



June 2007

TOP STORY: EPA Releases New Guidelines for Wetland Regulators

After months of anticipation, the Environmental Protection Agency and the Army Corps of Engineers have issued official guidelines for district offices to follow in response to the Supreme Court decision in *Rapanos v. U.S.* (2006). Most significantly, the guidance states that federal jurisdiction may no longer be extended to manmade ditches that drain “uplands,” (i.e., do not cross an actual wetland area). This has important ramifications for ICSC members who were previously required to obtain federal permits under Section 404 of the Clean Water Act. The guidance is effective immediately but the agencies will accept public comments for 180 days and then reassess the effectiveness of the new guidelines. Members will recall that ICSC argued in an amicus brief in the *Rapanos* case that certain isolated wetlands were not legitimately under federal jurisdiction and should instead be regulated by individual states. The case resulted in a confusing 4-1-4 plurality decision that prompted the need for the new guidelines.



Spring Convention Highlights Industry's Environmental Commitment

ICSC hosted its first “Green Pavilion” at the Spring Convention in Las Vegas to showcase ecologically sustainable shopping centers and tenants. ICSC also featured “green” products and vendors in a special “Green Zone” located within the Leasing Mall. Both efforts were part of ICSC’s SEED program (Sustainable Energy and Environmental Design), ICSC’s commitment to environmentally responsible development and management.

Environment - State News

- In California, the Assembly Appropriations Committee is preparing to hear several bills opposed by the industry relating to “green building standards,” including: A.B. 35, sponsored by Assembly Member Ira Ruskin (D- Redwood City); A.B. 888 sponsored by Assembly Member Ted Lieu (D-Torrance); A.B. 1058 sponsored by Assembly Member John Laird (D-Santa Cruz); and A.B. 1065 sponsored by Assembly Member Sally Lieber (D-Mountain View). The bills were previously placed on the Committee’s suspense file, which is used as a hold on bills that are found to cost more than \$150,000.
- The Florida legislature approved legislation on May 2 to increase state funding for the cleanup of the Everglades. The bill, S.B. 392, expanded the existing cleanup program to include several tributaries flowing into Lake Okeechobee. The bill is pending review by Governor Charlie Crist ®.
- Legislation that is being pushed by Massachusetts Governor Duval Patrick (D) was heard on May 3 by the Joint Committee on Environment, Agriculture and Natural Resources. The bill, H.B. 3757, addresses exemptions granted by the Department of Environmental Protection relating to the environmental permitting process. Representative Frank Smizik (D-Brookline), the House Chair of the Committee, said that they were leaning toward grandfathering in projects that were struggling with permits or financing. It still remains unclear what alterations will be made to the permitting process in the future. Action on the bill is expected within the next few weeks.
- The Massachusetts Senate Committee on Global Warming and Climate Change held a special hearing

regarding "green building" technology on May 18. The Committee, chaired by Senator Marc R. Pacheco (D-Taunton), heard testimony from environmental groups and businesses that are trying to promote "green" technology. The issue has received some attention in the state, as over twenty bills have been filed in the General Court, and Governor Patrick's Administration has begun to examine requirements for new developments large enough to warrant a state environmental review to quantify the amount of greenhouse gas emissions they produce. Developers would also be required to take steps to avoid, minimize or mitigate such gases. An advisory committee will begin developing guidelines for the new policy and should be ready by July 1.

- The 80th session of the Texas legislature is over and the following environmental bills passed:
 - o S.B. 662 requires the Texas Commission on Environmental Quality to adopt rules requiring persons who submit subdivision plats to transmit any useful groundwater information to the Texas Water Development Board and appropriate groundwater conservation districts.
 - o H.B. 1956 authorizes the Texas Commission on Environmental Quality to order an owner or operator of an underground storage tank that fails to maintain acceptable evidence of financial responsibility to place the tank out of service.
 - o H.B. 2714 requires manufacturers of computer equipment to adopt and implement a recovery plan for used computer equipment and affix a permanent, readily visible label to the computer equipment with the manufacturer's brand. It prohibits a retailer from selling new computer equipment unless it shows a manufacturer's label and the manufacturer is listed as having a recovery program.
 - o H.B. 3220 expands the classes of persons allowed to participate in the dry cleaner remediation fund to include property owners; extends the benefit eligibility until Dec. 31, 2007, and requires payment of an annual registration fee of \$1,500 and late fees for registering as a new participant.



Growth Management - State News

- In California, the San Diego City Council recently passed an ordinance to prohibit the construction of big-box retail stores within city limits, despite a threatened mayoral veto. The measure to limit the building of superstores, such as those that Wal-Mart has been trying to erect, was tentatively approved on a 5-3 vote by the council last November, but the second reading was delayed so that more public input could be generated. The measure bans new establishments that are larger than 90,000 square feet and generate more than 10 percent of revenue from non-taxable goods, like groceries.
- In Florida there was considerable discussion on the need to revise provisions of the Growth Management Act of 2005 (S.B. 360) due to the way the Department of Community Affairs (DCA) and some local governments interpreted the proportionate share mitigation and transportation concurrency statutes. DCA Secretary Tom Pelham and many senior staff members in Governor Charlie Crist's ® office, the State House of Representatives and the State Senate thought that the changes should be made in the 2008 session after more review. However, ICSC's efforts to remind legislators that transportation concurrency issues required immediate attention led to the passage of legislation H.B. 7203 with several positive changes. The bill is pending approval by Governor Crist after passing the legislature with minimal opposition.
- ICSC and others continue efforts to defeat or amend legislation in Maine (L.D. 1810) that would require retail developments in excess of 75,000 square feet to fund an "independent" impact study. Similar legislation was defeated last year in Vermont.
- Legislation sponsored by New Jersey State Senator Richard Codey (D) was signed into law on May 6. The bill, S. 2095, makes revisions to the "Neighborhood Revitalization State Tax Credit Act" to encourage corporate participation in the revitalization of distressed New Jersey communities. Specifically, a corporate participant implementing a qualified neighborhood revitalization project may be granted up to 100 percent of the approved assistance provided to a nonprofit organization. Prior to the bill's enactment, the amount of the state tax credit was 50 percent of the approved assistance. Additionally, the amount of the tax credit allowed to a business entity was increased.

- New York State Assemblyman Sam Hoyt (D-Buffalo) hosted a hearing in Buffalo on May 17 regarding state Industrial Development Agency (IDA) reform. Hoyt, the chairman of the Assembly Local Government Committee, is working under a short timeframe to advance IDA reform legislation as the end of the legislative session fast approaches and as portions of current IDA law are set to expire in June.
- In Ohio, the Senate passed S.J.R. 1, a proposed November ballot issue that would call for a statewide vote on a constitutional amendment to restrict public entities' eminent domain proceedings.
- The Ohio Senate also passed S.B. 7, which reforms Ohio's laws regulating the exercise of eminent domain and reaffirms the Ohio Supreme Court ruling against the city of Norwood, which found private property ownership to be a "revered and fundamental right." The bill defines that 90 percent of property in a targeted area must be determined blighted to qualify for eminent domain.
- While legislation approved by the South Carolina General Assembly earlier this year (S. 155) ratified two amendments to the State Constitution regarding eminent domain passed by the voters during the 2006 General Election, the issue remains significant in the state. A joint resolution (S. 661) extending the operations of the Eminent Domain Study Committee through January 31, 2008, was approved by the General Assembly and is pending approval by Governor Mark Sanford ®. The Study Committee was created by legislation enacted in 2006 to formulate recommendations concerning the condemnation authority of all entities that possess the power of eminent domain in the state, the effect of governmental policy on the value and ownership of private property, and the need for revision of current slum clearance and redevelopment uses of eminent domain in the state.
- In Texas several development bills passed:
 - o H.B. 1495 requires governmental entities seeking to condemn private property to provide affected landowners with a "Landowners Bill of Rights" statement informing them of their rights under Texas law and the state's constitution.
 - o H.B. 3694 makes several technical corrections and updates to statutes relating to the enterprise zone program including raising the number of enterprise projects that can be designated during a biennium from 85 to 105 and allowing any designations remaining at the end of a biennium to be carried forward to the next biennium.
 - o H.B. 2991 allows the Commissioners Court of a county of 3.3 million or more or an adjacent county to deny or designate access to or from a controlled access highway within the county and outside the limits of a municipality, including a state highway, at which access to or from the highway is permitted and determine the type and extent of access permitted at each location.



TRIA Expected to Be Reauthorized

In late April the House Financial Services Committee held a hearing regarding extension of the Terrorism Risk Insurance Act (TRIA). The witnesses included insurers, a commercial developer/broker and a representative from a real estate finance and investment company. The panel unanimously agreed on the importance of including nuclear, biological, chemical and radiological (NBCR) risks in the TRIA extension and removing the differentiation of foreign/domestic terrorism. The entire panel felt that the current program is working and that an extension is appropriate at this time. There was debate, however, on how long the extension should last. While the general consensus was 10 years, the Coalition to Insure Against Terrorism (CIAT), of which ICSC is a member, has suggested 15 to 25 years to allow for true stability in the markets. The House is expected to introduce legislation to reauthorize TRIA this month, with a rapid full committee mark-up and possible floor action before the July 4 recess.

Insurance - State News

- Two measures relating to workers' compensation insurance were approved by the Colorado legislature this year. H.B. 1176, sponsored by Representative Morgan Carroll (D) and Senator Lois

Tochtrop (D), allows for an injured worker to have a choice of physicians. This is the third year that Carroll has brought a version of this legislation. While this year's version is much less far-reaching than past versions, it is not without the potential to increase costs. A second bill, S.B. 258, makes it virtually impossible for employers to pay for expert medical testimony related to workers' injuries. Governor Bill Ritter (D) has signed H.B. 1176, and is expected to do the same with S.B. 258.

- Other legislation signed by Colorado Governor Bill Ritter (D) would retroactively alter existing contracts and effectively eliminate the "express" warranties builders currently offer home buyers and replace them with non-specific "implied" warranties. The bill, H.B. 1338, raised concerns over the constitutionality of such a measure, and a court challenge to the retroactive nature of the law is likely.
- A bill in Florida approved by the legislature would freeze rates for clients of Citizens Property Insurance Corporation, the state-run windstorm insurance provider, for the next two years. In addition to the rate freeze, the bill, S.B. 2498, provides that the state's new 90-day rule for insurers to pay claims would no longer apply to commercial property over 10,000 square feet. The bill is awaiting consideration by Governor Charlie Crist ®.
- In Texas, several bills that would have made insurance more available and affordable in coastal areas failed:
 - o H.B. 1865 would have established a system for payment and funding of excess losses to insurers in disaster areas;
 - o H.B. 2960 would have required the Texas Department of Insurance to create an incentive program to minimize the use of the Texas Windstorm Insurance Association as a means to obtain insurance;
 - o H.B. 3272 would have established and funded the Natural Disaster Catastrophe Fund to protect and maintain insurance capacity in the state;
 - o S.B. 1027 would have expanded the Fair Access to Insurance Requirements plan to include commercial property.
 - o S.B. 1473 would have required an insurer to write the same percentage of property and casualty insurance policies in the seacoast territory that it writes in the rest of the state.

Workforce

ICSC-Opposed Union Bill Moves to Senate

ICSC, as part of the Coalition for a Democratic Workplace, continues to oppose S. 1041, the Senate version of the Employee Free Choice Act, or "card check" legislation. As expected, the House version, H.R. 800, passed by a large margin earlier this year in that chamber. ICSC members are urged to contact their Senators to express their opposition on this important industry matter. The legislation eliminates the employee's right to a private election run by the National Labor Relations Board (NLRB) to decide whether to unionize and changes federally supervised private ballot procedures that were adopted more than 60 years ago to protect workers from intimidation or coercion by either employers or unions.

Workforce - State News

- Maryland Governor Martin O'Malley (D) recently signed H.B. 430, requiring state contractors and subcontractors to pay specified minimum wage rates of \$11.30 an hour in the Baltimore-Washington Metropolitan area and \$8.50 in other parts of the state, and adds a mandatory change of the living wage based upon the Consumer Price Index. O'Malley was one of the leading proponents of the bill, stating his support for such legislation in his State of the State Address in January.
- A bill approved by Vermont Governor Jim Douglas ® provides approximately \$5.5 million for workforce training and another \$500,000 for loan repayment. The bill, referred to as the "Next Generation" bill, was considered a top priority this session for Governor Douglas.
- During a recent roundtable discussion with state businesses, Wisconsin Governor Jim Doyle (D) stated his intent to increase current state appropriations for workforce training at the state's technical

colleges. The state legislature is currently reviewing their fiscal year 2007-2009 budget.

Other Legislative Issues

Streamlined Sales Tax Bill Introduced

Last month Senator Mike Enzi (R-WY) introduced S. 34, the "Sales Tax Fairness and Simplification Act." A similar bill is expected in the House this summer. The bill language is nearly identical to S. 2152 from the 109th Congress. There are some outstanding issues, including the concept of a small business exemption, but Enzi and his staff have said they view S. 34 as a starting point from which to find compromise on this and other policy issues of concern to stakeholders. ICSC has long supported Congress granting authority to states to level the sales tax collection playing field for retail sales of all types.

Significant Tax Change Being Considered

The Senate Finance Committee is considering a proposal to tax all returns on partnership carried interest as ordinary income (35 percent tax rate) as opposed to long-term capital gain (15 percent tax rate). The rationale behind this potential change is the view that the carried interest based on the services a general partner provides is compensation for services rendered and not based on capital contributed by the general partner to the partnership. Finance Committee Chairman Max Baucus (D-MT) is under significant pressure to find tax revenue to pay for spending items such as the Alternative Minimum Tax relief.

Although hedge fund managers are the real targets of this revenue raiser, small to mid-size real estate interests would be heavily impacted due to the significant use of partnerships. The carried interest is critical to the ability to pair entrepreneurial risk-taking and expertise with investment capital. Under the proposed tax regime, large and established companies would have the negotiating leverage to pass the increased tax on their carried interest onto the investors through re-pricing. In turn, this would impact pension fund beneficiaries, charities and endowments. Less established companies that do not possess such leverage will have to absorb the increased tax liability. This would serve to dampen, if not extinguish, the entrepreneurial risk-taking and capital placement on which the U.S. economy is based.

REMIC Changes Possible

Several real estate groups, led by the Mortgage Bankers Association (MBA), have joined together to address possible changes to the real estate mortgage investment conduit ("REMIC") regulations to expand the list of permitted loan modifications to include certain modifications incurred in connection with commercial mortgages. The existing regulations, adopted 15 years ago, do not address common situations that now arise with commercial mortgage loans held by REMICs. The suggested changes are related to loan collateral, recourse/non-recourse nature of a loan, prepayment penalties and the principal payment schedule of a loan.

Other Issues - State News

- The Florida legislature unanimously approved legislation permitting private property owners, including shopping center owners, to prohibit signature gathering on their property. The bill, S.B. 1920, codifies case law commonly referred to as the "Publix Law" in reference to the Florida Circuit Court's decision for Publix Supermarkets Inc. v. Tallahasseeans for Practical Law Enforcement, and is pending consideration by Governor Charlie Crist ®.
- Action was delayed until 2008 on a Maine bill that would have granted demonstrators and signature gatherers access to malls and shopping centers. ICSC is closely monitoring a similar bill in

Pennsylvania (H.B. 1383) that would stipulate large retail establishments provide access to any person engaging in noncommercial speech on matters relating to community affairs, religion, politics, collective bargaining, business practices, workplace rights or topics of public concern. Included in the bill is the right to distribute literature and gather signatures. It is not clear whether the Pennsylvania legislature will take action on the bill.

- Massachusetts Governor Duval Patrick (D) and the General Court appointed a commission on April 30 to study the tax code and make recommendations for revisions. The Commission is charged with “studying ways to modernize and simplify business tax laws, promote tax fairness, encourage business growth and innovation, and strengthen the Commonwealth’s global competitiveness.” The commission is a result of Governor Patrick’s “tax loopholes” bill, H.B. 3756, failing to gain support.
- Also in Massachusetts, the Joint Committee on Revenue held a hearing for a bill relating to the Streamlined Sales and Use Tax Agreement. Specifically, the bill (S.B. 1757) authorizes the Department of Revenue to prepare a feasibility study, together with a draft of legislation to bring the state into full compliance with the Streamlined Sales and Use Tax Agreement. The Committee has yet to take a vote on the bill.
- The Minnesota legislature adjourned their regular session on May 21 after having pushed through all of the major spending bills, despite not coming to a full budget agreement with Governor Tim Pawlenty ®. Legislators approved a tax bill that would increase subsidies to the Mall of America to help fund the construction of a \$180 million parking garage for mall expansion. The bill would also give the City of Bloomington authority to impose some new taxes, including a 1 percent lodging tax throughout the city, a 1 percent admissions tax on the amusement park and a 1 percent sales tax on purchases at the mall. Despite Governor Pawlenty’s support of the Mall of America expansion, it is believed he will veto the tax bill over other provisions. This leaves the Mall of America expansion in flux until the legislature convenes their 2008 legislative session.
- Governor Pawlenty also approved legislation prohibiting expiration dates and service fees for gift cards beginning August 1. The bill, S.F. 69, doesn’t apply to bank-issued cards that can be redeemed at multiple stores.
- New Jersey State Senator Joseph Doria (D) recently introduced legislation that would permit certain municipalities to impose a local realty transfer fee on the conveyance or transfer of real property within the municipality. The bill, S. 2643, specifies that the local realty transfer fee would be in the amount of \$0.50 per \$500 of consideration or fractional part thereof recited in the deed. Furthermore, the new fee would be in addition to any realty transfer fees currently imposed by law. It is pending consideration in the Senate Community and Urban Affairs Committee.
- In Oregon, S.B. 1036, currently moving through the Oregon legislature, proposes to give school districts the authority to levy a construction excise tax on commercial development and directs such revenue to fund school construction and improvements. As the bill was originally written, the tax rate of \$.50/square foot had no caps on retail construction while a \$25,000 cap was applied to all other commercial and industrial construction. ICSC was able to negotiate the same cap for retail construction and clarify that the language applies only to new construction rather than changes to existing property. In addition, ICSC secured an amendment in the bill to provide an exemption from the tax for brownfield redevelopments.
- In Texas, several bills that affect the real estate/shopping center industry passed:
 - o H.B. 320 expands the list of entities authorized to use electronically readable information from a driver’s license or personal identification certificate to include businesses using it for the purpose of check verification at the point of sale.
 - o H.B. 3093 allows a business to require a customer’s zip code for verification with customers purchasing goods or services with a credit card.
 - o S.B. 1389 requires retailers offering a rebate over \$10 to mail the amount of the rebate to the consumer or electronically pay within the time period promised in the rebate information, or if silent, not later than 30 days after the date they receive the properly completed rebate request.
- Bills that failed in Texas include:
 - o H.B. 2985 would have exempted flowthrough charges in triple net leases from the franchise tax.
 - o H.B. 133/S.B. 170 would have required purchasers of real property to file a sales price disclosure report with the chief appraiser of the county in which the property is located within 10 days of the sale.
- In Wisconsin, Senator Jim Sullivan (D) recently filed S.B. 191, which would require a seller of gift certificates, gift cards or similar items to provide a purchaser at the point of sale a conspicuous

disclosure of any expiration date that applies to the gift obligation and the terms and amount of any service charges that apply to the gift obligation. The bill is awaiting review in the Senate Small Business, Emergency Preparedness, Workforce Development, Technical Colleges and Consumer Protection Committee.

International Council of Shopping Centers

ICSC Office of Global Public Policy
1399 New York Ave. NW, Suite 720
Washington, DC 20005
ph: 202-626-1400, fax: 202-626-1418

[Contact Us](#)