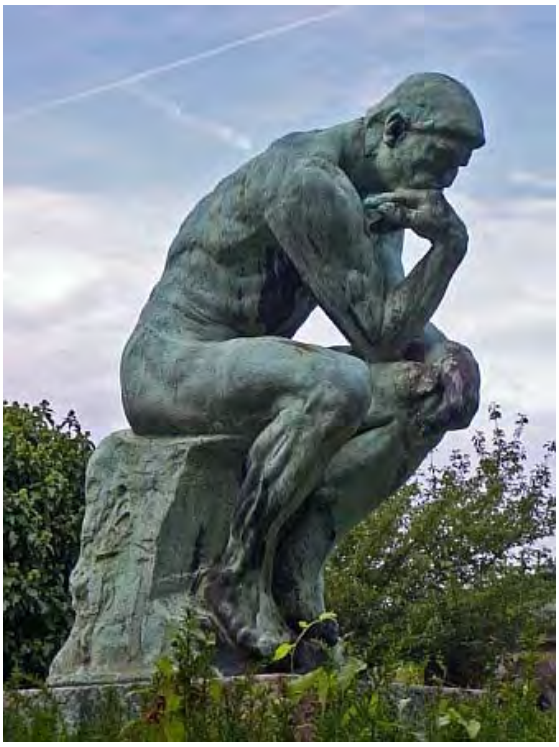
Wisconsin Shoreland Zoning Revision

NR 115 Guidebook

2011



FINAL DRAFT

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Introduction

Wisconsin County Code Administrators (WCCA) received a contract from the Wisconsin Department of Natural Resources (DNR) in 2010 to develop guidance for county zoning staff and county zoning committees for the implementation of the administrative rule NR 115 – Wisconsin's shoreland protection program. Through this guidebook WCCA intends to: 1) Provide its membership guidance on the model shoreland protection ordinance. 2) Attempt to explain NR 115 and make it clear where we feel there is ambiguity and address how counties can continue to provide greater protection for the resource. 3) Provide a menu of policy and procedure options for zoning staff to use in developing their revised county shoreland ordinances and in administering them.

Many of the participants in the project have shoreland ordinances within their respective counties which already incorporate impervious surface and mitigation standards and it is our intent to share their experience with those who have not yet had to administer these standards.

In this contract, WCCA agreed to establish an NR 115 Implementation Advisory Committee consisting of County Code Administrators to develop topic-related guidance for Wisconsin counties to address how existing county shoreland regulations are best amended to implement state-required provisions of NR 115 that were published as administrative rule on February 1, 2010 and need to be incorporated into county shoreland zoning ordinances by February 1, 2012.

This guidebook addresses the following components of shoreland zoning with a focus on-those that have changed due to the revised NR 115. It includes NR 115 language, DNR model ordinance language, example ordinance language and graphics, and administrative methods and procedures for their effective implementation as follows:

1. vegetation removal and retention
2. impervious surface limits
3. mitigation
4. nonconforming uses & structures
5. reduced shoreland setbacks
6. wetland protection

shoreland zoning in annexed, incorporated or extraterritorial areas

For Each Topic The Guidebook Provides:

A. NR 115 language including definitions
B. DNR model ordinance language from December 14, 2010
C. Additional resources
D. Guidance: Unforeseen difficulties related to topic
   - Options to address these issues in terms of ordinance text that can be reasonably administered and enforced. Examples of county ordinance language are provided or referenced where helpful.
   - Figures to illustrate ordinance language and decision-making
   - Recommendation on areas to be more restrictive than state minimums
   - Administrative methods and procedures, including permitting practices
E. Frequently asked questions

A Word About Example Forms Provided In This Guidebook:

The WCCA shoreland committee created and reviewed multiple forms related to the shoreland zoning revisions to try to make it easier for counties to administer. The committee strongly recommends that you use the example forms in this guidebook because these forms are in most cases based on county forms that have been used for multiple years already, and were reviewed by an attorney to help ensure they are legally defensible. Using these forms will also help achieve consistency between counties.

Example forms provided in this guidebook are:

- Shoreland buffer vegetation removal and replacement application
- Impervious surface calculations form
- Mitigation affidavit

A Word About Flow Charts Provided In This Guidebook:

The WCCA shoreland committee created and reviewed multiple flow charts based on the December 14, 2010 model ordinance for shoreland zoning to try to make it easier for counties to administer. The flow charts are not accurate for counties that adopt ordinance language different than the language in the model ordinance.

A Word About Water or Lake Classification:

Water classification is a locally-led process that allows counties to move beyond a one-size-fits-all approach to lake and river management. More than 20 counties—mostly in northern Wisconsin—have classified their lakes and rivers, and then adjusted their shoreland zoning standards to provide greater protection for the more sensitive waters such as small lakes and trout streams.

Water classification is a scientific process where counties gather data about their waters' physical features (such as lake or river type, size, watershed area, sensitivity to pollution and other development impacts, etc.) and characteristics relating to the current pattern and intensity of development around the waters.

For more information about lakes classification, see

www.wisconsinlakes.org/lakeclassification.html#what

and www.uwsp.edu/cnr/uwexlakes/factsheets/fs_1.pdf

Chapter 1:
Vegetation Removal and Retention

A. NR115 Language : NR 115.05(1)(c)

(c) *Vegetation.* To protect natural scenic beauty, fish and wildlife habitat, and water quality, a county shall regulate removal of vegetation in shoreland areas, consistent with the following:

1. The county shall establish ordinance standards that consider sound forestry and soil conservation practices and the effect of vegetation removal on water quality, including soil erosion, and the flow of effluents, sediments and nutrients.

Note: In developing and applying ordinances which apply to shoreland areas, local units of government must consider other applicable law and programs affecting the lands to be regulated, e.g., law and management practices that apply to state and county forests and lands entered under forest cropland and managed forest land programs, and ss. 59.692 (2) (a) and 59.69 (4) (a), Stats.

2. To protect water quality, fish and wildlife habitat and natural scenic beauty, and to promote preservation and restoration of native vegetation, the county ordinance shall designate land that extends from the ordinary high water mark to a minimum of 35 feet inland as a vegetative buffer zone and prohibit removal of vegetation in the vegetative buffer zone except as follows:

a. The county may allow routine maintenance of vegetation.

b. The county may allow removal of trees and shrubs in the vegetative buffer zone to create access and viewing corridors, provided that the combined width of all access and viewing corridors on a riparian lot or parcel may not exceed the lesser of 30 percent of the shoreline frontage or 200 feet.

c. The county may allow removal of trees and shrubs in the vegetative buffer zone on a parcel with 10 or more acres of forested land consistent with "generally accepted forestry management practices" as defined in s. NR 1.25 (2) (b), and described in Department publication "Wisconsin Forest Management Guidelines" (publication FR−226), provided that vegetation removal be consistent with these practices.

d. The county may allow removal of vegetation within the vegetative buffer zone to manage exotic or invasive species, damaged vegetation, vegetation that must be removed to control disease, or vegetation creating an imminent safety hazard, provided that any vegetation removed under the permit be replaced by replanting in the same area as soon as practicable.

Note: Information regarding native plants, shoreland and habitat management is available from the University of Wisconsin−Extension publications website: http://clean−water.uwex.edu/pubs/index.htm.

e. The county may authorize by permit additional vegetation management activities in the vegetative buffer zone. The permit issued under this subd. par. shall require that all management activities comply with detailed plans approved by the county and designed to control erosion by limiting sedimentation into the waterbody, to improve the plant community by replanting in the same area, and to maintain and monitor the newly restored area. The permit also shall require an enforceable restriction to preserve the newly restored area.

NR 115.03(7m)
(7m) "Routine maintenance of vegetation" means normally accepted horticultural practices that do not result in the loss of any layer of existing vegetation and do not require earth disturbance.

B. DNR model ordinance language from December 14, 2010

7.0 VEGETATION (NR 115.05(1)(c))

7.1 PURPOSE. (NR 115.05(1)(c)1.) To protect natural scenic beauty, fish and wildlife habitat, and water quality, a county shall regulate removal of vegetation in shoreland areas, consistent with the following: The county shall establish ordinance standards that consider sound forestry and soil conservation practices and the effect of vegetation removal on water quality, including soil erosion, and the flow of effluents, sediments and nutrients.

7.2 ESTABLISHMENT OF A VEGETATIVE BUFFER ZONE. (NR 115.05(1)(c)2.)To protect water quality, fish and wildlife habitat and natural scenic beauty, and to promote preservation and restoration of native vegetation, the county ordinance shall designate land that extends from the ordinary high water mark to a minimum of 35 feet inland as a vegetative buffer zone and prohibit removal of vegetation in the vegetative buffer zone except as follows.

(1) The county may allow routine maintenance of vegetation.

(2) The county may allow removal of trees and shrubs in the vegetative buffer zone to create access and viewing corridors, provided that the combined width of all access and viewing corridors on a riparian lot or parcel may not exceed the lesser of 30 percent of the shoreline frontage or 200 feet.

(3) The county may allow removal of trees and shrubs in the vegetative buffer zone on a parcel with 10 or more acres of forested land consistent with "generally accepted forestry management practices" as defined in s. NR 1.25 (2) (b), and described in

Department publication "Wisconsin Forest Management Guidelines" (publication FR-226), provided that vegetation removal be consistent with these practices.

(4) The county may allow removal of vegetation within the vegetative buffer zone to manage exotic or invasive species, damaged vegetation, vegetation that must be removed to control disease, or vegetation creating an imminent safety hazard, provided that any vegetation removed under the permit be replaced by replanting in the same area as soon as practicable.

(5) The county may authorize by permit additional vegetation management activities in the vegetative buffer zone. The permit issued under this subd. par. shall require that all management activities comply with detailed plans approved by the county and designed to control erosion by limiting sedimentation into the waterbody, to improve the plant community by replanting in the same area, and to maintain and monitor the newly restored area. The permit also shall require an enforceable restriction to preserve the newly restored area.

Policy Option:

7.3 CUTTING MORE THAN 35 FEET INLAND From the inland edge of the 35 foot area to the outer limits of the shoreland, the cutting of vegetation shall be allowed when accomplished using accepted forest management and soil conservation practices which protect water quality.

C. Additional Resources

Appendix 1 contains the following vegetation removal and retention resources recommended by the WCCA shoreland committee:

- Vegetative removal flow chart
- Shoreland Buffer Vegetation Removal and Replacement application

D. Guidance: Unforeseen Difficulties

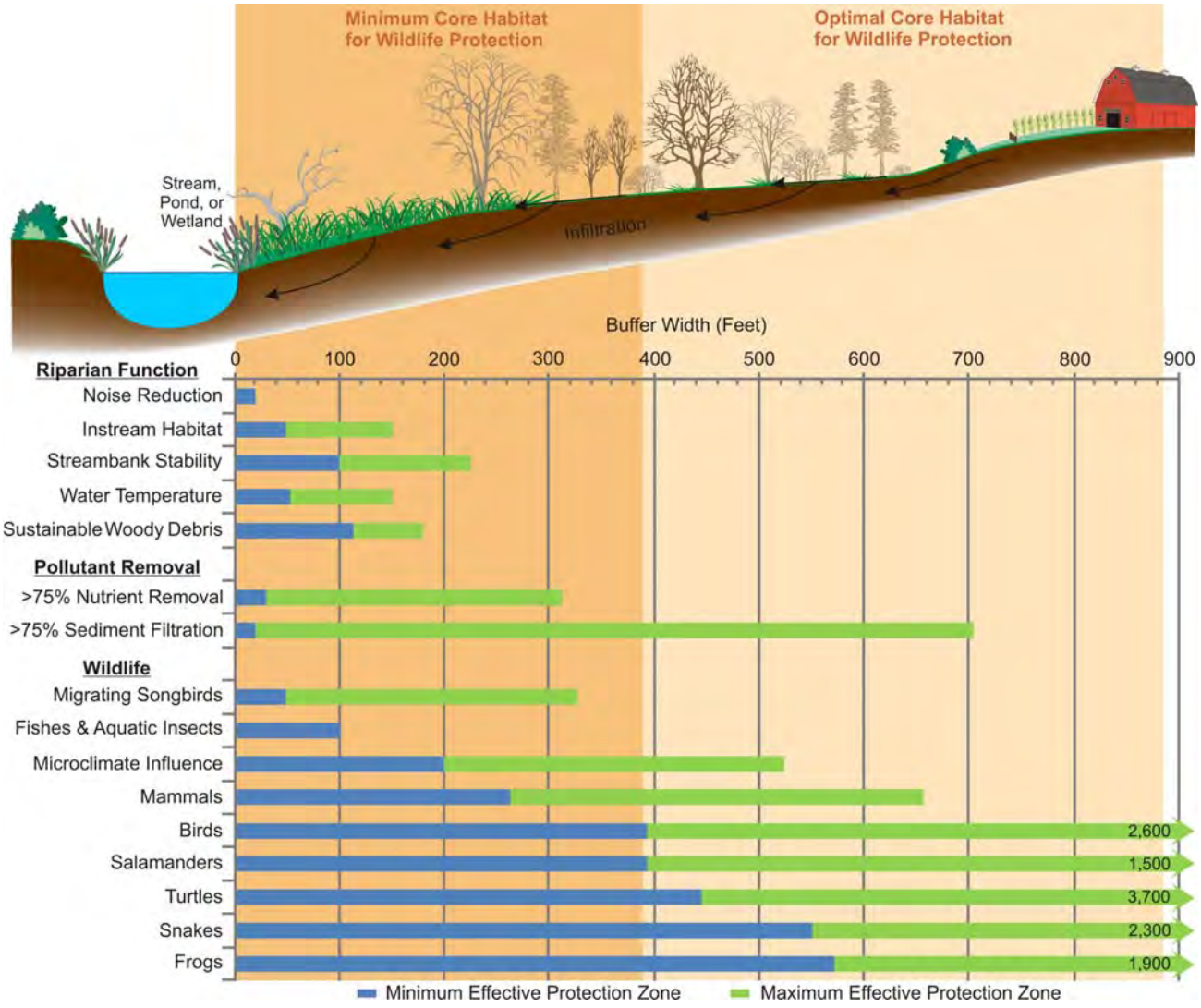
First, the NR 115 and model ordinance provide minimum standards. Counties may be more restrictive regarding vegetation and all other shoreland zoning topics. In fact many counties already are more restrictive. For instance, a 2007 report lists 12 Wisconsin counties with vegetative buffers greater than 35 feet deep; some up to 275 feet deep. [1]

Two definitions are related to the vegetation section:

1. "Routine maintenance of vegetation" straight from NR 115.
2. Vegetative buffer zone: Generally contains three layers of native vegetation: trees, shrubs and ground cover. Counties could also reference the shoreland habitat standard in 643A NRCS which provides that shoreland habitat means "area adjacent to a waterbody or watercourse in a non-agricultural setting that is vegetated with a *diverse* mixture of native species that can include grasses, grass-like species, forbs, shrubs, and trees." http://dnr.wi.gov/org/water/wm/dsfm/shore/documents/NRCSshorehabstandard.pdf

Following these state minimum vegetation standards may not achieve the goals in ch. 281.31 of Wisconsin Statutes which are to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty. The following Figure illustrates the buffer widths research has found are necessary to protect water quality and provide core wildlife habitat.

[1] County-Level Water Classification in Wisconsin: An Assessment. Wisconsin Association of Lakes, 2007. Table 2, pages 35-36. http://wisconsinlakes.org/publications/reports/07lakeclassification_assessment.pdf



Caption: Used with permission from Thomas Slawski, Southeast Wisconsin Regional Planning Commission, from the publication *Managing the Water's Edge*.

Options to further the goals of ch. 281.31 are:

1. Deeper buffers, especially if you have a lake or water classification scheme. A 2007 report lists 12 counties with vegetative buffers greater than 35' deep; some up to 275' deep.[2] Many counties set their buffer depth at 25 feet less than their shoreland setback to allow room for construction equipment, without unnecessarily removing buffers.

[2]County-Level Water Classification in Wisconsin: An Assessment. Wisconsin Association of Lakes, 2007. Table 2, pages 35-36. http://wisconsinlakes.org/publications/reports/07lakeclassification_assessment.pdf

2. Allow no more than a 30' wide viewing access corridor (VAC) for lots greater than 100' wide.
3. Allow only selective cutting in VAC, such as dead, diseased and dying trees and invasive plants.
4. Mitigation affidavits should be required related to buffer violations or building an addition to nonconforming structures and related mitigation. If you're removing invasive species or dying and diseased plants as part of a mitigation plan, these removals are also recorded via affidavit. "A mitigation plan shall be evidenced by an instrument recorded in the office of the County Register of Deeds."115.05(g)(5)d
5. Reference the mitigation section that has more details about restoration plans including specific species of plants and planting densities.
6. The county may allow routine maintenance of vegetation. This means counties also have the option to leave out 7.2(1) from the model ordinance that allows routine maintenance. If a county does this they will not need the "routine maintenance" definition. Another option for counties is to allow routine maintenance of existing lawns and removal of trees only to protect/maintain utilities such as power lines and septic systems. Or routine maintenance of vegetation could be defined as removal or pruning of limbs on live trees.

Many small viewing access corridors

Allowing many small viewing access corridors (VAC) on the same lot makes it difficult to determine what is a VAC, and what is not. Options for addressing this problem include:

- If the lot is less than 100', then a landowner gets 30% of total lot width as the VAC.
- Allow no more than a 30' wide VAC for lots greater than 100' wide.
- Some counties, including Lincoln County, allow VACs on large lots to be combined via CUP (or special permit) and then require no-touch on the remainder of the buffer on the lot.
- If a landowner desires a larger VAC based on common ownership of contiguous lots, the county may require that the commonly owned lots be combined into a single lot.

Buffers on agricultural and forested parcels

Each county can consider having different vegetative buffer zone standards for agricultural and forested parcels because most counties have difficulties enforcing these practices on agricultural land. See the best management practices for riparian areas in Chapter 5 of "Wisconsin Forest Management Guidelines" at: http://dnr.wi.gov/forestry/publications/guidelines/PDF/chapter5.pdf referenced in 115.05(c)2.c.

As an example, adjacent to farmland there are trees growing near a navigable stream that has been ditched. Can the trees be removed? Some counties including Langlade County say in their ordinance that the property is exempt from shoreland vegetation standards if the landowner is in compliance with agricultural BMPs. The landowner is considered in compliance with agricultural BMPs if the land is enrolled in a farm plan approved by the County Land and Water Conservation Department (LWCD). LWCD employees work with landowners, inspect, and give the P&Z an approval when the landowner complies with standards.

E. Frequently Asked Questions (FAQs)

Q: Is a permit required for removal of vegetation within the vegetative buffer zone to manage exotic or invasive species, damaged vegetation, vegetation that must be removed to control disease, or vegetation creating an imminent safety hazard, provided that any vegetation removed under the permit be replaced by replanting in the same area as soon as practicable?

A: There is ambiguity between NR 115.05(c)2.a . and NR 115.05(c)2.d. Counties may choose whether to require permits for removal of vegetation in these instances. It is suggested that county ordinances clarify the definition of "routine maintenance of vegetation" to either include or not include removal of exotic and invasive species, damaged vegetation, vegetation that must be removed to control disease, or vegetation creating an imminent safety hazard. The example vegetation removal and retention application in this guidebook should be edited by the county to match their decision about whether permits are required. If counties require administrative permits for these removals, WCCA suggests the permits have little or no associated cost.

Q: Do you need a permit for removal of trees and shrubs in the vegetative buffer zone to create access and viewing corridors?

A: Not according to NR 115.05(1)(c)2.b. However, counties may require a permit for this activity.

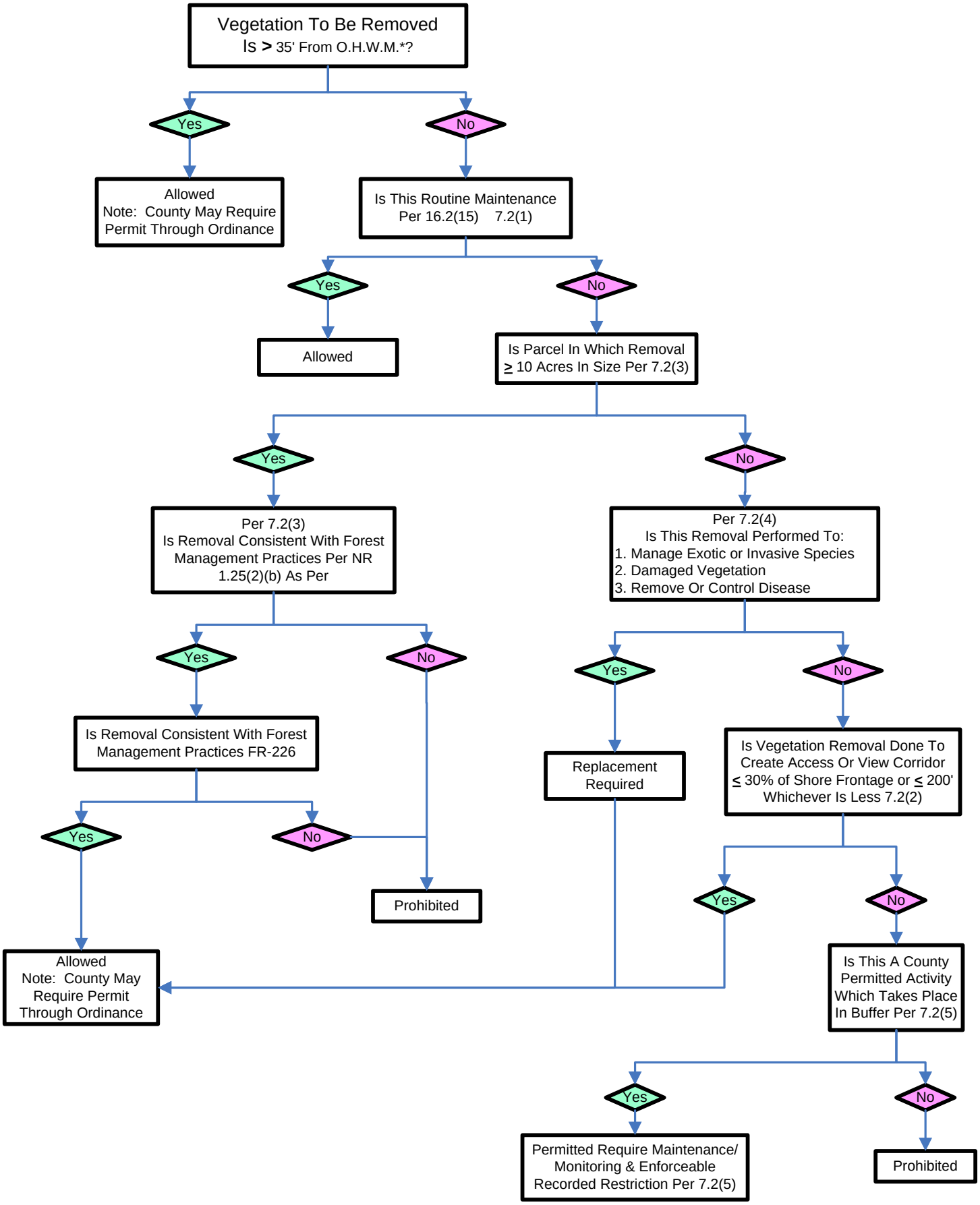
Q: Do you need a permit for additional vegetation management activities in the vegetative buffer zone beyond those listed in NR 115.05(1)(c)2.a-d?

A: Yes. According to NR 115.05(1)(c)2.e. a permit is required. The permit shall require that all management activities comply with detailed plans approved by the county and designed to control erosion by limiting sedimentation into the waterbody, to improve the plant community by replanting in the same area, and to maintain and monitor the newly restored area. The permit also shall require an enforceable restriction to preserve the newly restored area.

Chapter 1:

Appendix

7.0 Vegetative Removal



*O.H.W.M. = Ordinary High Water Mark

7.0 Vegetative Removal.vsd

Shoreland Buffer Vegetation Removal and Replacement Application

This permit is **REQUIRED** by WI Admin Code NR115.05(1)(c)2.d. & e. and Section _____ of the _____ County _____ Ordinance prior to the removal of any vegetation within the shoreland buffer zone, which extends from the ordinary high water mark (generally the water's edge) inland thirty-five (35) feet. This permit is NOT required if the parcel where the vegetation to be removed is ten (10) or more acres in area. (Please contact _____ at _____).

If soil disturbance/grading will be required to complete this project STOP at this point and contact _____ _____.

The undersigned hereby makes application for a Vegetation Removal and Replacement Permit and agrees that all activities shall be in accordance with the requirements of the _____ County General Code of Ordinances and all other applicable ordinances and the laws of the State of Wisconsin., and agree that all replacement plantings will be maintained and preserved as required in NR115.05(1)(c)2.e.

Pursuant to Chapter _____, _____ Ordinance, _____ County _____ Department employees assigned to inspect properties shall have access to said properties to make inspections.

If within _____ months of the date of issuance the proposed activities are not completed, this permit shall expire unless a renewal has been granted by _____.

Parcel I.D. # (from tax rolls)_____
(Include all zeroes and decimal points)

Permit No._____
(Office Use Only)

Town of:_____ ___1/4, ____1/4, Sec. _____, T____N R___E, Lot _____ Block _____ Subdivision_____

Owner _____

Agent/Contractor _____ Date_____ Telephone_____

Mailing Address_____

Property Address_____

Owner/Agent **Signature**_____

1. Reason for vegetation removal request: ☐ Invasive/Exotic ☐ Safety Hazard ☐ Diseased ☐ Damaged ☐ Access/View Corridor ☐ Other _____
2. Layer(s) of vegetation to be removed *(check all that apply)*: ☐ Ground cover ☐ Shrub layer ☐ Tree layer
3. Species or common name of plants/shrubs/trees to be removed & quantity of each: _____
   _____
   _____
4. Species or common name of plants/shrubs/trees to replace those removed & quantity of each. *Please be aware that only plants/shrubs/trees* **native** *to this area of Wisconsin may be planted in the buffer area. (To determine whether proposed plants are native see **website link below):* _____
   _____
   _____
5. On a separate sheet, diagram the lot or parcel showing the ordinary high water mark, property lines, location of any structures, and the location of the vegetation that is to be removed and replaced. Include location and description of measures used to control potential erosion and sedimentation.
6. Activities for removal will begin on or about _____ (Date) and be completed no later than _____ (Date).
7. The required number of replacement plants will be completed no later than _____ (Date).

** Visit http://wisplants.uwsp.edu/namesearch.html, search by common name and look at status to determine whether proposed plants are Native/Introduced/Invasive)

For Office Use Only **For Office Use Only** **For Office Use Only**

Permit **Issued** by_____ _____ Fee $_____ _____
Date — Make checks **payable to** _____ County — Date Started

Permit **Denied** for the Following Reasons: _____

_____ _____
Signature / Date

Inspections

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Date	Inspector	Remarks
_____	_____	_____
_____	_____	_____
_____	_____	_____

Chapter 2:
Impervious Surface Limits

A. NR 115 language including definitions: NR 115.05(1)(e)

(e) *Impervious surfaces.* Counties shall establish impervious surface standards to protect water quality and fish and wildlife habitat and protect against pollution of navigable waters. County impervious surface standards shall apply to the construction, reconstruction, expansion, replacement or relocation of any impervious surface within 300 feet of the ordinary high−water mark of any navigable waterway, and shall require all of the following:

1. 'Calculation of percentage of impervious surface.' Percentage of impervious surface shall be calculated by dividing the surface area of existing and proposed impervious surfaces on the portion of a lot or parcel that is within 300 feet of the ordinary high−water mark by the total surface area of that portion of the lot or parcel that is within 300 feet of the ordinary high−water mark, and multiplied by 100.

2. 'Impervious surface standard.' A county may allow up to 15% impervious surface on the portion of a lot or parcel that is within 300 feet of the ordinary high−water mark.

3. 'Maximum impervious surface.' A county may allow more than 15% impervious surface but not more than 30% impervious surface on the portion of a lot or parcel that is within 300 feet of the ordinary high−water mark, provided that the county issues a permit that requires a mitigation plan approved by the county and implemented by the property owner by the date specified in the permit. The mitigation plan shall include enforceable obligations of the property owner to establish or maintain measures that the county determines adequate to offset the impacts of the impervious surface on water quality, near−shore aquatic habitat, upland wildlife habitat and natural scenic beauty. The mitigation measures shall be proportional to the amount and impacts of the impervious surface being permitted. The obligations of the property owner under the mitigation plan shall be evidenced by an instrument recorded in the office of the County Register of Deeds.

Note: A property owner may seek a variance to a dimensional standard of the county ordinance and a county board of adjustment may review the request pursuant to s. 59.694 (7) (c), Stats.

4. 'Existing impervious surfaces.' For existing impervious surfaces that were lawfully placed when constructed but that do not comply with the standards in subds. 2. and 3., the property owner may do any of the following:

a. maintenance and repair of all impervious surfaces;

b. replacement of existing impervious surfaces with similar surfaces within the existing building envelope;

c. relocation or modification of existing impervious surfaces with similar or different impervious surfaces, provided that the relocation or modification does not result in an increase in the percentage of impervious surface that existed on the effective date of the county shoreland ordinance, and meets the applicable setback requirements in s. NR 115.05 (1) (b).

Note: For example this provision would allow an existing at−grade patio to be removed and replaced with a new building, if the new building meets the shoreland setback requirements.

Note: Nothing in this subsection shall be construed to supersede other provisions in county shoreland ordinances.

NR 115.03(4g)

(4g) "Impervious surface" means an area that releases as runoff all or a majority of the precipitation that falls on it. "Impervious surface" excludes frozen soil but includes rooftops, sidewalks, driveways, parking lots, and streets unless specifically designed, constructed, and maintained to be pervious.

B. DNR model ordinance language from December 14, 2010

9.0 IMPERVIOUS SURFACE STANDARDS. (NR 115.05(1)(e))

9.1 PURPOSE. Establish impervious surface standards to protect water quality and fish and wildlife habitat and to protect against pollution of navigable waters. County impervious surface standards shall apply to the construction, reconstruction, expansion, replacement or relocation of any impervious surface within 300 feet of the ordinary high-water mark of any navigable waterway, and shall require all of the following:

9.2 CALCULATION OF IMPERVIOUS SURFACE. (NR 115.05(1)(e)1.) Percentage of impervious surface shall be calculated by dividing the surface area of existing and proposed impervious surfaces on the portion of a lot or parcel that is within 300 feet of the ordinary high-water mark by the total surface area of that portion of the lot or parcel that is within 300 feet of the ordinary high-water mark, and multiplied by 100.

9.3 IMPERVIOUS SURFACE STANDARD. (NR 115.05(1)(e)2.) Allow up to 15% impervious surface on the portion of a lot or parcel that is within 300 feet of the ordinary high-water mark.

9.4 MAXIMUM IMPERVIOUS SURFACE. (NR 115.05(1)(e)3.) Allow more than 15% impervious surface but not more than 30% impervious surface on the portion of a lot or parcel that is within 300 feet of the ordinary high-water mark.

(1) A permit can be issued for development that exceeds 15% impervious surface but not more than 30% impervious surfaces with a mitigation plan that meets the standards found in section 12.0.

9.5 EXISTING IMPERVIOUS SURFACES. (NR 115.05(1)(e)4.) For existing impervious surfaces that were lawfully placed when constructed but that do not comply with the impervious surface standard in section 9.3 or the maximum impervious surface standard in section 9.4, the property owner may do any of the following:

(1) maintain and repair the existing impervious surfaces;

(2) replace existing impervious surfaces with similar surfaces within the existing building envelope;

(3) relocate or modify an existing impervious surface with similar or different impervious surface, provided that the relocation or modification does not result in an increase in the percentage of impervious surface that existed on the effective date of the county shoreland ordinance, and the impervious surface meets the applicable setback requirements in s. Wis. Admin. Code NR 115.05 (1) (b).

9.51 This section of the ordinance shall not be construed to supersede other provisions in the county shoreland ordinance. Maintenance, reconstruction, relocation and expansion of existing structures must comply with other provisions in the county shoreland ordinance, the shoreland setback standards in sections 6.1 or 6.2 and the nonconforming structure provisions of sections 11.0 through 11.8.

Policy Option: Definitions

(8) "Structure" (choose one)

- Anything constructed or erected, the use of which requires permanent or temporary location on the ground, or attached to something having a permanent or temporary location on the ground, including but not limited to any building, dwelling, manufactured building, manufactured home, mobile home, house trailer, recreational vehicle, boathouse, boat shelter, advertising sign, deck, patios, driveways, fences, retaining walls, or other improvements or any part of

such structure. A structure includes any permanent or temporary appurtenance attached thereto**.**

- Means any man-made object with form, shape and utility, either permanently or temporarily attached to or placed upon the ground, river bed, stream bed or lakebed. (NR 116.03(45))

It is important to define "structure" specifically so that landowners and zoning staff are clear on what is and is not included. The definitions above do not address :

- walkways
- steps
- sidewalks
- fences
- dog houses
- bird houses
- mail boxes
- flag poles
- fire rings
- wood piles

Counties are advised to sort through the list above and other items that have come up in their county. For each item, either add it to your "structure" definition, or state in the ordinance that the item is not a structure.

C. Additional Resources

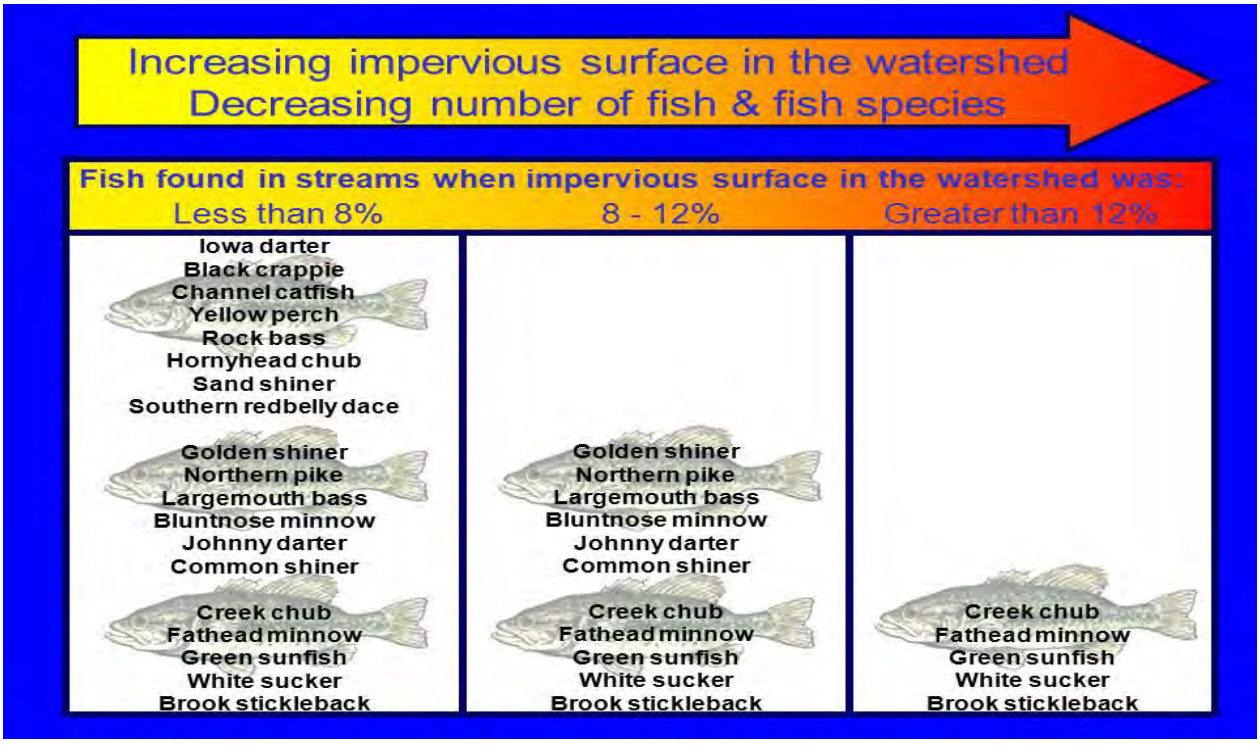
Appendix 2 contains the following impervious surface resources recommended by the WCCA shoreland committee:

- 9.0 Impervious surface flow chart
- Impervious surface calculations form
- Impervious surface diagrams showing 15% and 30% IS

D. Guidance: Unforeseen Difficulties

Some counties are already regulating impervious surfaces

According to a 2010 inventory, at least 21 counties currently limit impervious surface areas on shoreland lots, including Adams, Bayfield, Calumet, Chippewa, Dane, Door, Fond du Lac, Forest, Green Lake, Langlade, Lincoln, Polk, Price, Rusk, Sawyer, Shawano, Sheboygan, Vilas, Washington, Waukesha, and Waupaca.[1] These existing impervious surface standards are due in part to counties responding to scientific studies which found that impervious surfaces above certain levels do damage to lakes and streams. For example, a study of 47 warm water streams in southeast Wisconsin found that fish and insect populations decline dramatically when impervious surfaces exceed about 8-10% of the watershed. Streams with more than 12% imperviousness have consistently poor fish communities. [2]



[1] 2010. Local Innovation in Shoreland Management. Wisconsin Lakes. www.wisconsinlakes.org/policy/pdf/CountyImpvSurfaceMitigationOrdinanceExamples.pdf

[2] 2003. Shoreland development density and impervious surfaces (summary of research). Center for Land Use Education. Page 13. www.uwsp.edu/cnr/landcenter/pdffiles/Imp_Surf_Shoreland_Dev_Density.pdf Research studies: Wang, L., J. Lyons, P. Kanehl, R. Bannerman, and E. Emmons 2000. Watershed Urbanization and Changes in Fish Communities in Southeastern Wisconsin Streams. *Journal of the American Water Resources Association*. 36:5(1173-1187); Wang, L., J. Lyons, and P. Kanehl 2001. Impacts of Urbanization on Stream Habitat and Fish Across Multiple Spatial Scales. *Environmental Management*. 28(2):255-266.

In a study of 164 Wisconsin lakes, researchers found that both the number of fish species and the number of small-bodied intolerant fishes was lower when there were higher levels of impervious surfaces within 330 ft of the water or within the entire watershed of the lake. Intolerant fish are species that are sensitive to diminished water quality, sedimentation, and other forms of habitat degradation.[3] A county ordinance could reference these studies or make a general statement at the beginning of their impervious standard, as Sawyer County does

> *4.422 IMPERVIOUS SURFACE LIMITATIONS*
> *INTRODUCTION: Extensive research shows that shoreland development results in increased quantities and velocities of runoff that may overwhelm infiltration capacity and transport sediment, nutrients and other pollutants directly to surface waters if proper management is not employed.*[4]

Options for county flexibility

Counties have the flexibility to reduce the impervious surface standard where mitigation is required to less than 15%. For example a county may require mitigation if impervious surfaces exceed 10%. Another opportunity for county flexibility is to identify a square footage in addition to a percentage impervious surface that may not be exceeded. For instance, a county could limit impervious surfaces on shoreland lots within 300 feet of the OHWM to no more than 4,000 square feet or 15% of the lot area, whichever is less.

Definitions of impervious surfaces may

- leave flexibility, as the NR 115 definition does
- be more restrictive than NR 115
- be more specific than the NR 115 definition and address gravel, specific types of permeable pavers, etc. (DNR will review draft ordinances, and may disagree with a county's standard of what is pervious and what is not.)
- further clarify with standards like diverting water
- clarify that engineered surfaces that are pervious can be used if at least 51% of the runoff can pass through
- include maintenance agreements related to impervious surfaces

Impervious surface definitions are not subject to soil types.

Types of surfaces to consider when crafting your impervious surface definition

[3] Garrison, Paul et al. Implementation and interpretation of lakes assessment data for the Upper Midwest. Final report to the U.S. EPA. Grant No. X7-83254601. November 2008. pp.47-48

[4] www.sawyercountygov.org/Departments/ZoningandConservation/tabid/70/Default.aspx

Some counties considered these surfaces to be impervious and some considered them pervious.

1. Open decks with at least a 1/4 inch space between deck boards with a pervious surface below. Many counties considered this to be pervious.

2. Grass-crete, pavers with voids that are filled with soil and then planted. If properly installed and vegetated correctly these can be considered pervious. Most counties seem to allow them or consider them pervious.

3. Gravel. Typical gravel materials used for roads and parking lots are engineered and compacted to withstand heavy loads. These compacted gravel materials form a seal through which water will not readily infiltrate. Runoff from gravel is similar to paved surfaces with only a slight reduction in runoff. It would be difficult to call a typical gravel driveway pervious. Many counties consider this to be impervious.

4. Permeable Paver System. The key word here is system. The pavers are just a cap for the pervious system below. They are expensive and need to be installed properly and maintained. The WCCA shoreland committee has concerns about products that are marketed as pervious and depend on installation, maintenance and long-term compliance. If counties are going to allow the pervious pavers, they should consider an operation and maintenance agreement. Product representatives have recommended that on-site inspections should be required to ensure proper installation, and to ensure proper maintenance is occurring at 5 and 10 years. They require that contractors or product representatives ensure the systems stay pervious. Some counties consider permeable paver systems to be pervious and others do not.

5. Porous Asphalt. Expensive. Similar to #3 above.

6. Porous Concrete. Expensive. Similar to #3 above.

Maintenance and repair for pervious surfaces

Counties may want to have an additional definition for maintenance and repair for purposes of maintaining and repairing existing impervious surfaces. The maintenance and repair definition in the model ordinance, which is optional, is focused on buildings and is not looking at patios or driveways.

Impervious surface calculations for roads

The WCCA shoreland committee suggests this approach to calculating the impervious surfaces for roads:

- public roads are not included in impervious surface calculations because landowners have no control over their size or location

- private roads within 300 feet of the OHWM are included in impervious surface calculations if they are impervious
-

Recommendation to edit "Existing impervious surfaces" which is section 9.5(2) in the model ordinance

To clarify confusion between NR 115.05(1)(g)6 which addresses replacement and relocation of nonconforming principal structure and NR 115.05(1)(e)4 which addresses existing impervious surfaces the WCCA shoreland committee recommends counties edit 9.5(2) in the impervious surface section of the model ordinance from

a. "replace existing impervious surfaces with similar surfaces within the existing building envelope;"

to

b."replace existing impervious surfaces with similar surfaces that meet applicable setbacks;"

because this would reduce confusion and would be legally allowed.

Note that the recommended language b. will not allow:

- a gravel driveway or portion of the driveway within the shoreland setback to be surfaced in asphalt or concrete, and
- failing sidewalks or patios within the shoreland setback to be replaced, which may lead to debates over what is allowed under the "maintenance and repair" definition.

Counties may adjust the language in b. to not allow replacement of buildings within the shoreland setback but allow replacement of patios, driveways, and sidewalks within the shoreland setback.

Who will measure the impervious surfaces and how will they do it?

There are a number of possible approaches to who will measure impervious surfaces and how they will do it. The following table outlines different approaches and the advantages and disadvantages of each approach including: amount of county zoning staff time needed, accuracy of measurements and potential bias of measurements.

Option for measuring impervious surface	County zoning staff time needed	Accuracy of measurements	Potential bias
Surveyor, engineer, landscape architect, contractor	Clarify what is and is not impervious. Does initial training on impervious surfaces happen in the office or in the field?	High	Paid by homeowner
County staff uses GIS	Depends on GIS system and county staff experience using the system.	Based on your county's imperious surface definition, can you differentiate what is impervious and what is not from aerial photos? How recent are aerial photos? What level of resolution? How accurate are measurements from your GIS systems? Can the OHWM be accurately determined?	Paid by county
County zoning staff goes to site and does measurements	Time (and gas) for travel, measuring and recording	High	Paid by county
Applicant	Clarify what is and is not impervious. Does training on impervious surfaces happen in the office or in the field? Training regarding measurement and recording.	Variable	May skew to benefit self

A county could decide to use a combination of these approaches to measure impervious surfaces. For instance, they might begin by relying on measurements by applicants combined with checking aerial photos. If the measurements by the applicant do not match what is seen on the aerial photos, or if the percentage impervious is near the impervious surface threshold, county zoning staff may go to the site to do measurements.

The WCCA shoreland committee strongly recommends that counties seriously consider having a permit for impervious surfaces less than 15% of the lot for tracking and enforcement reasons NR 115 does not require a permit for impervious surfaces on lots with less than 15% imperviousness. However, counties have the authority under NR 115 to require permits for any impervious surfaces on lots with less than 15% impervious surfaces. It helps to have a baseline of the existing impervious surfaces in order to do calculations when they make a change on their property.

The model ordinance provides the following suggested definitions of "structure"

"Structure" (choose one)

- Anything constructed or erected, the use of which requires permanent or temporary location on the ground, or attached to something having a permanent or temporary location on the ground, including but not limited to any building, dwelling, manufactured building, manufactured home, mobile home, house trailer, recreational vehicle, boathouse, boat shelter, advertising sign, deck, patios, driveways, fences, retaining walls, or other improvements or any part of such structure. A structure includes any permanent or temporary appurtenance attached thereto.
- Means any man-made object with form, shape and utility, either permanently or temporarily attached to or placed upon the ground, river bed, stream bed or lakebed. (NR 116.03(45))

These suggested definitions include driveways, patios, decks, etc. Some impervious surfaces out there that were never considered a structure before are now considered a structure, and therefore may require permits. Counties could adopt a different definition for "structure." Items defined as structures in a county ordinance, which may include driveways or patios, may be subject to the 10 year statute of limitations, s. 59.692(1t) Wis. Stats.

If a county considers gravel driveways to be impervious as recommended on page 2-7, and a property owner paves or blacktops their driveway, the paving falls under either the replacement provision of the existing impervious surface provisions under NR 115.05(1)(e))4.b. because gravel has a very similar runoff curve to pavement or blacktop, or the paving could fit

under the relocation/modification of an existing impervious surface. If a county considers gravel driveways to be impervious, they could clearly spell out that paving or blacktopping an existing gravel driveway does not require a permit as long as the size of the driveway remains the same.

If a county does not consider gravel driveways to be impervious and a property owner blacktops a gravel driveway he/she will be increasing their impervious surface and will need a permit if they exceed 15% impervious surface.

Permits for impervious surfaces (IS)

According to 115.05(e)3 a permit is required for impervious surfaces between 15-30%. Counties may choose whether this permit is a separate IS permit, or is included in a zoning permit, land use permit, or fill and grade permit. The permit must include a date by which the mitigation plan is required to be implemented by the property owner.

E. Frequently Asked Questions (FAQs)

Q: How do you measure impervious surfaces for wet boathouses or other structures at or near the OHWM?

A: If the boathouse is completely wet, then it does not count toward impervious surface. If the boathouse extends upland beyond the OHWM, count the portion of the boathouse upland of the OHWM as impervious surface.

Q: May an existing accessory structure within the setback be rebuilt at its existing location within its three-dimensional building envelope?

A: DNR legal opinion - Yes, an existing accessory structure, which is located within the setback, could be rebuilt at its existing location within its three-dimensional building envelope under NR 115.05(1)(e)4.b. However, it is important to remember that all other provisions of the county's ordinance still apply to these structures. These nonconforming accessory structures would still be regulated as a nonconforming structure under s. 59.69(10) and a county could limit the reconstruction of these structures within the shoreland zone.

The WCCA shoreland committee strongly recommends not allowing expansion or rebuilding of nonconforming accessory structures. Example language to accomplish this is provided in the nonconforming structure section. In order to avoid repair vs. replacement debates, counties are advised to define in the ordinance how much of a building or structure can be repaired before it is considered replacement. This could be done in the "maintenance and repair" definition or in the nonconforming structure language. Bayfield County ordinance 13-1-40(c)(3)d. addresses this topic in the nonconforming structure language by stating:

> *The structure may not be substantially reconstructed by replacement of exterior walls constituting more than twenty-five percent (25%) of the perimeter of the structure over the life of the structure. The owner shall provide documentation of the perimeter of the structure at the time this provision took effect and any reconstruction shall be documented by recorded affidavit.*

Q: Does this mean that a patio could be replaced with a deck or shed?

A: Replacement of an impervious surface is only allowed under NR 115.05(1)(e)4.b if the replacement occurs "within the existing building envelope". Because "building envelope" is defined at NR 115.03(1p) as a three dimensional space, the deck may and the shed surely would be outside of the original building envelope. However, replacement and modification can occur pursuant to NR 115.05(1)(e)4.c. if the new structure does not increase the percentage of impervious surface and meets applicable setback requirements.

Q: Can an owner keep the existing impervious percentage if greater than 30% lot coverage and the structure is greater than 75' from the ordinary high water mark?

A: Yes, if it legally existed prior to the adoption of the ordinance. For example, if a property owner has 50% existing impervious area and wishes to relocate a 8'x10' shed with an 8'x10' shed, patio, deck, dwelling addition, etc… that is 78 feet from the OHWM he could do so without mitigation.

Q: Can an owner can keep the existing impervious percentage if there is greater than 30% lot coverage and they want to replace an accessory structure that is less than 75 feet from the ordinary high water mark but meets setback averaging?

A: No, setback averaging does NOT apply to accessory structures per NR115.(1)(b)(1) unless specified per NR115.05(1)1m.

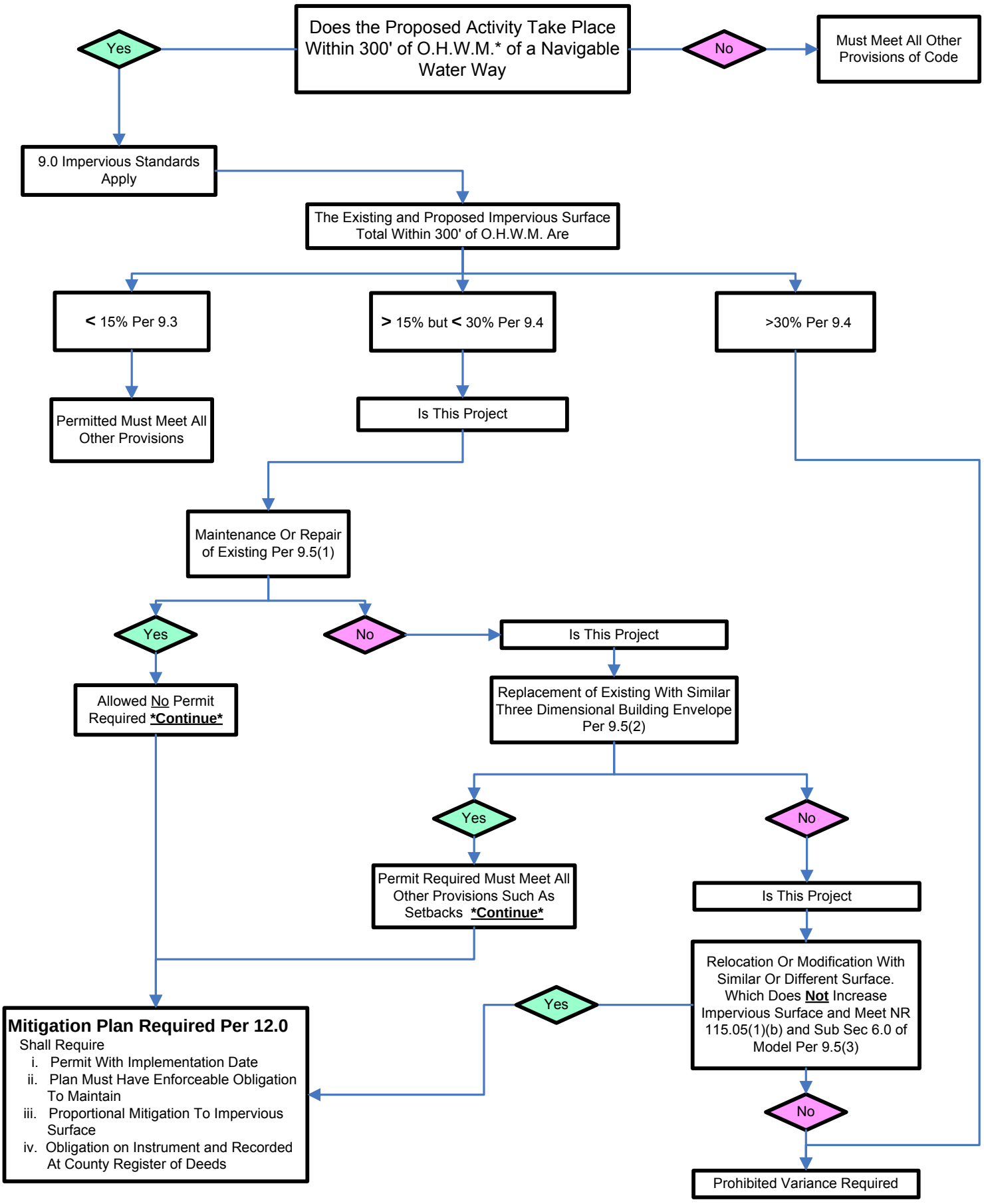
Q: Is a deck considered impervious or pervious?

A: NR115.03(4g) provides that the deck is impervious if it releases as runoff all or a majority of the precipitation that falls on it. The county zoning administrator must determine the degree of runoff afforded by the deck's specifications.

Chapter 1:

Appendix

9.0 Impervious Surface



*O.H.W.M. = Ordinary High Water Mark

9.0 Impervious (DFT 1)-RV1.vsd

_____County
Impervious Surface Calculations

These calculations are **REQUIRED** per WI Admin Code NR115.05 (1) (e) and Section _____ of the _____ County Ordinance. The undersigned hereby makes application for construction, reconstruction, expansion, replacement or relocation of any impervious surface within 300 feet of the ordinary high water mark and agrees that all activities shall be in accordance with the requirements of the _____ County General Code of Ordinances and all other applicable ordinances and the laws of the State of Wisconsin.

Pursuant to Chapter _____, Section _____ of the _____ County Zoning Ordinance, _____ Department employees assigned to inspect properties shall have access to said properties to make inspections.

Parcel Identification # _____

Town of: _____ ____1/4, ___1/4, Sec. ____, T___N R__E, Lot ____ Block _____ Subdivision _____

Owner _____

Agent/Contractor _____ Date_____Telephone_____

Mailing Address_____

Property Address_____

Owner/Agent Signature_____

Impervious Surface: An area that releases as runoff all or a majority of the precipitation that falls on it. "Impervious surface" excludes frozen soil but includes rooftops, sidewalks, driveways, parking lots and streets unless specifically designed, constructed and maintained to be pervious.

Calculation of Impervious Surface: Percentage of impervious surface shall be calculated by dividing the surface area of existing and proposed impervious surfaces on the portion of a lot or parcel that is within 300 feet of the ordinary high water mark by the total surface area of that portion of the lot or parcel that is within 300 feet of the ordinary high water mark, and multiplied by 100.

Impervious Surface Standard: Allow up to 15% impervious surface on the portion of a lot or parcel that is within 300 feet of the ordinary high water mark.

Maximum Impervious Surface: Allow more than 15% impervious surface but not more than 30% impervious surface on the portion of a lot or parcel that is within 300 feet of the ordinary high water mark. A permit can be issued for development that exceeds 15% impervious surface but not more than 30% impervious surfaces with a mitigation plan that meets the requirements of the _____County Ordinance.

Existing Impervious Surfaces: For existing impervious surfaces that were lawfully placed when constructed but that do not comply with the standards in Section(s) _____, the property owner may do any of the following. A zoning permit and onsite inspection is required pursuant to Section 9.32.

a. Maintenance and repair of all impervious surfaces;
b. Replacement of existing impervious surfaces with similar surfaces within the existing building footprint;
c. Relocation or modification of existing impervious surfaces with similar or different impervious surfaces, provided that the relocation or modification does not result in an increase in the percentage that existed on the effective date of the county shoreland ordinance, and meets the applicable setback requirements in Section 9.94(A).

Impervious Surface Item	Dimensions	Area (square footage)
Existing house		
Existing accessory building/garage		
Existing Sidewalk (s), Patio (s) & Deck (s)		
Existing Covered Porch (es), Driveway & Other Structures		
Proposed addition/house		
Proposed accessory building/garage		
Proposed Sidewalks (s) & Patio (s)		
Proposed Covered Porch (es) & Deck (s)		
Proposed Driveway		
Proposed Other structures		
Total:		

a. Total square footage of lot area located within 300 feet of the ordinary high water mark: _____

b. Total impervious surface area: _____

c. Percentage of impervious surface area: 100 x (b)/a =

If the proposed impervious surface area is greater than 15% mitigation is required

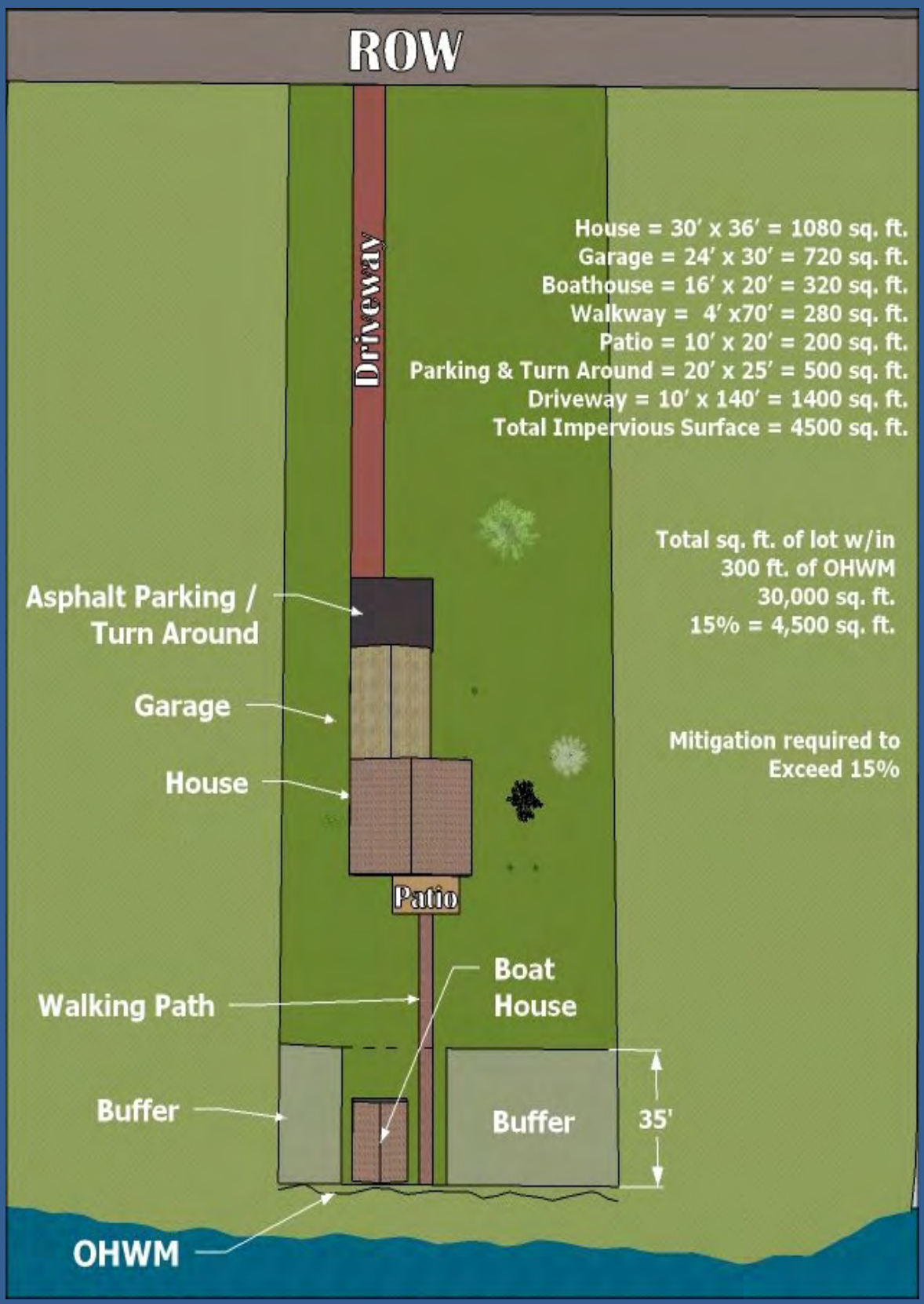
Total square footage of existing impervious surface being utilized: _____

Total square footage of additional impervious surface allowed: _____

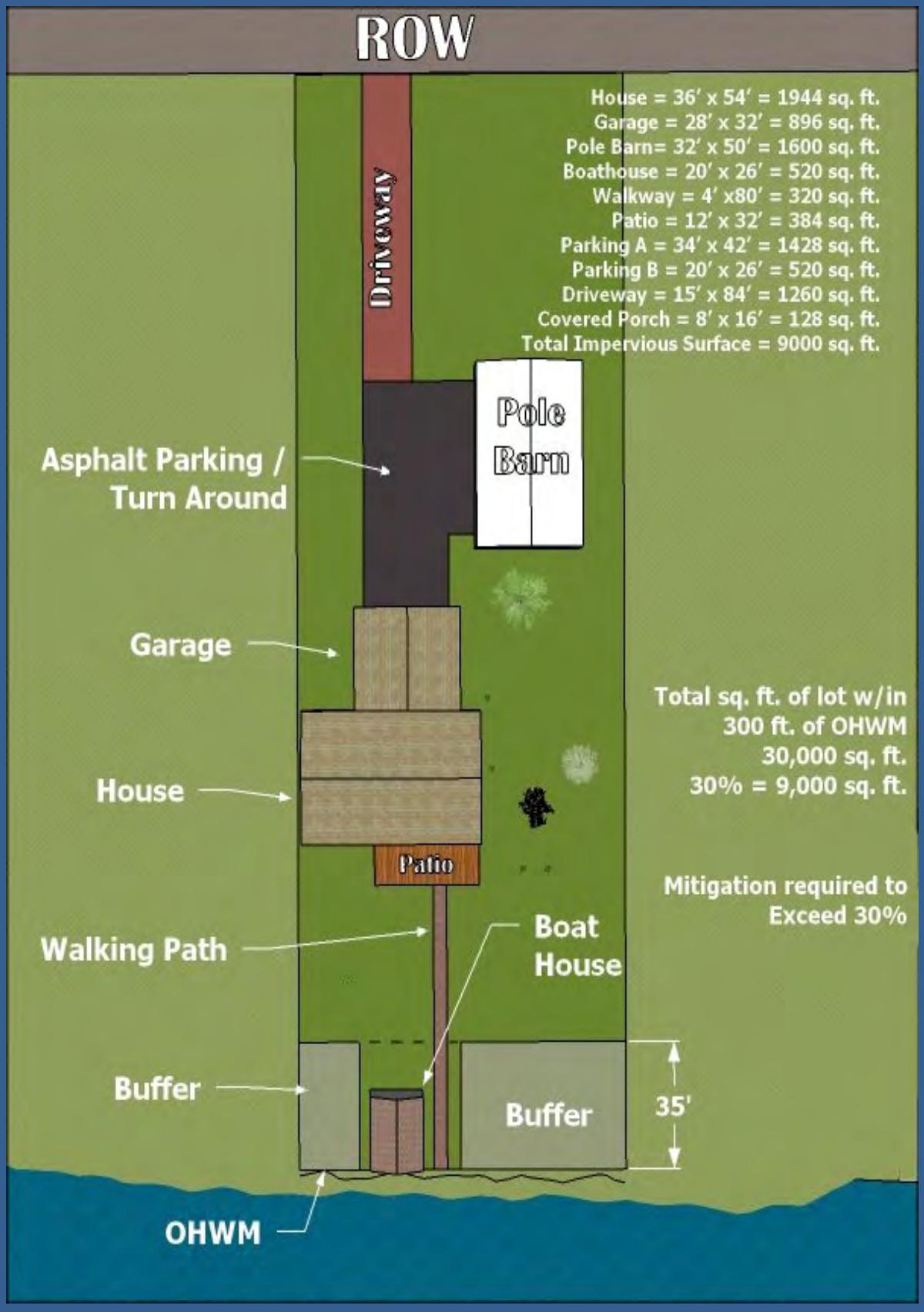
Inspections

Date	Inspector	Remarks
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Lot with 15% Impervious Surface within 300 feet of OHWM



Lot with 30% Impervious Surface within 300 feet of OHWM



Chapter 3:
Mitigation

A. NR 115 Language Including Definitions

NR115.03(4)(r): "Mitigation" means balancing measures that are designed, implemented and function to restore natural functions and values that are otherwise lost through development and human activities

Mitigation is required in the following sections:

- 115.05(1)(e)3: Maximum impervious surface
- 115.05(1)(g)5: Vertical expansion of nonconforming principal structure
- 115.05(1)(g)6: Replacement or relocation of nonconforming principal structure

Mitigation is optional for:

- 115.05(1)(g)5m: Expansion of nonconforming principal structure beyond setback

Under the following sections, mitigation shall offset the impacts and be proportional to the amount and impacts of the proposed impervious surface or building:

- 115.05(1)(e)3: 'Maximum impervious surface.' A county may allow more than 15% impervious surface but not more than 30% impervious surface on the portion of a lot or parcel that is within 300 feet of the ordinary high−water mark, provided that the county issues a permit that requires a mitigation plan approved by the county and implemented by the property owner by the date specified in the permit. The mitigation plan shall include enforceable obligations of the property owner to establish or maintain measures that the county determines adequate to offset the impacts of the impervious surface on water quality, near−shore aquatic habitat, upland wildlife habitat and natural scenic beauty. The mitigation measures shall be proportional to the amount and impacts of the impervious surface being permitted. The obligations of the property owner under the mitigation plan shall be evidenced by an instrument recorded in the office of the County Register of Deeds.
- 115.05(1)(g)5: 'Vertical expansion of nonconforming principal structure.' An existing principal structure that was lawfully placed when constructed but that does not comply

with the required building setback under par. (b) 1. may be expanded vertically, provided that all of the following requirements are met:

d. The county shall issue a permit that requires a mitigation plan that shall be approved by the county and implemented by the property owner by the date specified in the permit. The mitigation plan shall include enforceable obligations of the property owner to establish or maintain measures that the county determines adequate to offset the impacts of the permitted expansion on water quality, near−shore aquatic habitat, upland wildlife habitat and natural scenic beauty. The mitigation measures shall be proportional to the amount and impacts of the expansion being permitted. The obligations of the property owner under the mitigation plan shall be evidenced by an instrument recorded in the office of the County Register of Deeds.

- 115.05(1)(g)6: 'Replacement or relocation of nonconforming principal structure.' An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under par. (b) 1. may be replaced or relocated on the property provided all of the following requirements are met:

  e. The county shall issue a permit that requires a mitigation plan that shall be approved by the county and implemented by the property owner by the date specified in the permit. The mitigation plan shall include enforceable obligations of the property owner to establish or maintain measures that the county determines are adequate to offset the impacts of the permitted expansion on water quality, near−shore aquatic habitat, upland wildlife habitat and natural scenic beauty. The mitigation measures shall be proportional to the amount and impacts of the replaced or relocated structure being permitted. The obligations of the property owner under the mitigation plan shall be evidenced by an instrument recorded in the office of the County Register of Deeds.

Mitigation is optional under this section:

- 115.05 (1)(g)5m. 'Expansion of nonconforming principal structure beyond setback'. An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under par. (b) 1., may be expanded horizontally, landward or vertically provided that the expanded area meets the building setback requirements in par. (b) 1., and that all other provisions of the shoreland ordinance are met. A mitigation plan is not required solely for expansion under this paragraph, but may be required under par. (e) 3.

B. DNR model ordinance language from December 14, 2010

9.4 MAXIMUM IMPERVIOUS SURFACE. (NR 115.05(1)(e)3.) Allow more than 15% impervious surface but not more than 30% impervious surface on the portion of a lot or parcel that is within 300 feet of the ordinary high-water mark.

(1) A permit can be issued for development that exceeds 15% impervious surface but not more than 30% impervious surfaces with a mitigation plan that meets the standards found in section 12.0.

11.5 VERTICAL EXPANSION OF NONCONFORMING PRINCIPAL STRUCTURE. (NR 115.05(1)(g)5.) An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback per section 6.1 may be expanded vertically, provided that all of the following requirements are met:

(4) The county shall issue a permit that requires a mitigation plan that shall be approved by the county and implemented by the property owner by the date specified in the permit. The mitigation plan shall meet the standards found in section 12.0.

11.7 REPLACEMENT OR RELOCATION OF NONCONFORMING PRINCIPAL STRUCTURE. (NR 115.05(1)(g)6.) An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback per section 6.1 may be replaced or relocated on the property provided all of the following requirements are met:

(5) The county shall issue a permit that requires a mitigation plan that shall be approved by the county and implemented by the property owner by the date specified in the permit. The mitigation plan shall meet the standards found in section 12.0. including enforceable obligations of the property owner to establish or maintain measures that the county determines are adequate to offset the impacts of the permitted expansion on water quality, near-shore aquatic habitat, upland wildlife habitat and natural scenic beauty. The mitigation measures shall be proportional to the amount and impacts of the replaced or relocated structure being permitted. The obligations of the property owner under the mitigation plan shall be evidenced by an instrument recorded in the office of the County Register of Deeds.

Policy Option:

The WCCA Shoreland Committee recommends adopting this version of policy option 11.8, revised from the model ordinance.

11.8 MAINTENANCE OF NONCONFORMING ACCESSORY STRUCTURES. Accessory structures that were legally constructed before the adoption of this chapter may be maintained and repaired but shall not be expanded or rebuilt unless authorized by s. 59.692(1s) Wisconsin Stats. or unless they are made to conform to all other provisions of this ordinance.

12.0 MITIGATION. (s. 59.692(1v), Stats, NR 115.05 (1)(e)3., (g)5., (g)6.) When the county issues a permit requiring mitigation under sections 6.11(b)(4), 9.4, 11.5, 11.7, the property owner must submit a complete permit application, that is reviewed and approved by the county. The application shall include the following:

(1) A site plan that describes the proposed mitigation measures:
   a) The site plan shall be designed and implemented to offset the impacts of the permitted expansion or replacement on water quality, near-shore aquatic habitat, upland wildlife habitat and natural scenic beauty.
   b) The mitigation measures shall be proportional to the amount and impacts of the expansion being permitted
(2) An implementation schedule and enforceable obligation on the property owner to establish and maintain the mitigation measures.
   a) The enforceable obligations shall be evidenced by an instrument recorded in the office of the Register of Deeds prior to issuance of the permit.

Note: This model ordinance language was edited to reflect the state minimum standard that mitigation offset the impacts of the permitted expansion or replacement. See the guidance section of this chapter for alternative mitigation language for counties that choose to go beyond the minimum standard.

Policy Option:

12.1 RECORDING REQUIREMENT. The affidavit described in 12.0(2)a), as modified by the county during the permitting process, must be recorded with the Register of Deeds in order for the permit to be effective so that work may commence. If the affidavit is not recorded within one year the permit is null and void.

NOTE: Each county must select a mitigation system and codify that system in this ordinance that states the exact requirements.

There is also a computer program available from WDNR titled "mitigation calculator" or a county may propose their own version to meet the State minimums. In all cases the mitigation shall be proportional in scope. The WCCA shoreland committee and DNR strongly recommend that counties do not use the calculator. DNR will not provide technical support for the calculator.

Appendix 3 of this guidebook provides a recommended mitigation affidavit form.

11.6 EXPANSION OF A NONCONFORMING PRINCIPAL STRUCTURE BEYOND SETBACK. (NR 115.05(1)(g)5m.) An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under section 6.1, may be expanded horizontally, landward or vertically provided that the expanded area meets the building setback requirements per section 6.1 and that all other provisions of the shoreland ordinance are met. A mitigation plan is not required solely for expansion under this paragraph, but may be required per section 9.0.

Policy Option: (to use this policy option, the last sentence must be deleted from 11.6)

> 1) The county shall issue a permit that requires a mitigation plan that shall be approved by the county and implemented by the property owner by the date specified in the permit. The mitigation plan shall meet the standards found in section 12.0

16.2(11) "Mitigation" (NR 115.03(4r)) means balancing measures that are designed, implemented and function to restore natural functions and values that are otherwise lost through development and human activities. *Natural functions are those listed in ch. 281.31.*

C. Additional Resources

Appendix 3 contains the following mitigation resources recommended by the WCCA shoreland committee:

- Mitigation language from counties.
- Affidavit form to record mitigation plan
- Example mitigation plan

D. Guidance: Unforeseen Difficulties

Each county needs to discuss their goals for mitigation and staffing realities before deciding what mitigation measures they will require. Ensuring that a nonconforming accessory structure was removed as a mitigation measure is much easier for a short-staffed zoning office than creating a buffer restoration plan and ensuring it is planted and maintained.

DNR sent county zoning departments a letter on March 30, 2011 with a subject of "Shoreland Mitigation - Suggestions and Resources for County Zoning Ordinances." Please refer to this guidance when crafting ordinance language.

NR 115.05(g) states that mitigation plans are to offset the impacts of the permitted expansion or replacement. This is a statewide minimum standard. Counties have always been allowed to go above and beyond. Minimally, mitigation must be proportional to the impacts of a proposed project.

Several County Boards in Wisconsin have adopted lake classification systems and shoreland zoning ordinance language which includes more mitigation than that required to offset the impacts of the permitted expansion or replacement. The December 14, 2010 model ordinance language in 12.0 allows counties to go beyond the minimum standard for mitigation and states:

> 12.0 MITIGATION. (s. 59.692(1v), Stats, NR 115.05 (1)(e)3., (g)5., (g)6.) When the county issues a permit requiring mitigation under sections 6.11(b)(4), 9.4, 11.5, 11.7, the property owner must submit a complete permit application, that is reviewed and approved by the county. The application shall include the following:
> (1) A site plan that describes the proposed mitigation measures
> a) The site plan shall be designed and implemented to restore natural functions lost through development and human activities
> b) The mitigation measures shall be proportional in scope to the impacts on water quality, near-shore aquatic habitat, upland wildlife habitat and natural scenic beauty.
> (2) An implementation schedule and enforceable obligation on the property owner to establish and maintain the mitigation measures.
> a) The enforceable obligations shall be evidenced by an instrument recorded in the office of the Register of Deeds prior to issuance of the permit.

Potential mitigation measures:

- Buffer maintenance
- Buffer restoration

    - Deeper
    - Narrowing a view corridor
    - Denser (3 layers)
- Evaluation/replacement of failing POWTS
- Runoff infiltration
    - Rain gardens
    - Infiltration structures
    - Directing gutters on pervious surfaces
    - French drains
    - Retention/detention basins
    - Diverting overland flows
    - Pervious pavers
- Wetland restoration
- Elimination of NC accessory structures
- Elimination or reduction of impervious surfaces
- Relocating a NC principal structure to a conforming location
- Removal of other shoreland modifications/items such as fire rings, seawalls, beaches, impervious surfaces
- Minimization of erosion and sedimentation reduction
- Color of structure
- Reducing shoreland lighting

<u>A note about buffer restoration as a mitigation measure</u>

Buffer restoration with native vegetation is appropriate in many situations. However, in some instances soils, steep slopes, stormwater runoff and/or strong wave action lead to an area near the shoreline that cannot be adequately stabilized with vegetation alone. If stormwater runoff

is eroding the bank, it may be more effective to find a way to infiltrate the runoff (redirecting or spreading out the runoff or creating infiltration areas) than restoring a buffer that may get washed out. If you suspect that engineering or hard armoring or other structural stabilization is needed, check with DNR regarding permits. Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) also has conservation engineers who may be able to help assess difficult sites http://datcp.wi.gov/Environment/Land_and_Water_Conservation/Conservation_Engineering/index.aspx .

Mitigation measures sorted according to the impacts they address

Column A: Maximum impervious surface 115.05(1)(e)3	**Column B: Vertical expansion of NC principal structure: 115.05(1)(g)5.d**	**Column C: Replacement or relocation of NC principal structure: 115.05(1)(g)6.e**	**Column D: Expansion of NC principal structure beyond setback: 115.05(1)(g)5m (mitigation optional)**
Reduce impervious surfaces and associated runoff: • Elimination or reduction of impervious surfaces • Elimination of NC accessory structures • Relocating a NC principal structure to a conforming location	Vertical expansion close to shore reduces natural beauty. Protect/restore natural beauty: • Elimination of NC accessory structures • Natural color of principal or accessory structure(s) • Reducing shoreland lighting • Removal of other shoreland modifications/items such as fire rings, seawalls, beaches	Replacing or relocating a NC principal structure may • increase compaction and runoff from construction area • reduce natural beauty • reduce upland habitat	Expansion of a NC principal structure beyond the setback may • increase compaction and runoff from construction area • increase impervious surface • reduce natural beauty

	• Buffer restoration
	  o Deeper
	  o Narrowing a view corridor
	  o Denser (3 layers)
	• Wetland restoration
		Choose mitigation measures from columns A & B that correspond with expected effects of replacement or relocation of NC principal structure.	• reduce upland habitat
			
			Choose mitigation measures from columns A & B that correspond with expected effects of NC principal structure expansion.

Runoff infiltration • Rain gardens • Infiltration structures • Directing gutters on pervious surfaces • French drains • Retention/detention basins • Diverting overland flows • Pervious pavers	Vertical expansion close to shore may reduce upland wildlife habitat and eventually aquatic habitat (tree falls). Increase habitat through • buffer restoration • sideyard restoration • wetland restoration		

Capture and cleanse runoff with buffer restoration • Deeper • Narrowing a view corridor • Denser (3 layers)			
Buffer maintenance			
Wetland protection or restoration			
Runoff increases nutrient loading to waters. Reduce nutrient loading by • Evaluation/replacement of failing POWTS			

County mitigation language examples

Susan Tesarik from Wisconsin Lakes compiled mitigation language from Wisconsin counties that have it in the 2010 document" Local Innovation in Shoreland Management" available at www.wisconsinlakes.org/policy/pdf/CountyImpvSurfaceMitigationOrdinanceExamples.pdf

A brief list demonstrating the variety of mitigation approaches follows, with the 2010 mitigation language for each of the counties provided in Appendix 3.

- Calumet County: Includes steps to complete and record a revegetation plan, mitigation methods from avoidance to accelerated recovery, and density requirements which includes planting dates.
- Door County: Buffer shall be established for at least one growing season before the permit to build is granted. Density requirements for buffer restoration assign points based on size of trees and shrubs, rather than a simple stem density.

- Douglas County: All mitigations require two mandatory practices plus choosing 2 points from a menu. Restoration densities defined for woodland and prairie buffers. Plants must come from County native plant list.
- Langlade County: All mitigation practices apply to all lots. Extent of mitigation required depends on lot width and pre-existing structures. Plants must be native to WI. County has shoreland vegetation guidelines and density requirements separate from the ordinance.
- Lincoln County: Points needed depend on slopes, setbacks and lot sizes. "Opportunities" to earn mitigation points includes many options with flexibility to extent of implementation.
- Polk County: A Land Use Runoff Rating is determined for the entire lot, up to 300 feet of the OHWM and drains directly to the lake, for lake classes 1, 2, 3 and rivers. Rating is determined by soil types, slopes and vegetation.
- Vilas County: Mitigation points needed depend on level of development and sensitivity to development of the waterbody, plus distance from the OHWM where expansion occurs. Points awarded for buffer zones depend on whether trees and shrubs are included.

Mitigation affidavit

An affidavit is required in all instances where mitigation is required.
Why are affidavits required? To ensure that potential property owners and future property owners know about the mitigation plan and specific t mitigation measures that apply to a specific property.

The mitigation affidavit form to record a mitigation plan is in Appendix 3.

The WCCA shoreland committee strongly recommends that you use the example forms in this guidebook because these forms are in most cases based on county forms that have been used for multiple years already, and were reviewed by an attorney to help ensure they are legally defensible. Using these forms will also help achieve consistency between counties.

What are the enforceable obligations that must be included in the mitigation plan?

- Certificate of compliance, which requires an on-site inspection
- Letters of compliance state that the mitigation must stay in place

Options for where to file the mitigation plan

- File it with the affidavit:

- Pros: Future potential property owners see the plan through a title search.
- Cons: Potential property owners may need an explanation from the zoning office to understand the mitigation plan. To revise or supersede the mitigation plan an additional filing fee will be required by the Register of Deeds.

- Reference the plan on the affidavit, but keep the plan in the zoning office.
  - Pros: To revise or supersede the mitigation plan no additional filing fee will be required by the Register of Deeds.
  - Cons: Future potential property owners are unlikely to be aware of or view the mitigation plan before purchase.

Inspection and enforcement of mitigation

Section 115.05(1)(g) states that the mitigation plan shall include enforceable obligations of the property owner to establish or maintain measures that the county determines adequate to offset the impacts of construction. The county has options on how to inspect, monitor, and enforce anything approved through the department.

Options for inspecting mitigation include:

- Inspect 10% of restorations per year
- Phased installations of restoration (Eg. Install groundcover and shrubs first year, trees second year)
- For perspective, Langlade County has 400-500 restorations to monitor

Landowners are required to abide by their mitigation affidavits. For some counties enforcement of mitigation obligations may be different from normal enforcement procedures. You may want to contact the counties that have been administering mitigation about how they handle the enforcement of those mitigation measures.

E. Frequently Asked Questions (FAQs)

Q: How do counties make mitigation proportional?

A: Some counties, including Lincoln, Vilas and Washington, have a point system or menu of mitigation measures for property owners to choose from. Langlade County requires the

same set of mitigation requirements in each mitigation plan, regardless of the type or size of the shoreland development proposed. Mitigation needs to be approved by the DNR. Counties can be more restrictive than the state minimums and require significant mitigation in all cases, rather than proportional mitigation.

Q: Is mitigation required when Gard gazebo structures are placed within the shoreland setback?

A: Yes, mitigation is required. However, the required mitigation is described in Wis. Stats. Sec. 59.692(1v)(d), not in NR 115.

Q: When does the affidavit need to be filed?

A: Before the permit is issued. Counties may require that mitigation be installed prior to issuing the permit. From the mitigation section of the model ordinance, 12.0(2):
(2) An implementation schedule and enforceable obligation on the property owner to establish and maintain the mitigation measures. a) The enforceable obligations shall be evidenced by an instrument recorded in the office of the Register of Deeds prior to issuance of the permit.

Chapter 3:

Appendix

County mitigation examples

Many thanks to Susan Tesarik from WAL who compiled mitigation language from nearly all counties who have in the Fall of 2010. A brief list of the mitigation approaches by county is followed by their mitigation language with unique text highlighted in yellow.

- Calumet County: Includes steps to complete and record a revegetation plan, mitigation methods from avoidance to accelerated recovery, and density requirements which includes planting dates.
- Door County: Buffer shall be established for at least one growing season before the permit to build is granted. Density requirements for buffer restoration assign points based on size of trees and shrubs, rather than a simple stem density.
- Douglas County: All mitigations require two mandatory practices plus choosing 2 points from a menu. Restoration densities defined for woodland and prairie buffers. Plants must come from County native plant list.
- Langlade County: All mitigation practices apply to all lots. Extent of mitigation required depends on lot width and pre-existing structures. Plants must be native to WI. County has shoreland vegetation guidelines and density requirements separate from the ordinance.
- Lincoln County: Points needed depend on slopes, setbacks and lot sizes. "Opportunities" to earn mitigation points includes many options with flexibility to extent of implementation.
- Polk County: A Land Use Runoff Rating is determined for the entire lot, up to 300 feet of the OHWM and drains directly to the lake, for lake Classes 1, 2, 3 and rivers. Rating is determined by soil types, slopes and vegetation.
- Vilas County: Mitigation points needed depend on level of development and sensitivity to development of the waterbody, plus distance from the OHWM where expansion occurs. Points awarded for buffer zones depend on whether trees and shrubs are included.

Calumet County: Includes steps to complete and record a revegetation plan, mitigation methods from avoidance to accelerated recovery, and density requirements which includes planting dates. Julie said at the current time she has no other language that she will propose. However, they are trying to hire a 'mitigation educator' who might have some suggestions.
http://www.co.calumet.wi.us/departments2.iml?dept_id=74

Sec. 82-81. Shoreland Vegetation.
(4) Revegetation Mitigation Plan. If the landowner is required to submit a plan to preserve or establish a vegetative buffer per Sec. 82-43(f)(2)D., Vegetation Preservation, or, if vegetation has been removed in violation of par. (c) above, Requirements, the preservation plan or violation must be created and mitigated per the following:

A. Mitigation Plan and Procedure. The following must be completed prior to preserving or establishing a vegetative buffer zone or beginning any mitigation efforts.
1. Prepare a Plan. A plan must be prepared by a professional engineer or landscape architect. The plan shall indicate how the site will be preserved, established, or mitigated to meet the requirements of this chapter and shall show buffer size, location of viewing corridor and pathway, location of structures, and specify the type, name, size, number and location of all materials to be used to preserve or establish the buffer zone or mitigate the violation. The plan must be approved

Mitigation Review Sheet

Applicant: Richard & Dawn Serafin Nature of project: To raze two existing cottages and replace them with a year round home on a lot on Tug Lake. The home would not be located 75 feet from the Ordinary High Water Mark of Tug Lake.

Site Conditions:

Slope indicated by applicant within building area _____ Field verified slope 1%

Soil type in building area Comstock Silt Loam A slopes HEL or PHEL? No

Lot area as determined by deed or Land Records About 15,000 square feet.

Setback to the OHWM of proposed structure on application 45 feet - eaves and 50 feet - wall

Field Verified setback to OHWM (closest point as staked) 50 feet to wall

Setback of existing structure(s) to OHWM (closest point) on application _____

Field verified setback to OHWM of existing structure(s) 39 to 42.5 feet

Setback to the road centerline of proposed structure on application _____

Field Verified setback to road centerline (closest point as staked) _____

Mitigation Point Calculations	**Points Necessary**
Are slopes 7% to 12%? (1 point)	No
Are slopes >12%? (2 points)	No
Soil type – PHEL? (1 point)	
Soil type – HEL? (2 points)	
Land area reduction below minimum lot size (applies to new developments only - 1 point for 1st 0-10,000 sq.ft. & ½ point for each additional rounded 5,000sq.ft.)	1.5
Reduction from required water setback (1 point for 1st 0-10 foot increment and ½ point for each additional rounded 5 ft. increment)	3
Reduction from required road setback (applies to nonconforming lots under Sec. 21.14 and 1 point is required for first 0-10 foot reduction and ½ point for each additional rounded 5 foot increment)	
Total Points Necessary	4.5

Rev 1/16/04

CONDITIONAL USE PERMIT AFFIDAVIT

435570
9/3/04

COPY

Conditional Use Permit No. 23-04	This agreement is made between the Government Unit and the Real Property owner(s)
Governmental Unit Lincoln County Zoning Administration	Date of Conditional Use: August 13, 2004
Parcel Identifier No. (PIN): Parcel # 18.353306.001.011.01.00 PIN # 018.3306.351.9972	Real Property owner(s): Richard & Dawn Serafin
We, the Real Property owner(s) acknowledge that the Conditional Use Permit was granted for the following property (legal description, attach separate sheet if necessary): See attached Rider.	

Return to:
Lincoln County Zoning Administration

As an inducement to **Lincoln County** to issue a Conditional Use Permit for the above described property, we agree to the following:

1. Owner(s) agree to conform to the conditions of the aforementioned Conditional Use Permit. If these conditions are not met Lincoln County does have the right to revoke said Permit.
2. Said Permit shall remain and be preserved upon this described property in perpetuity.
3. This agreement shall be binding upon the owner(s), their heirs, successors and assigns. The owner(s) shall submit this agreement & recording fee to the Lincoln County Zoning Administration, and the agreement shall be recorded by the Register of Deeds in a manner which will notify any individual referencing the deed to the property as to the existence of this agreement.

CUP # 23-04 Granted for the purpose of: to reconstruct a home in a noncompliant location on the lot with a proposed setback of 45 feet from the OHWM.
Conditions of the granted permit are as follows: 1. The applicant has selected mitigation methods that will earn 4.5 or more mitigation points which include: removal of two nonconforming cottages, removal of a privy & shed, replace septic system and passively restore the buffer zone. 2. The passive restoration of the buffer zone shall occur by not mowing and allowing native trees and shrubs to grow in accordance with the densities prescribed by the ordinance to a depth of 35 feet from the ordinary high water mark, with the exception of a 15 foot envelope around the proposed structure and provision for a view and access corridor no wider than 30 feet to the water. 3. The methods of mitigation (named above) shall earn a total of 10 points and they shall be maintained by present and future owners.

Owner's Name(s) - Please print Richard Serafin Dawn Serafin	Subscribed & sworn to before me on this date: 8/26/04	Governmental Unit Official Name – Please print Daniel J. Miller
Notarized Owner(s) Signature(s): Richard R. Serafin Dawn R. Serafin	Notary Public (Signature): [signature]	Governmental Unit Official Title - Please print Zoning Administrator
	My Commission Expires: 2-24-08	Governmental Unit Official Signature: [signature]

Drafted by: Lincoln County Zoning Department

Personal information you provide may be used for secondary purposes (Privacy Law, s 15.04(1)(m))
CUP Affidavit Temp (rev 2/03)

Black Ink Only

TUG LAKE

OHWM. 97 ft 0 in OHWM. OHWM.

Area #1

Area #2

Existing trees

38' wide viewing corridor

Ex. Turf Lawn

Ex. Turf Lawn

Ex. Turf Lawn

Ledgend:

TREES

9 RIVER BIRCH

8 SWAMP WHITE OAK

SHRUBS

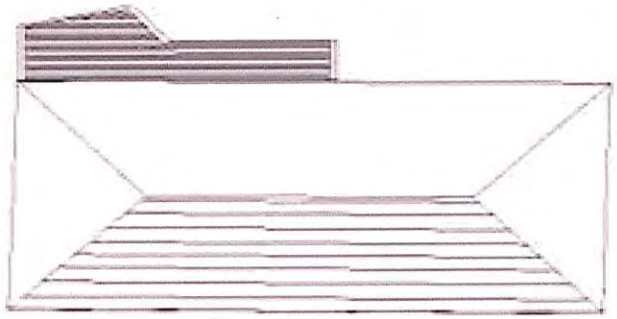
10- DWARF BUSH HONEYSUCKLE

12- Snowberry

4- COMPACT AMERICAN CRANBERRY

4-Red Twig Dogwood

-6 American Hazelnut



N

Northwoods Landscaping Inc.

SERAFIN RES.
N5274 North Shore Rd.

Drawn By: Will Duckett

Date: 09-04-08 | Scale: | Page: 1

Property before restoration

Property after restoration

MITGATION AFFIDAVIT

File or Reference No.	This agreement is made between the Government Unit and the Real Property owner(s)
Governmental Unit County Zoning Administration	Date:
Tax Key Nos. : Parcel # PIN #	Real Property owner(s):
We, the Real Property owner(s) acknowledge that the mitigation applies to the following property (legal description, attach separate sheet if necessary):	

Return to:
_____County Zoning Administration

As an inducement to _____ **County** to issue a _____ Permit for the above described property, we agree to the following:

1. Owner(s) agree to conform to the conditions of the aforementioned _____ Permit and will follow the mitigation plan here in attached or referenced. If these conditions are not met _____ County does have the right to revoke said Permit and enforce the mitigation plan standards. Owner(s) agrees that removal of the structures authorized by the _____ Permit will not void this agreement or the conditions placed hereon.
2. Said Permit shall remain and be preserved upon this described property in perpetuity.
3. Owner(s) agree to allow authorized representatives of _____County to enter upon the owner's property at the above description to inspect the structure(s) authorized by permit and to determine if agreed conditions are being met.
4. This agreement shall be binding upon the owner(s), their heirs, successors and assigns. The owner(s) shall submit this agreement & recording fee to the _____ County Zoning Administration, and the agreement shall be recorded by the Register of Deeds in a manner which will notify any individual referencing the deed to the property as to the existence of this agreement.

A mitigation plan is conditionally approved for the purpose of _____. The vegetative buffer, for a distance of ____ feet landward of the ordinary high water mark, must be preserved if currently in tact as a condition of the mitigation plan. The owner agrees to the following conditions to authorize the project:

1) _____. Mowing, trimming, and raking will not be allowed within the shoreland buffer but is permissible inside of the view & access corridor. (this section must be written to tailor the activity or permit authorization. The no mowing, trimming and raking activity is standard in Lincoln County but may not be in others).

All heirs and assigns of this property are bound and obligated to maintain the aforementioned mitigation.

Owner's Name(s) – Please Print:	Subscribed & sworn to before me on this date:	Governmental Unit Official Name – Please Print:
	Notary Public (Printed or Typed):	Governmental Unit Official Title – Please Print:
Notarized Owner(s) Signature(s):	Notary Public (Signature):	Governmental Unit Official Signature:
	My Commission Expires:	

Drafted by: _____

Personal information you provide may be used for secondary purposes (Privacy Law, s.15.04(1)(m)

Black Ink Only

MITIGATION PERMIT AFFIDAVIT INSTRUCTIONS:

ORIGINAL FORM MUST BE COMPLETED AND SIGNED IN INK OR IT WILL NOT BE ACCEPTED. IT MUST BE LEGIBLE AND COMPLETE OR IT WILL BE RETURNED.

1. The document number space and the box in the top right must be left blank for Register of Deeds use. ALL OTHER BOXES MUST BE COMPLETED.

2. Be sure the correct tax parcel numbers are referenced.

3. The date will be filled in by the Zoning Department.

4. Print or type the property owner(s)' name as it appears on the deed. (all owner's listed on this affidavit must sign in the presence of a notary)

5. Fill in the legal description exactly as it appears on the most recent deed. *If the legal has been filled in by the Zoning Department it is your responsibility to review it completely and make sure that it is correct.*

6. Please read through the agreement completely.

7. The Governmental Unit Official information must be completed by the Zoning office.

THE ORIGINAL MUST BE RETURNED TO THE ZONING OFFICE WITH A RECORDING FEE OF $30.00.

Checks payable to:_____. After this agreement has been recorded, the original will be returned to you for your records/reference along with the permit.

by the Planning Department. The plan must be submitted to the Planning Department no more than 30 days after the violation has been discovered and the landowner notified verbally on site or in writing.

2. *Affidavit. By law, the landowner must file an affidavit with the Planning Department and record it with the Calumet County Register of Deeds. This affidavit ensures that the landowner will preserve, establish or perform the mitigation and that all future landowners are aware the vegetation must be maintained and removal of the vegetation is restricted per an approved plan on file in the Planning Department. The affidavit gets attached to the landowner's deed. Blank affidavit forms are available from the Planning Department. The affidavit should be filed after the Planning Department approves the plan in subd. 1. above, Prepare a Plan, but prior to a regular zoning permit being issued authorizing the actual preservation, establishment, or mitigation activities. It is the landowner's responsibility to notify the Planning Department when the affidavit has been recorded.*
3. *Permit. A separate regular zoning permit must be obtained from the Planning Department authorizing the establishment or mitigation. Specific regular zoning permit application forms for establishment or mitigation efforts are available from the Planning Department. Prior to processing an application, the application must be accompanied by all required paperwork and the required processing fee. All fees are non-refundable.*
4. *Completion. As stated in the affidavit, the landowner must also perform the preservation, establishment or mitigation, and, maintain the material to achieve compliance. Since establishment and mitigation deal with the installation of plant materials and because the growing season is limited in this region, the land owner will have one summer season after permit issuance to complete the establishment or mitigation project.*

B. In General.

1. *Establishment and Mitigation Methods. There are basically 4 methods of mitigation that will establish or maintain a buffer. Each method involves preserving or establishing three vegetative layers: ground cover (grasses, etc.), shrub understory, and tree canopy. Attempts should be made to duplicate or mimic the undisturbed vegetative habitat that exists around the particular water body.*
   - *a.) Avoidance. Some of the buffer may be totally intact or undisturbed. If that is the case, that area does not have to be mitigated. However, the affidavit shall state that the landowner will not disturb the area and will remain compliant with placement of the viewing corridor, etc.*
   - *b.) Natural Recovery. Some of the buffer may be present but some of the understory vegetation may have been removed, or the area may have been mowed to the shore. The goal is to reestablish the natural condition, had the area not been disturbed. The recovery method involves simply stopping all mowing or clearing and letting the area regenerate naturally.*
   - *c.) Accelerated Enhancement Recovery. This method is similar to natural recovery, but entails actually installing some plant materials to achieve proper vegetation density, as outlined in subd. 2., Density, below. Simply, the landowner fills in areas that are too thin or where the vegetation is missing.*
   - *d.) Accelerated Creation Recovery. This method is used when no buffer exists. The area in question may have been graded to bare soil or the site may have been mowed for many years. Creation will involve planting groundcover, shrubs and trees.*

2. *Density. If you have to install plantings, a specific vegetation density is required. Refer to subd. a)., Table of Density Requirements, which denotes how many plantings should be instated per square foot per vegetative layer (groundcover, shrub or tree canopy). Planting dates should be verified with the chosen plant supplier. The landowner may take credit for existing plants. (For example, if all soil is covered by grasses, the landowner does not have to install plantings in that layer. Likewise, if the buffer has 10 existing trees, the trees would count as 3 new trees.)*

a.) *Table of Density Requirements.*

LAYER	MAX. NO. OF DIFFERENT SPECIES	NO. TO BE INSTALLED PER 100 SQ. FT.	CREDITS FOR EXISTING VEGETATION	PLANTING DATES
Tree Canopy	3	1	1 existing tree = 0.3 new trees	4/15-11/15
Shrub Understory	4	2	1 existing shrub = 0.5 new shrubs	4/15-11/15
Groundcover Plant Plugs	1	70	n/a	5/15-11/15
Groundcover Seedlings, Cool Season	1	General seed broadcasting	Complete cover of bare soil	5/1-6/15
Groundcover Seedlings, Warm Season	1	General seed broadcasting	Complete cover of bare soil	Thaw-7/15

3. *Plant Selection. When selecting the plantings to install, the landowner shall use species which are native to the region and non-noxious. The landowner should pay special attention to which species grow in the soil and light conditions specific to the subject property.*

4. *Erosion Control and Maintenance. As with any construction project, erosion control measures should be utilized during mitigation. Runoff from impervious structures should be diverted away from the water, and, matting or mulch should be used as groundcover plantings are taking root. The mitigated area is intended to be a natural area so little maintenance is needed. There should be no need to mow, rake or fertilize. For detailed information on care and maintenance of the mitigated area the landowner is encouraged to consult a landscape architect.*

Door County: Buffer shall be established for at least one growing season before the permit to build is granted. Density requirements for buffer restoration assign points based on size of trees and shrubs, rather than a simple stem density. David said this section only applies to Gard gazebo structures. He did not state whether they plan to use this language for other mitigation.
http://map.co.door.wi.us/planning/

5.09 Shoreland vegetation. …

(4) Shoreland Vegetative Buffer Zone. To qualify for an exemption from the ordinary high water mark [setback of 75 ft.] as provided in Section 3.07(3)(l), a shoreland vegetative buffer plan shall be established.

(b) Implementation. Upon approval of the shoreland vegetative buffer plan by the planning department, the shoreland vegetative buffer plan shall be completed before the planning department will grant the regular zoning permit for the structure. The shoreland vegetative buffer shall be established for a least one growing season before the permit to build the structure is granted. No mowing shall be allowed in the shoreland vegetative buffer zone so as to maximize the growth of grasses and shrubs.

(c) Standards. Shoreland vegetative buffer plant materials shall be required so as to accumulate 100 landscape points per 100 sq. ft. of shoreland vegetative buffer zone. Landscape points shall be accumulated according the table "LANDSCAPE POINTS" of Section 7.03(2)(b) of this ordinance. One canopy tree with a caliper of at least 2 inches shall be required for each 100 square feet of shoreland vegetative buffer zone and shall be spaced no more than 10 feet apart. (Added: 18 April 2000; Ord. 07-00)

7.03 Parking area landscaping requirements.
(2) Minimum landscaping requirements.
(b) … Landscape points shall be accumulated according to the following table:

LANDSCAPE POINTS

Landscape Element	Minimum Planted Size	Points
Canopy Trees	2 in. caliper or 1.5 in. caliper for multi-stem trees	50 pts.
Evergreen Trees	4 feet high	30 pts.
Low Ornamental Trees	5 feet high and balled and burlapped stock	20 pts.
Tall Shrubs	2.5 feet high	9 pts.
Medium Shrubs	18 inches high	6 pts.
Low Shrubs	15 inches high	3 pts.

The publication, A Guide to Selecting Landscape Plants for Wisconsin, by E. R. Hasselkus, UW-Extension publication A2865, shall be used to determine which plants are "low ornamental trees" and "tall/medium/low shrubs."

Douglas County Mitigation: All mitigations require two mandatory practices plus choose 2 points from menu. Restoration densities defined for woodland and prairie buffers. Plants must come from County native plant list. Steve would like to keep the mitigation language "as is" if it will pass DNR muster.
http://www.douglascountywi.org/DocumentView.aspx?DID=124

9.4 Mitigation Measures.
(1) Required mitigation
A site plan and implementation schedule describing any required mitigation shall be submitted by the property owner or their authorized agent and approved by the Zoning Department prior to issuing the related land use permit(s). Mandatory practices for mitigation shall include:
(a) Evaluation and if needed upgrading of any existing sanitary system on the subject property to meet current Douglas County and Department of Commerce regulations.
(b) Implementation of standard erosion and storm water runoff control measures described in applicable sections of this ordinance.

(2) Additional requirements
(a) Accumulating at least two (2) points from among the following proposed or current practices:
(1) Maintenance of an existing shoreland buffer area within 35 feet of the OHWM for Class 1&2 Lakes and within 50 feet for Class 3 Lakes and River/Streams (2 points).
(2) Restoration of the shoreland buffer area within 35 feet of the OHWM for Class 1&2 Lakes and within 50 feet for Class 3 Lakes and River/Streams (2 points).
(3) Restoration of native vegetation along both sideyards, minimum of 5 feet wide measured perpendicular to the lot line for the entire length of the lot. (1/2 point).
(4) Removal of legal pre-existing accessory buildings from within the shoreland setback area (1 point per building).
(5) Use of exterior building materials or treatments that are inconspicuous and blend with the natural setting of the site (1/2 point).

(6) Removal of waterward improvements (seawalls, dockage, artificial sand beach etc. and / or restoration of emergent aquatic vegetation (1/4 point for each distinct removal / restoration effort).

(7) Any other mitigation that is deemed appropriate by the Zoning Administrator may be used to meet the mitigation requirement of Section 9.4(2)(a).

(3) A Shoreland Mitigation/Preservation Affidavit shall be signed and recorded with the register of deeds prior to the issuance of a zoning permit for the expansion or improvement of a legal pre-existing principal building which requires mitigation under Section 9.2.

9.41 Type of Shoreland Buffer.

The type of shoreland buffer restoration required under Section 9.4(2) will be determined by the Zoning Department and/or the Land Conservation Department. The buffer type shall be either woodland, prairie, or wetland. The woodland and prairie buffers shall comply with the standards set forth in Section 9.41 Table 1. Wetland buffers will also be permitted where deemed appropriate by the Zoning Department and/or the Land Conservation Department.

9.42 Table 1. Shoreland Buffer Planting Standards

	Woodland Buffer		***Prairie Buffer***		
Layer	***Minimum number of species***	***Density per 100 square feet***	***Minimum number of species***	***Density per 100 square feet***	***Area Credits***
Tree Canopy	*3*	*1*	*2*	*0.2*	*Existing tree canopy edge viewing corridor*
Shrub Understory	*4*	*1.5*	*2*	*0.5*	*Existing shrub understory wet edge viewing corridor*
Groundcover Plant Plugs	*1*	*70*	*5*	*70*	*Existing well vegetated native ground cover*
Groundcover seeding	*1*	*Varies*	*5*	*Varies*	*Existing well vegetated native ground cover*

9.43 Type of Vegetation Recovery.

(1) Natural Recovery
Shoreland buffer areas that are suited for natural recovery will be allowed only after Zoning and /or County Land Conservation approval.
(2) Accelerated (planted) recovery
Areas not suited to natural recovery will require plantings to establish native vegetation and must be planted. Areas such as lawns or eroded sites with no seed source will require plantings. Dense turf grass growths that have been maintained for several years will need to be removed and native plantings installed. Planted buffers must meet the required plant densities based on square footage of buffer area and the type of buffer (Table 1). Planting credits will be allowed for the viewing corridor, areas of existing native vegetation, and areas suited for natural recovery.

9.44 Douglas County Native Plant List.

Species of plants must be selected from the Douglas County Native Plant List and approved for shoreline buffers by the Zoning and /or Land Conservationist. Substitutions must be approved by the Zoning and /or Land Conservationist. Substitutions to the list will be allowed in the event of lack of plant stock or seed availability on a case-by-case basis. All plants may be transplanted from areas outside of the buffer zone.

9.45 Planting Densities.

Planting densities are based on the total area of the required buffer. Area credits calculated are subtracted from the total required density on an equal square footage of coverage basis. Trees must be at least 2 years old and greater than 1 foot tall to qualify as a credit or planting.

9.46 Shoreland Buffer Plan Requirements.

A shoreland restoration plan shall be completed for all required shoreland mitigation or preservations. Plans must be approved by the Zoning and Land Conservationist.

(1) Shoreland Buffer Restoration Site Plans must include:
- *(a) Name and Address of property owner*
- *(b) Property address and legal description*
- *(c) Extent of the shoreland buffer*
- *(d) Scale (e.g. 1 inch = 10 feet)*
- *(e) North arrow*
- *(f) Ordinary high water mark (OHWM) location*
- *(g) Location of all structures in the shoreland buffer zone*
- *(h) Viewing and access corridor*
- *(i) Boundary of the shoreland buffer zone*
- *(j) Existing trees, shrubs, and native ground cover*
- *(k) Areas to be planted with trees, shrubs, and groundcovers*
- *(l) Implementation schedule*
- *(m) A plant species list; indicate if you are requesting substitutions from the prepared list*
- *(n) Erosion control practices (to be installed prior to and during buffer establishment)*
- *(o) Water diversions and channelized flow areas*
- *(p) Buffer Maintenance (weeding, replanting)*

(2) Implementation schedule.

The approved Shoreland Buffer Restoration Site Plan must be started within one year from the issue date of applicable permit. All plantings and any other required activities in the Shoreland Buffer Restoration Site Plan must be completed within two years of the permit issue date.

Langlade County Mitigation: All mitigation practices apply to all lots. Extent of mitigation required depends on lot width and pre-existing structures. Plants must be native to WI. County has shoreland vegetation guidelines and density requirements separate from the ordinance. Becky said they intend to keep their mitigation language the same with the exception of 17.12(3)(d)4d about erosion and storm water runoff http://lrrd.co.langlade.wi.us/

17.12(3)(d)

4. *Mitigation is required to compensate for lost shore buffer area functions when legal pre-existing structures are improved or expanded within the shore setback area. Such mitigation requirements shall be listed as a condition(s) on the zoning permit:*
   a. *The associated privately owned wastewater treatment system must be evaluated and upgraded as appropriate in compliance with COMM83, Wis. Administrative Code.*
   b. *Native vegetation and water quality protection functions of the shore buffer area must be restored to the extent practicable following the standards in Section 17.30(13).*
   c. *Nonconforming accessory structures must be removed from the shore setback area. This requirement shall not apply to a detached garage which is in good repair and located at least as far from the ordinary high water mark as the principal structure on the property.*
   d. *Standard erosion & storm water runoff control measures must be implemented*
   e. *Exterior building materials shall blend with the natural ground cover in the vicinity of the construction.*

17.30 (13)(b) Plan Requirements. An applicant shall submit a restoration plan for approval by the Land Records and Regulations Department prior to issuance of a zoning permit. The plan shall provide for the following:

1. Restoration on a waterfront lot shall, to the extent practicable, be conducted on all land within 50 feet of the ordinary high water mark as follows:

a. Maximum restorable area:

1) For lots with a single principal structure, maximum length of shoreline over which the 50 ft. buffer must be restored shall be limited to the minimum lot width for the class of waterway on which the land is located. However, vegetation protection area regulations shall apply across the entire shoreline frontage of that lot.

2) For lots with multiple principal structures, including but not limited to resorts, restorable area shall be determined by department staff after consideration of essential shoreline functions.

b. Pre-existing structures. For lots with legal pre-existing structures, restoration is not required within 15 feet of the principal structure.

c. Viewing Corridor. Sod, mulch, or other approved non-erodeable natural material is allowed in the view corridor to the minimum extent necessary for access and recreation as stipulated below:

1) Wherever feasible, grass species used shall be no-mow/low-grow grasses which do not require cutting.

2) One 200 square foot area at the water shall be allowed for swimming access as allowed in Section 17.30(8)(b)6.

3) One 400 square foot area shall be allowed elsewhere in the view corridor for a picnic/play/lounge area.

4) One path with a maximum width of 4 feet as allowed Section 17.30(6)(b).

5) Storage areas for small boats, docks or similar items are allowed to the minimum extent necessary and shall not be mowed. Pruning or culling of shrubs or trees to maintain this small area is allowed.

2. Restoration shall be conducted as follows:

a. Minimum restoration standard: within the restorable area described in Section 17.30(13)(1)(a), no vegetation cutting or raking shall occur and native shrubs and trees shall be planted throughout this same area in a manner that ensures cutting and raking will not occur. Refer to shoreland vegetation guidelines maintained by the Langlade County Land Records & Regulations Department.

b. Restoration measures exceeding this minimum standard may also be required by the Department in situations where the minimum habitat functions of the shoreline buffer. (For example, where natural regeneration is limited by site conditions).

c. Vegetation used in any restoration shall be native to the state of Wisconsin and shall be installed at densities that are adequate to reestablish the water quality, habitat and natural beauty protection functions of a shoreline buffer area. Density recommendations are available from the Langlade County Land Records & Regulations Department.

3. Once the shoreline buffer has been reestablished, vegetation removal and land disturbing activities are generally prohibited except as permitted by applicable provisions of Section 17.30(6), the vegetation protection area.

Lincoln County: Points needed depend on slopes, setbacks and lot sizes. "Opportunities" to earn mitigation points includes many options with flexibility to extent of implementation. Dan said that some changes will be made to mitigation language including some additional triggers for mitigation and fleshing out the mitigation point schedule to reflect the new impervious surface rules. There are also other mandated mitigation measures in the code that are not included here.

http://library6.municode.com/default-test/home.htm?infobase=12537&doc_action=whatsnew

4.11 MITIGATION SCHEDULE
MITIGATION REQUIREMENTS AND OPPORTUNITIES

Points are required for developing property under the following conditions:
- *Building or excavating on slopes from 10% to 20% - 2 points*
- *Building or excavating on slopes greater than or equal to 20 % - 3 points*
- *Building at reduced setbacks from the *OHWM - 1 point for 1st 0-10 ft. & ½ point for each additional rounded 5 ft. increment*

• Building at a reduced setback from the road right-of-way - 1 point for 1st 0-10 ft. and ½ point for each additional rounded 5 ft. increment (only applies to non-conforming lots under Sec. 11.13)
• Building on an existing lot that contains less than the required lot dimension – 1 point for the 1st reduction of 0-10,000 sq.ft. and ½ point for each additional rounded 5,000 sq.ft. reduction

Opportunities to earn mitigation points include:
• Increasing buffer depths - ½ point for each rounded 5 ft increment
• Reducing the width of the view / access corridor - 1 point for each rounded 5 ft. increment
• If lot is larger than prescribed minimum size - ½ point for each rounded 5000 sq. ft. increment
• Removal of legal non-conforming accessory structure - 1 point
• Removal of legal non-conforming habitable structure - 3 points
• Replacement of failing septic system due to setbacks or sizing - 2 points
• Replacement of failing septic system due to surface water or groundwater impacts - 3 points
• Removal of a sanitary privy - 1 point
• Removal of non-structural impervious surfaces - ½ point for each rounded 500 sq.ft. of pavement. ½ point for each rounded 1000 sq.ft. of hardpacked gravel
• Restoration of a Passive Buffer -1 point
• Restoration of a Active Buffer -2 points
*• Installation of a pre-approved **** runoff control structure - 2 points*
• Leaving percentages of the parcel in a natural state. 25-49% - 1 point. 50-74% - 2 points. >74% - 3 points

***** *Only in special circumstances can a setback of less than 75 ft to the OHWM be authorized by mitigation – see Sections 10 & 11 of this ordinance.*
****** *The Lincoln County Land Conservation Department has a list of pre-approved runoff control structure designs. The use of a specific runoff control structure is subject to approval by the Zoning Department.*

16.1010 MITIGATION

4) The implementation of a shoreland buffer restoration plan under Section 16.1009, on a shoreland property other than that of the proposed construction (2 points).
Will DNR support this option for mitigation under the revised 115?

Polk County: All permits within 300 feet of the water which drain directly to the lake and increase impervious area or are building expansions (in lieu of 50% increase in value) are required to complete the Land Use Runoff Rating. We also have a handout that graphically explains this and a worksheet which will do all the calculations for you once the areas are available. Gary said they will take their ordinance to a citizen advisory group and hope that they stay with the current ordinance with some minor changes. www.co.polk.wi.us/landinfo/ordinances.asp

14.C. Land Use Runoff Rating – A rating number is determined for the entire lot, up to 300 feet of the ordinary high water mark and drains directly to the lake, for lake Classes 1, 2, 3 and rivers. (Rating is determined by soil types, slopes and vegetation*)…*

3. If the rating number for the lot is less than or equal to the rating of 69, the landowner/agent is not required to take any action to reduce the runoff rating. If the runoff rating is greater than 69, then the landowner/agent must implement measures as approved by the Zoning Department to arrive at a runoff rating of 69 or less. Such measures are as follows, but are not limited to:

rain basins, retention ponds, vegetative areas, redirecting water away from the navigable water.

…

5. Runoff rating plans approved after September 1 of each calendar year must be completed by June 1 of following year, all others must be completed by October 31 of the same calendar year.

6. All structural practices must be installed prior to issuance of permit and any runoff control practices installed must have an operation and maintenance plan and have that plan recorded on the deed.

Vilas County: Mitigation points needed depend on level of development and sensitivity to development of the waterbody, plus distance from the OHWM where expansion occurs. Points awarded for buffer zones depend on whether trees and shrubs are included. Dawn said they plan to keep their mitigation language intact as much as possible. http://www.co.vilas.wi.us/dept/zoning.html

ARTICLE XI: MITIGATION

11.1 Applicability.

Mitigation is required whenever a property owner requests a zoning permit for construction on a waterfront lot where the proposed construction is located less than 300 feet from the OHWM and involves greater than three hundred square feet (>300 sq. ft.) of any new or existing structure. Mitigation is not required for rebuilding a structure under & 6.5.B. An additional permit fee may be required by, the Zoning Office for administration of the mitigation requirements.

11.2 Mitigation Points Required.

A. Lakes Greater Than 50 Acres.

The number of mitigation points required depends on lake classification and is set forth below in Table 4.

Table 4

MITIGATION POINTS, FOR LAKES GREATER THAN 50 ACRES			
Sensitivity to Development	Current Level of Development		
	Low Development Level	*Medium Development Level*	*High Development Level*
High Sensitivity	*Five Mitigation Points*	*Six Mitigation Points*	*Six Mitigation Points*
Medium Sensitivity	*Four Mitigation Points*	*Five Mitigation Points*	*Five Mitigation Points*
Low Sensitivity	*Four Mitigation Points*	*Four Mitigation Points*	*Four Mitigation Points*

B. For Lakes 50 Acres and Less Six Mitigation Points Are Required.

C. For Class II Rivers and Streams Four Mitigation Points Are Required.

D. For Class I Rivers and Streams Six Mitigation Points Are Required.

E. Additional Points for Certain Structures.

Additional mitigation points shall be required on properties with principal structures located closer than seventy-five feet (75') from the ordinary high water mark as follows:

1. Expansion of principal structures with any part located closer than forty feet (40') from the ordinary high water mark require two (2) additional mitigation points.

2. Expansion of principal structures with any part located closer than seventy-five feet (75') but more than forty feet (40') from the ordinary high water mark require one (1) additional mitigation point. This point is not added to the two mitigation points required if a structure is located closer than forty feet (40').

11.3 Mitigation Practices.

Property owners may choose among the following mitigation practices to achieve the number mitigation points required.

A. Buffer Zones.

1. Points may be obtained for maintaining existing buffer zones or for creating and maintaining new buffer zones as set forth below.

2. Buffer Zone Options.

a. <u>Primary Active Buffer Zone</u>: Shore buffer zone within thirty-five feet (35') of the OHWM, including trees, shrubbery, underbrush and other natural vegetation, and subject to the conditions in ¶ A.3. (3) Three points. A shoreline recreational area as defined in Article VIII is allowed.

b. <u>Secondary Active Buffer Zone:</u> An additional fifteen feet (15') of buffer zone depth inland from the OHWM beyond the thirty-five feet (35') of buffer zone already established, providing a total of fifty feet (50') of buffer zone depth, subject to the conditions in ¶ A.3. (2) Two points.

c. <u>Recreational Area Buffer Zone</u>: Shore buffer zone along the entire shoreline, including within the space that may otherwise have been occupied by the recreational area, except that a foot path of no more than six feet (6') in width may be maintained, subject to the conditions in ¶ A.3. (2) Two points.

d. <u>Passive Buffer Zone</u>: Shoreland vegetation buffer area within thirty-five feet (35') of the OHWM, including un-mowed, grass or other under story vegetation, but without the tree and shrub layers required to meet the three-point mitigation standard. A shoreline recreational area as defined in Article VIII is allowed. (2) Two points.

e. <u>Side lot Buffer Zone:</u> A ten foot (10') wide side lot buffer zone including trees, shrubbery, underbrush and other natural vegetation extending along a side lot line for a depth of at least one hundred feet (100') from the OHWM. (1) One point. The side lot buffer area is subject to the conditions in ¶ A.3. Points for side lot line buffers may be additive, for a maximum of two (2) points, if buffer areas exist and are maintained along both side lot lines.

3. Conditions.

a. No mowing is permitted in the buffer zone.

b. The establishment of buffer zones except under ¶ A.2.d.are subject to a density of at least two (2) tree stems and four (4) shrub stems per one hundred square feet (100 sq. ft.) of buffer zone area is required. This density must be maintained through the maturity of the species.

B. Removal of Structures.

Points may be obtained for the removal of structures as set forth below.

1. *Removal of a principal structure located within seventy-five feet (75') of the OHWM to a site that meets the OHWM set back requirements for new development on that water body. (3) Three points.*
2. *Removal of all non-principal, accessory structures located within thirty-five feet (35') of the OHWM, with the result that all such structures, including boathouses, are set back at least thirty-five feet (35') from the ordinary high water mark. (2) Two points.*
3. *Removal of all non-principal, accessory structures located between thirty-five feet (35') and seventy-five feet (75') from the ordinary high water mark, with the result that all such structures, including boathouses, are set back at least seventy-five feet (75') from the ordinary high water mark. (1) One point.*
4. *No non-principal, accessory structures are located less than seventy-five feet (75') from the ordinary high water mark. This point is not added to points awarded for removal of structures from ¶ B.1. and ¶ B.2. above. (1) One point.*

C. *Other Practices.*

1. *At the discretion of the Zoning Administrator, up to three (3) additional mitigation points may be approved for restoration or protection activities that are likely to provide significant benefits to meet the objectives of this ordinance. Examples may include construction of a storm water detention basin or implementation of other storm water management plan activities, replacement of seawalls with bio-engineered structures, or removal of artificial sand beaches.*
2. *Factors to be considered in making the determination of number of points and approval of alternative mitigation practices include, but are not limited to:*
    a. *Cost of implementation;*
    b. *Runoff diversion and/or retention;*
    c. *Lot configuration;*
    d. *Parcel size;*
    e. *Location of impervious areas;*
    f. *Sensitivity and level of development of the water body; and*
    g. *Significance toward meeting ordinance objectives.*

11.4 Mitigation Plan.

A. *Development and Implementation of Mitigation Plan.*

1. *A mitigation plan shall be submitted on forms provided by the Zoning Administrator for review and approval. The plan shall indicate the selected mitigation strategies and shall be signed by the property owner and filed with the Zoning Office prior to issuance of the zoning permit.*
2. *The mitigation measures shall be maintained in perpetuity, unless the property owner receives approval of a new, approved mitigation plan meeting the same point requirements.*
3. *Notwithstanding any other provision of this ordinance, the current owner is solely responsible for compliance with the terms of this Article.*

Chapter 4:
Nonconforming Structures

A. NR 115 language including definitions: 115.05(1)(g)

(g) *Nonconforming structures and uses.* 1. 'General rule for nonconforming uses.' Pursuant to ss. 59.69 (10) (a) and 59.692(2) (a), Stats., an ordinance enacted under those provisions may not prohibit the continuation of the lawful use of a building, structure or property, that exists when an ordinance or ordinance amendment takes effect, which is not in conformity with the provisions of the ordinance or amendment.

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

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

4. 'Maintenance of nonconforming principal structure.' An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under par. (b) 1. may be maintained and repaired within its existing building envelope. Maintenance and repair includes such activities as interior remodeling, plumbing, insulation, and replacement of windows, doors, siding, or roof.

5. 'Vertical expansion of nonconforming principal structure.'
An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under par. (b) 1. may be expanded vertically, provided that all of the following requirements are met:

a. The use of the structure has not been discontinued for a period of 12 months or more.

b. The existing principal structure is at least 35 feet from the ordinary high−water mark.

c. Vertical expansion is limited to the height allowed in s. NR 115.05 (1) (f).

d. The county shall issue a permit that requires a mitigation plan that shall be approved by the county and implemented by the property owner by the date specified in the permit. The mitigation plan shall include enforceable obligations of the property owner to establish or maintain measures that the county determines adequate to offset the impacts of the permitted expansion on water quality, near−shore aquatic habitat, upland wildlife habitat and natural

scenic beauty. The mitigation measures shall be proportional to the amount and impacts of the expansion being permitted.
The obligations of the property owner under the mitigation plan shall be evidenced by an instrument recorded in the office of the County Register of Deeds.

e. All other provisions of the shoreland ordinance shall be met.

Note: Other provisions include requirements such as impervious surface limitations.
Note: This code does not supercede s. 59.692 (1s), Stats.

5m. 'Expansion of nonconforming principal structure beyond setback'. An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under par. (b) 1., may be expanded horizontally, landward or vertically provided that the expanded area meets the building setback requirements in par. (b)

1., and that all other provisions of the shoreland ordinance are met. A mitigation plan is not required solely for expansion under this paragraph, but may be required under par. (e) 3.

6. 'Replacement or relocation of nonconforming principal structure.' An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under par. (b) 1. may be replaced or relocated on the property provided all of the following requirements are met:

a. The use of the structure has not been discontinued for a period of 12 months or more.

b. The existing principal structure is at least 35 feet from the ordinary high−water mark.

c. No portion of the replaced or relocated structure is located any closer to the ordinary high−water mark than the closest point of the existing principal structure.

d. The county determines that no other location is available on the property to build a principal structure of a comparable size to the structure proposed for replacement or relocation that will result in compliance with the shoreland setback requirement in par. (b) 1.

e. The county shall issue a permit that requires a mitigation plan that shall be approved by the county and implemented by the property owner by the date specified in the permit. The mitigation plan shall include enforceable obligations of the property owner to establish or maintain measures that the county determines are adequate to offset the impacts of the permitted expansion on water quality, near−shore aquatic habitat, upland wildlife habitat and natural scenic beauty. The mitigation measures shall be proportional to the amount and impacts of the replaced or relocated structure being permitted. The obligations of the property owner under the mitigation plan shall be evidenced by an instrument recorded in the office of the County Register of Deeds.

f. The county shall issue a permit that requires that all other structures on the lot or parcel that do not comply with the shoreland setback requirement in par. (b) 1. and are not exempt under par. (b) 1m. to be removed by the date specified in the permit.

g. All other provisions of the shoreland ordinance shall be met.

Note: Other provisions include requirements such as height and impervious surface limitations.
Note: This code does not supercede s. 59.692 (1s), Stats.

7. 'Boathouses.' The maintenance and repair of nonconforming boathouses which extend beyond the ordinary high−water mark of any navigable waters shall be required to comply with s. 30.121, Stats.

B. DNR model ordinance language from December 14, 2010

11.0 NONCONFORMING USES AND STRUCTURES. (NR 115.05(1)(g))

11.1 PURPOSE. To protect water quality, fish and wildlife habitat, and natural scenic beauty, some control is needed over the modification and reconstruction of these structures.

11.2 GENERAL RULE FOR NONCONFORMING USES AND STRUCTURES. Pursuant to s. 59.692(1s), Stats.

(1) Restrictions that are applicable to damaged or destroyed nonconforming structures and that are contained in an ordinance enacted under this s. 59.692 stats. may not prohibit the restoration of a nonconforming structure if the structure will be restored to the size, subject to par. (b), location, and use that it had immediately before the damage or destruction occurred, or impose any limits on the costs of the repair, reconstruction, or improvement if all of the following apply:

a) The nonconforming structure was damaged or destroyed after October 14, 1997.

b) The damage or destruction was caused by violent wind, vandalism, fire, flood, ice, snow, mold, or infestation.

Policy Option:

c) Landowners seeking zoning permits to perform work authorized by Wis. Stats. Sec. 59.692(1s) shall include in their application the scope, nature and extent of damage alleged to have been done, as well as the dimensions of the proposed restoration.

(2) An ordinance enacted under this section to which par. (1) applies shall allow for the size of a structure to be larger than the size it was immediately before the damage or destruction if necessary for the structure to comply with applicable state or federal requirements.

11.3 DISCONTINUED NONCONFORMING USE. (NR 115.05(1)(g)3.) If a nonconforming use is discontinued for a period of 12 months, any future use of the building, structure or property shall conform to the ordinance.

11.4 MAINTENANCE OF NONCONFORMING PRINCIPAL STRUCTURE. (NR 115.05(1)(g)4.) An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback per section 6.1 may be maintained and repaired within its existing building envelope. Maintenance and repair includes such activities as interior remodeling, plumbing, insulation, and replacement of windows, doors, siding, or roof.

11.5 VERTICAL EXPANSION OF NONCONFORMING PRINCIPAL STRUCTURE. (NR 115.05(1)(g)5.) An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback per section 6.1 may be expanded vertically, provided that all of the following requirements are met:

(1) The use of the structure has not been discontinued for a period of 12 months or more.

(2) The existing principal structure is at least 35 feet from the ordinary high-water mark.

(3) Vertical expansion is limited to the height allowed in section 10.0.

(4) The county shall issue a permit that requires a mitigation plan that shall be approved by the county and implemented by the property owner by the date specified in the permit. The mitigation plan shall shall meet the standards found in section 12.0.

(5) All other provisions of the shoreland ordinance shall be met.

11.6 EXPANSION OF A NONCONFORMING PRINCIPAL STRUCTURE BEYOND SETBACK.

(NR 115.05(1)(g)5m.) An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback under section 6.1, may be expanded horizontally, landward or vertically provided that the expanded area meets the building setback requirements per section 6.1 and that all other provisions of the shoreland ordinance are met. A mitigation plan is not required solely for expansion under this paragraph, but may be required per section 9.0.

See Policy Option in Appendix A:

(to use this policy option, the last sentence must be deleted from 11.6)

> 1) The county shall issue a permit for expansion that requires a mitigation plan that shall be approved by the county and implemented by the property owner by the date specified in the permit. The mitigation plan shall meet the standards found in section 12.0

11.7 REPLACEMENT OR RELOCATION OF NONCONFORMING PRINCIPAL STRUCTURE.

(NR 115.05(1)(g)6.) An existing principal structure that was lawfully placed when constructed but that does not comply with the required building setback per section 6.1 may be replaced or relocated on the property provided all of the following requirements are met:

(1) The use of the structure has not been discontinued for a period of 12 months or more.

(2) The existing principal structure is at least 35 feet from the ordinary high-water mark.

(3) No portion of the replaced or relocated structure is located any closer to the ordinary high-water mark than the closest point of the existing principal structure.

(4) The county determines that no other location is available on the property to build a principal structure of a comparable size to the structure proposed for replacement or relocation that will result in compliance with the shoreland setback requirement per section 6.1.

(5) The county shall issue a permit that requires a mitigation plan that shall be approved by the county and implemented by the property owner by the date specified in the permit. The mitigation plan shall meet the standards found in section 12.0. include enforceable obligations of the property owner to establish or maintain measures that

the county determines are adequate to offset the impacts of the permitted expansion on water quality, near-shore aquatic habitat, upland wildlife habitat and natural scenic beauty. The mitigation measures shall be proportional to the amount and impacts of the replaced or relocated structure being permitted. The obligations of the property owner under the mitigation plan shall be evidenced by an instrument recorded in the office of the County Register of Deeds.

(6) The county shall issue a permit that requires that all other structures on the lot or parcel that do not comply with the shore-land setback requirement per section 6.1 and are not exempt under section 6.11 to be removed by the date specified in the permit.

(7) All other provisions of the shoreland ordinance shall be met.

Policy Option:

The WCCA Shoreland Committee recommends adopting this version of policy option 11.8, revised from the model ordinance.

11.8 MAINTENANCE OF NONCONFORMING ACCESSORY STRUCTURES. Accessory structures that were legally constructed before the adoption of this chapter may be maintained and repaired but shall not be expanded or rebuilt unless authorized by s. 59.692(1s) Wisconsin Stats. or unless they are made to conform to all other provisions of this ordinance.

11.8 WET BOATHOUSES. (NR 115.05(1)(g)7.) The maintenance and repair of nonconforming boathouses which extend beyond the ordinary high-water mark of any navigable waters shall be required to comply with s. 30.121, Stats. (This section 11.8, clearly different than the one above, is also from the model ordinance. This section is not optional. The WCCA shoreland committee suggests counties adopt both 11.8 sections with changes to the numbering.)

C. Additional Resources

Appendix 4 contains the following nonconforming structure resources recommended by the WCCA shoreland committee. For each topic listed in the left column, the associated graphics and flow charts are listed across that row.

Topic	Graphics with NR 115 reference numbers	Flow charts with model ordinance reference numbers
General rule for NC structures and uses	None	11.2 NC structures replacement of existing damaged or destroyed
Vertical expansion of NC principal structure	115.05(1)(g)5 Graphics A, B, G, and H	11.5 NC vertical expansion of principal
Expansion of NC principal structure beyond setback	115.05(1)(g)5m Graphics B, C, and D	11.6 Horizontal expansion of NC
Replacement or relocation of NC principal structure	115.05(1)(g)6 Graphics E, F, G, and H	11.7 Replacement/Relocation of NC structure
Accessory structures in the shoreland		11.8 Accessory structures in the shoreland

D. Guidance: Unforeseen Difficulties

Counties may be able to keep their current nonconforming structure language

Many Wisconsin counties have updated their nonconforming structure language to language from the 50% valuation rule to language that limits expansion based on floor area or footprint of the structure. Revising ordinance language about NC structures can be quite controversial. Counties may stick with the language they currently have in their shoreland ordinance if their language is at least as stringent as the new NR 115.

Like all areas of NR 115, counties may be more stringent than the state minimums in regulating nonconforming structures. They might do this by:

- Limiting vertical expansion to structures that are 50’ or more from the OHWM

- Limiting expansion beyond the shoreland setback to structures that are a certain distance from the OHWM (the revised NR 115 allows any structure that extends beyond the SL setback to expand beyond the setback)

- Limiting expansion by setting a maximum footprint or square footage for NC structures

Some of these approaches are described on pages 42-45 and 64-66 of *Zoning Nonconformities* (2005) which is on-line at www.uwsp.edu/cnr/landcenter/Publications/NonconformitiesHandbook.pdf A printed copy of the same publication is free from the Center for Land Use Education.

Vertical expansion of principal nonconforming structures

Vertical expansion of principal NC structures may be problematic with earthmoving activity and vegetative removal close to the water. Other concerns are some structures may lack the structural integrity needed for additional stories, and vertical expansions can compromise natural scenic beauty. Counties may be more restrictive than NR 115 and not allow vertical expansion of nonconforming structures, or limit vertical expansions to greater distances back from the OHWM.

Expansion of principal nonconforming structures beyond the setback

NR 115.05(1)(g)5m that allows expansion of a principal nonconforming structure that extends to the shoreland setback, which may include setback averaging. This allows a principal structure located very close to the OHWM that extends to the shoreland setback to be expanded beyond the setback. Counties may be more restrictive than NR 115 and only allow expansion of nonconforming structures that meet a certain shoreland setback.

Nonconforming accessory structures

The WCCA shoreland committee strongly encourages counties to not allow rebuilding of nonconforming accessory structures. For example, the Lincoln County shoreland ordinance states in section 21.13

> *21.13 LEGAL PRE-EXISTING STRUCTURES THAT DO NOT CONFORM TO THE NEW STANDARDS .*
>
> *(1) ACCESSORY STRUCTURES Accessory structures that were legally constructed before the adoption of this chapter may be maintained, but may not be expanded or rebuilt*

unless made to conform with provisions of this chapter. Legal pre-existing boathouses are subject to §21.07(4)(a) of this chapter.[1]

E. Frequently Asked Questions (FAQs)

Q: Is relocation allowed for principal structures that are less than 35 feet from the OHWM? Please clarify NR 115.05(1)(g) about nonconforming structures.

A: DNR legal opinion - Structures that are less than 35 feet from the OHWM can still be maintained, as provided in NR 115. Also these structures could be relocated beyond the required building setback under NR115.05(1)(b)1., which means that these structure could be relocated beyond the 75 foot setback or reduced setback. Also it is important to remember that NR 115 does not override the provisions for nonconforming structures in s. 59.69(10), Wis. Stats. which contains the 50% rule. The variance process is also available to property owners.

Q: Is it true that vertical expansion of a nonconforming principal structure is NOT allowed if any portion of the existing principal structure is closer than 35' from the OHWM?

A: Correct, if the existing principal structure is closer than 35' from the OHWM it CANNOT be vertically expanded per NR 115.05(1)(g)5.

Q: If a structure is less than 35 feet from the OHWM, may a landowner tear off the portion of the structure closer than 35' and then expand the remaining structure vertically?

A: It depends on the county's definition of "maintenance and repair." Some counties' definitions for "maintenance and repair" include language such as not replacing more than a specified percentage of the structure's perimeter. If removing the portion of the structure closer than 35' from the OHWM complies with the county's maintenance and repair definition, then the landowner could remove the portion of the structure closer than 35' from the OHWM and then expand vertically on the remaining structure which will be at least 35' from the OHWM.

[1] General Code, County of Lincoln, Wisconsin www.municode.com/resources/gateway.asp?pid=12537&sid=49 accessed 2/5/11.

Q: If an existing principal structure was lawfully placed at less than 35' from the OHWM can it be expanded?

A: If it extends to the shoreland setback, then yes the portion of the structure that meets the setback requirement can be expanded landward, vertically or horizontally according to NR 115.05(1)(g)5m.

Q: If a structure is at 36' from OHWM may the entire structure be expanded vertically or only that portion of the structure beyond 75' from the OHWM?

A: The entire structure can be expanded vertically according to NR 115.05(1)(g)5 but is limited to 35' in height according to NR115.05(1)(f).

Q: Under NR115.05 (1)(g)6.d, the county determines that no other location is available on the property to build a principal structure of a comparable size. What is meant by "comparable size?" Does this mean that the replacement principal structure must be the same/similar/exact size using square footage or cubic footage? Must the proposed roof lines/angle be the same as the existing principal structure?

A: It is recommended that each county define "comparable size," to their liking within their ordinance. Please keep in mind that said definition must meet review by the Department of Natural Resources.

Q: How do we read NR 115.05(1)(g)6 which addresses replacement and relocation of nonconforming principal structure together with NR 115.05(1)(e)4 which addresses existing impervious surfaces?

A: DNR Legal - If you are replacing and relocating a non-conforming structure, you will also have to meet the standards for impervious surfaces. See the following examples.

Scenario #1: Someone wants to replace a 1000 sq. ft. cottage that is within 40 ft. from the OHWM.

The non-conforming structure provisions would require:

1. That the use not be discontinued for more than 12 mos.

2. The structure is at least 35 ft. from the OHWM

3. No portion of the replaced/relocated structure is any closer to the OHWM than the existing structure

4. The county determines that no other location is available for a structure of a comparable size

5. A mitigation plan is submitted and approved by the county

6. All other non-conforming structures (non-exempt) on the lot be removed.

Then the existing impervious surface regulations would allow "replacement of existing impervious surfaces with similar surfaces within the existing building envelope". This means that if the cottage is a one-story ranch currently, they could replace it with a 1 story ranch as long as it didn't take up more sq. ft. of land. (NR 115.05(1)(e)4.b.)

Let's say they also want to create a new garage, which will meet the required setbacks, in addition to the new house. If they are removing existing structures that are within the setback, such as a shed or deck, or putting the garage over part of the existing driveway, they could offset the area of the new garage such that they have no increase in impervious surfaces and would not kick in the impervious surface regulations. If they could not offset the area of the new garage then they would have to determine if they exceed 15% or 30% IS. If they exceed 15% IS then they are already doing mitigation but might have to do more, depending upon the county's system.

Scenario #2: They want to replace a 1000 sq. ft. cottage. However, it is currently a 2-story structure and they want a 1-story structure.

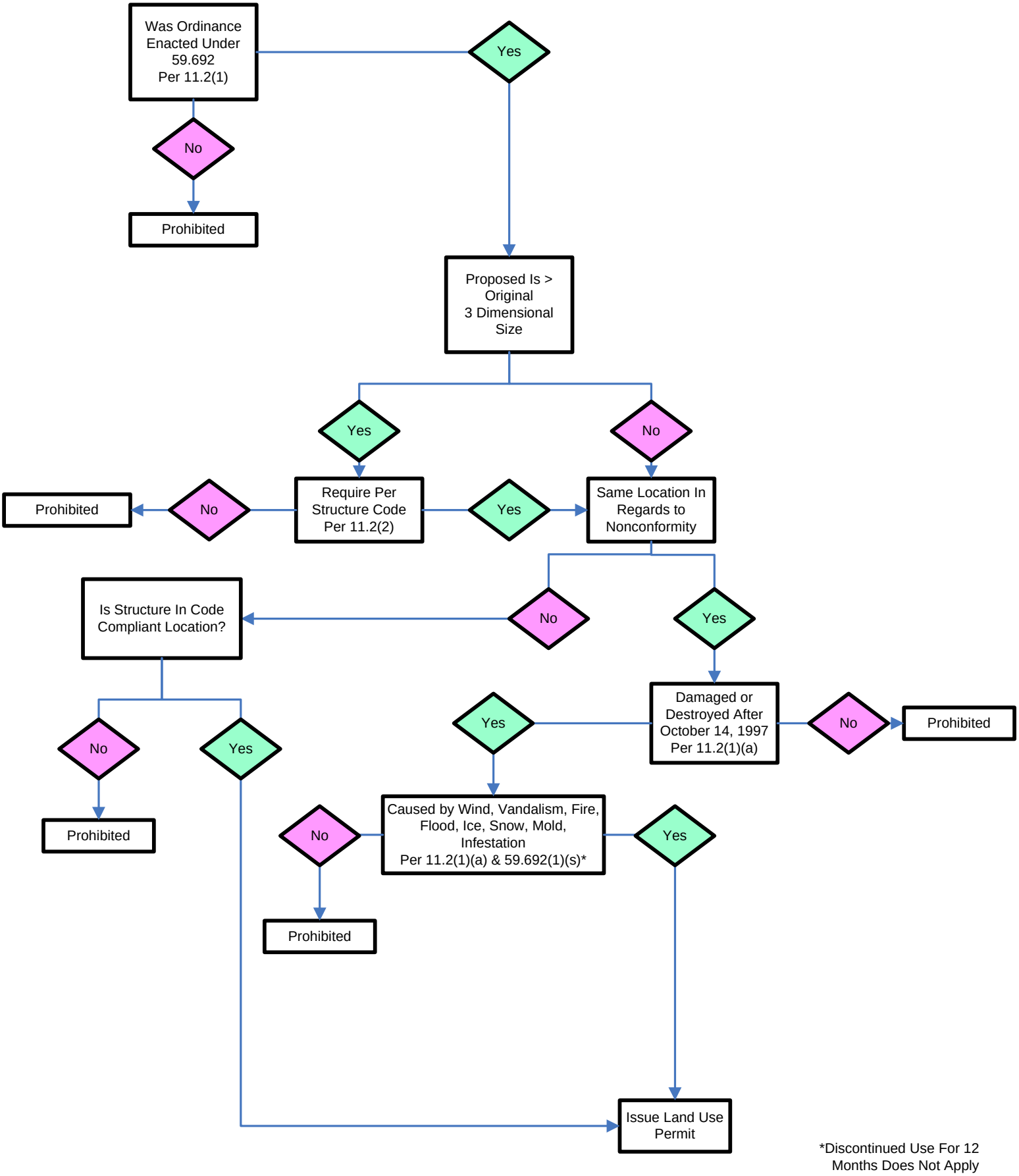
The same situation exists for the non-conforming structure provisions but now they may not take advantage of the existing impervious surface standards and would have be to determine if they exceed 15% or 30%.

Chapter 4:

Appendix

11.2 Nonconforming Structures

Replacement of Existing Damaged or Destroyed

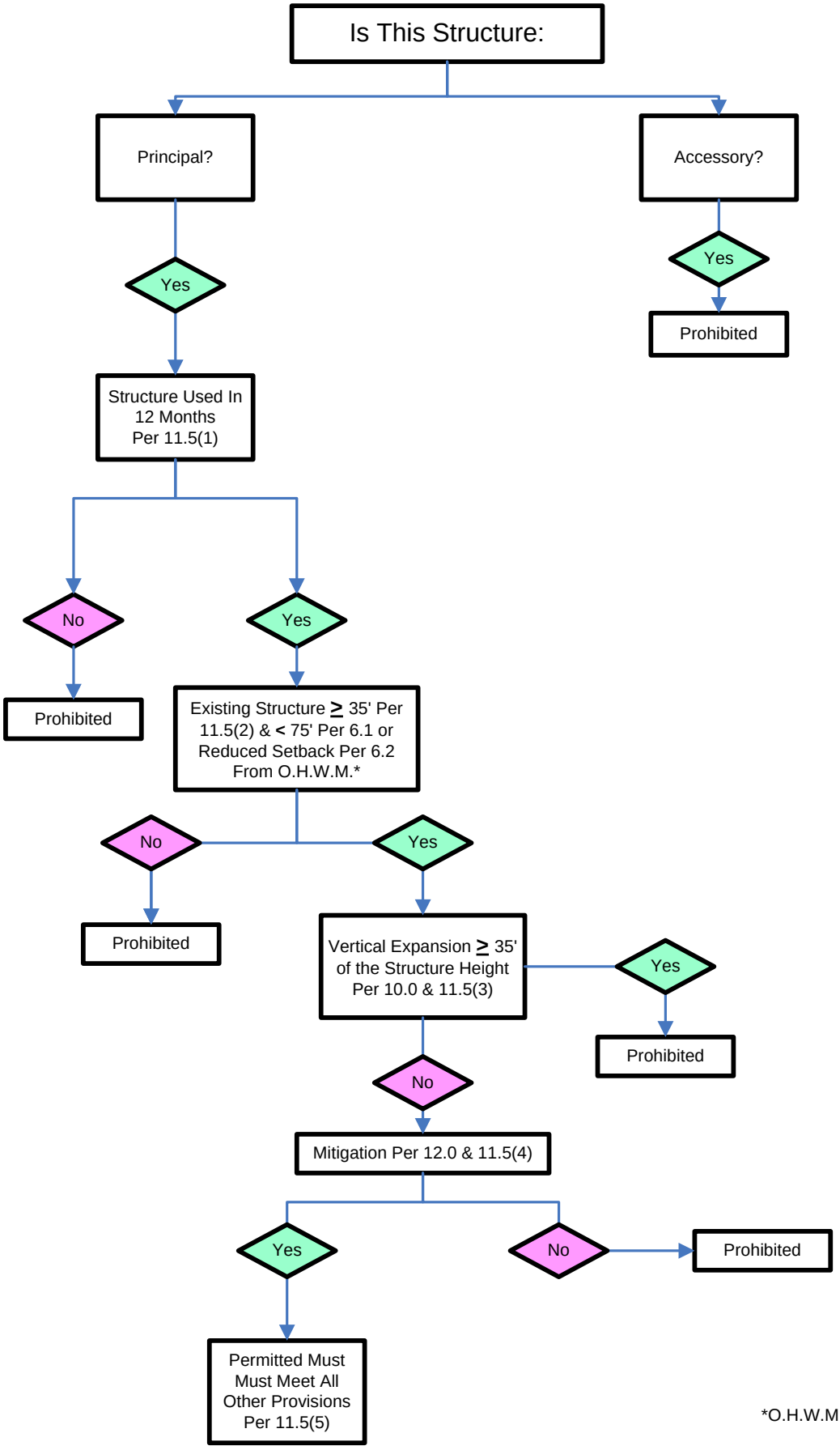


*Discontinued Use For 12 Months Does Not Apply

11.2 NonConform Struct (DFT 1)-RV2.vsd

11.5 Nonconforming

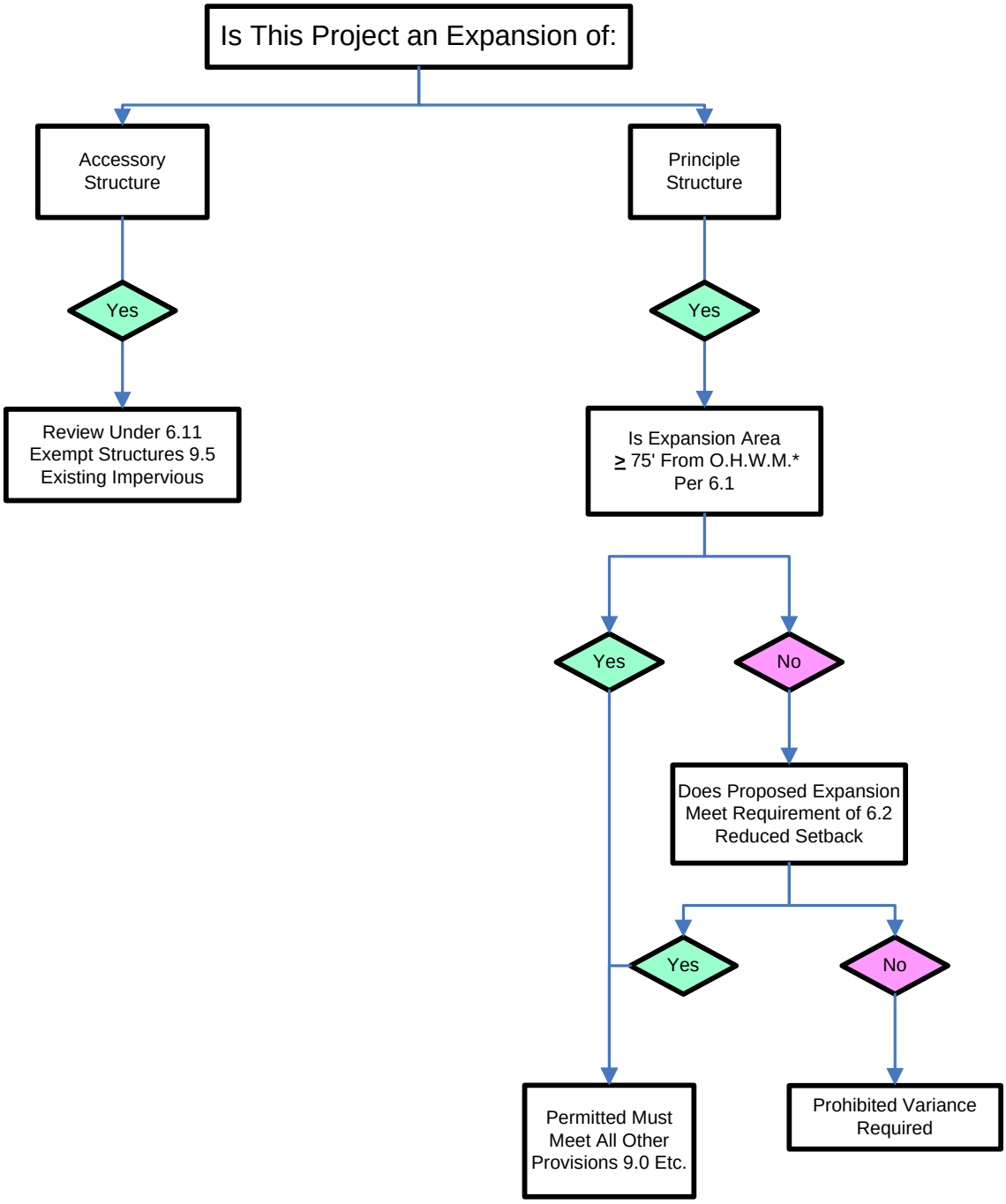
Vertical Expansion Principle Only



*O.H.W.M. = Ordinary High Water Mark

11.5 NonConform Vertical (DFT 1)-RV3.vsd

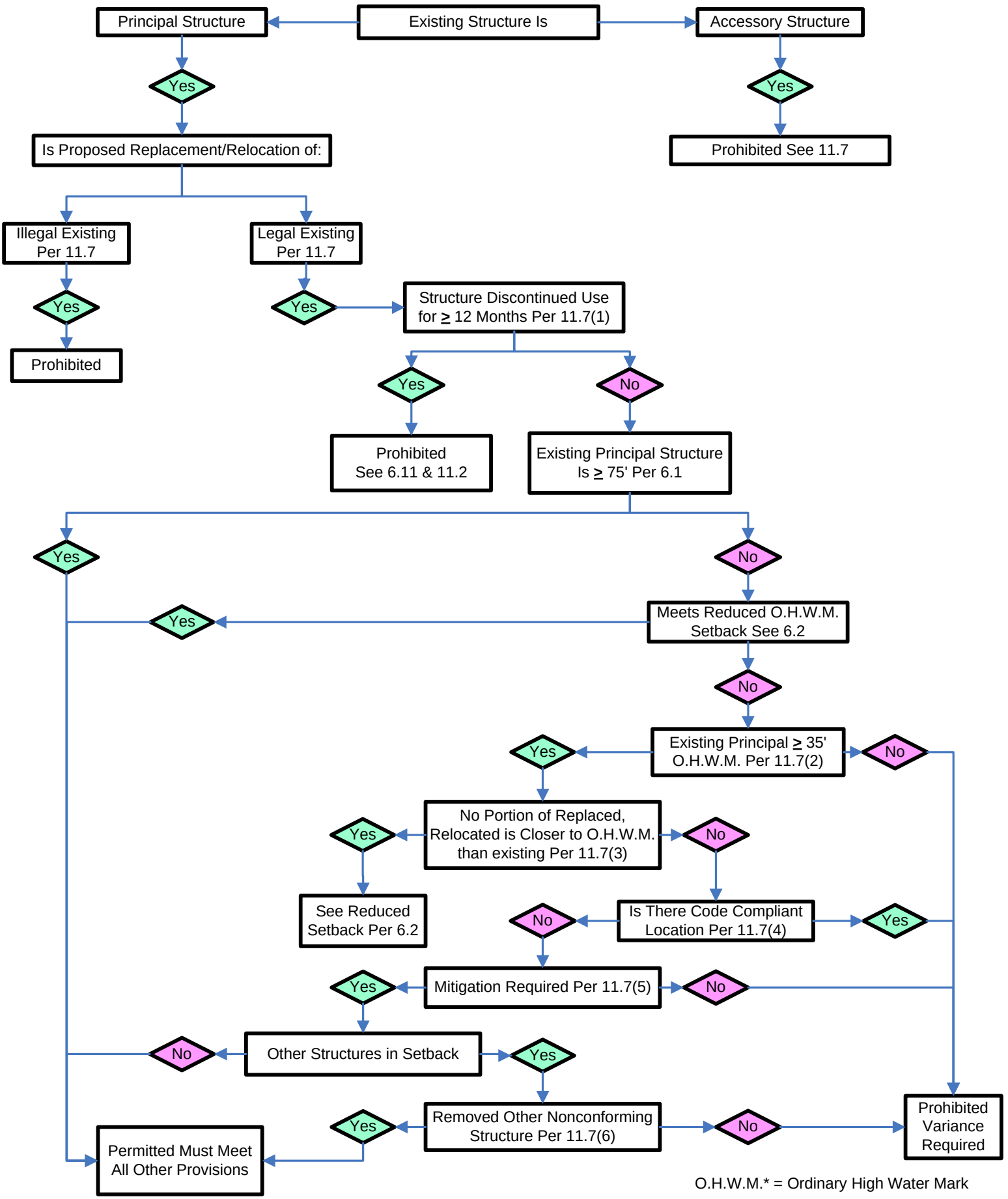
11.6 Horizontal Expansion (Additions) of Non-Conforming



*O.H.W.M. = Ordinary High Water Mark

11.6 Horizontal Expansion-Addition(DFT 1).vsd

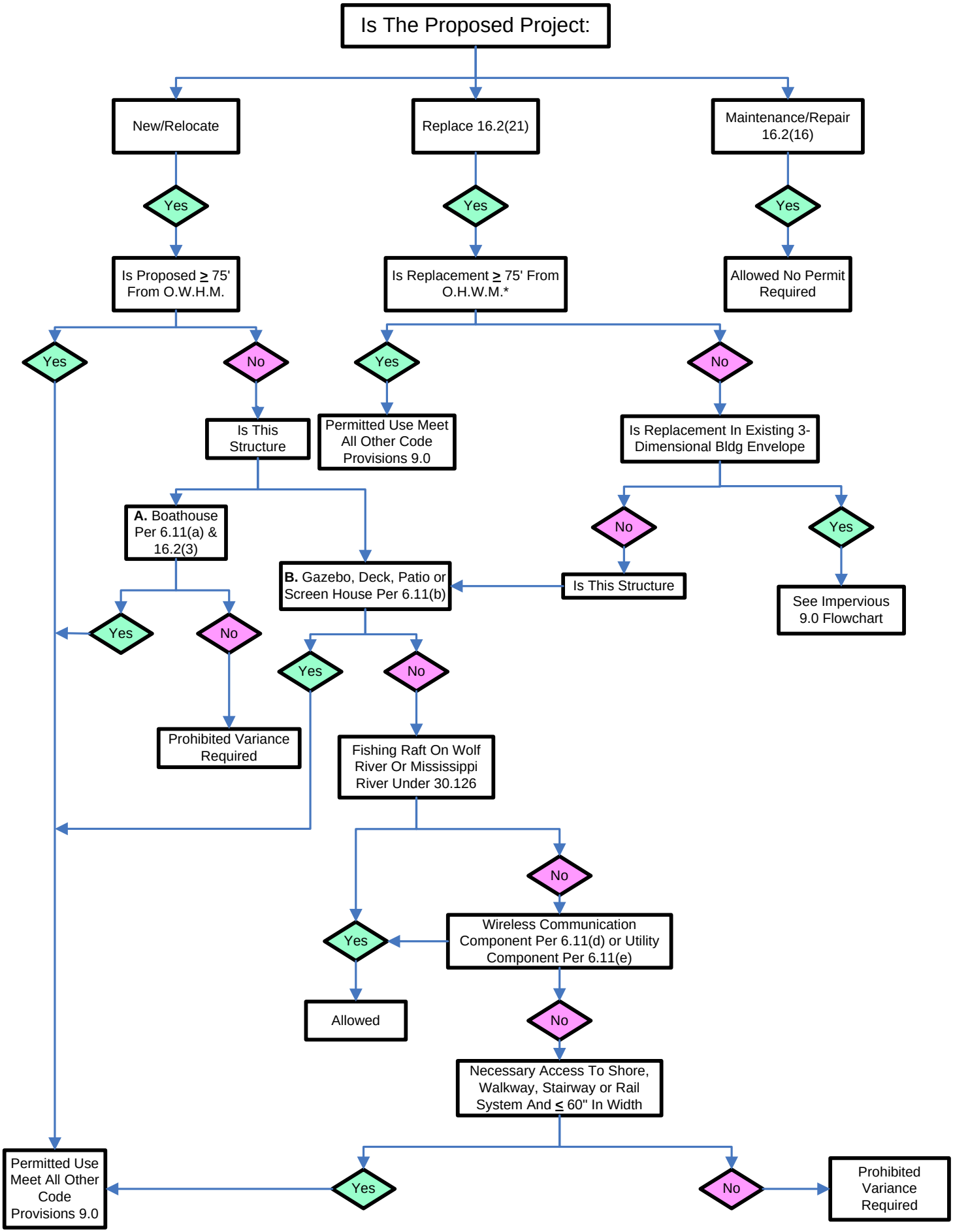
11.7 Replacement/Relocation of Principal Non-Conforming Structure



O.H.W.M.* = Ordinary High Water Mark

11.7 ReplaceRelocate (DFT 2).vsd

Accessory Structures In Shoreland

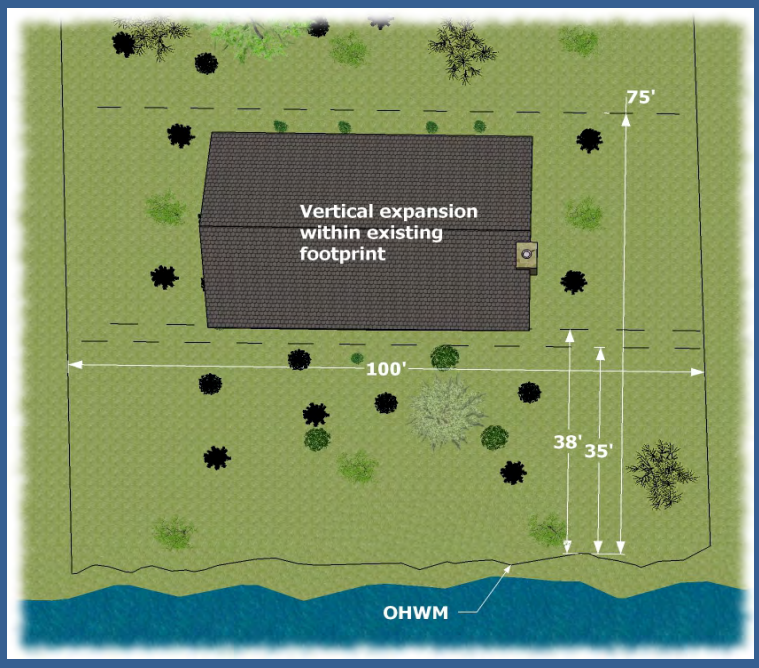


*O.H.W.M. = Ordinary High Water Mark

Accessory Structures (DFT 1).vsd

Diagram A:

Nonconforming Principal Structure Located Greater than 35 feet from the OHWM.
Vertical Expansion within the Existing Building Envelope.



NR115.05(1)(g)(5)

- Use has not been discontinued for a period of 12 months or more
- Limited to height NR115.05(1)(f)
- Mitigation required
- All other provisions apply

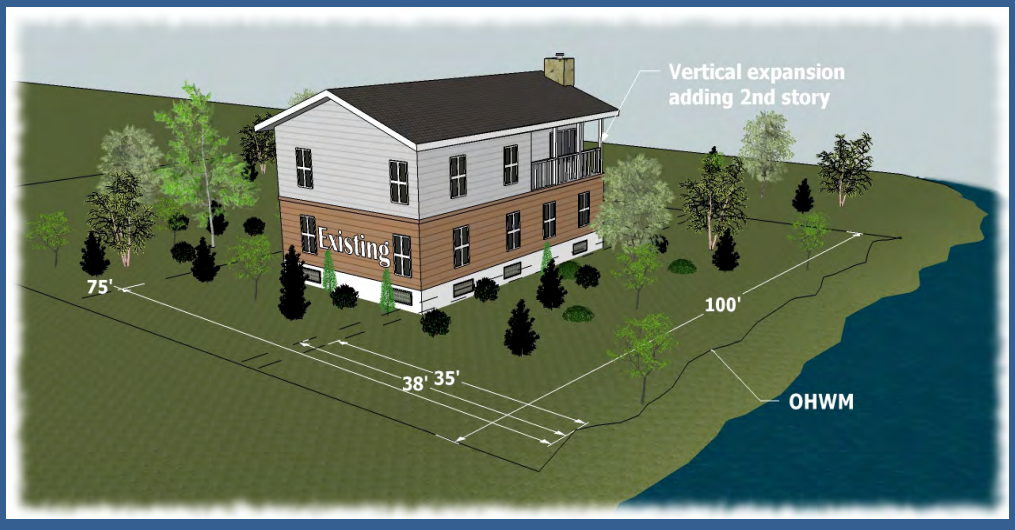
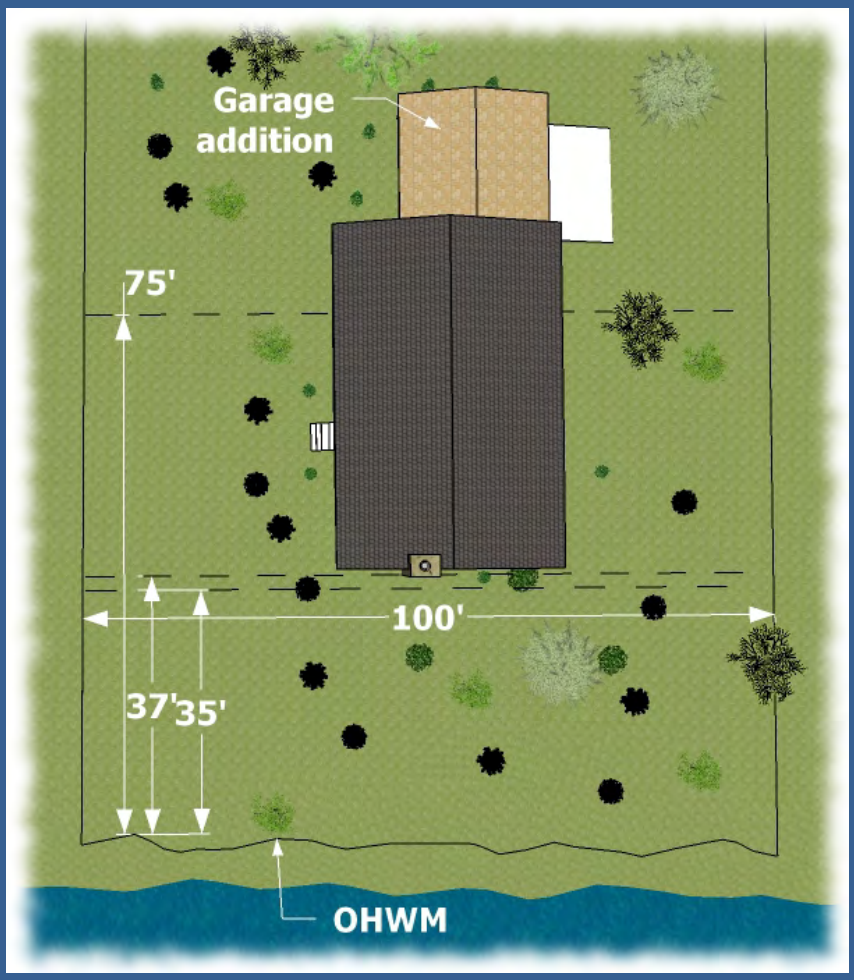


Diagram B:

Nonconforming Principal Structure Located Greater than 35 feet from the OHWM. Vertical Expansion within the Existing Building Envelope and Horizontal Expansion at a Setback Greater than 75 feet from the OHWM.



NR115.05(1)(g)(5)&(5m)

- Use has not been discontinued for a period of 12 months or more
- Mitigation is required
- Limited to height limitations
- All other provisions apply

Diagram C:

Nonconforming Principal Structure Located Less than 35 feet from the OHWM. Vertical Expansion within the Existing Building Envelope and Horizontal Expansion at a Setback greater than 75 feet from the OHWM.

NR115.05(1)(g)(5m)

- Use has not been discontinued for a period of 12 months or more
- Mitigation is required
- Limited to height limitations
- All other provisions apply

Diagram D:

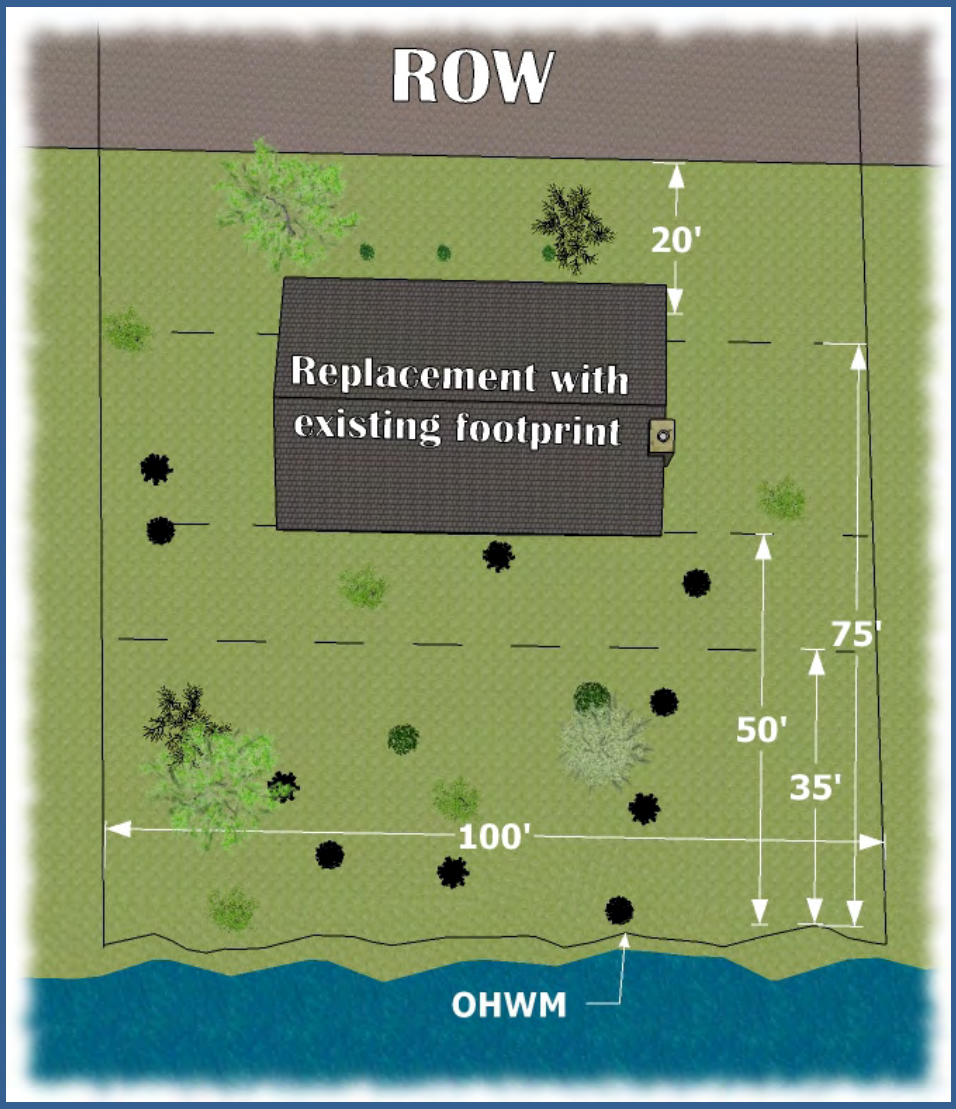
Nonconforming Principal Structure Located Greater than 35 feet from the OHWM. Horizontal Expansion at a Setback Greater than 75 feet from the OHWM.

115.05(1)(g)(5m)

- Use has not been discontinued for a period of 12 months or more
- All other provisions apply

Diagram E:

Nonconforming Principal Structure Located Greater than 35 feet from the OHWM. Replacement within the Existing Building Envelope.



NR115.05(1)(g)(6)

Permitted replacement @ 50'. No other compliant location for a principal structure of comparable size.

- Use has not been discontinued for a period of 12 months or more
- No portion of replacement can be closer than existing setback
- County must look @ options
- Mitigation required
- Removal of all accessory structures < 75'

Diagram F:

Nonconforming Principal Structure Located Greater than 35 feet from the OHWM. Replacement and Relocation of the Existing Building Envelope.

NR 115.05(1)(g)(6)

New Replace/Relocate to 50’ from OHWM

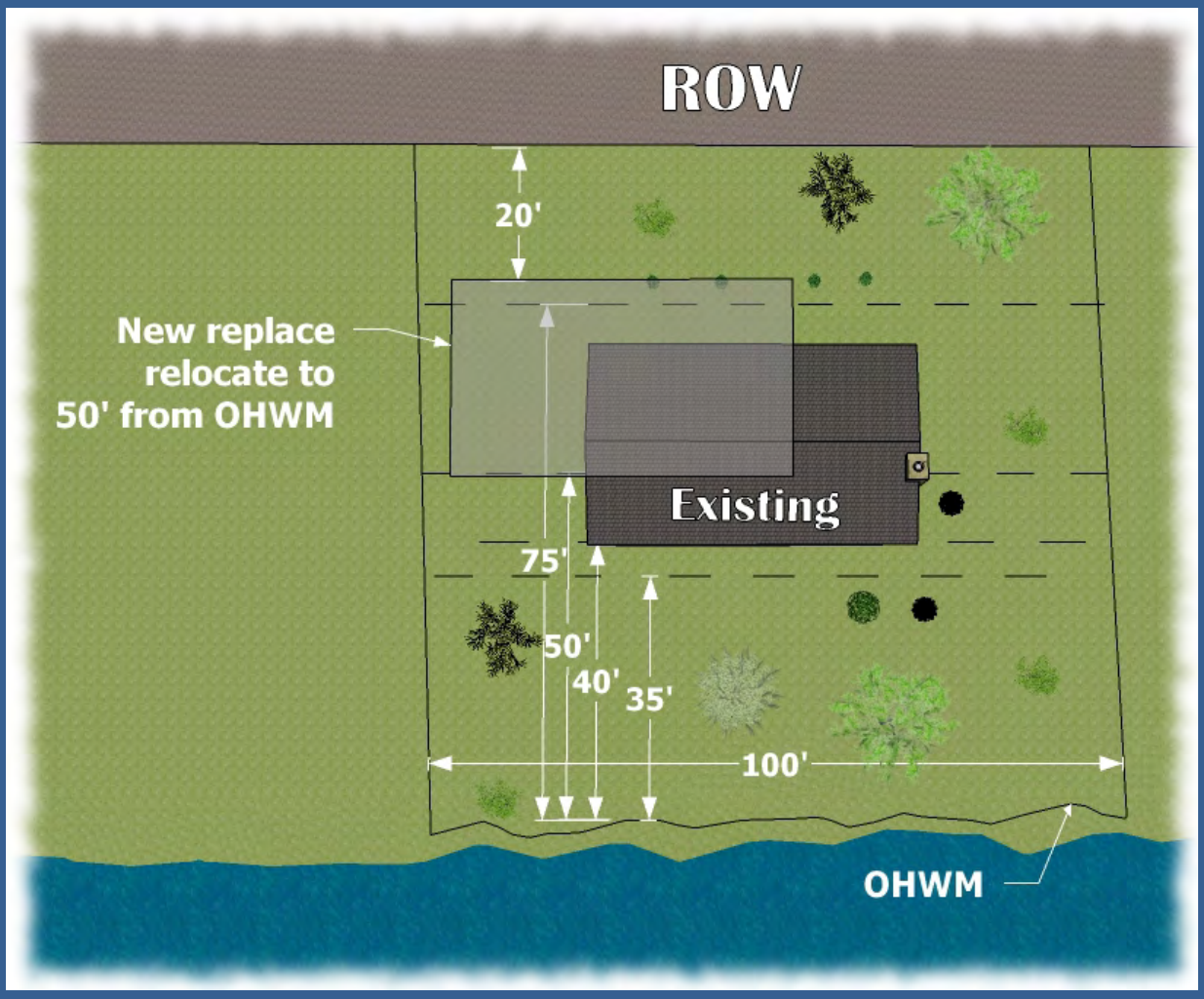
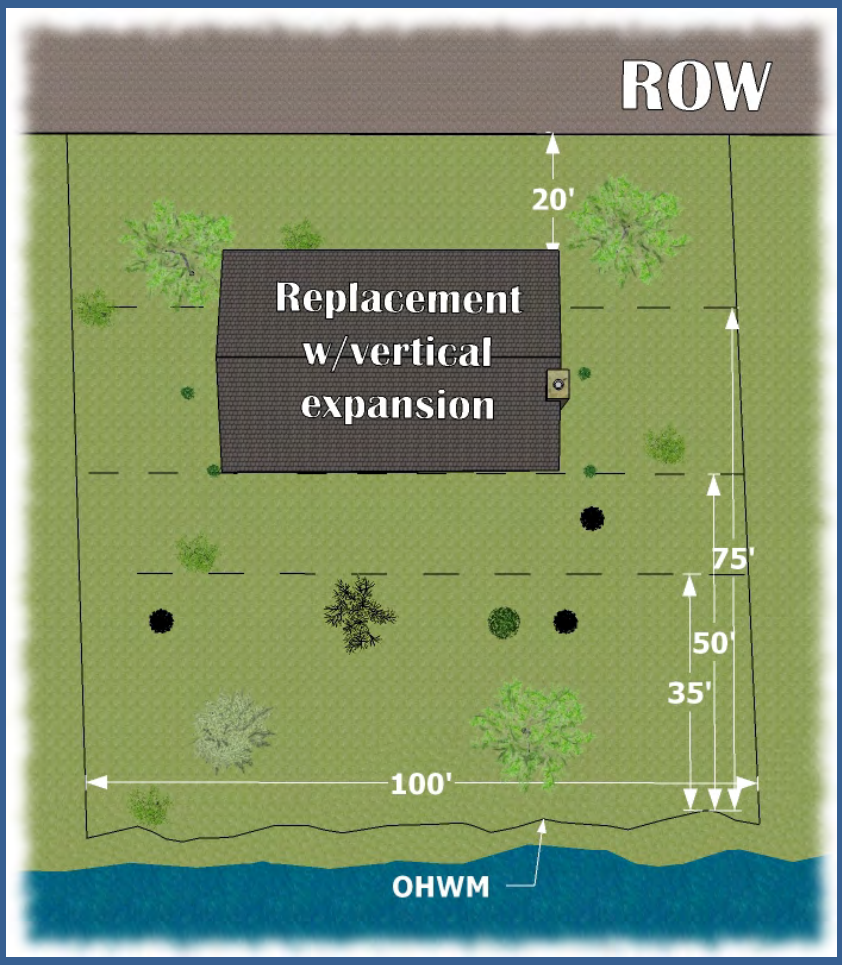


Diagram G:

Nonconforming Principal Structure Located Greater than 35 feet from the OHWM. Replacement and Vertical Expansion within the Existing Building Envelope.



NR115.05(1)(g)(5)&(6)

- Was not been discontinued > 12 months
- No portion of replacement can be closer than existing setback
- County must look @ options
- Mitigation required
- Removal of all accessory structures < 75’
- Limited to height limitations

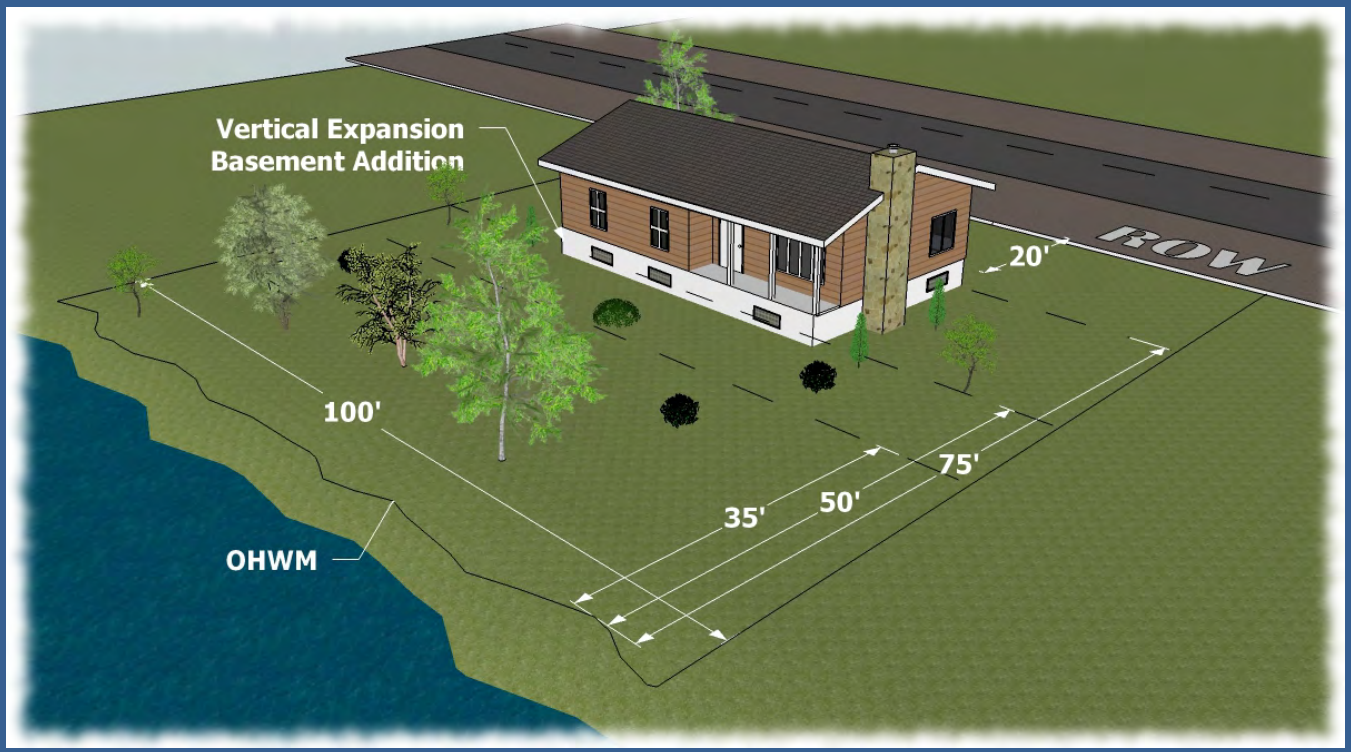


Diagram H:

Nonconforming Principal Structure Located Greater than 35 feet from the OHWM. Replacement, Relocation and Vertical Expansion within the Existing Building Envelope.

NR115.05(1)(g)(5)(6)

- New Replace/relocate to 50' from OHWM
- Addition > 75' meeting 20' setback to Row
- Was not been discontinued > 12 months
- No portion of replacement can be closer than existing setback
- County must look @ options
- Mitigation required
- Removal of all accessory structures < 75'
- Limited to height limitations

Chapter 5:
Reduced Shoreland Setbacks

A. NR 115 Language Including Definitions: NR 115.05(1)(b)

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

1. 'Shoreland setback.' Except where exempt under subd. 1m., a setback of 75 feet from the ordinary high−water mark of any navigable waters to the nearest part of a building or structure shall be required for all buildings and structures. Where an existing development pattern exists, the shoreland setback for a proposed principal structure may be reduced to the average shoreland setback of the principal structure on each adjacent lot, but the shoreland setback may not be reduced to less than 35 feet from the ordinary high−water mark of any navigable waters.

Note: A property owner may seek a variance to a dimensional standard of the county ordinance and a county board of adjustment may review the request pursuant to s. 59.694 (7) (c), Stats.

1m. 'Exempt structures.' All of the following structures are exempt from the shoreland setback standards in subd. 1.:

a. Boathouses located entirely above the ordinary high−water mark and entirely within the access and viewing corridor that do not contain plumbing and are not used for human habitation.

Note: This chapter does not prohibit repair and maintenance of boathouses located above the ordinary high−water mark.

b. Open sided and screened structures such as gazebos, decks, patios and screen houses in the shoreland setback area that satisfy the requirements in s. 59.692 (1v), Stats.

c. Fishing rafts that are authorized on the Wolf river and Mississippi river under s. 30.126, Stats.

d. Broadcast signal receivers, including satellite dishes or antennas that are one meter or less in diameter and satellite earth station antennas that are 2 meters or less in diameter.

e. Utility transmission and distribution lines, poles, towers, water towers, pumping stations, well pumphouse covers, private on−site wastewater treatment systems that comply

with ch. Comm 83, and other utility structures that have no feasible alternative location outside of the minimum setback and that employ best management practices to infiltrate or otherwise control storm water runoff from the structure.

f. Walkways, stairways or rail systems that are necessary to provide pedestrian access to the shoreline and are a maximum of 60−inches in width.

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

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

115.03(3m)

(3m) "Existing development pattern" means that principal structures exist within 250 feet of a proposed principal structure in both directions along the shoreline.

B. DNR model ordinance language from December 14, 2010

1.2 REDUCED PRINCIPAL STRUCTURE SETBACK. (NR 115.05(1)(b)1.) Existing development pattern means that principal structures exist within 250 feet of the proposed principal structure in both directions along the shoreline. Where there is an existing development pattern, the shoreland setback for a proposed principal structure may be reduced to the average shoreland setback of the principal structure on each adjacent lot within 250 feet of the proposed principal structure. The shoreland setback may not be reduced to less than 35-feet from the ordinary high-water mark of any navigable waters.

16.2(6) "Existing development pattern" (NR 115.03(3m)) means that principal structures exist within 250 feet of a proposed principal structure in both directions along the shoreline.

16.2(17) "Shoreland setback" also known as the "Shoreland setback area" in s. 59.692(1)(bn) means an area in a shoreland that is within a certain distance of the ordinary high-water mark in which the construction or placement of buildings or structures has been limited or prohibited under an ordinance enacted under section 59.692, Wis. Stats.

Policy Option to 6.2

1) When an existing development pattern exists county may permit a reduced minimum setback for a new principal residential structure of not less than 35 feet if all of the following conditions are satisfied:

a) The lot does not have a compliant building location which meets the applicable county setback, a minimum of 75 feet from the ordinary high water mark, due to unique property features.

b) The depth of the structure is limited to 30 feet.

c) The lot is a legal lot of record that complied with the applicable lot size standards in effect at the time that the lot was recorded at the county register of deeds office.

d) The minimum setback shall be minimally reduced to create a compliant building location and may not be less than 35 feet from the ordinary high water mark.

e) Soil disturbance and vegetation removal activities do not encroach into the primary shoreland buffer.

f) All other provisions of this ordinance are met

C. Additional Resources

Appendix 5 contains the following reduced water setback resource recommended by the WCCA shoreland committee:

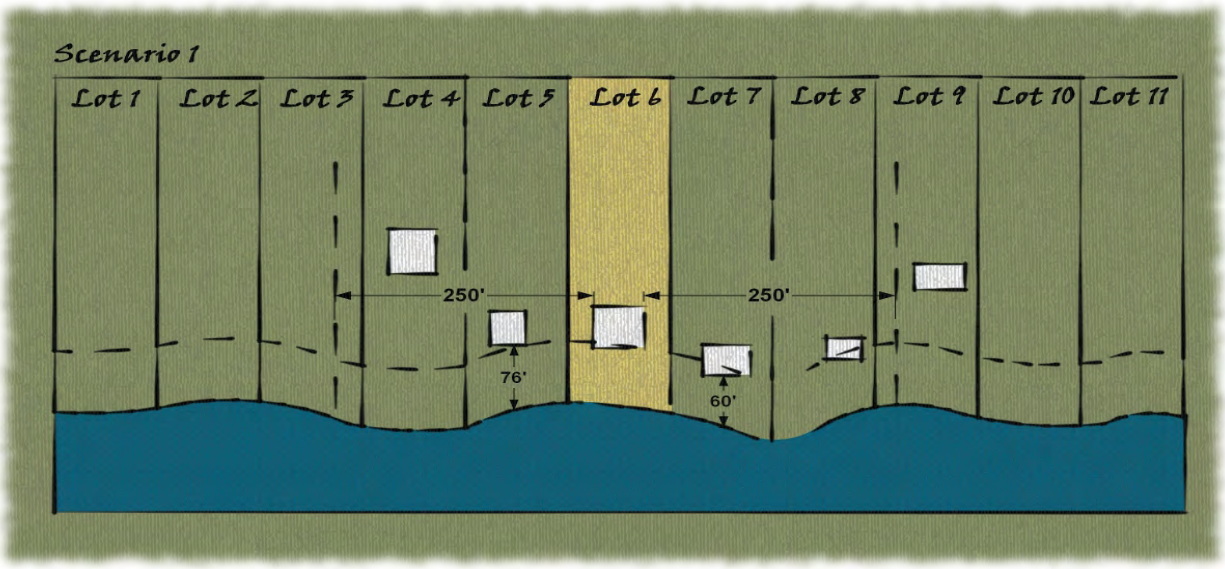
- 6.2 reduced water setback flow chart

D. Guidance: Unforeseen Difficulties

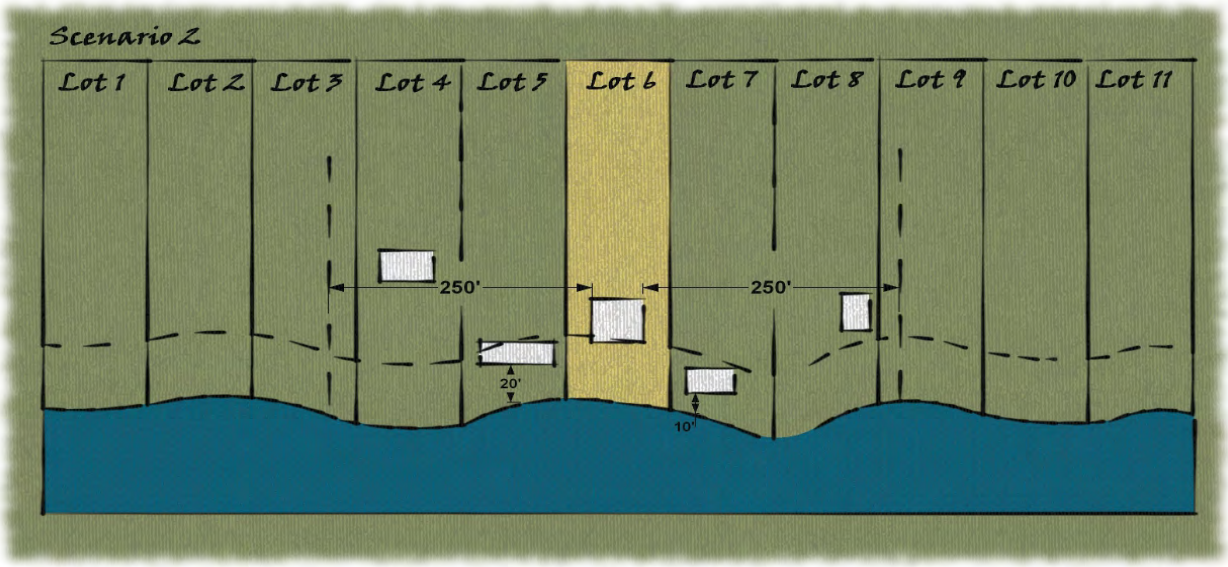
<u>Setback averaging discouraged</u>
The WCCA shoreland committee discourages counties from using setback averaging. Many counties have removed setback averaging from their ordinance which reduced their workload because without setback averaging the setback is the setback.

E. Frequently Asked Questions (FAQs)

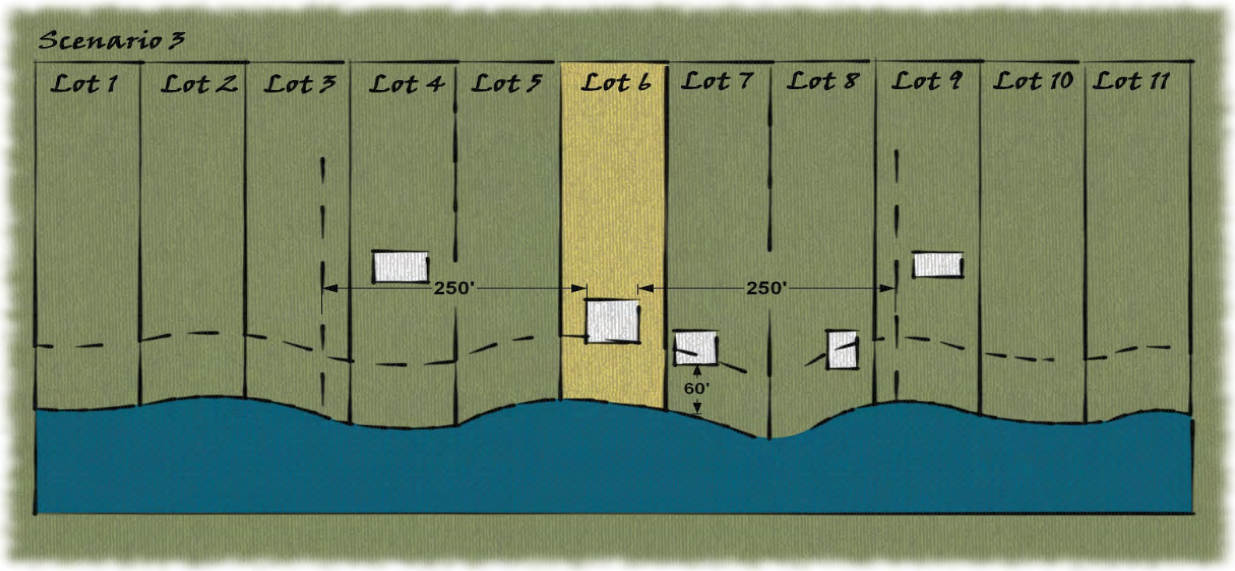
The below graphics relate to the question on page 5-6.



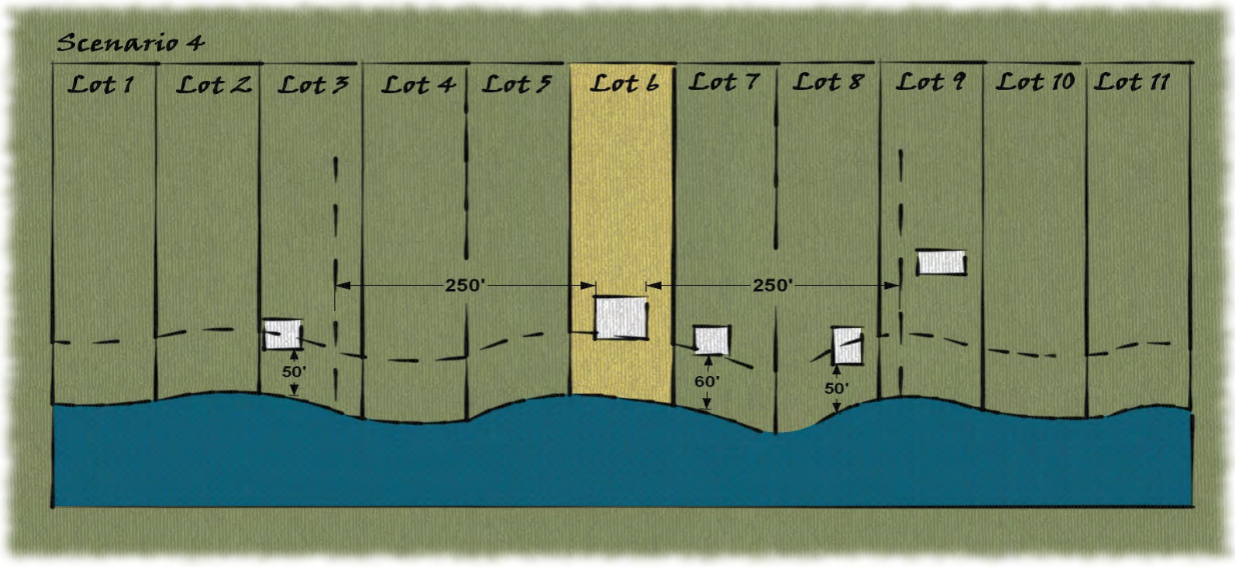
Scenario 1, Lot 6 Reduced Setback is 68 feet.
250' Pattern on both sides of Lot 6 - Yes. Adjacent Lots are: Lot 5 is 76 feet and Lot 7 is 60 feet.



Scenario 2, Lot 6 Reduced Setback is 15 feet – Minimum Setback allowed 35 feet.
250' Pattern on both sides of Lot 6 - Yes. Adjacent Lots are: Lot 5 is 20 feet and Lot 7 is 10 feet.



Scenario 3, Lot 6 Reduced Setback is prohibited – No structure on adjacent lot, per 6.2.
250' Pattern on both sides of Lot 6 – Yes. Adjacent Lots are: Lot 5 no principle structure and Lot 7 is 60 feet.



Scenario 4, Lot 6 Reduced Setback is 15 feet – Minimum Setback allowed 35 feet.
250' Pattern on both sides of Lot 6 - No. Reduced Setback prohibited – No pattern.

Q: In Scenario 3 above do you setback average between 60 feet and 75 feet when there is a principal structure at 60 feet from the OHWM on one adjacent lot and no principal structure on the other adjacent lot?

A: WCCA recommends not using setback averaging. If you do, be aware that DNR legal counsel and the WCCA legal counsel disagree about how to interpret it as described below.

DNR Legal Opinion:

To have a reduced setback you must have two things:

- An existing development pattern, which has been defined in NR 115 to "mean[s] that principal structures exist within 250 feet of a proposed principal structure in both directions along the shoreline."
- A principal structure on each adjacent lot to the proposed structure.

So for scenario 3 you would not have an existing pattern of development, so setback averaging is not allowed.

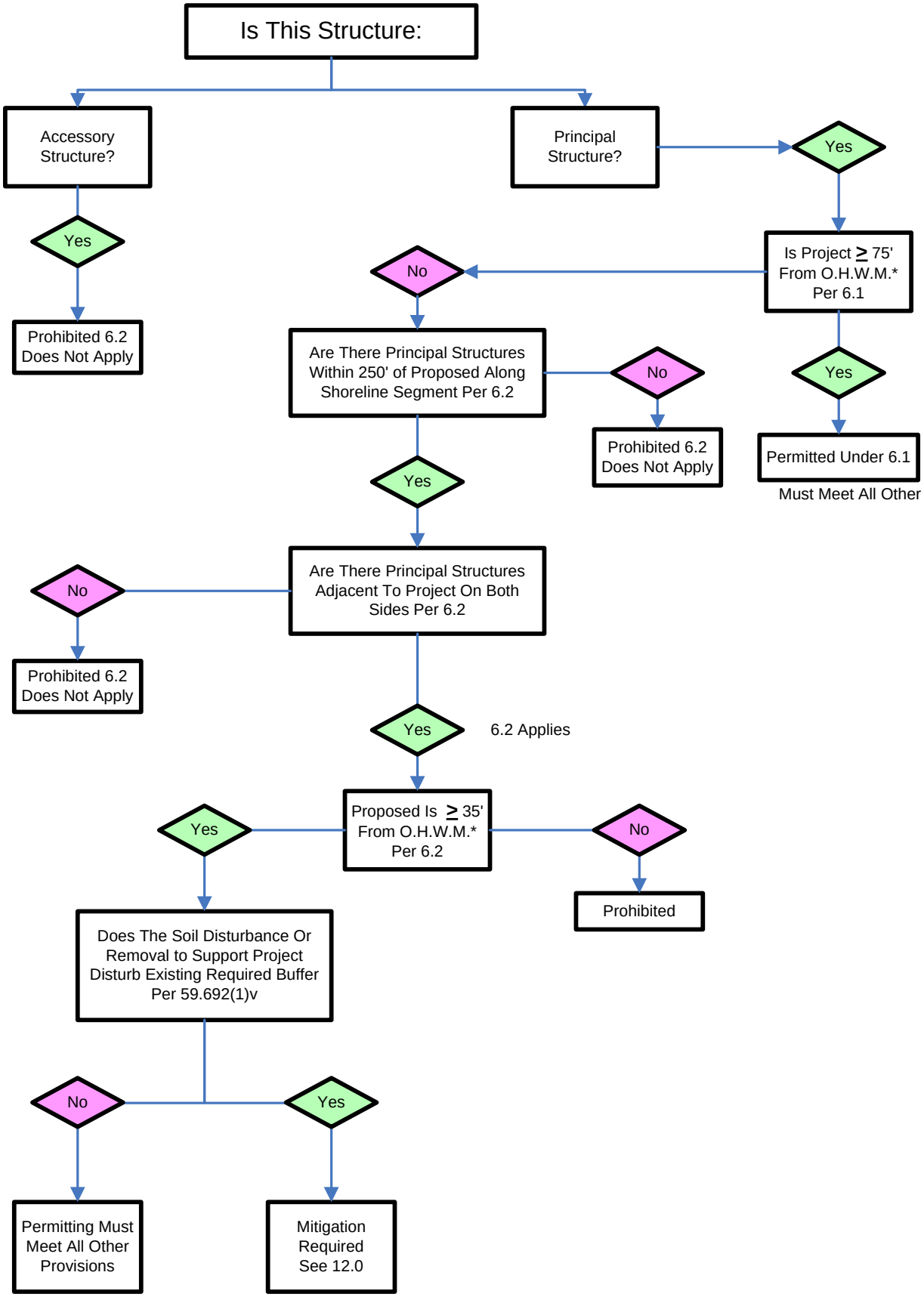
WCCA Legal Counsel Opinion:

I believe there is case law that distinguishes “abutting” (a lot touching another lot) with “adjoining” (lots that are in close proximity). In shoreland areas where narrow lots are prevalent, it is possible that a next neighboring existing structure may be within 250 feet of the proposed structure, but not necessarily on the abutting lot. It is quite possible that the structure that gives rise to setback averaging could be on a non-abutting lot, if the abutting lot is vacant. The rules refer to “adjoining” and “250 feet”. I believe it is proper to use averaging if an abutting (or even next adjoining) lot is vacant, if there is a structure within 250 feet of the proposed structure. In these cases, the vacant lots are skipped”.

Chapter 5:

Appendix

6.2 Reduced Water Setback



*O.H.W.M. = Ordinary High Water Mark

6.2 Reduced Water Setback (DFT 1)-RV2.vsd

Chapter 6:
Wetland Protection

Kyle Magyera from Wisconsin Wetland Association developed compiled wetland protection language from Wisconsin coastal counties, and provided recommendations in a publication "Land Use and Wetlands: Zoning Opportunities to Improve Wetland Protection" available at www.wisconsinwetlands.org/localgovs.htm

The following text is an excerpt from this document that is a policy option for counties to consider.

Recommendation A:

Modify the Purpose and Intent section of the ordinance to identify wetland protection as a distinct goal and to recognize how wetland protection and restoration advances other zoning objectives.

The Purpose and Intent section of an ordinance articulates the goals and objectives of an ordinance, and sometimes includes a description of the means by which these goals will be met. These statements reflect local governments' land use priorities, provide the basis for decision-making, and help educate the public on the range of concerns the ordinance aims to address.

Conversely, omissions from these statements may imply a lack of commitment to certain goals. Including wetland protection as a distinct goal in the Purpose and Intent statement of a shoreland or general zoning ordinance confirms your jurisdiction's commitment to implement and enforce its wetland zoning requirements.

Local governments can also bolster public understanding of wetlands and support for wetland preservation by adding ordinance language that outlines how protecting and restoring wetlands can help the community meet other traditional zoning objectives.

For example, zoning ordinances often include standard objectives such as "reduce water pollution," "protect public safety," and "preserve fish and wildlife habitat. Many people, including policy makers, may not know that wetlands provide a suite of related public benefits (i.e., wetland functions). These include water quality improvement, flood attenuation, fish and wildlife habitat, groundwater recharge, shoreland erosion control, and preservation of natural scenic beauty.

What options are available to implement this recommendation?

These recommendations correspond to Sections 1.3-1.34 (Purpose and Intent) of the WDNR Minimum Shoreland Wetland Model Ordinance and/or similar section of a typical General Zoning Ordinance.

1. Add the following bullet to Section 1.31 (*Further the Maintenance of Safe and Healthful Conditions and Prevent and Control Water Pollution Through*):
    (5) Preserving wetlands to minimize runoff and soil erosion.
2. Add the following bullets to Section 1.34 (*Preserve and Restore Shoreland Vegetation and Natural Scenic Beauty Through*):
    (5) Preventing the destruction and degradation of wetlands.
    (6) Preserving native wetland plant/tree communities.
3. Add Section 1.35 (*Protect and Preserve Wetlands Through*)
    (1) Restricting the placement of fill material in wetlands.
    (2) Encouraging avoidance and minimization of wetland impacts.
    (3) Preserving native wetland plant/tree communities.
4. Add Section 1.36 (*Prevent Flood Damages Through*):
    1) Restricting filling, grading, and the placement of buildings and structures in floodplains and wetlands.
    2) Preserving the ecological integrity of floodplains and wetlands.
    3) Restoring floodplains and wetlands to increase floodwater storage.

Are these recommendations mandatory per recent State law revisions?

No. However, the recommendation to include wetland protection as a distinct goal is consistent with the intent of the minimum state standards, which require establishment of shoreland wetland zoning districts to reduce development in shoreland wetlands.

The WDNR Model Ordinance does recommend including wetland preservation as a means to protect spawning grounds, fish, and aquatic life.

The model ordinance fails to include wetland preservation as a means to prevent water pollution or protect scenic beauty and fails to recognize the reduction of floods and flood damages as a distinct goal. Protecting people and property from floods is yet another common zoning objective that can be advanced through wetland protection and restoration.

Have other local governments already adopted a similar recommendation?

Door County includes "to preserve wetlands" as a distinct goal in the purpose statement of its general zoning ordinance.

Kenosha and Racine Counties' purpose statements both read: *"to obtain the wise use,*

conservation, development and protection of the county's water, soil, wetlands, woodlands, wildlife and other natural resources and attain a balance between land uses and the ability of the natural resource space to support and sustain such uses."

Ashland, Brown, Douglas, Iron, Kewaunee, Marinette, and Ozaukee Counties list "wetland preservation" as a means to protect spawning grounds, fish, and aquatic life (as recommended in the WDNR model ordinance).

Recommendation B:

Protect all wetlands in the shoreland zone.
(*Establish a wetland district based on wetland definitions and field conditions; Use best available technology and information generated in state and federal wetland permit reviews to implement*).

State law defines w*etlands as* "those areas where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which have soils indicative of wet conditions."9 The State of Wisconsin regulates (requires review and approval of) construction activities in all wetlands, regardless of wetland size or location. Though local governments have the authority to exceed state minimum shoreland zoning standards, the minimum standards only require local protection of wetlands that fall within the shoreland zone *and* appear on the Wisconsin Wetland Inventory (WWI).10.11 Because the minimum mapping unit is 2 or 5 acres depending on the county, impacts to wetlands less than 2 (or 5) acres are subject to no local land use review in many counties. As time passes between ordinance updates, the most recent version of the WWI maps (i.e., the most accurate) may also not be referenced in the code.

Regulating shoreland wetlands based solely on adoption of a particular version of the WWI map(s) can be confusing to the public and poses inherent challenges for the implementation of both state and local wetland protection laws. These challenges include but are not limited to:
1. A public perception that "if it's not on a map it's not a wetland";
2. A public perception that wetlands less than 2 (or 5) acres are not regulated under any laws;
3. Confusion over where a wetland starts and stops due to discrepancies between map boundaries and field conditions;
4. A need to update the ordinance if/when new WWI maps are released;
5. An unnecessary restriction of the county's authority to discourage development in small wetlands (< 2-5 acres), ephemeral ponds, forested wetlands, and other wetlands that tend to be underrepresented on the WWI due to the limitations of using remotely sensed information as the primary data source. 12
6. The need for a dispute-resolution process in counties that wish to regulate based on field conditions but rely on WWI maps as the baseline for their jurisdiction.

These challenges can be easily addressed by designating the shoreland-wetland district to include all wetlands, regardless of depiction on WWI maps, and adopting some or all of the implementation recommendations below. These changes can help counties enhance wetland protection and reduce regulatory confusion and conflicts. We note that many of the recommendations can be implemented at little to no additional expense to the county and may improve the efficiency of county's implementation of the shoreland-wetland zoning program.

What options are available to implement this recommendation?

These recommendations correspond to Sections 2.2 (Shoreland-Wetland Maps); 2.3 (Compliance); 2.52 (Abrogation and Greater Restrictions); 3.1 (Designation); 3.11 (Locating Shoreland-Wetland Boundaries); 8.13 (General Standards); and 8.4 (Permit Conditions) of the WDNR Minimum Shoreland Wetland Zoning Model Ordinance and/or the similar sections of a typical General Zoning Ordinance.

1. Modify Section *3.1 Designation* to clearly indicate that all wetlands are protected in the intended jurisdiction. Include language to establish that maps are used to help identify wetlands but that the regulations apply to lands where field conditions meet the definition of wetlands.
This section could be written as follows:

Wetlands are defined as those areas where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which have soils indicative of wet conditions.13 The Shoreland-Wetland District shall include all wetlands located within shorelands and the jurisdiction of this ordinance. The maps adopted as part of this ordinance show the general location of wetlands and are intended to alert landowners if there is a high likelihood of the presence of a wetland. Maps do not represent the definitive presence and boundaries of wetlands and cannot serve as a substitute for a delineation of wetland boundaries by a certified wetland delineator or verification by the Wisconsin Department of Natural Resources (WDNR) or the United States Army Corps of Engineers (USACE).

2. Modify Section 2.2 *Shoreland Wetland Maps* to allow the use of best available information to identify known and potential wetlands in the Shoreland Wetland District, including but not limited to:
(1) Any current *and revised* WWI maps (i.e., avoid the need to formally adopt new maps by codifying that the most recent version of the WWI maps *shall* be considered part of the zoning ordinance);
(2) WDNR's Wetland Indicator Maps, which include hydric soils and are available for free, on-line, through WDNR's Surface Water Data Viewer;14
(3) Other maps and images that can be readily used to help zoning staff and landowners evaluate the presence or absence and likely extent of wetlands on the property.

The shoreland-wetland maps section should also include the following caveat: *Due to inherent inaccuracies in wetland mapping tools, maps are to be used for planning purposes only*.

Is this recommendation mandatory per recent State law revisions?

No; however, some of alternatives outlined above are recommended in the WDNR Minimum Shoreland Wetland Zoning Model Ordinance.

For example, Section 3.11 Locating Shoreland-Wetland Boundaries of the new DNR model ordinance, reads:

Where an apparent discrepancy exists between the shoreland-wetland district boundary shown on the Wisconsin Wetland Inventory maps and actual field conditions, the county shall contact the Department to determine if the map is in error. If the Department determines that a particular area was incorrectly mapped as wetland or meets the wetland definition but was not shown as wetland on the map, the county shall have the authority to immediately grant or deny a shoreland zoning permit in accordance with the applicable regulations based on the Department determination as to whether the area is wetland. In order to correct wetland mapping errors on the official zoning map, an official zoning map amendment must be initiated within a reasonable period of time.

Through use of this statement, local governments can reserve the right to regulate based on actual field conditions.

The recommended definition of "Shoreland-Wetland District" in Section 16.2(24) of the model ordinance provides local governments with the flexibility to define for themselves which maps or mapping tools shall be adopted for use in the implementation of this ordinance as follows:

Shoreland-wetland district means the zoning district, created as a part of this shoreland zoning ordinance, comprised of shorelands that are designated as wetlands on the wetland maps which have been adopted and made a part of this ordinance.

Have other local governments already adopted a similar recommendation?

Kenosha County allows the use of "best available data" for determining which areas are to be located in the C-1 Lowland Resource Conservancy District, as follows:

The Kenosha County Office of Planning and Zoning Administration shall develop district maps reflecting the best data available. The district delineation process shall make use of the Wisconsin Wetland Inventory Maps for Kenosha County, dated June 20, 1985, and stamped "FINAL"; and other maps used by the Southeastern Wisconsin Regional Planning Commission in delineating primary environmental corridors.

Kenosha County also outlines a dispute resolution process for reconciling discrepancies between district maps and actual field conditions. Steps include a request to WDNR to stake the boundaries of the district and an opportunity for the landowner to pursue a final wetland determination on the property.

Marinette County created a Conservancy District to protect shoreland wetlands that are two acres or smaller.

Door, Marinette, and Sheboygan Counties have adopted dispute resolution language similar to the recommendation contained in Section

Chapter 7:
Shoreland Zoning in Annexed, Incorporated or Extraterritorial Areas

A. Frequently asked questions with answers from DNR Legal

Q. For annexed or incorporated areas that have a shoreland zoning ordinance, which shoreland zoning ordinance applies to these areas once the county updates its ordinance?

A. It depends upon which "option" the City or Village chooses in under s. 59.69(7)(a), which refers to annexations or s. 59.69(7)(ad), which refers to incorporations. There are three options, under each of these two sections, that a City or Village may choose amongst when it decides to I ncorporate or annex land into their municipal boundaries. Below is a restatement of those three options.

1. The City/Village enacts an ordinance, for the annexed/incorporated area, that complies with NR 115 and is at least as restrictive as the county's shoreland zoning ordinance.

2. The City/Village, after annexation/incorporated, requests the county amend its ordinance to delete or modify provisions, that establish specified land uses or requirements associated with those uses that are not necessary to effect the purposes of the shoreland zoning ordinances. Then after the county enacts the amendment the city or village administers the county's ordinance as it applies to the annexed area. (Note that county's amendment only applies to annexed/incorporated area)

3. After annexation/incorporation the city/village asks the county to enforce the county's ordinance in the annexed/incorporated area and the county agrees.

Under option 1 and 2 the City or Village would apply the county ordinance or their version of the county that was in effect at the time of annexation/incorporation, which means that the counties old shoreland zoning standards would be in place in these situations. However, under 3 the County would enforce whatever county ordinance is in place, which means it could be the revised shoreland zoning standards. Also, for recently incorporated/annexed areas, if they are unable to enact an ordinance before the county updates their shoreland zoning ordinance then they too would have to enact the revised shoreland zoning ordinance.

Q. What shoreland regulations would apply in areas of extraterritorial zoning?

A. A March 1974 opinion of Wisconsin's Attorney General concluded that the municipal extraterritorial zoning does not supersede county shoreland zoning. Both must be applied to the extent that the municipal zoning is "consistent with or more restrictive than the county shoreland zoning ordinance." Therefore, a County's updated shoreland zoning ordinance would be applied to these areas of extra territorial zoning.

However, under s. 59.692(4)(a), Wis. Stats., a county could enact an ordinance empowering the City or Village to act in place of the County's zoning staff in providing the administrative functions required by the county zoning ordinance. Duplicative processing of permit applications could be avoided. However, complete delegation of county shoreland zoning responsibilities is not legally possible. County zoning permits would still be required (although they could be issues by the City/Village on behalf of the County), the county board of adjustment would still be required to act on any appeals or variance applications filed under the county ordinance, as required by s. 59.692(4)(b), Wis. Stats., and the county planning and zoning committee and the county board would continue their usual duties related to requests for county ordinance text and map amendments (rezonings). Some duplication of effort is unavoidable in the administration of the extraterritorial shoreland zoning that a City or Village has adopted.