

LEGISLATIVE BILL 35

Approved by the Governor May 17, 1983

Introduced by Wagner, 41; H. Peterson, 35

AN ACT relating to flood plain management; to provide intent; to define terms; to provide procedures, duties, and authorities for the Nebraska Natural Resources Commission and the Department of Water Resources; and to repeal sections 2-1506.01 to 2-1506.10 and 2-1506.12 to 2-1506.27, Reissue Revised Statutes of Nebraska, 1943.

Be it enacted by the people of the State of Nebraska,

Section 1. (1) The Legislature finds that recurrent flooding in various areas of the state presents serious hazards to the health, safety, welfare, and property of the people of the state, both within and outside such areas. The hazards include loss of life, loss of and damage to private and public property, disruption of lives and of livelihoods, interruption of commerce, transportation, communication, and governmental services, and unsanitary and unhealthy living and environmental conditions. The wise use of land subject to flooding is a matter of state concern. The Legislature further finds that the establishment of improved flood plain management practices and the availability of financial assistance to citizens of the state whose property is damaged during times of flooding are essential to the health, safety, and general welfare of the people of Nebraska.

(2) The purposes of this act shall be to:

(a) Accelerate the mapping of flood prone areas;

(b) Assist local governments in the promulgation and implementation of effective flood plain management regulations and other flood plain management practices;

(c) Assure that when state lands are used, and state-owned and state-financed facilities are located and constructed, flood hazards are prevented, flood losses are minimized, and the state's eligibility for flood insurance is maintained;

(d) Encourage local governments with flood

prone areas to qualify for participation in the national flood insurance program; and

(e) Provide interim state regulation of certain flood plains until local flood plain management programs can be developed and implemented.

Sec. 2. As used in this act, unless the context otherwise requires, the definitions in sections 3 to 16 of this act shall apply.

Sec. 3. Commission shall mean the Nebraska Natural Resources Commission created in section 2-1504.

Sec. 4. Department shall mean the Department of Water Resources created in section 81-101.

Sec. 5. Base flood shall mean the flood having a one per cent chance of being equalled or exceeded in magnitude in any given year.

Sec. 6. Drainway shall mean any depression two feet or more below the land which serves to give direction to a current of water less than nine months of the year, and which has a bed and well-defined banks.

Sec. 7. Flood shall mean the water of any watercourse or drainway which is above the bank or outside the channel and banks of such watercourse or drainway.

Sec. 8. Floodway shall mean the channel of a watercourse or drainway and the adjacent land areas that are necessary to be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than a reasonable height, as designated by the commission.

Sec. 9. Flood fringe shall mean that portion of the flood plain of the base flood which is outside of the floodway.

Sec. 10. Flood plain shall mean the area adjoining a watercourse or drainway which has been or may be covered by flood waters.

Sec. 11. Flood plain management shall mean the operation of an overall program of corrective and preventive measures for reducing flood damage, including but not limited to, flood control works and flood plain management regulations.

Sec. 12. Flood plain management regulations shall mean and include zoning ordinances, subdivision regulations, building codes, and other applications of the police power which are authorized by law to secure safety from floods and provide for the reasonable and prudent use of flood plains.

Sec. 13. Local government shall mean a county, city, or village in the state.

Sec. 14. National flood insurance program shall mean the program authorized by the United States Congress under the National Flood Insurance Act of 1968, as amended, 42 U.S.C., sections 4001 to 4128.

Sec. 15. Obstruction shall mean any wall,

wharf, embankment, levee, dike, pile, abutment, projection, excavation, channel rectification, bridge, conduit, culvert, building, wire, fence, rock, gravel, refuse, fill, or other analogous structure or matter which may impede, retard, or change the direction of the flow of water, either in itself or by catching or collecting debris carried by such water, or that is placed where the natural flow of the water would carry such structure or matter downstream to the damage or detriment of either life or property. Dams designed to store or divert water are not obstructions if permission for the construction thereof is obtained from the department pursuant to section 46-257.

Sec. 16. Watercourse shall mean any depression two feet or more below the surrounding land which serves to give direction to a current of water at least nine months of the year and which has a bed and well-defined banks.

Sec. 17. Except for the powers granted to the department in sections 23 to 31 of this act, the commission shall be the official state agency for all matters pertaining to flood plain management. In carrying out that function, the commission shall have the power and authority to:

- (1) Coordinate flood plain management activities of local, state, and federal agencies;
- (2) Receive federal funds intended to accomplish flood plain management objectives;
- (3) Prepare and distribute information and conduct educational activities which will aid the public and local units of government in complying with the purposes of this act;
- (4) Provide local governments having jurisdiction over flood prone lands with technical data and maps adequate to develop or support reasonable flood plain management regulation;
- (5) Prepare, adopt, and promulgate, by rule or regulation, minimum standards for local flood plain management regulation. In addition to the public notice requirement in section 84-907, the commission shall, at least twenty days in advance, notify by mail the clerks of all cities, villages, and counties, which might be affected, of any hearing to consider the adoption, amendment, or repeal of such minimum standards. Such minimum standards shall be designed to protect human life, health, and property, and to preserve the capacity of the flood plain to discharge the waters of the base flood and shall take into consideration (a) the danger to life and property by water which may be backed up or diverted by proposed obstructions and land uses, (b) the danger that proposed obstructions or land uses will be swept downstream to the injury of others, (c) the availability of alternate locations for proposed

obstructions and land uses, (d) the opportunities for construction or alteration of proposed obstructions in such a manner as to lessen the danger, (e) the permanence of proposed obstructions or land uses, (f) the anticipated development in the foreseeable future of areas which may be affected by proposed obstructions or land uses, (g) hardship factors which may result from approval or denial of proposed obstructions or land uses, and (h) such other factors as are in harmony with the purposes of this act. Such minimum standards may, when required by law, distinguish between farm and nonfarm activities and shall provide for anticipated developments and gradations in flood hazards. If deemed necessary by the commission to adequately accomplish the purposes of this act, such standards may be more restrictive than those contained in the national flood insurance program standards, except that the commission shall not adopt standards which conflict with those of the national flood insurance program in such a way that compliance with both sets of standards is not possible;

(6) Provide local governments and other state and local agencies with technical assistance, engineering assistance, model ordinances, assistance in evaluating permit applications and possible violations of flood plain management regulations, assistance in personnel training, and assistance in monitoring administration and enforcement activities;

(7) Serve as a repository for all known flood data within the state;

(8) Assist federal, state, or local agencies in the planning and implementation of flood plain management activities, such as flood warning systems, land acquisition programs, and relocation programs;

(9) Enter upon any lands and waters in the state for the purpose of making any investigation or survey or as otherwise necessary to carry out the purposes of this act. Such right of entry shall extend to all employees, surveyors, or other agents of the commission in the official performance of their duties and such persons shall not be liable to prosecution for trespass when performing their official duties;

(10) Enter into contracts or other arrangements with any state or federal agency or person, as defined in section 49-801, as necessary to carry out the purposes of this act; and

(11) Adopt and enforce such rules and regulations as are necessary to carry out the duties and responsibilities of this act.

Sec. 18. In determining areas of the state for which state prepared flood hazard data and maps are needed by local governments or by state or federal agencies, and the order in which such data and maps are to be prepared, the commission shall consult with the

department and consider the following factors in such areas:

- (1) Potential for future development;
- (2) Potential for flood damage or loss of life;
- (3) Probability that adequate data and maps will be prepared within a reasonable time by other sources;
- (4) Availability and adequacy of any existing maps;
- (5) Availability of flood data and other information necessary to produce adequate maps; and
- (6) Degree of interest shown by the local governments in the area in utilizing flood data and maps in an effective flood plain management program.

Flood area data and maps produced by the commission may be provided either directly to the local government which has jurisdiction over such area, or indirectly through the national flood insurance program if the commission and the federal agency responsible for administering the national flood insurance program agree to such an arrangement. Such maps shall delineate the flood plain of the base flood and, when information is available, the floodway and flood fringe of such flood plain. Such maps shall also contain or be accompanied by such other information as the commission deems appropriate.

Sec. 19. When the commission, a federal agency, or any other entity has provided a local government with sufficient data and maps with which to reasonably locate within its zoning jurisdiction any portion of the flood plain for the base flood of any watercourse or drainway, it shall be the responsibility of such local government to adopt, administer, and enforce flood plain management regulations which meet or exceed the minimum standards adopted by the commission pursuant to subdivision (5) of section 17 of this act. The authority of a local government to adopt flood plain management regulations in accordance with this section shall not be conditional upon a prior appointment of a planning commission or the adoption of a comprehensive development plan pursuant to sections 14-403, 14-404, 14-407, 15-1101, 15-1102, 18-1306, 19-901, 23-114.01 to 23-114.03, or 23-174.04 to 23-174.07.

Sec. 20. If a local government does not adopt and implement flood plain management regulations in accordance with section 19 of this act within one year after flood hazard data and maps have been provided to it pursuant to such section, the commission shall, upon petition of at least ten per cent of the owners of the land located within the flood plain of the base flood delineated in such maps, or upon the written request of the department or the board of directors of

the natural resources district in which such land is located, conduct a public hearing after providing notice pursuant to section 22 of this act. If the commission finds after such hearing that the data and maps available are sufficient to reasonably locate the boundaries of the base flood, the commission shall determine and fix by order the boundaries of the base flood and, where deemed appropriate, the boundaries of the floodway within the zoning jurisdiction of such local government. If within three months of the date of such order, the local government still has not adopted and implemented flood plain management regulations for the area subject to such order in accordance with section 19 of this act, the commission shall be vested with the power and authority to adopt flood plain management regulations for the area and shall adopt and promulgate such regulations for the identified base flood within the zoning jurisdiction of such local government. Such regulations shall be consistent with the minimum standards adopted by the commission pursuant to subdivision (5) of section 17 of this act and shall take effect on the date prescribed by the commission. All ordinances or other actions by the local government which are contrary to the commission's adopted regulations shall be null and void.

Sec. 21. It shall be the duty of the local government to administer and enforce any regulations adopted by the commission pursuant to section 20 of this act in the same manner as if the local government had enacted such regulations. Such duty may be enforced in a mandamus action brought against such local government by any resident or landowner within the jurisdiction of such local government. If such mandamus action is successful, the local government may be held responsible for all reasonable and actual costs of the plaintiff, including, but not limited to, attorney's fees. Neither the regulations enacted by the commission nor the boundaries of the base flood or floodway adopted by the commission may be modified by the local government without the written consent of the commission, except that a local government may adopt a measure more restrictive than that adopted by the commission.

Sec. 22. Notice of any hearing to be conducted by the commission pursuant to section 20 of this act shall be given to the clerk of the local government, and to such other local officials as the commission deems appropriate, at least thirty days prior to the hearing. Notice shall also be published in a newspaper of general circulation in the area involved at least once each week for three consecutive weeks, the last publication of which shall be not less than five days prior to the date set for the hearing. The regulations of the commission adopted in accordance with

section 20 of this act shall not be subject to the provisions of Chapter 84, article 9. Appeals from commission determinations pursuant to section 20 of this act may be taken by any aggrieved party to the district court of Lancaster County, and may be initiated by filing a petition in such court within sixty days of the commission's determination. The filing of the petition shall not stay enforcement by the local government of regulations adopted pursuant to section 20 of this act. The review shall be conducted by the court without a jury on the record prepared by the commission. The court may affirm the commission's decision, remand the case for further proceedings, or reverse or modify the commission's decision if substantial rights of the petitioners have been prejudiced because the commission's decision is:

- (a) In violation of constitutional provisions;
- (b) In excess of the statutory authority or jurisdiction of the commission;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;
- (e) Unsupported by competent, material, and substantial evidence in view of the entire record; or
- (f) Arbitrary or capricious.

Sec. 23. (1) All state agencies, boards, and commissions shall take preventive action to minimize flood hazards and losses in connection with state-owned and state-financed buildings, roads, and other facilities, and shall take such steps as are necessary to insure compliance with the minimum standards adopted by the commission in accordance with subdivision (5) of section 17 of this act when such facilities are being located or constructed in any area where no local government is enforcing flood plain management regulations pursuant to section 19 or 21 of this act. If a local government with jurisdiction over the land upon which any such facility is to be located or constructed is enforcing flood plain management regulations pursuant to section 19 or 21 of this act, the state agency, board, or commission locating or constructing such facility shall comply with such regulations unless such compliance is specifically waived by the department.

(2) The commission shall assist state agencies, boards, and commissions in determining and evaluating flood hazards and alternative flood protective measures, and shall establish by rule or regulation, standards and procedures to govern its review of proposed state-owned and state-financed facilities not subject to local flood plain management regulations. Such standards and procedures shall meet the minimum criteria necessary to maintain the state's

eligibility for flood insurance under the national flood insurance program.

Sec. 24. In those flood plains where data and maps sufficient to reasonably locate the boundaries of the base flood have not been prepared or provided to the responsible local government, the department may exercise interim authority for the purpose of regulating the location of obstructions in, along, or across such flood plains. Such authority shall extend to and be exercised only in those areas specifically designated in accordance with sections 24 to 31 of this act. The department may receive and expend any federal funds made available for the costs incurred in exercising such authority.

Sec. 25. The flood plains initially subject to the provisions of sections 24 to 31 of this act shall be those subject to regulation in accordance with sections 2-1506.15 to 2-1506.27 on the day prior to the effective date of this act. Such areas shall remain subject to the provisions of sections 24 to 31 of this act until a new map for the local government affected has been prepared and notice has been published by the department in accordance with sections 26 to 28 of this act.

Sec. 26. Except as provided in section 25 of this act, the department shall exercise its authority pursuant to sections 24 to 31 of this act only in the flood plains of watercourses and drainways identified on a local government map prepared by the department in accordance with this section and sections 27 and 28 of this act. The department may include on such a map any watercourses or drainways where commercial, residential, or other developments not consistent with sound flood plain management principles and practices appear likely to occur in the flood plain before an adequate local flood plain management program can be implemented in accordance with section 19 or sections 20 and 21 of this act. When preparing a map, the department shall consult with the commission, the local government affected, and such other state and local agencies as the department deems appropriate.

Sec. 27. Notice of a map prepared pursuant to section 25 or 26 of this act shall be published in a newspaper of general circulation in the area affected at least once each week for three consecutive weeks, the last publication to be not less than ten days prior to the date set by the department as the effective date of the map. The department may modify a map prepared pursuant to section 26 of this act at any time. If a modification results in the addition of land area subject to sections 24 to 31 of this act, the publication requirements of this section shall apply.

Sec. 28. In addition to complying with the

publication requirement in section 27 of this act, the department shall make the map available in such locations as it deems appropriate and shall provide one or more copies of applicable maps to any office of local government where permission would be sought to locate a building or other obstruction in the flood plain area subject to regulation by the department. Before issuing any local permit, local authorities shall inform the applicant of the need to first obtain a permit from the department. Any local permit issued knowingly in violation of sections 24 to 31 of this act shall be null and void.

Sec. 29. It shall be unlawful for any person to locate any obstruction in, along, or across any flood plain of a watercourse or drainway identified in accordance with section 25 or 26 of this act without first obtaining a permit from the department. Any person desiring such permission shall file a written application with the department and shall include such information as requested by the department, which may include, but shall not be limited to, a hydraulic or hydrologic analysis, or both, of the watercourse or drainway involved, and an analysis of the effects of the proposed obstruction upon the storage and conveyance of flood flows. After reviewing the application and conducting such additional investigation and analysis as it deems necessary, the department shall enter an order permitting or prohibiting location of the obstruction. Permission may be granted only if it is determined that location of such obstruction will comply with the minimum standards developed by the commission in accordance with subsection (5) of section 17 of this act. Any terms and conditions necessary to assure such compliance may be included in the permit. In furtherance of the duties carried out pursuant to this section, the department may conduct such hearings as it deems appropriate, and may obtain and rely on technical assistance from the commission.

Sec. 30. The Director of Water Resources may commence, maintain, and prosecute an action, in the district court of the county in which any obstruction or portion thereof is located, to enjoin or abate any such location which is in violation of section 29 of this act, or to enforce any permit terms or conditions prescribed pursuant to section 29 of this act.

Sec. 31. (1) The authorities granted by sections 24 to 31 of this act are intended to be exercised by the department only on an interim basis to prevent irreversible development of flood prone areas prior to the initiation of an adequate local flood plain management program in accordance with section 19 or sections 20 and 21 of this act. Such authorities are not intended to substitute for local flood plain

management programs when sufficient flood hazard data and maps are available. The authority of the department over the flood plain of any watercourse or drainway identified in accordance with section 25 or 26 of this act shall terminate immediately upon the effective date of an adequate local program which encompasses the same land area. For purposes of this section, a local program shall be considered adequate if it entitles the local government to participate in the regular program of the national flood insurance program, or if the commission has reviewed the local program and has certified that it is consistent with the minimum standards adopted in accordance with subdivision (5) of section 17 of this act. Even if no adequate local flood plain management program is in effect, the department's authority shall also terminate three years after flood hazard data and maps sufficient to reasonably locate the base flood have been provided to the responsible local government. Thereafter the local government shall be responsible for implementing an adequate flood plain management program. Failure of the local government to implement such a program shall be handled in accordance with section 20 of this act.

(2) The commission shall be responsible for monitoring the status of all local flood plain management programs and shall regularly advise the department of such status as it relates to the department's performance of its responsibilities pursuant to sections 23 to 31 of this act.

Sec. 32. That sections 2-1506.01 to 2-1506.10 and 2-1506.12 to 2-1506.27, Reissue Revised Statutes of Nebraska, 1943, are repealed.