
Floodplain – Shoreland Management Notes

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Senate Approves National Flood Insurance Reform Act

by Gary Heinrichs

After months of contentious debate, SB 1405 - The National Flood Insurance Reform Act of 1994 - was approved as an amendment to the Community Development Bank Bill by the U.S. Senate on March 17, 1994. Hailed as the first comprehensive revision of the program since its inception in 1968, the bill must now be reconciled with similar House of Representatives legislation - HR 3191 - which went to the floor on May 3 and passed 330 to 66. The House version, a compromise worked out between Congressman Kennedy (D-MA) and

Congressmen Bacchus (D-FL) and Baker (R-LA), preserves most of the original bill, although all erosion-area regulation provisions were deleted and replaced with an economic impact study.

Nevertheless, the strong focus on mitigation, disaster assistance and lender compliance will likely remain intact due to last summer's record flooding and the recurrent flood disasters being experienced this spring in many areas of the Mississippi drainage basin.

The Senate bill is intended "to strengthen the NFIP and to reduce risk to the National Flood Insurance Fund by increasing compliance, providing incentives for community floodplain management, and providing for mitigation assistance." The bill also declares a new purpose to be "encouraging state and local governments and federal agencies to protect natural and beneficial floodplain functions that reduce flood-related losses."

New initiatives in mitigation policy are prominent among the bill's provisions. Grants for mitigation planning (75%-25% split) would be available to local governments provided they implement comprehensive mitigation plans. The Flood Insurance Fund would spend \$20 million a year to fund flood and erosion mitigation

activities: \$1.5 million would fund mitigation planning activities while the remaining \$18.5 million would be awarded to states and communities with approved mitigation plans to elevate, relocate or floodproof structures; construct and repair flood control structures; enact erosion control measures; and provide technical mitigation assistance. The highest preference for grant funds would be communities that have a high percentage of insured buildings, are in the CRS, and have experienced significant repetitive losses.

Flood loss reduction strategies would also be pursued through a new mitigation insurance fee which won't exceed \$50.00. The fee would help pay for the cost of complying with floodplain management standards for properties that are repetitive loss structures; have sustained flood damage which equals or exceeds 50% of the prior value of the property; or have multiple losses which demonstrate the cost-effectiveness of bringing the property into compliance with current requirements. The cost of compliance includes elevation, floodproofing, relocation or demolition.

The House version relies on mitigation grants instead of insurance. The concern is that since the mitigation insurance is part of the policy contract, it could create an unlimited draw on the Insurance Fund in the event of a major disaster and require the borrowing authority to be exercised to cover the claims. With grants, the reasoning goes, the total dollar liability is limited by the funds generated by the surcharge. Due to the difficulties encountered last summer in the grants administration process, the House will create a mechanism to involve states and communities in the program. The House version also will make individuals eligible for mitigation grants.

The Senate bill authorizes \$5 million to map erosion hazard areas, which will be an important first step in doing community assessments to determine likely erosion hazard areas; estimating the number of claims attributable to erosion; assessing the economic impact of erosion on the NFIP; and measuring the costs and benefits of expenditures from the NFIP to complete erosion mapping. Impacts on property values, tax revenues, employment, economic development, and disaster assistance if insurance in these areas is denied will also be studied.

Other changes mandated by the Senate bill include requiring the purchase of flood insurance as a condition of receiving federal disaster assistance; changing the five day waiting period for flood insurance to 10 days; providing more incentives for flood risk or erosion damage reduction through the CRS; raising maximum coverage rates; mandating a five-year periodic review for revision of flood and erosion hazard area studies; and establishing a Technical Mapping Advisory Council to make recommendations to FEMA on accuracy, quality, use and distribution of floodplain maps, standards and guidelines.

Flood Mitigation Project Update

by Gary Heinrichs

Governor Tommy Thompson approved \$1.1 million in Hazard Mitigation Grant Program funds for the City of Darlington to help pay for floodproofing 38 businesses. The structures, located in the city's historic central business district, all suffered significant flooding last summer and are plagued by structural deficiencies. Darlington has also received \$494,000 for floodproofing 27 homes and requested funds

to relocate four businesses, acquire one business, and elevate one home and one business. The city has also received about \$5 million from FmHA for relocating and rebuilding its wastewater treatment plant.

Projects in Eau Claire and Pierce counties are still under review, pending benefit/cost analyses and environmental assessment reports. The City of Bloomer has requested \$1.125 million for residential relocation projects, but proposal details are not available yet. Black River Falls is exploring the use of FEMA Public Assistance funds to pay for water supply facility improvements. Both the DNR Wastewater Management and Water Regulation & Zoning programs are working with the city to address contamination, facility demand, and floodplain issues.

Other projects under consideration include relocating homes in Vernon County out of the hydraulic shadow of 22 different dams; floodproofing and relocating 35 homes in Spring Green; relocating up to 40 homes in the Town of Wheatland, Kenosha County; and acquiring 29 homes in the City of Eau Claire; and elevating 15 homes in the Town of Saratoga, Wood County.

Sue Boldt, FEMA Disaster Recovery Officer for Wisconsin, is developing a model environmental assessment process for the mitigation program. She will be working with environmental compliance officers from DOD, DNR, SHS, and U.S.E.D.A. on the project. The State Division of Tourism has received additional money to develop "image" advertising to counteract the negative publicity generated last season during the flood events. The message will be that the water is gone, the damages repaired, and Wisconsin is open for fun and recreation as usual.

While not yet confirmed, Wisconsin is likely to receive an additional \$6.6 million in disaster recovery monies through the Community Development Block Grant program. These funds can be used for a variety of purposes, including acquisition/relocation of structures, floodproofing, stormwater retention/detention, and elevation of structures. Applications for these funds must come from the community, so if there is a floodplain project that would benefit your constituents, contact your district floodplain management specialist or Tim McClain in Madison at (608)266-0161.

Report Chronicles Tulsa's Hazard Mitigation Plan

by Gary Heinrichs

According to George Orwell's novel, 1984 signified the "Big Brother" syndrome: evil, omnipresent, intrusive big government spying on citizens and controlling thought and actions through electronic oversight.

In Tulsa, Oklahoma, however, 1984 marked the beginning of a new spirit of cooperation and positive relations between all levels of government and local citizens in resolving the city's most pervasive natural disaster nightmare: severe and recurrent flooding.

Between 1969 and 1984, Tulsa experienced nine floodplain disasters, earning the city the dubious distinction of *United States Flood Capital*. On Memorial Day weekend, 1984 - while most of the city slept - 15 inches of rain transformed sleepy Mingo Creek into a cauldron of destructive power which caused 14 deaths, 288 injuries and \$180 million in damages. People clung to rooftops in the darkness, waiting to be rescued. Cars crashed in to walls of water 10 feet high and

were sent spinning down streets like toy boats. By morning the final toll became clear: more than 6,800 homes and businesses damaged or destroyed; 7,000 vehicles damaged or destroyed; nine bridges and two streets shattered.

After this disaster, local officials decided to reassess the city's response to floods. Like many communities, Tulsa had traditionally rebuilt in place and to the same standards as before, thus insuring that residents could move back in as quickly and cheaply as possible and also guaranteeing that they would be moving out as quickly as possible during the next flood. For the 14 victims who were swept to their deaths while sleeping during the 1984 disaster, this was not an option. Not this time.

This time, Tulsa officials considered the lives lost. They considered the homes that had been flooded 10 times. They considered the homes that had been repaired at a cost more than three times the assessed value. The same homes that would be flooded again and again. The same homes whose occupants were at just as much risk as the 17 who had previously died in flood disasters. This time, they decided, it was time to end the cycle of death and destruction and put people where the floodplains weren't.

Using local and federal funds, the city acquired and relocated over 300 of the most severely damaged homes - primarily in the Mingo Creek watershed - before they were rebuilt. A moratorium on mobile home hookups was issued until the city could conduct case-by-case reviews. Eventually, the city purchased a 228 space mobile home park in one of the most flood-prone areas and converted it to green space. Since more than 6,800 buildings were damaged, a hardship committee was set up to equitably decide which owners would be bought out

with the limited funds available. Criteria used to make the decisions included danger, flood depth and velocity, damage, existing project plans, and personal crises. In some cases, owners moved their own homes to dry sites; others were moved by the local redevelopment agency to a former slum area which created a strong market that helped to stabilize the neighborhood. Some of the cleared floodplains are used for flood control works while other areas are used as open space and recreation.

A mix of local and federal funds paid for the project. Flood insurance checks for structural damages and Small Business Administration loans were allowed to be used for acquisition. The city also received Federal 1362 funds (50/50 basis). The city sold revenue bonds which were repaid with unallocated local sales tax funds to fund the city's share of the project. Federal temporary housing assistance and SBA involuntary relocation loans also were used.

While 1984 was the watershed year, so to speak, in the city's floodplain management program, Tulsa has not rested on its past achievements. The 1984 flood convinced the city to establish a comprehensive flood and stormwater management program, which includes watershed-wide land-use regulations, master drainage plans, flood control works, warning and evacuation plans, and public awareness programs. Maintenance and management are provided by a \$2.41 monthly utility fee on all residences and businesses. Both structural and nonstructural project are developed and maintained in partnership with the Army Corps of Engineers and the Federal Emergency Management Agency.

To date, the city has relocated about 875 homes from floodplains. Since 1980, Tulsa has committed more than \$100 million to

flood control projects. The city is also working with the Corps on the Mingo Creek flood control project, which includes about \$80 million in federal funds. In 1992, Tulsa received the nation's highest rating in the NFIP Community Rating System, which means that city residents have the lowest flood insurance rates in the country. The city was also honored by FEMA by being selected as the recipient of the "Outstanding Public Service Award", because of its "significant contributions and distinguished leadership" to the nation in floodplain management.

Has Tulsa's floodplain management worked? Since new regulations were adopted in the late 1970's, no structures built in accord with those regulations have experienced any flood damage. Several rains have occurred since then that would have caused flooding previously, but the system has handled them without significant damage.

Tulsa's mayor, M. Susan Savage, is satisfied with the city's progress in floodplain management, noting that "our system is still being implemented and it is keyed to a 100-year flood. We live in tornado alley and we know that larger rains will occur. We believe that, inevitably, Tulsa will flood again. But we are certain that flooding will be less frequent and damages will be reduced because of the stormwater programs that Tulsa had developed - not because we're perfect, but because this community reacted to repeated disasters by drawing together and making a hard-willed commitment to progress."

Illinois Completes Hazard Mitigation Plan

(reprinted from IASFM News)

As hard as Wisconsin was hit by the floods of 1993, Illinois suffered much greater losses. Numerous levees were breached, entire communities were flooded, and major transportation routes across the Mississippi River were stymied by the closing of bridges for a 200-mile span from Burlington, Iowa to St. Louis. Notices of interest for federal public assistance monies were filed by 187 local governments, 77 state offices, 184 special districts, and 44 nonprofit organizations. As a condition of receiving federal disaster assistance, Illinois formed an interagency team and prepared a hazard mitigation plan to prepare for future flooding disasters. The recommendations are summarized below.

1. Inventory and evaluate the impact of a catastrophic infrastructure disruption, identify alternate systems, and prepare a clearly defined plan of action to be included in County Emergency Operation Plans.
2. Perform a habitability analysis on all structures. Construction standards for repair or rebuilding of all flood damaged structures should be adopted and enforced.
3. Identify incentives for development that are compatible with the floodplain, and develop measures to discourage or prohibit inappropriate development of the floodplain. Provide incentives to communities.
4. Identify and evaluate socioeconomic impacts of relocation and other mitigation techniques.

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5. Prepare an assessment of stormwater runoff management measures in the Upper Mississippi River Watershed. Use additional structural and/or nonstructural means to reduce flooding where needed.
 6. Require routine maintenance of noncertified levees.
 7. Require the design of new and/or reconstructed infrastructure systems and critical public facilities to meet the 100 or 500 year flood protection standard as appropriate or floodproof such systems and facilities.
 8. Remove private residences from the floodplain by purchasing them through "life estates".
 9. Prohibit non-compatible floodplain development of new infrastructure and acquire or relocate noncompatible existing systems.
 10. Encourage Congress to pass the bill currently under consideration to make the Community Rating System statutory, institute mitigation funds, and enforce penalties to lenders not requiring flood insurance. Set up an education program through the Illinois Department of Insurance to teach effective marketing of flood insurance.
 11. Create a comprehensive Bill to address all floodplain management issues.
 12. Develop educational material and procedures to actively disseminate mitigation information to elected and appointed officials and legislators at the federal, state and local levels.
 13. Expand coordination and training activities to improve disaster response.
 14. Educate residents of floodprone areas on inherent dangers, and recommend standard readiness measures and procedures through public awareness programs.
 15. Convene a Governors' Conference to formulate a Basin-wide Management Authority responsible for developing a unified approach to water resource management.
 16. Provide technical and financial assistance to individual communities through a liaison.
 17. Establish a permanent consortium of federal/state mitigation personnel from all appropriate agencies to meet twice a year.
 18. Identify and secure additional mitigation funding and the organizational structure to manage it.
 19. Conduct a critique of emergency responders to gather and preserve experiences for future use.
 20. Develop a plan for temporary supply of potable water and wastewater disposal facilities, plus follow-up technical assistance.
 21. Set priorities for concurrent flood control and agricultural production objectives. Submit a report to Congress.

Extension Offering Disaster Management Program

The Disaster Management Center at the University of Wisconsin-Extension recently announced the establishment of a Disaster Management Diploma Program. The program is offered through the Department of Engineering Professional Development and is open to candidates from any educational background. Program goals stress the development of disaster/emergency management skills, technical knowledge, and preparation for new responsibilities for individuals from all levels of government and private organizations.

Working professionals will appreciate the flexibility and convenience built into the coursework. The diploma can be earned through a combination of self-study, videotape, and, if desired, on-campus courses. Workshops and seminars are regularly held to bring together practitioners from a variety of locations and disciplines. There are no engineering prerequisites for the courses.

Candidates for the diploma must accumulate 60 Continuing Education Credits (CEU) within five years. Courses already taken through the Disaster Management Center will automatically be credited toward the diploma. Other coursework may be credited if it meets certain criteria. To find out more about the program and for registration information, please contact:

Disaster Management Diploma Program
University of Wisconsin-Disaster
Management Center
Dept. of Engineering Prof. Development
432 North Lake Street
Madison, WI 53706
1-800-462-0876

The Obscure Laws of Zoning by Gary Heinrichs

A recent submittal from Gary Lepak in our Western District Office shared the ponderings of a certain individual by the name of McLaughry and that person's view of zoning: *Where zoning is not needed, it will work perfectly. Where it is desperately needed, it always breaks down.*

This, of course, begs the obvious question: How many other nuggets and pearls and words of wisdom about zoning are out there, waiting to be shared? Our staff includes a former county zoning specialist who has brightened our days with some of the "rules" that sanitary inspectors swear by. (This would include never chewing your fingernails, eating with your fingers...I think you get the drift.) What about zoning administrators, BOA members, Planning & Zoning committee members? We here at *Floodplain-Shoreland Management Notes* would like to hear your stories, sayings, thoughts to live by, amusing anecdotes, or whatever else strikes you as unique or memorable about your job. For starters, we have made up some other "Philosophies of Zoning" that might be applicable to you or your job. Help us out by sending in your own suggestions.

Donald Trump's Philosophy of Zoning: "I filed for bankruptcy because the damn zoning administrator gave out too many casino permits."

Common Philosophy on Improvements to Nonconforming Buildings: "Listen buddy, when it comes to repairing that old shack, there ain't no such thing as ordinary."

Leona Helmsley Philosophy on Improvements to Nonconforming Buildings: "Yes, I put marble walls and floors in all the

rooms. Honey, to me that is ordinary maintenance."

The Theory of Nonconforming Use 101: "If Bob and Carol and Ted and Alice can do it, so can I."

Reasonable Use for Beginners: "My wife asked me for one good reason why we can't have a deck over the lake and I couldn't think of one."

Swedish Law of Hardship: "I need a sauna right by the lake because it's too damn steep to run up the hill in the middle of winter after taking a dip."

Please send your submissions to:
Gary Heinrichs, WZ/6
DNR
P.O. Box 7921
Madison, WI 53707

Governor Signs Development Impact Fee Legislation

On April 14, 1994, Governor Tommy Thompson signed Assembly Bill 818 into law. The new law authorizes cities, villages, counties and towns to enact ordinances that contain development impact fee provisions. Beginning May 15, 1995, communities may collect impact fees if they have adopted an impact fee ordinance and if they have prepared a public facilities assessment report detailing the cost of services to be offset by the fees.

The need for statewide enabling legislation arose due to lawsuits challenging the validity of these fees in a number of Wisconsin communities. Besides the lack of statutory authority, another concern raised was the need for impact fee programs to

demonstrate a reasonable connection between the amount of money collected and the benefits provided by the improvements financed by the fees. Also, fees cannot be collected from developing areas to pay for improvements in developed areas.

The proliferation of development impact fees is related to the steady rise in property tax rates around the state, especially in rapidly developing suburban communities. While commercial and industrial development more than pays its own way when comparing new tax revenues to additional municipal expenditures, studies have shown that residential development requires between \$1.12 and \$1.54 in additional services for every dollar of new tax revenue it generates.

Before enacting an impact fees ordinance, a community must prepare a public facility needs assessment addressing these topics:

- An inventory of existing public facilities, including any deficiencies that might be corrected through the imposition of impact fees.
- An identification of new public facilities or improvement/expansion of existing facilities that will be required by land development for which impact fees may be imposed. This must be based on explicitly identified service areas and standards.
- A detailed estimate of the capital costs of providing the new or improved facilities, including an estimate of what effect recovering these costs through impact fees will have on the availability of affordable housing in the community.

Impact fees can vary among developments in a community as long as the needs

assessment identifies and justifies the differences. The fees must bear a rational relationship to the need for expanded public facilities to serve the property. The fees must be proportional among developments, shall be based on actual capital costs, and may not be used to correct existing deficiencies. Fees shall be reduced if state or federal assistance is received to pay for the relevant facilities, or if special assessments, charges, or land dedications are imposed to pay for the facilities.

Benchmark Datum Upgrade Program Needs Local Support

by Tim Fox

If Wisconsin's strong floodplain management program and technical assistance for local zoning administration is to continue, efforts such as the State Cartographer's Office (SCO) proposed upgrade of USGS Benchmark datum needs your support.

This effort, in cooperation with the U.S. Geological Survey (USGS) and the National Geodetic Survey (NGS), would involve approximately 7,000 benchmarks and useful elevations. This is not a physical monument maintenance program. Formally titled the "USGS 3rd Order Leveling Transfer Project", it would accomplish:

- the automation of USGS paper files
- the transfer of the automated (digital) USGS information to NGS
- the adjustment of the data to the North American Vertical Datum of 1988 (NAVD 88)
- the preservation of the USGS vertical control information within the NGS database

- improved availability of USGS data through NGS data publication and distribution

The USGS data is currently referenced to the National Geodetic Vertical Datum of 1929 (NGVD 29). However, NAVD 88 is now the official vertical datum for all federal and federally funded projects, including floodplain projects. The NGS will no longer support the NGVD 29 datum which is crucial since most studies are based on USGS benchmarks. If the USGS data is not adjusted to the NAVD 88 datum, its value as precise geodetic control information will diminish and no longer be of use. Since this data represents the largest coverage of vertical control, averaging over 100 elevations per county, this upgrading program is very important for effective floodplain zoning administration.

The SCO forwarded the proposal to the Wisconsin Land Information Board (WLIB), which has endorsed a questionnaire/solicitation for comments from affected parties, including county zoning administrators, land information officers and surveyors. While USGS will pay for half of the estimated \$85,000 project cost, contributions of money or staff from local governments are needed. WLIB has not yet funded statewide projects, so the assistance of other agencies is needed. Surveyors and land information officers know the value of this elevation information; it is important that local governments acknowledge the importance of keeping this information current by supporting the effort.

If you have any questions or need more information, call Tim Fox at (608) 267-9798.

Courthouse Corner

by Gary Heinrichs

Wisconsin Supreme Court: Jean E. Marris v. City of Cedarburg and the Board of Zoning Appeals for the City of Cedarburg, 176 Wis. 2d 14

(May 11, 1993)

This is an important case for all zoning officials and boards because the Court provided some guidelines for distinguishing between structural and nonstructural repairs when applying the 50% rule to nonconforming structures. The ruling has statewide significance since Cedarburg uses "nonconforming structure" language similar to that in the DNR model floodplain ordinance. Also, the Court ruled that the Board of Zoning Appeals interpretation of the term "structural repairs" should not be viewed as controlling or persuasive and that the Court should interpret the term itself, without considering the findings or judgement of the BZA.

The Court said that nonconforming use provisions attempt to balance two competing policies: the protection of property ownership rights and protection of the community's interest in the elimination of nonconforming uses. The Court stated:

"These ordinances avoid imposing undue hardship on property owners by allowing them to continue the nonconforming use of the property and to make reasonable renovations to prevent deterioration. However, to ensure that the life of the structure is not extended indefinitely and that the nonconforming use is gradually eliminated, these ordinances also limit the amount of structural repairs or alterations property owners can make."

The Court rejected Marris' interpretation that structural repairs or alterations means only changes of supporting members of a structure such as foundations, bearing walls, columns, beams or girders. It also rejected the Board's finding that anything not considered ordinary maintenance is a structural repair. Acknowledging the difficulty in distinguishing between structural and nonstructural repairs, the Court chose to set out some general guidelines while cautioning that each case must be decided on the precise language of the applicable law and the particular facts in the case. It construes as structural repairs:

- 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 or permanence of the building.

The Court noted that its characterization of structural repairs allows a property owner to modernize the facilities. Such improvements as new ceilings, light fixtures or mechanical systems are necessary to prevent deterioration and maintain a structure in good repair, but may also extend the life expectancy of the nonconforming use. The Court stated:

"Repairs that are reasonably necessary to prevent deterioration might not be classified as structural repairs. It is in the community's interest that buildings be maintained in good, safe and sanitary condition. We recognize that any modernization or maintenance carries with it some possibility of extending the life expectancy of the nonconforming use. Yet, in order to respect ownership

rights, some modernization and maintenance must be permitted."

Implications for Local Zoning Programs

This decision should not have major impacts on a municipality's administration of nonconforming zoning regulations. For communities using the DNR model floodplain ordinance nonconforming language, the decision recognizes the category of "ordinary maintenance and repairs" (referred to by the Court as nonstructural repairs) as distinct from "structural repairs" and only adds a few more examples of what might be included in that category. Regardless of the language in the municipalities' ordinance, the Court provided some guidance in deciding these cases:

- that while a court decided the meaning of an ordinance (because the meaning of words in an ordinance presents a question of law), courts give varying degrees of deference to agency interpretations of a law (or ordinance) and frequently refrain from substituting their interpretation for that of the agency charged with administration of the law; and
- that each case turns on the precise language of the applicable law (ordinance) and the particular facts before the court; and
- that any decision regarding the application of an ordinance provision must be in terms of the purpose of the type of ordinance, the language of the ordinance, and the proposed improvement.

Wisconsin Supreme Court: State of Wisconsin ex rel Warren E. Hodge v. Town of Turtle Lake, No. 92-1807, (December 7, 1993)

In this case, the Town Supervisory Board deliberated in closed session on Hodge's permit application to store junked automobiles. The Board relied on the authorization in sec. 19.85 (1) (a), Stats., which states that a closed session may be held for "deliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body."

The nexus in this matter was the definition of "case." When Hodge challenged the Board's authority to deliberate in closed session on this matter, the Court of Appeals ruled for the Board, noting that the exemption in statutes "authorized the closed deliberation because the power of a municipal corporation to issue permits is a quasi-judicial function", citing Allstate Ins. v. Metropolitan Sewerage Comm., 80 Wis. 2d 10, 17, 258 N.W.2d 148 (1977).

The Wisconsin Supreme Court, in reversing the Court of Appeals judgment, sought to liberally construe the Open Meetings Law to achieve the purpose of providing the public with the fullest and most complete information possible regarding the affairs of government. The language - "concerning a case" - was added to the statutes in 1977. Previously, closed sessions were allowed after any quasi-judicial trial or hearing. The Court determined that this language was added to clarify the legislature's intention to limit the exemption. It stated, "any other construction of the language would render the word 'case' superfluous, a result which we are to avoid in construing a statute. Had the legislature intended to allow any quasi-judicial function to be exempted from the

Open Meetings Law it need not have added the language 'concerning a case' in the 1977 revision since the draft in effect before 1977 which allowed closed deliberations after any quasi-judicial trial or hearing clearly accomplished that purpose."

The Court cited Black's Law Dictionary for a definition of "case": "A general term for an action, cause, suit, or controversy, at law or in equity...A judicial proceeding for the determination of a controversy between parties..." It also referred to Lamasco Realty Col. v. Milwaukee, 242 Wis. 357, 381, 8 N.W.2d 372 (1943), in which "case" is associated with matters of fact or conditions involved in a controversy. Finally, Wisconsin's Administrative Procedure and Review Act defines "contested case" in sec. 227.01(3), Stats., as "an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order."

Implications for Local Zoning Programs

Most routine deliberations (permits, variances, etc.) by local government bodies cannot meet the new definition of "case" advanced in the Hodge decision by the Wisconsin Supreme Court. Therefore, DNR recommends that local government bodies deliberate zoning decisions in open sessions whenever possible. Many local zoning boards of adjustment/appeals have always deliberated in open session, closely following the intent of Wisconsin's Open Meetings Law, which declares that it is state policy that the public is entitled to the fullest and most complete information regarding the affairs of government. Of course, other exemptions for convening in closed session (described in sec. 19.85 (1), Stats.) are still

allowable. This would include conferring with legal counsel for matters affecting the government body; employment and licensing matters; financial, medical, social or personal information; and conducting public business with competitive or bargaining implications.

The Book Nook

"Law of the Land Review" is an occasional report to local government officials regarding regulations and policies for natural resources management. Don Last, Extension Natural Resource Policy Specialist at UW-Stevens Point, began the series of concise reports in 1986. Recent reports have addressed development impact fees, Oregon state's land use program, and floodplain management policies. "Law of the Land Review" is distributed through Extension Community Natural Resource and Economic Development Agents. Contact your county extension office to be added to the distribution list.

USUFRUCT

(Thanks to Jim Burgener)

A memorable word with a memorable definition: "The right to utilize and enjoy the profits and advantages of something belonging to another so long as the property is not damaged or altered in any way." Thomas Jefferson wrote "The earth belongs in usufruct to the living." Over 200 years ago, then, Jefferson advocated that while we could enjoy the profits and advantages of owning land, usufruct required that we leave it in its natural state - undamaged and unaltered. The concept then, that land belongs to the "living" (ie, the public), is not

- as some would have us believe - the product of a modern, overreaching and overly restrictive bureaucracy. Rather, it was a principal ethos of one of our nation's key founders and democratic philosophers. The Public Trust Doctrine - upon which floodplain, shoreland and wetland regulations are based - is really based on the principle of usufruct.

When you come down to it, one of the principle reasons land use law exists is to promote and enforce the principles of usufruct. The possibilities for using this word are endless. When a board denies a permit to fill a wetland, they can say they were "fulfilling their usufructuary obligation". When a landowner finally understands the reasons for not building closer than 75 feet to a lake, we can refer to them as being "in a usufructian way." When someone removes an illegal boathouse under threat of court action, they can be said to have been "usufructally coerced." All in all, a good word we can use to promote wise land use and our role as protectors of natural resources.

Just What Exactly is Fish Habitat?

By Lee Kernen, Director, DNR Bureau of Fisheries Management

A destructive summer thunderstorm swept through southern Wisconsin last year, and early the next morning you could hear the roar of the chain saws all over the area as people cleaned up their yards. It was amazing to see the progress.

By the late afternoon hug piles of brush lined the streets and even the shredded green leaves were raked up. The area was almost back to normal. Such pride in homes and property is great to see, but it doesn't do so

well when applied to where fish and wildlife live.

Picture a wilderness lake in your mind and what do you see? Numerous logs lie along the shore with their craggy limbs all green and mossy. Huge cedar trees lean way out over the water, defying gravity and casting a shadow on the water. Along the shore grows a bed of bulrush, their pencil-sized stems marching right up the shore. Lily pads grow nearby, and under the surface lie unseen beds of aquatic vegetation, their bright green swirls hiding the soft muck bottom.

The whole scene fairly reeks of fish – a large northern pike lives under the log near the cedar. A school of perch dart under the lily pads. Further up the bank, about 500 newly-hatched crappies, about 1-inch long, live in less than 3 inches of water among the bulrush. A pack of 6-inch largemouth bass lurks nearby waiting for one of the nearly transparent fingerlings to venture out beyond the cover of the bulrush.

All these places where fish live are called habitat. The logs, the shady spot under the cedar, the bulrush and the underwater weeds, and a thousand other places in the lake, provide food and hiding spots for two dozen different species of fish, several species of frogs, and numerous kinds of aquatic insects.

Now let's take a look at many of our lakes in Wisconsin. All the logs have been pulled out long ago because they might damage a propeller on an outboard motor. The leaning cedars are gone and replaced with a white dock. The aquatic vegetation has been pulled out and the mucky bottom covered with sand to make a beach. Very little of anything can live on or in the sand. The bulrush is gone and a concrete wall extend 2

feet out in the lake. No crappies live here because they can't hide from the bass – the bass are gone too.

The lakeshore looks nice and neat just like our pretty Wisconsin cities – but nature has suffered fiercely. Many of those lakes have a serious lack of habitat needed by fish during the first few weeks of their life. Just as city wildlife needs a refuge or park to hide in, many of our lakes could use some “wild shoreline” where limbs and logs lie in the water, where mucky bottoms grow

dragonfly nymphs, and where calm, shallow water only inches deep warms quickly in the sunshine, providing a safe sanctuary for all kinds of fragile creatures.

That is what fish managers mean by good habitat. Please think about that the next time you have an urge to clear aquatic vegetation or alter the shoreline in front of your lakeshore home. And when the next tree falls in the lake off your property, maybe you could leave the chain saw in the garage?

Bureau of Water Regulation and Zoning
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