Floodplain and Shoreland Management Notes

ASFPM's Executive Director Comments on Katrina

How to rebuild after Hurricane Katrina - and should we?

The effects of Hurricane Katrina are extending far beyond the states of Alabama, Florida, Louisiana and Mississippi. It may, in the words of academics, present the field of disaster management with a paradigm shift. At the very least, it will force governments, citizens and disaster management professionals to review the current positions held on construction and reconstruction in areas at risk to natural hazards.

On September 9, 2005, Larry Larson, Executive Director, Association of State Floodplain Managers (ASFPM), along with Mark Davis from the National Wildlife Federation and Gerry Galloway of the University of Maryland spoke at a National Press Club press conference in Washington, D.C. At the press conference, ASFPM's white paper *Hurricane Katrina: Reconstruction Through Mitigation* was presented.

ASFPM's position regarding reconstruction in the Gulf Coast area was that governments and local citizens should not rush to rebuild for rebuilding's sake. Rather, the reconstruction of structures and communities damaged by Hurricane Katrina and at risk to future damage should be done based on sound planning and mitigation principles. A summary of the main points of the white paper is as follows:

1. Reconstruction along the coast must be done in compliance with regulations and codes. Now is also the time to collect and analyze data from this storm to determine if our current mapping and management approaches worked and what adjustments are needed based on an actual event.

2. If the New Orleans area is to be rebuilt, two things must happen concurrently:
   a. Structural protection must be provided to the 500 year/ cat 5 level; and
   b. The coastal wetlands must be protected/restored to buffer future storms.

Mr. Larson expanded further on the issue of the reconstruction of New Orleans in ASFPM's *The Insider* (September 2005). In the September 2005 article, Mr. Larson stated the public can say that cities like New Orleans, Miami Beach, St. Louis, Los Angeles, San Francisco and others should not be where they are because they are at great risk to natural hazards. If they did not exist today, data and information is available that could perhaps guide them to safer locations. But these cities already exist, and the tremendous political pressure to keep them there would outweigh the scientific voice to abandon any such city, its heritage, culture, and its people.

The economic impact of the New

Continued on Page 8. . .

Volume 3
Number 3
Fall 2005

Inside this issue:

Update on Proposed Ch. NR 115 Changes

Recently more than 1,200 citizens sacrificed a summer evening to attend public hearings vital to preserving the Wisconsin they grew up knowing and loving. Thanks to everyone who took the time to become involved in this process through the public comment period and 11 public hearings held around the state. Updating the state's 35-year-old rules to preserve clean water, great fishing, and natural scenic beauty along Wisconsin's lakes and rivers is challenging and controversial- and absolutely essential. We want to make sure we get the rules right, and your comments will go a long way in helping achieve that goal.

It was very clear from the comments heard that Wisconsin's 15,000 lakes and thousands of streams are the heart and soul of the Badger state, a wellspring of favorite memories for waterfront property owners and others alike. People also described these waters as a linchpin of Wisconsin's economic future: a powerful reason to keep people and businesses here, important amenities we can offer prospective businesses and residents, and an anchor of the state's $12 billion tourism industry.

DNR shoreland protection staff launched the revision process in 2002 by convening a citizens' advisory committee to look at the current rules, which set statewide minimum standards (in largely unincorporated areas) for lot sizes, building setbacks and limits on removing shoreland vegetation. The proposed changes debated at public hearings reflect nearly three years of advisory committee meetings and hundreds of phone calls, e-mails and comments by the public.

The changes sought to strike the proper balance between providing

Continued on Page 11 . . .

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 polices of the federal government.

Floodplain Contacts:
- Gary Heinrichs, 608-266-3093
  Gary.Heinrichs@dnr.state.wi.us,
- Miriam G. Anderson, 608-266-5228
  Miriam.Anderson@dnr.state.wi.us,
- Bob Watson, 608-266-8037
  Bob.Watson@dnr.state.wi.us

Shoreland Contacts:
- Dave O'Malley, 608-264-6285
  David.O'Malley@dnr.state.wi.us,

Dam Safety Contacts:
- Meg Galloway, 608-266-7014
  Meg.Galloway@dnr.state.wi.us,
- Bill Sturtevant, 608-266-8033
  William.Sturtevant@dnr.state.wi.us

Photographs in this issue were provided by DNR file photos, FEMA and U. S. DOT.

Vast majority of piers won't need permit under proposed pier rules by Lisa Gaumnitz

The vast majority of Wisconsin's nearly half-million piers can continue to be placed along Wisconsin lakes and rivers without a state permit, and the same is true for most new piers, under proposed changes in state waterway permitting rules. The proposed changes are to be considered for adoption by the Natural Resources Board at its Sept. 28 meeting in Port Washington.

"As in the past, the vast majority of people will not need a permit to continue putting their existing piers, or new piers, in any Wisconsin lake or river," says Mike Staggs, who leads the Department of Natural Resources fisheries management and habitat protection program.

Wisconsin Act 118, passed last year by the Wisconsin Legislature and signed by Gov. Jim Doyle, formalized longstanding size limits for piers that would not need a permit to be placed in Wisconsin's public waters. Piers exempted from needing a permit are as follows:

- The pier or wharf can be up to 6 feet wide.
- The pier can have a maximum of two boat sites for the first 50 feet of shoreline frontage and one additional slip for every additional full 50 feet.
- The pier can extend into the water out to the length necessary to adequately moor their boat or to a water depth of 3 feet, whichever is greater.
- Piers can be configured in a variety of ways and qualify for the exemption from permitting as long as they meet the size limits. Piers may be straight or configured in an "L" or "T" or similar shape, and may include catwalks.

DNR is developing rules to cover piers that did not fit the exemption, and these are the rules that will be reviewed by the Natural Resources Board next week.

"Act 118 left existing larger piers in limbo - they were too big to be exempt under the new law and they weren't grandfathered in," says Liesa Lehmann, waterways regulation coordinator. "The proposed rules will "grandfather" virtually all other existing larger piers through a general permit that's permanent and transfers to future property owners."

Provisions of pier rules, as proposed, include:

- Existing piers larger than the Act 118 exemption limits would be "grandfathered" with a general permit. These piers can be up to 8 feet wide and have a loading platform at the end of the pier of up to 160 square feet. They can also have more boat slips and extend farther into the water. Owners of these piers will have two years to apply for the $50 permit, which is permanent and transfers to future property owners. It is important for owners of these piers to apply for the permit within the two-year timeframe in order to take advantage of the "grandfathering" and to assure they will not be subject to future size requirements.

Continued on Page 9 . .

Wisconsin APA Legal Update

By Michael R. Christopher[1], DeWitt, Ross & Stevens S.C.

The Wisconsin Chapter of the American Planning Association (WAPA) recently compiled a review of several important land use decisions issued by Wisconsin courts over the past year. Two of the decisions related to the appeal of conditional use permits and variances. One of the cases, *Malcolm, Inc. v. Eau Claire County Board of Land Use*, resulted in the court requiring the Board of Land Use to analyze a variance request for a flag pole under the unnecessary hardship rule from *Ziervogel v. Washington County Board of Adjustment*.

Do Neighbors Have Standing To Object To The Granting Of A Conditional Use Permit?

On July 6, 2005, *Gill, et al. v. City and Common Council of Oconomowoc, et al.,* was an interesting case decided relating to the long saga of the Pabst Farms Development and the effort of neighbors to stop that development in the Town of Summit. The developer wanted to build a large grocery distribution facility to be operated by Roundy's on property owned by Pabst Farm Development LLC ("Pabst"). The City of Oconomowoc Planning staff reviewed the application and determined that it was complete. Both the Plan Commission of Oconomowoc and its Common Council approved the issuance of the Conditional Use Permit for this project. The lawsuit was brought by property owners in the Town of Summit on their own behalf and on behalf of other neighbors of Pabst alleging that each of them has been or will be injured by the actions of the City. The trial court determined that the plaintiffs lacked standing to pursue their claims so the action was dismissed.

On appeal, the property owners first argued that the trial court incorrectly determined that Wis. Stat. § 62.23(7)(f)2 applied to this action. They argued that the case should have been decided under § 62.23(7)(e)10, which allows any person aggrieved by any decision of the Board of Appeals to commence a *certiorari* action. They argued that the City violated its own zoning ordinances during the approval process and thereby legally deprived them of the opportunity to appeal the Plan Commission's decision to the Board of Appeals. They argued that since they should have been allowed to appeal to the Board of Appeals, the court should have allowed them to satisfy the less restrictive standing requirements contained in § 62.23(7)(e)10.

The court dealt with this argument by analyzing the controlling statute which gave the Common Council the authority to appoint a Plan Commission or Board of Appeals. *See* Wis. Stat. §§ 62.23(1) and (7)(e). The statute also states that its provisions do not prevent the City Council from granting a special exception. In other words, based on this statute, the court concluded that the Council is allowed to make conditional use decisions. Because the property owners have challenged the decision of the City Council, the Court of Appeals concluded that the property owners had to comply with the more stringent standing requirement set out in § 62.23(7)(f)2.

In order to survive a standing challenge under this statute, a property owner must establish that he or she is: (1) an adjacent or neighboring property

Continued on Page 5 . . .

Continued from Page 4. . .

owner, and (2) that he or she is specially damaged. Although the trial court determined that some of the plaintiffs were neighboring property owners within the meaning of the statute, it also found that none of the property owners established that they have been or will be specially damaged by the decision to grant the conditional use permit. The Court of Appeals agreed.

The Wisconsin Supreme Court has defined "specially damaged" as irreparable injury done to property if the injury threatened is special and different from that of the general public. In previous cases that have defined "specially damaged" so that the proximity to the proposed use was an important factor.

However, in this case the court found that the property owners did not prove that they were facing irrevocable injury as a result of the City's actions that was different from any injury faced by the general public. At the most, they established that all of the homes on the northern shore of Middle Genesee Lake and the properties to the east and west of the proposed distribution center may be injured by the alleged increase in noise and traffic. Because this is a potential injury faced by the general public and is not specific to these neighbors, the court concluded that the neighbors lacked standing to challenge the Common Council's decision to grant a conditional use permit.

Because the Court of Appeals found that the neighbors had no standing, it did not have to address the merits of this development. Sometimes a court is able to avoid a sticky development issue by relying upon a narrowly drawn procedural problem. This is what may have occurred in this case.

Who Has The Authority To Name A Town Road?

In a decision recommended for publication, the Court of Appeals decided the case of *Liberty Grove Town Board v. Door County Board of Supervisors* on June 7, 2005. Although the question posed by this case, namely what governmental authority can name a town road may seem to be relatively minor in the scope of other land use issues before our courts, this case demonstrates that road-naming authority is often a hot local issue.

Door County passed an ordinance which established a naming and numbering system for roads in unincorporated portions of the county. The goal was to eliminate duplicate road names within the county in order to simplify providing emergency services, particularly as to the 911 emergency dispatch system. To implement the ordinance, Door County identified duplicate road names, determined how many addresses in each town would be affected by changing the name of the road, and requested towns with the fewest affected addresses to change the road name.

Based on this methodology, Door County requested Liberty Grove to change 20 road names, but Liberty Grove refused to change 7 of them. The Town brought this action seeking a declaratory judgment that towns, not counties, had the exclusive right to name town roads. The trial court entered summary judgment in favor of Door County and the Court of Appeals affirmed that decision.

What this case turned on were two

Continued on Page 6 . . .

Continued from Page 5 . . .

apparently conflicting statutes. When this type of statutory conflict occurs, a court will go out of its way to attempt to harmonize the statutes through a process of reasonable construction. The parties agreed that the statutes involved could be harmonized to avoid conflict, but disagreed on the manner of doing so. The Town argued that it had exclusive authority to name roads within its jurisdiction, relying on Wis. Stat., § 81.01(11) and Wis. Stat. § 60.23(17). The court concluded that these statutes give a town initial authority to name town roads within their jurisdiction. At the same time, the County contended that it had road-naming authority by virtue of Wis. Stat. § 59.54(4) which gives counties the authority to implement a naming system, a numbering system, or a combination of both.

Liberty Grove argued that the way to harmonize these apparently conflicting statutes is simple. If a county chooses a numbering system, there is no conflict with a town naming-authority. If a county chooses a naming system or a combination system, conflict is avoided when the county seeks town approval of any name change. If a town does not approve, the county can resolve any name duplication problems through numbering.

Door County contended that Liberty Grove's proposed reading of the statutes is unreasonable because it distorts the statute's plain language. The Court of Appeals agreed with the County, concluding that the plain language of Wis. Stat. § 59.54(4) and (4)(m) does not condition a county's road-naming authority on town consent. Rather, the naming systems "*may* be carried out in cooperation with a town."

The other argument made by Door County which was embraced by the court was that if the interpretation as suggested by Liberty Grove was agreed to, a county's statutory authority to implement a naming system is eviscerated. An elementary rule of statutory construction is that statutes should be interpreted in such a way so that no provision is rendered meaningless. A county's authority to implement a naming system is meaningless if that authority can be usurped by a town's refusal to consent to road name changes.

Therefore, the court concluded that although a town has initial authority to name town roads, the town's authority is subject to the county's discretionary authority to establish a road-naming and numbering system for the specific purpose of aiding in fire protection, emergency services, and civil defense. Ultimately, a county has the authority to implement name changes even if a town does not consent when the name changes are made under the system pursuant to Wis. Stat. § 59.54(4) which is exactly the process followed by Door County in this case.

How Far Will Courts Go When It Applies The New Standard For An Area Variance?

On March 19, 2004, the Wisconsin Supreme Court decided in *Ziervogel v. Washington County Board of Adjustment*, that a zoning board of appeals must apply an "unnecessary hardship" standard when considering whether to grant an area variance, essentially overruling the test for an area variance set forth in *State v. Kenosha County Board of Adjustment*. Keeping in mind the timing and substantive holding of *Ziervogel*, the Court of Appeals deci-

Continued on Page 7 . . .

Continued from Page 6 . . .

sion made on August 23, 2005, in *Malcolm, Inc. v. Eau Claire County Board of Land Use*, presents an interesting fact situation.

Malcolm sought a variance from the Board that would have allowed him to fly an American Flag at its commercial property at a height above what was currently allowed by local zoning law. Specifically, Malcolm wanted to fly the flag from a 1,048-foot flagpole, while the maximum allowed height in the zoning district was 1,034 feet. Malcolm contended that the flag was not viewable by passing motorists at the current maximum allowed height.

At the Eau Claire County Board of Land Use appeals hearing on March 10, 2004 - 9 days before the area variance standard was significantly changed - the Board applied the "no reasonable use of the property" test as stated in *Kenosha County* and denied Malcolm's variance application.

The court agreed with Malcolm that the Board had to analyze this variance request under the unnecessary hardship rule from *Ziervogel*. In that decision, the Wisconsin Supreme Court said that an unnecessary hardship exists when "compliance with the strict letter of restrictions governing area, setbacks, frontage, height, bulk or density, would unreasonably prevent the owner from using the property for a permitted purpose, or would render conformity with such restrictions unnecessarily burdensome." Whether the standard has been met is based upon the purpose of the zoning restriction in question, its effect on the property and the affect of a variance on the neighborhood and the larger public interest. Finally, the hardship had to be unique to the parcel and not self-created by the party.

In any event, this Court remanded to the Board the Malcolm application so it could properly apply the unnecessary hardship standard. However, the more significant part of the Court holding was that it rejected Malcolm's argument that the Court should grant the variance. It concluded that remand to the Board provided the appropriate avenue for the application of the proper standard. The Court also rejected Malcolm's argument that the Board would not be able to consider any new evidence when it applies the unnecessary hardship test. The Court concluded that any material changes may rightfully affect the Board's decision. Therefore, the Court found that when the Board applied the correct standard and conducted a fact-intensive analysis, it could also consider any new relevant evidence.

1. Michael R. Christopher is a shareholder in the Madison office of DeWitt Ross & Stevens S.C., 2 East Mifflin Street, Madison, Wisconsin 53703; (608) 255-8891; mrc@dewittross.com. He is legal counsel to WAPA. He received his law degree from the University of Wisconsin in 1972.

-Hwy 29, Chippewa Falls, WI area

Continued from Page 1 . . .

Orleans coastal area is immense. Indications are that a third of the goods flowing through U. S. ports go through New Orleans, and that 15 - 20% of the nation's gasoline comes from refineries in the area. Such facilities cannot exist without workers and the infrastructure to support them. To create that infrastructure elsewhere now would be even more costly than reconstruction.

- Biloxi, MS September 2005

Mr. Larson continued by saying not reconstructing New Orleans won't happen and the question posed is not should New Orleans be reconstructed, but rather how should it be reconstructed. ASFPM's basic position has always been that structural works are a poor alternative to reduce flood losses. But when they are the only viable option (and in this case, that is how the nation's decision makers see the New Orleans area), the structural protection must be more than the minimum standard of the 1% chance flood event that is used to protect structures in ordinary floodplains. The logic of this is that a flood larger than the predicted 1% will do minor damage to a structure elevated to the 1% level, but will have catastrophic consequences to those structures protected by structural measures such as levees and dams once that structure fails or is overtopped. This is true because structures behind levees are typically not elevated at all.

- New Orleans, LA September 2005

If the New Orleans area is to going to exist because it has structural protection, continued Mr. Larson, then the levees must be designed not only for the 500 year flood, but for a Category 5 hurricane, whichever is greater. While that will be enormously expensive, the alternative costs of the disaster are now clear. At the same time, investment must be made in the protection of the coastal ecosystem that will preserve and restore the wetlands, which in turn, provide the buffer for the Southeast Louisiana area. Existing data has indicated that for every 2.7 miles of wetland buffer, the hurricane storm surge drops 1 foot. Therefore, if the nation decides it wants the New Orleans area to be there, both the 500 year/Category 5 protection and the wetlands buffer protection/restoration must occur concurrently. Many reasons exist to support the ecosystem restoration beyond flood protection, ranging from the economic arguments through the natural resource issues and environmental issues.

ASFPM's white paper, *Hurricane Katrina: Reconstruction through Mitigation* can be downloaded at www.floods.org. Questions or comments can be sent to asfpm@floods.org.

Continued from Page 3 . . .

- Existing piers in designated sensitive habitat areas on one of 136 waters would require a one-time, $50 general permit and short DNR review to assure the piers are properly placed and designed.
- If a pier doesn't qualify for an exemption or a general permit, the owner may need a more detailed individual permit and comprehensive review to assure the pier design and location are done properly to minimize their impacts. Less than one-half of 1 percent of pier owners are expected to require this more detailed individual permit. Piers in this category are the ones with the biggest potential to harm fish habitat and interfere with boating, swimming and other recreation in public waters.

DNR based its proposed pier rules on input from a citizen's advisory group and public hearings conducted in late 2004.

"We greatly appreciate the work of the advisory group and the input from the hearings," Lehmann says. "People wanted property owners to be able to enjoy their waterfront but meet reasonable pier requirements to minimize harm to sensitive, shallow water habitats."

Pier rules are designed to allow shore owners access to the water while protecting the public's enjoyment of the waters. Private property owners can't place a pier so large or located in a way it harms everyone else's rights in those waters.

Contrary to the belief that piers provide good fish habitat, research in Wisconsin and elsewhere shows that piers can shade out important aquatic plants that provide critical habitat where fish spawn, grow up, find insects and other food, and seek shelter from predators. In addition, boats associated with piers enlarge the area where the shading occurs and also scour the lake and river beds beneath, hampering spawning substrate and chopping up aquatic plants.

A copy of the proposed pier rules, a fact sheet describing the rules, and research detailing environmental concerns associated with piers are available on the DNR Web site.

FOR MORE INFORMATION CONTACT:
Liesa Lehmann (608) 266-2997 or Mary Ellen Vollbrecht (608) 264-8554.

- Example of an exempt pier

Map Modernization and Adopting the New Model Floodplain Ordinance

How should a community proceed if they need to adopt the new model floodplain ordinance when they are expecting updated floodplain maps in the near future? A community's flood maps and its floodplain zoning ordinance are the primary tools for ensuring that local residents are not placed at risk when they build or purchase a home. In Wisconsin, the official flood map is the Flood Insurance Rate Map (FIRM) and the local ordinances must include at minimum the language in the DNR's Model Floodplain Ordinance. Confusion can occur when communities are asked to update the local floodplain ordinance to include the language from the Model when new maps are expected within the next 12-18 months.

In 2004 and 2005, FEMA and DNR notified 135 communities of the need to update their local floodplain ordinances becasue the ordinances did not meet the minimum federal or state requirements. These communities were chosen becasue they had recently experienced a flood related disaster. The Model Ordinance was updated in 2004/5 to include language from state statutory changes and to meet new FEMA minimum standards. The letter stated the communities had six (6) months to submit a draft ordinance to DNR for review and comment and to adopt the final approved ordinance. Failure to comply with this requirement could result in suspension from the NFIP.

All Wisconsin communities will be notified by DNR of the need to update their floodplain zoning ordinances. Communities do not need to wait for the notification letter to begin updating their ordinances. Assistance from the DNR is available upon request.

During 2005, several communities were notified they will be receiving new Flood Insurance Rate Maps (FIRM) in 2006. The new FIRMs will affect both the county as well all the incorporated communities therein. Each of the affected communities will be required to adopt the new FIRM as the effective map through an update of the local floodplain ordinance. For some communities, this will result in two adoptions of the same ordinance within a 12-18 month period.

Several communities have questioned the need to update their ordinances twice and have asked to delay the adoption of the new language until the new FIRMs are completed. Other communities have questioned the requirement to use the FIRMs as the effective map.

Why adopt the language changes and map changes separately?

The adoption of new language in an ordinance can often be a long and contentious process for a community. While a 6 month time limit was placed on the adoption of the new language, flexibility in the process exists to allow for sufficient community review and debate. For the adoption of new maps, federal regulations state clearly that the new maps must be adopted within 6 months of the acceptance of the final FIRMs. However, the two time periods do not coincide. Therefore, in order to ensure that communities do not run afoul of either deadline and potentially face suspension from the NFIP, DNR has recommended

Continued on Page 11 . .

Continued from Page 10 . .

that communities adopt the updated language and the new maps separately.

How will the Map Modernization process affect the 135 communities notified in 2004 and 2005? The communities notified by letter were given 6 months to adopt the new ordinance language. However, these communities will need to adopt the new maps only when the maps are finalized which may be sometime over the next 12-24 months.

The Map Modernization process will affect all communities in Wisconsin eventually. Currently, FEMA and DNR tentatively plan on producing updated maps for all Wisconsin communities within the next six (6) years. These new maps will require the adoption of the updated model floodplain ordinance.

Are there any exceptions to the requirement of adopting the new FIRMs? There are no exceptions to the requirement to adopt the FIRMs. However, every effort is being made by the DNR and FEMA to include "best available data" in the new FIRMs.

A state map outlining the proposed schedule for map updates and other information related to Map Modernization in Wisconsin can be found on the Dam Safetey, Floodplain and Shoreland Management website: http://dnr.wi.gov/org/water/wm/dsfm/flood/mapping.htm.

For questions regarding either Map Modernization or adoption of the Model Floodplain Ordinance, please contact your DNR Regional Staff person.

Continued from Page 2 . .

property owners more flexibility in what they could do on their land in exchange for measures to offset the resulting impacts on lakes and rivers.

Over 12,000 comments have been received on the proposed revision to NR 115. After reviewing and compiling the comments, the Department will make changes to the rule proposal based on the comments heard during the comment period and public hearings. The final draft of the rule will then be taken to our Natural Resources Board for final consideration.

Due to the high volume of comments, it is unclear when the rule will be brought to the Board for approval and it is also unclear the specific changes that will be made to the proposal, but one thing is certain, the final proposed rules will look different, and considerably different, in some cases, than the ones featured at the public hearings.

We listened, and we will act.

-Shoreland buffer

Floodplain and Shoreland Management Notes

A publication of Wisconsin Department of Natural Resources, Dam Safety, Floodplain, Shoreland Section.

Wisconsin Department of Natural Resources
Bureau of Watershed Management
Box 7921
Madison, WI 53707-7921

Address Service requested.

Presorted Standard
U.S. Postage Paid
Madison, WI
Permit 906