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Residential Construction in Farmland Preservation Zoning Districts

2009 Wis. Act 28 repealed and recreated Wisconsin's Farmland Preservation program under ch. 91, Stats. Among other things, the new law creates new minimum zoning standards for residential construction in farmland preservation zoning districts (*see* Wisconsin Statutes ss. 91.42, 91.44 and 91.46).

Background

- Farmers covered by a farmland preservation zoning ordinance are eligible for state income tax credits if the Department of Agriculture, Trade and Consumer Protection (DATCP) certifies that the ordinance meets or exceeds state farmland preservation standards.

- Among other things, a certified ordinance must restrict residential construction in farmland preservation zoning districts. Ordinance standards must *meet or exceed* the new state standards. A certified ordinance may not allow any residential use that is prohibited by the state standards.

- The new state standards apply to ordinances (and ordinance amendments) that are certified under the new law. Ordinances certified under the old law remain temporarily certified under the new law, but must eventually be recertified in order for farmers to continue claiming tax credits (deadlines vary).

- Farmland preservation standards *do not apply* to land that is rezoned out of a certified farmland preservation district. But the rezoning authority must make certain statutory findings and charge a statutory rezoning "conversion fee" before granting a rezone request. The "conversion fee" applies to rezones granted under a new *or existing* ordinance beginning January 1, 2010.

The New Standards

Overview

Within a certified farmland preservation district:

- **All residences must meet local zoning standards.**

  - Local standards for "non-farm residences" must *meet or exceed* state standards (local ordinance may be more restrictive).

    - Local standards for "farm residences" may be equivalent to or more lenient than local standards for "nonfarm residences" (local option).

- **A conditional use permit is normally required.**

    - Local ordinance *must* require a conditional use permit for a "non-farm residence" (unless the residential parcel is rezoned out of the farmland preservation district).

    - Local ordinance *may* require a conditional use permit for a "farm residence" (local option).

    - A conditional use permit *may* authorize a small contiguous "cluster" of complying residences (local option, subject to state standards).

- **Conditional use permit standards for a "non-farm residence" must *meet or exceed* the following minimum standards:**

    - The ratio of "nonfarm residential acreage" to "farm acreage" may not exceed 1 to 20 (0.05) on any "base farm tract."

    - There may be no more than 4 dwelling units in "non-farm residences" (nor more than 5 dwelling units in residences of any kind) on any "base farm tract."

    - The location of the non-farm residence (house and lot) will not convert cropland or "prime farmland" (if there are reasonable alternative locations), or significantly impair current or future agricultural use of other farmland.

- **There is no longer a minimum lot size requirement.**

    - The new state standards encourage smaller residential lots that convert less farmland.
    - If an ordinance still includes a minimum lot size requirement (local option), that requirement must be *in addition to* (and *not* in lieu of) the state standards. The result will be more restrictive than the state standards themselves.

- **Residences that meet the new standards may be constructed *within* a farmland preservation zoning district *without rezoning.***

    - There is no rezoning "conversion fee" because the land is not rezoned.
    - Farmland preservation standards still apply (unlike rezoned land).

- **The new standards do *not* regulate land divisions or parcel sizes as such, but only the "uses" to which those parcels are put.** There is no *per se* limit on the size, shape or number of farm or "open space" parcels that may be created.

- **The new standards do *not* apply to residences that *legally existed* prior to the ordinance change ("prior nonconforming uses"). However:**

  - A "prior nonconforming use" may not be expanded (per normal law of "prior nonconforming uses").
  - The number and location of existing residences may limit conditional use permits for new residences.

Definitions

- *"Base farm tract"* means one of the following:

  - All contiguous parcels in a farmland preservation zoning district that are part of a single farm when DATCP *first certifies* the farmland preservation ordinance under the new law (or on an earlier date specified in the ordinance), *regardless of any subsequent changes in the size of the farm.*

  - Any other tract that DATCP by rule defines as a "base farm tract."

  NOTE: The boundaries of all "*base farm tracts*" in a certified farmland preservation zoning district are determined on the same date. Once determined, those boundaries remain constant over time, even as actual farm boundaries change due to farm consolidations and splits. A *"base farm tract"* is not necessarily synonymous with a "farm," except on the date when its boundaries are determined.

- *"Farm"* means land *under common ownership* (all owned by exactly the same person or entity) that is *primarily devoted to agricultural use*.

  NOTE:

  - Land under common ownership that produced at least $6,000 in "gross farm revenues" in the previous year, or at least $18,000 in "gross farm revenues" in the preceding 3 years, is presumed to be "primarily devoted to agricultural use."

  - If a farm owner splits a parcel from the farm, and deeds it to another person, that parcel is no longer part of the original "farm." A house built on the deeded parcel is not a "farm residence" (even if occupied by a parent, child or employee of the original farm owner) unless the deeded parcel qualifies as a "farm" in its own right.

- *“Farm acreage”* means the size of a farm in acres.

  NOTE: For purposes of residential density calculations, “farm acreage” may also include open space parcels that are split from a farm if they are kept in open space use and contain no residential or other non-farm buildings. “Farm acreage” does not include “non-farm residential acreage.”

- *“Farm residence”* means any of the following structures that is *located on a “farm:”*

  - A single-family or duplex residence that is the *only residential structure* on the “farm” *or* is occupied by any of the following:

    * An owner or operator of the farm.
    * A parent or child of an owner or operator of a farm.
    * An individual who earns more than 50 percent of his or her gross income from the farm.

  - A state-certified migrant labor camp.

  NOTE: *A local ordinance may adopt a more restrictive “farm residence” definition.*

- *“Non-farm residence”* means any residence other than a “farm residence.”

- *“Non-farm residential acreage”* means the total number of acres of all parcels on which “non-farm residences” are located.

  NOTE: A residential lot, like a farm, may include land from 2 or more deed parcels. If a landowner proposes to build a nonfarm residence on land consisting of 2 or more *commonly-owned* and *contiguous* deed parcels, all of those deed parcels should be counted as part of the residential lot (“nonfarm residential acreage”) *unless* the landowner can show that some of the deed parcels are clearly devoted to nonresidential use (not just open space use).

- *“Prime farmland”* means any of the following:

  - An area with a class I or class II land capability classification as identified by NRCS.
  - Any other land designated as “prime farmland” in the county’s certified farmland preservation plan.

- *“Protected farmland”* means land that is located in a farmland preservation zoning district, is covered by a farmland preservation agreement, or is otherwise legally protected from nonagricultural development.

Standards for "Farm Residences"

- A certified farmland preservation zoning ordinance may regulate "farm residences." An ordinance may allow "farm residences" as *permitted uses* (without a conditional use permit) or *conditional uses* (with a conditional use permit), depending on local preference.

- A "farm residence" must be located on a farm parcel. A residence constructed on a separately-owned residential lot (split off from the farm and deeded to another person) does not qualify as a "farm residence," even if occupied by a farm family member or farm worker.

  Example: Suppose that a local zoning ordinance requires a conditional use permit for a "non-farm residence" but not for a "farm residence."

  - The sole individual proprietor of a 200-acre farm deeds a one-acre parcel from that farm to his son. The son proposes to build a house on the parcel. The house will not qualify as a "farm residence," because the residential parcel is separately owned and is no longer part of the farm. The son must get a conditional use permit to build the house, because it is considered a "non-farm residence."

  - The result is the same whenever a farm owner (individual, married couple or business entity) deeds a residential parcel to an individual or business entity that is not identical to the farm owner.

- A single-family or duplex residence may qualify as a "farm residence" if it is the *only* residential structure on the farm (*regardless* of who occupies it).

- An additional residence on the same farm may also qualify as a "farm residence" (even though it is not the *only* residential structure on the farm) if it is occupied by an owner or operator of the farm, a parent or child of the farm owner or operator, or an individual who earns more than 50 percent of his or her gross income from the farm. However, a change of occupancy may convert this "farm residence" to a "non-farm residence."

  Example: A farmer owns a 200-acre farm parcel on which there are 2 houses (both owned by the farmer). The farmer lives in one of the houses, and rents the other to his son. An ordinance may treat both residences as "farm residences" (no conditional use permit required). But if the son vacates the rented house, and the farmer then rents that house to an unrelated person, the house becomes a "non-farm residence" (a conditional use permit is required for continued occupancy).

Standards for "Non-Farm Residences"

Conditional Use Permit Required

A conditional use permit is *always* required for a "non-farm residence" (unless the residence *legally existed* as a "non-farm residence" prior to the ordinance change, and thus qualifies as a "prior nonconforming use"). A zoning authority may issue a separate conditional use permit for each residence or, if allowed by the local zoning ordinance, the zoning authority may issue a single permit covering an approved *cluster* of "non-farm residences" (see below).

Standards for Issuing Conditional Use Permits

A zoning authority may issue a conditional use permit for a "non-farm residence" if ***ALL*** of the following standards are met (a zoning ordinance may include *additional* or *more stringent* standards, but must ensure compliance with these minimum standards):

> ***Standard #1:*** *The ratio of* **all** *"nonfarm residential acreage" to "farm acreage" on the "base farm tract" will not exceed 1 to 20 (0.05).*

Examples:

- A farmer operates a 200 acre farm when the farmland preservation ordinance is first certified under the new law (that 200-acre land area thus becomes a "base farm tract"). The farmer subsequently sells a 7-acre parcel, and the purchaser applies for a conditional use permit to build a "non-farm residence" on that 7-acre parcel. The proposed residence meets *Standard #1* because the ratio of "non-farm residential acreage" (7 acres) to "farm acreage" (now 193 acres) on the "base farm tract" does not exceed 1 to 20 (0.036 < 0.05).

- The same farmer then sells another 7-acre parcel, and the purchaser of that parcel also applies for a conditional use permit to build a "non-farm residence." The zoning authority may *not* issue a conditional use permit for that residence, because the ratio of "non-farm residential acreage" (now 14 acres) to "farm acreage" (now 186 acres) on the "base farm tract" would be greater than 1 to 20 (0.075 > 0.05).

- If the owner of the 200-acre farm had sold two 4-acre parcels, rather than two 7-acre parcels, the zoning authority could permit the construction of residences on *both* parcels, because the ratio of all "non-farm residential acreage" (8 acres) to "farm acreage" (192 acres) on the "base farm tract" would not exceed 1 to 20 (0.042 < 0.5).

- If the original 200-acre farm were split into two 100-acre farms, the "base farm tract" would still be 200 acres (because the size of the "base farm tract" is determined when the ordinance is certified, and remains unchanged regardless of subsequent farm consolidations or splits):

  - If one of the 2 farmers sells a 7-acre parcel, the zoning authority may permit the purchaser to build a house on that parcel because the ratio of "non-farm residential acreage" (7 acres) to "farm acreage" (193 acres) on the "base farm tract" (still 200 acres) will not exceed 1 to 20 (0.036 < 0.05).

  - If the second farmer *also* sells a 7-acre parcel, the zoning authority may permit residential construction on one *but not both* of the 7-acre parcels because, if houses were built on both parcels, the ratio of all "non-farm residential acreage" (7+7=14 acres) to "farm acreage" (186 acres) on the "base farm tract" would exceed 1 to 20 (0.075 > 0.05).

  - *However,* if each farmer sells two 2-acre parcels (rather than one 7-acre parcel), residences could be constructed on *all 4 parcels* because the ratio of all "non-farm residential acreage" (8 acres) to "farm acreage" (192 acres) on the "base farm tract" would *not* exceed 1 to 20 (0.042 < 0.05).

- If the original 200-acre farm is later expanded by adding another 150 acres (creating a "farm" of 350 acres), the "base farm tract" is still the original 200 acres for purposes of *Standard #1*. The 150 acres added from another "base farm tract" are still counted as part of that other "base farm tract" for purposes of *Standard #1*.

- *The new law does not require any minimum residential lot size*. If a local zoning ordinance nevertheless requires a minimum lot size, that local requirement will combine with *Standard #1* to restrict residential development. For example:

  - Suppose that a local government decides to keep a 35-acre minimum lot size requirement (even though it is no longer required to do so). If a farmer sells a 35-acre parcel from a 200-acre "base farm tract," the buyer may *not* build a house on that parcel because the ratio of "non-farm residential acreage" (35 acres) to "farm acreage" (now 165 acres) on the "base farm tract" would exceed 1 to 20 (0.21 > 0.05).

- By comparison, if a local ordinance has a 5-acre (not 35-acre) minimum lot size, and a farmer sells a 5-acre parcel from a "base farm tract" of 200 acres, the zoning authority may permit the buyer to build a house on that parcel because the ratio of "non-farm residential acreage" (5 acres) to "farm acreage" (now 195 acres) on the "base farm tract" will not exceed 1 to 20 (0.026 < 0.05).

Standard #2: *There will be no more than 4 dwelling units in "non-farm residences" (nor more than 5 dwelling units in residences of any kind) on the "base farm tract."*

Examples:

- A farmer owns a 200 acre farm when the farmland preservation ordinance is first certified under the new law (that 200-acre land area thus becomes a "base farm tract"). The farmer has one single-family farm residence on the farm. The farmer subsequently sells four 2-acre parcels, and each of the four purchasers applies for a conditional use permit to build a single-family "non-farm residence" on that purchaser's parcel. All 4 residences will meet *Standard #2*, because there will be no more than 4 dwelling units in "non-farm residences" (nor more than 5 dwelling units of any kind) on the "base farm tract."

- There is one single-family "farm residence" on the original 200-acre farm ("base farm tract"). The farmer subsequently sells four 2-acre parcels:

  - The purchaser of the first parcel obtains a permit to build a duplex on that parcel (there is no prohibition against multi-family dwellings, provided that *Standard #2* is met).

  - The purchasers of the 2nd and 3rd parcels obtain permits to build single-family homes on those parcels (because *Standard #2* is still met).

  - The purchaser of the 4th parcel may *not* construct a residence on that parcel, because construction would cause a violation of *Standard # 2.*

- The owner of the original 200-acre farm sells 100 acres to another farmer (despite this farm split, the "base farm tract" is still the original 200 acres for purposes of *Standard #2*):

  - The seller retains a 100-acre farm, including the existing single-family "farm residence."

- The purchaser farms the 100 acres that he has purchased, and builds a duplex residence on that 100-acre farm (no conditional use permit is required, because the duplex qualifies as a "farm residence").

- One of the farmers later sells 3 one-acre lots from his 100-acre farm, and the purchasers apply for conditional use permits to construct single-family residences. If the zoning authority grants the first 2 applications it must deny the third (construction on the 3rd lot would violate *Standard #*2, because there would be more than 5 total dwelling units on the 200-acre "base farm tract").

Standard #3: *The location of the non-farm residence (house and lot) will not do any of the following:*

- *Convert cropland or "prime farmland" if there are reasonable alternative locations.*
- *Significantly impair the current or future agricultural use of other "protected farmland."*

Example:

A farmer sells a 5-acre lot, and the purchaser applies for a conditional use permit to construct a "non-farm residence" on the lot.

- The zoning authority finds that the proposed "non-farm residence" complies with *Standard #1* and *Standard #2***.** But before the zoning authority may issue a conditional use permit, it must also answer the following questions:

  - Will the residential lot convert any cropland (other than woodlot) or "prime farmland" from agricultural use? If so, the zoning authority must deny the permit unless it finds that there are no reasonable alternatives.

  - Will the location of the house or residential lot significantly impair or limit current or future agricultural use of other "protected farmland?" If so, the zoning authority must deny the permit.

- In its initial review, the zoning authority finds that the lot itself does not convert "prime farmland" or impair agricultural use of other "protected farmland." However, the zoning authority finds that the proposed location of the house on the lot will impair agricultural use of neighboring "protected farmland." The lot owner agrees to change the location of the house on the lot. The zoning authority finds that the new location will not impair agricultural use of the neighboring land,

and issues a conditional use permit allowing residential construction at the new location.

Non-Farm Residential "Clusters"

A zoning ordinance *may* authorize the local zoning authority to issue a conditional use permit for a cluster of 2 or more "non-farm residences" if all of the following apply:

- The residential parcels comprising the cluster are contiguous.
- Legal restrictions ensure that, if *all* of the proposed residences are constructed, *each residence* will meet the standards for "non-farm residences" (see above).

Once a cluster permit is issued, parcel owners within the cluster may proceed with the authorized residential construction, without having to get another conditional use permit.

Prior Non-Conforming Uses

When a farmland preservation zoning district is created, or when zoning standards are revised, there may be some legally pre-existing residences that do not meet the new zoning standards. These "prior non-conforming uses" may continue to exist, but may not be expanded or modified in violation of existing laws related to "prior nonconforming uses."

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