

## State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

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September 24, 2008

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Honorable J.B. Van Hollen  
Attorney General  
114 East, State Capitol  
Madison, WI 53707-7857

RE: Application and interplay of town and county St. Croix Riverway zoning ordinances enacted under s. 30.27, Stats., and ch. NR 118, Wis. Admin., Code

Dear Attorney General Van Hollen:

I am requesting guidance from your office on questions raised in the attached letter dated June 30, 2008, from the Town Chairperson, Town of Troy in St. Croix County to the Bureau of Legal Services of the Department of Natural Resources ("Department" or "DNR"). The questions relate to separate local overlay St. Croix Riverway zoning ordinances adopted under s. 30.27, Stats., by the Town of Troy and St. Croix County, respectively. The questions concern any restrictions that s. 30.27, Stats., ch. NR 118, Wis. Admin. Code, or other applicable law may place on the ability of the Department, County, or Town to determine the application, scope, and interplay of county and town riverway ordinances on land located within the boundaries of the Town, County, and Riverway.

Because the questions relate to municipal law and general zoning law as well as riverway zoning, we believe your office is more suited than the Department to provide guidance or responses to these questions.

### I. History, Purpose, and Statutory Authority

Under s. 30.27, overlay riverway zoning ordinances adopted by local units of government (counties, cities, villages, and towns) regulate use and development of land - especially the banks, bluffs, and bluff tops of the St. Croix River - that is located within both the boundary of the Lower St. Croix National Scenic Riverway and the boundary of the local unit of government adopting the ordinance. Land in an overlay zoning district is subject to the overlay zoning ordinance requirements plus any other requirements that apply based on classification (e.g., industrial, residential) of the land in any general zoning ordinance. Any unincorporated area of land that lies within shorelands is also subject to the overlay shoreland zoning ordinance of the county in which the land lies.

Before addressing the Town's questions a brief review of applicable zoning law is appropriate.

#### A. General Zoning Statutes - County and Town

**COUNTY ZONING:** S. 59.69, Stats., the authorizing statute for general county zoning, states that a county "may by ordinance effective within the areas within such county outside the limits of incorporated villages and cities establish districts ... and adopt such regulations" that zone such area. S. 59.69(4) (emphasis added). County ordinances adopted under s. 59.69 are not effective in towns until approved by the town board. The town's approval must extend to the ordinance in its entirety and may not extend only to parts of the ordinance. 63 Atty. Gen. 199 (1974). Once a town board approves the county zoning ordinance, the county ordinance takes effect within the town and supersedes any town ordinance concerned with zoning, except as provided by s. 60.62, which deals with towns adopting zoning ordinance by exercising village powers. S. 59.69(5)(c). S. 60.62, Stats.,

provides that a town located in a county (like St. Croix County) that has adopted a county zoning ordinance may not adopt a town zoning ordinance by exercising village powers unless the county board approves such town ordinance. S. 60.62(3). So under general zoning authority a town may reject the application of county zoning within the boundaries of the town. However, once a town board approves the county zoning ordinance, the county zoning ordinance applies within the boundaries of the town and supersedes town zoning. The exception to this rule is when a town exercises village powers to adopt a zoning ordinance. If the county in which the town exercising village powers is located has a county zoning ordinance, any town zoning ordinance adopted by a town exercising village powers also must be approved by the county board. S. 60.62(3). No statute authorizes a town to withdraw its earlier approval of a county zoning ordinance or a county to adopt a procedure that allows a town to withdraw from county zoning ordinance coverage after the town gives its approval. 67 Atty. Gen. 197 (1978).

Once a county zoning ordinance takes effect, it may be amended under the procedures in s. 59.69(5)(e). Those procedures allow a town affected by a proposed county zoning amendment to timely file a resolution disapproving the proposed amendment, which restricts the ability of the county zoning agency to recommend approval of the county zoning amendment. S. 59.69(5)(e)3. An amendment to a county zoning ordinance that adds one new zoning district<sup>1</sup> does not necessarily constitute a comprehensive revision which would require town board approval of the entire revised zoning ordinance. 81 Atty. Gen. 98 (1994).

**TOWN ZONING:** Towns are generally not authorized to exercise zoning power unless the county in which they are located has failed to do so and continues to fail to do so after the town petitions it to enact a county zoning ordinance. S. 60.61(2) and (3). But a town that has been authorized by its town meeting to exercise village powers under s. 60.10(2)(c) and 60.22(3) is authorized by s. 60.62, Stats., to exercise those village powers to adopt zoning ordinances under s. 61.35, the statute authorizing villages to zone. However, as noted above, if the town exercising village powers to zone is located in a county that has a zoning ordinance, the town zoning ordinance requires county board approval.

*B. Shoreland Zoning Statute*

**COUNTY SHORELAND ZONING:** S. 59.692, the authorizing statute for county shoreland zoning, states that “each county shall zone by ordinance all shorelands in its unincorporated area. This ordinance may be enacted separately from ordinances enacted under s. 59.69.” S. 59.692(1m); also see s. NR 115.02, Wis. Admin. Code. Except as otherwise specified, all provisions of s. 59.69 also apply to ordinances enacted under s. 59.692. This is true whether the s. 59.692 ordinances were enacted separately or together with other ordinances under s. 59.69. An important exception is that s. 59.69(5)(c) (which requires county general zoning ordinances to be approved by a town board before they take effect in the town) does not apply to shoreland zoning. S. 59.692(2)(a) expressly states that shoreland zoning ordinances do not require town approval to take effect in towns within the county and may not be disapproved by a town.

**TOWN SHORELAND ZONING:** There is no separate statute authorizing towns to adopt shoreland zoning, but an existing town ordinance relating to shorelands that is more restrictive than a later county shoreland zoning ordinance continues in effect to the extent of any greater restrictions in the town ordinance. S. 59.692(2)(b). The Department has also taken the position that a town exercising village powers may adopt a shoreland zoning ordinance under s. 60.62. As explained above, if the county has a zoning ordinance the town zoning ordinance adopted using village powers requires approval by the county board. Because the county shoreland zoning ordinance also would still apply in the town, a town shoreland ordinance would only have practical effect to the extent it is more restrictive than the county ordinance. The Department’s position is consistent with an earlier Attorney General Opinion on this topic. 65 Atty. Gen. 108 (1976).

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<sup>1</sup> Adopting a riverway zoning ordinance creates an “overlay” riverway zoning district.

### C. Riverway Zoning Statute

First enacted in 1974, s. 30.27 (“Lower St Croix River preservation”) aims “to ensure the continued eligibility of the Lower St. Croix River for inclusion in the national wild and scenic rivers system and to guarantee the protection of the wild, scenic and recreational qualities of the river for present and future generations.” *State v. St. Croix County*, 2003 WI App 173, 266 Wis.2d 498, 668 N.W.2d 743 (<http://www.wisbar.org/res/capp/2003/02-1645.htm>) briefly recaps the history of the federal Wild and Scenic Rivers Act.

S. 30.27 has been revised several times – most recently in 1999. S. 30.27(2) requires the Department to establish “guidelines and specific standards for local zoning ordinances which apply to the banks, bluffs and bluff tops of the Lower St. Croix River.” Years ago the Department promulgated these “guidelines and specific standards” in ch. NR 118, Wis. Admin. Code, but revised and substantially expanded ch. NR 118 effective November 1, 2004.

**COUNTY, CITY, VILLAGE, & TOWN RIVERWAY ZONING:** S. 30.27(3) provides that counties, cities, villages and towns lying, in whole or part, within the areas affected are “empowered to and shall adopt zoning ordinances complying with the guidelines and standards [promulgated by the Department] within 30 days after their effective date.” A town is not required to adopt an ordinance under ch. NR 118 “if the county in which the town is located has adopted a local zoning ordinance that applies to the town.” Ss. NR 118.02(3) and 118.09(1). Any county, city, village, or town overlay riverway zoning ordinance must be at least as restrictive as s. 30.27 and ch. NR 118, but can be more restrictive. S. 30.27(3) and s. NR 118.02(3). S. 30.27 and ch. NR 118 are silent regarding whether a riverway zoning ordinance is like a county general zoning ordinance, which must be approved by town boards to be effective within the town, or like a county shoreland zoning ordinance, which does not require town approval to take effect within a town.

If a local unit of government does not adopt an ordinance within the prescribed time limit or adopts an ordinance that the Department determines does not meet ch. NR 118 guidelines and standards, “the Department shall immediately adopt such an ordinance.” S. 30.27(3). The Department must review the riverway zoning ordinance adopted by each local unit of government, determine whether it satisfies the requirements of ch. NR 118, and notify the local unit of government of its determination. S. NR 118.09(1). Because neither s. 30.27 nor ch. NR 118 require that the local ordinances or amendments obtain Department approval before taking effect, the Department has interpreted s. 30.27(3) to mean that local overlay zoning ordinances take effect when enacted by the local units of government. But if the Department reviews a local ordinance and determines that it does not meet ch. NR 118 minimum standards and guidelines, the Department is authorized to adopt an ordinance that meets such standards which the local unit of government must then implement and enforce. Department practice has been to review local ordinances and provide comments and changes that the Department believes the local unit of government must make for the ordinance to meet ch. NR 118 minimum requirements. A local unit of government that does not make the required changes risks having the Department adopt an ordinance in its stead. S. NR 118.089(1).

Many local units of government were slow to revise their local overlay zoning ordinance to reflect the November 2004 revision, but the Town of Troy adopted its initial riverway ordinance promptly, and St. Croix County revised its existing riverway ordinance as well. Both submitted their revised ordinances to DNR for review pursuant to s. 30.27(3) and s. NR 118.09(1), and both received DNR comments on and suggested changes to their respective ordinances. To date DNR has not notified the Town that its ordinance satisfies the requirements of ch. NR 118.<sup>2</sup>

<sup>2</sup> S. NR 118.09(1)(b): “The department shall review the ordinance or amendment and determine whether it satisfies the requirements of this chapter. The department shall notify the local unit of government of its determination.”

D. *St. Croix County Zoning*

An unofficial version of St. Croix County Zoning Ordinances is on the County website ([http://www.co.saint-croix.wi.us/county\\_ordinances.htm](http://www.co.saint-croix.wi.us/county_ordinances.htm)). St. Croix County adopted a general zoning ordinance under s. 59.69, an overlay shoreland zoning ordinance under s 59.971 [now 59.692], and an overlay riverway zoning ordinance under s. 30.27, Stats., and ch. NR 118, Wis. Admin. Code. Land within the overlay riverway district is subject to County general zoning requirements and standards as well as the overlay riverway zoning requirements and standards; and any area that also lies within shorelands is subject to a third layer of zoning - County shoreland zoning requirements and standards.

The County general zoning ordinance (ss. 17.10-17.19 subch. II St. Croix County Ordinances) applies to “those towns which approve its application.” S. 17.10(2) St. Croix County Ordinances. In 1975 the Town of Troy approved the application of County zoning in the Town. Town of Troy Resolution dated 01-14-75.

St. Croix County adopted its overlay Shoreland Zoning Ordinance (ss. 17.25-17.35 subch. III St. Croix County Ordinances) as authorized by ss. 59.971 and 144.26 [now s. 281.31], Stats. S. 17.26(1) subch. III St. Croix County Ordinances. The County shoreland zoning ordinance applies to “all shorelands in unincorporated areas of the county.” S. 17.26(4) St. Croix County Ordinances (emphasis added).

The County Riverway Zoning Ordinance applies to “all unincorporated land in the State and Federal Zones of the Riverway District of St. Croix County.” S. 17.36.C.1.b. subch. III.V. St. Croix County Ordinances (emphasis added). (S. 17.36 notes that the current County overlay Riverway Zoning Ordinance was adopted effective July 1, 2005 and amended effective July 1, 2007.) By letter of June 27, 2008 (copy attached) DNR notified the County that its riverway ordinance satisfies the requirements of ch. NR 118. S. NR 118.09(1)(b).

County Planning Department Director David Fodroczi said that the County overlay ordinances for shoreland zoning, riverway zoning, and floodplain zoning (another overlay zoning ordinance) were not adopted as amendments to the County general zoning ordinance using the procedures in s. 59.69(5)(e) or adopted under authority of s. 59.69. Instead, they were adopted under authority of the specific statutes requiring their adoption - ss. 59.971 [now s. 59.692] 30.27, and 87.30 Stats. Ss. 17.26(1) subch. III, 17.36(A)2.a. , and 17.40.A.2.a. subch. IV St. Croix County Ordinances. (Though the floodplain ordinance cites s. 87.3 and ss. 59.69 and 59.692 as the authorizing statutes, Mr. Fodroczi said the County often cites the general zoning statute too since it contains other authority and procedures that may apply.)

The County general zoning ordinance (s. 17.01-17.09 subch. I St. Croix County Ordinances) states the following:

17.06 RELATIONSHIP TO TOWN ORDINANCES AND POWERS.

(1) The following chapters and subchapters of this chapter are exempted by State statute from modification or veto by any town board:

- (a) Subchapter III, Shoreland Zoning.
- (b) Subchapter IV, Floodplain Zoning.
- (c) Chapter 18, Subdivision and Platting.
- (d) Chapter 15, Sanitary Code.

(2) The following subchapters of this chapter are exempted by State statute from modification or veto by any town board insofar as they apply to Shoreland and Floodplain areas as defined in this chapter:

- (a) Subchapter I, General Provisions.
- (b) Subchapter V, Off-Street Parking.
- (c) Subchapter VI, Highway Setbacks.
- (d) Subchapter VII, Administration and Enforcement.

(3) Town Boards have approval power under §59.97, Wis. Stats., overall [sic] parts of this chapter specified in subs. (1) or (2).

(emphasis added). While the statement in sub. (3) – that Towns have approval power over the zoning ordinance listed in sub. (1) or (2) – is correct pursuant to s. 59.69(5)(c) regarding County general zoning ordinances, it is not correct for County shoreland and floodplain zoning ordinances, since s. 59.692(2)(a) expressly states that county shoreland zoning ordinances do not require town approval to take effect in towns within the county, and 62 Atty. Gen. 264 (1973) reached the same conclusion for floodplain ordinances. St. Croix County Planning Department Director David Fodroczi said that s. 17.06 was one of the oldest sections of the County zoning ordinance, and agrees that the reference in sub. (3) that says shoreland and floodplain zoning need town approval is incorrect. S. 17.06 does not mention riverway zoning (Ch. 17 subch. III.V).

*E. Town of Troy Zoning:*

The Town of Troy is authorized to exercise village powers pursuant to ss. 60.10(2)(c) and 60.22(3), Stats. S. 21-3 Town of Troy Code. County Planning Department Director David Fodroczi said the Town has been authorized to exercise village powers since 1959, but has not done so pursuant to ss. 61.35 and 62.23(7), Stats. in regard to general zoning, so County general zoning applies in the Town. While the Town general zoning ordinance (ch. 170) has a few specific provisions, it essentially adopts the County general zoning ordinance.<sup>3</sup> The Town approved the County general zoning ordinance under s. 59.69(5)(c) by a Jan. 14, 1975 resolution (copy attached).

In 2004 the Town adopted an overlay riverway zoning ordinance (ch. 171) under s. 30.27 and ch. NR 118. Ch. 171 Town of Troy General Code; s. 30.27(3); s. NR 118.02(3). Some language in the Town riverway ordinance differs from the language in ch. NR 118. Differences that result in more restrictive requirements and standards than ch. NR 118 are allowed, but differences that cause the Town ordinance to be less restrictive than ch. NR 118 are not allowed. The unofficial<sup>4</sup> website copy of the Town of Troy General Code (<http://www.townoftroy.org/>) says the Town riverway zoning ordinance was adopted December 1, 2004, and amended July 27, 2007.

## **II. Questions Presented & Suggested Department Responses**

Both s. 30.27 and ch. NR 118 are silent regarding whether a county riverway zoning ordinance – like a county general zoning ordinance under s. 59.69(5)(c) - must be approved by a town board to take effect within a town, or whether a county riverway zoning ordinance - like a county shoreland zoning ordinance under s. 59.692(2) - does not require town approval to take effect within a town. Both s. 30.27 and ch. NR 118 are also silent on whether both town and county overlay riverway ordinances apply in towns with a town riverway ordinance, or whether the county riverway ordinance only applies to towns without a town riverway ordinance.

DNR and St. Croix County have maintained that the Town and County have concurrent jurisdiction in the Town of Troy riverway district. Some Town of Troy residents assert that the County riverway ordinance should not apply in any town with a town overlay riverway zoning ordinance. In his letter to the Director of the DNR Bureau of Legal Services, the town chairperson stated that enforcing both Town and County ordinances within the Town has created delays, increased application fees, and caused multiple problems. To determine the appropriate way to resolve these issues he asked the Director for his legal opinion on the 7 questions listed below. I have provided the Department's analysis below each question.

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<sup>3</sup> S. 170-1 Town of Troy General Code adopts ch. 17 of the St. Croix County Zoning Ordinance by reference, makes it the Zoning Ordinance of the Town provided that the zoning restrictions and administrative provisions in ch. 170 control over any similar provision of the County Ordinance, and provides that the Town "shall defer to St. Croix County in the administration of this Zoning Ordinance, except in the areas of additional zoning restrictions as set forth herein. In those situations, and as to those provisions, the Town shall enforce all portions of its Zoning Ordinance."

<sup>4</sup> Official copies of the codes are available from the Town and County.

**Q-1. Under s. 30.27 or ch. NR 118, does a town that has adopted a riverway ordinance approved by DNR as consistent with the intent of ch. NR 118 have sole authority in enforcing that ordinance within the Town's municipal boundaries?**

**A-1.** Several caveats are in order. First, s. 30.27 does not require DNR to approve a local ordinance as "consistent with the intent of ch. NR 118." S. 30.27 and s. NR 118.09(1)(b) require DNR to determine whether an adopted ordinance complies with ch. NR 118 (the guidelines and specific standards for local zoning ordinances that DNR promulgated) and "satisfies the requirements of [ch. NR 118]." (emphasis added) Although a local ordinance is allowed to be more restrictive than ch. NR 118, it must be at least as restrictive as ch. NR 118.

In reviewing local ordinances to determine if they are at least as restrictive as ch. NR 118, the Department has not looked to the intent or application of a local ordinance (i.e., performance standards or outcome based analysis). Instead, it has compared the plain language of the local riverway ordinance to ch. NR 118 and analyzed the effect of differing language to decide whether the local ordinance "satisfies the requirements of ch. NR 118." Second, DNR has taken the position that a local riverway zoning ordinance takes effect like any local zoning ordinance - its effective date does not depend on DNR notifying the local unit of government that it has determined the local unit of government's riverway ordinance satisfies ch. NR 118 requirements. Third, to date the Department has not notified the Town that its ordinance satisfies ch. NR 118 requirements. With those caveats, the Department agrees that a town is the sole authority in enforcing a town riverway ordinance within town boundaries, but this does not preclude or prevent the county in which the town is located from exercising concurrent jurisdiction to apply, administer, and enforce its county riverway ordinance within all towns in the county regardless of whether a town has its own riverway ordinance.

**Q-2. Does s. 30.27 limit a county to enforcement of its riverway ordinance only in those municipalities in that county (incorporated or not), that have not adopted such an approved riverway ordinance?**

**A-2.** No. S. 30.27 and ch. NR 118 are silent on the issue of concurrent zoning jurisdiction - they neither expressly state nor implicitly imply that county riverway zoning does not apply in any area of the county. However, s. 59.69, the statute authorizing counties to exercise general zoning powers, limits application of county zoning authority to "areas ... outside the limits of incorporated villages and cities" so county riverway zoning does not apply in cities and villages. S. 59.69(4). The Town of Troy is an area "outside the limits of incorporated villages and cities" since towns are not incorporated. The Town approved the County general zoning ordinance pursuant to s. 59.69(5)(c), so DNR thinks land within the Town is subject to County general zoning jurisdiction..

The Department does not know whether - on a specific topic like riverway zoning - the legislature could by enacting a specific statute extend county zoning jurisdiction to incorporated cities and villages otherwise exempt or retract county zoning jurisdiction from towns otherwise subject to county zoning. Even if the legislature could do so, nothing indicates it intended to do so in s. 30.27, which is silent on the matter of concurrent jurisdiction.

**Q-3. Does s. 30.27 create or apply different standards for the adoption and enforcement of local riverway ordinances in incorporated and unincorporated municipalities?**

**A-3.** By "create or apply" we think the Town is asking whether unincorporated towns and incorporated cities and villages must use the same minimum standards and requirements and the same procedures in adopting local riverway zoning ordinances. We think that the reference to different standards for enforcement simply reiterates the Town's concerns and dissatisfactions regarding concurrent jurisdiction that it expressed in its letter.

*Standards and requirements.* DNR thinks the minimum requirements and standards for riverway zoning are the same for all local units of government. S. 30.27(3) empowers and requires counties, cities, villages, and towns to adopt riverway zoning ordinances that comply with standards and requirements that DNR promulgates for "local zoning ordinances which apply to the bank, bluffs and bluff tops of the Lower St. Croix River." S. 30.27(2)(a)

and (3). Ch. NR 118 goes further to state that “a town is not required to adopt an ordinance under this chapter if the county in which the town is located has adopted a local zoning ordinance that applies to the town.” (emphasis added) SS. NR 118.02(3) and 118.09(1). The restrictive clause “that applies to the town” arguably implies the obverse – that in some cases a county may adopt a local zoning ordinance that does not apply to the town. If so, s. 30.27 and ch. NR 118 provide no way of determining which county local zoning ordinances do or do not apply to a town, nor whether a county’s “local zoning ordinance” means only a riverway ordinance. S. NR 118.03(22) defines “local zoning ordinance” broadly:

(22) “Local zoning ordinance” means any county, town, city or village zoning ordinance, portion of an ordinance, or amendments thereto, adopted by a local unit of government, with authority from state enabling legislation, which regulates the use of land within the Lower St. Croix riverway.

(emphasis added). It is unclear whether “local zoning ordinance” means just a riverway zoning ordinance or should be interpreted more broadly under the plain language of the rule to mean any local zoning ordinance adopted under any state enabling legislation so long as the local ordinance applies to land within the riverway. Under the broader meaning a town would not be required to adopt a town riverway ordinance if the town was already subject to county general zoning, perhaps because the county riverway ordinance also would apply to a town that had already accepted the application of county zoning within the Town. But a town (unlike Town of Troy) that had not approved county general zoning or subsequent amendments under s. 59.69(5)(c), (d), and (e) arguably is required to adopt a riverway zoning ordinance since the county riverway ordinance might not apply within that town.

*Adoption procedures.* Neither s. 30.27 nor ch. NR 118 provide a specific procedure that local units of government must use to adopt a riverway ordinance nor expressly state whether - if the procedures under the general zoning statute apply for ordinance adoption - town board approval under s. 59.69(5)(c), (d), or (e) is required for the county riverway ordinance to take effect in towns within the county. Faced with a similar situation regarding floodplain zoning ordinances, an earlier Attorney General opined that town approval was not required since there was ample authority for a county to adopt the floodplain zoning ordinances required by s. 87.30 under general zoning authority in s. 59.69(4)(c) and under shorelands zoning authority in s. 59.692. 62 Atty. Gen. 264 (1973). DNR thinks that the same analysis would apply to riverway zoning – each local unit of government would adopt the ordinance using whatever procedure it was authorized to use in adopting ordinances, except that the requirement for town approval would not apply.

**Q-4. [a] Under s. 30.27, is DNR obliged to create and require the adoption of riverway ordinances in towns, villages, cities and counties that have not adopted riverway ordinances under s. 30.27 and ch. NR 118?**

**[b] Does s. 30.27 allow DNR to substitute the enforcement of a county riverway ordinance in a jurisdiction that has not adopted a riverway ordinance in lieu of the DNR imposing its own riverway ordinance?**

**A-4. [a] Yes, s. 30.27(3) requires DNR to adopt a riverway ordinance for local units of government that do not do so, except that ss. NR 118.02(3) and 118.09(1) allow towns to not adopt a town riverway ordinance so long as the county riverway ordinance applies in the town.**

**[b] This question is imbedded with the unproved assumption that a county riverway ordinance does not apply in a town until and unless DNR “substitutes the enforcement” of the county ordinance. But DNR thinks county ordinances apply in towns, so a county ordinance is not “substituted” - the county ordinance just continues to apply whether the town has a riverway ordinance or not.**

**Q-5. [a] May a town that has legally adopted a DNR-approved riverway ordinance temporarily suspend Town implementation and enforcement of that Town ordinance if a County imposes enforcement of its riverway zoning ordinance in the riverway boundaries of the Town?**

**[b] Would that temporary suspension preclude the Town from reinstating enforcement of its town riverway zoning ordinance at a later date?**

**A-5.** With the caveat that DNR has not yet determined that the Town of Troy ordinance does comply with s. 30.27 and ch. NR 118, DNR takes no position on whether a town may [a] temporarily suspend and [b] later reapply its riverway ordinance, except to presume that general governmental and zoning law governs the analysis.

**Q-6. [a] Does s. 30.27 or ch. NR 118 allow a county to selectively enforce its riverway ordinance in a municipality that has adopted a DNR-approved riverway ordinance, but not enforce its riverway ordinance in other municipalities that have adopted approved riverway ordinances?**

**[b] Would selectively applying a county riverway ordinance enforcement in some municipalities, but not other municipalities in that county violate equal protection?**

**A-6. [a]** The Town of Troy is the only town within the Riverway that has adopted a town riverway ordinance. All other municipalities within the Riverway with riverway ordinances are counties or incorporated villages or cities, not unincorporated towns. DNR thinks that the Town is referring to the fact that DNR and the County think that county riverway zoning applies in a town (even a town with its own riverway ordinance) but does not apply in a city or village. DNR thinks the question and use of the term “selectively enforce” reveal a misunderstanding about how zoning ordinances in general and riverway ordinances in particular apply. Ss. 59.69(4), 59.692, and 30.27 do not authorize counties to apply county zoning ordinances in incorporated municipalities (cities and villages) within a county regardless of whether the cities or villages have riverway ordinances (all cities and villages in the Riverway are required to adopt riverway ordinances). However, s. 59.69 and (where applicable) s. 59.692 authorize the application of county riverway ordinances in towns within a county, and s. 30.27 does not state that towns with town riverway ordinances are exempt from county zoning.

**[b]** No. Since the county ordinance applies in all towns in the county, there is no equal protection issue regarding towns. An equal protection challenge based on the fact that county riverway zoning applies to towns (unincorporated county areas) but not cities or villages (incorporated county areas) will fail since the legislature has seen fit to distinguish between the powers, duties, and rights it has bestowed upon counties, cities, villages, and towns by statute. Statutes are entitled to a presumption of legality, and here the legislature needs only a rational basis to make such distinctions since municipalities are not a “protected class” under equal protection analysis, so DNR believes there is no equal protection issue here.

**Q-7. [a] Does s. 30.27 or ch. NR 118 require that a county adopt a riverway ordinance that identifies and regulates all the types of land use districts in the county riverway district as specified in ch. NR 118?**

**[b] Does s. 30.27 permit a county to limit the jurisdiction and enforcement of its riverway ordinance to riverway districts in unincorporated municipalities only?**

**A-7. [a]** Yes. First, we think that by “land use district ... specified in ch. NR 118” the Town is referring to the 5 riverway management zones listed in s. NR 118.04. S. 30.27(b) requires that the guidelines and standards that DNR drafted in ch. NR 118 be consistent with (but may be more stringent than) those promulgated by the Secretary of the Interior under the Wild and Scenic Rivers Act. The Cooperative Management Plan, Lower St. Croix National Scenic Riverway (2002), created pursuant to the federal statute, provides for 5 management zones within the riverway. In ch. NR 118 (the guidelines and standards that DNR drafted to comply with s. 30.27(b)), s. NR 118.04 establishes those 5 zones and describes the boundaries of each in Wisconsin, and ss. NR 118.05 and



118.06 lay out the uses and standards for each management zone. Ss. NR 118.04 – 118.06. A local unit of government cannot pick and choose which management zones within its boundaries it does or does not wish to regulate. Its riverway ordinance must identify all areas of each riverway management zone that lies within its boundaries and regulate each at least as stringently as ch. NR 118 does in order for that ordinance to satisfy the requirements of ch. NR 118.

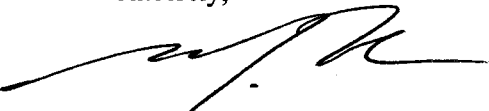
[b] It is not s. 30.27 that restricts a county's zoning jurisdiction to unincorporated areas of the county. S. 59.69, the county general zoning authority, only grants counties zoning jurisdiction in unincorporated areas of the county, and nothing in s. 30.27 indicates that the legislature intended to extend county zoning into incorporated areas or withdraw county zoning from unincorporated areas (like the Town of Troy) with their own riverway ordinances.

### III. Conclusion

Clearly the Town of Troy disagrees with the DNR and St. Croix County position that county riverway zoning applies to unincorporated towns with riverway zoning ordinances but not to incorporated cities and villages. But since Wisconsin became a state (and possibly when it was still a territory) its laws have distinguished between the various types of municipalities. If the Town of Troy wants to be treated like an incorporated village or city under zoning law it should incorporate as a village or city. Ch. 66 subch. II.

The Department has received numerous questions from the Town regarding the interaction and applicability of the town and county ordinances. Clarity on this issue from your office will be of invaluable service to the Department and the citizens of the State of Wisconsin. DNR Attorney Edwina Kavanaugh will be the Department's liaison on this matter.

Sincerely,



Matthew Frank  
Secretary  
Department of Natural Resources

C: Rick Prorise, LS/8