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Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

Please Route to:

Inside This Issue

1

Floods & Floodplains

12

The Ordinary High Water Mark

Water's Edge: Floodplains & the Ordinary High Water Mark

Awareness of floodplain regulations is critical for floodplain property owners as well as those contemplating the purchase of a property lying partially or completely within a floodplain. REALTORS® should also be familiar with the National Flood Insurance Program (NFIP), lender requirements for flood insurance and the terms and conditions of flood insurance policies. Anyone owning or working with a waterfront property also should be aware of the concept of the ordinary high water mark (OHWM) and its ramifications relative to property taxation, zoning regulation and use of the water and shoreline.

This *Legal Update* examines two issues pertaining to the water's edge: floodplains and the OHWM. The *Update* reviews basic floodplain terminology, the purpose of floodplains, how a REALTOR® or consumer can determine if a property is in a floodplain and the development restrictions that apply to floodplains. The national flood insurance system and revisions to floodplain mapping are examined in detail. A chart of floodplain terminology and a chart of floodplain acronyms are included for easy reference. The origins, determination and consequences of the OHWM are also discussed. Each topic includes a section of Legal Hotline questions and answers.

Floods and Floodplains

The NFIP defines a flood as, "A general and temporary condition of partial or complete inundation of two or more

acres of normally dry land area or of two or more properties (at least one of which is the policyholder's property) from:

- Overflow of inland or tidal waters; or
- Unusual and rapid accumulation or runoff of surface waters from any source; or
- Mudflow; or
- Collapse or subsidence of land along the shore of a lake or similar body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels that result in a flood as defined above."

In other words, a flood is an excess amount of water (or mud) on land that's normally dry.

Floods are the most common natural disaster in the United States and Wisconsin is 10th in the nation in documented flood damage. In Wisconsin, the primary cause of floods is excessive rain, snowmelt or a combination of the two. Floodplains are typically lowland areas adjacent to lakes, wetlands and rivers that are covered by water during a flood.

Before 1968, floodplains were generally not regulated and flood insurance was not available to people living in flood-prone areas. In 1968, Congress passed the National Flood Insurance Act and created the NFIP. Under the NFIP, flood insurance is made available to residents of communities that agree to adopt minimum building

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and zoning regulations for development in flood-prone areas. The primary standard under the NFIP is that new structures (or substantial improvements to existing structures) must be elevated so that the lowest floor of the entire structure (including basement) is above the elevation of the one-percent (1-%) chance flood, that is, the flood that has a 1-percent (1-%) chance of occurring in any given year. Wisconsin law also requires communities to zone their flood-prone areas to protect people and property, and the floodplain management standards of the NFIP and Wisconsin are very similar.

Despite the risks and costs, people continue to build in floodplains. To be located in floodplains, structures must not only be elevated above the flood protection elevation (FPE), but they must be placed so as to not diminish the ability of the floodplain to carry and store flood water. Therefore, the decision to buy an existing residence or build a new residence in the floodplain must be approached with great care.

Floodplains, Floodways and Flood Fringes

“The **floodplain** is that land which has been or may be covered by floodwater during the regional flood. The floodplain includes the floodway and flood fringe areas.

The **floodway** is the channel of a river or stream, and those portions of the floodplain adjoining the channel required to carry the regional flood discharge. The floodway is the most dangerous part of the floodplain – it is associated with moving water.

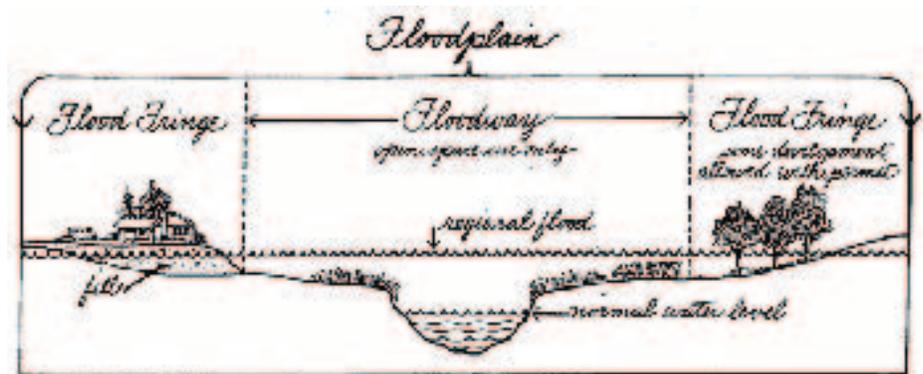
The **flood fringe** is the portion of the floodplain outside of the floodway, which is covered by floodwater during the regional flood. The term, 'flood fringe' is generally associated with standing water rather than flowing water. It is also that part of the floodplain in which development is allowed subject to the floodplain development standards.

The **regional flood** is the same as the 100-year flood, the 1-percent (1-%) chance flood, or the base flood (FEMA).

The **regional flood elevation** is the elevation determined to be representative of large floods known to have occurred in Wisconsin or which may be expected to occur on a particular lake, river, or stream at a frequency of 1-percent (1%) during any given year.

The **flood protection elevation** is an elevation which is two feet above the regional flood elevation.”

(The above text is from the DNR's Web site: www.dnr.state.wi.us/org/water/wm/dsfm/flood/standards.htm.)



The floodplain diagram is from the DNR's Web site: www.dnr.state.wi.us/org/water/wm/dsfm/flood/standards.htm.

Benefits and Purpose of Floodplains

One of the goals of floodplain management is to minimize the threat to life and property resulting from flooding by promoting the preservation of floodplains for carrying and storing floodwaters and encouraging property owners to mitigate their flood risk by elevating, relocating or otherwise flood-proofing their structures. Floodplains often contain wetlands and other areas important to a diverse, healthy ecosystem. Ideally, floodplains should be open spaces used only as natural areas, trails, ball fields and golf courses. Such areas provide opportunities for hunting, fishing and other recreational activities.

The values and benefits of undeveloped land located in floodplains include:

- Flood damage reduction
- Recreational opportunities
- Habitat for plants and animals
- Water pollution reduction
- Stormwater management
- Erosion control
- Preservation of cultural resources
- Outdoor education

Is It in a Floodplain?

How does a person know if a property is in a floodplain?

1. The first place to start is the community's local floodplain zoning administrator or building inspector. This person is knowledgeable about the specifics of the community's floodplain zoning ordinance. The local official should have a copy of the floodplain map and study for the community. These maps and studies are usually the official source of information about whether a structure is located in the regulatory floodplain. They can determine whether a property is located in the floodway, the flood fringe or the general floodplain

area. The local official should also have a copy of any LOMAs, LOMRs and Elevation Certificates.

2. Insurance agents are good resources because most insurance companies write flood insurance policies for the NFIP. Insurance agents can quote rates for flood insurance based on the location and elevation of the structure.
3. Lenders are another source of information. If a person is borrowing money to purchase or refinance a property, the lender is responsible for determining whether the property is located in the floodplain for flood insurance purposes and informing the purchaser of the flood zone determination. If a structure is located in a floodplain, flood insurance is required to close the loan unless a LOMC has been issued.
4. The DNR regional staff person in the area or the DNR floodplain management staff in Madison are also available to answer questions about owning, buying or building a home in the floodplain. They are familiar with other rules that may apply to the property, such as shoreland management zoning and public waters/wetland rules. Contact information for DNR regional offices can be found at: www.dnr.state.wi.us/staff-dir/SearchDNREmp.asp.

Not all communities have been designated by FEMA as flood-prone, so some do not have maps that show floodplains. Also, landowners should be aware that communities may contain substantial areas that are subject to flooding, but are not indicated as flood-prone on the official maps.

Floodway Development Restricted

New development is prohibited in floodway areas due to the water depth and velocity during flood events. Anyone purchasing a lot along a watercourse should check to ensure that there is a buildable area outside the floodway.

Because the floodway area can be very dangerous during a flood, most structural development is not allowed. Certain activities and uses, however, are allowed provided they meet certain strict criteria:

- Certain structures accessory to open space or historical areas
- Campgrounds
- Certain uses permitted by the Wisconsin DNR pursuant to permits granted under the procedures of Wis. Stat. Ch. 30 and 31
- Conditional uses and variances may occasionally be granted upon satisfaction of strict criteria.

What ISN'T Allowed in the Floodway:

- All structures intended for human habitation
- Storage of materials that are buoyant, flammable, explosive or injurious to human, animal, plant, fish or other aquatic life
- Sewage systems or wells
- Solid or hazardous waste disposal facilities
- Wastewater treatment pond or facilities except as otherwise permitted by the Wis. Admin. Code
- Fill which would cause an obstruction to flood flow

Any structure built prior to the original adoption of the local floodplain zoning ordinance that is not in compliance with current floodplain regulations is defined as a nonconforming structure. Most nonconforming structures are subject to the 50-percent (50%) rule, which states that if the cumulative value of structural modifications, repairs and additions exceeds 50 percent (50%) of the structure's current equalized assessed value (EAV), the entire structure must be brought into compliance with current floodplain regulations.

Owners or purchasers of floodway structures should be aware that structural improvements are limited because they may block the flow of a flood, leading to additional damage. Ordinary maintenance and repairs are allowed without limit. There are also restrictions on repairing damaged structures. If the cost of repair including labor from any type of damage is less than 50 percent (50%) of the structure's pre-damage EAV, then the structure may be repaired to its pre-damage condition.

If the damage to a floodway structure from a flood equals or exceeds 50 percent (50%) of the structure's pre-damage EAV, the structure must meet the current local ordinance standards. This means the structure must be moved out of the floodway. If the damage to a floodway structure is caused by a source other than flooding and the damage equals or exceeds 50 percent (50%) of the pre-damage EAV, the structure may be restored to its pre-damaged condition. However, the structure must meet minimum NFIP standards. For example, the lowest floor and utilities must be elevated to the regional flood elevation (RFE), and must be constructed using flood resistant materials. If the rebuilt structure violates the applicable floodplain ordinance, the owner could be subject to legal action by the community.

Flood Fringe Development

Most activities and uses are permitted in the flood fringe, provided they meet certain development standards:

- Residential, commercial, manufacturing and industrial uses
- Accessory uses (to those mentioned above)
- Storage of materials
- Public utilities and infrastructure
- Private sewage systems and wells

- Conditional uses and variances may occasionally be granted upon satisfaction of strict standards.

Solid or hazardous waste disposal facilities are not allowed in the flood fringe.

Wisconsin flood fringe development standards for new construction include the following requirements:

- Lowest floor elevated on fill must be two feet or more above the RFE (basement floor can be at RFE)
- Fill must be one foot or more above RFE
- Fill must extend 15 feet beyond the structure
- Structure must have dryland access
- Local ordinances may be more restrictive

The requirement for structures to be at least two feet above the RFE (or the base flood evaluation (BFE) as shown on a Flood Insurance Rate Map (FIRM)) creates a flood protection elevation (FPE) that is higher than the minimum federal requirements. This two-foot "freeboard" used in Wisconsin to arrive at the FPE

requirement is important to property owners for several reasons. Wisconsin has adopted the freeboard standard to protect life, health and property in dangerous floodplain areas. Because flood insurance rates are based on the elevation of a structure's lowest floor including basement, the freeboard standard also lowers a property owner's flood insurance costs dramatically. If flood elevations rise when an area is re-mapped, the freeboard standard acts as a safeguard or buffer to ensure that existing structures do not become nonconforming and therefore subject to limitations on repairs and remodeling and potential lowering of market value.

Additions and modifications to nonconforming structures in the flood fringe are allowed with certain restrictions. An addition or modification cannot raise existing flood elevations, as determined through a study by a licensed engineer, and must have a low flood damage potential. Therefore, any additions or modifications that go beyond the boundaries of the

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existing structure's footprint must be elevated or flood-proofed to the FPE.

Limits are placed on the total cost for additions and modifications to nonconforming structures. If the cost limits are exceeded, the structure must meet all current zoning requirements. For flood fringe properties, this means the structure must be elevated to the FPE and have dryland access.

Flood Insurance

A structure located in a flood zone (also referred to as a Special Flood Hazard Area, or SFHA) has a 26-percent (26%) chance of being damaged by a flood over a 30-year mortgage. Standard property/casualty insurance policies do not cover damage caused by flooding. However, any property owner or renter in a community that participates in the NFIP can purchase flood insurance, whether or not the property is in the floodplain. See a list of the Wisconsin communities participating in the NFIP at www.fema.gov/cis/WI.pdf.

For virtually every mortgage transaction involving a structure in the United States, the lender reviews the current NFIP maps for the community in which the property is located to determine whether it is located in a published SFHA and completes a Standard Flood Hazard Determination form. If the lender determines that the structure is within an SFHA and the community is participating in the NFIP, the borrower is notified that flood insurance will be required as a condition of receiving the loan. A similar review and notification is completed whenever a loan is sold on the secondary loan market.

The Flood Disaster Protection Act of 1973 and the National Flood Insurance Reform Act of 1994 mandate the purchase of flood insurance as a condition of federal or federally related financial assistance for the acquisition or construction of buildings in SFHAs. The purchase

of flood insurance on a voluntary basis is also frequently wise for properties near but outside of SFHAs.

The Acts prohibit federal agency lenders, such as the Small Business Administration (SBA) and United States Department of Agriculture (USDA)'s Rural Housing Service, and government-sponsored agencies such as Freddie Mac and Fannie Mae, from making, guaranteeing or purchasing any loan secured by improved real estate or mobile homes in an SFHA, unless flood insurance has been purchased and is maintained during the term of the loan. The Acts also apply to lenders under the jurisdiction of federal regulatory entities such as the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Office of Thrift Supervision, the National Credit Union Administration and the Farm Credit Administration. These federally regulated and related lenders are required to escrow for flood insurance premiums.

Flood insurance is not required for conventional loans made by federally regulated lenders when the community in which the building is located does not participate in the NFIP. In addition, federal flood insurance also is generally not available for new construction or substantially improved structures, but federally regulated lenders will make conventional loans for these properties. In these cases, the lender is required to notify the borrower that, in the event of a flood disaster, federal disaster assistance will not be available for the permanent repair or restoration of the building. Federally regulated or insured lenders are required in all cases to notify the borrower when the building being used to secure a loan is in an SFHA.

Flood Insurance Rate Maps

Each community that chooses to participate in the NFIP works closely with FEMA to col-

ACRONYMS

Floodplain management uses many acronyms. The following is a list of the most commonly used acronyms.

BFE:	Base Flood Elevation
BOA:	Board of Appeals or Adjustment
CRS:	Community Rating System
DFIRM:	Digital Flood Insurance Rate Map
DNR:	Department of Natural Resources
EAV:	Equalized Assessed Value
FEMA:	Federal Emergency Management Agency
FIRM:	Flood Insurance Rate Map
FIS:	Flood Insurance Study
FPE:	Flood Protection Elevation
LOMA:	Letter of Map Amendment
LOMC:	Letter of Map Change
LOMR:	Letter of Map Revision
LOMR-F:	Letter of Map Revision Based on Fill
NFIP:	National Flood Insurance Program
NSFHA:	Non-Special Flood Hazard Areas
OHWM:	Ordinary High Water Mark
RFE:	Regional Flood Elevation
SFHA:	Special Flood Hazard Area

Definitions

Floodplain management uses many different terms. The following is a list of floodplain terminology.

- ▶ **100-year Floodplain:** The boundary of a flood that has a 1-percent (1%) chance of being equaled or exceeded in any given year.
- ▶ **Accessory Structure:** A detached subordinate structure that is incidental to the principal structure and is located on the same lot as the principal structure.
- ▶ **Basement:** Any enclosed area of a building having its floor sub-grade (below ground level) on all sides.
- ▶ **Base Flood Elevation:** Terminology used for the regional flood elevation on a flood insurance rate map.
- ▶ **Board of Appeals/Adjustment:** A locally appointed board authorized to hear and approve requests for variances, special exceptions or appeals of decisions made by the local zoning official.
- ▶ **Certificate of Compliance:** A document issued by a community certifying that the construction of a building, the elevation of fill or the lowest floor of a structure is in compliance with all ordinance provisions.
- ▶ **Development:** Any change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials.
- ▶ **Digitized Flood Insurance Rate Map:** The Flood Insurance Rate Map in an electronic format.
- ▶ **Equalized Assessed Value:** The value of a structure or parcel of property as determined by the local assessor with any adjustments made to account for an assessment that does not reflect full value.
- ▶ **Federal Emergency Management Agency:** The federal agency that provides emergency disaster services and administers the National Flood Insurance Program.
- ▶ **Flood Fringe:** The floodplain area outside of the floodway that is covered by standing floodwater during a regional flood.
- ▶ **Flood Insurance Rate Map:** The official map of a community showing the Special Flood Hazard Areas and the risk-premium zones (100- and 500-year elevations, floodway/fringe boundaries). Information on the map is based on historic, meteorological, hydrologic and hydraulic data as well as open-space conditions, flood-control works and development.
- ▶ **Flood Insurance Study:** An engineering examination, evaluation and determination of the local flood hazard areas. The study is the basis for the flood maps.
- ▶ **Floodplains:** The lowland areas adjacent to lakes, wetlands and rivers that are covered by water during a flood. For floodplain management purposes, the floodplain is the area covered by a flood that has a 1-percent (1%) chance of occurring in any given year, or the 100-year flood. In Wisconsin, the floodplain is officially mapped as the floodway, flood fringe or general floodplain.
- ▶ **Flood Protection Elevation:** In Wisconsin, an elevation of two feet above the regional flood elevation. The regional flood elevation is shown as the base flood elevation on a Flood Insurance Rate Map.
- ▶ **Flood proofing:** Any modifications to properties and structures subject to flooding for the purpose of reducing or eliminating flood damage.
- ▶ **Floodway:** The channel of a river and the immediately adjacent areas required to carry the regional flood discharge. The floodway is the area that experiences the deepest water and the highest flow velocities.
- ▶ **Freeboard:** Freeboard is a safety factor expressed in terms of feet added to the current effective base flood elevation on the Flood Insurance Rate Map. Freeboard is intended to allow for uncertainties in analysis, design and construction; compensates for factors such

(continued on page 7)

lect the information needed to create an accurate Flood Insurance Rate Map (FIRM) and conduct a Flood Insurance Study (FIS) of the region to identify the community's risk levels. The FIS includes statistical data for river flow, storm tides, rainfall and topographic surveys, as well as hydrologic and hydraulic analyses. After examining the FIS data, FEMA and the NFIP create a FIRM delineating the different areas of flood risk that can be used for floodplain management

and insurance purposes. The FIRM and FIS are used to determine flood insurance rates for property owners.

A FIRM will generally show a community's base flood elevations, flood zones and floodplain boundaries, and give a reliable indication of the flood zone in which a property is. Digital versions of these maps are called DFIRMs.

A FIRM will show where the areas at high risk for flooding are located – these are referred to as

floodplains or SFHAs. The FIRM will also show Non-Special Flood Hazard Areas (NSFHA), that is, areas that are in a low- to moderate-risk flood zone. A property in a NSFHA is not in any immediate danger from flooding caused by overflowing rivers or hard rains, but the structure is still at risk. One out of four floods occur in a NSFHA.

Properties in floodplains, or SFHAs, are at a high risk for flood damage.

Definitions (continued)

as ice jams, debris accumulation and the obstruction of bridge openings and floodways; and provides greater protection against flash flooding, headwater flooding and backwater flooding. For example if the current base flood elevation at a location is 14 feet above sea level and the community adopts a three-foot freeboard, then new, substantially improved and damaged buildings would have to have their lowest levels elevated to 17 feet above sea level, which would then be the flood protection elevation.

- ▶ **Letter of Map Amendment:** An official amendment by letter to an effective FEMA map. This establishes a property's location in relation to Special Flood Hazard Areas.
- ▶ **Letter of Map Revision:** An official revision by letter to an effective FEMA map, which may change flood insurance risk zones, floodplain boundary delineations, planimetric features, or base flood elevations.
- ▶ **Letter of Map Revision Based on Fill:** An official revision by letter to an effective FEMA map, which is caused by the placement of fill on the property and which may change flood insurance risk zones, floodplain boundary delineations, planimetric features or base flood elevations.
- ▶ **Manufactured/Mobile Home:** A building transportable in one or more sections that is built on a permanent chassis and is designed for use with or without a permanent foundation when attached to utilities. Includes "double-wides." Does not include recreational vehicles.
- ▶ **Mobile Recreational Vehicle:** A recreational vehicle that is carried, towed or self-propelled; is licensed for highway use (if registration is required); and is always capable of being driven or towed by a licensed vehicle.
- ▶ **National Flood Insurance Program:** A federal program that makes flood insurance available to owners of property in participating communities nationwide through the cooperative efforts of the federal government and the private insurance industry. The National Flood Insurance Program encourages state and local governments to exercise sound floodplain management to reduce losses caused by flooding.
- ▶ **Nonconforming Structure:** An existing lawful structure that is not in conformity with the dimensional or structural requirements of ordinances adopted after the structure's construction.
- ▶ **Ordinary High Water Mark:** The point on a bank or shore up to which the presence and action of surface water is so continuous as to leave a distinctive mark by erosion, destruction or prevention of terrestrial vegetation, predominance of aquatic vegetation or other easily recognized characteristic.
- ▶ **Regional Flood Elevation:** The water surface elevation shown on a floodplain map that has a 1-percent (1%) chance of being equaled or exceeded in any given year, also sometimes referred to as the 100-year flood. The regional flood elevation is shown as the base flood elevation on the Flood Insurance Rate Map.
- ▶ **Structure:** Any man-made object with form, shape and utility either permanently or temporarily attached to or placed on ground, a riverbed, a streambed or a lakebed.
- ▶ **Subsidence:** A gradual settling or sudden sinking of the Earth's surface owing to subsurface movement of earth materials. Land subsidence is the lowering, settling or sinking of the ground relative to a fixed reference point such as sea level.
- ▶ **Substantial Damage:** Damage of any origin sustained by a structure where the cost of restoring the structure to its pre-damaged condition would equal or exceed 50 percent (50%) of the market value of the structure before the damage occurred.

Some floodplains experience frequent flooding, while others are affected only when there is a severe storm. For properties in the floodplain or SFHA, it's not so much a question of *if* a flood will damage the property as *when*. A home in an SFHA has a 26-percent (26%) chance of being flooded over a 30-year period, as compared to a 9-percent (9%) chance of suffering a fire. In other words, the property is three times more likely to be damaged by a flood than a fire.

FEMA's Floodsmart Web site has a feature where a property owner can enter his or her address and find out the relative flood risk for the property, based upon the DFIRMS. Visit www.floodsmart.gov/floodsmart/pages/riskassessment/findpropertyform.jsp. If the area where the property is located does not yet have digitalized FIRMS, however, a result may not be generated.

Purchasing Flood Insurance

A lender making, renewing, increasing, or extending a loan, or at any time during the term of the loan, may inform the builder, potential buyer or borrower that the building is in an SFHA and that flood insurance must be purchased. Sometimes a property owner or renter simply becomes concerned with the risk of flooding and elects to purchase flood insurance.

A flood insurance policy may be purchased from any licensed insurance agent or broker who is in good standing in the state in which the agent is licensed, if the property is located in a community that belongs to the NFIP. Flood insurance may also be available from an insurance company participating in the FEMA "Write Your Own" Program. For more information on this program, visit www.fema.gov/business/nfip/wyo.shtm.

Flood Insurance Coverage

Homeowners can purchase flood insurance coverage for up to \$250,000 for structural damage for a one- to four-family structure and up to \$100,000 for contents. Renters also can purchase up to \$100,000 for contents coverage. Businesses can purchase up to \$500,000 in building and \$500,000 in contents coverage. Flood insurance is also available for condominiums. However, separate policies must be purchased for the common areas and the individual units. Group policies are available.

Flood insurance covers a home's foundation elements and the equipment necessary to support the structure such as the furnace, water heaters, circuit breakers, etc. Other basement items, such as a washer and dryer, chest freezer, finished walls, ceilings and floors and stored personal belongings, would be covered only under contents coverage. For a complete list of what's covered, review the different flood insurance policy forms online at www.fema.gov/business/nfip/sfip.shtm.

Coverage is provided if waves or currents from an adjacent lake cause the property to sink, as well as for damage caused by sewer or drain backup or overflows from a sump pump, if the event is a direct result of flooding. Seepage or leaks in the home are not covered. Flood insurance specifically excludes wind and hail damage, but most homeowners' insurance policies provide this coverage.

Flood insurance policies typically are for a one-year term. For structures located in the floodplain, flood insurance should be purchased for the full replacement cost of the structure.

Owners of residential and non-residential properties in low or moderate risk areas may consider the Preferred Risk Policy as a lower cost flood insurance option. This program offers multiple coverage combinations for both buildings and contents (or contents only for renters) that are located in the B, C and X Zones and that meet eligibility requirements based on the building's entire flood loss history. For example, for just \$112 a year, homeowners can purchase a minimum of \$20,000 building and \$8,000 contents coverage (\$25 more if there is a basement). For more information about this program, visit www.floodsmart.gov/floodsmart/pages/prp.jsp.

On the other hand, some property owners may wish to purchase more flood insurance than the NFIP offers. These owners may wish to investigate private insurance companies that offer excess flood protection coverage.

All flood insurance policies have a rider for Increased Cost of Compliance (ICC). The ICC rider provides policyholders with up to \$30,000 to assist with the cost of bringing substantially damaged homes or businesses into compliance with local floodplain ordinances. The rider becomes effective only if the structure has suffered flood damage equaling or exceeding 50 percent (50%) of its EAV.

There is a standard 30-day waiting period, from date of purchase, before a new flood policy goes into effect. However there are some exceptions to the 30-day waiting period:

- A lender requires flood insurance in connection with the making, increasing, extending or renewing of a loan
- An additional amount of insurance is required as a result of a map revision

- Flood insurance is required as a result of a lender determining that a loan, which does not have flood insurance coverage, should be protected by flood insurance
- An additional amount of insurance is being obtained in connection with a policy renewal

Flood Insurance Premiums

A number of factors are considered when determining flood insurance premiums. These factors include the amount and type of coverage being purchased, the location and flood zone and the design and age of the structure. For homes in high-risk areas built after the first FIRMs were drawn for that community, the elevation of the building in relation to the BFE is also required. Consumers can estimate what their annual flood insurance premium would be and see the factors that impact the rating and underwriting decisions online at www.floodsmart.gov/floodsmart/pages/premiumest.jsp. To obtain precise premium quotes, however, consumers must contact their insurance agent.

Communities interested in reducing flood insurance costs for property owners and residents should consider joining FEMA's Community Rating System (CRS). The CRS is an incentive program that rewards the adoption of progressive flood protection practices by reducing flood insurance premiums by up to 45 percent (45%). Mitigation efforts that go above and beyond the basic requirements of the NFIP are evaluated and given a class number. Class 10 receives no premium reduction and is given to any community that is in full compliance with the rules and regulations of the NFIP, but has not yet earned or received a lower CRS rating. The lower a community's CRS rating, the lower the risk of flooding and the lower the premium rates for individual property owners in the community. Class 1 requires the most credit points and awards the highest premium reduction.

Flood mitigation measures that earn CRS credit for a community generally include the adoption of zoning ordinances, subdivision regulations, rules for building in floodplains and special-purpose floodplain ordinances all designed to prevent flood risks. Credit is also given for public information activities such as the provision of elevation certificates, flood zone information distribution, hazard disclosure requirements, flood protection information and flood protection assistance. Detailed flood data, open space preservation, stormwater management, floodplain management, drainage systems maintenance, flood warning programs and dam safety also all earn credit for the community.

The CRS is explained in detail in the document online at www.fema.gov/pdf/nfip/manual200610/19crs.pdf. Pages 28-29 of that document list the Wisconsin communities participating in the CRS program and the flood insurance premium discounts earned for properties in those communities.

Floodplain Mapping Modernization

Floodplain maps are used by REALTORS[®], lenders, communities, design professionals, builders and regulators for a variety of purposes. Accurate floodplain delineations are vital when making planning decisions regarding structure location, solid waste disposal, hazardous material storage and transportation routes. Understanding floodplain locations is critical to developing effective, comprehensive plans as part of Wisconsin's new Smart Growth law.

The majority of the existing FIRMs developed by FEMA were approximated using 10-foot contour-interval topographic maps. The dissatisfaction with these approximate methods is clear – countless letters of map amendment have been issued to remove properties from the mapped floodplain (thereby giving the prop-

erty owner an exemption from the mandatory flood insurance purchase requirement). Conversely, some areas that are actually flood prone, but not shown as such on the FIRMs, continue to be developed by unsuspecting landowners. In addition, changes on the ground such as paving and bridgework have modified the dynamics of rainwater runoff.

The increasing inadequacy of floodplain maps has not gone unnoticed. The Bush Administration has increased federal funds for new floodplain mapping, which also means increased funding for mapping in Wisconsin.

DFIRMs

The 1-percent (1%) chance floodplain (RFE) and related floodway, flood fringe and general floodplain areas are delineated on FIRMs, Flood Hazard Boundary Maps (FHBM) and Flood Boundary and Floodway Maps (FBFM) published by the NFIP. In 1988, FEMA began publishing combined FIRM maps with all the information previously contained on the FIRM and FBFM.

New FIRMs are in a digital or electronic format. Digital is a better method of storing and transferring flood hazard information and mapping with Geographic Information Systems (GIS). Digital Flood Insurance Rate Maps (DFIRMs) are easier to update, distribute and incorporate into local GIS applications.

While most of the prior FIRMs overlay floodplain boundaries onto a street network base map, the new DFIRMs overlay floodplain boundaries onto aerial photographs. Using a photo background on the new maps makes it easier to see how a flood zone relates to specific structures and project sites.

DFIRMs are in a countywide format, which corrects conflicting floodplain boundaries between communities and presents a unified view of flood risks for all residents. The new flood maps

show the most recent flood studies and flood data available for a community. This does not mean that every river, stream and creek has been restudied, but all new data meeting FEMA standards are included on the maps.

Flood Risk Zones

Flood zones are established by FEMA based upon the risk of flooding in a particular area. Due to the cost of these engineering analyses, some floodplain areas are mapped as general floodplains. The general floodplain is also called an approximate study area, unnumbered A Zone or Zone A. Floodway and flood fringe areas are designated only after an engineering analysis has been performed and a 100-year flood elevation has been determined. They are labeled on flood maps as either Zones A1-30 or Zone AE.

Both A and AE Zones are high-risk areas that correspond to the 1-percent (1%)-annual-chance floodplains, also known as the 100-year floodplain. Flood insurance is required in these zones. A Zones are areas determined by approximate engineering methods. Detailed hydraulic analyses are not conducted and no base or regional flood elevations are shown. On the other hand, AE Zones are areas determined by detailed hydraulic analyses and base flood elevations are shown on the maps in these zones.

Shaded X Zones are moderate risk areas and generally correspond to the 0.2-percent (0.2%)-annual-chance floodplain, also known as the 500-year floodplain. Base flood elevations are not shown in these areas and flood insurance is not required.

Unshaded X Zones are outside of the 0.2% annual chance floodplain. Base flood elevations are not shown in these areas of lower risk and flood insurance is not required.

For additional information regarding the FIRMs and the changes in flood risk designations that may occur as a

result of the remapping process, see the questions and answers at www.dnr.state.wi.us/org/water/wm/dsfm/flood/documents/mapmod_faq.pdf.

Letters of Map Change

Letters of Map Amendment (LOMA), Letters of Map Revision (LOMR) and Letters of Map Revision Based on Fill (LOMR-F) are documents issued by FEMA that officially remove a property and/or structure from an SFHA. They are collectively called Letters of Map Change (LOMC). To obtain a LOMA, LOMR or LOMR-F, the applicant must submit mapping and survey data for the property. Some data may be obtained from local government offices (e.g., city hall, the county courthouse, etc.). In most cases, the applicant will need to hire a surveyor to prepare an elevation certificate for the property. Upon receiving a complete application, FEMA normally completes its review in four to six weeks.

LOMCs may be issued for a single structure or lot, or for multiple structures or lots. All LOMCs remove a structure or lot from the floodplain for flood insurance purposes. A structure or lot removed from an SFHA by an LOMC is not subject to the requirements of the NFIP and may be exempt from the requirements of Wisconsin's floodplain management program in Wis. Admin. Code ch. NR 116.

A LOMA is typically a correction to a flood map based on better survey data showing that a property's natural lowest grade is above BFE. A LOMA is an amendment to the current effective FEMA map and establishes that a property is not located in an SFHA. Property and elevation materials supporting a request for a LOMA must be submitted to FEMA if the goal is to remove a property from the SFHA. A property owner will often request a LOMA after being informed by a lender that the property is believed to be within an SFHA. FEMA does not charge a fee for reviewing LOMA applications.

A LOMR is an official amendment or revision to the current FEMA flood map based on technical engineering studies submitted by the applicant. LOMRs are typically issued for complex or large-scale projects such as subdivisions, stream relocations and road or bridge projects. FEMA does charge a fee for reviewing a LOMR application. A LOMR changes flood zones, delineations, and elevations, and may mean that a particular property is no longer in the floodplain or SFHA. The risk of flooding for such a property will have been reduced, but not eliminated. The property owner, however, will likely be eligible for lower flood insurance premiums.

A LOMR-F is concurrence from FEMA that the data submitted by the applicant shows that a property has been filled to an elevation at or above the BFE. LOMR-Fs must be obtained prior to the start of any construction on the property if the property owner wishes to avoid the mandatory purchase of flood insurance. The issuance of a LOMR-F only waives the flood insurance purchase requirement. Under Wisconsin regulations, a property will not be considered removed from the floodplain until the building site is filled to the FPE and is contiguous to lands outside the floodplain.

A property owner may also request a Letter of Determination Review (LODR) from FEMA if they believe the structure was incorrectly determined to be in an SFHA by a lender. A LODR is not a LOMC. It is FEMA's comment on the determination made by the lender or third party that the borrower's structure is in an SFHA. A request for a LODR must be submitted within 45 days of the date of the lender's notification that a building is in the SFHA and that flood insurance is required. FEMA charges a fee for reviewing a LODR request.

Communities are required to maintain copies of all LOMCs issued by FEMA because they represent changes to the effective FIRM. LOMCs are usually filed with a

community's floodplain zoning map and other related technical data.

Floodplain Maps

Because it will take years to revise and modernize floodplain mapping, the existing FIRMs will be used in the interim. To make FIRMs more accessible, the DNR has scanned and geocoded all of the floodplain maps for the state.

For a statewide map indicating the estimated timeline for preliminary map delivery, visit www.dnr.state.wi.us/org/water/wm/dsfm/flood/Images/prelim_maps.pdf. For fact sheets regarding the ongoing county flood mapping projects and other flood mapping resources, visit www.dnr.state.wi.us/org/water/wm/dsfm/flood/mapping.htm.

The floodplain management program at the DNR has scanned the existing paper maps and geo-registered them. They are displayed on the DNR's interactive map applications, online at www.dnr.state.wi.us/org/water/wm/dsfm/section/mapindex.htm, where they can be overlaid on air photos or topographic maps.

 **REALTOR® Resource Page:** The Floodplains Resource Page describes floodplains and gives a list of features that may signal the presence of floodplains. There also are links to DNR floodplain information and the DNR page for interactive maps. These links can be found at www.wra.org/Government/Land_Use/floodplains/default.htm.

Legal Hotline Questions and Answers – Floodplains

The seller, who is also a broker, has a property for sale. Part of the property is in a floodplain and the seller did not disclose this. There is no RECR because it is new construction. What should the buyer do?

Item C11 on the Real Estate Condition Report (RECR) and the property condition provisions of the offer to purchase both require dis-

closure if any part of the property being sold is in a floodplain, wetland or shoreland zoning area. If the seller has not disclosed the floodplain, the listing agent may consider giving the buyer a material adverse fact disclosure letter regarding the apparent location of part of the property in a floodplain. See *Legal Update* 02.12, online at www.wra.org/LU0212, for a sample disclosure letter. The agent may also refer the buyer to legal counsel to determine whether the buyer will close the transaction given the seller's apparent misrepresentation regarding floodplain.

The broker has a listing on a property that at the present time is not located in the floodplain. FEMA has given the city new preliminary maps. If the city accepts these maps, the property will be in the floodplain. This will probably happen in about 18 months. What must be disclosed, and how?

Whether the content of the newly proposed FEMA maps constitutes a fact the broker needs to disclose as an adverse material fact is a judgment that only the broker can make after considering all of the facts and circumstances in the situation. Since the maps have been published and are available for review, the content may be shared. The maps may not represent the final determination of floodplains. Any information shared may be attributed to its source and accompanied with a referral to FEMA for more information.

If the broker, as a competent licensee, knows that this fact (1) has a significant adverse affect on the value of the property; (2) significantly reduces the structural integrity of the property; (3) presents a significant health risk to the occupants of the property; or (4) is information that indicates that a party to the transaction is not able to or does not intend to meet their obligations under the contract, then the issue constitutes an adverse fact. If a party to the transaction was to so indicate, or if a competent licensee would generally recognize that this fact is of such importance that it would affect a reasonable party's decision to enter into a contract or would affect the party's decision about the terms of the contract, the

fact is both adverse and material. If this fact is both adverse and material, then § RL 24.07(2) requires the broker to timely disclose the fact in writing to all parties to the transaction, even if the client would direct the broker not to disclose.

If the broker knows or is aware of information suggesting the possibility of a material adverse fact, § RL 24.07(3) states that the broker will be practicing competently if the broker makes timely written disclosure of the information suggesting the material adverse fact to all parties to the transaction, recommends the parties obtain expert assistance to inspect or investigate for the possible material adverse fact and, if directed by the parties, drafts appropriate inspection or investigation contingencies. The duty to disclose has priority over any duty owed to the broker's client.

The seller represented that the 25-acre vacant floodplain lot was buildable. The DNR now requires an additional survey to determine if it is buildable. On the vacant offer the buyer has a proposed use contingency for a single family home. There is an additional contingency at line 180 regarding building. How do these provisions apply?

Until the DNR has provided the engineering reports, a final determination whether the lot is buildable may not be complete. If the buyer, acting in good faith and with due diligence, can't obtain the evidence that the lot is buildable, then the buyer may be protected by the contingency. The parties may amend the offer to purchase regarding the DNR elevation reports. Alternatively, the buyer may be able to give notice that one or both contingencies were not met, depending on how the proposed use contingency or the building contingency were drafted.

The agent has a new listing on a friend's home. A couple of feet in one corner of the lot are in a floodplain. The friend has lived there 12 years and has never had to pay any floodplain insurance. Can the agent get a map showing how much of the property is in a floodplain? What portion of a property has to be in a floodplain for flood insurance to be mandatory?

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The agent can look up a property address or location on FEMA's Web site and on the DNR's Web site to determine the floodplain status.

FEMA: www.fema.gov/nfip/info-con.shtm

Maps from DNR Web site: www.dnr.state.wi.us/org/water/wm/dsfm/section/mapindex.htm

DNR floodplain: www.dnr.state.wi.us/org/water/wm/dsfm/flood/title.htm

Floodplain Resources

Information regarding floodplain management in Wisconsin can be found at: dnr.state.wi.us/org/water/wm/dsfm/flood/. Answers to questions regarding flood insurance can be found at either FEMA's Web site: www.fema.gov or the NFIP's Web site: www.floodsmart.gov.

The Ordinary High Water Mark

Under the Wisconsin Constitution, lakes and rivers belong to the public and the DNR manages these waters for the benefit of all citizens. The Wisconsin Supreme Court has ruled that the state owns title to lakebeds, but not streambeds or flowed lands, and that the Ordinary High Water Mark (OHWM) establishes the boundary between public lakebed and private waterfront land.

The Wisconsin Supreme Court, in *Diana Shooting Club v. Husting*, 156 Wis. 261, 272, 145 N.W. 816 (1914), defined the OHWM as, "the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation or other easily recognized characteristic. ... And where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of ordinary high-water mark is,

recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark."

Watermarks are often at various elevations, but the most permanent and prevalent marks constitute the OHWM. The OHWM doesn't change with temporary fluctuations in water levels, nor is it always at or near open water. The Wisconsin Supreme Court, in *State v. Trudeau*, 139 Wis.2d 91, 103-04, 408 N.W.2d 337 (1987), held that the land below the OHWM, even though the water over that land was not navigable, is held in trust for the public. Although the OHWM determines lakebed, it does not necessarily determine navigability.

The OHWM is an important boundary for riparian owners because it establishes the extent of state ownership in the lakebed, which impacts the public's right to use the lake as well as the riparian owners' rights in the land above the OHWM.

Most lakes and streams have distinct and stable OHWMs at the shoreline, but the OHWM is not always at or even near open water. The area between the water's edge and the OHWM may be heavily vegetated even to the extent that an area of public water can't be navigated. For example, this would be the case with cattail marshes and bogs. Wetlands and floodplains can occur both above and below the OHWM. Where the OHWM isn't as readily visible and may be away from the water's edge, or where water levels or flows are raised and lowered dramatically by dams or storms, specific data on the location of the OHWM may be needed.

Determining the OHWM from DNR Records

The OHWM isn't typically identified on surveys and may be difficult to see on many of the properties being developed today. To determine the

OHWM, a property owner may wish to search the DNR record database for relevant information. DNR permit records from lakes and streams across the state contain information about the OHWM. An owner can search the DNR's Waterway and Wetland Permit Query System online at www.dnr.state.wi.us/org/water/fhp/waterway/permitdata/index.shtml, make a list of files pertaining to the area of interest and then call the DNR to arrange to look at the records to see if they contain OHWM data. A property owner also can search by the name of a lake or stream or by the public lands survey location (township, range, section). Before beginning to search by section, it is necessary to identify the quarter section of the property from the Public Lands Survey (available in a plat book or by using the DNR Web view maps online at dnr.wi.gov/maps/gis/appwebview.html).

Some property owners discover that when the OHWM is identified, land they thought was theirs is actually public lakebed. Many property surveys done in earlier decades used the water's edge, not the OHWM, in setting boundaries. If the OHWM for a property conflicts with the deed description, there may be repercussions with respect to taxation, setbacks and other zoning requirements.

Taxation

If a property owner's actual acreage based upon the OHWM is different from the acreage in the legal description in the local tax and assessment records, the value of the parcel may be reduced by the value of the land removed to determine the total value of the property. The value change depends on supply and demand for waterfront land and the characteristics of the property. Property owners who find that acreage change is large and believe that their land is now not as valuable as similar lakefront properties may wish to discuss the situation with the local assessor. Some prop-

erty owners may also need the assistance of a surveyor or an appraiser.

Regulation

Confirmation of the actual OHWM may cause some structures to be considered nonconforming and other county zoning restrictions may now apply. Consult the zoning office or check local ordinances for details and be aware that the state is revising its statewide standards for shoreline development to give property owners more flexibility in the remodeling and repairs that can be undertaken on structures that don't meet current county setbacks.

Access to the Water

The general public must follow the law to legally gain access to public waters. People using Wisconsin waterways will, for the most part, have to follow the "keep your feet wet" test.

The general public must gain access to a public stream, river or connected lake via a public access point such as a public boat landing or a public highway that crosses the river or stream. Someone hunting or fishing on a lake or stream must keep his or her feet wet. Because navigable waters are public, they may be used for fishing if public access is available, or if the fisherman has the permission of the landowner to cross the landowner's property to reach the water.

Stream Access

Wis. Stat. § 30.134(2) & (3)(a) provide that members of the public may use any exposed shore area of a stream without the permission of the riparian landowner only if it is necessary to exit the body of water to bypass an obstruction. In addition, a member of the public may not enter the exposed shore area except:

- From the water
- From a point of public access on the stream

- With the permission of the riparian landowner

Obstructions could consist of trees or rocks, shallow water for boaters or deep water for wading trout fishermen. The bypass can involve areas up to the OHWM and should be by the shortest possible route.

This limited right to use the exposed shoreline applies only to rivers and streams, and not to lakes.

Lake Access

On lakes and flowages, users must be in the water with no right to use the exposed shoreline without the riparian landowner's consent. Adjacent property owners have exclusive use of dry or exposed lakebed below the OHWM. Such areas may be posted, but not fenced. If private land surrounds a land-locked lake, the general public must obtain the riparian landowner's permission to enter.

Legal Hotline Questions and Answers – OHWM

Can the public walk along the shoreline of a lake that is below the OHWM but above the water's edge?

The public has the right to canoe, fish, ice skate, snowmobile, wade, etc., in navigable waters as long as access can be obtained legally, such as from a public road or boat landing. The riparian has exclusive use of exposed lakebeds when the water is low. When using public waters, the general rule-of-thumb is to "keep your feet wet" to avoid trespassing. On lakes and flowages, users must be in the water and have no right to use the exposed shoreline without the owner's consent. For additional information, see the DNR's Web site at www.dnr.wi.gov/org/water/fhp/fish/faq/access.htm.

An agent has a property listed in a subdivision where the subdivision residents own a 30-foot-wide strip from the edge of the lots to the lake shoreline. Since the shoreline is in essence

partially owned by the seller, can it be listed in the MLS as "waterfront?"

In Wisconsin, waterfront or riparian property owners own the land to the OHWM. The state owns the lakebed below the OHWM. If the property owner, however, does own to the OHWM, this may be advertised as lakefront property. It may be wise to disclose to buyer prospects in the MLS remarks or in other handouts the situation regarding the ownership of the 30-foot strip. The agent should also understand that the legal description of the 30-foot strip might not coincide with the OHWM, and be careful and precise in any descriptions.

Is a meander line a line that runs around a lake that determines the dividing line between the properties owned by the lakefront parcel owners and the lakebed, which is owned by the state and is actually public property? When selling lakefront property, does a licensee need to disclose what meander line is?

Meander lines are created by surveyors for legal descriptions. The OHWM divides the public waterbed from private property ownership. The OHWM generally is not shown on survey or subdivision maps and may not be the same as the meander line.

If a person owns a property on a lake, does he or she also own the land in the water or does his or her land rights stop where the water begins? A riparian or waterfront property owner can place a pier off of the frontage, but does the waterfront owner own the water?

The state owns the lakebed and the water. The riparian owner owns the land above the OHWM and has the exclusive right to use any exposed lakebed below the OHWM. The placing of a pier would be subject to certain DNR restrictions and in some cases may require a permit.