforming structure from the 50% value limitation on modifications to nonconforming structures.

4. Does rule/board action represent an opportunity for pollution prevention and/or waste minimization?

- ☐ Yes
- ☐ Unsure. Will consult with the Bureau's pollution prevention expert(s) and/or the Bureau of Cooperative Environmental Assistance.
- ☐ No. Adoption of federal requirements that do not include or allow for pollution prevention.
- ☑ No. Other reason (explain):

This rule change does not involve an environmental standard which might accomodate pollution prevention or waste minimization opportunities.

5. Who will participate in board action/rule development, and what is the anticipated time commitment?

	Name of Person Responsible	Time Before Hearing	Time After Hearing	Acknowledgement
a. Drafting bureau	Gary Heinrichs	20 hours	40 hours	
b. Legal Services	Thomas Steidl	10 hours	10 hours	
c. Env. Analysis/Liaison (SS)				
d. Management & Budget				
e. Other Department staff				
f. Recommended Public Participation	Municipal zoning officials			

6. Which federal statute, regulation, state statute or judicial decision is the authority for the proposed rule/board action?
87.30

a. ☐ The proposed rule/board action conforms to and does not exceed requirements of a federal or state statute or controlling judicial decision.

b. ☐ The proposed rule/board action exceeds the minimum requirements of a federal or state statute or controlling judicial decision.

c. ☑ The proposed rule/board action is based on general authorization that requires rule making, but contains no specific standards.

d. ☐ The proposed rule/board action is based on a general authorization, with no specific direction that rules must be developed.

Bureau of Legal Services

7. Proposed schedule (Fill in blanks applicable)

a. Month of green sheet for requesting authorization for hearing or briefing on proposed board action: June

b. Hearing(s) - Number: 1

Date(s): August

Location(s): Madison

c. Rule adoption or action by Board: October

Anticipated timing of Legislative review - Start: November

End: December

Anticipated effective date: March 1, 2004

Initials of Bureau Director:

FOR DIVISION ADMINISTRATOR'S USE

8a. Recommendation to Secretary ☐ Approved ☐ Approved as amended ☐ Disapproved

b. Other Board actions ☐ Approved ☐ Approved as amended ☐ Disapproved

Division Administrator's Signature | Date Signed

FOR SECRETARY'S USE

9. Secretary's approval required before drafting begins.

Drafting ☐ may ☐ may not proceed on rule or action.

Secretary's Approval | Date Approved 3/25/03

Completed original to be filed with the Bureau of Legal Services.

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Scott Hassett, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY 608-267-6897

February 25, 2003

Mr. John Rybarczyk
Zoning Director
111 West Dunn Street
Prairie du Chien, WI 53821

Subject: Crawford County Floodplain Ordinance

Dear Mr. Rybarczyk:

This letter is in response to a request from Representative DuWayne Johnsrud about proposed changes to Crawford County's zoning ordinances. The question is associated with a motion from the Joint Committee for Review of Administrative Rules (JCRAR) directing the Department to re-evaluate its policy on counting floodproofing costs for nonconforming structures against the 50% cost figure. The Department will be initiating rule-making on that issue shortly. Specifically, we've been asked by Representative Johnsrud if the department would approve a change to Crawford County's Floodplain Ordinance if it excluded certain costs associated with the floodproofing of non-conforming structures.

We presume that Crawford County would consider amending their non-conforming uses general standards section consistent with JCRAR's direction to the Department. Specifically, the ordinance would identify that floodproofing costs associated with elevating the structure to a minimum of the flood protection elevation would be excluded from the 50% cumulative limit presently in effect for any structural repairs or modifications to the existing non-conforming structures.

Such an approach would be consistent with JCRAR's rule-making directive and would also meet FEMA requirements if the following restrictions are included in the ordinance (as required under existing state and federal regulations):

1) No expansion of the habitable living area associated with the existing structure would be allowed.
2) Elevation of the structure must be on piers or pilings so as not to impede the flow of water and be designed and certified to be structurally stable during the 100-year flood event by an engineer licensed in the State of Wisconsin.
3) Any area below the habitable structure could not be enclosed.
4) Associated with any permit to allow elevation would be requirements that all utilities (wells, private wastewater systems, gas and electrical services, etc.) be brought into compliance so as to meet floodproofing standards.
5) All hazardous storage containers such as fuel tanks associated with the structure would have to be anchored to meet floodproofing standards.
6) The structure must be elevated to or above the flood protection elevation to meet DNR and FEMA standards.

In addition, the county would need to develop an adequate emergency action plan that would describe how rescue and relief services would be provided to structures in the floodplain where dryland access is not available.

Under the proposed rule-making directive of JCRAR, the department would approve an ordinance amendment that meets these requirements. Please feel free to contact me or Gary Heinrichs (608/266-3093) if you have any specific questions regarding this issue. Also know we would be happy to meet with you and your corporation counsel to review a draft ordinance to ensure it met or exceeded both FEMA and DNR minimum standards and that it had adequate provisions to allow it to be effectively administered.

Sincerely,

Al Shea, Director
Bureau of Watershed Management

Cc: Representative DuWayne Johnsrud
Dan Baumann, WCR
Gary Heinrichs, WT/2
Robert Dillman, Crawford County Chair

Wisconsin
Department of Natural Resources

Return to Shoreland Management Program

What's New in Shoreland Management

Reviewing Wisconsin's Minimum Shoreland Development Standards

To facilitate the revision of county shoreland zoning ordinances, introduce a level of flexibility for property owners and to address the current weaknesses in the statewide minimum standards, the Department of Natural Resources would like to begin collecting information on how to improve Wisconsin's Shoreland Management Program. The goal is to reflect the needs of our citizens while continuing the dedication to the protection of our natural resources. As information becomes available, it will be added to this webpage.

Links will open in a new browser window.

Provide Comments!

We would like feedback on the options presented to the advisory committee. Your comments can be emailed to Toni Herkert at Toni.Herkert@dnr.state.wi.us or mailed to her at Wisconsin DNR, WT/2, Box 7921, Madison, WI 53707-7921.

- Comment Sheet - Shoreland Setbacks and Buffers

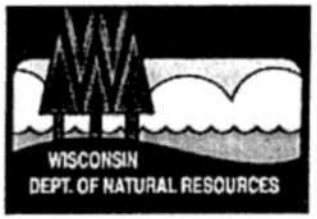
Advisory Committee Information

- March 2003 Meeting - Nonconforming Issues
- January 2003 Meeting - Shoreland Setbacks and Buffers
- December 2002 Meeting - Introduction to Four Main Issues
- November 2002 Meeting - Introduction to Shoreland Management Program
- General Information - Background Information on the Advisory Committee

- **View Archive of Shoreland News**

Please contact our office at 608-266-8030 with questions related to shoreland management, watch our webpage for program updates, and feel free to contact Toni Herkert, Shoreland Management Team Leader, with your suggestions or comments on how the program can be improved.
Return to Shoreland Program's main webpage.

Last Revised: Tuesday March 18 2003



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http://www.dnr.state.wi.us/
Legal notices and disclaimers

Revising Wisconsin's Shoreland Development Standards

Advisory Committee Membership

December 1, 2002

Local Government	
Wisconsin County Code Administrators	Pam Labine, Forest County; Karl Kastrosky, Bayfield County; and Phillip Gaudet, Washington County
Elected Co. Planning & Zoning member (north and south)	Neal A. Nielsen III, Vilas County and Nancy Russell, Walworth County
Wisconsin Towns Association	Richard Stadelman
Wisconsin Counties Association	Mark O'Connell
Public Resource Interests	
Wisconsin Association of Lakes	Elmer Goetsch
River Alliance of Wisconsin	Todd Ambs
Conservation Congress	Paul Mongin
Trout Unlimited	William Pielsticker
ECCOLA	Jim Wise
Riparian Owners	
Riparian Property Owners (north and south)	Earl Cook, Springbrook and Jill Geisthardt, Wauwatosa
Academic Resources	
University Representative (water quality)	Paul McGinley
University Representative (habitat)	Scott Craven
University Representative (land use)	Mike Dresen
WI Chapter of American Planning Association	Roland O. Tonn
Private Business	
Wisconsin Builders Association	Jerry Deschane
Wisconsin Realtors Association	Tom Larson
Landscape Consultant	Paul Kent
Restoration Contractor	John Larson, AES
Agricultural Representative	Paul Zimmerman
Forestry Representative	Miles Benson
NRB Appointee	Glenn Schiffmann

NEWS RELEASE

Wisconsin Department of Natural Resources
101 S Webster, P.O. Box 7921, Madison, WI 53707
Phone: (608) 266-6790 TDD: (608) 267-6897
www.dnr.state.wi.us www.wisconsin.gov

DATE: **Released in the March 18, 2003 DNR News**

CONTACT: **Al Shea (608) 267- 2759; Toni Herkert (608) 266-0161**

SUBJECT: **Shoreland rule revision committee to address nonconforming structures**

MADISON, Wis. – An advisory committee helping update state rules to protect shorelands is set to tackle what officials say is one of the most controversial and problematic parts of the rules: limits on renovating or enlarging what are known as "nonconforming structures." Nonconforming structures include homes and buildings that were built before current rules and are located closer to the water than the rules allow.

"The number one problem we hear about Wisconsin's shoreland protection rules is that property owners are confused and concerned about whether they're going to be able to make reasonable use of homes that don't conform to the rules," says Al Shea, who chairs the advisory committee and directs the Department of Natural Resources watershed management bureau. "The second biggest problem is that the provisions for these nonconforming structures are difficult for county zoning administrators to enforce."

The advisory committee will try to address those problems when it meets March 24 and 25 in Madison at the Lussier Family Heritage Center. It's the second of three committee meetings to focus on specific parts of the state shoreland zoning rules, Chapter Natural Resources 115 of the Wisconsin Administrative Code.

All materials for the meeting are available on the DNR Web site: http://www.dnr.state.wi.us. From the home page, click on the "go to some topic" drop down menu and select "shoreland management" and look on the righthand side for the latest news on the revision. People also can send in their comments to be circulated among DNR staff and advisory committee members, and can attend statewide listening sessions planned for later this year to comment on the committee's preferred options for rule changes to all aspects of NR 115.

(more)

At the March meeting, advisory committee members will discuss and consider options and recommendations to existing NR 115 requirements that limit expansion, improvement or structural repair of older waterfront cottages and homes located closer to the water than the rules allow. The state rules require structures to be set back 75 feet from the water; some counties require greater setbacks.

The goals of the meeting, Shea says, are to find ways to make these requirements for "nonconforming structures" easier for people to understand and for counties to administer. Most importantly, the committee will consider ways to allow people who own some nonconforming structures not immediately next to the water to moderately enlarge these homes if the owners take steps to offset, or "mitigate" their project's potential harm to the environment. Such steps might include planting and maintaining a buffer of native plants and trees between the home and the water's edge.

Now, both NR 115 and most Wisconsin counties allow people to maintain and repair their nonconforming structures, including internal and external painting, decorating, paneling, and replacing doors, windows and other nonstructural components, according to Linda Meyer, the DNR lawyer working with the advisory committee. But people are limited in the amount of structural repairs, expansions and improvements they can do at that same location. Someone who wants to build a bigger building on their property and the costs exceed 50 percent of the current equalized assessed value of the structure must set it back far enough from the water to meet the requirement in the current county ordinance.

The concept of nonconforming structures traces to the advent of zoning in the United States in the 1920s and is common in residential and other kinds of zoning, not just shoreland zoning, Meyer says. The idea is to allow a person reasonable use of a house or other structure that doesn't meet zoning ordinances passed since the home's construction, but to eventually require the structure to meet current ordinance requirements, she says.

The assumption is that near the end of the home's useful life, the owner would replace it with a building that meets current ordinances instead of continuing to try to maintain a deteriorating structure. All properties eventually need to comply so the municipality can meet constitutional requirements for treating property owners in the same zoning area fairly and to achieve its zoning goal – which in the case of shoreland zoning, is to protect water quality, habitat and scenic beauty, Meyer says.

The Legislature's 1966 Water Resources Act charged DNR with developing NR 115, the minimum shoreland standards that set minimum lot sizes, how far structures are set back from the water, and limits on removing trees and other plants. The law required counties to adopt ordinances requiring these statewide minimum standards or more protective standards, and mandated the counties to address nonconforming issues, according to Gary Heinrichs, the DNR shoreland management team member who will talk to the advisory committee about nonconforming structures.

(more)

People were to be allowed to continue to use homes built before counties adopted their shoreland zoning ordinances, the law said, but their homes eventually had to comply with the ordinances, including requirements that structures be set back at least 75 feet from the water to meet the state minimum standard or more if the county's ordinance was more protective.

Most counties adopted an approach known as the "50 percent rule." That approach typically allowed people to do regular maintenance but limited additions, modifications, and structural repairs to 50 percent of the current equalized assessed value of the structure at the time the project is proposed, Heinrichs says.

The 50 percent is a cumulative figure that applies to all additions, modifications and structural repairs; property owners can reach the limit by doing one large project or by doing a number of smaller projects which add up to 50 percent of the equalized assessed value. For example, an owner making a $30,000 improvement to a house assessed at $100,000 would have "used up" 30 percent toward that 50 percent cumulative limit. If, as time passes, the assessed value doubles to $200,000 and the homeowner wants to make an additional $50,000 improvement, that particular improvement constitutes 25 percent of the current assessed value, but it would be added to the earlier 30 percent improvement, exceeding the allowed 50 percent limit.

While every Wisconsin county probably used this 50 percent rule approach at one time, it has proved unpopular and confusing. For instance, a 1996 University of Wisconsin-Superior survey found that only 7 percent of property owners, and 32 percent of real estate agents and consultants polled in Oneida County, could correctly answer questions about rules governing nonconforming structures.

Counties using the 50 percent rule in the past sought to allow exemptions to the limits on structural repairs, additions and expansions by granting variances, Meyer says. But a 1997 Wisconsin State Supreme Court ruling has limited counties' uses of variances at the same time more property owners are wanting to expand or tear down and replace their existing structures on the same site.

As a result of these problems, some counties have eliminated the 50 percent rule entirely, made some changes to it, or are struggling with applying it in a fair manner, Shea says.

Shea says the committee will consider options that allow more flexibility for structural repairs and expansions for people whose existing homes are closer to the water than controlling setback distance, whether it's 75 feet or greater, but aren't right next to the water in the most critical habitat, known as the primary buffer zone.

"The primary buffer zone is where we need to be particularly careful of where development is allowed," Shea says. "But for structures outside that zone, we are seeking to give property owners more flexibility in the amount of alteration or expansion they're allowed for nonconforming structures if we can get greater environmental protection elsewhere on the same property."

(more)

Committee expands to address floodproofing in floodplains

MADISON – The advisory committee helping revise Wisconsin's shoreland protection rules will expand its charge for the March 24-25 meeting in Madison and welcome new members.

The committee's planned discussion about current limits on how people can enlarge or replace older homes close to the waterfront also will extend to limits on "floodproofing" existing homes in floodprone areas and other concerns about "nonconforming structures." Nonconforming structures are those that do not meet current ordinances for floodprone areas: either they are located in the "floodway," where water flows during floods, or they are not properly elevated in the "floodfringe," areas with standing water during flooding.

The advisory committee also will expand; four representatives are being added specifically for the March 24-25 meeting to help tackle the floodproofing issue. Four new members will join the committee permanently to broaden representation from waterfront property owners as the group continues efforts to help update 36-year-old rules that govern lot sizes, how far buildings are set back from the water, and other limits on development along Wisconsin lakes and rivers.

Al Shea, who chairs the advisory committee and directs the Department of Natural Resources' watershed management bureau, said the advisory committee was expanding its agenda to include consideration of the floodproofing issue to meet a legislative mandate in a timely, efficient manner.

The Joint Committee for the Review of Administrative Rules has directed DNR to review and change the floodproofing limitations in floodplains, a provision in Natural Resources Chapter 116 of the Wisconsin Administrative Code.

The advisory committee updating the shoreland rules, Chapter NR 115, seemed a logical choice to address the legislative committee's charge because DNR would involve many of the same interest groups in the discussions.

"The issue of nonconforming structures crosses the two rules and many of the zoning administrators that are keeping track of our NR 115 process also administer NR 116," Shea says. "So we thought it would be best to talk about those two issues at one time, in one place."

As with NR 115, counties are required to adopt the state minimum standards laid out in NR 116 or can adopt more protective standards. NR 116 rules are intended to protect human life, human health, and property and they do so by prohibiting homes and other "habitable" structures in the part of the floodplain likely to be covered by flowing water during a flood, and limiting the expansion and alteration of structures in the "floodfringe," which will tend to have standing water during flooding.

People joining the committee for the discussion concerning floodproofing are Dan Olson, a representative of the League of Wisconsin Municipalities; a representative from the Association of

Floodplain Managers; Tamara Dudiak of the University of Wisconsin-Extension Lakes program, and Mark Cupp, a representative of the Lower Wisconsin Riverway Board.

The new permanent members joining the committee starting with the March 24-25 meeting are waterfront property owners Robert Kendall of Three Lakes, Marc A. Schultz of Onalaska and Jim Liebert of Heartland. A fourth new waterfront member, from Stevens Point, also has been invited but has not yet accepted.

-30-

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Scott Hassett, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY 608-267-6897

March 31, 2003

The Honorable Russell D. Feingold
U.S. Senate
506 Hart Senate Office Bldg
Washington, DC 20510

Subject: Mr. Mike McQuin

Dear Senator Feingold:

This is in response to your letter of February 26, 2003, where you inquired as to the status of proposed administrative rule changes cited by your constituent Mr. Mike McQuinn.

We understand that Mr. McQuinn owns a structure in Trempealeau County in the floodway of the Mississippi River. Under NR116, DNR's floodplain management rule, new structures may not be built in the floodway and limits are placed on expansion of existing structures. The DNR rule, along with certain FEMA standards, form the basis for the ordinance adopted by Trempealeau County.

Recently, the Wisconsin Legislature's Joint Committee for Review of Administrative Rules directed the Department of Natural Resources to revise NR116 so as to identify that costs associated with the floodproofing of existing structures would not count against the limits placed on expansion of existing, non-conforming structures located in the floodway. As a result of this action the DNR has begun the process to amend NR 116 to do this. We hope to receive authorization from the Natural Resources Board to hold public hearings on this proposed change in May or June. It is possible that changes to the rule could become effective this fall if both the NRB and the legislature approve them.

However, it is not clear to us if the proposed changes would apply to Mr. McQuin's proposal to construct a deck and a second set of stairs to access to his cottage. While the proposed changes to the rule would clearly allow existing structures to be raised to an elevation above the Regional Flood Protection Elevation, they would not allow expansions of existing structures. Additionally, if the county chose to amend their ordinance (this change would be discretionary, not mandatory) they would also be required to develop and adopt an emergency action plan.

Finally, it would appear to us that Trempealeau County, by proposing to allow Mr. McQuin to construct a landing and ramp, appears to be meeting the reasonable accommodations requirement under the Americans With Disabilities Act. (See attached program guidance memo for detail). Certainly the requirements of this act supersede both county ordinance and state administrative rule.

I trust this will help you respond to your constituent.

Sincerely,

Paul Heinen
Government Liaison

CORRESPONDENCE/MEMORANDUM

State of Wisconsin

DATE: July 26, 2002 FILE REF: Zoning

TO: Toni Herkert – WT/2
Carmen Wagner – WT/2

FROM: Linda Meyer - Bureau of Legal Services

SUBJECT: Guidance on the Applicability of the Americans with Disabilities Act (ADA), the Federal Fair Housing Amendments Act of 1988 (FHAA) and the Wisconsin Fair Housing Act (WFHA) in the Administration of Local Zoning Ordinances

I. Introduction

This memo is intended to provide program guidance to Department staff and local zoning officials regarding situations where applicants for zoning permits, special exception permits or variances argue that the Americans with Disabilities Act, the Federal Fair Housing Act or the Wisconsin Fair Housing Act require that they be allowed to deviate from otherwise-applicable zoning standards. Applicants may argue that they are themselves disabled, that they rent housing to a disabled person, or that they operate a place of public accommodation that must comply with these laws.

The legal interpretations contained in this guidance apply to the administration of all city, village, town and county zoning ordinances - not just shoreland, shoreland-wetland or floodplain zoning ordinances.

II. Fair Housing Acts Apply to Zoning Decisions

The Federal Fair Housing Act prohibits discrimination against handicapped persons where housing is concerned and requires local governments to make reasonable accommodations in applying their zoning regulations, in order to afford handicapped persons the same opportunity to use and enjoy housing that a non-handicapped person would have.

Likewise, the Wisconsin Fair Housing Act prohibits various kinds of discrimination against persons with disabilities, in order to provide equal opportunity for housing to the disabled.

Both acts apply regardless of whether the applicant for the permit or variance is handicapped themselves or is a person or company that is attempting to provide housing for handicapped persons. (In fact, most of the reported cases on the Federal Fair Housing Act involve group homes for the handicapped owned by Oxford House, Inc. or some other commercial group home operator.)

The legislative history of the two laws, and the case law interpreting the Federal act, clearly indicate that the Federal FHAA and the WFHA require that "reasonable accommodations" be made by zoning administrators and zoning boards and committees to provide handicapped persons with equal housing opportunities.

However, it is equally clear that the federal courts have interpreted the Federal FHAA to require only "reasonable" accommodation in zoning cases that will not "undermine the basic purpose that the zoning ordinance seeks to achieve."

> "An accommodation is reasonable under the FHA if it does not cause any undue hardship or fiscal or administrative burdens on the municipality, or does not undermine the basic purpose that the zoning ordinance seeks to achieve." Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1186 (E.D.N.Y., 1993)

When a disabled person, or a person who proposes to provide housing for disabled people, applies for a zoning or building permit, special exception or conditional use permit or variance to allow the construction of something that would not otherwise be allowed to be constructed as proposed under the local zoning ordinance, local zoning officials must decide whether the proposed accommodation is "necessary to afford equal opportunity [to the handicapped person] to use and enjoy a dwelling unit" and whether the proposed accommodation is "reasonable" and will not "undermine the basic purpose that the zoning ordinance seeks to achieve."

III. Who Should Process Applications That Raise Fair Housing Act or ADA Issues?

Every county, city and village, and every town that has adopted its own zoning, should amend its zoning ordinances, as soon as possible, to specifically designate a procedure for processing applications that raise Fair Housing Act or ADA issues and to reference the standards in the Federal FHAA, the WFHA and the ADA. The municipality may want the planning and zoning committee or some other board or committee to evaluate disability issues before a building permit, zoning permit or special exception permit is issued, and that would be legally permissible. However, such an amendment should **not** require that variances be issued in order to allow "reasonable accommodations," for the reasons cited in Section IV of this guidance.

In situations where the local zoning ordinance does not specifically provide for special handling of applications that raise Fair Housing Act or ADA issues, it is my opinion that applications for permits or variances filed by, or on behalf of, disabled persons should be handled by the same individual, board or committee that would normally handle the permit or variance application if it did not involve disability issues. The procedures that would normally apply to the issuance of the permit or variance need to be followed, of course. The decision-making process will also be the same, except that a two-step analysis is required where accommodations are requested because of a disability.

After considering whether or not a permit or variance could be issued to a non-handicapped applicant under the facts of the case, the zoning administrator, board or committee would also have to consider what "reasonable accommodations" are necessary, and should be allowed, because of the handicapped person's disability. A building permit or zoning permit may be issued for "reasonable accommodations" even if a non-handicapped person would have been denied a permit under the same circumstances, if the accommodations are necessary and reasonable. However, a variance should not be issued to anyone, including a handicapped person, unless there are special conditions unique to the property that would justify a variance even if the applicant were not disabled, and a special exception permit should not be issued to anyone, including a handicapped person, unless all of the requirements listed in the ordinance for a special exception are met.

In my opinion, where the applicant applies for a building permit or zoning permit, the Zoning Administrator (or other official who has the authority to issue such a permit) has the authority to permit or deny construction that is requested as a "reasonable accommodation" under the Federal FHAA, WFHA or ADA, in addition to his or her authority to grant a permit for construction that is allowed under the local zoning ordinance. This is a situation that is analogous to a Zoning Administrator taking into account the Wisconsin Supreme Court's decision in Marris v. City of Cedarburg when interpreting the applicability of a 50% limit on "structural repairs or alterations" to a nonconforming building, or taking into account a state statute requirement that preempts local action (such as ss. 62.231 and 61.351, Wis. Stats., which do not allow cities or villages to prohibit the "repair, reconstruction, renovation, remodeling or expansion" of legal, nonconforming structures that existed in shoreland-wetland areas prior to the effective date of the applicable city or village shoreland-wetland zoning ordinance).

The Zoning Administrator's decision on Fair Housing Act or ADA issues can be appealed to the board of adjustment or board of appeals, as is true for any issue where the Zoning Administrator's interpretation of the ordinance and other applicable laws is challenged. If the board of adjustment or board of appeals believes that a permit should be issued to allow "reasonable accommodations," they should do so by directing the zoning administrator to issue a building permit or zoning permit (not by issuing a variance).

If a Zoning Administrator (or other official who has the authority to issue building permits or zoning permits) feels uneasy about issuing a permit for "reasonable accommodations" that he or she believes to be required by the Federal FHAA, the WFHA or the ADA in the absence of a specific provision in the local ordinance that authorizes the issuance of such a permit, the only solution that I can see is for that person to refer the matter to the planning and zoning agency or committee with a request for a text amendment to the applicable zoning ordinance that will specifically allow the Zoning Administrator to issue a building permit or zoning permit to a handicapped person if "reasonable accommodations" are necessary.

If the applicant applies for a variance or special exception permit, the application should be handled by the same board or committee that normally handles variances or special exception permit applications, and the board or committee must apply the same criteria that would be otherwise applicable to a variance or special exception application.

If a disabled person applies for a variance, a board of adjustment or board of appeals can only consider the statutory variance criteria, as interpreted by Wisconsin courts, in order to decide whether or not a variance should be granted, and cannot consider the personal characteristics of the applicant. The Wisconsin Court of Appeals has held that a board of adjustment may not grant a variance to a disabled applicant in a situation where the statutory variance criteria are not satisfied. "[O]ur supreme court has consistently interpreted the terms 'special conditions' and 'unnecessary hardship' in s. 59.694 (7)(c), Stats., to apply to the conditions especially affecting the lot in question and not to conditions personal to the landowner." *County of Sawyer Zoning Board v. Wisconsin Department of Workforce Development*, 231 Wis.2d 534 at 539-540, 605 N.W.2d 627 (Ct. App., 1999). "The board could not grant the variance without acting in excess of its powers and contrary to law." *County of Sawyer Zoning Board,* 231 Wis.2d at 542.

A board of adjustment, board of appeals or planning and zoning committee may decide that "reasonable accommodations" are also required after deciding that a variance or special exception permit should be granted, **but only if** the board or committee **first** determines that the variance or special exception criteria are satisfied and, **secondly**, determines that "reasonable accommodations" (i.e. changes to the details of what would be allowed for a non-handicapped applicant under the variance or special exception permit) are necessary because of the applicant's disability. If the "reasonable accommodations" involve a separate aspect of a construction project or involve a separate structure, the variance or special exception permit should only cover that portion of the application that meets variance or special exception standards. The board or committee may direct the zoning administrator or building inspector to issue a separate building permit or separate zoning permit for "reasonable accommodations" that don't satisfy the criteria for a variance or special exception permit, but the board or committee cannot legally include "reasonable accommodations" in a variance.

For example, assume that a handicapped person applies for (1) a variance to construct an addition to his or her nonconforming residence that will exceed 50% of the current fair market value of the house, for reasons that have nothing to do with the person's handicap (for example, to accommodate a growing family), and (2) a variance to construct an entrance ramp and deck that will encroach into a setback area. If the board members determine that the entrance ramp and deck are necessary because of the person's disability and would be "reasonable accommodations, the board may authorize the issuance of a building permit or zoning permit for the entrance ramp and deck, whether or not a variance is issued for the addition. However, the board does not have the authority to include the construction of the proposed entrance ramp and deck as part of the variance (unless, of course, the applicant is able to prove that, due to conditions unique to the property, there would be no reasonable use for the property in the absence of the ramp or the deck). Requests for reasonable accommodations because of a person's disability (that are necessary to allow a handicapped person to have equal housing opportunities) must be distinguished from requests that require the issuance of variance, and such requests must be decided separately. In my example, since the two variance requests can be handled separately, the cost of the ramp and deck should not be counted to determine if the proposed addition to the nonconforming residence will exceed 50% of the current fair market value of the house (because a permit issued to allow the construction of the ramp and deck

should require their removal once they are not longer needed by a disabled person). A variance permitting the construction of an addition that will exceed 50% of the current fair market value of the house can only be granted if all of the statutory variance criteria are satisfied, regardless of whether the board finds that the proposed entrance ramp and deck are required because of the applicant's disability.

IV. Permits, Not Variances, Should Be Issued

The granting of a variance is not the appropriate vehicle for granting "reasonable accommodations" required by the Federal FHAA, WFHA or ADA, except in circumstances where the criteria found in s. 59.99(7)(c) and 62.23(7)(e)7, Wis. Stats., are satisfied (that is, where "unnecessary hardship" that is due to special conditions unique to the property can be demonstrated.) Boards of appeals and boards of adjustment do not have the authority to issue variances if the statutory variance criteria are not met. *County of Sawyer Zoning Board v. Wisconsin Department of Workforce Development*, 231 Wis.2d 534 at 539-540, 605 N.W.2d 627 (Ct. App., 1999).

Boards of appeals and boards of adjustment do not have the authority to create variances that will expire when a disabled person no longer occupies the property. All variances continue to be applicable to the parcel for which they are granted forever, regardless of who owns or occupies the parcel.

It is true that the variance process was created to provide a "safety valve" to allow local zoning officials to make exceptions to ordinance requirements in order to avoid "unneccessary hardship." But it was a safety valve intended to avoid "takings" situations, where zoning ordinances might unintentionally leave a property owner without any feasible use for his or her property.

In Snyder v. Waukesha County Zoning Board, 74 Wis.2d 468, 247 N.W.2d 98 (1976), the Wisconsin Supreme Court quoted from a New York case:

> "Since the main purpose of allowing variances is to prevent land from being rendered useless, `unnecessary hardship' can best be defined as a situation where in the absence of a variance no feasible use can be made of the land. . . " 74 Wis.2d at 474.

The Wisconsin Supreme Court also stated in the Snyder decision:

> "Practical difficulties or unnecessary hardship do not include conditions personal to the owner of the land, but rather to the conditions especially affecting the lot in question. . . It is not the uniqueness of the plight of the owner, but the uniqueness of the land causing the plight, which is the criterion [for issuing a variance]."
> 74 Wis.2d at 478.

Denying a handicapped person the "reasonable accommodations" that he or she requests will not, in the vast majority of cases, leave the property with "no feasible use." In most situations, the

property remains useable by non-handicapped persons. It is also worth noting that the federal court decisions dealing with Fair Housing Act issues have not indicated that a variance should have been granted in situations where "reasonable accommodations" should have been allowed, nor have they even implied that a variance would be an appropriate mechanism to allow "reasonable accommodations." There is no common law basis for creating a new type of variance.

In situations where "reasonable accommodations" must be made because of the nature of the disabled person's handicaps (not because of the nature of the parcel of land), a zoning or building permit, or a conditional use or special exception permit, if applicable, should be issued (not a variance). If a permit authorizes anything that would not otherwise be in compliance with the requirements of the zoning ordinance, the permit should cite the fact that the zoning administrator, board or committee that issued the permit did so to comply with the requirements of the Federal Fair Housing Act and the Wisconsin Fair Housing Act (or the Americans with Disabilities Act, if it is applicable). Such a permit can be worded to specifically provide that the continuation of the "reasonable accommodations" that are approved under the permit continues only as long as disabled persons reside on the property. The permit can require subsequent owners or occupants to remove nonconforming structures - such as ramps, decks or porches - that are no longer required by a disabled resident and are fairly easily removed. A building or zoning permit that authorizes "reasonable accommodations" will not "run with the land" like a variance would, and will not confer "conforming structure" status like a variance would.

If an application for a variance to allow "reasonable accommodations" for a disabled person is brought to a board of appeals or board of adjustment, the board should treat the application as an appeal for an interpretation of applicable ordinance provisions. The board may authorize the issuance of a building permit or zoning permit that allows "reasonable accommodations" taking into account the disabled person's needs, **if** the board is convinced that some sort of accommodation is necessary to give the disabled person equal opportunity for housing. The board may **not** issue a variance unless the applicant has shown that the statutory variance criteria have been satisfied for reasons that have nothing to do with the person's disability.

V. Specific Situations Where Requests For "Reasonable Accommodations" May Be Requested

A. Ramps, Porches and Decks to Allow Disabled Persons to Enter and Exit

It is my opinion that a disabled person, or the owner of a residence for disabled persons, would be entitled under the Federal FHAA and the WFHA to construct an entrance ramp, a small porch or small deck, or other accommodations that are necessary to allow the disabled person or persons adequate means to enter and exit the dwelling, even where these ramps or other structures would encroach into a setback area or sideyard, or otherwise be prohibited under the local zoning ordinance, **if** such structures are "necessary to afford equal opportunity [to the disabled person] to use and enjoy a dwelling unit." If such structures are no larger than is necessary to allow the disabled person to get in and out of the building, these structures probably

will not significantly "undermine the basic purpose that the zoning ordinance seeks to achieve," especially if they are temporary. Local zoning officials can ensure that the "basic purpose" of the ordinance provision that is not being complied with will not be "undermined" in the long run by clearly providing in the building or zoning permit that is issued for these structures that the structures are to be removed when they are no longer needed by a disabled occupant.

However, neither the Federal FHAA nor the WFHA require local zoning officials to grant permits for decks, patios or walkways, unless the applicant can show that such structures are required by disabled persons so that they may enter or exit the residence on the property or gain access to a pier. If permission to construct a deck or patio in a location that would otherwise not be allowed is requested by someone with a disability, the applicant would have to show that a deck or patio with smaller dimensions (or a sidewalk or walkway with smaller dimensions) would not be adequate to allow the disabled person access to the residence or pier. Disabled persons are guaranteed equal opportunity to housing (and equal opportunity to use their riparian rights if the property has frontage on a lake or stream, in my opinion), but the disabled do not have a right to demand special privileges because they are disabled. In situations where a deck or patio could not be built by an applicant that wasn't disabled (because the proposed structure would be located closer than 75 feet from the OHWM, for example), a disabled person does not have a right to construct a deck or patio in that location either (except as necessary to gain access to the residence or a pier, as mentioned above).

B. Remodeling of Nonconforming Structures

Likewise, where remodeling of a legal nonconforming structure is necessary to afford equal housing opportunity to a disabled person, both the Federal FHAA and the WFHA require local zoning officials to allow the remodeling even if the cost of the structural alterations or structural repairs that are proposed would exceed 50% of the current fair market value of the dwelling (where the local ordinance contains a 50% of current fair market value limit on additions or structural repairs to nonconforming structures) **if** the applicant is able to prove that all of the structural alterations and structural repairs are "necessary to afford equal opportunity [to the disabled] to use and enjoy" the housing, and that the remodeling will not significantly undermine a basic purpose of the zoning ordinance.

To evaluate a request from a disabled applicant for a permit to remodel a legal nonconforming structure, local zoning officials must first determine what "reasonable accommodations" are required because of the applicant's disability. Is remodeling that is not required by the person's handicap included in the proposal? If so, the two categories must be separately evaluated. Zoning officials should first determine whether the total cost of any structural alterations or structural repairs that are required to make "reasonable accommodations" will exceed 50% of the current fair market value or other applicable limitations on additions or improvements to the legal nonconforming structure. (The costs of "reasonable accommodations" that are **not** considered structural alterations or structural repairs - such as the replacement of plumbing fixtures or new electrical wiring within the pre-existing portion of the building - should not be counted to determine compliance with a 50% limit. See the Wisconsin Supreme Court's decision

in Marris v. City of Cedarburg for guidelines on distinguishing between structural and non-structural alterations and repairs.)

If structural alterations or structural repairs are required to make a "reasonable accommodation" and those structural alterations or structural repairs add up to less than 50% of the current fair market value of the building, the applicant can make additional structural alterations or structural repairs up to the 50% limit (adding the cost of both categories of structural alterations and structural repairs together). If the structural alterations or structural repairs that are required to make "reasonable accommodations" add up to 50% or more, the applicant can not make any additional structural alterations or structural repairs beyond what is required for "reasonable accommodation" unless a variance is granted because of unique conditions of the property that create an unnecessary hardship (for reasons that have nothing to do with the applicant's disability).

Although, strictly speaking, the Federal Fair Housing Act and the Wisconsin Fair Housing Act only require "reasonable accommodations" for disabled persons (which means that future owners or occupants of a home who are not handicapped do not have a legal right to expect those accommodations to continue for them), it would not make sense to require the owners of a nonconforming building to remove additions or reconstructed portions of that building after the disabled person has moved out, in situations where a nonconforming building has been altered or remodeled in excess of a 50% limit to allow "reasonable accommodations." The objective of gradually eliminating nonconforming structures, that is the reason for the use of limitations on structural alterations and structural repairs to nonconforming buildings, can best be achieved under these circumstances by making sure that the building will still be treated as a nonconforming structure, subject to the 50% limit or other applicable limitations if further structural alterations or repairs are proposed in the future (that is, by not issuing a variance that will confer conforming status on the building).

VI. Americans with Disabilities Act

The Americans with Disabilities Act (ADA) consists of five parts: Title I, which prohibits employment discrimination; Title II, which prohibits discrimination against the handicapped in the administration of public services; Title III, which mandates that public accommodations and services operated by private parties be made accessible to the handicapped; Title IV, which deals with telecommunications; and Title V, which contains miscellaneous provisions. Titles I, II, III and IV are potentially applicable to zoning agencies and boards. Title I prohibits discrimination against disabled persons in a local or state government's employment policies and practices.

Title II of the ADA prohibits discrimination against disabled persons in all programs, activities and services provided by the governmental entity. State and local governments must eliminate any eligibility criteria for participation in programs, activities and services that screen out or tend to screen out persons with disabilities, unless it can establish that the requirements are necessary for safe operation of the service, program or activity. Safety requirements may be adopted if

they are based on real risks, not on stereotypes or generalizations about individuals with disabilities.

State and local governments are also required by the ADA to ensure that applicants and members of the public with disabilities have communication access that is equally effective as that provided to people without disabilities. This means, for example, that if a deaf person were to apply to a board of appeals or board of adjustment for a permit or variance, the BOA must provide an effective means for the deaf person to communicate at the BOA hearing, such as providing a sign language interpreter.

Title III of the ADA prohibits discrimination against disabled persons in public accommodations and services operated by private entities. Title III does not apply to private clubs and religious organizations, and does not directly apply to public entities either. However, the requirements of Title III may become an issue for zoning officials if the owner/operator of a restaurant, hotel or motel, for example, were to apply for a zoning permit or variance, citing the requirements of the ADA as the reason for the permit or variance request.

Title III specifies, among other things, that public accommodations must remove existing physical barriers to disabled persons, if doing so is "readily achievable." The Act defines "readily achievable" to mean "easily accomplishable and able to be carried out without much difficulty or expense." Adding a ramp to replace or supplement steps, installing grab bars, and lowering pay telephones are examples of "readily achievable" actions that remove barriers. Restaurants may need to rearrange tables and retail stores may need to adjust the layout of racks and shelves in order to permit access to wheelchair users. Businesses are not required to retrofit their facilities to install elevators unless such installation is readily achievable, which is unlikely in most cases. When an alteration is proposed that could affect the usability of public accommodations or commercial facilities, the alteration must be made in an accessible manner, to the maximum extent feasible. For example, if during remodeling, a doorway is being relocated, the new doorway must be wide enough to meet the standards for accessibility that apply to new construction. Bathrooms, telephones and drinking fountains serving a place of public accommodation must be made accessible if the facility is being remodeled, but only to the extent that these added accessibility costs do not exceed 20% of the cost of the original alteration. If barrier removal is not readily achievable, a public accommodation must make its goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if they are readily achievable.

It is my opinion that applicants who request a permit or variance to allow an alteration to an existing commercial facility or place of public accommodation, that would violate otherwise-applicable zoning regulations, should be required to prove that the proposed alteration is required by the ADA. If there is any doubt as to whether the proposed alteration is required by the ADA, local zoning officials could require the applicant to present a letter from the Federal Architectural and Transportation Barriers Compliance Board or other appropriate federal agency to establish exactly what is required under the Act.

Places of public accommodation and commercial facilities should be granted zoning or building permits to allow them to add ramps or wider doorways or walkways to existing buildings if those structures are necessary to provide adequate access to their facilities for disabled persons, even though the construction of such structures may violate a setback requirement or other zoning ordinance provision, as long as the proposed alteration is "readily achievable." However, I would argue that if a proposed alteration represents a major violation of otherwise-applicable zoning regulations, and would have an adverse impact that clearly outweighs the alleged benefit of the alteration, it would not be "readily achievable." If the applicant is requesting approval for an alteration that represents a major deviation from the requirements of a zoning ordinance, local zoning officials should ask the applicant whether there are alternative methods for making goods, services or facilities available to the disabled. I would also argue that a variance should not be granted in response to such requests (for the reasons outlined above) unless the variance criteria in s. 59.99(7)(c) and 62.23(7)(e)7, Wis. Stats., are satisfied.

It should be noted that the ADA does not require that places of public accommodation make alterations to allow disabled persons access to all areas within a building or facility. If, for example, a restaurant installs a ramp to allow disabled persons in wheelchairs access to a dining room and restroom, the restaurant would not be required to make alterations to allow disabled persons in wheelchairs access to a second story dining area or an outdoor deck. Since such alterations are not required by the ADA, the applicant would have to satisfy the criteria in s. 59.99(7)(c) and 62.23(7)(e)7, Wis. Stats., to qualify for a variance from applicable zoning requirements.

Title III also requires that all new construction of places of public accommodation, as well as "commercial facilities" such as office buildings, be accessible to disabled persons. This does not mean, however, that an applicant for a zoning variance who wants to build a new building to be used for public accommodations or as a commercial facility has a right to build in violation of zoning regulations just because the ADA requires a design that accommodates disabled persons. For example, if a restaurant is proposed to be built on a small lot, and the property owner argues that the only way that he can build the restaurant to accommodate people in wheelchairs is to increase the dimensions beyond those that would otherwise be allowed (that is, he would have to encroach into setback or sideyard areas, or violate other dimensional standards), he would not be entitled to a permit or variance simply because he has raised the issue of ADA compliance. He would have to satisfy the variance criteria in s. 59.99(7)(c) and 62.23(7)(e)7, Wis. Stats., before a variance could be granted. In such a case, the applicant should find a site for his restaurant that is large enough to accommodate the building that he has planned. The BOA is only authorized to issue a variance in such a case if the owner of the small lot can prove that if the variance is not granted, no feasible use for the property that is permitted under the ordinance will remain.

APPENDIX A

LEGISLATIVE HISTORY AND CASE LAW INDICATING THAT THE FEDERAL AND STATE FAIR HOUSING ACTS APPLY TO ZONING DECISIONS

The Federal Fair Housing Amendments Act of 1988 created the following provisions in the Federal Fair Housing Act, in 42 USC s. 3604(f)(3):

"For purposes of this subsection, discrimination includes -

> (A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises...
>
> (B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling;..."

["Premises" is defined in Volume 24, Code of Federal Regulations (CFR) section 100.201 to mean: "the interior or exterior spaces, parts, components or elements of a building, including individual dwelling units and the public and common use areas of a building." "Rules, policies, practices or services" include local zoning ordinances.]

> "Courts have unanimously applied the reasonable accommodations requirement to zoning ordinances and other land use regulations and practices." Oxford House, Inc. v. Town of Babylon, 819 F. Supp. 1179, 1185 (E.D. N.Y., 1983)

The legislative history of the Federal FHAA specifically provides that the Federal Fair Housing Act as amended was "intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community." H.R. Report No. 711, 100th Cong., 2d Sess. 24 - June 17, 1988.

> ". . . although a municipality has a legitimate governmental interest in regulating land use, we have a duty under the [Federal Fair Housing] Act to ensure that that interest is effectuated in a nondiscriminatory manner." U.S. v. Borough of Audubon, 797 F. Supp. 353 (D.N.J. 1991).

Wisconsin's Fair Housing Act was amended by 1991 Wisconsin Act 295 to add to the Wisconsin law provisions that were comparable to the provisions in the Federal Fair Housing Amendments Act of 1988. 1991 Wisconsin Act 295 (which became effective on September 1, 1992) created s. 101.22 (2r), Wis. Stats:

"s. 101.22 (2r)(b) *Types of discrimination prohibited.* In addition to discrimination prohibited under subs. (2) and (2m), no person may do any of the following:

. . . .

3. Refuse to permit, at the expense of a person with a disability, reasonable modifications of existing housing that is occupied, or is to be occupied, by such person if the modifications may be necessary to afford the person full enjoyment of the housing, except that in the case of rental housing the landlord may, where it is reasonable to do so, condition permission for a modification on the tenant's agreement to restore the interior of the housing to the condition that existed before the modification, other than reasonable wear and tear....

4. Refuse to make reasonable accommodations in rules, policies, practices or services that are associated with the housing, when such accommodations may be necessary to afford the person equal opportunity to use and enjoy housing, unless the accommodation would impose an undue hardship on the owner of the housing."

Information Memorandum 92-18, prepared by the Wisconsin Legislative Council prior to the passage of 1991 Wisconsin Act 295, described the provisions of the Federal Fair Housing Amendments Act of 1988 and the corresponding amendments to the Wisconsin Fair Housing Act that were being proposed. That Information Memorandum clearly indicates that the drafters of the bill that later became 1991 Wisconsin Act 295 were aware that the Federal FHAA was intended to apply to zoning decisions.

"Under the Amendments, the prohibitions against housing discrimination based on handicap apply to zoning decisions and practices, . . . (emphasis in original)." Wisconsin Legislative Council, Information Memorandum 92-18.

floodplain developments, together with all pertinent information such as the nature of the proposal, legal description of the property, fill limits and elevations, building floor elevations and flood proofing measures.

(2) Require the applicant to furnish any of the following additional information as is deemed necessary by the Department for evaluation of the effects of the proposal upon flood height and flood flows, the regional flood elevation and where applicable to determine the boundaries of the floodway:

(a) A typical valley cross-section showing the channel of the stream, the floodplain adjoining each side of the channel, the cross-sectional area to be occupied by the proposed development, and all historic high water information.

(b) Plan (surface view) showing: elevations or contours of the ground; pertinent structure, fill or storage elevations; size, location and spatial arrangement of all proposed and existing structures on the site; location and elevations of streets, water supply, and sanitary facilities; soil types and other pertinent information.

(c) Profile showing the slope of the bottom of the channel or flow line of the stream.

(d) Specifications for building construction and materials, flood proofing, filling, dredging, channel improvement, storage of materials, water supply and sanitary facilities.

(3) Transmit one copy of the information described in pars. (1) and (2) to the Department District office along with a written request for technical assistance to establish regional flood elevations and, where applicable, floodway data. Where the provisions of s. 7.1(2)(c) apply, the applicant shall provide all required information and computations, to delineate floodway boundaries and the effects of the project on flood elevations.

6.0 NONCONFORMING USES

6.1 GENERAL

(1) APPLICABILITY

Insofar as the standards in this section are not inconsistent with the provisions of s. 59.97(10), Stats., for counties or s. 62.23(7)(h), Stats., for cities and villages, they shall apply to all nonconforming uses and nonconforming structures. These regulations apply to the modification of, or addition to, any structure and to the use of any structure or premises which was lawful before the passage of this ordinance or any amendment thereto.

(2) The existing lawful use of a structure or building or its accessory use which is not in conformity with the provisions of this ordinance may continue subject to the following conditions:

(a) No modifications or additions to a nonconforming use or a nonconforming structure shall be permitted unless they are made in conformity with the provisions of this ordinance for the area of the floodplain occupied. The words "modification" and "addition" include, but are not limited to, any alteration, addition, modification, structural repair, rebuilding or replacement of any such existing use, structure or accessory structure or use. Ordinary maintenance repairs are not considered modifications or additions; these include internal and external painting, decorating, paneling and the replacement of doors, windows and other nonstructural components and the maintenance, repair or replacement of existing private sewage or water supply systems or connections to public utilities.

(b) If a nonconforming use or the use of a nonconforming structure is discontinued for 12 consecutive months, it is no longer permitted and any future use of the property, and any structure or building thereon, shall conform to the applicable requirements of this ordinance.

(c) As requests are received by the municipality for modifications or additions to nonconforming uses or nonconforming structures, a record shall be kept which lists the nonconforming uses and nonconforming structures, their present equalized assessed value, and the cost of those additions or modifications which have been permitted, and the percentage of the structure's total current value those modifications represent. (Rev. July-91)

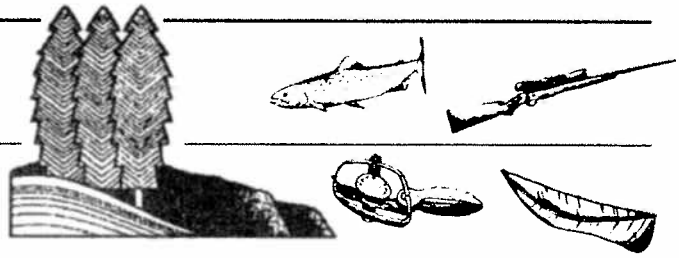
(d) No modification or addition to any nonconforming structure or any structure with a nonconforming use, which over the life of the structure would exceed fifty percent (50%) of its present equalized assessed value, shall be allowed unless the entire structure is permanently changed to a conforming structure with a conforming use in compliance with the applicable requirements of this ordinance. Contiguous dry land access must be provided for residential and commercial uses in compliance with s. 4.3(2).

(e) If any nonconforming structure or any structure 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 use and the structure meet the requirements of this ordinance. For the purpose of this subsection, restoration is deemed impractical where the total cost of such restoration would exceed 50% of the present equalized assessed value of the structure.

6.2 FLOODWAY AREAS

(1) No modification or addition shall be allowed to any nonconforming structure or any structure with a nonconforming use in a floodway area, unless such modification or addition:

Assembly Committee on
Natural Resources
State Representative
DuWayne Johnsrud, Chair



April 30, 2003

Joint Committee on the Review of Administrative Rules

Dear Co-chairs Grothman, Leibham and committee members:

Thank you for getting together today to search for a way through the floodplain zoning maze that is plaguing Mr. Mike McQuinn at his cabin on Rock Lake in Trempealeau County.

His request, for a landing and additional emergency egress from the building, is reasonable. Mr. McQuinn's proposal:

> Does not increase the footprint of this non-conforming, prior existing structure (an assessor does not include decks in the square footage of property)
>
> Would not substantially impede floodwaters, especially if stairs are built instead of a more extensive and expensive ramp.
>
> Conflict with federal floodplain rules (FEMA rules prohibit substantial improvements only if they will result in an increase in flood levels [44 CFR Ch. 1]).

In fact, having two exits from his cabin would bring it into compliance with uniform dwelling code.

Again, thank you for getting together to resolve this issue. I am confident that our discussions will reveal a solution that protects everyone's property and is fair to the homeowners who we are meeting today.

Sincerely,

DuWayne Johnsrud
State Representative
96th Assembly District

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CAPTION

Entry 52

An Abstract of Title, prepared by

Trempealeau County Abstract Company

of Whitehall, Wisconsin, Number 6357, of the following described lands in Trempealeau County, Wisconsin, to-wit:

A parcel of land lying in Government Lot 6, Section 35-18-9 West, and described as follows:

Commencing at the Southwest corner of Lot 6;
thence East on the South line of said lot a distance of 496 feet;
thence North 22 deg. 16 min. West a distance of 84 feet to the place of beginning;
thence North 22 deg. 16 min. West a distance of 90 feet;
thence North 67 deg. 44 min. East a distance of 204.3 feet;
thence South 22 deg. 24 min. East a distance of 90 feet;
thence South 67 deg. 44 min. West a distance of 204.5 feet to the place of beginning.

Together with the right of ingress and egress to said parcel of land over and across the lands now owned by the grantors designated as streets on an unrecorded plat designated as Birch Acres Addition to the Town of Trempealeau.

from the 31st day of January, 1957, at 8 o'clock A.M.

to the 9th day of August, 1965, at 8 o'clock A.M.

Donna
Leone Ware

Division of Land Management

Trempealeau County Zoning Department
Courthouse, P.O. Box 67
Whitehall, WI 54773

Phone: (715) 538-2311 ext 223
Email: rmcroberts@tremplocounty.com
Web Page: www.tremplocounty.com/landmanagement

January 27, 2003

Mr. James Mcquin
E5899 Spring Coulee Ridge Road
Westby, Wi 54667

Dear Mr. Mcquin:

This letter is in response to your Zoning application to construct a secondary exit and entrance at your property located at N10380 Birch Lane in the town of Trempealeau.

After reviewing your application and consultation with the Department of Natural Resources, The Trempealeau County Zoning Department determined it would allow you to construct a secondary entrance and exit, with restrictions, meeting the following dimensional criteria, but not to exceed the following widths and lengths.

- 60'' by 60'' landing by existing door entrance and exit
- 42'' outside by 36'' inside ramp not to exceed 1:12 slope ratio
- If direction of ramp is needed to change a 60'' by 60'' landing will be provided
- A roof may be constructed over 60'' by 60'' landing adjacent to existing door
- Handrails shall be provided along both sides, mounted between 30'' and 34'' above ramp surface
- A landing length shall be 60''

A condition of the permit will be that the Landings, ramp and roof will be completely removed and restored back to pre- existing condition upon sale of the property.

The preceding dimensions have been taken from the Uniform Federal Accessibility Standards and should meet your request for a secondary entrance and exit.

This offer will be valid until February 28, 2003, provided we receive a written letter from you accepting the proposed construction requirements. If we do not receive a letter of acceptance from you by that time Trempealeau County will withdraw this offer to permit a structural modification to the property at N10380 Birch Lane.

Thank you for your cooperation with this matter. If you have any questions, please call me at (715) 538-2311 ext. 255

Sincerely,

Kevin Lien
Zoning Administrator

c.c Mark Stephenson D.N.R.
c.c Linda Meyer Bureau of Legal Services

MOUNT TREMPEALEAU MTC CORPORATION

March 27, 2003

The Honorable Joseph Leibham
Senate Co-Chair
Joint Commission for Review
of Administrative Rules
Room 409 South, State Capitol
P.O. Box 7882
Madison, WI 53707-7882

RE: Changes to NR116

Dear Senator Leibham:

I have been requested by the Mount Trempealeau Corporation to forward this letter addressed to Representative DuWayne Johnsrud to you and the members of your committee. We are most grateful for the efforts of your committee in revising NR 116 so that it would allow property owners to protect, maintain, and improve their property. This change is long over due. Thank you.

Very truly yours,

M. Paul Hendrickson

M. Paul Hendrickson
President, Mount Trempealeau Corporation
411 1st Avenue, PO Box 233
Holmen, WI 54636

xc: Honorable Robert Welch, Rm 10 South
Honorable Mary Lazich, Rm 127 South
Honorable Judith Robson, Rm 5 South
Honorable Tim Carpenter, Rm 126 South

Archives

[Back] [Email to a Friend]

Tough Floodplain Rules May Be Revised

Floodplain Rules, Long Controversial In The State, Have Gotten The Attention Of A Legislative Committee, Which Last Month Told The Dnr To Rewrite The Rules.

Wisconsin State Journal :: FRONT :: A1

Thursday, February 20, 2003
Ron Seely Environment reporter

Mike McQuinn has been fighting battles all his life. The way he sees it, this is just another one - against unreasonableness.

A veteran who lost both his legs in Vietnam and now uses a wheelchair, McQuinn wants to build a porch on his cabin on Rock Lake in Trempealeau County. But because the cabin is in a floodplain, he has had to fight the local zoning authorities and the state Department of Natural Resources to get permission for the porch. So far, he's had little luck.

The DNR and Trempealeau County argue that because the cottage is in a floodplain, it is a "legal non-conforming use," meaning it is subject to laws that regulate improvement of existing structures in a floodplain. So local zoning officials have turned down McQuinn's request to improve his cabin.

"I wanted a little deck with a roof over it and it's like I'm building the Taj Mahal," McQuinn said.

McQuinn isn't the only one who thinks the state's floodplain rules, especially for homes or cabins that have been along lakes and rivers for many years, are too strict. Last month, the DNR was told by a state Legislative committee to rewrite the rule to make it easier to maintain and improve existing buildings in floodplains, those areas adjacent to rivers and lakes that are subject to recurring floods.

"I think there are some things that just aren't working," said state Rep. DuWayne Johnsrud, R-Eastman, a member of the Joint Committee for Review of Administrative Rules, which asked for the change. "Even the DNR will say they aren't working. So let's change them so they aren't arbitrary and capricious."

The move was significant, partly because the floodplain rules have been controversial for years but also because the committee's action may foreshadow increased scrutiny by the Republican-controlled state Legislature of several such environmental rules. Johnsrud said rules on everything from shoreline development to hazardous air pollutant rules are likely to be examined.

Specifically, the committee has asked the DNR to change those parts of the floodplain rule that govern flood proofing of existing buildings in floodplains. Currently, the DNR follows a guideline that allows a homeowner to repair damage to a structure in the floodplain only if the cost of the repairs is less than 50 percent of the building's assessed value; more than 50 percent and the repairs aren't allowed.

This is considerably different and more strict, Johnsrud said, than the federal approach to improvements in the floodplain. He said, for example,

that the Federal Emergency Management Agency allows owners of existing structures in floodplains to flood proof their homes. Beyond making the state and federal rules more similar, Johnsrud said, he would like to see more common sense applied to enforcing the floodplain rules. McQuinn's situation, he said, is a good example.

McQuinn wants to add a covered porch and stairs to his home because he has only one entrance and exit and his insurance agent said he should have two for safety reasons. McQuinn has a wheelchair lift at his existing door and doesn't want a ramp off the porch he'd like to build, just stairs.

But Mark Lein, zoning administrator for Trempealeau County, denied McQuinn's request after consulting with the DNR. The deck and stairs would be in violation of the DNR's floodplain rules, Lien said, which don't allow any change to a building's "footprint" if the building is in a floodplain.

Lein added, however, that the county agreed to allow McQuinn to build a 60 inch by 60 inch platform with a wheelchair ramp rather than the larger deck.

"That would not require a variance," Lein said. "And the DNR has made it very clear we can be sued for allowing variances. They've made it very clear there will be no improvements (in the floodplain). So we don't allow any modifications in the floodplain, none at all."

McQuinn refused to accept the county's alternative of a small stoop with a ramp. The idea doesn't make sense, he said, because the ramp, which would have to incorporate several switchbacks to make it safe, would take up more room than the deck and stairs he originally asked to build.

Johnsrud said it is his hope that the DNR will rewrite its floodplain rule not only to address differences with FEMA but also so that local governments have more room to apply common sense solutions in situations such as McQuinn's.

Al Shea, director of the DNR's Bureau of Watershed Management, said the agency has been meaning to evaluate the rule and that the rule committee's request is not necessarily a surprise. He said the interpretation of the 50 percent rule needs to be clarified.

But he added that the floodplain rules are important because, ultimately, living in floodplain areas can be dangerous not only to homeowners but also to others because structures in such areas can actually worsen floods by speeding up and altering the flow of water. The floodplain rules,

including the 50 percent provision, are meant to slowly remove structures from flood prone areas, Shea said.

And state Rep. Spencer Black, D-Madison, who is also a member of the rules committee, said that although he agrees with changes allowing flood proofing of existing buildings, he doesn't want wholesale changes in floodplain laws.

"My concern is that some are pushing to allow larger and new structures in floodplains," Black said. "That would be a mistake."

Johnsrud, however, agreed that floodplain laws are necessary and that the changes being sought are not major.

"No way are we going to allow new structures in floodplains," Johnsrud said. "These buildings we're talking about are legal non-conforming structures. And people ought to be allowed to keep them."

Trempealeau County
Land Conservation Department

AGRICULTURAL SERVICE CENTER, COURTHOUSE, WHITEHALL WISCONSIN 54773
PHONE (715) 538-2311

TREMPEALEAU COUNTY
"Land of Hills and Conservation Practices"

FAX TRANSMITTAL SHEET

DATE: 4-29-03

TIME: 2:00 P.M.

TO: Pat VanderSanden   SENT TO FAX NUMBER: 608-282-3549

ATTENTION: ______   PHONE: 608-266-2056

SUBJECT: Mike McQuin

COMMENTS: Here are a copy of the two letters sent to Mr. McQuin, He has made no additional contact with Trempealeau County Regarding any modification to our proposal, We have assumed Mr McQuin had decided not to pursue the permit Request.

FROM: [illegible] Administrator

PHONE: 715-538-2311 ext. 255 ([illegible] Trempealeau County [illegible])

WE ARE SENDING 3 PAGES, INCLUDING THIS COVER PAGE. IF YOU DO NOT RECEIVE ALL OF THESE PAGES, PLEASE CALL (715) 538-2311 Ext. 260. THANK YOU.

FAX NUMBER; 715-538-4132

Division of Land Management

Trempealeau County Zoning Department
Courthouse, P.O. Box 67
Whitehall, WI 54773

Phone: (715) 538-2311 ext 223
Email: rmcroberts@tremplocounty.com
Web Page: www.tremplocounty.com/landmanagement

October 31, 2002

Mr. James Mcquin
E5899 Spring Coulee Ridge Road
Westby, Wi 54667

Dear Mr. Mcquin:

At your request I am sending you a copy of the Trempealeau County Floodplain Ordinance section that pertains to nonconforming uses section 6.0.

If you wish to apply for a variance from this section I will assist you with the proper application forms.

Thank you for your cooperation with this matter. If you have any questions, please call me at (715) 538-2311 ext. 255
Sincerely,

Kevin Lien
Zoning Administrator

Division of Land Management

Trempealeau County Zoning Department
Courthouse, P.O. Box 67
Whitehall, WI 54773

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January 27, 2003

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E5899 Spring Coulee Ridge Road
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Kevin Lien
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