

January 27, 2012

Village Board  
Village Plan Commission  
Village of Fontana  
P.O. Box 200  
Fontana, WI 53125

***RE: Pyramiding Regulations***

Dear Board and Plan Commission Members:

Please find enclosed a proposed amendment to Section 18-110(d) as it exists in the December 2<sup>nd</sup> draft of the proposed zoning revisions. This revision is being offered as a result of the direction given to me at the last Board meeting to work with representatives of the Lake Geneva Conservancy on the subject of their attorney's November 23 memo and subsequent communications. We have had an opportunity now to meet with representatives of the Conservancy, and I have also had two opportunities to talk with their attorney, research the issues raised, consider the memoranda submitted by the attorney and draft a revision based upon instruction given to me at the Staff meeting last week.

In preparing this revision, I went back to the research file we have on this subject and reviewed the experience of numerous other communities on the subject of pyramiding regulations, including the Village of Elkhart Lake, the City of Delafield, the Village of Oconomowoc Lake, the Village of Nachotah, and others.

Given the limitations of the budget that I was given by the Board, I have limited my revisions to those steps which could be done in a way which would most effectively address the concerns raised by the Conservancy without undertaking a wholesale rewrite. The enclosed draft makes the following changes:

1. I have moved the proposed code section from Section 18-110 to a stand alone section proposed as Section 18-111. This is a change that would remove it as a regulation which exists only in the Lakeshore Overlay District and make it more of a Village wide regulation whose effect is limited to lakeshore areas.
2. I have deleted all exceptions other than the one I think is required to be present in a

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**Dale L. Thorpe - Scott T. Christian**

Jennifer L. Riemer | Elizabeth R. Olson\* | Darryl J. Lee  
Serena N. Hulbert | John K. Bartosz - of Counsel | \*also licensed in Illinois



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regulation such as this. I have retained an exception for publicly owned land or public access points, but eliminated exceptions with regard to leases and commercial operations which I don't believe would be regulated by this provision in any event.

I am also enclosing a memo which summarizes the discussion that took place at the recent Staff meeting and in earlier conversations with representatives of the Conservancy. It is my understanding that one or more representatives of the Conservancy will be present at the January 30 Plan Commission meeting, and they may wish to supplement this memo with their own point of view with regard to Conservancy priorities.

Please let me know if you need anything further on these subjects.

Very truly yours,

**THORPE & CHRISTIAN, S.C.**

A handwritten signature in black ink, appearing to read 'D. L. Thorpe', written over a faint, larger version of the same signature.

By: Dale-L. Thorpe

Email: [dthorpe@ThorpeChristian.com](mailto:dthorpe@ThorpeChristian.com)

DLT:bld  
Enclosures

cc: Ms. Kelly Hayden, Village Administrator (w/encls.)  
Mr. Dennis Martin, Village Clerk (w/encls.)  
Mr. Mike Slavney (w/encls.)

# DRAFT

## **Section 18-111: Pyramiding Not Permitted**

- (a) No lakeshore lot or tract of land shall be used, occupied, subdivided into lots or outlots, condominiumized, sold, leased, or otherwise transferred or disposed of, nor shall any easement or interest therein be created, so as to convey riparian use of or access to Geneva Lake or any waterway connected therewith, to any offshore land, including lot(s) or outlot(s) in a subdivision, condominium or development. Doing so would be considered pyramiding which shall not be permitted.
- (b) This Section 18-111 shall not be deemed to restrict in any manner any publicly owned land or public access points to Geneva Lake or waterways connected therewith.

**To: Village Board Plan Commission**

*Thorpe & Christian, S.C.*

**From: Dale L. Thorpe**

**MEMORANDUM**

**Subject: January 18, 2012 Staff Meeting**

**Attorney Work Product**

**Date: January 27, 2012**

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The one item on this month's Staff meeting agenda was the Village's zoning and land division ordinance revisions and the concerns of the Geneva Lake Conservancy expressed by their attorney, Attorney William O'Connor. At the January 18 Staff meeting, both Attorney O'Connor and a representative of the Conservancy were present. A memo dated January 18, 2012 was handed out at the beginning of the meeting (see copy attached). The memo was then discussed, together with other concerns raised in an earlier memo from Attorney O'Connor dated November 23 (see copy attached).

The memos speak for themselves. My impression of the meeting was that the Conservancy's primary point of concern as expressed in the November 23 and the January 18 memos, and in conversations I had with Attorney O'Connor on two occasions had to do with the possible conveyance of riparian rights to off lake property owners and regulating moorings. A number of possible revision points to the ordinances were discussed, all as set forth in the enclosed memos; however, Staff pointed out to the Representatives from the Conservancy that enhancing Village regulation on the subject of mooring and riparian rights had not been articulated as a drafting policy for purposes the Chapter 17 & 18 Revisions. Representatives of the Conservancy were invited to

express these concerns to the Village Board and Plan Commission in order to obtain some direction from those public bodies to Staff on these important subjects.

One point that everyone seemed to agree on was the need to for possible clarification on the Village's Anti-Pyramiding ordinance which was newly adopted in the Fall of 2010. I offered to prepare a simple revision within the limited budget available to me from the Village Board and to circulate it in advance of the Plan Commission meeting on January 30<sup>th</sup>.

We also discussed whether or not a new direction from the Board to undertake changes based on concerns raised by the Conservancy should be included in the Ordinance being considered for adoption now or in a trailer ordinance undertaking housekeeping changes immediately following adoption of the most recent draft of 17 & 18. Again, this is a subject for consideration by the Plan Commission and Board so that direction may be given to Staff.

January 18, 2012

COPY

GENEVA LAKE CONSERVANCY

VILLAGE OF FONTANA-ON-GENEVA-LAKE  
ZONING AND LAND DIVISION ORDINANCE REVISIONS  
AFFECTING GENEVA LAKE

1. The Village's proposed land division and zoning ordinances incorporate existing provisions that define and prohibit "pyramiding" which results in the expansion of riparian rights and excessive shore area development. Sections 18-110(c) and (d) of the proposed Zoning Ordinance incorporate this policy in the new Lakeshore Overlay Zone (which includes all lands within 75 feet of Geneva Lake). The language in the draft ordinance aims to prevent the use of easements, condominium plats and other approaches to extend riparian rights to others than lakefront owners. The current language addresses the riparian right of "access to Geneva Lake" but does not specify any other riparian right these provisions aim to restrict. The riparian right that most affects the water quality and habitat of Geneva Lake is the placement of piers and moorings in navigable waters. Although the Village separately regulates piers and moorings in Chapter 54, the application of those provisions requires the Village to apply the Anti-pyramiding (and other) policies to determine whether a pier proponent qualifies to place a pier and whether riparian rights attach to a "lot." The Village should consider revisions to clarify the three exceptions from the Anti-pyramiding policy, which generally apply to public land, certain leases and "commercial patrons." The Village should also consider additional revisions to ensure that its zoning and land division policies are appropriately applied to waterfront lots.

2. Drafting effective Anti-pyramiding provisions is challenging, especially where property owners apply the highly flexible condominium ownership law or the use of "outlots" that are generally exempt from waterfront width and area standards. The Village should consider revisions to expressly state that: (a) state the Village's policy that no condominium plat can be approved by the Village that would increase the permissible development of piers and moorings beyond what would apply if the condominium were not declared and (b) define "outlot" in a manner that would prohibit the placement of piers extending from outlots that do not meet the area and width standards otherwise applicable to waterfront lots.

3. The application of waterfront lot size regulations and the regulation of piers raises sometimes complicated questions as to how riparian lots are defined. This is especially tricky where existing lots are made subject to the condominium ownership act, where established lot boundaries differ from the configuration of tax parcels and where substandard lots are held common ownership or developed with a single primary structure. The Village should consider including new language in the revised codes that comprehensively addresses how it determines the existence and boundaries of riparian lots and riparian owners for purposes of its land division, zoning and pier regulations.

4. One of the most consequential riparian rights is the construction of piers and boat moorings, which is regulated both by state law and the Fontana Village Code Ch. 54. The pier regulations included in Ch. 54 of the Code were enacted under authority granted in Wis. Stat. Sec. 30.13. Among other provisions, the Code establishes a 12.5-foot side boundary pier setback (resulting in minimum 25-foot spacing between piers). There is no comparable provision in State law or regulations. Since 2007 the Legislature has significantly reduced state regulation of piers and further steps toward de-regulation are pending. A 2010 decision of the Wisconsin Court of Appeals held a local pier ordinance trumped by state authorization to place a pier. In order to help protect the validity of the Village's existing pier ordinance, it should consider re-enacting the current regulations as a part of the zoning ordinance. Although this would not guarantee that Village pier regulations (such as the 12.5 foot setback) would not be held to be trumped by State law, it would materially reduce that risk. This approach (incorporating pier regulations in a zoning ordinance) has been taken by numerous counties and municipalities. The Village could help protect its current pier regulations through a relatively simple amendment that would insert the Village's existing pier regulations into Sec. 18-110 (the Lakeshore Overlay Zone).

5. Section 18-110(e)(1) of the proposed Lakeshore Overlay Zone includes a short section that aims to regulate shoreland vegetation. Generally, that provision prohibits "clear cutting" of trees, shrubbery and underbrush and includes general language aimed to protect native vegetation. Many waterfront municipalities have established more rigorous standards addressing near shore vegetation because of the importance of the habitat existing at the water's edge. These include provisions establishing lakefront buffer areas (typically extending 35-feet inland from the shore) to protect water quality, habitat and natural scenic beauty, "mitigation" requirements and other standards. The Village of Elkhart Lake is a good example of such an ordinance, adopted in a community that shares many of the premier lakefront qualities that characterize the Village of Fontana.

MEMORANDUM

TO: Michael Slavney  
Attorney Dale Thorpe  
Kelly Haden-Staggs

FROM: William P. O'Connor  
Geneva Lake Conservancy

RE: Village of Fontana Ordinance Revision  
Riparian Parcels and Structures

DATE: November 23, 2011

COPY

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The Geneva Lakes Conservancy has asked me to review the Draft revision of the Village of Fontana Zoning Ordinance. As you know, Conservancy representatives have been present at every public meeting during this Zoning Revision process. The Conservancy is particularly interested in a set of related issues that have not been directly discussed so far. These include provisions that regulate the creation, development and use of lots and interests on and near the shore of Geneva Lake.

The Conservancy concurs in the Village's general policy goal of maintaining existing waterfront development, but establishing appropriate restrictions on further development in the lakeshore area. The draft ordinance includes policies to address waterfront development that support that objective, including the creation of the Lakefront Residential (LR-O) and Lakeshore (LS) Overlay Districts. Those Districts include Density, Intensity and Bulk Regulations aimed to prevent high density development, especially on lands within 75 feet of the ordinary high water mark of Geneva Lake. The Ordinance prohibits structures within the Shore Yard setback, with exceptions that include piers and docks placed in compliance with the Pierhead Line and Wharf Regulations in Chapter 54, Article III of the Village code.

These policies are reasonable approaches to protect Geneva Lake's exceptional importance to the Village. But we believe additional language is needed to ensure these policies are effective. In particular, these relate to the creation of lots and interests that include "riparian rights", especially the right to place piers and structures on the bed of Geneva Lake. These are importantly affected by the complex interplay of state statutes and common law and by local zoning, land division and other regulations.

For example, Section 18-99 of the current Zoning Ordinance declares the Village's longstanding "anti-pyramiding" policy, which prohibits certain transactions that assign riparian rights to persons other than "the owner or legal occupant of the lot and his guests." Although this "anti-pyramiding" provision is carried into the draft Zoning Ordinance revision, we believe additional language is needed to clarify its application to

particular circumstances, including a determination of what constitutes an owner's "lot." For example, some Condominium Declarations create condominium "units" that include riparian land. Although state law requires these units to be recognized as parcels of real property, it also makes clear that a declaration of condominium is not a form of land division. The Village ordinance should make it clear that its anti-pyramiding provision is applied to the underlying parcels and not to the condominium units. In the absence of clarifying language, property owners could effectively bypass the Village policy through the use of condominium form of ownership.

The application of this policy may also be affected by the creation of "outlots" under a subdivision plat or CSM, unless the Village's land division or zoning ordinance clearly defines the permitted use of outlots. Although outlots are commonly considered "unbuildable" (except for utility type facilities) state law expressly permits the conveyance and development of outlots "in compliance with restrictions imposed by or under this section." Wis. Stat. Sec. 236.13(6). Since the statutes broadly authorize municipal land division ordinances, the Village should include ordinance language that defines "outlot" in a way that prohibits their use for the placement of piers and other riparian structures. Otherwise, the Village policy to reduce waterfront density by setting minimum waterfront lot widths and areas could be bypassed through the designation of substandard riparian lots designated as "outlots."

Like Fontana, the State has undertaken to prohibit certain transfers of riparian rights by easement and similar conveyances under Wis. Stats. Ch. 30 (Navigable Waters). But, again, the application of this policy to particular circumstances has been inconsistent, particularly where the affected property is subject to a condominium declaration, designation of outlots or where one or more persons are on the title to a parcel of waterfront land and the same owner or a related entity owns adjacent land. This is an area in which state policy is critically affected by local ordinance language.

A very similar problem arises in the application of regulations on piers and other riparian structures. State water law authorizes the placement of certain piers without permits and provides for "general permits" and "individual permits" for certain others. In each case, state law recognizes that riparian rights attach to the ownership of waterfront land and that the extent of riparian structures is proportional to frontage. For example, s. 30.12(1g)(f) authorizes a "riparian owner" to place a pier that meets certain dimensional standards and includes moorings for a number of boats proportional to the "riparian owner's shoreline frontage." The application of these statutes is also affected by lot configuration. Because local governments have primary jurisdiction over the creation and division of lots, the application of state pier regulations will be importantly affected by the way these are handled in the Village's land division and zoning ordinances. This is particularly relevant in circumstances where two or more existing lots are made subject to a condominium declaration, replat or re-survey, including those that include outlots.

Although state pier regulations apply to all navigable waters in Wisconsin, the statutes also authorize local governments (including the Village) to adopt and enforce ordinances regulations on piers, wharves and swimming rafts. Under Sections 84-81, et

seq., the Village of Fontana has established a pierhead line, permit and other pier regulations affecting Geneva Lake. Among other provisions, the ordinance generally requires piers to be placed at least 12 ½ feet from “a riparian proprietor’s property line.” This provision also requires a determination of the relevant parcel boundary, which raises the same set of parcel and lot definition issues. In addition, the Village ordinances should address the interplay of the Village pier ordinance with state pier law. For example, would the Village require that a pier meet the 12 ½ foot setback in the case of a pier that is authorized by a state pier permit under Wis. Stat. 30.12, which does not require a boundary line setback? The Village pier ordinance was apparently adopted in 1989. Since that time, there have been significant revisions to state pier law that warrant review of the Village’s pier placement regulations. The Conservancy would support ordinance language that makes it clear that the Village pier ordinance requirements apply independent of statewide regulations.

In view of the above, the Conservancy urges the Village to include provisions in the revised zoning ordinance, its pier and wharf ordinance and/or its land division ordinances that would: (1) recognize that riparian rights attach to riparian parcels, (2) expressly provide for the regulation of riparian rights based on the boundaries of lawfully created water front lots or parcels, (3) prohibit any re-assignment of riparian rights from a riparian parcel to one or more non-riparian parcels by easement, elements of a condominium or any other means, (4) define and prohibit “pyramiding”, (5) adopt regulations on the placement of piers under the Village’s zoning authority and its authority under the navigable waters statutes, specifying that the regulations are independent of state requirements.