

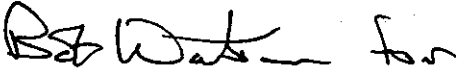
CORRESPONDENCE/MEMORANDUM

State of Wisconsin

DATE: September 23, 1996

TO: Regional Directors

Insertion: Ch. 3, Floodplain and Shoreland
Management Guidebook

FROM: Larry Larson - WT/6  for

Distribution: Floodplain Staff
Regional Floodplain Managers
County Zoning Administrators
Municipal Zoning Admin./Bldg. Inspectors

SUBJECT: Program Guidance Regarding 1995 Wisconsin Act 455 (Restoring
Nonconforming Buildings Damaged by Nonflood Disasters).

Background

On June 27, 1996, a new law became effective in Wisconsin (1995 Wisconsin Act 455) which affects the restoration of nonconforming buildings which have been damaged by "nonflood disasters". The purpose of this memo is to provide guidance to DNR staff to assist local zoning officials and property owners in the implementation of this new legislation. This memo summarizes the major provisions of the legislation, responds to questions raised by the new law and provides a suggested revision for local ordinances to implement the new law. (See Addendum)

Summary of the law. 1995 Wisconsin Act 455 creates s. 87.30(1d), Wis. Stats. requiring floodplain zoning ordinances to allow a property owner whose legal, nonconforming building was either damaged or destroyed (more than 50% of the present equalized assessed value) by a nonflood disaster to repair, improve or reconstruct the building in order to restore it to its original, pre-disaster condition provided that the federal minimum regulations governing the reconstruction of nonconforming uses are met. The new law draws upon FEMA's authority in 42 USC 4001 to 4129 as well as the federal regulations found in 44 CFR pertaining to emergency management and assistance.

Effective date of the law. The effective date of the new law is June 27, 1996. Note that the treatment of the new law applies to restorations occurring after the effective date, regardless of when the floodplain zoning ordinance was enacted.

Application to Zoning District. The practical impact of this new law affects those

regulations associated with the floodway zoning district. The law has no practical effect in floodfringe districts and does not apply to shoreland zoning.

Federal regulations in general. If a nonconforming building is damaged or destroyed by a nonflood disaster, it may be restored to its pre-disaster condition provided that all federal regulations governing construction in floodplain areas are adhered to. It is important to stress that the federal regulations vary depending upon the stage of the National Flood Insurance Program for each community and the level of study information available for each community. (e.g., regulatory floodway identified versus no regulatory floodway identified, presence or absence of base flood elevation data, emergency phase versus regular phase of the program).

Although, the federal regulations vary from one community to the next, the general requirements in the federal regulations (found in 44 CFR 60.3(c)) are the same as the state standards for floodfringe development (found in s. NR 116.13 Wis. Adm. Code).

Definition of "nonflood disaster". According to s. 87.30 (1d)(a)(3) Wis. Stats., the law defines "nonflood disaster" as "a fire or an ice storm, tornado, windstorm, mudslide, or other destructive act of nature, but excludes a flood". "Disaster" as defined by the new law must be an act of nature. It is also important to note that the concept of nonflood disaster does not apply to modifications or additions to nonconforming buildings unrelated to nonflood disasters which are still subject to the nonconforming provisions of ch. NR 116 and local ordinance. Therefore, local zoning administrators will need to continue to document and monitor the conditions of dilapidated buildings to insure that property owners are abiding by the provisions of ch. NR 116 and the local ordinance which regulate improvements or additions to nonconforming uses.

"Restoration" of building. The new law allows for the "restoration" of nonconforming buildings which are damaged or destroyed by a nonflood disaster. Zoning Administrators will need to review the restoration of nonconforming buildings damaged or destroyed by nonflood disasters. Present equalized assessed value is, by statute, the standard method of measurement for making the determination of whether a nonconforming use has been modified or altered beyond the 50% regulatory restriction. However, it is recommended that communities use square footage measurements and the concept of keeping within the footprint as an initial rule of thumb for determining whether a nonconforming building damaged or destroyed by a nonflood disaster has been "restored".

Implementation of law. The new law applies to all communities including counties, cities, and villages which have a floodplain zoning ordinance. The new law applies regardless of when the community adopted its ordinance and overrides contrary provisions of a community's floodplain ordinance. If a municipality wants to update their ordinance to include the new law the attached addendum has language which could be used to incorporate the change. It is recommended that the new law be implemented through the communities' permit process (i.e., by issuing a permit for the restoration, provided the standards or criteria applicable to nonflood disaster situations have been met). It is important that zoning administrators make sure that claims of nonflood disaster related damages are substantiated - particularly claims of nonflood

disasters which occurred in previous years.

QUESTIONS

What about damages which occur as a result of a flood disaster? Non-conforming structures which are damaged or destroyed by a flood would remain subject to the existing provisions of local floodplain ordinances premised on ss. 59.97(1), 61.35 and 62.23(7)(h), Wis. Stats. which limit repairs or alterations of legal, nonconforming buildings to 50% of its present equalized assessed value over the life of the structure. Under the state rules involving a flood disaster, if a structure is damaged less than 50% of its value the property owner is allowed to make repairs to restore the structure. However, if the repairs go beyond 50% of the present equalized assessed value (cumulative over the life of the structure), the structure must conform with the zoning requirements pertaining to the particular district:

For example for a building in a floodway, if damages result in repairs to the building of more than 50% of the present equalized assessed value over the life of the building, the building must be removed from the floodway. If the building is located in a floodfringe district and the cost of restoring the damaged building exceeds 50% of the present equalized assessed value of the building, the building must be elevated and dry land access must be provided.

If a building is damaged or destroyed by a nonflood disaster as defined by law, does this preempt or remove all other floodplain rules such as the local ordinance or state rules (NR 116)? NO. It is important to stress that the new law applies only very narrowly to one particular situation or event, i.e., a nonflood disaster. Although the law provides that an ordinance shall permit the repair, reconstruction or improvement of any legal, non-conforming building due to a nonflood disaster to restore the building, other provisions of state and local regulations pertaining to floodplain zoning have not been eliminated and must continue to be adhered to by the property owner and the community, in addition to the federal regulations.

For example, s. NR 116.16 and the local ordinance based on the state rule, require that adequate floodproofing methods be used when repairing a structure even when it is damaged by a nonflood event. According to s. NR 116.16(1), "When floodproofing measures are required by either a municipal floodplain zoning ordinance or some other regulation which incorporates by reference the floodproofing requirement of this chapter, such measures must be designed to withstand the flood depths, pressures, velocities, impact and uplift forces and other factors associated with the regional flood to assure that the structures are watertight and completely dry to the flood protection elevation (two feet above the base flood elevation) without human intervention during flooding." Again, the new law provides an opportunity to restore the nonconforming building to its original, pre-disaster condition. However, as part of the restoration, all remaining regulations including state, federal and local provisions must be followed.

Does the new law eliminate the nonconforming use status of structures damaged or destroyed by a nonflood disaster? NO, the status of a building or use which is classified as legal, nonconforming (existed prior to the adoption of a floodplain

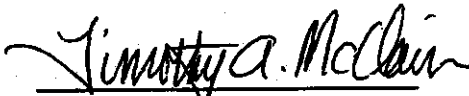
ordinance) is not removed by this law. The building and its uses continue to be subject to all applicable state and local regulations governing their existence. For example, if the owner of a legal, nonconforming building in a floodway area which is either damaged or destroyed by a nonflood disaster, is allowed to restore the building to its original, pre-disaster condition. However, the property owner is not allowed to expand and encroach into the floodplain. This is consistent with the principles of general zoning in which a property owner is allowed to make minor repairs to the nonconforming building over the life of the structure, but is not allowed to expand the building. This allows the nonconforming use, which is incompatible with the hazards of a floodplain area, to be phased out over time.

Cumulative aspect. Note too, that although nonflood restoration costs do not count toward the 50% rule for state law, if the structure has had prior flood damage/substantial improvements, this amount can and should be carried forward counting toward the 50% figure.

Can the law be applied retroactively (before the new law was enacted) to buildings which were damaged or destroyed by a nonflood disaster? According to Section 9 of the new law (initial applicability), the statute allows for repairs, reconstruction and improvements that begin on the effective date of the new law. Therefore, if a structure was damaged or destroyed by a nonflood disaster prior to the effective date of the law (June 27, 1996), repairs are allowed after June 27, 1996 as long as no repairs were initiated before that date. Repairs cannot be made if a legal nonconforming building lost its nonconforming use status due to discontinuance of the use (e.g., the use of the building was discontinued for 12 consecutive months).

Drafted By: Tim McClain and Dan Hunt

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Tom Steidl

ADDENDUM(attached)

ADDENDUM

Communities which have floodplain zoning ordinances based on DNR's model floodplain zoning ordinance, may implement the provisions of the new s. 87.30(1d), Wis. Stats., (pertaining to restoration of nonconforming buildings which are destroyed by a "nonflood disaster") in the following manner:

Proposed Ordinance Amendment

This amendment would be created as 6.2(4), "Floodway Areas," within the general nonconforming use section of 6.0.

6.2(4)

The owner of a nonconforming building that is damaged or destroyed by a nonflood disaster and that is authorized to be restored to its pre-disaster condition under s. 87.30(1d), Stats., shall meet the standards in subs. (1)(c) and (d) and (2).

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