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# Floodplain-Shoreland Management Notes

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OCTOBER 2001

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## Municipal Flood Control Grant Program Is Set To Take Off

With the memories of the spring flooding still on the minds of many Wisconsin residents, what better time than now to announce the official inauguration of the Municipal Flood Control Grant Program.

This program, the first of its kind in the badger state, will offer cost-sharing grants to cities, villages, towns and metropolitan sewerage districts to implement a host of flood mitigation projects, including acquisition and removal of flooded structures, floodproofing and elevation projects, acquisition of land and easements for providing flood storage, building flood control structures and restoration of the flood-carrying capacity and natural and beneficial functions of watercourses.

"This program will provide municipalities with much-needed funding for projects that help them achieve effective, long-term solutions to flooding problems," says Gary Heinrichs, the department's floodplain planning program manager and project manager for this program. "In past years, Wisconsin communities were entirely dependent on federal mitigation funds, which were only available after the president declared a flood disaster in their areas."

While there are many funding options, the following types of projects are not eligible:

- Projects that would increase runoff or flood elevations;
- Projects that would line a watercourse with impervious materials;
- Projects that would not protect the natural and beneficial functions of aquatic and riparian environments;
- Projects that do not provide flood protection to the flood protection level; and

- Projects that do not protect historic structures.

While federal dollars will continue to play an important role in local mitigation programs, the new state grant dollars offer important benefits to Wisconsin residents. This program will provide ongoing funding, which will allow communities to do long-term flood mitigation planning, knowing that a reliable funding source will be available to turn plans into projects.

There is approximately three million dollars in project funding for the current biennium. The state will pay 70 percent of all eligible costs while the local share will be 30 percent. It may be possible to use federal grant dollars to pay a portion of the local match. All properties acquired under this program are eligible for full state relocation benefits and the applicant is responsible for completing an approved relocation plan.

Grant application forms will be available on November 1, 2001. You can either download the forms off the department website or request a paper copy. The application deadline is December 31, 2001, and the department will make funding decisions by January 31, 2002.

If you have questions regarding mitigation projects, please contact Gary Heinrichs, Floodplain Planning Program Manager, at (608) 266-3093, or e-mail at [heinrg@dnr.state.wi.us](mailto:heinrg@dnr.state.wi.us). To receive a paper copy of the application forms or if you have other grants-related questions, please contact Barbara Ingram, Grants Program Manager, at (608) 267-7152, or e-mail at [ingrab@dnr.state.wi.us](mailto:ingrab@dnr.state.wi.us).

Please visit this website to download the forms: <http://www.dnr.state.wi.us/org/caer/cfa/Ef/flood/grants.html>

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## Substantial Damage Explained

Gary Heinrichs

Severe flooding in Wisconsin in recent years has prompted state and local officials to re-examine how we manage nonconforming uses and structures both before and after a flooding event.

It is well established, both through rules and case law, that limits are placed on alterations, additions, repairs and rebuilding of structures that do not comply with current zoning ordinance provisions. Since the intent of nonconforming law is to eventually bring nonconformities into compliance or to remove them, courts in both Wisconsin and the rest of the nation have tried to find a balance between the rights of the property owner to perform reasonable maintenance and repairs and the community's interest in ensuring that all structures meet the minimum standards in the applicable zoning ordinance provisions.

For floodplain nonconformities, state regulations allow unlimited "ordinary maintenance and repairs," which is defined as nonstructural repairs that are not considered modifications or additions, such as painting, decorating, paneling, replacing doors, windows and other nonstructural components and repairing or replacing wells or septic systems.

For other types of repairs, modifications or additions, including all structural work, a record must be kept of the fair market value of the work done and what percentage of the structure's current equalized assessed value that work represents. The total cumulative value of these structural repairs, modifications or additions cannot exceed 50 percent of the structures equalized assessed value, over the life of the structure.

This is the framework that Wisconsin communities and the department have followed since the beginning of floodplain zoning in the state. While there have been disagreements about what is "structural," or how communities track improvements to nonconforming structures, or whether floodproofing costs "count" (they do, but that's another story), it has been well understood that some costs count against the 50 percent cumulative cap and some don't.

What has changed in recent years (since the 1997 floods in southeast Wisconsin) is our understanding of what costs count against the 50 percent cumulative cap for a flood-damaged property.

S. NR 116.15 (1)(d), Wis. Admin. Code, states that "If any nonconforming building or any building with a nonconforming use is destroyed or is so badly damaged that it cannot be practically restored, it cannot be replaced, reconstructed or rebuilt unless the provisions of ch. NR 116 are met. For the purpose of this subsection, restoration is deemed impracticable where the total cost of such restoration would exceed 50 percent of the present equalized assessed value of the building."

"Destroyed or is so badly damaged" and "total cost" are the keys. Unlike repairs, modifications or additions to undamaged structures, where a distinction must be made between ordinary maintenance and structural work, all costs to restore a flood-damaged structure are counted against the 50 percent cumulative cap.

If these costs exceed 50 percent, the structure must be brought into compliance with current zoning ordinance provisions. If the structure is in a floodfringe area, it must be elevated and have dryland access. If it's in a floodway area, it must be moved. So if it's flood-damaged, all costs count and it's cumulative. If a structure suffered damages of less than 50 percent in 2001 or an earlier year, those damages must be tracked and added to future damages to determine when the 50 percent threshold is reached.

Please note that this guidance only applies to flood-damaged structures in floodplain zones. S. 87.30 (1d), Wis. Stats., which was enacted recently, allows nonconforming buildings that are damaged or destroyed by a nonflood disaster to be restored to the size and use in existence at the time of the disaster. These provisions only require the structure to meet the federal floodplain standards in 42 USC 4001 to 4129, which state that the rebuilt structure must be at or above the regional flood elevation, not cause any increase in the RFE, and ensure that the structure - including the service facilities, well and septic system - is adequately floodproofed and anchored.

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This legislation only exempts these structures from the community's floodplain zoning standards. All other local, state and federal regulations must be followed, including shoreland, wetland, dam safety and well and septic regulations. For most projects, building, land use and sanitary permits are needed.

Also note that a statutory change to shoreland zoning provisions in s. 59.692 (1s) does not supercede the floodplain regulations. This recently enacted change is similar to s. 87.30 (1d), but it covers all natural disasters, including flooding. In a non-floodplain shoreland zone, it authorizes rebuilding of any nonconforming structure damaged or destroyed by any natural disaster, to the size, use and in the location that it had immediately before the damage occurred. For floodplain shoreland areas, however, the more restrictive floodplain provisions would apply and would not allow the rebuilding of flood-damaged structures.

Unlike routine repairs, alterations and additions, court cases dealing with restoration of flood-damaged structures are nonexistent. So there is no case law or precedent to look to, just the plain meaning and intent of the administrative rules and ordinance provisions. It is pretty clear from reading the rules that total costs means total costs; there are no exclusions, exceptions or variance criteria which would allow a community to modify or disregard these provisions.

However, like work performed on undamaged nonconforming structures, local zoning administrators are faced with many of the same barriers in enforcing these regulations:

- **Lack of adequate staff to monitor improvements to nonconforming structures.** Zoning officials in communities with large jurisdictions and small budgets find it hard enough to keep up with the traditional permit workload, let alone trying to monitor every remodeling project going on in the community.
- **No building permit authority in the towns.** Many towns have opted out of county zoning, so the county staff are only issuing sanitary permits, which means that many remodeling projects are not receiving the proper scrutiny. While they are still responsible for shoreland and floodplain zoning, the traditional "triggers"

for these processes is missing and therefore some projects fall off the radar screen.

- **Lack of political support for "unfunded mandates."** That's how tracking of improvements to nonconforming structures or substantial damage monitoring is viewed. It's not popular locally and it is difficult for zoning officials to make it a priority. The department did not aggressively monitor this in the past, so it became a work task that was forgotten.
- **Department/FEMA procedures for assisting communities with substantial damage assessments is inadequate.** Even in 2001, after careful thought and deliberation, letters to communities ended up in the wrong office, guidance was not clear and follow-up was spotty. The department is committed to doing a better job after the next major flood; we pledge to work with local zoning staff to make the process easier for them as well.

The reality is that monitoring and enforcing substantial damage provisions is unpopular - not only with property owners, but also with many zoning and local elected officials. It goes against our tendency to maintain the homes we live in and the businesses we depend on for our livelihood.

While substantial damage provisions eliminate the distinction between ordinary maintenance and structural repairs, they make the zoning officials job more difficult, since many improvements and repairs done after a flood will be internal work, done without a permit and not easily monitored.

Unlike shoreland zoning, where the 50 percent assessed value provisions can be replaced by a square footage cap or some other method, floodplain zoning is bound by administrative code provisions - and FEMA regulations - to the assessed value method.

Until these provisions are revised, floodplain staff and local zoning officials must develop a workable method for monitoring and enforcing substantial damage provisions. While not popular politically, ignoring the very real dangers of continued habitation in the floodplain is not something that we, as floodplain professionals, can afford to do.

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## Flood Mitigation Projects Protecting Wisconsin Residents

Roxanne Gray, State Hazard Mitigation Officer with Wisconsin Emergency Management, has been busy lately wrapping up old flood mitigation projects throughout the state while processing applications for new projects stemming from this spring's floods.

Gray, who oversees the federal Hazard Mitigation Grant Program (HMGP) and Flood Mitigation Assistance (FMA) programs in the state of Wisconsin, reports continuing strong interest in acquisition and floodproofing projects.

"Since the floods of 1993, we have awarded over \$34 million to local communities to acquire floodplain structures, floodproof remaining buildings and help citizens cope with the devastating impacts of flooding," she notes. "The mitigation programs have been unqualified successes, with strong support from property owners, local officials and our partner state and federal agencies."

In October, the Disaster Mitigation Act of 2002 was enacted, requiring all applicants to have an approved mitigation plan. The Act authorizes seven percent of HMGP funds to be used for producing plans and it increases from 15 to 20 percent the portion of disaster relief funds that will be used for mitigation projects, in states that have an approved state hazard mitigation plan. In addition, Wisconsin annually receives \$11,000 to \$15,000 in FMA funds to provide grants to local communities to produce mitigation plans.

The upshot of all this good news is that exciting things are happening in flood mitigation in Wisconsin. To date, HMGP and FMA funds have been used to acquire close to 300 structures and to floodproof almost 50 more. Some of the money has also been used to produce an instructional video and brochure on steps a property owner can take to protect their structure from flooding.

Most importantly, these projects have strengthened ties between state agencies, local governments and individual property owners, building on past successes and paving the way for more ambitious and beneficial projects down the road. With the new state Municipal Flood Control Grant Program gearing up as you read this story, another tool is being added to a community's list of resources to

be tapped in times of need. Not to mention the positive vibes that everyone feels when another successful mitigation project is completed.

With over 20 projects to date, we can't discuss every one in this short story, but we will focus on some of the highlights.

- **City of Darlington** - This vibrant city of less than 3,000 people has acquired 12 properties, floodproofed 21 historic commercial structures, created a recreational trail and campground along the Pecatonica River, and made great strides in revitalizing its downtown business district, which was hit hard by flooding three times in four years. It is a model of community initiative and perseverance for the rest of us.
- **Pierce County** - This rural county along the Mississippi River acquired 73 structures on a floodway island, subject to regular spring flooding. With most of the island cleared, the county plans to establish a park.
- **City of Wauwatosa** - This Milwaukee suburb on the Menomonee River acquired 25 structures with HMGP funds, another 44 with help from the metro sewerage district and is planning to acquire 10 large commercial buildings in order to extend a community park, provide additional flood storage and restore the natural functions of a degraded urban river.
- **City of Milwaukee** - Just downstream of the Wauwatosa project, the city and the sewerage district have acquired eight homes, floodproofed another 35, and built a levee to protect the rest of the neighborhood. In addition, a half-mile of concrete channel was removed from the river, the banks were landscaped to restore lost wildlife habitat and a walking trail and canoe launch were built.
- **City and County of Eau Claire** - Between them, the two governments have acquired 68 structures and floodproofed another three. River corridors have been restored, recreational trails improved and a long-neglected part of the city has been rejuvenated and rediscovered.

As exciting as these projects are, the best is yet to come. With the bump in HMGP dollars, along with the state grant program and the development of the state hazard mitigation plan, it's an exciting time to be doing mitigation in the state of Wisconsin.

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## Supreme Court Decides Floodplain Variance Case, Upholds Huntoon

On June 29, 2001, the Wisconsin Supreme Court issued a decision in State v. Outagamie County Board of Adjustment, 2001 WI 78 (the Warning case). The case involved DNR's challenge to a variance granted by the Outagamie County BOA to the Warnings, which authorized the construction of a sunporch addition to a home in a flood fringe area with a basement below the regional flood elevation. The basement was constructed without a county land use permit, although a town building permit was issued. The Circuit Court upheld the BOA, but the Court of Appeals reversed, holding that (1) under the Huntoon case (State v. Kenosha County Board of Adjustment), the variance could not be granted since the Warnings had not shown that "no reasonable use" of the property could occur without the variance; and (2) the variance was contrary to s. NR 116.13(2), Wis. Adm. Code, which prohibits variances for basement floors below the RFE.

The Supreme Court's decision is confusing because it consists of four separate opinions; a lead opinion written by Justice Diane Sykes, two concurring opinions and one dissenting opinion.

On the whole, the Outagamie County decision means that the Court of Appeals decision was reversed and the BOA's grant of a variance was affirmed. However, while the lead opinion, and one concurring opinion, sought to overrule the Huntoon decision, that effort failed because a majority of the Court (two concurring Justices and two dissenting Justices) refused to overturn the Huntoon decision.

A concurring opinion written by Justice Patrick Crooks clarified that the "no reasonable use" standard that was established for shoreland zoning cases in the Kenosha County decision arose from the "unnecessary hardship" analysis found in the Court's decision in Snyder v. Waukesha County Zoning Board of Adjustment, 74 Wis. 2d 468 (1976). In Snyder, the Court stated that "whether a particular hardship is unnecessary or unreasonable is judged against the purpose of the zoning law." Justice Crooks said in his concurring opinion in the Outagamie County decision that "I find no compelling reason to overrule Kenosha County. Instead, I read Kenosha County as applying the rule from Snyder, that the purpose of the ordinance guides the determination of whether there is an

unnecessary hardship that would warrant a variance."

This guidance emphasizes the duty of boards of adjustment and boards of appeals to consider the purposes of the underlying ordinance and whether the applicant will suffer an unnecessary or unreasonable hardship if the variance is denied. However, for shoreland or floodplain cases, the Court has already determined that these regulations do not unduly burden a property owner if there is a reasonable use of the property without a variance. In the Kenosha County decision, the Supreme Court concluded that "when the record before the Board demonstrates that the property owner would have a reasonable use of his or her property without the variance, the purpose of the [shoreland zoning] statute takes precedence and the variance should be denied." Kenosha County, 218 Wis. 2d 396 at 414.

A majority of the Court also found the provisions in s. NR 116.13(2) that prohibit BOAs from granting variances from flood protection standards to be invalid, provided that the statutory standards for variances are otherwise met.

On September 19, 2001, the Supreme Court denied a petition for review in State v. Trempealeau County BOA. In this case, the Court of Appeals applied the "no reasonable use" standard in deciding to affirm the circuit court's reversal of variances that had been granted by the Trempealeau County BOA in a floodplain zoning case without any evidence in the record to support a finding that there would be no reasonable use for the property in the absence of the variance. By letting the Court of Appeals decision in State v. Trempealeau County BOA stand, the Supreme Court reaffirmed the definition of "unnecessary hardship" that was set forth in the Huntoon case, as applied to floodplain zoning variances.

The full implications of the Outagamie County decision are not readily apparent. The Outagamie County decision is likely to get attention, not only for its floodplain zoning implications, but for identifying the split on the Supreme Court with respect to the Huntoon case conclusion that the "no reasonable use" standard applies to zoning variances, regardless of whether the variance is classified as a "use" or an "area" variance.

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## Milwaukee Sewerage District To Buy More Floodplain Properties

The Milwaukee Metropolitan Sewerage District is planning a \$25.2 million project to acquire 14 properties along the Menomonee River in western Milwaukee.

The proposal is part of a \$142 million flood control project along the Menomonee River that includes detention ponds, a levee and floodway in Wauwatosa and a floodwall and new storm sewer system in the Valley Park neighborhood.

MMSD would acquire and remove 14 commercial properties in the State Street area between 45<sup>th</sup> and 62<sup>nd</sup> streets. The district would then build a 4,100-foot levee along the south side of the railroad tracks south of State St. In addition, it would construct a new storm sewer along State St. and remove a bridge under Hawley Road.

Staff in the City of Milwaukee's economic development department have met with some of the businesses to provide information about available financing, tax credits and possible alternative sites. The city is working to keep all the businesses in the city.

While many business owners in the area were surprised by the announcement, many are willing to consider relocation rather than face the uncertainty of future flooding as upstream development and the associated runoff continues unabated. Wauwatosa has already acquired and removed 26 floodplain structures, is in the process of acquiring 44 more and is making plans to acquire a number of commercial properties just upstream of this site.

Clearing land along the Menomonee will also make it easier to connect with a bike trail that already runs through the Menomonee Valley to Miller Park. The district will be working with the city and the Department of Natural Resources to move a portion of the seven-mile Hank Aaron State Trail, which had to be diverted to city streets, to the land along the riverfront.

Once this land is cleared, which is projected to happen between 2005 to 2010, the trails can be connected and a contiguous greenway between the County Grounds and the lakefront will finally be a reality.

## Proposal To Invest In Natural Flood Control Moving Forward

With the bitter lessons of the 1997-1998 floods still being analyzed, the Milwaukee Metropolitan Sewerage District is moving forward with a bold plan to purchase over 7,000 acres of flood storage land in upstream communities.

While not meant to replace infrastructure upgrades such as storm sewer replacement and channel improvements, the proposal will lesson flooding concerns for downstream property owners and will also provide natural storage for flood waters, wildlife habitat, prairie restoration opportunities, and natural buffers for rapidly developing areas.

The district expects to spend at least \$15 million over the next five years to buy or obtain easements, mostly in Mequon, Germantown, Oak Creek and Franklin. The district hopes to expand the money available for buying land by forming partnerships with communities, land trusts and environmental groups.

One possible source of money for land acquisition is the state Stewardship Program. While the district is not eligible to apply, a land trust or community could apply for these funds. A number of metro-area communities and the Ozaukee Washington Land Trust are interested in participating.

Another source of funds could be the new state Municipal Flood Control Grant program, which can give grants for land acquisition and flood easements. All metropolitan sewerage districts, along with cities, villages and towns, are eligible for this program.

Of the 7,065 acres identified, 5,002 acres are in the Menomonee River watershed, 1,785 are in the Root River watershed and the remaining 278 acres are in the Oak Creek watershed. All of the sites are along waterways that could be developed in the future. Some of the acquired land would be restored to native prairie while the rest would be left in its current natural state.

National studies show that preserving floodplains costs eight times less than building flood-control structures after problems occur.

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## The "King" Is No More; Please Welcome Carmen Wagner

Yes, that's right. The king (Joe King) has left the building, surrendered the stage, stepped down from the throne. The longest-serving shoreland zoning specialist in the history of the DNR (and possibly the free world) has retired.

Joe started with the department in the spring of 1971. **Yes, that's right - 1971.** The teenyboppers were still circulating petitions to reunite the Beatles; colleges were aflame in anti-war protests; there were only three TV channels to choose from; and you could buy a brand-new VW Bug for \$1,995.00.

While Joe did take a brief hiatus to serve as the budget and policy analyst for the Bureau of Water Regulation and Zoning in the 1990's, we were able to secure his valuable shoreland zoning services once again in 1996 when reorganization dumped him into our grateful laps.

So Joe, who has been involved with the shoreland zoning program since there was a shoreland zoning program, has left the operation in the capable hands of Toni Herkert and, our newest permanent employee, Carmen Wagner.

When Joe started with the department, Carmen was still pretty much a homebody. Which is a good thing, since she was only a year old in 1971. But she has come a long ways since. Carmen has bachelor's degrees in Soil Science and Conservation, and a Master's in Environmental Planning, all from the UW-Madison. Prior to joining the central office staff, Carmen spent six months as a Water Management Specialist and five years managing a native plant nursery and doing prairie, wetland and woodland restoration work.

Carmen's job duties include providing zoning and related training, working with WCCA, Lakes Partnership and UW-Extension on zoning issues, managing shoreland restoration projects, managing the shoreland ordinance summary database, and maintaining the shoreland web pages.

Carmen brings a wealth of experience, talent, dedication and enthusiasm to the program and we look forward to working with her for many years to come. Please join us in welcoming Carmen.

## The National Flood Determination Association Is Here To Help

For anyone who has bought property or refinanced property in recent years, a new player has entered the market, much to the shock of many borrowers.

Flood determination companies provide a valuable service in the mortgage lending and real estate sectors, but their purpose is not always clear and it is typically when a property is determined to be in a flood zone that borrowers find out what impact these faceless service providers can have on the mortgage approval process.

Many of the flood determination companies came together in the early 1990's to form the National Flood Determination Association (NFDA). The NFDA is a national, nonprofit organization comprised of flood zone determination companies, their suppliers and their resellers. The association works on legislative and regulatory issues and collaborates with the NFIP and related agencies involved in the flood insurance business.

The flood zone determination industry is instrumental in assisting the lending community in meeting flood compliance requirements. Through the use of advanced geographic information systems and spatial technology and internet delivery systems, the lender receives prompt responses, which keeps the mortgage approval process moving along smoothly.

While lender compliance guidelines drive most requests for flood determinations, other segments of the market are growing. Insurance companies, independent agents/brokers, and commercial insurers also seek the services of members.

This year, the NFDA released its certification program, designed to recognize companies that follow the guidelines set forth by the NFDA to maintain minimum standards and strive to provide the highest quality services within the industry.

For more information about the NFDA or the flood zone determination process, please contact the chair, Cheryl Small, at 303-716-5050.

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