Floodplain-Shoreland Management Notes

September 2002

Rivers Conference Planned

The year 2002 marks the 30th Anniversary of the Clean Water Act, while 2003 has been proclaimed as "International Year of Freshwater" by the United Nations and has been proposed as "The Year of Water" in Wisconsin. To mark the occasion, the River Alliance of Wisconsin and a host of other organizations are sponsoring a statewide conference, Rivers 2002: A Watershed Event, on November 8-10, 2002 in Rosholt, Wisconsin.

Rivers 2002 will bring together representatives of Wisconsin organizations concerned with local watershed protection – conservationists, activists, anglers, paddlers and others – to sharpen our skills, strategize ways we can work together toward our common goals, and to continue to build our "water stewardship community."

Attendees will work on developing "River Works 2002-2005: A Citizen Action Plan for Wisconsin's Watersheds." River Works will identify issues of concern to all represented organizations and begin to develop a structure through which we can address them. Through this process, we can bring our collective efforts to bear on the most pressing issues facing local watershed advocates and to coordinate and support ways to address these.

This event is also a training opportunity. There will be hands-on workshops and conference sessions offered to help improve your communication, management, planning, funding and overall effectiveness in watershed protection work.

Two field trips - "Communities and Small Dams" and "Canoe the Plover River" will be offered. Workshop topics will include outreach strategies, fundraising and watershed management.

To register, please contact the River Alliance at www.wisconsinrivers.org. Mailing address is:
River Alliance of Wisconsin
306 East Wilson Street, #2W
Madison, WI 53703

WAFSCM Conference Coming Up

So you've been waiting for your 15 minutes of fame your entire life and it still hasn't happened? Don't despair - prepare! Yes, prepare to be part of the newest and hottest organization to hit the Badger state since Krispy Kreme Donuts.

Yes, that's right. The Wisconsin Association for Floodplain, Stormwater and Coastal Management (WAFSCM) will be holding its inaugural conference this fall and there is still time to sign up and be part of this history-making event.

Organized last year by a group of professionals with over 100 years experience in water planning and engineering, WAFSCM is dedicated to promoting sound floodplain, stormwater and coastal management in the interest of the citizens of Wisconsin.

WAFSCM is the 30th state chapter affiliated with the Association of State Floodplain Managers (ASFPM) and already boasts 36 members, a number that is growing weekly as more membership forms are received at WAFSCM world headquarters.

Dave Fowler, a Senior Project Manager with the Milwaukee Metropolitan Sewerage District, is the current WAFSCM chairperson, and has done a yeoman's job on the initial organizing of the association and the conference. Mark Riebau, Water Resources Manager for Short Elliot Hendrickson, is the vice-chair; Sue Josheff, Water Management Engineer for the Wisconsin DNR is the secretary; and Jennifer Wright, Senior Project Manager at MMSD, is the treasurer.

The first annual WAFSCM conference, scheduled for November 6, 2002, will be held at the Country Inn, 2810 Golf Road, Pewaukee. If you have even a mild interest in water management issues, this is the event for you as it will be overflowing with tantalizing information and dynamic speakers.

Leading off the day will be Gary Heinrichs, Floodplain Planning Program Manager with the Wisconsin DNR. Gary will present an overview of Wisconsin's floodplain management program, the new state-funded municipal flood control grant program, and the DNR/FEMA working partnership.

Eric Rortvedt, also representing the DNR, will present information on Wisconsin's stormwater management program. He will be followed by Alberto Vargas, of the Department of Administration, who will be sharing the latest news on coastal management issues.

For those interested in flood mitigation activities, the state's hazard mitigation officer, Roxanne Gray, will be updating attendees on recent mitigation projects, proposed changes to the federal Hazard Mitigation Grant Program, and new initiatives through the Disaster Mitigation Assistance Act.

A case study on Darlington, Wisconsin will follow. Darlington is famous for having implemented one of the most comprehensive flood mitigation projects in the country. Most of the downtown business district was floodproofed and a number of structures along the riverfront were acquired in order to provide more open space and flood conveyance area.

Larry Larson, Executive Director of the Association of State Floodplain Managers, will be the luncheon keynote speaker. Other presenters include Terry Fell, from the Federal Emergency Management Agency (FEMA) regional office in Chicago; Matt Miller, with FEMA headquarters in Washington, Kevin Shafer, MMSD Executive Director, and Mike Hahn with SEWRPC.

If you have questions about the conference or would like to join WAFSCM, please contact Dave Fowler at (414) 277-6368, or dfowler@mmsd.com. Conference registration includes membership for 2003 or join by completing the enclosed form.

THE "NO REASONABLE USE" STANDARD: HOW IT'S USED IN DECIDING SHORELAND OR FLOODPLAIN ZONING VARIANCES

By Linda Meyer, Staff Attorney
DNR Bureau of Legal Services

In May, 1998, the Wisconsin Supreme Court reviewed the Kenosha County Board of Adjustment's decision to grant a variance permitting Ms. Janet Huntoon to construct a deck in the shoreland setback area, attached to an existing house that was 78 feet from the ordinary high water mark of Hooker Lake. The Supreme Court decided in *State v. Kenosha County Board of Adjustment* (218 Wis. 2d 396) that the board should have interpreted the statutory "unnecessary hardship" standard that is found in section 59.694 (7)(c), Wis. Stats., to mean that Ms. Huntoon needed to prove that there would be "no reasonable use of the property without a variance" before a variance could be granted. The Supreme Court concluded that Ms. Huntoon had reasonable use of her property without a variance, because she could continue to use the house as a residence, as had been done since the 1930's.

While many people welcomed the clarification of the "unnecessary hardship" standard for shoreland cases, others denounced the decision and argued that the "no reasonable use" standard essentially denied local boards of adjustment/appeals the ability to grant **any** variance from the dimensional standards found in **any** zoning ordinance. The argument that the "no reasonable use" standard is unreasonable when applied to general zoning variances ignores the fact that the Supreme Court is limited to reviewing the facts in the case before it. Since the Kenosha County case only dealt with a variance from shoreland zoning requirements, the Court did not decide what standard should be applied to other zoning ordinance variances.

Due to the confusion over this issue, a statutory amendment was introduced in the State Legislature to add "unnecessarily burdensome" language from the Supreme Court's decision in Snyder v. Waukesha County Zoning Board of Adjustment, 74 Wis. 2d 468 (1976), to the non-shoreland variance criteria. The Department of Natural Resources and the Wisconsin Counties Association, among others, opposed this proposal, and the language was never adopted. The department argued that adding this term to the statutes would cause more confusion and would likely increase the number of variance appeals because the Supreme Court, in *Kenosha County,* had already clarified that "unnecessarily burdensome" means the same thing as "unnecessary hardship."

The controversy surrounding this issue has intensified since June 29, 2001, when the Wisconsin Supreme Court issued its decision in *State v. Outagamie County Board of Adjustment*, 2001 WI 78. The court decided that the homeowners, David and Barbara Warning, were entitled to a variance in connection with their application for a building permit to add a sun porch to their home. The variance would give their non-compliant basement legal, non-conforming structure status. The court found that the homeowners' hardship was not self-created and was caused by the town's issuance of a permit to build the home 11 years earlier without notifying the homeowners that they would need a county zoning permit. The Court also ruled that s. NR 116.13(2), Wisconsin Administrative Code, was invalid because it prohibits communities from granting variances from flood protection standards when the statutory standards are otherwise met.

The *Outagamie County* decision, which consists of four different opinions, has added to the confusion on variance standards. Three justices tried - and failed - to overrule the *Kenosha County* "no reasonable use" standard. Because the Outagamie County case involved a variance from a floodplain zoning ordinance and because a majority of the Court upheld the *Kenosha County* "no reasonable use" standard, local boards must continue to deny variances **from a floodplain or shoreland zoning ordinance** unless a property owner has no reasonable use of the property without a variance.

In the *Outagamie County* case, three justices stated that they wanted to "restore the distinction between use and area variances to the law of zoning in this state" and argued that it is necessary to distinguish between use variances and area variances because "variances from use restrictions have the potential to bring about great changes in neighborhood character" while "area variances do not generally change neighborhood character." However, the variance criteria in the Wisconsin

Statutes do not distinguish between area variances and use variances. It must also be emphasized that dimensional requirements can be more important than use restrictions, depending on the purpose of the zoning ordinance.

For example, shoreland zoning rules require all counties to adopt shoreland setbacks, minimum lot sizes and other dimensional standards to protect water quality and aquatic and shoreland habitat. Use restrictions are only required for mapped wetlands within the shoreland area. Shoreland zoning purposes are achieved almost exclusively through the use of dimensional standards.

It is also important to understand that the *Snyder* decision's use of the phrase "unnecessarily burdensome" is presented in the context of explaining that "area variances are not more easily obtained because practical difficulties are something much less severe than unnecessary hardship . . . ," that the analysis "relates to what hardships or practical difficulties may be considered unnecessary or unreasonable in light of the purpose of the zoning law" and that "there should be no significant practical distinction drawn between the terms unnecessary hardship and practical difficulties." (See 74 Wis. 2d 471 to 478) In the *Snyder* decision, the Court ruled that the property owner would not suffer "unnecessary hardship" or "practical difficulty" if he was not allowed to keep a porch that had been constructed without a permit in violation of the Waukesha County Shoreland and Floodplain Ordinance.

In *Snyder*, the Court held that "whether a particular hardship is unnecessary or unreasonable is judged against the purpose of the zoning law." The *Snyder* decision, the *Kenosha County* decision and the majority decision in the *Outagamie County* case are all based on the principle that the purpose of the ordinance provision in question must guide the analysis as to whether there is an unnecessary hardship, or an unreasonable or unnecessary burden that would warrant a variance.

What does this mean for boards of adjustment and boards of appeals in Wisconsin? For cases where a variance is sought from an ordinance provision **other than** a shoreland, shoreland-wetland, or floodplain zoning ordinance provision, the board should determine whether the hardship to be suffered is unnecessary or unreasonable in light of the purposes of the ordinance. It is only in shoreland, shoreland-wetland and floodplain zoning variance cases that the board is required to determine that there will be "no reasonable use for the property in the absence of a variance" before granting a variance, because the only variance cases that have gone to the Supreme Court so far have been shoreland and floodplain zoning cases.

While boards can decide not to use the "unnecessary hardship" standard for cases other than shoreland, shoreland-wetland or floodplain cases, they should take into account that all zoning ordinances place a burden on property owners to some extent. It is reasonable and necessary to expect nonconforming property owners to live with some limitations on the use of their property in exchange for being able to enjoy the benefits of those limitations on other property owners.

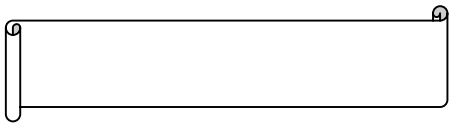
State statutes provide that a board can only issue variances when all of the statutory criteria are satisfied, including "unnecessary hardship." This means that the board must determine whether the burden on the property owner is unnecessary or unreasonable in light of the purpose of the ordinance (in other words, whether the burden is justified by the benefit that the ordinance seeks to create). Some ordinance provisions are enacted to protect very important interests that justify a heavy burden on individual property owners.

In the *Kenosha County* decision and in the decision of the majority of justices in the *Outagamie County* case, the Supreme Court has pointed out that the purposes of floodplain ordinances (to protect life, health and property) and shoreland ordinances (to protect water quality, fish and wildlife habitat, and scenic beauty) are very important purposes, and make a fairly heavy burden on individual property owners necessary and reasonable. However, for some zoning ordinance provisions that have a less important purpose, a heavy burden on the individual property owners can not be justified.

Local governments concerned with the application of variance criteria in "general" zoning cases should be aware of the options available to address their concerns. They can amend their general zoning ordinances to define in more specific terms how the board should apply the "unnecessary hardship" standard to cases that don't involve shoreland or floodplain variances. Local governments can also amend their zoning ordinances to create conditional uses that will be allowed if conditions that are spelled out in the ordinance are satisfied, so that

conditional use permits are issued instead of variances in situations that reoccur fairly often. Local governments can also create less restrictive provisions for substandard lots that meet certain minimum standards, in order to try to minimize the number of cases where a variance is required in order for the property to have a reasonable use.

The Department believes that the Wisconsin Supreme Court was on the right track when it stated in the *Kenosha County* decision that "variances should be granted sparingly." Local governments should consider other ways to deal with relatively minor deviations from zoning standards if they have relied heavily on the issuance of variances in the past.



Heat, pollutants affect rainfall

A recent government study has confirmed that rainfall patterns are affected by the heat and pollutants associated with large cities.

NASA researchers studied rainfall data for a number of southern and midwestern cities and found that rainfall downwind of these cities averaged 28 percent more than the areas upwind, with some increases as high as 51 percent.

According to the researchers, cities tend to be one to 10 degrees hotter than surrounding rural areas and this added heat destabilizes the air and the rougher city surfaces cause convergence, in which the air moves toward the city and then rises. When the rising warm air over cities cools, water begins to condense, clouds form and drift downwind, causing areas of higher rainfall. The researchers found that the higher rainfall amounts typically occur between 18 to 36 miles downwind from the city studied.

Polluted River To Be Rerouted

$10 million will be spent to reroute six miles of the Little Menomonee River on Milwaukee's northwest side to solve a decades-old pollution problem.

Federal officials with the Environmental Protection Agency, after years of study, have decided that physically relocating the channel offers the best opportunity to make sure that the hazardous substances are out of the river. By designing a new channel, the stream can be meandered and a safe recreational corridor established.

From 1921 to 1976, a plant that treated railroad ties with creosote operated on the river's banks. Creosote contains chemicals known as polycyclic aromatic hydrocarbons, or PAHs. The chemicals cause cancer and skin burns. The plant was not listed with the Superfund program until 1985. Now, 17 years later, the EPA will begin overseeing the final three-year stage of its cleanup.

Beginning in early October, contractors will excavate the first 1.14 miles of new channel for the narrow river, removing an estimated 25,000 cubic yards of clean soil. When the river's flow is diverted this winter, workers will dredge about 5,000 cubic yards of heavily contaminated muck from the former channel. Then the old riverbed will be filled with soil from the new channel.

Contaminated sediments will be stored at the former plant site while awaiting treatment. Chemicals will be removed so that the material can be placed as fill elsewhere on the property.

Other clean-up activities scheduled for the site:

- Removing 1,100 gallons of a heavy concentrate of creosote and fuel oil from a depth of 9 to 10 feet beneath the surface. Six wells slowly pumped out the chemicals from 1995 to 1999.
- Installing a groundwater treatment system that began operating in the summer of 2000. For the remainder of this decade, air and nutrients will be injected below ground to spur bacteria to digest contaminants in groundwater.
- Heating 137,000 tons of highly contaminated soil from the plant site. Thermal treatment destroyed the chemicals.

WHY NOT FLOOD INSURANCE ?

David Schein, FEMA Region V Chicago

Federally backed flood insurance is available in over 3,600 communities and counties in Region V. These communities and counties participate in the National Flood Insurance Program (NFIP), regulating new development in identified Special Flood Hazard Areas (SFHAs) in return for the availability of federal flood insurance. All homeowners' and many small businesses insurance policies do not cover flood damage. These communities have close to *half a million* insurable structures in the flood hazard area, yet the number of flood insurance policies in effect in the Region is only 153,000, and a healthy percentage of those are for personal property, not buildings. Since 1974, federal law has required the purchase of a flood insurance policy as a condition of any loan from a federally regulated or insured lender, secured by improved real estate located in the SFHA of a participating community.

Statistically, over the life of a 30-year loan, the risk of flooding in the SFHA is 26%. Over the same period, the risk of fire is only 1%. *Everyone* carries fire insurance, even when the mortgage is paid off. Even the house *next door* to the fire station carries fire insurance. Even the *fire station* carries fire insurance. So why do so relatively few people, *at risk*, purchase flood insurance?

There are several reasons. Human nature (denial), our terminology ("100-year" floods), poor hazard identification and/or risk assessment, inability to interpret floodplain maps, failure of lenders to require flood insurance for new loans in the floodplain, assuming homeowners insurance covers flooding, and more. However, the single biggest reason for so few people being protected is insurance agents failing to aggressively market this protection. Homeowners policies specifically exclude flooding as a covered peril.

We rely on our insurance professionals to give us good advice, and to tell us what kinds of insurance we need, in what amounts, and at what costs. But when it comes to flood insurance, it seems that many insurance agents and brokers just don't want any part of it. Perhaps they have had bad experiences obtaining and reading Flood Insurance Rate Maps, or getting local community officials to cooperate in providing Elevation Certificates. Even so, their responsibility is to tell us what we need to protect ourselves. Perhaps they don't like the program, or the government rules, or the fixed commission, or are just confused. However, we depend upon agents to inform us of the need to purchase appropriate insurance protection and to offer this line of coverage. Yet, we hear that some agents and brokers *try to talk their clients out of buying flood insurance*! Have you ever had an insurance agent try to talk you out of buying insurance? Life, health, liability, auto, fire, theft, etc.? What sense does that make? But for some reason, that is exactly what happens, in many cases, with flood insurance.

Flood insurance complaints are the number one errors and omissions insurance claim against agents. They can correct this immediately by attending training, learning how easy it actually is to write a policy, and by understanding the true risk of flooding to their clients. Everyone faces some flood risk. It is only reasonable to expect our insurance professionals to explain that risk and offer us protection. FEMA and the DNR are ready to assist the insurance professional in offering flood insurance to the public.

Flood Insurance Forum Huge Success

A recent forum for Wisconsin lending professionals on the ins and outs of flood insurance regulations brought a well-deserved round of applause from all in attendance.

Hosted by MMSD at their Milwaukee headquarters, speakers from the federal, state and private sectors shared information on the ever-changing world of flood insurance marketing, coverage and compliance. Topics covered included general flood insurance information, floodplain regulations and mapping, the role of the Federal Deposit Insurance Corporation and an explanation of the National Flood Determination Association's mission in providing accurate and timely flood information.

If you would like more information on the forum or are interested in hosting one, please contact Rich Slevin, NFIP Bureau and Statistical Agent, at (630) 577-1407, or e-mail nfipregv@aol.com.

NFDA Announces New Web Site

The National Flood Determination Association (NFDA), which represents the leading flood determination companies in the nation, recently announced its new web site, www.floodassoc.com.

"The site will improve communication and information exchange and will foster awareness of the role and importance of the industry among other NFIP constituencies," explained Vicki Chenault, NFDA chair. "It will educate the public about our services and facilitate relationships between our members and partners," she added.

Cheryl Small recently released the NFDA's Certification Program in a letter to members and other flood zone determination vendors. "It is the Association's sincere hope that through the Certification Program, we can further represent our industry as professional businesses committed to the critical services we provide and the success of the National Flood Insurance Program," stated Small.

Applications are being accepted for the first certification cycle which are due November 1, 2002. A Power Point presentation, certification criteria, information about the program and an application are available at www.floodassoc.com.

The NFDA is a national nonprofit organization comprised of flood zone determination companies, dedicated to promoting the interests and success of members involved in making, distributing, and reselling flood zone determinations. NFDA serves a collective industry voice on legislative and regulatory issues. NFDA supports the National Flood Insurance Program (NFIP) and the agencies that serve the NFIP.

Contact: Vicki Chenault, NFDA Chair
800-447-1772, x1105
vchenault@firstam.com

Contact: Cheryl Small, Certification Chairperson
303-791-3816
cheryl.small@transamerica.com

County Restricts Stream Bank Development

Summit County, Ohio, recently adopted new rules restricting stream bank development to protect water quality and reduce erosion and flooding on the Cuyahoga, Tuscarawas and Rocky Rivers.

New buildings must be set back 30 to 300 feet from the water, depending on the size of the watershed. Existing buildings are not affected.

"It's a start. That's how we see this," said Joan Hug-Anderson, an urban stream specialist with the Summit Soil & Water Conservation District. "It seems once one community adopts it, and that it works out fine, it takes some of the fear away."

While stream bank protection is nothing new, it is still not well accepted because of concerns over property rights and skepticism about the benefits.

Stream bank development increases erosion and makes buildings along the banks susceptible to flooding. It strips vegetation that stabilizes the stream bank and increases storm water runoff, which destabilizes the river bank.

The new rules will promote more creative development and protect the county's more sensitive areas. Two of the Cuyahoga River's cleanest tributaries, Yellow Creek and Furnace Run, will enjoy greater protection.

"Some people like building homes overlooking gorges or rivers, but we can't afford that any more," said county Councilman Paul Gallagher. "It's too damaging to our streams and environment."

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Contacts: Gary Heinrichs, 266-3093, or Bob Watson, 266-8037 (floodplain); Toni Herkert, 266-0161, or Carmen Wagner, 266-0061 (shoreland & wetland); Meg Galloway, 266-7014 or Bill Sturtevant, 266-8033 (dam safety)

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