
Floodplain – Shoreland Management Notes

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DNR Reorganization Progresses

A year after it was first announced, the Department of Natural Resources is preparing to submit its comprehensive reorganization plan for approval to the Natural Resources Board, the Department of Administration and the Governor's office. This plan will further increase efficiency and effectiveness, better integrate resources and environmental programs, manage programs on a natural resources basis, increase front-line services, and decentralize decision-making to staff who are working directly with our customers.

The department is proposing to consolidate the current six districts into five regions. The new Northern Region includes all of the Northwest District and the north half of North Central, with the remainder going to the West Central Region. Northeast and

south Central have only minor changes while Southeastern is unchanged.

The Northeast Region will conduct a pilot project using locally based customer service centers as the prime service delivery point. These centers, which are expected to handle more than 80% of all decisions and services, will provide information, technical assistance, license sales and permit services. They will eventually be located throughout the state to provide close access for everyone.

To ensure the success of this project, the department will move many positions from the central office to the regional headquarters and service centers. These new regional staff members will be concentrated in front-line service, information, and technical support positions. They will be organized into teams based on geographic boundaries or the needs of the ecological resources in an area. These multi-disciplinary teams will form partnerships with local agencies and organizations to ensure broad input and support for the department's operations.

In addition to the decentralization of central office staff, 100 to 120 supervisory positions will be converted to front-line positions. This will flatten the number of management layers in the agency, making it simpler and quicker to make decisions on both internal and external issues.

Internally, the department will reorganize into six divisions: Water Management, Land Management, Air & Waste Management, Enforcement, Customer Assistance & External Relations, and Administration & Technology. Central office staff will concentrate on policy development, budget & work planning, and program evaluation. Field staff will implement the programs, serve as regional experts, provide day-to-day support and continuity, make most decisions, and resolve issues and conflicts.

This new organization should benefit our customers in many ways: More expertise and support will be available closer to home; decisions will be made at the local level; conflicts and complaints will be resolved at the local level; department staff will have a broader understanding of local environmental, economic, social and political issues; there will be more opportunities for productive partnerships; and the department will make a bigger contribution to the people, communities, institutions and businesses it serves.

Please bear with us as we go through the growing pains to be expected in any new venture. We are fully committed to making this work. And we think the final product will be worth it.

Time To Plan For Dam Safety Seminars

We are inviting dam owners, consultants, construction contractors and other interested parties to join us for the 1996 Dam Safety Seminars.

Seminars will be held on Feb. 20th in Appleton at the Best Western, 3033 W. College Ave.; on Feb. 22nd in Rhineland at

the Claridge Motor Inn, 70 N. Stevens St.; and on Feb. 27th in Eau Claire at the Best Western, 2851 Hendrickson Dr.

Topics for the seminars include Emergency Action Plans for small dams; water diversion for construction; five elements of dam design and maintenance; and visual imaging for design and landscape plans.

The seminars will begin at 8:00 a.m. and conclude by 4:30 p.m. Registration and payment (\$20.00 for lunch and breaks) is due by Feb. 12th. Please contact Eleanor Lawry at (608) 266-2220 if you are interested.

Flood Insurance Rates To Rise

Subsidized rates for certain flood insurance policy holders would increase under a rule proposed by the Federal Emergency Management Agency (FEMA). Policy holders in communities in the emergency phase of the National Flood Insurance Program (NFIP) and those living in structures built or substantially improved before issuance of the community's first Flood Insurance Rate Map (FIRM), or before January 1, 1975, would be subject to the new rate policy.

The rate for a residential structure would increase from \$.60 per \$100 to \$.68. Contents coverage would rise to \$.79 per \$100 from the current \$.70. Non-residential would rise from \$.70 to \$.79 and \$1.40 to \$1.58, respectively. The total cost of a policy, including the rate and the expense constant (administrative costs), would rise no more than 10%.

The rate increases are needed to help the NFIP build reserves for catastrophic loss years. Coverage changes and optional

deductibles are also part of the ongoing effort to achieve these goals. In the past, appropriations were required to replenish the program's borrowing authority when income was not sufficient due to the subsidized rates.

The NFIP has been self-supporting in recent years because it has achieved high market penetration in the Southeast, an area that has not experienced a catastrophic flood in many years, and has had low penetration in areas such as the Midwest that have experienced major floods recently. These fortuitous conditions have allowed policy holders to enjoy unusually low premium rates relative to the risks they are insured against.

However, loss rates have increased dramatically in recent years, starting with Hurricane Hugo in 1989, Hurricanes Andrew and Iniki in 1992, the Midwest flooding of 1993, and major floods in 1995. In addition, new flood insurance coverage requirements stemming from the National Flood Insurance Reform Act will increase market penetration in all parts of the country, escalating the amount of potential insured flood losses nationwide.

Using current subsidized rates and projected full risk loss costs at 1995 levels, it is expected that the average annual shortfall in the risk portion of premiums needed to fund loss expenses, including the catastrophic potential, is over \$400 for each subsidized policy holder.

Even with the increase, the proposed new rates will only produce 39% of the premium that would have to be charged if these policies were actuarially rated (i.e., not subsidized). FEMA is proposing only a modest increase at this time in order to maintain a balance between the need to decrease the subsidy while still making flood insurance available at reasonable rates to

protect those at risk of catastrophic flood losses.

For further information, contact:

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New Fannie Mae Flood Insurance Rules

In response to passage of the National Flood Insurance Reform Act, Fannie Mae has issued new guidelines for lenders who sell mortgages on the secondary market. Flood insurance is required if any part of the principal structure is in a Special Flood Hazard Area (SFHA). Accessory structures must also be covered if they are used as security for the mortgage.

Fannie Mae will not accept mortgages for properties in a SFHA in communities not participating in the National Flood Insurance Program (NFIP). Lenders must continually monitor the status of communities it serves.

A lender that escrows for other purposes must escrow for flood insurance premiums. Insurance must be in place at origination and continued in force for the life of the loan. Mortgage documents must identify the flood zone and insurance status.

Because coverage limits have increased for all categories of insurable structures, lenders/servicers should review the amount of coverage in their Fannie Mae portfolio and determine whether additional coverage is needed.

If a lender uses a flood determination vendor, Fannie Mae suggests the following selection criteria:

- Should be on FEMA's list of vendors and subscribe to the NFDA guarantee (in box)
- Ask about the vendor's methodology. On-site inspections, surveys or cross-referencing with tax maps are the most reliable methods. Probability or other approximation techniques are not acceptable.
- Review financial statements to determine the vendor's soundness and ability to do the work.
- Life-of-loan service must be transferable.
- Contracts should include clear procedures for resolving disputes related to difficult determinations, and set out responsibility for compliance and payment of related penalties.

Lenders or the vendor must monitor all flood map and community status changes. If a property has been remapped into the SFHA, a policy should be in place within 120 days of the effective date. If the borrower refuses to purchase a policy, the lender must do so and either escrow or collect the premium from the borrower.

Lenders acquiring Fannie Mae portfolios must ensure that adequate flood insurance is in place for affected properties, monitor changes in flood maps and community status, and record the appropriate vendor and product information in their servicing and accounting systems.

Fannie Mae has revised its procedures for monitoring flood compliance. When reviewing underwriting and quality control

procedures, the agency will also review lenders' procedures for making flood hazard determinations and obtaining flood insurance.

When reviewing servicing practices, it will verify procedures for assuring that flood insurance is in place if required and that flood map changes are being monitored. It will also periodically sample portfolio loans to check flood insurance status.

NATIONAL FLOOD DETERMINATION ASSOCIATION GUARANTEE

Any person a lender relies on for making flood zone determinations guarantees:

To perform a diligent, bona fide review of the Flood Hazard Boundary Map, Flood Insurance Rate Map, or Letter of Map Correction in effect at the time of the determination.

To provide the lender with a determination that accurately represents the flood hazard status of the land beneath the insurable buildings as identified by the Director of FEMA on the map in effect at the time of determination.

To indemnify the lender and the borrower against uninsured flood loss that would have been insurable through the NFIP resulting from an incorrect determination, a diligent, bonafide review not withstanding.

To maintain sufficient assets, funded reserves, and/or professional liability insurance to support the above guarantees.

Local Taking Case Attracts National Attention

A new interpretation of takings law by a Wisconsin court is expected to affect claims of takings based on environmental laws, including floodplain/shoreland/wetland restrictions.

In its order remanding the case, Alfred A. Zealy v. City of Waukesha, back to the trial court, the 2nd Court of Appeals decided unanimously that landowners may need to be compensated if a zoning restriction on part of their land has a substantial impact on their reasonable anticipated use of the property.

Previously, courts had held that a taking of property occurred when an entire parcel had lost essentially all its value — not merely the portion affected by the restrictions. The Zealy court held that regulation of only part of a parcel sometimes can be a taking, if it interferes with a landowners "anticipated and distinct investment opportunities." When Zealy's 10.1 acre parcel was annexed by the city in 1967, it was zoned R-1 residential. A small portion was later upgraded to B-4 business. In 1982, Zealy granted the city an easement for storm and sanitary sewers because, he alleges, city officials told him it would expedite residential development. Three years later, however, the city rezoned 8.2 acres of the R-1 property to C-1 conservation, effectively precluding further development.

A 1990 appraisal concluded that the rezoning had reduced the value of the subparcel from \$200,000 to \$4,000, a 98% devaluation. However, Zealy conceded that the value of the total 10.1 acres was not reduced severely enough to support a taking because of the value of his commercial property. Based on these facts, the trial court dismissed Zealy's inverse condemnation action, holding that he could not segment his property in order to prove that a taking had occurred.

When analyzing the trial court's findings, the Appeals Court recognized its duty to balance the tenets of the Fifth Amendment, which requires payment for private property when it is converted to public use, vs. the government's duty to protect the public from

the destructive use of land by individual citizens. Citing Lucas v. South Carolina Coastal Council, 505 U.S. 112 S. Ct. 2886 (1992), it noted that government regulation may render private property effectively useless even though legal title remains in the hands of the citizen. It is this line of analysis, referred to as constructive takings, which is at issue here.

Citing a recent United States Supreme Court case, Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust, 508 U.S. 113 S. Ct. 2264, 2290 (1993), it noted that three factors have emerged for analyzing this type of takings:

- the nature of the government regulatory scheme,
- the severity of the economic impact on the landowner, and
- the degree of interference with the landowner's anticipated and distinct investment opportunities.

The court concluded that the first two factors were well-settled points of law. It therefore concentrated its analysis on the third factor: what are the landowner's anticipated investment opportunities associated with the property?

In reaching its conclusion, *the court rejected both the city's position that the affected parts of the parcel can never be segmented and Zealy's assertion that the parcel must always be segmented. Instead, it asserted that the relevant question is "is the unaffected part of the parcel relevant to the anticipated use of the affected parcel"?* If the answer is yes, then the whole parcel should be considered in determining whether there has been a taking. If the answer is no, then only the anticipated investment opportunity of the affected parcel should be considered.

This reasoning is based on a case, Ciampitti v. United States, 22 Cl. Ct. 310 (1991), where the landowner claimed that the Army Corps of Engineers denial of a landfill permit in a wetlands area constituted a taking of his property. In defending the claim, the government pointed to other parts of the landowner's original purchase that had been successfully developed. The court agreed that the additional lands should be included in the analysis, pointing to a number of factors including the degree of parcel contiguity, dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the protected lands enhance the value of the remaining lands.

The court stressed that "focusing on anticipated use teaches us that sometimes the whole property must be considered and sometimes not. We prefer the type of undertaking used by the court in Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994)."

There, the government was concerned that simplistic rules on how a parcel is analyzed would encourage developers to divide their holdings to demonstrate that government regulation had taken the undevelopable parcel. The Loveladies court tackled this problem by carefully assessing the landowner's acquisition of the property, including the timing of transfers in light of the developing regulatory environment.

In its summary, the court rejected simplistic rules that parcels can or cannot be separated for purposes of takings analysis. It reiterated that the three criteria in the Concrete Pipe case, especially the degree of interference with the landowners anticipated and distinct investment opportunities, are the correct focal point for analysis.

By concentrating on this and the relevancy of affected to unaffected parcels, the court places great weight on the subjective expectations of the owner and leaves unclear how these are to be proven or disproven by the governmental regulator. The court did recognize that if rezoning part of a parcel to conservancy increased the value of the remaining lands, the owner's investment opportunity would be enhanced and presumably no takings would occur.

The City of Waukesha has appealed this case to the Wisconsin Supreme Court. Oral arguments will occur in March or April, 1996, with a decision expected by July, 1996.

State Wins Appeal Case

The state of Wisconsin's position was upheld in the Wisconsin Court of Appeals recently in a case involving a Hager City man who completed over \$200,000 worth of improvements to an island home in the Mississippi River floodway.

The existing home was a legal, nonconforming structure in the floodway. However, Pierce County passed a floodplain zoning ordinance in 1968 which prohibited most new structures in the floodway (including residences), and placed certain restrictions on existing, nonconforming structures.

Continued occupation and use of the home is allowed under state laws, but structural improvements and additions are limited to 50% of the structure's equalized assessed value. This limitation allows reasonable use of these properties, protecting the owner's investment, but doesn't allow unlimited expansion or improvements to the structure that would extend the structure's longevity or

increase flooding risks and other hazards to residents.

Building inspectors and state officials said Jeffrey Oskey violated these regulations, but Pierce County Circuit Judge Robert Wing had dismissed a lawsuit seeking to force Oskey to remove the violating structural additions and alterations to his Trenton Island house.

In dismissing the lawsuit, the court ruled that the state had not met its burden of proof regarding improvements made to the house. It also ruled that Oskey had not created a substantially different building because "the Oskey home was a single family residence before the construction and it was a single family residence after the construction was completed."

The 3rd District Court of Appeals overturned Wing's ruling on January 9, 1996.

At trial the state introduced evidence showing that, among other things, Oskey had moved the front wall of his house out four feet to enclose an existing deck, built a new 18 by 24-foot screened porch, and added a half-story to the house, which included a bedroom, recreation room, storage area and closet. The roof of the house was redesigned to accommodate the new half-story.

The contractor estimated the cost of the new porch was \$15,000, moving the outside wall to enclose the existing deck was an additional \$15,000, and the cost of the new story and roof alterations was \$62,000. Oskey had obtained a permit to expand his house, which limited improvements to \$18,401.

Based on this uncontested evidence, the appeals court ruled that the trial court had interpreted "substantially different" too narrowly. The appeals court concluded that

adding a new porch, enclosing an existing deck and adding a half-story to a house does create a "substantially different" building as contemplated in a recent Wisconsin Supreme Court decision, Jean E. Marris v. City of Cedarburg, 176 Wis. 2d 14 (May 11, 1993).

In Marris, the court recognized the need to balance two competing policies in dealing with nonconforming uses: the protection of property ownership rights, and protection of the community's interest in the elimination of nonconforming uses. To allow property owners to make reasonable renovations to prevent deterioration and yet limit structural repairs or alterations to ensure that these uses are gradually eliminated, the Marris court set out three guidelines to judge what should be construed as structural repairs or alterations:

- work that would convert an existing building into a new or substantially different building; or
- work that would affect the structural quality of the building; or
- proposed improvements that would contribute to the longevity of permanence of the building.

In reviewing these guidelines, the appeals court found that the improvements made by Oskey were not necessary to prevent deterioration, and were thus properly classified by the state as structural repairs or alterations, subject to the 50% rule. Oskey's records indicate that he paid the contractor a total of \$134,761.64 for remodeling and reconstruction.

Since Oskey did not dispute the contractor's cost estimates for the work performed on his house, the appeals court accepted these costs as actual costs and remanded the matter to the circuit court to determine what improvements to the house violated state and county

regulations that only allow \$18,401 worth of structural repairs and alterations.

Assistant Attorney General Shari Eggleston said the state will continue to argue that the improvements which exceed the 50% limit must be removed.

The appeals court also concluded that the state administrative laws and county code sections that restrict structural repairs and alterations in floodplains are not unconstitutionally vague.

The appeals court ruling may affect enforcement actions involving questionable building improvements against other homeowners on Trenton Island. There are about 86 structures on the island, including a some businesses.

Flood Damage Creates New Opportunity

(reprinted from River Voices, Spring 1995)

The Great Midwest Flood of 1993 took a heavy toll on the lives, businesses, homes, farms, and communities of people living in the path of disaster. The price we paid to help these folks was astronomical:

- \$4.2 billion in direct federal expenditures,
- \$1.3 billion in payments from federal insurance programs,
- more than \$621 million in federal loans to individuals, businesses and communities.

The severity of the 1993 floods led taxpayers, lawmakers and the many federal, state and local agencies that provide flood protection and disaster relief to ask a similar question: How can we afford to repeatedly pay to rebuild in places that flood over and over again?

In response, the federal government made a major shift in public policy. For the first time, a significant share of disaster funding was made available to local governments to buy out damaged structures and remove them from floodplains. Now, close to two years after the devastating floods, a number of Midwest communities are looking forward to the conversion of these "buy out" areas to public open space.

Few people who pursue the option to be bought out and move from the floodplain are motivated by desire for appropriate land use. They just want to put their lives together after a flood and avoid having to go through the ordeal again. However, a year or more into a buyout project, when negotiations with individual property owners are nearing completion, attention shifts toward the future of the buyout properties. Adjacent landowners have concerns about cleanup and use of the buyout area, and the community as a whole doesn't want it to become an eyesore. People begin to consider the possible benefits of open space.

This has been the case in Iowa, where more than \$19 million has been obligated by the State Emergency Management Division to purchase flood-damaged homes. Staff of the National Park Service Rivers, Trails & Conservation Assistance Program (NPS) are working with three towns that have requested NPS help to develop and start implementing local open space plans for flood buyouts.

One of the three towns, Cherokee, has Iowa's largest residential buyout: 187 properties in a 67-acre area along the Little Sioux River. The Little Sioux went out of its banks five times in Cherokee between April and July 1993. It had also flooded in 1963, 1965, 1969, 1983, 1984, 1987 and 1990.

Cherokee has been working for a number of years to protect and restore floodplain open space. The city has enacted and enforced strong floodplain ordinances. It has also identified the floodplain corridor as a greenbelt and encouraged private donations of land within the corridor. When the disaster declaration was made in 1993 and hazard mitigation funding became available, Cherokee was quick to act on the opportunity to further floodplain management goals through property buyouts.

For Cherokee and other Midwest towns, putting together a buyout project has been an arduous undertaking - one requiring extensive public education, communication with property owners, and coordination among many federal and state agencies.

NPS is helping Cherokee prepare the open space planning strategy for their buyout project. Rivers, Trails and Conservation Assistance staff have worked with city officials to form a local Greenspaces Advisory Committee, which is sponsoring a workshop to get people's ideas on how to use the buyout area as open space. NPS will help the Advisory Committee and the city review the ideas, compile an open space plan representative of what the community wants, and identify potential funding sources to implement the plan.

Nevada and Audubon, Iowa, other towns that NPS is assisting, have similar open space planning efforts underway for buyout areas.

Nevada has strong floodplain ordinance. There is little development along Indian Creek, which runs through town. A strategic planning effort several years ago, identified community objectives which included development of a multipurpose trail system. When 13 property owners along one portion of Indian Creek showed interest in a flood

buyout, the Parks Board recognized the opportunity to put a key trail segment in place.

NPS is helping Nevada develop a comprehensive open space plan for the Indian Creek corridor, including the buyout area. Along with trail development, residents are interested in wetland and prairie restoration and environmental education. The Parks Board is exploring opportunities to extend the open space corridor through easements with private landowners and, possibly, purchase of additional property. There is potential for a 60 to 70-acre trail/greenway system within the city limits, most of it in the floodplain.

Audubon residents are developing a plan for an 11-acre buyout area along Bluegrass Creek that will include wetland or prairie restoration for an outdoor classroom, as well as trails, a picnic area, and athletic fields.

They are also enthusiastic about the potential to link their buyout area with a nearby rail line that is being abandoned. The line, which extends 30 miles south to Atlantic, Iowa, is being considered for a segment of the transcontinental American Discovery Trail. Open space planning for the buyout has led residents to start working with the county conservation department, trail proponents in Atlantic, and statewide trail groups.

By focusing local attention on positive long-term uses of their buyout areas as open space, Cherokee, Nevada, Audubon and other Midwest communities stand to realize benefits much more far-reaching than flood damage reduction. They will be providing opportunities for multi-purpose recreation, economic and tourism development, conservation education, restoring habitat, reducing soil erosion, and improving water quality. Studies indicate they can also expect

economic benefits beyond reduced costs of future floods.

For example:

Increased property values: A study of property values near greenbelts in Boulder, Colorado, noted that housing prices declined an average of \$4.20 for each foot of distance from a greenbelt, up to 3,200 feet. In one neighborhood, this figure was \$10.20 for each foot. (Correll, Lillydahl, and Singell, 1978). The same study revealed that the aggregate property value for one neighborhood was approximately \$5.4 million greater than if there had been no greenbelt.

Reduced cost of municipal services: A South Portland, Maine study of development costs indicated that residential development cost \$1.30 in directly attributable services for every \$1 of revenue from property taxes (Ryan, 1990).

Expenditures for recreation: More than one-fourth of the total national wildlife-related recreation expenditures, \$55.7 billion in 1985, was related to bird watching and wildlife photography (U.S. Fish and Wildlife Service, 1988).

Local leaders know that open space can be a tremendous asset to their community, enhancing their city's livability, attracting residents and businesses, and fostering community pride.

EMI Offers Classes

FEMA's Emergency Management Institute is offering classes in "Managing Floodplain Development Through the NFIP" and "The Community Rating System (CRS)". The weeklong classes are held at the Institute's campus in Emmitsburg, Maryland. Tuition is free and travel stipends are available. Room and board costs are very reasonable. Each class is limited to 25 students.

The CRS course will be held June 17-21, July 29- August 2, and September 23-27. Managing Floodplain Development Through the NFIP will be held March 18-22 and June 24-28.

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