

ENROLLED ORDINANCE 168-59

AMEND THE WAUKESHA COUNTY SHORELAND AND FLOODLAND PROTECTION ORDINANCE DISTRICT ZONING MAP FOR THE TOWN OF VERNON BY REZONING CERTAIN LANDS LOCATED IN PART OF SECTIONS 30 AND 31, T5N, R19E, TOWN OF VERNON, WAUKESHA COUNTY, WISCONSIN, FROM THE AD-10 AGRICULTURAL DENSITY-10 ACRE, A-E EXCLUSIVE AGRICULTURAL CONSERVANCY AND E-C ENVIRONMENTAL CORRIDOR DISTRICTS TO THE C-1 CONSERVANCY DISTRICT IN ORDER TO INCORPORATE THE MUKWONAGO DAM FAILURE STUDY BOUNDARIES (SZ-1757)

WHEREAS, after proper notice was given, a public hearing was held and the subject matter of this Ordinance was approved by the Vernon Town Board on September 25, 2013, and

WHEREAS, the matter was referred to and considered by the Waukesha County Park and Planning Commission, which recommended approval and reported that recommendation to the Land Use, Parks and Environment Committee and the Waukesha County Board of Supervisors, as required by Section 59.692 of the Wisconsin Statutes.

THE COUNTY BOARD OF SUPERVISORS OF THE COUNTY OF WAUKESHA ORDAINS that the Waukesha County Shoreland and Floodland Protection Ordinance District Zoning Map for the Town of Vernon, Waukesha County, Wisconsin, adopted by the Waukesha County Board of Supervisors on June 23, 1970, is hereby amended to rezone certain lands located in part of Sections 30 and 31, T5N, R19E, Town of Vernon, Waukesha, Wisconsin, from the AD-10 Agricultural Density-10 Acre, A-E Exclusive Agricultural Conservancy and E-C Environmental Corridor Districts to the C-1 Conservancy District in order to incorporate the Mukwonago Dam Failure Study boundaries, and more specifically described in the “Staff Report and Recommendation” and map on file in the office of the Waukesha County Department of Parks and Land Use and made a part of this Ordinance by reference SZ-1757, is hereby approved.

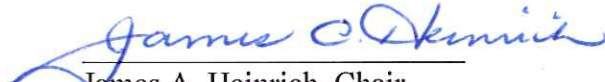
BE IT FURTHER ORDAINED that the Waukesha County Clerk shall file a certified copy of this Ordinance with the Town of Vernon Clerk.


BE IT FURTHER ORDAINED that this Ordinance shall be in full force and effect upon passage, approval and publication.

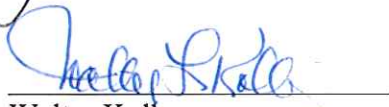
BE IT FURTHER ORDAINED that all Ordinances inconsistent with or in contravention of the provisions of this Ordinance are hereby repealed.

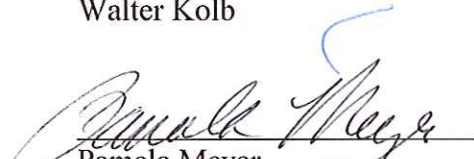
AMEND THE WAUKESHA COUNTY SHORELAND AND FLOODLAND PROTECTION
ORDINANCE DISTRICT ZONING MAP FOR THE TOWN OF VERNON BY REZONING
CERTAIN LANDS LOCATED IN PART OF SECTIONS 30 AND 31, T5N, R19E, TOWN OF
VERNON, WAUKESHA COUNTY, WISCONSIN, FROM THE AD-10 AGRICULTURAL
DENSITY-10 ACRE, A-E EXCLUSIVE AGRICULTURAL CONSERVANCY AND E-C
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ORDER TO INCORPORATE THE MUKWONAGO DAM FAILURE STUDY BOUNDARIES
(SZ-1757)

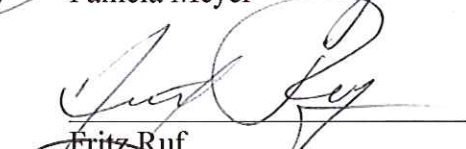
Presented by:
Land Use, Parks, and Environment Committee

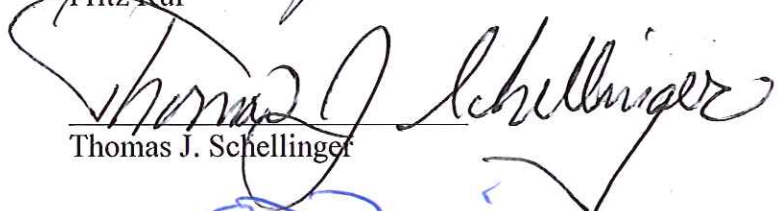

James A. Heinrich, Chair


Jim Batzko


Walter Kolb

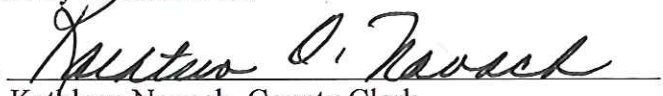

Pamela Meyer


Fritz Ruf



Thomas J. Schellinger


David D. Zimmermann

The foregoing legislation adopted by the County Board of Supervisors of Waukesha County, Wisconsin, was presented to the County Executive on:

Date: 11/26/2013, 
Kathleen Novack, County Clerk

The foregoing legislation adopted by the County Board of Supervisors of Waukesha County, Wisconsin, is hereby:

Approved: X
Vetoed: _____
Date: 12-3-13, 
Daniel P. Vrakas, County Executive

WAUKESHA COUNTY BOARD OF SUPERVISORS

V

DATE-11/26/13

(ORD) NUMBER-1680059

- | | |
|---|--------------------------|
| 1 C. SLATTERY..... | 2 D. Zimmermann.....AYE |
| 3 R. MORRIS.....AYE | 4 J. BATZKO.....AYE |
| 5 J. BRANDTJEN.....AYE | 6 J. JESKEWITZ..... |
| 7 J. GRANT.....AYE | 8 P. HAUKOHL..... |
| 9 J. HEINRICH.....AYE | 10 D. SWAN.....AYE |
| 11 F. RUF.....AYE | 12 P. WOLFF.....AYE |
| 13 P. BECKER <i>HAWROTH</i>AYE | 14 P. MEYER..... |
| 15 W. KOLB.....AYE | 16 M. CROWLEY.....AYE |
| 17 D. PAULSON.....AYE | 18 L. NELSON.....AYE |
| 19 C. CUMMINGS.....AYE | 20 T. SCHELLINGER....AYE |
| 21 W. ZABOROWSKI.....AYE | 22 P. JASKE.....AYE |
| 23 K. HAMMITT..... | 24 D. DRAEGER.....AYE |
| 25 G. YERKE..... | |

TOTAL AYES-19

TOTAL NAYS-00

CARRIED _____

DEFEATED _____

UNANIMOUS X

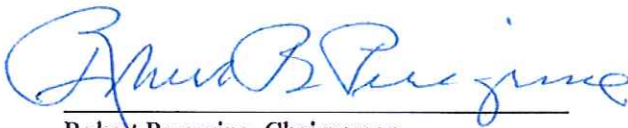
TOTAL VOTES-19

COMMISSION ACTION

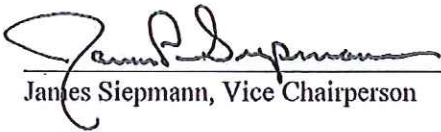
The Waukesha County Park and Planning Commission after giving consideration to the subject matter of the Ordinance to amend the Waukesha County Shoreland and Floodland Protection Ordinance hereby recommends approval of (SZ-1757) Town of Vernon, Mukwonago Dam Failure Analysis in accordance with the attached "Staff Report and Recommendation".

PARK AND PLANNING COMMISSION

October 17, 2013



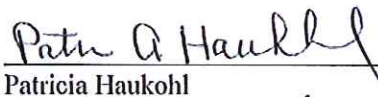
Robert Peregrine, Chairperson



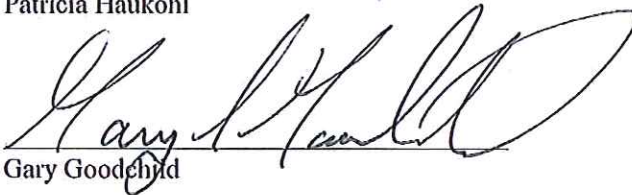
James Siepmann, Vice Chairperson



Walter Kolb



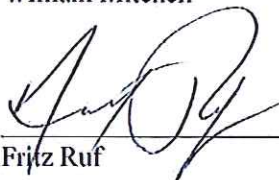
Patricia Haukohl



Gary Goodchild



William Mitchell



Fritz Ruf

WAUKESHA COUNTY DEPARTMENT OF PARKS AND LAND USE
STAFF REPORT AND RECOMMENDATION
ZONING MAP AND TEXT AMENDMENT

FILE NO.: SZ-1757 (Map) and SZ-1757A (Text)

DATE: October 3, 2013

PETITIONER: Bruce Kaniewski, Village Planner
Village of Mukwonago
440 River Crest Court
P.O. Box 206
Mukwonago, WI 53149

LOCATION:

The six properties that are subject of the rezone amendment are located downstream of the Mukwonago Dam and are located in Sections 30 and 31, T5N, R19E, Town of Vernon, Tax Key No's. VNT 2133.998, VNT 2134.998.001, VNT 2135.999, VNT 2134.996, VNT 2136.998, and VNT 2136.997 (See map).

PROPOSED ZONING:

Amend the text and maps of the Waukesha County Shoreland and Floodland Protection Ordinance in order to adopt a new Dam Failure Analysis for the Mukwonago Dam in accordance with NR 116 of the Wisconsin Administrative Code. The hydraulic shadow of the Dam Failure Analysis must be mapped as a new floodplain boundary along the Mukwonago River from the Mukwonago Dam to the confluence with the Fox River. Lands will be rezoned from the AD-10 Agricultural Density-10 Acre, A-E Exclusive Agricultural Conservancy and E-C Environmental Corridor Districts to the C-1 Conservancy District. Some lands that lie within the failure shadow are currently zoned C-1 because the lands are also designated wetlands. Because the County's shoreland jurisdictional limits extend to the full extent of the floodplain limits, if the floodplain extends further than 300 ft. from a stream or 1,000 ft. from a lake, a small area of additional shoreland jurisdiction is proposed to be created.

PUBLIC HEARING DATE:

June 6, 2013.

PUBLIC REACTION:

One of the downstream property owners (the Porter family) that own several of the parcels affected by the rezone amendment expressed concern related to property values and they stated that they did not feel that their property is subject to flooding because I-43 acts as a dam and the Mukwonago River is on the other side of the highway. The Village Planner responded by stating that there is at least one culvert which runs under the highway that connects the hydrology (water flow) from one side of the highway to the other.

Following the public hearing, Planning and Zoning staff contacted the WDNR to inquire about the statement and concern raised by the Porters. The WDNR confirmed that the Village's consultant floodplain engineer relied upon the proper base floodplain study (the effective FEMA floodplain study and profiles for the Mukwonago River) in conducting the Mukwonago Dam failure analysis study. Michelle Hase, the DNR floodplain engineer covering Waukesha County, indicated that FEMA floodplain studies are based upon the best available topographic data available at the time of study. Ms. Hase did indicate that the inquiring property owner or any other owner or entity always has the right to retain an engineer to further study a specific portion of the FEMA floodplain, which could include conducting more detailed

topographic surveys which could be used as the basis for proposing a change to the effective FEMA mapping. However, FEMA has just recently initiated an effort to comprehensively re-study the Fox River watershed within Waukesha County and because so little upland area is affected by the proposed dam failure study, a separate effort to study the subject area is likely not advantageous to the concerned party at this time. In order to further challenge the proposed dam failure shadow, the DNR stated that a contesting party would need to hire a consultant to study the FEMA floodplain to prove that the existing underlying FEMA maps are incorrect. Through a phone conversation, Planning and Zoning Division Staff conveyed this information from the DNR to the Porters and explained that the Fox River watershed is to be re-studied in the coming years and that the elevation and location of the floodplain may decrease or increase as part of that process. However, the DNR has indicated that it may take several years before the FEMA maps are finalized and formally updated.

TOWN OF VERNON PLAN COMMISSION ACTION:

On June 6, 2013, the Town of Vernon Plan Commission recommended approval to amend the text and zoning maps of the Waukesha County Shoreland and Floodland Protection Ordinance to adopt the Dam Failure Analysis for the Mukwonago Dam and create a new C-1 Conservancy District boundary along the Mukwonago River between the dam and the confluence with the Fox River, subject to the following conditions:

1. Documentation shall be submitted to the Town Planner that Waukesha County has approved the rezoning. Any and all conditions established by Waukesha County shall be incorporated herein. If Waukesha County does not approve this rezoning within 120 days this action is null and void.
2. Town Attorney Review: The Town of Vernon Plan Commission's recommendation shall not be in full force and effect until such time that the Town Attorney has reviewed the conditions and placed them in final form.
3. Professional Fees: The Petitioner shall, on demand, reimburse the Town of Vernon for all costs and expenses of any type that the Town of Vernon incurs in connection with this approval, including the cost of professional services incurred by the Town of Vernon (including engineering, legal, planning and other consulting fees) for the review and preparation of required documents or attendance at meetings or other related professional services for this application, as well as to enforce the conditions in this approval due to a violation of these conditions. Planner Note: This condition may be waived by the Town Board.
4. Payment of Charges: Any unpaid bills owed to the Town of Vernon by the Subject Property Owner and/or Agent, for reimbursement of professional fees (as described above); or for personal property taxes; or for real property taxes; or for licenses, permit fees or any other fees owed to the Town of Vernon; shall be placed upon the tax roll for the Subject Property if not paid within thirty (30) days of the billing by the Town of Vernon, pursuant to Section 66.0627, Wisconsin Statutes. Such unpaid bills also constitute a breach of the requirement of this conditional approval that is subject to all remedies available to the Town of Vernon, including possible cause for termination of the conditional approval. Planner Note: This condition may be waived by the Town Board.

TOWN OF VERNON BOARD ACTION:

On July 11, 2013, the Town of Vernon Board decided not to act on the rezone request until the comments provided by the Town Attorney to the Town Planner were addressed. The Town Clerk conveyed the list of

Town Attorney concerns dated June 13, 2013 to Planning and Zoning Staff (See attached Exhibit "A"). Planning and Zoning Staff consulted with the Waukesha County Corporation Counsel Office regarding the Town Attorney concerns and then Dale Shaver, Director of the Department of Parks & Land Use, and Jason Fruth, Planning and Zoning Manager, met the Town Planner on July 25, 2013 to provide a response to each concern. As an outcome of the meeting and pursuant to the Town Planner's request, Jason Fruth provided a written response to each subject concern (see attached email correspondence dated July 31, 2013 and identified as Exhibit "B") and offered to meet again with the Town Planner and Town Chairman, if they were so inclined. On August 20, 2013, Dale Shaver and Jason Fruth met with the Town Chairman and Town Planner to further discuss the issues raised by the Town Attorney and to further discuss the previously provided written County response.

On September 25, 2013, the Town of Vernon Board approved the rezoning request subject to a number of conditions (see attached Exhibit "C").

COMPLIANCE WITH THE COMPREHENSIVE DEVELOPMENT PLAN FOR WAUKESHA COUNTY AND THE TOWN OF VERNON LAND USE PLAN:

Prevention of flooding is a key natural resource protection recommendation of both land use plans, and the proposed rezoning will protect the newly studied floodplain from fill and prevent future property damage and personal injury for the portion of the properties to be rezoned and on the properties upstream and downstream of the subject area.

BACKGROUND ANALYSIS:

The Mukwonago Dam is located within the Village of Mukwonago limits and is owned and operated by the Village of Mukwonago. The dam, which is located on the Mukwonago River, creates a chain of reservoirs, known as Lower and Upper Phantom Lakes. The dam is more specifically located between C.T.H. ES and S.T.H. 83, south of Front Street, in the Indian Head Park area. The six parcels affected by the proposed dam failure floodplain shadow that are located within the Town of Vernon are both east and west of I-43 in the vicinity of the confluence of the Fox and Mukwonago Rivers. The lands affected are largely either undeveloped lowland conservancy land or farmed lowland conservancy lands. The dam consists of a spillway with two (2) sluice gates and an earth embankment on either side of the spillway. In 2008, a major flooding event occurred and concern was raised that the structural stability of the Mukwonago Dam was at risk. Some neighborhoods within the Village of Mukwonago were given evacuation orders because the dam failure zone (shadow) was unknown and it was feared the dam could break, given the very old age of the dam structure and the magnitude of the flood. The WDNR completed inspections of the dam and ordered the Village to improve the dam and required that a dam failure analysis be conducted to determine the extent of the hydraulic shadow for the dam and to determine the required hydraulic capacity for the hazard the dam creates. The results of a dam failure analysis allow the WDNR to assume a dam hazard rating according to Wisconsin Administrative Code NR 333. The purpose of NR 333 is to ensure that dams are designed, constructed and reconstructed so as to minimize the danger to life, health and property.

A dam failure analysis determines the hydraulic shadow for the failure of a dam, which is the area that would flood during a regional flood if the dam failed. A "regional flood" is defined as a flood with a one (1) percent chance of being equaled or exceeded in any given year. In accordance with Wisconsin Administrative Code NR 116, the hydraulic shadow is then required to be regulated as floodway and be placed in the appropriate zoning category by the local floodplain regulatory entity as part of the community or county's floodplain zoning program. Once the dam failure analysis is approved by the WDNR and

floodplain zoning is established, the dam hazard rating can be lowered, if appropriate. There are three (3) dam hazard ratings established by the Wisconsin Administrative Code: high hazard, which indicates a potential loss of life if the dam fails; significant hazard, which indicates a potential for structural loss if the dam fails; and low hazard, which indicates that there would only be environmental impacts if the dam fails. Insurance costs are higher and design and maintenance requirements are greater with higher hazard ratings.

The required dam failure analysis was completed by Mead and Hunt in June of 2012 and was approved by the WDNR on July 11, 2012. It was determined by the WDNR that no dwellings or critical infrastructure existed within the newly determined dam failure floodplain (hydraulic shadow). Therefore, the WDNR determined that the dam, as improved, could be designed and rated as a low-hazard dam if the hydraulic shadow for the dam failure is adopted by the Village and County. The Village administers a floodplain protection ordinance for areas within its boundaries and Waukesha County administers a floodplain protection ordinance for all unincorporated areas of the County. The WDNR approved the proposed improvements to the dam and the Village completed most of the improvements in 2012, with a grant from the WDNR. There are still some minor improvements that need to be made to the dam. Currently, the upgraded dam is designated as a high hazard dam because the hydraulic shadow downstream of the dam has not been amended to the C-1 Conservancy District and is not regulated as floodway. The Village can request that the WDNR change the rating of the dam to a low-hazard dam once the zoning is amended. As constructed, the dam does not meet high hazard dam requirements and the DNR indicated that significant additional improvements would be required if the dam failure shadow is not adopted.

The proposed hydraulic shadow extends downstream of the Mukwonago Dam to the confluence with the Fox River. A majority of the affected properties are located in the Village of Mukwonago and are not a part of this amendment (See Exhibit "D"). Much of the affected land within the Village is park and open space and is owned by the Village. The Village approved the zoning amendment for the lands affected within the Village limits on June 18, 2013. There are a total of six (6) properties affected by this rezone amendment within the Town of Vernon. There are a total of 42.02 acres proposed to be rezoned, but only 1.2 acres are not already designated in a lowland conservancy zoning category because most of the subject acreage is already mapped floodplain or wetland. Below is a table that quantifies and describes the existing zoning designations relative to the affected lands.

Current Zoning Designation of Affected Lands and Basis for Current Zoning Designation

Existing Zoning District	Acreage
A-E Exclusive Agricultural (currently within FEMA floodplain and DNR designated wetland)	36.7
A-E Exclusive Agricultural (currently DNR wetland only)	4.1
Remain in the C-1 Conservancy District (currently DNR wetland only)	4.4
E-C Environmental Corridor	0.98
AD-10 Agricultural Density 10-acre	0.20

The majority of the affected acreage (40.84 acres) is being rezoned from the A-E Exclusive Agricultural District and is already regulated as floodplain and/or wetland because of existing FEMA or DNR designations. Existing agricultural activities are permitted in both the C-1 Conservancy District and the AE districts. Because the hydraulic shadow must be regulated as floodway, lands within the dam failure

shadow are proposed to be zoned to the C-1 Conservancy District. The same standards of development apply to floodplain areas within either the C-1 or AE Districts, but the C-1 District better designates the restricted floodway zone. Existing agricultural uses can continue within either district. Therefore, there is no difference in the permitted uses between the two (2) districts that would affect the continuation of the existing farming operations on the cultivated lands to the east of I-43. 4.4 acres of land will remain in the C-1 Conservancy District, but are currently only designated as wetland, not floodplain. Said area will be designated as wetland and floodplain as part of this amendment.

The 0.98 acres of land that is proposed to be rezoned from the E-C Environmental Corridor District to the C-1 District (See Map) is located to the north side of a pond on one of the Porter family parcels and consists of hydric soils in its entirety. The area is not currently zoned AE only because consideration was given to the fact that a pier and grassy area already exists in this high groundwater area. The same area is also within the 75 ft. floodplain and wetland conservancy setback area that applies under the current zoning regulations and is, therefore, undevelopable based upon existing zoning.

The 0.20 acres of land that is proposed to be rezoned from the AD-10 Agricultural Density 10-acre District to the C-1 Conservancy District (See Map) on an adjacent parcel owned by the Porter family is also within an existing required 75' floodplain setback. The 0.2 acre area also contains prime agricultural soils. The AD-10 Agricultural Density 10-acre District requirements restrict new development activities on prime agricultural soils unless the lands are non-tillable or contain mature vegetation. Therefore, the change in designation has minimal affect.

As noted above, the areas that would be inundated by a dam failure are required to be regulated as floodway, since flowing floodwater will be discharged downstream as part of a dam failure. The dam failure floodplain boundary covers a larger area than the existing FEMA floodplain boundary downstream of the dam. However, FEMA does not acknowledge the dam failure floodplain boundary in its regulatory maps. Therefore, the existing FEMA floodplain boundary and associated elevations are still valid for flood insurance purposes.

As required per Wisconsin Administrative Code NR 116, Waukesha County must also add the Dam Failure Analysis to the list of Official Studies identified in Section 6(b)1.B.ii. of the Waukesha County Shoreland and Floodland Protection Ordinance. The table in Section 6(b)1.B.ii of the ordinance will be repealed and re-created in its entirety (see Exhibit "E").

While the Town Plan Commission recommended approval of the proposed rezoning subject to fairly basic conditions, the Town Board has recommended two additional conditions (See Conditions No. 1 and 2 of Exhibit "C") that are of concern to Planning and Zoning Staff. The first Town Board-recommended condition requires that the property owners of the lands to be rezoned to floodplain zoning categories are required to accept the terms and conditions of the rezoning approval in writing. DNR floodplain program staff has confirmed that the dam failure shadow must be adopted by the entity responsible for floodplain management. NR 116 does not provide for a voluntary process or a consent program, likely because it would be virtually impossible to protect floodplains within the State with a voluntary program, as invariably, some property owner would object to such a designation, thus defeating the public safety and property protection purpose of floodplain zoning. The second recommended Town Board condition of concern is the requirement that the Village of Mukwonago indemnify the Town against claims growing out of the rezone approval. Because the Village, as owner of the dam, has been required by DNR, pursuant to NR 116 to make certain improvements to the dam and adopt a dam failure study, and NR 116 does not call

for any such indemnification process, such a condition is of concern to Planning and Zoning Staff. Furthermore, to not adopt a dam failure shadow would allow for continued construction of improvements within the failure zone, which could cause further property damage or physical harm to individuals within the Town or upstream or downstream of the Town during a dam failure event.

STAFF RECOMMENDATION:

It is the opinion of the Planning and Zoning Division Staff that this request be approved. Because adoption of the dam failure study is required by the WDNR under NR 116 of the Wisconsin Administrative Code, adoption of the flood study by text reference and incorporation of the floodplain boundaries into the Waukesha County Shoreland and Floodland Protection Ordinance brings the improvements of the Mukwonago Dam into compliance with State standards and provides the public with the most current and accurate information. Rezoning the dam failure shadow as floodplain on the County zoning map prevents development within said areas, which ultimately protects the subject landowners and upstream and downstream property owners and their improvements from flooding and danger. The 1.2 upland acres proposed to be rezoned to conservancy categories are already primarily unbuildable because of hydric soil conditions and effective wetland and floodplain setback regulations, therefore, the change in zoning results in very little practical change as to how the owners of the 1.2 acres can use said areas. The Mukwonago Dam enables recreation on two lakes, and these lakes contribute to the local economy and natural environment. This rezoning helps ensure that the impounded waters do not pose a significant safety and property damage risk to the region.

Respectfully submitted,

Jason Fruth

Jason Fruth
Planning & Zoning Manager

Amy Barrows

Amy Barrows
Senior Land Use Specialist

Enclosures: Exhibits "A" through "E" (SZ-1757A-Text Amendment)
Map (SZ-1757)

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EXHIBIT "A"

LAW OFFICES OF
**ARENZ, MOLTER,
MACY, RIFFLE & LARSON, S.C.**
720 N. EAST AVENUE
P.O. BOX 1348
WAUKESHA, WISCONSIN 53187-1348
Telephone (262)548-1340
Facsimile (262)548-9211
Email: jmacy@ammr.net

DALE W. ARENZ
DONALD S. MOLTER, JR.
JOHN P. MACY,
COURT COMMISSIONER
H. STANLEY RIFFLE,
COURT COMMISSIONER
ERIC J. LARSON

RICK D. TRINOL
JULIE A. AQUAVIA
PAUL E. ALEXY
R. VALJON ANDERSON

June 13, 2013

JAMIE RYBARCZYK
TOWN PLANNER
TOWN OF VERNON
FOTH INFRASTRUCTURE & ENVIRONMENT, LLC
LINCOLN CENTER II
2514 S. 102ND STREET, SUITE 278
WEST ALLIS, WI 53227

**Re: Town of Vernon
Mukwonago Dam Failure Shadow Rezone
Conditions of Approval
First Draft**

Dear Mr. Rybarczyk:

I received the conditions of approval and other materials that you provided to me regarding the above-noted matter and your request that I review the same. I have had an opportunity to carefully consider this matter.

Based upon my review, I am not able to approve the form of the same at this time. I note the following comments, questions, concerns and recommendations in this regard:

1. Your Staff Report indicates that Fred Winchowky, Mukwonago Village President, is the applicant. That fails to comply with Section 39(b)(1) of the Waukesha County Shoreland and Floodland Protection Ordinance, which describes who may petition for an amendment. Amendment petitions must come from an affected property owner, or the Town Board of an affected Town, or any member of the Waukesha County Board, or the County zoning agency. I recommend that this matter be revisited to ensure that the correct process is followed.
2. The text amendment is insufficient, in my opinion, because it fails to include this land within the reach of the C-1 District. As I understand the matter, this land is being added to the C-1 District because it would be flooded if the dam would fail, but there is nothing within the C-1 Conservancy District that encompasses this purpose. Section 7(a) of the

LAW OFFICES OF
ARENZ, MOLTER, MACY, RIFFLE & LARSON, S.C.

Jamie Rybarczyk, Town Planner
June 13, 2013
Page 2

Waukesha County Shoreland and Floodland Protection Ordinance states that the district applies as follows:

This district includes all shoreland areas that are considered wetlands and/or floodplains as defined in this Ordinance and as mapped and/or determined as wetlands and/or floodplains in Section 3(a) and 6(b) of this Ordinance.

Nothing in this paragraph, nor in the definition of wetland, the definition of floodplain, or the referenced Section 3(a) or 6(b), indicates that land qualifies for Conservancy District designation simply because it is in a dam failure shadow.

I would be interested in hearing the County's position in this regard, as they may have an explanation of how they interpret their code to include dam failure shadow land within the C-1 Conservancy District. Absent that, it strikes me that, at a minimum, Section 6(b)(3) should be modified to include dam failure shadow land within the determination of the boundaries for the C-1 Conservancy District.

3. I am concerned that the text amendments apparently were not provided or on file, prior to the public hearing, and I question whether this constitutes adequate notice pursuant to Section 40(b)(1)(C) of the Shoreland and Floodland Protection Ordinance.
4. I am particularly concerned regarding the foregoing due to the fact that the property owners affected by this rezoning have not requested this rezoning, and I have no information regarding any involvement that they may have had in this process. This C-1 rezoning may have a substantial impact on these Town property owners. It is very possible that these property owners would contest this rezoning. At a minimum, it is essential that all of the required procedures be followed.
5. There is a policy issue involved, as well, regarding whether the Town of Vernon supports the Village of Mukwonago's request for a "low hazard" rating for the Mukwonago Dam. That is, if the alternatives are keeping higher regulatory controls on the dam in order to prevent dam failure, or lowering the regulatory controls on the dam because impacts of failure are smaller due to the C-1 zoning designation, I am not sure which of these two options the Town of Vernon policymakers would prefer.
6. I see from the map that some portions of the dam failure shadow extend outside of the shoreland zoning jurisdiction. Given that this is a shoreland

LAW OFFICES OF
ARENZ, MOLTER, MACY, RIFFLE & LARSON, S.C.

Jamie Rybarczyk, Town Planner
June 13, 2013
Page 3

zoning ordinance amendment, it will not be effective outside of the shoreland zoning jurisdiction, and the dam failure shadow, and proposed C-1 zoning jurisdiction shown in the map that has been provided, is inaccurate in this regard. This should be corrected.

7. As to the conditions that you've listed, I have no concerns regarding these relatively standard conditions, but I would suggest that you consider the following. Do you want to add a condition that would require the written approval of the affected property owners, before this rezoning would take effect? I can propose language to accomplish that intent on request. In lieu of that, or perhaps in addition to that, do you want to add a paragraph to state that this rezoning is subject to the Village of Mukwonago indemnifying the Town of Vernon against any claims or liability that could arise as a result of this action? Again, I could propose language for your consideration in that regard on request.

If you should have any questions regarding this matter, please do not hesitate to contact me.

Yours very truly,
ARENZ, MOLTER, MACY,
RIFFLE & LARSON, S.C.

John P. Macy

John P. Macy

JPM/bes
cc: Jim Slawny, Town Chair
Karen Schuh, Town Clerk
L:\MyFiles\Vernon\Mukwonago Dam Failure Shadow\jr.tr.06-13-13

Fruth, Jason

EXHIBIT "B"

From: Fruth, Jason
Sent: Wednesday, July 31, 2013 8:36 AM
To: jamie.rybarczyk@foth.com
Cc: Shaver, Dale
Subject: Mukwonago Dam

Jamie,

You asked our office to respond to the issues raised by the Town Attorney in correspondence that he transmitted to you regarding the proposed Mukwonago Dam rezoning request. I have inserted the concerns below and provided a response in italics below each issue. Please feel free to follow up with questions, or if both you and the Town Chairman would like to come in and discuss further, we can certainly set up a time.

1. Your Staff Report indicates that Fred Winchowky, Mukwonago Village President, is the applicant. That fails to comply with Section 39(b)(1) of the Waukesha County Shoreland and Floodland Protection Ordinance, which describes who may petition for an amendment. Amendment petitions must come from an affected property owner, or the Town Board of an affected Town, or any member of the Waukesha County Board, or the County zoning agency. I recommend that this matter be revisited to ensure that the correct process is followed.

Our Corporation Counsel has advised that because the Village is a property owner (VNT2134.998.001) within the area to be affected by the rezoning, the Village is an acceptable applicant pursuant to Section 39(b)(1).

2. The text amendment is insufficient, in my opinion, because it fails to include this land within the reach of the C-1 District. As I understand the matter, this land is being added to the C-1 District because it would be flooded if the dam would fail, but there is nothing within the C-1 Conservancy District that encompasses this purpose. Section 3(a) of the Waukesha County Shoreland and Floodland Protection Ordinance states that the district applies as follows:

This district includes all shoreland areas that are considered wetlands and/or floodplains as defined in this Ordinance and as mapped and/or determined as wetlands and/or floodplains in Section 3(a) and 6(b) of this Ordinance.

Nothing in this paragraph, nor in the definition of wetland, the definition of floodplain, or the referenced Section 3(a) or 6(b), indicates that land qualifies for Conservancy District designation simply because it is in a dam failure shadow.

I would be interested in hearing the County's position in this regard, as they may have an explanation of how they interpret their code to include dam failure shadow land within the C-1 Conservancy District. Absent that, it strikes me that, at a minimum, Section 6(b)(3) should be modified to include dam failure shadow land within the determination of the boundaries for the C-1 Conservancy District.

The C-1 Conservancy District specifies that the district includes floodplains as defined in the Ordinance and/or determined as floodplains in Section 3(A) and 6(b) of the Ordinance. The definition of floodplain is contained in Section 2 and states, "Land which has been or may be covered by flood water during the regional flood. It includes floodway and the floodfringe, and may include other designated floodplain areas for regulatory purposes. Also known as floodlands." The DNR has advised that this study must be adopted and incorporated into the Floodplain Zoning Ordinance pursuant to NR116. Our office has consistently mapped dam failure flood shadows to the C-1 District because the above definition recognizes "other designated floodplain areas." Furthermore, Section 6(b) contains language that states, "Regional flood elevations have been derived from other studies and are approved by the WDNR." The definition of Regional Flood in Section 2 states "A regional flood may be also be determined by other studies approved by the WDNR."

3. I am concerned that the text amendments apparently were not provided or on file, prior to the public hearing, and I question whether this constitutes adequate notice pursuant to Section 40(b)(1)(C) of the Shoreland and Floodland Protection Ordinance.

The public hearing notice described that the text amendment was for the purposes of adopting the dam failure analysis study for the Mukwonago Dam located on the Mukwonago River. The text amendment was available at the public hearing and was read into the record. The amendment language simply lists the preparer and date of study and lists the date that the DNR approved the study and leaves a placeholder for the date of County Board adoption. The text amendment will not be in final form until an expected date of County Board action is known. Amy Barrows of our staff sent email correspondence to you, as Town Planner, with a copy to the Town Chair, Clerk and Attorney on May 22, 2013 advising that a draft would be available in advance of the hearing.

4. I am particularly concerned regarding the foregoing due to the fact that the property owners affected by this rezoning have not requested this rezoning, and I have no information regarding any involvement that they may have had in this process. This C-1 rezoning may have a substantial impact on these Town property owners. It is very possible that these property owners would contest this rezoning. At a minimum, it is essential that all of the required procedures be followed.

We believe that proper procedures were followed. In analyzing the dam failure shadow against existing zoning, it appears as though less than ¼ acre of potentially buildable land on a currently agricultural parcel will be impacted by the new zoning designation from a development impact standpoint. The majority of the shadow area is already zoned C-1 Conservancy District and/or AE- Exclusive Agricultural Conservancy District because the lands are either within the existing FEMA floodplain, within mapped DNR wetlands or both. The approximately 0.2 acre area where development potential may be impacted could still be part of a future divided lot or parcel, but it could not contain a building footprint without further rezoning or a variance. It should be noted that the DNR floodplain engineer for the County has advised that the dam failure shadow floodplain is very similar to the "dam in place- no failure" shadow and the "dam non-existent" shadow because the C.T.H. "ES" bridge is also an impounding structure holding the waters of the Phantom Lakes and Mukwonago River back even if a failure were to occur.

5. There is a policy issue involved, as well, regarding whether the Town of Vernon supports the Village of Mukwonago's request for a "low hazard" rating for the Mukwonago Dam. That is, if the alternatives are keeping higher regulatory controls on the dam in order to prevent dam failure, or lowering the regulatory controls on the dam because impacts of failure are smaller due to the C-1 zoning designation, I am not sure which of these two options the Town of Vernon policymakers would prefer.

You may wish to consult with DNR floodplain program staff regarding this topic. A high hazard designation may present substantial additional cost in dam improvements yet result in no net benefit for any downstream buildings and have limited impact upon downstream properties because the vast majority of the affected land is already zoned in conservancy zoning categories. DNR has advised that a high hazard dam would have to pass a 1000 year flood event rather than a 100 year flood event, and DNR staff has described that the required additional improvements for high hazard dam designation would be significant and costly. DNR staff has advised that adoption of a dam failure shadow is also required for a high hazard dam.

6. I see from the map that some portions of the dam failure shadow extend outside of the shoreland zoning jurisdiction. Given that this is a shoreland zoning ordinance amendment, it will not be effective outside of the shoreland zoning jurisdiction, and the dam failure shadow, and proposed C-1 zoning jurisdiction shown in the map that has been provided, is inaccurate in this regard. This should be corrected.

The rezone petition proposes that the dam failure shadow boundaries be adopted in conjunction with the floodplain study. Section 59.692 of the statutes states that shorelands extend 300 feet from a river or stream or to the landward side of the floodplain, whichever distance is greater. Therefore, the adoption of the proposed dam failure shadow would

result in an extension of the Shoreland Ordinance jurisdictional boundaries to be equal to the extent of the dam failure shadow floodplain. The DNR Floodplain Planning Program Manager has advised that he concurs that the dam failure shadow floodplain can be considered a floodplain boundary for these purposes. As proposed, the study would be adopted into the Shoreland Ordinance- not the Basic Zoning Code.

7. As to the conditions that you've listed, I have no concerns regarding these relatively standard conditions, but I would suggest that you consider the following. Do you want to add a condition that would require the written approval of the affected property owners, before this rezoning would take effect? I can propose language to accomplish that intent on request. In lieu of that, or perhaps in addition to that, do you want to add a paragraph to state that this rezoning is subject to the Village of Mukwonago indemnifying the Town of Vernon against any claims or liability that could arise as a result of this action? Again, I could propose language for your consideration in that regard on request.

You may wish to consult with DNR floodplain program staff regarding this topic.



EXHIBIT "C"

Lincoln Center II • 2514 South 102nd Street, Suite 278
West Allis, WI 53227
(414) 336-7900 • Fax: (414) 336-7901
www.foth.com

September 30, 2013

Mrs. Amy Barrows, Senior Land Use Specialist
Waukesha County
515 West Moreland Boulevard
Waukesha, WI 53188

Dear Mrs. Barrows:

RE: Town of Vernon, Mukwonago Dam Failure Shadow (DFS) Rezone

Please be advised that the Town of Vernon Board Conditionally Approved the Rezone requests (SZ-1757 & SZ-1757A) for the Village of Mukwonago regarding the properties impacted by the Dam Failure Shadow, subject to the following conditions:

1. **Property Owner Agreement.** As a condition precedent to approval of the rezoning, the property owners (i.e. Village of Mukwonago, Timothy & Ginger Pladies, and Howard Porter & George Porter Et Al) are required to accept the terms and conditions of this approval in its entirety in writing.
2. **Indemnification.** In addition to, and not to the exclusion or prejudice of, any provisions of this approval, the Village of Mukwonago shall indemnify and save harmless and agrees to accept tender of defense and to defend and pay any and all legal, accounting, consulting, engineering and other expenses relating to the defense of any claim asserted or imposed upon the Town, its officers, agents, employees and independent contractors growing out of this approval, by any party or parties.
3. **Documentation** shall be submitted to the Town of Vernon Clerk that Waukesha County has approved the rezoning. Any and all conditions established by Waukesha County shall be incorporated herein. If Waukesha County does not approve this rezoning within 120 days from the last Town Board action, September 25, 2013, this action is null and void.
4. **Town Attorney Review.** The Town of Vernon Plan Commission's recommendation shall not be in full force and effect until such time that the Town Attorney has reviewed the conditions and placed them in final form.
5. **Professional Fees.** The Petitioner shall, on demand, reimburse the Town of Vernon for all costs and expenses of any type that the Town of Vernon incurs in connection with this approval, including the cost of professional services incurred by the Town of Vernon (including engineering, legal, planning and other consulting fees) for the review and preparation of required documents or attendance at meetings or other related professional services for this application, as well as to enforce the conditions in this approval due to a violation of these conditions.
6. **Payment of Charges.** Any unpaid bills owed to the Town of Vernon by the Subject Property Owner and/or Agent, for reimbursement of professional fees (as described above); or for personal property taxes; or for real property taxes; or for licenses, permit fees or any other fees owed to the Town of

C:\Users\jfruth\Temporary Internet Files\Content.Outlook\5TFQZPMR\TV-L-VM DFS Conditions to County-2013 09 30.doc

Mrs. Amy Barrows
Waukesha County
September 30, 2013
Page 2

Vernon; shall be placed upon the tax roll for the Subject Property if not paid within thirty (30) days of the billing by the Town of Vernon, pursuant to Section 66.0627, Wisconsin Statutes. Such unpaid bills also constitute a breach of the requirements of this conditional approval that is subject to all remedies available to the Town of Vernon, including possible cause for termination of the conditional approval.

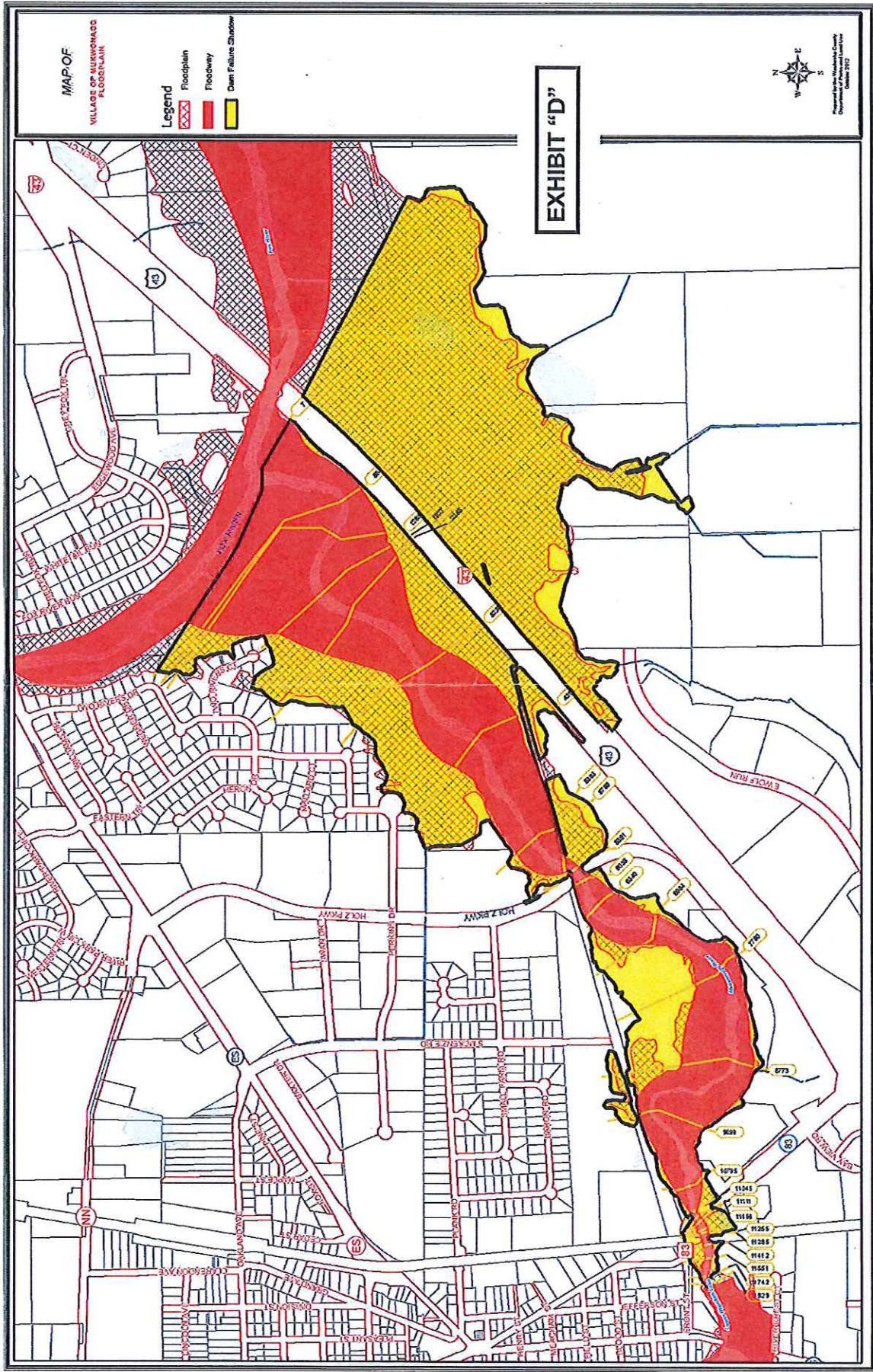
Sincerely,

Foth Infrastructure & Environment, LLC



Jamie Rybarczyk
Town Planning Consultant

cc: Jim Slawny, Town Chairman
Karen Schuh, Town Clerk
John Macy, Town Attorney



**PROPOSED AMENDMENT
TO THE WAUKESHA COUNTY
SHORELAND AND FLOODLAND PROTECTION ORDINANCE**

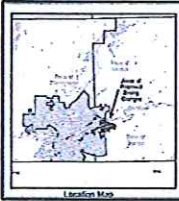
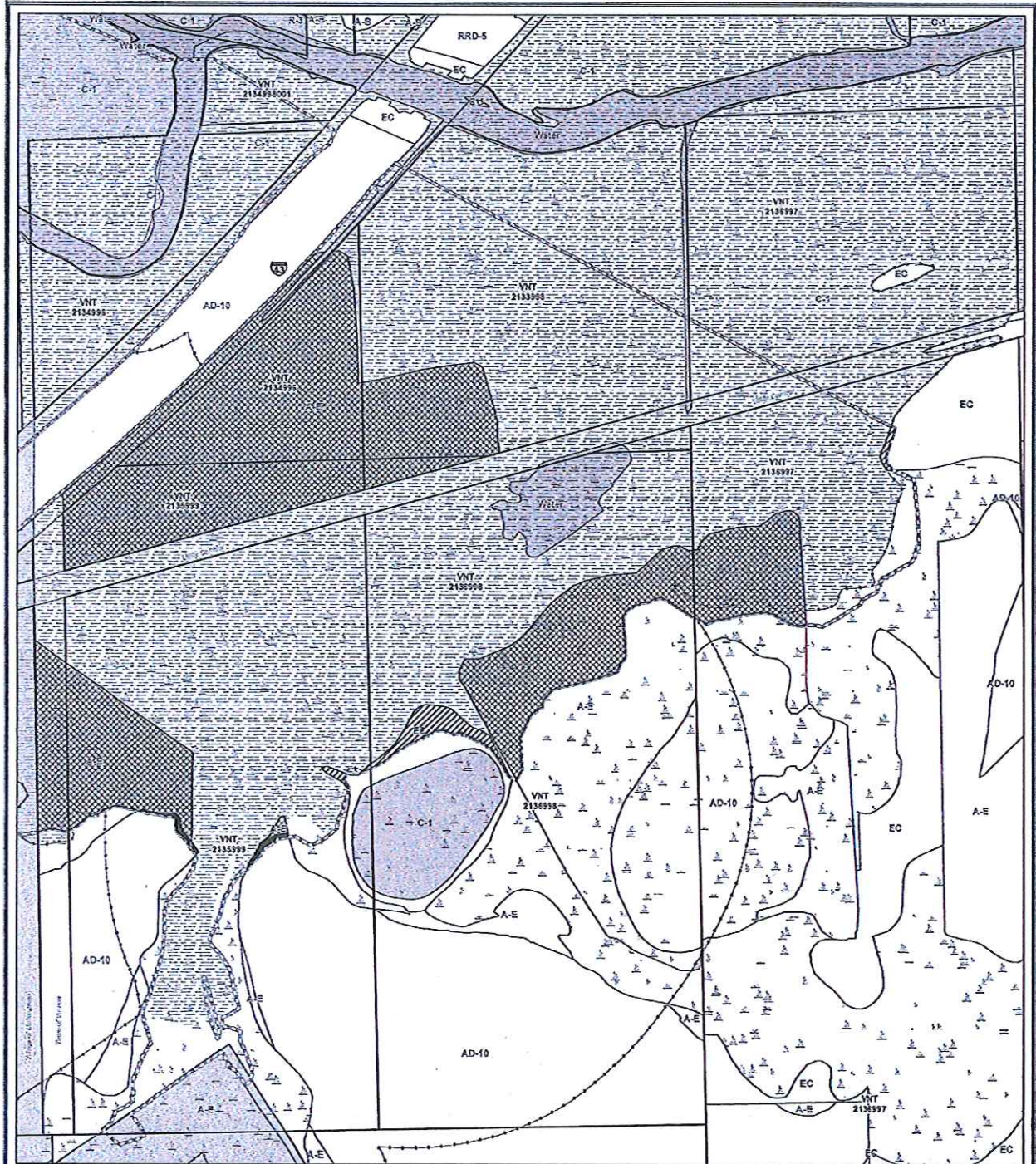
Notes: *Text to be added appears in italics. Some formatting may change as the Editor incorporates the proposed amendments into the existing code.*

Table 6(b)1.B.ii.

List of Official Maps Based Upon Other Studies to be Used in Conjunction with the Waukesha County Shoreland and Floodland Protection Ordinance Zoning Maps is as follows:

1. Dam Failure Analysis and Emergency Action Plan for Wambold and Kroll Dams on Eagle Spring Lake, prepared by Graef, Anhalt, Schloemer & Associates, Inc., revised April 2002. Approved by the WDNR in April of 2002 and adopted by the Waukesha County Board on April 13, 2004.
2. Dam Failure Analysis and Proposed Dam Capacity Analysis-Monches Dam, Hey and Associates, Inc., April 17, 2006; amended on October 13, 2006 by Hey and Associates, Inc.; further amended on May 17, 2011 by the Waukesha County Department of Public Works; and further amended by R.A. Smith National on January 19, 2012. Approved by the WDNR on January 24, 2012 and adopted by the Waukesha County Board on March 27, 2012.
3. Dam Failure Analysis – Monterey Dam, prepared by Kunkel Engineering Group, LLC on September 12, 2011. Approved by the WDNR and adopted by the Waukesha County Board on December 18, 2012.
4. *Dam Failure Analysis – Mukwonago Dam, prepared by Mead & Hunt, June 2012. Approved by the WDNR on July 11, 2012 and adopted by the Waukesha County Board on _____.*

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Legend

- Shoreland Zoning Jurisdiction
- Hydraulic Flood Shadow (Foodery)
- 100-yr Floodplain (EMA)
- County Zoning District Areas

1 inch = 250 feet

**ZONING MAP AMENDMENT
SECTION 30
TOWN OF VERNON**

Prepared by the Winnebago County Department of Parks and Land Use

- CONDITIONAL BICOASTAL ZONING CHANGE FROM S1 ENVIRONMENTAL CORRIDOR DISTRICT (R.31 A2)
- CONDITIONAL BICOASTAL ZONING CHANGE FROM A-E EXCLUSIVE AGRICULTURAL CONSERVATION DISTRICT TO C-1 CONSERVATION DISTRICT (R.31 A2)
- CONDITIONAL SHORELAND ZONING CHANGE FROM AD-10 AGRICULTURAL DENSITY - 10 DISTRICT TO C-1 CONSERVATION DISTRICT (R.31 A2)

FILE: _____ 62-1767

DATE: _____ 10/17/13

AREA OF CHANGE: _____ 42.02 ACRES

TAX KEY NUMBERS: _____ VNT2134 998 001, 2133 997, 998, 2133 998, 2134 996, & 2133 999