

# Judge takes Bayfield County to task in Shadow Wood decision

*Rezoned sent back to zoning committee for reconsideration*

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Bayfield County Circuit Court Judge John Anderson said Bayfield County proceeded under an "incorrect theory of law" when they agreed to rezone 340 acres of northern Bayfield County land using ordinary zoning regulations.

Anderson, who ruled against the county's rezoning of the property earlier this month, filed a supplemental written decision on the case affecting the proposed Shadow Wood Development planned by the CFS LLC developers from the Twin Cities.

In his written ruling, Anderson said the county used standard zoning rules despite the fact that the developer submitted to the county a preliminary wetlands determination that indicated the existence of wetlands on the property. He also said the documents disclosed that an intermittent stream, a tributary of Pike's Creek, was located at the north end of the property. Anderson said this indicated the county "all but conceded the presumption that the intermittent stream was navigable" and thus rezoning of the property should have been done under shoreland zoning.

"This issue alone is determinant of whether the board proceeded according to a correct theory of law," Anderson wrote in the supplemental written decision. "The applicant presented evidence which clearly showed a presumed navigable waterway on the subject property. The county's failure to recognize that fact in the application constitutes an error of law, mandating reversal."

Anderson was also critical of the county's assertion that the Bayfield Committee for Responsible Land Use and others who filed the lawsuit against the rezoning lacked standing to sue in Circuit Court.

"While the county has every right to raise the issue of standing, it is a curious proposition for the county to all but admit that it failed to apply the shoreland zoning ordinance in this case, while at the same time arguing that the citizens of this county have no right to require their legislative body to follow their own set of ordinances. Aside from this apparent intellectual

contortion, it is clear that the plaintiffs together and individually have every right to seek enforcement of the laws governing a presumed navigable water body in the state of Wisconsin."

Anderson said the county should be reminded of the long history of the Public Trust Doctrine in the state, which he said had its roots in the Northwest Ordinance of 1787, and which was incorporated into the Wisconsin constitution when it became a state in 1848.

He noted that the doctrine declared that the state should have concurrent jurisdiction on all rivers, lakes and tributaries that feed into the Mississippi and the St. Lawrence River, which empties the Great Lakes. Thus a tributary of Pike's Creek, which feeds into Chequamegon Bay and thence into Lake Superior, and whose waters, after flowing through the various Great Lakes, eventually empties into the St. Lawrence, is included under the Public Trust Doctrine.

Anderson said that while the original purpose of the Public Trust Doctrine was to ensure that navigable waters would be available to the public for commercial purposes, the trust doctrine has been interpreted by the courts from the time of statehood to be "broadly and beneficially construed."

Anderson noted that while the Public Trust Doctrine on its own did not create an independent cause of action, it did establish a standing to sue "for the purpose of vindicating the public trust."

"It provides citizens the opportunity to challenge the validity of legislative action that is violative of the trust," he wrote in the decision. He quoted a previous court decision saying that efforts by a legislative body to "serve or advance a purely private interest to the detriment of the public trust are invalid."

On Tuesday night at the Bayfield County Board meeting, Anderson's action striking down the rezoning was recognized and the matter was remanded back to the Zoning Committee for consideration.