

New Model Floodplain Zoning Ordinance Available

After 18 months of negotiations with the Federal Emergency Management Agency (FEMA), the new model floodplain zoning ordinance is complete. The model, which has not been updated since 1991, was out of date and failed to meet minimum state or federal standards.

To remain in good standing in the National Flood Insurance Program (NFIP), Wisconsin communities must meet the minimum standards of both the state and federal programs. Adoption of the new model will ensure that your community will be able to enjoy all the benefits that membership in NFIP has to offer.

Approximately 200 community officials, regional planning commission staff and department staff attended workshops in Merrill, Barron, Middleton, Appleton, Waukesha and Sparta. To obtain a copy of the new model, either visit our webpage at <http://www.dnr.state.wi.us/org/water/wm/dsfm/flood/title.htm> or contact Terry Lohr in Madison at (608) 267-2375 or Terry.Lohr@dnr.state.wi.us.



- Floodplain development in western Wisconsin

Our webpage has both a clean copy of the new model that is ready to be adopted (after the blanks are filled in) and an annotated version that shows the language changes that were made with explanations. While there are plenty of highlights to talk about, the following will give you a flavor of the changes that were made.

Official Map

All communities participating in the NFIP must use the Flood Insurance Rate Map (FIRM), which is derived from the federal Flood Insurance Study (FIS), as the official floodplain

map for all federally-identified Special Flood Hazard Areas (SFHA's) in the community. If other entities - state agencies, private consultants, etc. - identify and map other flood hazard areas in the community, those maps can also be adopted by the community and used to regulate those floodplain areas.



Volume 1
Number 2
Fall 2003



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NR115 Listening Sessions Scheduled Around the State

Listening sessions have been scheduled around the state to solicit feedback on the recommendations and options developed by the NR115 Advisory Committee. After the conclusion of the listening sessions, a summary report will be prepared and used as the basis for the development of the draft NR115 rule package.

The Department hopes to have a rule package prepared by next spring and public hearings held in late spring and early summer.

The schedule for listening sessions is:

- November 11 at the Spooner Agricultural Research Center
- November 12 at the Lake Tomahawk Community Building
- November 13 at the Eau Claire DNR

Regional Headquarters

- December 1 at the Onalaska City Hall
- December 4 at the Grand Chute Town Hall
- December 5 at the Crivitz Village Hall
- December 9 at the Madison DATCP Building
- December 11 at the Waukesha County Building

For more information on listening sessions times and other details on the NR115 revision, check the DNR website at www.dnr.state.wi.us. From the home page, select "shoreland management" from the "go to some topics" drop-down menu, and then look on the left hand side for the NR115 Revision Update.

Floodplain and Shoreland Management Notes

"Floodplain and Shoreland Management Notes" is published by the WDNR, Bureau of Watershed Management. Its purpose is to inform local zoning officials and others concerned about state and federal floodplain management, flood insurance, shoreland and wetland management, and dam safety issues. Comments or contributions are welcome.

This newsletter is supported by funding through FEMA Cooperative Agreement No. EMC-92-K-1290 as part of the Community Assistance Program - State Support Services Element of the National Flood Insurance Program. The contents do not necessarily reflect the views and policies of the federal government.

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Photographs in this issue were provided by DNR file photos, FEMA, R. Queen and C. Wagner.

Understanding the Issues Surrounding Nonconforming Lots

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Minimum lot sizes are specified in many ordinances, including shoreland zoning ordinances. When minimum lot sizes are established, however, there is the issue of how to deal with existing "substandard" or "nonconforming" lots that do not meet the new minimum lot size.

Most zoning ordinances provide that substandard lots that were legally created prior to the adoption of ordinance provisions may still be developed if certain criteria are met, in order to allow the property owners to have reasonable use of the substandard lot. However, "merger of title" provisions in zoning ordinances are also common and are intended to require the owner of a substandard lot who also owns adjacent land to treat the combined properties in common ownership as one parcel for the purpose of determining what development is allowed on the land.

The "merger of title" doctrine is supported by Wisconsin common law and a number of courts in other states have upheld the constitutionality of "merger of title" provisions in zoning ordinances. Those courts have held that property owners have no vested right to maintain or sell separate substandard lots if they are in common ownership. See, for example, *Mackay v. Mayhall*, 92 Misc. 2d 868, 401 NYS2d 679 (1977).

As reported in Volume 4 of *Anderson's American Law of Zoning*, § 25.23, a New Jersey court decision found that: ". . . the mere delineation of lots on a map filed after approval by a municipality carries with it no guaranty that each

lot or parcel will be sufficient in itself to be built upon when the time comes to do so." *Ardolino v. Board of Adjustment*, 24 NJ 94, 130 A.2d 847 (1957) *Anderson's* cites decisions from Cali-



ifornia, Florida, Texas, Ohio, Connecticut, Illinois, Pennsylvania, Michigan and Arizona that also hold that the recording of a subdivision plat does not give the landowner a vested right to develop vacant platted land contrary to zoning ordinance provisions that have been adopted or amended since the land was platted. These decisions in other states are consistent with Wisconsin Supreme Court decisions that have dealt generally with the concept of a property owner's vested rights.

The Wisconsin Supreme Court has held that a person who purchases land intending to use it as allowed under the zoning restrictions that exist at that time does not acquire a right to later develop the property as planned if zoning restrictions change. See, for example, *State ex rel. Schroedel v.*

- Intensely
developed
shoreline in
Waukesha County

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Pagels, 257 Wis. 376, 43 N.W.2d 349 (1950) and *Smart v. Dane County Board of Adjustments*, 177 Wis. 2d 445, 501 N.W.2d 782 (1993).

The Wisconsin Supreme Court has stated that "the general rule in Wisconsin [is] in order for a developer's rights to vest, the developer must submit an application for a building permit which conforms to the zoning or building code requirements in effect at the time of the application" *Lake Bluff Housing Partners v. South Milwaukee*, 197 Wis. 2d 157, 177, 540 N.W.2d 189 (1995). In most cases, this means that a property owner must have applied for and been issued a building permit before the property owner has a "vested right" to develop the property as planned.

There clearly is no basis for a property owner to argue that a "takings without just compensation" will occur if a "merger of title" provision is enforced, to prohibit the sale or development of a substandard lot that is being treated as having "merged" with adjacent property in common ownership. The Wisconsin Supreme Court pointed out in *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 376, 548 N.W.2d 528 (1996), that the U. S. Supreme Court "has consistently held that a landowner's property in such a case [where a regulatory taking is alleged] should be considered as a whole." As long as the zoning restriction on the property as a whole does not "practically or substantially render the property useless for all reasonable purposes," there would be no regulatory taking. See *Zinn v. State*, 112 Wis. 2d 417, 424, 334 N.W.2d 67(1983).

WAFSCM Conference Scheduled

Wisconsin Dells is hosting the 2003 annual conference of the Wisconsin Association for Floodplain, Stormwater

and Coastal Management on November 13 and 14 at the Kalahari Resort.

This year's conference is covering a broad range of issues related to surface water manage-

ment in Wisconsin, including concurrent sessions on hydrologic modeling,

floodplain mapping, multi-objective management, and stormwater issues.

Tom Dosch, Assistant Attorney General for the Wisconsin Department of Justice will present at Friday's plenary session, giving an update on floodplain violation enforcement and Roxanne Gray from Wisconsin Emergency Management will be presenting on mitigation planning and implementation.

Registration for the two-day conference is \$90 for members and \$100 for non-members. For more information on the conference or to receive a registration form, contact Dan Cook at (414) 259-1500 ext. 9092 or e-mail at dan.cook@gasai.com



- Flooding near Hawley Road in Milwaukee

After-the Fact Variances and Enforcement of Violations

A zoning officer discovers a violation of the shoreland or floodplain zoning ordinance and issues a Notice of Violation. In a perfect world, the property owner works with the zoning office to voluntarily correct the violation. But in some circumstances, a property owner is not willing to correct the violation. In these cases, three scenarios might play out:

- the zoning office begins formal enforcement procedures,
- the property owner appeals to the board of adjustment/appeals making the case that the ordinance or permit provision is being incorrectly interpreted and, in the applicant's opinion, no violation occurred, or
- the property owner applies for an after-the-fact variance to allow the project to continue.

This article will address with the third situation and some of the issues involving "after-the-fact" variances.

Review of After-the Fact Variance Applications

When a board of adjustment/appeals receives an after-the-fact variance application, it has to review the application as if the project is still in the proposal stage. Completing the project without the necessary permits is a self-imposed hardship and may not be considered when reviewing the variance request (*State ex rel. Markdale Corp. v. Board of Appeals of City of Milwaukee*, 27 Wis. 2d 154, 163, 133 N.W.2d 795 (1965); *Synder v. Waukesha County Zoning Board*, 74 Wis. 2d 468, 479, 247 N.W.2d 98 (1976)).

Burden of Proof

To qualify for a variance, the applicant must demonstrate that the variance criteria are met (*State v. Kenosha County Board of Adjustment*, 218 Wis. 2d at 420, 577 N.W.2d. 813 (1998); *Arndorfer v. Board of Adjustment*, 162



Wis. 2d at 254, 469 N.W.2d 831 (1991)). It is crucial that the applicant have a complete application package, clearly demonstrating why the proposed project will meet the variance criteria.

As with any variance application, it is not the responsibility of county or DNR staff to provide a complete application for the board to consider in making its decision. If the application submitted by the applicants is not complete, the Board may request additional information from the applicant. If the record of the public hearing on the variance request, including the variance application, does not support granting a variance, the Board must deny the variance.

- Grading and installation of accessory structures, such as retaining walls, are common violations in the shoreland and floodplain zones

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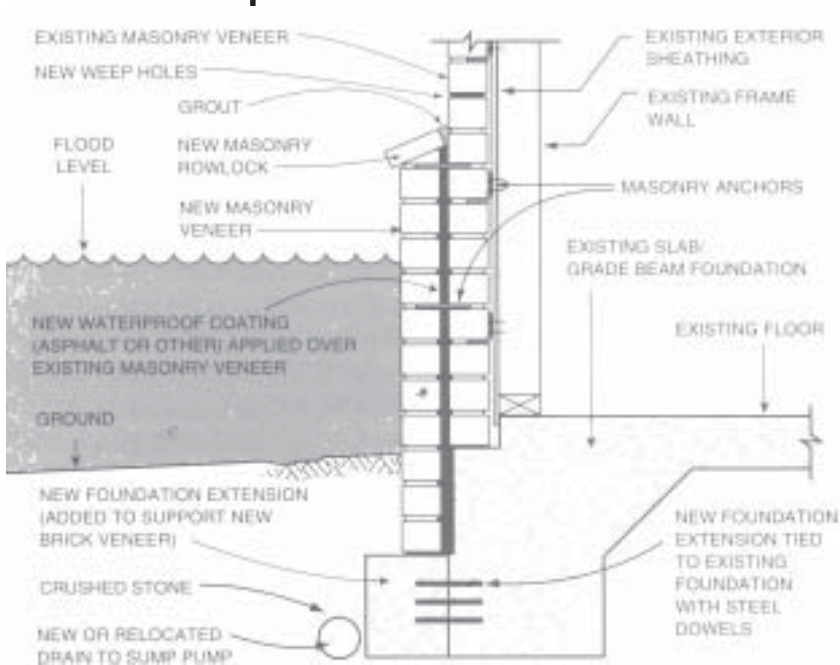
Protecting Property from Flooding: Exterior Walls

Where appropriate, property owners can be encouraged to use floodproofing techniques to limit flood damages. FEMA offers a variety of resources to help in the selection. This is first in a series that will look at options available to homeowners.

Flood protection can involve a variety of changes to a property, changes that can vary in complexity and cost. Some types of changes can be classified as

less than 2 feet deep, a house can be severely damaged if water reaches the interior. The damage to walls and floors can be expensive to repair, and the house may be uninhabitable while repairs are underway.

One way to protect a house from shallow flooding is to add a waterproof veneer to the exterior walls and seal all openings, including doors, to prevent the entry of water. As shown in the figure, the veneer can consist of a layer of brick backed by a waterproof membrane. Before the veneer is applied, the siding is removed and replaced with exterior grade plywood sheathing. If necessary, the existing foundation footing is extended to support the brick. Also, because the wall will be exposed to flood water, changes are made to the interior walls as well so that they will resist moisture damage. In the area below the flood level, standard batt insulation is replaced with washable closed-cell foam insulation, and any wood blocking added inside the wall cavity is made of exterior grade lumber.



- Example of waterproof veneer

"do-it-yourself", but complicated or large-scale changes and those that affect the structure, its electrical wiring or plumbing should be carried out only by a professional licensed contractor. One example of flood protection is adding a waterproof veneer to the exterior walls of a structure. This is something that only a licensed contractor should do.

Waterproof Veneer on Exterior Walls

Even in areas where flood waters are

Tips

Keep these points in mind adding a waterproof veneer added to exterior walls of a structure:

- Adding a waterproof veneer is appropriate in areas where the flood depth is less than 2 feet. When flood depths exceed 2 feet, the pressure on waterproofed walls increases greatly, usually beyond the strength of the walls. If greater flood depths are expected, consult with a licensed civil or structural engineer before using this method.
- Changes to the foundation must be

done by a licensed contractor, who will ensure that the work is done correctly and according to all applicable codes. This is important for safety.

- If the structure is being remodeled or repaired, consider having the veneer added as part of the remodeling or repair work. It will probably be cheaper to combine these projects than to carry them out separately.

- If the structure has brick walls, this method can still be used. The new brick veneer and water-proof membrane are added over the existing brick.

- If the structure is flooded by ground-water entering through the floor, this method will not be effective.

Estimated Cost

If a contractor adds a waterproof brick veneer, costs average about \$10 per square foot of exterior wall. For ex-

ample, a 3-foot-high brick veneer on a house measuring 60 feet by 30 feet would cover about 540 square feet and would cost about \$5,400. This figure does not include the cost of sealing doors and other openings or extending the foundation.

Other Sources of Information

- Protecting Your Home from Flooding, FEMA, 1994

- Repairing Your Flooded Home, FEMA-234, 1992

- Flood Emergency and Residential Repair Handbook, FIA-13, 1986

- Retrofitting Flood-Prone Residential Structures, FEMA-114, 1986

To obtain copies of these and other FEMA documents, call FEMA Publications at 1-800-480-2520. Information is also available at www.fema.gov.

- Story and image courtesy of FEMA.

New Shoreland Stewardship Series

The new series on shoreland stewardship includes "A Fresh Look at Shoreland Restoration" (Pub# FH-429), "Protecting and Restoring Shorelands" (Pub# WT-748), and "Protecting Our Living Shores" (Pub# WT-764). They provide information on how property owners can protect waterfront areas and the ecological and economic benefits of doing so.

The series was created to help people who want to protect their waterfront property, not only their property investment, but also the

wildlife habitat and the natural beauty it provides. In addition, anglers and other water enthusiasts who notice people taking out lawns and putting in native plants along the shore can turn to the fact sheets for an explanation.

For copies of the series, visit the DNR shoreland management publications page at www.dnr.state.wi.us/org/water/wm/dsfm/shore/publications.htm or contact Carmen

Wagner, shoreland management specialist, at 608-266-0061 or Carmen.Wagner@dnr.state.wi.us.



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However, the official FIRM cannot be modified (changes to flood elevations or boundaries) or superceded unless the new study has been reviewed and approved by the DNR and FEMA.

There are two exceptions to this requirement. If better technical data shows that flood elevations are higher or floodplain boundaries are greater than shown on the approved FIS/ FIRM, that data can be used by the community as "best available data," contingent on approval from the DNR. If the community has SFHA's with no detailed information (ie., no flood elevations or floodway delineations), the community can use better technical data to set flood elevations and floodplain or floodway boundaries, contingent on approval from the DNR. In either case, FEMA may use the better technical data to publish a new FIRM, subject to mapping priorities agreed upon by the DNR and FEMA, or the data may be used to issue a Letter of Map Change (LOMC), but not a new map.

the FIS need both DNR and FEMA review and approval before any changes can be made to them. while maps based on other studies only need DNR approval.

Removing Land From the Floodplain

Section 1.5(5) has been modified to clarify that meeting the technical standards in chapter NR 116.18, which describe the requirements for removing land from the floodplain, do not remove the requirements for the purchase of flood insurance for the property. The mandatory insurance provision can only be waived if the property is also removed from the floodplain through the federal LOMC process. Conversely, receiving a LOMC does not necessarily meet the state standards for removing land from the floodplain. Both sets of regulations must be followed if the property owner wishes to both remove the land from the floodplain and to have the insurance purchase requirement waived.

Annexed Land

When a municipality annexes land, the county zoning ordinance in effect at the time remains in effect for the annexed land until the municipality adopts a floodplain ordinance that is at least as restrictive as the county ordinance standards that it is replacing, in addition to meeting minimum state and federal standards. The old model ordinance only refers to Chapter NR 116 standards, but the NFIP standards must also be met.

General Development Standards

This is a new section with minimum permitting and construction standards which FEMA requires in order to be compliant with the NFIP. Standards



- Campground
in Dane
County

The "Official Map" section of the model ordinance (1.5(2)) has been divided into two sections, one for maps based on the FIS and one for

maps based on other studies. This change was made to emphasize that all FEMA-approved maps derived from

are derived from FEMA technical manuals and represent years of experience with construction techniques in flood hazard areas.

One-Foot Waiver Standard

Section 2.1 of the old model referred to a procedure for obtaining a waiver from FEMA for exceeding the one-foot maximum increase in flood elevation due to new development. This was an error in the old model and has been removed to reflect minimum standards. A note has also been added to emphasize that both the DNR and FEMA must approve any increases in flood elevations depicted on the FIRM.

Floodplain Campground Standards

These standards were developed in consultation with FEMA staff and represent the minimum requirements of Chapter NR 116 and the NFIP. Only mobile recreational vehicles are allowed in floodplain areas and are limited to a maximum stay of 180 consecutive days. The campground must also have an approved flood warning and evacuation plan and the flood warning time must be at least 72 hours.

Mobile Recreational Vehicles

A definition and minimum criteria have been added to the model ordinance for mobile recreational vehicles. While similar language was in the old model, it is now in a separate section to emphasize that different standards apply to camping units compared to manufactures homes, which are regulated as permanent structures.

Non-Flood Damaged Structures Exempted

Section 6.1(1)(e)2 has been added to the model ordinance because of a

statutory change which exempts non-flood damaged structures from the substantial damage provisions of the nonconforming section. The statutory change allows such structures to be rebuilt to the same size and use as they had before the damage event, provided the structure can meet the minimum requirements in the NFIP regulations. Property owners will need to consult with FEMA to determine what criteria they must meet.

Historic Structure Language

Section 6.1(1)(f) has been added which allows nonconforming historic

structures to be altered if the alteration will not preclude the structures continued designation as a historic structure. This language meets minimum state and federal requirements.

Variance Language

Section 7.3(4)(b) has been added with minimum NFIP standards that must be met before a floodplain variance can be granted. These standards are in addition to the state standards already in the ordinance. Sub-section (c) has also been modified by deleting the prohibition on granting variances for floors below the regional flood elevation. Such variances must still meet all the other criteria in the ordinance, including unnecessary hardship, unique conditions, not contrary to the public interest and



- Mills are just one of the common nonconforming historic structures in Wisconsin

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consistent with the purposes of the ordinance.

In addition to these changes, a number of definitions have been added and others have been modified.

All communities currently participating in the NFIP will soon receive a letter from the department concerning the new model ordinance. While no specific date has been set, the DNR and FEMA have agreed that one year is a reasonable time for the necessary changes to be made. Department staff are available to assist communities with questions about the

changes, adoption procedures and any other assistance that is needed.

For further information on this issue and other water issues, please contact your regional water leader:
 Northeast Region: Charles Verhoeven, (920) 492-5831
 Northern Region: John Gozdziwski, (715) 635-4002
 South Central Region: Marjorie Devereaux, (608) 275-33160
 Southeastern Region: Charles Krohn, (414) 263-8514
 West Central Region: Dan Helsel (acting), (715) 284-1431

NR118 Revision Proceeds

Revision continues on Chapter NR118, the administrative rule for land use management along the Lower St. Croix Riverway. The revision is partly a result of the recently updated Cooperative Management Plan that helps guide management along the riverway. This plan was developed cooperatively with citizens, local government, both the Minnesota and Wisconsin DNRs, and the National Park Service.

issues were received through the end of the August. The Department is currently summarizing the comments and determining what additional revisions may be made in the final draft rule. The final draft is expected to be completed in mid-winter for the Natural Resource Board to review.

Many of the comments targeted issues such as nonconforming structure regulations, measurement of setbacks, vegetative management restrictions, permit application requirements, and the DNR's veto authority regarding zoning variances.

For more information on Lower St. Croix Scenic Riverway and other details on the NR118 revision, check the DNR website at www.dnr.state.wi.us. From the home page, select "shoreland management" from the "go to some topics" drop-down menu, and then click "NR118 Revision Update".



- Historic picture from Interstate Park on the St. Croix River

Goals of the revision include improving the clarity and consistency of the application of these rules, and increasing flexibility for municipalities and landowners,

while maintaining the scenic and natural values of the riverway.

A public hearing was held in July and public comments covering a variety of

Staff Reports

Once a complete application is received from the applicant, zoning staff should prepare a staff report with factual reasons for a recommendation to grant, deny or modify the variance application based on the specifics of the request. If approval is recommended, the report may also include conditions for approval for the variance.

It is crucial for the staff report to include any information that may be relevant to the variance application that may not be supplied by the applicant. For instance, if a property owner has three adjacent lots and can build in compliance with ordinance standards if the lots are treated as one parcel, that information should be included in the staff report, if it is not in the variance application.

Another common circumstance in which the staff report can be helpful is when the applicant claims that "there is no place to build". In this situation, the board can find it extremely helpful if the staff prepare a diagram illustrating the buildable area available on a particular lot. This can help the board judge whether or not the claim is accurate.

The staff report should be delivered, along with the agenda, to all members before the meeting. The staff should present and answer questions on the contents of the report early in the meeting so citizens can comment in light of the staff information. The staff report is public information and citizens may review it at the zoning office prior to the public hearing.

DNR staff often comment on variance applications as a trustee of the navigable waters of the state and to uphold the public trust doctrine. If DNR staff do not comment on a variance application however, that should not be viewed as a reason to approve the variance request.

Enforcement Settlements

If the board finds that the after-the-fact variance application does not meet the variance criteria, then the board must deny the variance request. At that time, the community can try to work with the property owner on an enforcement solution. It is at this time that it is appropriate for the community, and the DNR if requested, to work with the property owner to determine the capability of complying with the ordinance. This information cannot play a role in determining whether or not to grant the variance, but may be considered when working with a property owner to correct a violation.

Voluntary correction of violations is preferred to legal actions that entail costly prosecution procedures or enforcement penalties. Settlement agreements are a way of reaching and documenting an agreement between a property owner and the community. The agreement should entail how the violation will be corrected and may include a restoration plan, implementation schedule and maintenance plan. The community may also require bonding to ensure that the violation is corrected as described in the agreement.

If the property owner agrees to correct the violation, be sure to inspect the property to make certain the violation has been corrected.