NO ADVERSE IMPACT AND THE COURTS:
PROTECTING THE PROPERTY RIGHTS OF ALL

Prepared for the Association of State Floodplain Managers

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PREFACE

This paper discusses selected legal issues associated with a "No Adverse Impact" floodplain management approach. The primary audience for this paper is government lawyers and lawyers who advise government officials such as land planners, legislatures, and natural hazard managers or who defend governments against natural hazard-related common law or constitutional actions. The secondary audience is government officials, regulators, academics, legislators, and others undertaking actions which may impact or reduce flood hazards. Given the primary audience, we have included many case law citations in the paper.

The paper addresses the general law of the nation. Anyone wishing for more specific guidance pertaining to their state should contact a local attorney.

The paper is based, in part, upon a review of floodplain cases over the last twenty years. Sam Riley Medlock, CFM, a student at Vermont Law School, updated case law, drafted the chapter on 42 U.S.C. § 1983, and added images and credits for this 2007 edition. Research for the 2005 edition was carried out by the authors and by Todd Mathes, a law student at the Albany Law School. The paper is also based upon earlier surveys of flood, erosion and other natural hazard case studies carried out by Dr. Jon Kusler in preparing a 1993 report, *The Law of Floods and Other Natural Hazards*, which was funded by the National Science Foundation.

For other legal publications by Dr. Kusler on related subjects, see Kusler, J., *Wetland Assessment in the Courts*, Association of State Wetland Managers (2003); Kusler, J., *The Lucas Decision, Avoiding "Taking" Problems With Wetland and Floodplain Regulations*, 4 Md. J. Contemp. L. Issues 73 (1993); Kusler, J., *Regulating Sensitive Lands*, Ballinger Publishers (1985); Kusler, J., et al., *Our National Wetland Heritage*, The Environmental Law Institute (1985); Kusler, J. and Platt, R., *The Law of Floodplains and Wetlands: Cases and Materials*, American Bar Association, Special Committee on Housing and Urban Development Law (1982); Kusler, J., et. al., *Regulation of Flood Hazard Areas to Reduce Flood Losses*, U.S. Water Resources Council, U.S. Government Printing Office (Vol. 1, 2, 3) (1972, 1973, 1975); Kusler, J., *Open Space Zoning: Valid Regulation or Invalid Taking?*, 57 Minn. L. Rev. 1 (1972); Kusler, J., *Water Quality Protection for Inland Lakes in Wisconsin: A Comprehensive Approach to Water Pollution*, 1970 Wis. L. Rev. 35 (1970).

For other publications by Attorney Thomas on related topics, see Thomas, E. A., *Liability for Water Control Structure Failure Due To Flooding*, Association of State Floodplain Managers, 2005.

We thank the many who have reviewed drafts of the paper and provided helpful comments. We thank particularly Professor Pat Parenteau, Esq., from Vermont Law School, and Larry Larson and other staff at ASFPM. We contemplate that this paper will be continuously updated and improved. Comments, suggestions, and input are always welcome through the Association of State Floodplain Managers.

Jon Kusler and Ed Thomas

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EXECUTIVE SUMMARY

This paper examines the No Adverse Impact, or NAI, approach for community floodplain management from several legal perspectives. With such an approach, a community implements a goal not to increase flood peaks, flood stage, flood velocity, erosion, and sedimentation in public works projects, development permitting, and other activities.

The paper first considers the relationship of an NAI approach to landowner common law rights and duties pertaining to flooding and erosion. The paper next considers the constitutionality of floodplain regulations incorporating a No Adverse Impact standard. Through legal research and analysis, we reach the following conclusions:

The No Adverse Impact approach is consistent with common law rights and duties, and will reduce the potential for successful lawsuits against communities (e.g., nuisance negligence) by private landowners for increasing flood and erosion hazards on private lands. From a common law perspective, a No Adverse Impact approach for floodplain management coincides, overall, with traditional, truly ancient common law public and private landowner rights and duties with regard to the use of lands and waters. Courts have followed the maxim "Sic utere tuo ut alienum non laedas," or "so use your own property that you do not injure another's property." See *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987) and many cases cited therein. This maxim characterizes overall landowner rights and duties pursuant to common law nuisance, trespass, strict liability, negligence, riparian rights, surface water law rights and duties (many jurisdictions), and statutory liability. At common law, no landowner (public or private) has a right to use his or her land in a manner that substantially increases flood or erosion damages on adjacent lands except in a dwindling number of jurisdictions applying the "common enemy" doctrine to diffused surface or flood waters.

Communities which adhere to a No Adverse Impact approach in decision-making and activities that affect the floodplains will decrease the potential for successful liability suits from a broad range of activities such as road and bridge building, installation of stormwater management facilities, construction of flood control works, grading, construction of public buildings, approving subdivisions and accepting dedications of public works, and issuing permits.

Courts will uphold community floodplain regulations which contain a No Adverse Impact standard against "takings" and other Constitutional challenges to regulations. From a Constitutional law perspective, courts are very likely to uphold community regulations which adopt a No Adverse Impact performance standard against claims of unreasonableness or "taking" of private property without payment of just compensation. This is particularly true if there is some flexibility in the regulation of development. Courts have broadly and consistently upheld state and local performance-oriented floodplain regulations including many which exceed minimum Federal Emergency Management Agency (FEMA) standards against taking challenges. Recent U.S. Supreme Court and State Court decisions have further emphasized this trend.

Courts are likely to uphold a No Adverse Impact standard not only because of this general support, but because such a standard is consistent with, overall, common law rights and duties. Courts have reasoned that regulations take nothing from landowners when they enforce common law rights and duties. Courts have broadly upheld regulations designed to prevent landowners from creating nuisances or undertaking activities which violate other common law private property concepts as not a "taking," in part, because no landowner has a "right" to cause a nuisance or violate the private property rights of others, even where this may significantly impact the landowner.

Courts are likely to not only uphold a broad No Adverse Impact performance goal or standard, but more specific implementing regulations which tightly control development in floodways, coastal high hazard areas, and other high risk zones to implement such a standard. They are also likely to uphold very stringent regulations for small strips of land (e.g., setbacks) and open space zoning for floodplains where there are economically viable uses such as transferable development rights, forestry, or agriculture. Communities are likely to encounter significant "taking" problems only where floodplain regulations permanently deny all or nearly all economic use of entire floodplain properties.

NAI provides the framework for sound and sustainable policy, not as a prescribed set of standards, but as an overall principle to guide all community activities. Communities can incorporate NAI approaches into all phases of hazard identification & mitigation, development planning & regulation, public education & involvement, emergency management & services, capital improvements & public works, and the myriad other local functions and activities that present opportunities prevent harm. As local governments implement a consistent and complementary NAI approach, leaders can be confident that their efforts to reduce the misery, expense, and disruption of flooding will be effective, as well as legally sound.

In summary, NAI is a PRINCIPLE that leads to a PROCESS which is legally acceptable, non-adversarial (neither pro- nor anti-development), understandable, and palatable to the community as a whole. The process clearly establishes that the "victim" in a land use development is not the developer, but rather the other members of the community who would be adversely affected by a proposed development. The developer is liberated to understand what the communities concerns are so they can plan and engineer their way to a successful, beneficial development.

PART 1: INTRODUCTION

Part 1 of the following paper briefly discusses the No Adverse Impact goal. Part 2 discusses community liability for increasing flood and erosion damages on private lands under common law theories and how a No Adverse Impact goal may help reduce such liability. In Part 3, the paper considers the constitutionality of community regulations (zoning, building codes, subdivision controls) incorporating a No Adverse Impact standard against "takings" challenges and various types of implementing regulations. Finally, in Part 4, the paper provides recommendations to help communities avoid common law liability and constitutional problems with No Adverse Impact regulations.

The paper is based upon a general examination of state and federal case law pertaining to flooding and floodplain regulations. For more precise conclusions for a particular jurisdiction, the reader is advised to consult a lawyer or examine the case law from that jurisdiction.

THE NO ADVERSE IMPACT GOAL

In 2000, the Association of State Floodplain Managers (ASFPM) recommended in a white paper a "No Adverse Impact" goal or approach for local government, state, and federal floodplain management. ASFPM recommended that communities adopt this goal to help control the spiral of flood and erosion losses, new development which increases flood risks, and then additional flood losses. The paper stated: "**No Adverse Impact floodplain management is an approach which ensures that the action of one property owner does not adversely impact the properties and rights of other property owners, as measured by increased flood peaks, flood stage, flood velocity, and erosion and sedimentation.**" The following explanation of "No Adverse Impact" is taken from this paper. The entire paper can be found on the ASFPM web site www.floods.org.

According to ASFPM, the "No Adverse Impact" goal is not intended as a rigid rule of conduct for all properties. Rather it has been suggested as a general guide for landowner and community actions (construction of public works, use of public lands, planning, regulations) in the watersheds and the floodplains which may adversely impact flooding and erosion on other properties or communities. A No Adverse Impact goal could also potentially be applied to environmental and other impacts, if a community chooses to do so.

Fundamentally, a No Adverse Impact Approach is a Property Rights Protection Approach which ensures that the Property Rights of **all** persons in a community are protected.

ASFPM notes in the paper that flood damages in the United States continue to escalate. From the early 1900s to the year 2000, flood damages in the United States have increased fourfold, approaching $6 billion annually. Damages in 2004 and 2005 have been wildly above this already high level. This occurred despite, and apparently, in some cases, because of, billions of dollars spent for structural flood control, and other structural and non-structural measures. Nationally, development within floodplains continues to intensify. Development is occurring in a manner whereby flood prone or marginally protected homes and businesses are suddenly prone to damages because of the actions of others in the floodplain. These actions raise flood heights and velocities and erosion potential. Such increases in flood heights and velocities also have the potential to significantly increase the likelihood that levees will be overtopped, thus dramatically increasing the potential for serious, even life-threatening harm to areas,

throughout this Nation, protected by such structures.

The 2005 hurricane season and ongoing misery caused by Hurricanes Katrina, Rita and Wilma serve as harsh reminders of the urgent need for all communities to adopt development (much of damage avoidance comes through subdivision, planning guidance, not just regulations and codes) standards beyond federal minimums. Current FEMA National Flood Insurance Program (NFIP) floodplain management standards do not prohibit diverting floodwaters onto other properties, reduction in channel and overbank conveyance areas; filling of essential valley storage; and changing flood velocities with little regard as to how these changes impact others in the floodplain and watershed. There is no question that the damage potential in the nation's floodplains is intensifying. This current course is one that is not equitable to those whose properties are impacted.

ASFPM recommends that, for local governments, No Adverse Impact floodplain management represents a way to prevent ever worsening flooding and flood damages and potentially increased legal liability. Most local governments have simply assumed that the federal floodplain management approaches embody a satisfactory standard of care, perhaps not realizing that existing approaches will not prevent increased flood damages and may induce additional flooding and damage.

Image credit: Texas Colorado River Floodplain Coalition.

According to ASFPM, No Adverse Impact floodplain management offers communities an opportunity to promote responsible and equitable, as well as legally sound, floodplain development through community-based decision-making. Communities with such an approach will be able to better use federal and state programs to enhance their proactive initiatives and utilize those programs to their advantage as communities. A community with a No Adverse Impact floodplain management initiative empowers all the community, including property owners, developers, and citizens to actively participate as stakeholders at the local level. No Adverse Impact floodplain management can be a step towards individual as well as community accountability by not increasing flood damages on other properties and in other communities. A No Adverse Impact floodplain management goal requires communities to be proactive in understanding potential flood development impacts and implementing programs of loss mitigation before impacts occur.

ASFPM recommends that No Adverse Impact floodplain management be the default management standard for community regulations. It can also serve as an overall goal for a community that wishes to develop a comprehensive watershed and floodplain management plan which identifies acceptable levels of impact, specifies appropriate measures to mitigate those adverse impacts, and sets forth a plan of actions for implementation. No Adverse Impact can be extended to entire watersheds to promote the use of retention and detention technologies to mitigate increased runoff from urban areas. The Minimum Standards of the National Flood Insurance Program require that communities "review all permit applications to determine whether proposed building sites will be reasonably safe from flooding." See 44 C.F.R. 60.3(a)(1). In addition, the regulations on the flood program specifically state that "(a) any community (under the NFIP states are also considered as communities) may exceed the minimum criteria (in the regulations) by adopting more comprehensive flood plain management regulations… Therefore, any flood plain management regulations adopted by a State or community which are more restrictive (than the Flood Program Minimum Standards) are encouraged and shall take precedence."

LEGAL ISSUES

The No Adverse Impact goal raises two major sets of legal issues which are examined in this paper:

- Is the no impact goal consistent with the flood-related common law rights and duties of public and private landowners pertaining to flooding? Will adherence to this approach reduce suits against governments for flood losses (e.g., where new community roads, bridges, storm sewers will result in increased flood damage to private lands)?

Image credit: Institute for Justice.

- Is community adoption of a No Adverse Impact regulatory standard consistent with the constitutional prohibitions against taking private property without payment of just compensation? May specific implementing standards include attachment of conditions to permits, tight regulation of high-risk areas, tight regulation of narrow strips of land (buffers), open space zoning, and other implementing regulations?

We will examine the two questions in sequence.

PART 2: NO ADVERSE IMPACT AND THE COMMON LAW

Is the no impact goal consistent with the flood-related common law rights and duties of public and private landowners pertaining to flooding? Will adherence to the No Adverse Impact approach reduce successful suits against governments for increasing flood and erosion losses on private property?

SUCCESSFUL COMMON LAW SUITS AGAINST GOVERNMENTAL UNITS

Despite government efforts to protect lives and reduce property losses, natural hazards continue to take a heavy toll in the U.S. and abroad. Damages, including loss of life, due to Hurricanes Katrina, Rita, and Wilma are estimated at $150 billion in costs and over 1300 deaths. Estimates indicate that Katrina will be the costliest disaster in U.S. history. The "Great Midwest Flood" along the Mississippi and Missouri Rivers in 1993 caused damages in excess of $12.5 billion and nearly 50 deaths. Loss of life in the U.S. from hurricanes and flooding, as well as property losses, continue to mount as private and public development occurs in hazardous locations. Development in the watershed which increases flood and erosion on other properties further exacerbates the problem.

Landsat inundation imagery, New Orleans, Louisiana, August 31, 2005. Image credit: NOAA Coastal Services Center.

When individuals are damaged by flooding or erosion, they often file lawsuits against governments or other individuals, claiming that the governments have caused the damages, contributed to the damages, or failed to prevent or provide adequate warnings of natural hazards.

Box 1 outlines principal legal theories for such suits including "nuisance", "trespass", "violation of riparian rights", violation of the "law of surface water", "strict liability", "negligence", "denial of support", "statutory liability" and constitutional liability for "uncompensated takings". All but "statutory" grounds and "uncompensated takings" are "common law" grounds for suits. The common law is judge-made law dating back more than one thousand years. This judge-made law is primarily concerned with resolving disputes between individuals in a fair and equitable manner.

In a typical common law flood suit, a private landowner damaged by flood waters sues a community, alleging that the community actions increased flood or erosion damages on his or her property. The landowner's lawyer will argue liability based on one or several legal theories or grounds of the sort outlined in Box 1. To win in court, the landowner must prove the amount of flood damage, that the flooding or erosion was more severe than would have naturally occurred, and that the community's actions were the cause of the damage.

LEGAL THEORIES OR GROUNDS FOR LIABILITY

Nuisance

At common law, no landowner (public or private) has a right to use his or her land in a manner that substantially interferes, in a physical sense, with the use of adjacent lands. See, e.g., *Sandifer Motor, Inc. v. City of Rodland Park,* 6 Kan. App. 2d 308 (Kan., 1981) (Flooding due to city dumping debris into ravine which blocked sewer system was a nuisance.) "Reasonable" conduct is usually no defense against a nuisance suit, although reasonableness is relevant to a determination of nuisance in some contexts and the type of relief available.

Principal activities which increase natural hazard losses on adjacent lands and may be subject to nuisance suits include: dikes, dams, levees, grading, construction of roads and other land alterations which increase flood heights and velocities on other lands; erosion control structures such as groins and seawalls which increase erosion and/or flooding on other lands; and mud slide, landslide, and other ground failure structures that increase rather than decrease damages on adjacent lands.

Trespass

At common law, landowners can also bring trespass actions for certain types of public and private actions which result in physical invasion of private property such as flooding or drainage. See *Modern, Inc. v. State,* 444 F. Supp. 2d 1234 (M.D. Fla. 2006). There are several different types of "trespass" (trespass and "trespass on the case"). An extensive discussion of the law of trespass with all of its nuances is beyond the scope of this paper.

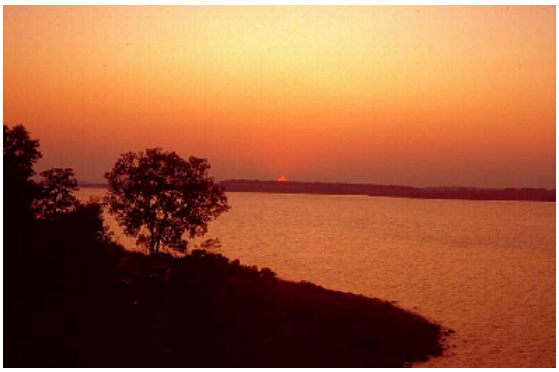


Image credit: US Army Corps of Engineers.

Violation of Riparian Rights

At common law, riparian landowners enjoy a variety of special rights incidental to the ownership of riparian lands. These rights or "privileges" include fishing, swimming, and construction of piers. Riparian rights must be exercised "reasonably" in relationship to the reciprocal riparian rights or other riparians. Courts in some instances have held that construction of levees, dams, etc. by one riparian which increase flood damages on other lands are a violation of the riparian rights of other riparians. See *Lawden v. Bosler,* 163 P.2d 957 (Okla., 1945).

Violation of the Law of Surface Water

Under the rule of "reasonable use" (or some variation of it), in most states landowners cannot, at common law, substantially damage other landowners by blocking the flow of diffused surface waters, increasing that flow, or channeling that flow to a point other than the point of natural discharge. Courts have applied these rules to governmental units as well as private landowners and have, in some instances, applied even more stringent standards to governmental units. See, for example, *Wilson v. Ramacher,* 352 N.W.2d 389 (Minn., 1984).

Strict Liability

Courts, in a fair number of states, have held that landowners and governments are "strictly liable" for the collapse of dams and other water control structures such as levees because impoundment of water, following an early English ruling, has often been held an "ultrahazardous" activity. Private and public landowners are liable for damages from ultrahazardous activities even when no negligence is involved. This topic is the subject of a related paper by attorney Edward A. Thomas, *Liability for Water Control Structure Failure Due to Flooding,* Association of State Floodplain Managers, 2006, available at http://www.floods.org.

Negligence

At common law, all individuals (including public employees) have a duty to other members of society to act "reasonably" in a manner so as not to cause damage to other members of society. "Actionable negligence results from the creation of an unreasonable risk of injury to others. In determining whether a risk is unreasonable, not only the seriousness of the harm that may be caused is relevant, but also the likelihood that harm may be caused." The standard of conduct is that of a "reasonable person" in the circumstances. Negligence is the primary legal basis for public liability for improper design of hazard reduction measures such as flood control structures, improperly prepared and issued warnings, inadequate processing of permits, inadequate inspections, etc. See discussion below; *Kunz v. Utah Power & Light Co.*, 526 F.2d 500 (9th Cir., 1975).

Denial of Lateral Support

At common law, the owner of land has a duty to provide "lateral support" to adjacent lands, and any digging, trenching, grading, or other activity that removes naturally occurring lateral support is done so at one's peril. Government construction of roads, bridges, buildings, and other public works may deny lateral support to adjacent lands causing land failures (landslides, mudslides, erosion, building collapse). See discussion below; *Blake Constr. Co. v. United States*, 585 F.2d 998 (Ct. Cl., 1978) (U.S. government liable for subsidence due to excavation next to existing buildings.)

Image credit: US Army Corps of Engineers.

Statutory Liability

Some states have adopted statutes which create separate statutory grounds for legal action. For example, the Texas Water Code, section 11.086, makes it unlawful for any person to divert the natural flow of waters or to impound surface waters in a manner that damages the property of others. See *Miller v. Letzerich*, 49 S.W.2d 404 (Tex., 1932).

Inverse Condemnation or "Taking" Without Payment of Just Compensation

Courts have quite often held governments liable for direct physical interference with adjacent lands due to flooding, mudflows, landslides, or other physical interferences based upon a theory of "taking" of property without payment of just compensation. Government landowners but not private landowners may be liable for such a taking. Successful inverse condemnation suits have been particularly common in California. For example, see *Ingram v. City of Redondo Beach*, 119 Cal. Rptr. 688 (Cal., 1975) in which the court held that collapse of an earthen retaining wall maintained by the city was basis for an inverse condemnation suit. But, inverse condemnation actions have been recognized in many other states as well. See, e.g., *Wilson v. Ramacher*, 352 N.W.2d 389 (Minn., 1984) (flooding); *McClure v. Town of Mesilla*, 601 P.2d 80 (N.M., 1979) (operation of drainpipe).

Successful liability suits based upon natural hazards have become increasingly expensive to governments, not only because of the increasing awards for flood and erosion damages but because of increasing attorney and expert witness fees and court costs which may exceed the damage award. See, for example, *City of Watauga v. Tayton*, 752 S.W.2d 199 (Tex., 1988). In this case, the trial court awarded only $3,000 for damages to a home flooded by city actions and $6,800 for destruction of personal property and fixtures. But it awarded $19,500 for mental anguish and $15,000 for attorney's fees, more than three and one half times the amount of the physical damages. The appellate court

overturned the award for attorney's fees but upheld the award for mental anguish. For a much larger award of damages and hefty attorney's fees, see *West Century 102 Ltd. v. City of Inglewood*, 2002 Cal. App. Unpub. LEXIS 1599 (Calif. App., 2002), in which the court awarded a judgment of $2,448,120 against the city for water damage, including $493,491 in attorney's fees.

Successful liability suits of all types have increased in the last two decades for several reasons:

- **A growing propensity to sue.** Historically, members of society were more willing to accept losses from a broad range of natural hazard causes. Now, individuals suffering losses look for fault and monetary compensation from other individuals (public or private) who may have played even a limited role in causing or failing to prevent the losses.

- **Large damage awards and the willingness of lawyers to initiate suits.** Dramatic increases in damage awards, combined with expanded concepts of liability and lessened defenses, have encouraged lawyers to take liability cases on a contingent fee (20-60% or more) basis. This means that landowners and other claimants do not need large sums of money to initiate or pursue suits. Nor, will they be responsible for attorney's fees and court costs if they lose.

- **Governments are viewed as having "deep pockets".** Governments are often considered as being "able to pay." In some jurisdictions, governments may be held liable for the full amount of damages even where government actions were only a small contributor to such damages. Such joint and several liability has often been criticized and either judicially or legislatively changed in many states. But, even without joint and several liability, governments remain a good candidate for suit because juries often view them unsympathetically.

- **Expanded concepts of liability.** Courts and legislative bodies have expanded the basic rules of liability to make landowners and governmental units responsible for actions which result in or increase damages to others. For example, the traditional "common enemy" doctrine with regard to diffused surface waters (and other flood waters in some states), whereby a landowner could grade, dike, levee, or otherwise protect himself or herself against surface water without liability to other landowners or individuals who might be damaged by increased flows, has been replaced judicially or legislatively in most jurisdictions by a rule of "reasonable use". Pursuant to this rule, landowners must act "reasonably" with respect to other landowners. See, e.g., *County of Clark v. Powers*, 611 P.2d 1072 (Nev., 1980). In general, any activity which substantially increases the amount, velocity, or depth of surface waters on other lands has been held by courts to be unreasonable and potentially subject to liability. See, e.g., *Lombard Acceptance Corp. v. Town of San Anselmo*, 114 Cal. Rptr. 2d 699 (Cal. App., 2002), in which the court issued an injunction against a town for unreasonable increases in surface water which caused a landslide.

  Similarly, the doctrine of *caveat emptor* (let the buyer beware) with regard to the sale of improved or unimproved property has been partially replaced by one of "implied warranty of suitability." Pursuant to this doctrine, a developer of new homes is now legally liable if the homes are not suitable for their intended uses due to flooding, erosion, subsidence, or other natural hazards.

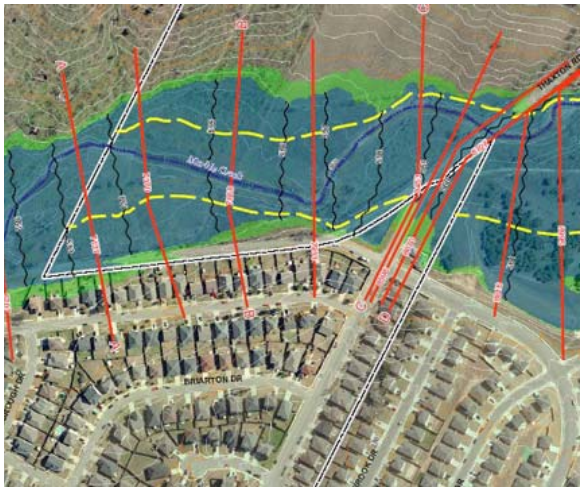
- **Uncertainties with regard to the legal rules of liability and defenses (e.g., "act of God")**

due to the evolving nature of the body of law and the site-specific nature of many tort actions. The evolving and expanding nature of liability law, combined with the potential for large judgments, has encouraged landowners and their lawyers to initiate suits even in situations where no plaintiff has won before. With the potential for a several million-dollar judgment in a single suit, lawyers can take chances on untested legal theories and factual situations with only a limited chance of success.

Even without expansion in basic rules of liability, the site-specific nature of negligence actions encourages a large number of suits due to the lack of hard and fast rules for negligent or non-negligent conduct. Negligence depends upon the circumstances. "Negligence" is, to a considerable extent, what a judge or jury says is reasonable or unreasonable in a specific circumstance.

- **Abrogation or substantial modification of sovereign immunity in most jurisdictions.** Traditionally governments could not be sued for negligence due to "sovereign immunity" although they were, in general, able to be sued at common law for nuisances and taking of property without payment of just compensation. In the last three decades, the defense of sovereign immunity has been substantially reduced or abrogated altogether by court action or, more commonly, by Congressional or legislative acts. As a result, governmental units at all levels of government can be sued for negligence under certain circumstances, although there are exceptions. Most governments now carry liability insurance.

- **Hazards have become more "foreseeable" and predictable.** The potential for private and government liability has increased as the techniques and capabilities for defining hazard areas and predicting individual hazard events have improved and actual mapping of hazard areas has taken place. With improved predictive capability and the actual mapping of areas, hazard events are now (to a greater or lesser extent) "foreseeable" and failing to take such hazards into account may constitute negligence. See, e.g., *Barr v. Game, Fish, and Parks Comm'n*, 497 P.2d 340 (Col., 1972.)



The increased availability and accuracy of digital hazard maps help communities anticipate and prepare for disasters. Image credit: City of Austin, Texas.

- **Limitations on the "Act of God" defense.** "Act of God" was, at one time, a common, successful defense to losses from flooding and erosion. But, at common law, "acts of God" must not only be very large hazard events but must also be "unforeseeable." See, e.g., *Barr v. Game, Fish, and Parks Comm'n*, 497 P.2d 340 (Col., 1972.) See also, *Lang et al. v. Wonneberg et al.,* 455 N.W.2d 832 (N.D., 1990); *Keystone Elec. Mfg. Co., City of Des Moines*, 586 N.W.2d 340 (Ia., 1998). Improved predictive capability and the development of hazard maps for many areas have limited the use of this defense.

Image credit: Federal Emergency Management Agency.

- **Advances in the techniques for reducing hazard losses.** Advances in hazard loss reduction measures (e.g., warning systems or elevating structures) create an increasingly high standard of care for reasonable conduct. As technology advances, the techniques and approaches which must be applied by engineers and others for "reasonable conduct" judged by practices applied in the profession also advance.

Private landowners and governments are negligent if they fail to exercise "reasonable care" in the circumstances. Architects and engineers must exercise "reasonable care" and demonstrate a level of knowledge and expertise equal to that of architects and engineers in their region. See Donald M. Zupanec, Annotation, *Architect's Liability for Personal Injury or Death Allegedly Caused by Improper or Defective Plans or Designs*, 97 A.L.R.3d 455 (2004). Widespread dissemination of information concerning techniques for reducing flood and erosion losses through magazines, technical journals, and reports, has also broadened the concept of "region" so that a broad if not national standard of reasonableness may now exist. *See, e.g.,* Jon Kusler, Professional Liability for Construction in Flood Hazard Areas (May 14, 2007)(unpublished paper on file with the Association of State Floodplain Managers).

- **Advances in natural hazard computer modeling techniques, which can be used to prove causation.** Fifty years ago, it was very difficult for a landowner to prove that a particular activity on an adjacent land substantially increased flooding, subsidence, erosion, or other hazards on his or her land. This was particularly true when the increase was due to multiple activities on many lands, such as increased flooding due to development throughout a watershed. Today, sophisticated computer modeling techniques facilitate proof of causation and allocation of fault, although proof may still be difficult. See, e.g., *Souza v. Silver Dev. Co.*, 164 Cal App. 3d 165 (Cal., 1985); See, e.g., *Lea Co. v. North Carolina Board of Transp.*, 374 S.E.2d 866 (N.C., 1989).

- **Limitations upon the defenses of contributory negligence and assumption of risk.** Traditionally, contributory negligence (i.e., actions which contribute to the injury or loss) and assumption of risk were often partial or total defenses to negligence. Today most states have adopted comparative negligence statutes which permit recovery (based upon percentage of fault), even where the claimant has been partially negligent. In a somewhat similar vein, courts have curtailed the "assumption of risk" doctrine and have, in some cases, held that even relatively explicit assumption of risk is no defense against negligent actions.

Summary

All levels of government -- the federal government, states and local governments -- may now be sued for negligence, nuisance, breach of contract, or the "taking" of private property without payment of just compensation under certain circumstances when they increase flood or erosion hazards, although vulnerability to suit varies. As a practical matter, local governments are most vulnerable to

liability suits based upon natural hazards because they are, in many contexts, the units of government undertaking most of the activities which may result in increased natural hazards or "takings of private property"; they are also the least protected by defenses such as sovereign immunity and statutory exemptions from tort actions. It is at the local level that most of the active management of hazardous lands occurs (road building and maintenance; operation of public buildings such as schools, libraries, town halls, sewer and water plants; parks). It is also at the local level where most public services with potential for creating liability, such as flood fighting, police, ice removal, emergency evacuation, and ambulance services, are provided.

EXAMPLES OF FLOODING, DRAINAGE, AND EROSION CASES

Units of government have been successfully sued for flooding, drainage, and erosion damages in a broad range of contexts which are illustrated below. Flooding affects, to a greater or lesser extent, much of the land in the U.S. Approximately 7% of the land and 8.5 to 11 million structures in the U.S. are within the 100-year floodplain. Flooding is due to tides, storm surges, pressure differentials (seiches), long-term fluctuations in precipitation leading to high groundwater levels or high lake levels, riverine flooding, flash flooding, storm surge (hurricanes), and stormwater flooding. High water levels and high velocities may kill people, livestock, and wildlife and destroy or damage structures, crops, roads, and other infrastructure.

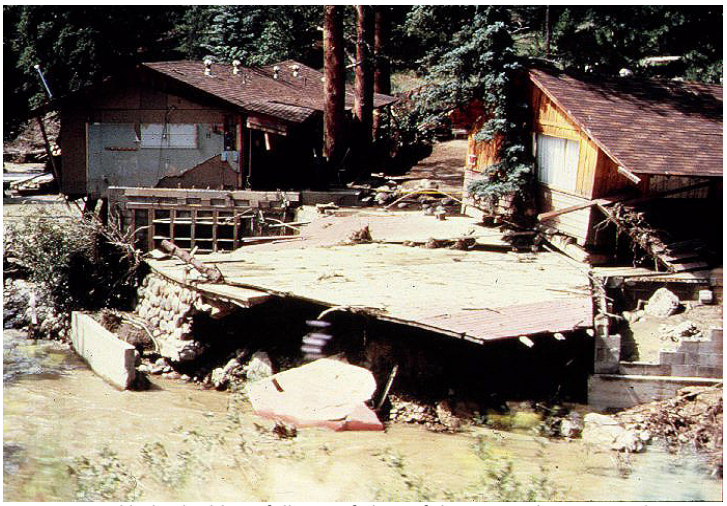
Floods are, to a lesser or greater extent, foreseeable and predictable. As a result of the broad scale incidence of flood and drainage problems and the foreseeability of flooding, most (perhaps 85%) of natural hazard related liability suits against governments have been the result of flood or drainage damages. Many examples of successful cases are provided below and in other publications. See, for example, Binder, D.B., *Legal Liability for Dam Failures*, Association of State Dam Safety Officials, Lexington, Kentucky (1989); Annotation, *Liability of Municipality or Other Governmental Subdivision in Connection with Flood Protection Measures*, 5 A.L.R.2d 57 (2003). Cases illustrating various types of situations in which courts have held that governments may be sued for flooding, drainage, or erosion damages include the following. They have commonly been brought based on one or more of the legal theories identified in Box 1. At one time, nuisance and trespass were the most common grounds for successful suits. More recently, negligence and unconstitutional takings have become more common. Examples include the following:

- *Avery v. Geneva County*, 567 So.2d 282 (Ala., 1990) (County may be liable for breaking a beaver dam which resulted in a flood and drowning.)

- *United States v. Kansas City Life Ins. Co.,* 339 U.S. 799 (1950) (Federal government is liable for artificially maintaining the Mississippi River at an artificially high level which raised the water table, blocked drainage of properties and caused destruction of the agricultural value of lands.)

- *Coates v. United States*, 612 F. Supp. 592 (D.C. Ill., 1985) (Federal government is liable for failure to give adequate flash flood warning to campers in Rocky Mountain National Park and to develop adequate emergency management plan.)

- *Ducey v. United States*, 830 F.2d 1071 (9th Cir., 1983) (Federal government is potentially liable for failure to provide warnings for flash flood areas for an area subject to severe flooding in Lake Mead National Recreation Area.)



Campground lodge buildings following failure of the Lawn Lake Dam, Rocky Mtn. Nat'l. Park. Image credit: Estes Park, Colorado.

- *County of Clark v. Powers*, 611 P.2d 1072 (Nev., 1980) (County is liable for flood damage cause by county-approved subdivision.)

- *Myotte v. Village of Mayfield*, 375 N.E.2d 816 (Oh., 1977) (Village is liable for flood damage caused by issuance of a building permit for industrial park.)

- *Masley v. City of Lorain*, 358 N.E.2d 596 (Oh., 1976) (City is not liable under theory of trespass for increased flooding due to urbanization including lots and streets, but may be liable for inverse condemnation for damages due to storm sewer system.)

- *Barr v. Game, Fish & Parks Comm'n*, 497 P.2d 340 (Col., 1972) (State agency is liable for negligent design of dam and spillway inadequate to convey maximum probable flood; "act of God" defense inapplicable because of the foreseeability of the hazard event.)

- *Rodrigues v. State*, 472 P.2d 509 (Haw., 1970) (State is liable for damages due to inadequate maintenance of drainage culverts which were blocked by sand bars and tidal action.)

Cases are not confined to flooding and erosion but also include water-related landslides and earth movements. See, for example:

- *ABC Builders, Inc. v. Phillips*, 632 P.2d 925 (Wyo., 1981) (Evidence of city's failure to maintain a drainage ditch was sufficient to establish city's liability for resulting landslide.)

- *Blau v. City of Los Angeles*, 107 Cal. Rptr. 727 (Cal., 1973) (City potentially liable under a theory of inverse condemnation for approving and accepting dedication of subdivision improvements that resulted in landslide.)

- *Albers v. County of Los Angeles*, 398 P.2d 129 (Cal., 1965) (County liable for inverse condemnation for landslide damage caused by public placement of fill; landowner could recover not only difference in fair market value before and after slide, but cost of stopping slide.)

LIABILITY FOR ENTIRELY "NATURAL" FLOOD AND EROSION DAMAGES

May a local government be held responsible for **all** flood or erosion damages occurring in a community? For, example, is it responsible for damages caused by overflow waters from a creek which has not been channelized or otherwise altered by the community?

Courts have generally held that landowners and governments have no affirmative duty to remedy **naturally occurring** hazards except in some special situations. See, e.g., *Souza v. Silver Dev. Co.,* 164 Cal App. 3d 165 (Cal., 1985). For example, a Georgia court held that one landowner with a beaver dam on his property was not responsible for removing this dam when it flooded adjacent property. See *Bracey v. King*, 406 S.E.2d 265 (Ga., 1991). The court in this case demonstrated humor which is uncommon in court decisions when it observed that "There is no suggestion in this case that the appellee (landowner) and/or his brother imported the offending beavers onto their property, trained them to build the dams, or in any way assisted or encouraged them in this activity."

Courts have also held in most contexts that landowners and governments ordinarily have no duty to warn visitors, invitees, trespassers, or members of the general public for **naturally occurring** hazards (not exacerbated or created by governments) nor do they have a duty to correct or ameliorate these hazards or reduce hazard losses including the adoption of regulations or hazard reduction structures (e.g., dams, disaster assistance, public insurance, etc.). However, there are exceptions to this general rule of no affirmative duty and there is a gradual trend in the courts to broaden these exceptions whenever governments take any action which directly or indirectly contributes to the flood or erosion damage. In addition, if governments do warn, correct or ameliorate hazards, or take other affirmative measures, they must do so with reasonable care.

Courts have repeatedly held that once a governmental unit elects to undertake government activities, even where no affirmative duty exists for such action, it must exercise reasonable care. See e.g., *Indian Towing v. United States*, 350 U.S. 61 (1955). In the context of emergency services, this is often referred to as the "Good Samaritan" rule. Although a public entity or private individual ordinarily has no duty to provide aid to an individual in distress not caused by the public entity or private individual, once a governmental unit (or a private individual) has decided to provide aid, it must do so with ordinary care. As will be discussed in greater depth below, the doctrine applies in a broad range of contexts.

Image credit: US Army Corps of Engineers.

Some governments believe they may avoid **all** liability for hazard losses by avoiding various **future** affirmative actions that increase flood hazards by filling, grading, construction of bridges, flood control works, etc. This may well reduce future liability. However, many public works projects already undertaken have increased flooding, drainage, erosion, or land failure hazards on other lands. Any construction of a public building and invitation to the public to use public land can create the potential for "premises" liability. Many of the land alteration activities which governments have been undertaking over the last three hundred years in the U.S., and are continuing

to undertake, are “affirmative” acts which increase natural hazards -- with liability implications. In such situations, governments need to not only avoid actions which will increase future flood heights and velocities but undertake flood loss mitigation measures such as flood warning systems to reduce potential liability.

Consider the typical municipality where many major land and water alterations have been carried out by the government or approved by government. These include public roads, sewers, water supply systems, stormwater systems, dikes, ditches, levees, general grading, and park development. Most private subdivisions have also been approved by governments under subdivision control laws; private buildings have been approved through building permits. These land alterations and permitted activities have modified runoff, drainage, stream and river channel flood characteristics, erosion potential, and landslide and mud slide potential throughout the community. The potential for damage from other hazards such as earthquakes (bursting pipelines), avalanches, and snow may also have been increased. Because government has modified the natural landscape, the argument of “doing nothing” to avoid liability has limited application. To reduce potential liability, governments need to avoid future increases in flood heights and simultaneously address pre-existing increases though flood hazard planning and development plan implementation with a No Adverse Impact standard.

LIABILITY FOR AFFIRMATIVE ACTS THAT INCREASE FLOOD AND EROSION DAMAGE

In what contexts may a community be held liable for increases in the amount and change the location of discharge of “surface” waters? What about waters in rivers, streams, and other channels? And, what about coastal features, such as shore protection or groins, which may result in erosion or loss of beach by interrupting littoral drift on adjacent properties?

Communities, like other landowners, may be held liable in almost all contexts for substantially increasing the amount of discharge or location of discharge of water with resulting damage to private property owners. They may be held liable under one or more of theories described above for both increasing flood and erosion damage from surface waters and waters in rivers, streams, shorelines or other channels.

Under English common law, and the law of some states, private and public landowners could block or dispose of “diffused surface water” (i.e., surface water not confined to a defined watercourse, lake, or the ocean) pretty much as they wished under the “common-enemy doctrine”. The common enemy doctrine was so named because “at one time surface water was regarded as a common enemy with which each landowner had an unlimited legal privilege to deal as he/she pleased without regard to the consequences that might be suffered by his/her neighbor.” *Butler v. Bruno*, 341 A.2d 735 (R.I., 1975). However the common enemy doctrine has been judicially or legislatively modified in all but a few states so that anyone (public or private) increasing natural drainage flows or the point of discharge does so at his or her peril. See generally, Annot., *Modern Status of Rules Governing Interference with Drainage of*

Surface Waters, *93 A.L.R.3d 1193* (2003); R. Berk, *The Law of Drainage*, 5 Waters and Water Rights, #450 et seq. (R. Clark Ed., 1972); Kenworthy, *Urban Drainage--Aspects of Public and Private Liability*, 39 Den. U.L. Rev. 197 (1962).

As recently as 1993 the State of Missouri abrogated the "common enemy doctrine" in no uncertain terms in *Heins Implement v. Hwy. & Transp. Comm'n*, 859 S.W.2d 681, 683 (1993):

> The principal issue raised by this appeal is whether the modified common enemy doctrine should be applied to bar recovery by landowners and tenants whose property was flooded because a culvert under a highway bypass was not designed to handle the normal overflows from a nearby creek. We conclude that the common enemy doctrine no longer reflects the appropriate rule in situations involving surface water runoff and adopt a doctrine of reasonable use in its stead.

On the other hand, Arizona reaffirmed that "the common enemy doctrine" was still in effect as recently as 1989 in *White v. Pima County,* 161 Ariz. 90, 96 (App. 1989):

> Arizona follows the common enemy doctrine as it applies to floodwaters. Under this doctrine a riparian owner may dike against and prevent the invasion of his premises by floodwaters. If thereby the waters which are turned back damage the lands of another, it is a case of *damnum absque injuria*. This common enemy doctrine was not abrogated by the floodplain statutes, is available to those who comply with or are exempt from the floodplain regulations, and is likewise available to a condemning authority when it is protecting its property like any other riparian owner.

Two alternative doctrines to the common enemy doctrine are now applied to surface water in all but a few states. A highly restrictive "civil-law" rule has been adopted in a small number of states. The rule requires that the owner of lower land accept the surface water naturally draining onto his land but the upper owner may do nothing to increase the flow. See, *Butler v. Bruno*, 115 R.I. 264 (R.I., 1975). The rule is that "a person who interferes with the natural flow of surface water so as to cause an invasion of another's interests in the use and enjoyment of his land is subject to liability to the others." Id. at 737. See also Kinyon & McClure, *Interferences with Surface Waters*, 24 Minn. L. Rev. 891 (1940). This civil-law rule, like the common enemy doctrine, has, however, been somewhat modified in most of the states so that landowners may, to some extent, increase flows so long as they do so in good faith and "non-negligently."

Image credit: Harvard Graduate School of Design.

A third doctrine -- the rule of "reasonable use" -- has gradually replaced the common enemy and civil rules in most states. Under this rule, the property owner's liability turns on a determination of the reasonableness of his or her actions. Factors relevant to the determination of reasonableness are similar to those considered in determining riparian rights and negligence (listed below). The issue of reasonableness is a question of fact to be determined in each case upon the consideration of all the relevant circumstances. *Butler v. Bruno*, 341 A.2d 735, 738 (R.I., 1975).

A very similar doctrine of reasonableness has been applied under the law of "riparian rights" which applies to water in watercourses. See generally Annot., *Right of Riparian Owner to Construct Dikes, Embankments, or Other Structures Necessary to Maintain or Restore Bank of Stream or to Prevent Flood*, 23 A.L.R.2d 750 (1952 with 2004 updates). The factors considered in determining "reasonableness" are similar to those used in determining whether a landowner has been "negligent" (see discussion below). Riparian rights have been interpreted, in some cases, to include the right to constructive flood and erosion protection measures so long as they do not damage other riparians. As the court in *Lowden v. Bosler*, 163 P.2d 957 (Okla., 1945) noted in holding a landowner liable for damages caused by a jetty placed in a river (*Id.* at 958):

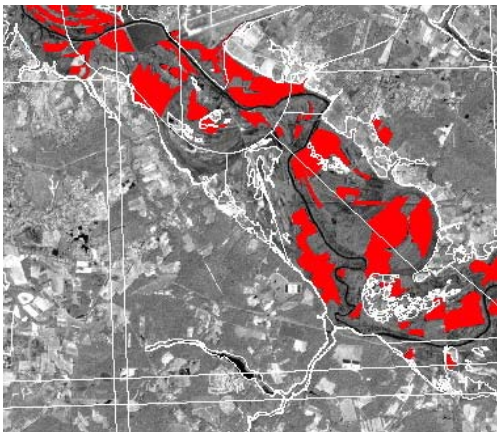
> A riparian proprietor may lawfully erect and maintain any work or embankment to protect his land against overflow by any change of the natural state of the river and to prevent the old course of the river from being altered; but such a riparian proprietor, though doing so for his convenience, benefit, and protection, has no right to build anything which in times of flood will throw waters on the lands of another such proprietor so as to overflow and injure him.

FACTORS RELEVANT TO REASONABLENESS

A variety of factors are relevant to the "reasonableness" of conduct in particular circumstances pursuant to a suit based on negligence and, to a lesser extent, other theories incorporating a reasonableness standard such the rules of "reasonable use" pertaining to diffused surface water and the law of riparian rights. Some of these include:

The severity of the potential harm posed by the particular activity. Where severe harm may result from an act or activity, a "reasonable person" must exercise great care. See *Blueflame Gas, Inc. v. Van Hoose*, 679 P.2d 579 (Col., 1984), in which the court held that the greater the risk, the greater the amount of care required to avoid injury. With an ultrahazardous activity, the degree of care required may be so great that it approaches strict liability.

Foreseeability of the harm. A "reasonable person" is only responsible for injuries or damages which are known or could be reasonably foreseen. See *Scully v. Middleton*, 751 S.W.2d 5 (Ark., 1988). To constitute negligence, the act must be one in which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause him not to do the act or to do it in a more careful manner. The test is not whether he or she did in fact foresee the harm, but whether he or she should have foreseen it, given all the circumstances. For example, direct warning of a dangerous condition, such as the report from a user of a public road that a bridge was washed out, provides foreseeability. But so may a flood map or other less direct information.



Flooding associated with Hurricane Floyd, North Carolina. Image credit: Dartmouth Flood Observatory.

Custom. The standard for reasonable conduct in a negligence suit is usually a community standard. Therefore, evidence of the usual and customary conduct of others under the circumstances is relevant and admissible. See The Law of Torts 193. However, courts have found an entire industry careless and

custom is not conclusive. See *The T.J. Hooper*, 60 F.2d 737 (2nd Cir., 1932). As noted by the Illinois Supreme Court in *Advincula v. United Blood Serv.*, 678 N.E.2d 1009 (Ill., 1996) "while custom and practice can assist in determining what is proper conduct, they are not conclusive necessarily of it. Such evidence may be overcome by contrary expert testimony (or its equivalence) that the prevailing **professional standard of care (***emphasis added by the court)*, itself, constitutes negligence."

Emergency. The overall context of acts determines their reasonableness for negligence purposes. For example, acts of a reasonable person in an emergency are subject to a lower standard of care than acts not in an emergency. See , e.g*., Cords v. Anderson*, 259 N.W.2d 672 (Wis., 1977). An emergency is a sudden and unexpected situation which deprives an actor of an opportunity for deliberation. However, courts have found that a ministerial duty on the part of a public official can arise where a known and compelling danger exists. See e.g., *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71 (2002).

The status of the injured party. The duty of care owed by a private or public entity depends, to some extent, upon the status of the injured party and his or her relationship to the entity. Traditionally, at common law, the owner or occupier of land owed different standards of care to various categories of visitors for negligent conditions on the premises. See generally, Annot., *Modern Status of Rules Governing Landowner's Liability Upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R.4th 296 (1983 with 2003 updates). Some jurisdictions have held that an owner or occupier of land is held to a duty of reasonable care under all circumstances to invitees, licensees, and trespassers alike. Most others have held that the duty of reasonable care extends only to invitees and licensees but that a lesser standard of care exists with regard to trespassers. In general, a landowner is only responsible to a trespasser for "willful and wanton" conduct with the exception of attractive nuisances. See *Adams v. Fred's Dollar Store*, 497 So.2d 1097 (Miss, 1986).

Special relationship. In some instances, a special relationship exists between an injured individual and a governmental unit that creates a special duty of care. For example, in *Kunz v. Utah Power & Light Co.*, 526 F.2d 500 (9th Cir., 1975) a Federal Court of Appeals held that the Utah Power and Light Company which operated a storage facility at a lake had a special relationship with downstream landowners and a duty to provide flood control because they had operated the facility to provide flood control over a period of time and downstream landowners had come to rely upon such operation. Failure to act reasonably in light of this duty was negligence.

Statutes, ordinances, or other regulations applying to the area. Negligence may arise from breach of a common law duty or one imposed by statute or regulation. See *Hundt v. LaCross Grain Co.*, 425 N.E.2d 687 (Ind., 1981) In general, violation of a statute or ordinance creates, at a minimum, a presumption of negligence or evidence of negligence. See, e.g., *Distad v. Cubin*, 633 P.2d 167 (Wyo., 1981). It is also relevant to nuisance and trespass. See, e.g., *Tyler v. Lincoln*, 527 S.E.2d 180 (2000).

GOVERNMENT FAILURE TO ADOPT REGULATIONS

Are governments liable if they choose not to adopt floodplain regulations?

Governmental units generally have no duty to adopt regulations and no liability results from failure to adopt a regulation. In *Hinnigan v. State*, 94 A.D.2d 830 (N.Y., 1983), the New York appellate court held that State of New York was not liable for failing to assure the participation of towns in the National Flood Insurance Program (NFIP) and, similarly, that the town of Jewett was not liable for failing to meet the minimum federal standards of the NFIP thereby making flood insurance available in the town. See

also *Urban v. Vill. of Inverness*, 530 N.E.2d 976 (Ill., 1988) (No affirmative duty by city to prevent flooding due to land alteration through adoption and enforcement of regulations on development.) However, see *Sabina v. Yavapai County Flood Control Dist.*, 993 P.2d 1130 (Ariz., 1999) (Court implied that Flood Control District might be liable for failing to regulate.)

However, legislatures in many states have adopted statutes requiring local governments to adopt floodplain regulations. See, *County of Ramsey v. Stevens*, 283 N.W. 2d 918 (Minn., 1979). These statutes create a duty to adopt regulations and might serve as the basis for suit if regulations were not then adopted. For example, see generally ***Natural Res. Def. Council, Inc. v. New York State Dep't of Envtl. Conservation***, 700 F. Supp. 173 (S.D.N.Y., 1987) (State liable for failing to adopt regulations as required.) See also *Roberts v. Secretary, Dep't of Housing & Urban Dev.*, 473 F. Supp. 52 (1979) and *United States v. St. Bernard Parish*, 756 F.2d 1116 (5th Cir., 1985).

To be on the safe side, government units should adopt regulations where statutes require such adoption.

FAILING TO ADEQUATELY CONSIDER FLOODING IN PERMITTING

May governmental units be liable if they fail to consider adequately flooding in issuing regulatory permits with resulting damage to private landowners?

Courts in most jurisdictions have held that governments are immune from liability for issuance or denial of building and other types of permits because issuance is a discretionary function. See *Liability of government entity for issuance of permit for construction which caused accelerated flooding*, 62 A.L.R.3d 514 (2000). See *Wilcox Assoc. v. Fairbanks North Star Borough*, 603 P.2d 903 (Ala. 1979) and cases cited therein. This rule continues to prevail in the majority of the jurisdictions. See for example:

- *Phillips v. King County, et al.,* 968 P.2d 871 (Wash., 1998) (County not liable for approving a developer's drainage plan which resulted in flooding.)

- *Johnson v. County of Essex*, 538 A.2d 448 (N.J., 1987) (No township liability for approving plats and building permits which increased flow of water under pipe due to statutory plan and design immunity and discretionary immunity.)

- *Loveland v. Orem City Corp.,* 746 P.2d 763 (Utah, 1987) (City not liable for approval of subdivision plat without requiring fencing of canal where child subsequently drowned was a discretionary function.)

Although the general rule is still no liability, courts have recognized some in-roads and qualifications on the rule, particularly where issuance of a permit results in damage to other lands. Annot., *Liability of Governmental Entity for Issuance of Permit for Construction Which Caused or Accelerated Flooding*, 62 A.L.R.3d 514 (2000). See for example:

- *Hutcheson v. City of Keizer*, 8 P.3d 1010 (Ore., 2000) (City liable for approving subdivision plans which led to extensive flooding.)

- *Columbus v. Smith*, 316 S.E.2d 761 (Ga., 1984) (Government entity which regulated construction along a stream in violation of a floodplain ordinance had a duty to prevent flooding to property along the stream caused by construction.)

- *Kite v. City of Westworth Village*, 853 S.W.2d 200 (Tex., 1993) (City was liable for approving subdivision plat which diverted water.)

- *Hurst v. United States*, 739 F.Supp. 1377 (D.S.D, 1990) (U.S. Army Corps of Engineers potentially liable for failing to regulate building obstructions in navigable waters which increased erosion damage.)

- *Columbus, Georgia v. Smith*, 316 S.E.2d 761 (Ga., 1984) (City may be held liable for approving construction project resulting in flooding.)

- *Pickle v. Bd. of County Comm.'s of County of Platte*, 764 P.2d 262 (Wyo., 1988) (County had duty of exercising reasonable care in reviewing subdivision plan.)

Courts have also held governments liable to permittees for erroneous issuance of building permits in a number of cases. See cases cited in *Municipal Tort Liability for Erroneous Issuance of Building Permits: A National Survey*, 58 Wash. L. Rev. 537 (1983). See, for example, *Radach v. Gunderson*, 695 P. 2d 128 (Wash., 1985) (City was liable for expense of moving house which did not meet zoning setback requirements constructed pursuant to a permit issued by city.)

Considering that many communities regularly issue variances to their ordinances to allow development, should this be expanded? Once constructed in violation a couple things can happen. First, § 1316 could be invoked indicating the variance was a violation and deny flood insurance; second, subsequent compliance enforcement may require the community to correct past violations of its ordinance, which could require costs to elevate or relocate (e.g., out of floodway)

ACCEPTANCE OF DEDICATED STORM SEWERS, STREET, OTHER FACILITIES

May a governmental unit be held liable for flood damages which result from ditches, channels, stormwater detention facilities, roads, and other infrastructure constructed by developers and dedicated to governmental units?

In an increasing number of cases, courts have held governmental units responsible for approving and accepting storm sewers and other facilities dedicated to governmental units by subdividers or other developers. See for example:

City of Keller v. Wilson, 2007 Tex. App. LEXIS 1459 (Tex., 2007) (Where the city's drainage plan called for construction of an earthen channel through an easement on private lands, failure to construct that channel as the area developed made the city liable for damage caused by diversion of flows associated with permitted development.

- *Kite v. City of Westworth Vill.*, 853 S.W.2d 200 (Tex., 1993) (City liable for approving subdivision plat and acquiring easement which increased flood damage on other property.)

- *City of Columbus v. Myszka*, 272 S.E.2d 302 (Ga., 1980) (City liable for continuing nuisance for approving and accepting uphill subdivision which caused flooding.)

- *Powell v. Village of Mt. Zion*, 410 N.E.2d 525 (Ill., 1980) (Once village approves and adopts sewer system constructed by subdivision developer, village may be held liable for damage caused by

it.)

However, courts have refused to find cities liable in other contexts. See, for example:

- *M.H. Siegfried Real Estate v. City of Independence*, 649 S.W.2d 893 (Mo., 1983) (City cannot be required to construct culverts to facilitate the flow of surface water when it assumes maintenance of streets possibly built by others.)

- *Martinovich v. City of Sugar Creek, Missouri*, 617 S.W.2d 515 (Mo., 1981) (City not responsible for sewer and catch basin constructed by private developer and never accepted by the city.)

INADEQUATE INSPECTIONS

May a governmental unit be held liable for failing to carry out adequate building inspections (e.g., failure to determine whether a structure complies with regulatory flood elevations and flood proofing requirements)?

Traditionally, failure of governments to carry out more traditional inspections or lack of care in such inspections was not subject to suit because inspections were considered either "governmental" or "discretionary" in nature. See *Municipal liability for negligent performance of building inspector's duties*, 24 A.L.R.5th 200 (2003). See, for example, *Stemen v. Coffman*, 285 N.W.2d 305 (Mich., 1979) (Failure of city to require owners of multi-dwelling unit to abate alleged nuisance due to inadequate fire protection devices was discretionary and not negligence.); Stone, F.F. & A. Renker, Jr., *Government Liability for Negligent Inspections*, 57 Tul. L. Rev. 328 (1982). In addition, many states such as Kansas, Alaska, California, and Utah have adopted statutes immunizing building inspection activities from suit. See K.S.A. 75-6104(j) (1989). Other examples of cases in which courts have refused to hold units of government responsible for inadequate inspections include:

- *Stannik v. Bellingham–Whatcom Bd. of Health* 737 P.2d 1054 (Wash., 1987) (Court refused to allow negligence claim against county by homebuyers for failure to inspect and detect sewage disposal system which did not comply with county ordinance due to "public duty" doctrine.)

- *Siple v. City of Topeka*, 679 P.2d 190 (Kan., 1984) (Court refused to hold city liable for inspection of private tree by city forester which later fell on a car due to statutory immunity for inspections and public duty doctrine.)

But some courts hold governmental units responsible for inadequate inspections. See, for example:

- *Tuffley v. City of Syracuse*, 82 A.D.2d 110 (N.Y., 1981) (City was held liable based upon a theory of inverse condemnation for acts of a city engineer in failing to adequately inspect building site and determine that culvert running under site was part of a city storm water drainage system. The court held that a "special relationship" existed here.)

- *Brown v. Syson*, 663 P.2d 251 (Ariz., 1983) (Court held that home purchaser's action against city for negligent inspection of home for violations of building codes was not barred by doctrine of sovereign immunity and public duty doctrine.)

INADEQUATE ENFORCEMENT OF REGULATIONS

Is a local government liable for failing to enforce floodplain regulations (e.g. illegal construction of a house in a floodway with resulting increased flood damages to adjacent lands)?

Courts have generally considered enforcement of regulations a discretionary function exempt from suit. However, as with negligent inspections, courts have held governmental units liable in a few instances. See, for example, *Radach v. Gunderson*, 695 P.2d 128 (Wash., 1985) (City was liable for expense of moving oceanfront house which did not meet zoning setback which was constructed pursuant to a permit issued by city. City was aware of violation before construction.) Also, see *State v. Outagamie County Bd. of Adjustment*, 191 Wis. 2d 829 (Wisc. App. 1995) (The State of Wisconsin successfully sued a local board of adjustment for exceeding its authority in issuing a variance that allowed construction of a residence in the floodway.)

LEGISLATIVE MODIFICATION OF COMMON LAW RULES

Could state legislatures modify the common law rules and impose a higher standard of care on local governments or private property owners for increasing flood damages on other lands, failure to comply with regulations, inadequate inspections, and similar actions?

It is clear that state legislatures could impose a higher standard of care on private landowners, public officials, and local governments than imposed by common law by adopting remedial statutes. For example, lower courts and the U.S. Supreme Court have upheld state laws changing the "common enemy" doctrine with regard to surface water to a doctrine of reasonable use against claims of taking or violation of due process. See, e.g., *Chicago & Alton R. Co. v. Tranberger*, 238 U.S. 67 (1915); *Peterson v. Northern Pac. Ry. Co.,* 156 N.W. 121 (Minn., 1916); *Tranberger v. Railroad*, 156 S.W. 694 (Miss., 1913).

However, local governments cannot, by ordinance, change the common law in a local unit of government. But, they can adopt ordinances which help establish a higher standard of care in construction design and other activities. In many jurisdictions, violation of an ordinance or other regulation is considered negligence per se if (1) the injury was caused by the ordinance violation, (2) the harm was of the type intended to be prevented by the ordinance, and (3) the injured party was one of the class meant to be protected by the ordinance. See *Boyles v. Oklahoma Natural Gas Co.*, 619 P.2d 613 (Okla., 1980).

Although violation of a statute or ordinance is, at a minimum, evidence of negligence, compliance with an ordinance or statute does not bar a negligence suit. *Corley v. Gene Allen Air Serv., Inc.*, 425 So.2d 781 (La., 1983). In addition, approval of a permit for a project by a state administrative agency does not preclude a private law suit. For example, in *Oak Leaf Country Club, Inc. v. Wilson*, 257 N.W.2d 739 (Ia., 1977), an Iowa court held that approval by a state agency of a stream channelization project did not preclude judicial relief to riparian landowners for damage from the project.

In summary, a No Adverse Impact approach is, overall, consistent with landowner common law rights and duties. Adherence to a No Adverse Impact standard in road building, grading, stormwater management, filling, grading, flood control works, permitting, and other activities will reduce community liability.

PART 3: THE CONSTITUTIONALITY OF A NO ADVERSE IMPACT STANDARD

Would a community which adopted a No Adverse Impact performance standard in floodplain, zoning, subdivision control or other regulations successfully defend those measures against landowner suits for "taking" private property without payment of just compensation? The question is confusing, and may ask from the wrong perspective. Any community is "subject to suit" question is win or lose Would it successfully defend against those suits if it adopted more specific implementing regulations such as a zero rise floodway restriction, stream setbacks, and freeboard requirements for elevation of structures or open space zoning?

As will be discussed below, courts are likely to uphold a general No Adverse Impact performance standard. They are also likely to uphold more specific implementing regulations as long as the regulations do not deny landowners all permanent, non-nuisance uses of entire properties.

Despite the small number of regulatory cases holding that governments have "taken" private property without payment of just compensation through flood hazard and other hazard regulations, governments are often fearful that the regulations they adopt will be held a "taking." Based upon the small number of successful cases to date and the overall trends in the courts, "taking" is not a serious challenge to performance-oriented hazard regulations and an overrated economic threat to public coffers. Successful regulatory taking cases for hazard-related regulations are extremely rare and are vastly outnumbered by successful common law cases holding governmental units liable for increasing flood, erosion or other hazard losses on private lands consistent with the legal theories previously described in Box 1 contained in Part I of this paper.

UNCOMPENSATED "TAKINGS"

The 5th Amendment to the U.S. Constitution and similar provisions in state constitutions prohibit governmental units from taking private property without payment of just compensation. Courts have held that unconstitutional "takings" may occur in two principal flood hazard contexts. The first occurs when a governmental unit increases flood or erosion damage on other lands through fills, grading, construction of levees, channelization or other activities as discussed. Governmental units may be found liable for such increases and impacts based upon a broad range of common law theories described in Box 1 located in Part I of this paper.

The second context in which governmental units may be held liable for "taking" private property without payment of just compensation is when they adopt regulations that deprive the suing property owner of all economic value, particularly where the regulation serves no meaningful public purpose. In such situations landowners sometimes claim "inverse condemnation" of their lands. However, very few of these suits have succeeded where communities expressed the public safely benefit of the regulation.

Over a period of years, there have been only a handful of successful challenges to floodplain regulations as a "taking." Those few cases almost invariably involve almost complete prohibition of building on property having no clearly demonstrated unique or quasi-unique hazard associated with the

site in question. Thus far, there are fewer than a dozen appellate cases finding that a property has been unconstitutionally "taken," in contrast with hundreds of cases supporting regulations. As we shall see, the trend in the courts is to sustain government regulation of hazardous activities for the prevention of harm. Nevertheless, local governments are often concerned about the possibility of a successful takings challenge to their regulations. Part of the concern with taking is due to misreading several U.S. Supreme Court decisions in the last decade addressing regulations for natural hazard areas described below. These decisions suggest that local and state regulations may be a "taking" in certain very narrow and easily avoidable circumstances. However, each of the decisions gave overall support to regulations.

RECENT FEDERAL CASES

Lingle v. Chevron

The United States Supreme Court recently issued a ruling in the Case of *Lingle v. Chevron,* 544 U.S. 528 (2005). That unanimous opinion of the Court sets forth four ways to pursue a Regulatory Taking Case:

The Chevron site at issue in *Lingle v. Chevron.* Image credit: American Planning Association – Hawaii Chapter.

1. Physical Invasion as in *Loretto v. Teleprompter Manhattan,* 458 US 419 (1982). The *Loretto* Case involved a New York City requirement that all residential buildings must permit a cable company to install cables, and a cable box the size of a cigarette pack. The Court held that any physical invasion must be considered a taking.

2. The Total, or Near Total Regulatory Taking as exemplified by the Case of *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992), where plaintiff Lucas was prohibited from building a home on the only vacant lots left on an otherwise fully developed barrier beach just outside Charleston, South Carolina. In 1988, State enacted the Beachfront Management Act, S. C. Code Ann. § 48-39-250 et seq., which barred the landowner from erecting any permanent habitable structures on his two parcels. The landowner asserted the effect of the Act on the value of the lots accomplished a taking under the Fifth and Fourteenth Amendments.

   The court held that where a state seeks to sustain a regulation that deprives land of all economically beneficial use, it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate showed that the proscribed use interests were not part of his title to begin with. The Supreme Court reversed the judgment of the state supreme court denying compensation to the landowner under the Takings Clause of the Fifth Amendment and remanded the case because the regulation's effect on the landowner's property value was relevant.

3. A significant, but not nearly total taking as exemplified by the *Penn Central Transportation Company v. New York City*, 438 US 104 (1978), where the Penn Central Company was not permitted to build above Grand Central Station in New York City to the full height permitted by the overlay zoning in the area, for Historic Preservation reasons, but was provided transferable development rights. In

Penn Central, the Court used a three part test: a) economic impact, b) how regulation affects "investment-backed expectations," and c) character of the government action.

4. Land use Exactions which are not really related to the articulated government interest as in *Nollan v. California Coastal Commission*, 483 US 825 (1987), where the California Coastal Commission conditioned a permit to expand an existing beachfront home on the owner, granting an easement to the public to cross his beachfront land. The articulated government interest was that the lateral expansion of the home would reduce the amount of beach and ocean the public on the roadside of the home could see. The Court indicated that preserving public views from the road really did not have an essential nexus with allowing folks to cross a beach. The Court also cited the *Dollan v. Tigard*, 512 US 374 (1994) case where someone wanted to expand a plumbing store and the community wanted the store to give the community some adjacent flood plain property and an easement for bike path in return for the possible increase in traffic caused by the expansion of the store. Again, in Dollan, the court basically indicated that there was really no relationship between the government interest and the exaction attempted. Basically the Court is saying no to plans of extortion.

In Lingle, the Court specifically indicates that it will no longer use the first part of the two part test for determining a Taking set forth in *Agins v. City of Tiburon* , 447 US 255 (1980): a) whether the regulation substantially advances a legitimate state interest, b) denies owner an economically viable use of land. The removal of this "substantially advances a legitimate state interest" prong of a takings test is a huge help to Floodplain Managers, to the concept of NAI and to Planning in general. In essence, the question of whether an action by a legislative body "substantially advanced a legitimate state interest" had provided a mechanism for judicial second-guessing of the relative merits of legislative action. The Supreme Court is indicating that it will defer to legislative decisions unless: there is no real relationship between what the legislative body desires and the action taken, or there is some other due process or equal protection issue. *See*, Nollan, *supra*; Dolan *supra*; and Justice Kennedy's concurring opinion in Lingle, *below*.

Chevron site from *Lingle v. Chevron.* Image credit: American Planning Association – Hawaii Chapter.

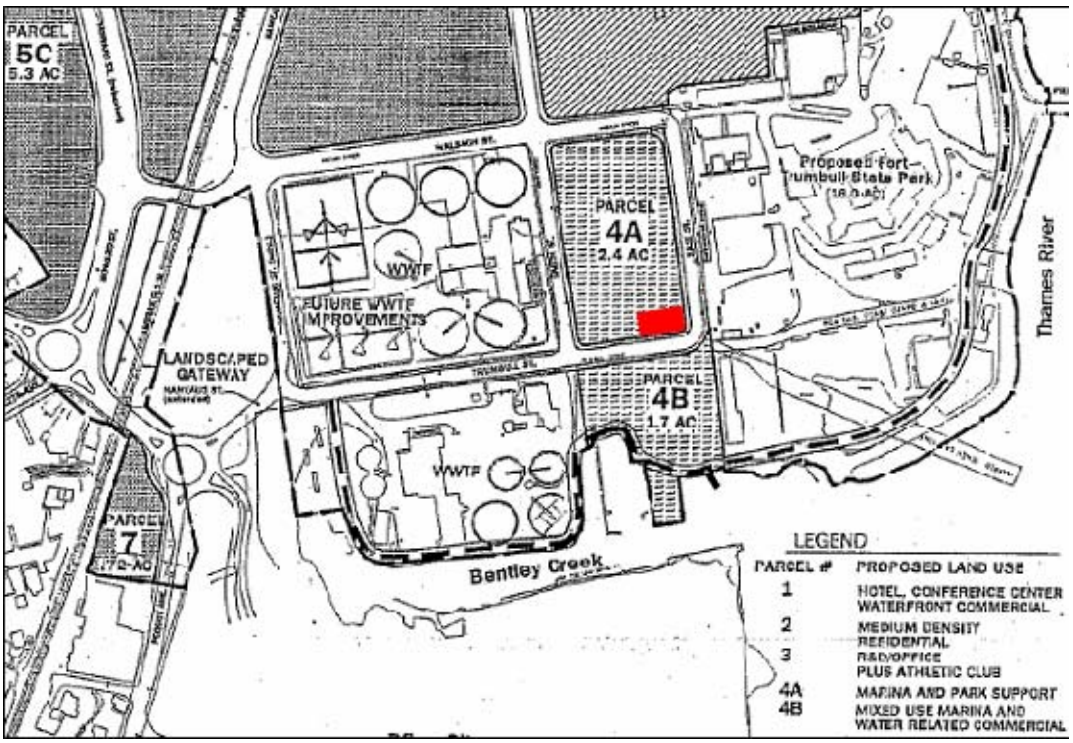
Justice Kennedy concurred in the majority opinion, but notes that the decision did not foreclose the possibility of litigating a regulation which was "so arbitrary or irrational as to violate due process." It is not in any way clear as to why none of the other members of the Court joined in Justice Kennedy's sentiments. However, this comment really does not matter to NAI because by its very nature NAI is the quintessence of the thoughtful and rational. The Court summed up its reasoning by stating that the tests articulated in Lingle "all aim to identify regulatory actions that are functionally equivalent to a direct appropriation of or ouster from private property."

This clear statement by this nation's highest court supports both the principles of the National Flood Insurance Program (NFIP) and No Adverse Impact (NAI) floodplain and stormwater management. Both the NFIP and NAI seek to require the safe and proper development of land subject to a hazard. Neither the NFIP nor NAI floodplain and stormwater management require or support government regulations which oust people from their property.

Kelo v. New London

Susette Kelo's house, New London, CT. Image credit: Dwight H. Merriam.

Kelo, 545 U.S. 469 (2005), involves condemnation, that is, a "paid taking" of residences. The case has to do with whether economic development in a community is considered a "public use" for purposes of a taking as described in the Constitution. The five-to-four decision that, yes, economic development can be considered a public use, shows how much deference the majority of the Justices are willing to give to local decision makers who, in this case, had decided to condemn private land so that commercial redevelopment could take place. Pro-government and planning associations cheered the decision. However, the announcement of the decision was also greeted by widespread public concern, outrage, and proposed legislative correction of the decision from groups concerned about the rights of minorities as well as property rights advocates. This widespread concern illustrates the extreme sensitivity of issues involving property rights. For floodplain and stormwater managers, the primary lesson of this case is that the Court was willing to give enormous deference to local decisions about what is best for a community, thus offering support to the concepts and principles of the Flood Insurance Program and No Adverse Impact floodplain/stormwater management.



Draft Fort Trumbull Municipal Development Plan, City of New London, CT. Susette Kelo's property is located at the southeast corner of Parcel 4A, marked with red box. Image credit: Dwight H. Merriam.

San Remo Hotel v. City and County of San Francisco, 545 U.S. 323 (2005)

This unanimous decision in a case involving fees charged to permit the change of use of a hotel does not directly relate to hazard regulation. Nevertheless, it is important to floodplain managers because it indicates that taking claimants who have already litigated an alleged "taking" in state court do not get another "bite at the apple" in Federal court.

The following seven Supreme Court decisions in the last fifteen years have special relevance to floodplain regulations. Four of these (Tahoe, Dolan, First English, and Keystone) dealt with hazard reduction regulations; two with beach regulations (Lucas and Nolan) and one with wetlands (Palazzolo). The Court remanded the cases for further proceedings in five of the seven. The potential importance of holdings to future federal and state court cases is indicated.

Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002)

The Court upheld Tahoe Regional Planning Agency temporary ordinances which had applied for 32 months to "high hazard" (steep slope) zones near Lake Tahoe against a claim that they were a taking of private property. The Court applied a "whole parcel" analysis to duration of regulation to decide that no taking had occurred. This case can be cited in the future to strongly support hazard-related regulations including "interim" regulations as well as moratoria on development when time is needed to adequately develop regulations e.g. in a post disaster context.

Palazzolo v. Rhode Island, 533 U.S. 606 (2001)

The Court held that purchase of wetland subject to restrictions was not bar to a suit for taking of private property but the test for taking was the value of the entire parcel and not simply the wetland portion. The case was remanded for further proceedings. This case may be cited in the future to help support hazard regulations in some contexts because it requires lower courts to consider the impact of regulations on entire parcels. But, it may also be cited to attack regulations where a landowner purchased lands subject to regulations and wishes to challenge the regulations. The Rhode Island Trial Court determined that there was no "taking" when it considered the case on remand. See discussion below under section entitled "Recent State Cases."

Dolan v. City of Tigard, 512 U.S. 374 (1994)

The Court held that city regulations for the 100 year floodplain which required a property owner to donate a 15 foot bike path along the stream were not reasonably related to the goals of the regulation and were therefore a taking. The Court stated that the municipality had to establish that the dedication requirement had "rough proportionality" to the burden on the public created by the proposed development. The Court later, in *City of Monterey v. Del Monte Dunes at Monterey*, Ltd, 526 U.S. 687 (1999), held that rough proportionality test was limited to exactions of interests in land for public use.).

Dolan may be cited those attacking floodplain dedication requirements where the dedication requirements are not roughly proportional to the burdens created by the proposed floodplain activity, and, in fact, have little or no relationship to the articulated government interest. The Courts will particularly scrutinize any government requirement that a property owner's right to exclude others from their property is being infringed.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)

The Court held that state beach statute prohibiting building of a house that prevents "any reasonable use of lots" was a "categorical" taking unless the state could identify background principles of nuisance and property law which would prohibit the owner from developing the property. The case was remanded for further determinations by the South Carolina court, which determined that the Coastal Council's regulations were, in fact, a "taking." South Carolina bought the property from Lucas and sold it to a builder. This case may be cited to challenge floodplain regulations if the floodplain regulations deny all economic use of entire lands and the prohibited uses are not nuisance-like in their surroundings or otherwise limited by public trust or other principles of state law. On the other hand, the case may be cited in the future to support floodplain regulations where proposed activities are limited by common law or other principles of state law or where regulations do not deny all economic uses.

View of Lucas's two lots, on either side of large square house in the center, from the edge of the ocean (looking towards northwest). Note that Lucas's lots are the only vacant lots in sight along the beach. Image credit: William A. Fischel, Dartmouth College.

March 2000 image indicates original two Lucas lots, one with new residence, the other with fresh grading. Image credit: William A. Fischel, Dartmouth College.

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)

The Court held that the California Coastal Council's conditioning of a building permit for a beach front lot upon granting public access to the beach lacked an "essential nexus" between the regulatory requirement and the regulatory goals and was a taking. The Court held that the access requirement "utterly fail[ed] to advance the stated public purpose of providing views of the beach, reducing psychological barriers to using public beaches, and reducing beach congestion." This case may be cited in the future to attack floodplain regulations if they lack adequate "nexus" to regulatory goals and dedications are required. However, inadequate nexus is very rarely a problem with floodplain regulations.

The Nollan property beach access. Image credit: Dan Mandelker, Washington Univ. School of Law.

First English Evangelical Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987)

The Court held that a temporary restriction by a flood hazard reduction ordinance which prevented the rebuilding of a church property was (potentially) a taking. The court remanded the decision to the Lower California court to reconsider whether a taking had occurred. The lower court held again that no taking had occurred. There was no further appeal of this decision. This case may be cited by landowners attacking floodplain regulations as a taking or temporary taking. However, this ruling is qualified by the Tahoe, above, which strongly upheld interim regulations as not a taking.

Keystone Bituminous Coal Ass'n v. De Benedictis, 480 U.S. 470 (1987)

The Court held that public safety regulations which restricted the mining of all of the coal to prevent subsidence were not a taking because the impact of regulations upon an entire property, not simply the areas where coal could not be removed, should be considered. This case may be citied in the future, supporting whole parcel analysis for floodplain regulations (see also *Tahoe* and *Palazzolo* above). The case may also be cited supporting regulations which restrict threats to public safety or control of nuisances)

Longwall subsidence from coal mining undermines this railway in western Pennsylvania. Image credit: Pennsylvania Department of Environmental Protection.

Traditional floodplain regulations permit some development in the floodplain, although an increasing number of local and state regulations require various types of compensatory measures to ensure that development will not increase flood heights on other lands, consistent with No Adverse Impact standard. Regulations preventing landowners from increasing flood or erosion damages on other lands have been broadly upheld for a variety of reasons. With regard to

uses with nuisance-like impacts, the U.S. Supreme Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987) concluded:

> The Court's hesitance to find a taking when the state merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of "reciprocity of advantage." Under our system of government, one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. These restrictions are "properly treated as part of the burden of common citizenship." Long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community"....and the Takings Clause did not transform that principle to one that requires compensation whenever the state asserts its power to enforce it.

A Texas court in *San Antonio River Authority v. Garrett Bros.*, 528 S.W.2d 266 (Tex., 1975) concluded, more broadly:

> It is clear that in exercising the police power, the government agency is acting as an arbiter of disputes among groups and individuals for the purpose of resolving conflicts among competing interests. This is the role in which government acts when it adopts zoning ordinances, enacts health measures, adopts building codes, abates nuisances, or adopts a host of other regulations. When government, in its roles as neutral arbiter, adopts measures for the protection of the public health, safety, morals or welfare, and such regulations result in economic loss to a citizen, a rule shielding the agency from liability for such loss can be persuasively defended, since the threat of liability in such cases could well have the effect of deterring the adoption of measures necessary for the attainment of proper police power objectives, with the result that only completely safe, and probably ineffective, regulatory measures would be adopted.

RECENT STATE CASES

Gove v. Zoning Bd. of Appeals, 444 Mass. 754, (Mass. 2005)

The Town of Chatham zoned several areas, including its Special Flood Hazard Areas, in such a way that a variance would be required to build in those areas. Gove sold a 1.8-acre parcel of land on the condition that a building permit for a single-family home would be issued. The Town declined to issue the permit, and Gove sued, alleging a taking. In this decision, Massachusetts' highest court emphasized that the Town of Chatham had identified unique hazards on this erosion-prone coastal A-Zone property. The court found that the plaintiffs had not sufficiently shown that they could construct a home in this area without potentially causing harm to others. The Town made a good case that this is not just any A-Zone property in a SFHA. It is on the coast adjacent to the V-Zone, in an area which has experienced major flooding and is now exposed to the open ocean waves due to a breach in a barrier beach just opposite the site. Further it is subject to accelerated "normal" erosion, and storm related erosion.

> The 1991 storm flooded the area around lot 93 [Gove's parcel] to a depth of between seven and nine feet above sea level, placing most, if not all, of the parcel underwater. The 1944, 1954, and 1991 storms, while significant, were less severe than the hypothetical "hundred year storm" used for planning purposes, which is projected to

> flood the area to a depth of ten feet. According to another expert called by Gove…, during storms, roads in Little Beach can become so flooded as to be impassable even to emergency vehicles, and access to the area requires "other emergency response methods," such as "helicopters or boats." The same expert conceded that, in an "extreme" event, the area could be flooded for four days, and that, in "more severe events" than a hundred year storm, storm surge flooding in Little Beach would exceed ten feet.

Id. at 756-57. The court upheld the regulations and unequivocally affirmed local interests in preventing harm and protecting the property rights of all.

> Zoning regulations on lot in coastal conservancy district which prohibited residential development were reasonably related to legitimate State interests in protecting rescue workers and residents, the effectiveness of the town's resources to respond to natural disasters, and the preservation of neighboring property, and thus regulations did not violate lot owner's due process rights.

This decision by the Massachusetts Supreme Judicial Court validates and supports the National Flood Insurance Program, the concept of No Adverse Impact floodplain, and stormwater management, as well as hazards based regulation in general. While the decision is binding only on Massachusetts Courts, it should have persuasive effect in other jurisdictions.

Palazzolo v. State, 2005 WL 1645974, (R.I. Super. Ct. 2005)

Palazzolo, an important Takings Issue case remanded in 2001 by the US Supreme Court, with instructions for re-hearing by the Rhode Island courts, was recently decided against the landowner. The decision is an extremely well written, well-reasoned, huge win for floodplain and hazard managers. Essentially, a Rhode Island Superior court determined that the stringent restrictions in coastal construction implemented by the Rhode Island Coastal Resources Council did not "take" the Palazzolo property in violation to the Fifth Amendment to the US Constitution:

> [B]ackground principles of state law limited the property rights acquired by Plaintiff and SGI, his predecessor in title. Plaintiff's proposed residential development of the site would constitute a public nuisance under Rhode Island law. Plaintiff's proposed use of the property was, accordingly, not a part of the "bundle of rights" acquired when he, and before him, SGI, obtained title to the subject parcel. Thus, the regulations complained of have not resulted in a taking under the Fifth Amendment.

Id. at 14. The case is well worth reading since it offers a great review of Takings Law, the *Penn Central* balancing test, the Public Trust Doctrine and nuisance law. The *Palazzolo* case was not appealed and is considered to be "over and final."

Smith v. Town of Mendon, 4 N.Y.3d 1 (N.Y. 2004)

This case involved a requirement by a town that, as a condition of issuance of a building permit, the property owner must grant a conservation easement for some portions of the site, including flood hazard areas, on which the Town had imposed conservation overlay zoning severely restricting development. The owner did not propose to build on these environmentally sensitive areas, but at the same time did not want to restrict any future activity by granting a conservation easement. New York's

highest court issued a sharply divided (4-3) opinion that upheld the Town's requirement. An attempt was made to file an appeal in Federal Court but, as we understand the matter, was filed too late.

From a floodplain manager's perspective, the interesting thing is that there was no real argument in the case that the Town's restrictions on building in flood hazard areas was a taking. The plaintiff only argued against an easement that would restrict future development on other parts of the land, yet the court still upheld the community's requirement aimed at protecting environmentally sensitive and hazard-prone areas.

K&K Construction, Inc. v. Department of Envtl. Quality, 705 N.W.2d 365 (Mich. App. 2005)

Michigan Department of Environmental Quality denies a permit to fill one-third of 83 acres wetlands. Trial court awards damages of $16.5 million base on a purported Penn Central review. Michigan Appeals Court overrules the Michigan trial court. The Appeals Court indicates that based on a whole parcel analysis the owners were not deprived of reasonable property value.

We suggest that had the State calculated the harms from filling these wetlands including increased flood heights and velocities they would have had an even better and stronger case which might never have even gone to court.

In Re Woodford Packers Inc., 830 A.2d 100 (Vt. 2003)

In this case, the Vermont Supreme Court reviewed a challenge to a state regulation that established a methodology based on fluvial erosion for the designation of floodways much broader than the FEMA minimum standard:

> Secretary of Agency of Natural Resources (ANR) was authorized to make determinations as to what constituted a floodway or a floodway fringe without promulgating a rule pursuant to Administrative Procedure Act (APA); even though ANR's use of "fluvial geomorphology" analysis, instead of Federal Emergency Agency (FEMA) National Flood Insurance Program (NFIP) maps, for determining floodways may have surprised applicant which sought land use permit for proposed retirement village, ANR's alteration of its methodology to determine presence of a floodway did not alter any preexisting rule… Evidence supported Environmental Board's decision that applicant's proposed retirement village project failed to comply with land use permit criterion for soil erosion; there had been significant erosion at and near the project site, and flood controls implemented by applicant, while intended to prevent the river from inundating heavily eroded areas, had potential for actually increasing the damage done by the river.

Id. at 106. This case is a huge win for sensible NAI-type regulation based on local conditions and applied to all property owners equally based on an individual application of a standard methodology to an individual property. We believe that the legal reasoning supporting this decision is equally applicable to State or local coastal erosion standards.

Wild Rice River Estates, Inc. v. City of Fargo, 705 N.W.2d. 850 (N.D. 2005)

In this case, the City of Fargo, North Dakota City had imposed a 21-month moratorium on development while FEMA mapped the floodplain/floodway of an area which had recently flooded. The State Supreme Court indicated that the moratorium was appropriate for this period of time so the

municipality could obtain the results of a FEMA an updated Flood Insurance Rate Study and Map which would include data derived from the recent flood experience.

Mansoldo v. State of New Jersey, 187 N.J. 50 (N.J. 2006)

This case arose from the State of New Jersey's refusal to issue building permits for the construction of residences in a designated and mapped floodway. In an extremely confused opinion, a lower New Jersey court had determined that the denial of this permit was a taking, but no compensation was due to the plaintiff. We have been unable to discover any case in this country that had reached such a conclusion involving a floodway. Such a determination could be of enormous detriment to floodplain management and to the fundamental principles of the National Flood Insurance Program.

This case is a landmark for the Association of State Floodplain Managers, in that it is the first time that the Association has submitted its own brief in any matter. (A link to the brief is on the ASFPM website at http://www.floods.org.) The brief was prepared pro bono by the Rutgers's Law School Environmental Law Clinic, and the Georgetown Environmental Law and Policy Institute.

Fortunately the New Jersey Supreme court vacated the ruling of the lower court and sent the case back to the lower court for further processing with clear and correct instructions as to what the Supreme Court had determined constituted a "taking".

In *Mansoldo*, the court took the extremely unusual step of essentially disagreeing with the arguments of both the Plaintiff and Defendant. Instead, the court essentially followed the arguments and analysis submitted in the ASFPM. The Members of ASFPM can and should take a great deal of pride that their Association was afforded this nearly unprecedented deference and respect by the New Jersey Supreme Court. In addition this assistance from the Association enabled the New Jersey Court to issue a ruling which neither does harm to the principles of No Adverse Impact Floodplain Management, nor to fundamental principles of the National Flood Insurance Program.

REGULATIONS EXCEEDING NFIP MINIMUM STANDARDS

Courts have sustained a wide range of floodplain regulations that exceed the specifically articulated minimum standards of FEMA's National Flood Insurance Program against challenges that they are unreasonable or a taking. See particularly *Hansel v. City of Keene*, 634 A2d 1351 (N.H., 1993) in which the New Hampshire Supreme Court upheld an ordinance adopted by the City of Keene which contained a "no significant impact" standard. The zoning ordinance prohibited new construction within the floodplain unless it was demonstrated "that the cumulative effect of the proposed development, when combined with all other existing and anticipated development, will not increase the water surface elevations of the base flood at any point within the community."

In sustaining the regulation, the court noted that the floodplain ordinance revealed "an understandable concern among city officials that any water surface elevation increase in the floodplain could, at minimum, strain city resources and impose unnecessary hardship on city residents." This case could be used by floodplain managers in considering whether to issue permits for structures in the floodway, where engineers have submitted "no-rise" certification. Such certification is often done considering only the proposed structure, not appropriately considering "that the cumulative effect of the proposed development, when combined with all other existing and anticipated development, will increase the water surface elevations of the base flood at any point within the community". NOTE:

Minimum NFIP standards allow floodway construction if "no-rise" is certified by a licensed professional engineer, whereas many state and local regulations prohibit non-water dependent structures in the floodway.

For other examples sustaining regulations which exceed minimum FEMA standards against "takings" and other challenges, see the cases cited below pertaining to setbacks, restriction of high hazard areas, and open space zoning:

- *Am. Cyanamid v. Dept. of Envtl. Prot*., 555 A.2d 684 (N.J., 1989) (Court held that N.J. DEP could use USGS 500-year design flood line for regulatory purposes.)

- *New City Office Park v. Planning Bd., Town of Clarkstown*, 533 N.Y.S.2d 786 (N.Y., 1988) (Court upheld planning board's denial of site plan approval because the developer could not provide compensatory flood storage for 9,500 cubic yards of fill proposed for the property. The court noted that, "[I]ndeed, common sense dictates that the development of numerous parcels of land situated with the floodplain, each displacing only a relatively minor amount of floodwater, in the aggregate could lead to disastrous consequences.)

- *Patullo v. Zoning Hearing Bd. of Tp. of Middletown*, 701 A.2d 295 (Pa. Cmwlth, 1997) (Court held that landowner i?s not entitled to a special exception or variance for construction of a garage in a 100 year floodplain where construction would have raised flood heights by 0.1 foot and area (lateral extent?) of the floodplain along a road by 1 foot.)

- *Reel Enter. v. City of LaCrosse*, 431 N.W.2d 743 (Wis., 1988) (Court held that Wis. DNR had not taken private floodplain property by undertaking floodplain studies, disapproving municipal ordinance, and announcing an intention to adopt floodplain ordinance for city putting all or most properties within floodway designation. Plaintiff had failed to allege or prove the deprivation of "all or substantially all, of the use of their property." Although the decision was partially overruled on procedural grounds, the Wisconsin Court of Appeals affirmed the substantive holding that to be actionable as a taking, the state must deprive the owner of all or substantially all use of their property in Busse v. Dane County Regional Planning Comm'n, 181 Wis. 2d 527.)

- *State v. City of La Crosse*, 120 Wis.2d 263 (Wis., 1984) (Court held that state's hydraulic analysis showing that fill placed in the La Crosse River floodplain would cause an increase greater than 0.1 in the height of the regional flood, contrary to the city's floodplain zoning ordinance and state regulations.)

- *Mt. Joy Township v. Davies Used Auto Parts*, 80 Pa. Commw. 633 (Pa. Cmwlth, 1984) (Court upheld the town's authority to require a thirty-foot setback from the floodplain for junkyards.)

- *In re C&M Developers*, 49 Pa. D. & C.4th 71 (Pa. Dist. & Cnty. 2000) (Court upheld local development standards that prohibited inclusion of floodplain acreage for minimum lot size purposes.)

- *Wawa, Inc. v. New Castle County Bd. of Adjustments*, 2005 Del. Super. LEXIS 39 (Del. Super. 2005) (Court upheld local prohibition on new underground gasoline storage tanks in the floodplain, drainages, riparian buffers, and steep slopes, and affirmed the denial of the applicant's request for a variance.)

Courts have only held flood-related regulations to be a taking in a very small number of cases where regulations denied landowners all economic and non-nuisance use of private lands. Various versions of the denial of economic use test have been widely applied at the state level for more than forty years. See Kusler, *Open Space Zoning: Taking or Valid Regulation*, 57 Minn. L. Rev. 1 (1972). For example, a New York Court of Appeals in *Arvene Bay Constr. Co. v. Thatcher*, 15 N.E.2d 587 at 592 (N.Y., 1938), held that "[a]n ordinance which permanently so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of property."

SIMULTANEOUS CONSTITUTIONAL CHALLENGES

Landowners wishing to challenge a floodplain regulation often simultaneously argue that the regulations are unconstitutional under the state and federal Constitution in a number of different ways: the regulations are adopted for improper goals; the regulations are not reasonably related (lack reasonable nexus) to regulatory goals; the regulations are discriminatory; and the regulations are an uncompensated taking of private property. Courts are more likely to find a taking if they find inadequate goals, inadequate nexus, or discrimination.

The authors have found no appellate cases successfully attacking floodplain regulations as lacking adequate goals. For a case upholding goals see, e.g., *Soc'y for Envtl. Econ. Dev. v. New Jersey Dep't of Envtl. Prot.*, 504 A.2d. 1180 (N.J., 1985). Additionally, landowners have very rarely succeeded in attacking floodplain regulations as lacking an adequate nexus to regulatory goals. For a single example see, e.g., *Sturdy Homes, Inc. v. Town of Redford*, 186 N.W.2d 43 (Mich. 1971) (No evidence of flooding for an area regulated as a floodplain, and case was probably long before flood maps were available.) Landowners have not succeeded in attacking floodplain regulations as discriminatory except where discrimination was also linked to takings challenges. See, e.g., *Baggs v. City of South Pasadena*, 947 F.Supp. 1580 (Fl., 1996), where a court rejected discrimination charges where a variance had been granted to some landowners but not to others. See also *Hansel v. City of Keene*, 634 A2d 1351 (N.H., 1993).

Courts have found in some instances that a community has failed to follow statutory procedures in adopting and implementing regulations (e.g., notice, hearing, publication of maps) and violated Due Process guarantees. This challenge is, however, separate from takings. Courts have required that communities follow statutory procedures in adopting and administering regulations and have occasionally invalidated regulations or permit decisions on this basis. See, e.g., *Ford v. Bd. of County Comm'rs of Converse County*, 924 P.2d 91 (Wy., 1996).

FACTORS CONSIDERED BY THE COURTS IN A TAKINGS CASE

In deciding whether floodplain regulations take private property without payment of just compensation, courts simultaneously examine a variety of factors in addition to goals, nexus and possible discrimination suggested above. They examine the following three with particular care:

What is the nature of the landowner's property interest?

Courts often grapple with the question of whether the public or landowners truly own floodplains. Moreover, is the landowner's property subject to public trust? See, e.g., *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988), in which the Supreme Court held that private landowners who believed

that they owned estuarine wetlands in Mississippi subject to the ebb and flow of the tide, and who had paid taxes on such lands for more than 100 years, did not in fact, own such lands and could not claim a taking when the state leased the lands to someone else. See also *Bubis v. Kassin*, 184 N.J. 612, (N.J. 2005), in which the court held that a private property owner's easement over a beach and bluff areas was extinguished between the beach and bluff areas, which were entirely below the mean high water mark.

Courts further inquire: What are the landowners' common law rights and duties? See discussion above. What are the landowners' reasonable, investment-backed expectations for the property? See generally *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), in which the Supreme Court indicated that factors relevant to determination of a taking included "the character of the government action", "the economic impact of the regulation on the claimant," and "the extent to which the regulation has interfered with distinct investment-backed expectations." *Id*. at 124.

What is the nature of the government action and need for regulation?

Has the regulation been adopted to serve adequate goals? Does the regulation have a reasonable relationship to the regulatory goals? If a landowner claims that regulations violate substantive due process because they lack adequate relationship to regulatory goals, the landowner's burden to overcome the presumption of validity is particularly great if a legislative act or expert agency action are involved. Courts have held that with regard to local zoning adopted by a local legislative body "In order to support his constitutional claims, the plaintiff is required to prove that the defendant's actions were clearly arbitrary, unreasonable, and discriminatory and bore no substantial relation to the health, safety, convenience and welfare of the community." *Burns v. City of Des Peres*, 534 F.2d 103, 108 (8th Cir. 1976), cert. denied, 429 U.S. 861 (1976). Courts have held that if the issue is "fairly debatable," a legislative act must be upheld. See *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir. 1986), cert. denied, 477 U.S. 905 (1986). Courts also ask: Is the regulation preventing harm (e.g., a public nuisance)? See cases cited below.

What is the impact of the regulation on the landowner?

What has the landowner paid for the land? What are the taxes? Does the landowner have some existing economic use of the land, such as a residence, agriculture, or forestry? What are the landowner's investment-backed expectations? What is the diminution in value resulting from the regulations? See, e.g., *McElwain v. County of Flathead*, 811 P.2d 1267 (Mont. 1991) (Court upheld 100 foot setback between septic tank field and floodplain against claim of taking, although the regulation reduced property values from $75,000 to $25,000 because the property owner was still able to utilize the property, although not as near the river.) Does the landowner have some economic use for the entire property? See discussion below.

Taking into account all of these factors, courts balance public interests and private rights to decide whether regulations have "gone too far." See *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) (Court upheld denial of air rights over Grand Central Station as not a taking and looked at the impact of the regulations on the entire property.) It is only when floodplain regulations deny all economic use of lands that regulations have encountered successful takings challenges. See cases cited below.

The "denial of all economic use" was set forth by Justice Scalia as a "categorical" test for taking in the 1992 Supreme Court decision, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)

although this test has been applied for many years in state courts. Justice Scalia concluded that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of this title to begin with." He emphasized, however, that this categorical rule applies only where there is a total loss of value through regulation.

Justice Scalia analogized regulations which prohibit all economically beneficial use of land to "permanent physical occupation" of land in arguing that such regulations should be subject to a categorical determination of taking if limitations upon use are not found in the property concepts of state law. He offered the following guidance in deciding whether state property law limitations upon use which would prevent the application of the categorical rule:

> Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts--by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.
>
> **On this analysis, the owner of a lake bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfill operation that would have the effect of flooding others' land.** (*Emphasis added*). Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements for its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a product use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit...
>
> The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public land and resources, or adjacent private property, posed by the claimant's proposed activities..., the social value of the claimant's activities and their suitability to the locality in question..., and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike...The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so....So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

Id. at 1029-30.

PERFORMANCE REGULATIONS AND DENIAL OF ALL ECONOMIC USE

Will performance-oriented No Adverse Impact floodplain regulations deny all economic use?

Denial of all economic use is rarely an issue with performance-oriented regulations, including a performance-oriented No Adverse Impact standard. With a performance-oriented approach, landowners have a number of options for achieving the standard, which may include both primary and secondary uses. As noted by the Nebraska court of appeals in *Bonge v. County of Madison*, 567 N.W.2d 578 (Neb., 1997), "[t]o establish that a regulation constitutes a taking, the landowner bears the burden of showing that not only that all primary uses are unreasonable, but also that no reasonable secondary use (one permitted by special use permit or variance) is available." See e.g., *Sirois v. Zoning Bd. of Review*, 2003 R.I. Super. LEXIS 29 (R.I. 2003).

For examples of cases sustaining performance-oriented floodplain regulations see:

- *In the Matter of Quality by Father & Son, Ltd. v. John Bruscella*, 666 N.Y.S.2d 380 (N.Y., 1997). (Denial of a variance for a house constructed below the flood elevation specified in a floodplain ordinance was valid.)

- *Krahl v. Nine Mile Creek Watershed District*, 283 N.W.2d 538, (MN 1979) owner failed to meet his burden of proof that community floodplain regulations deprived him of all reasonable use of his flood-prone property.

- *Beverly Bank v. Illinois Dept. of Transp.*, 579 N.E.2d 815 (Ill., 1991) (Floodplain legislation that restricted landowners from building in floodways was rationally related to several state interests and constitutional.)

- *Responsible Citizens v. City of Asheville*, 302 S.E.2d 204 (N.C., 1983) (Performance standard floodplain regulations are not a taking.)

- *Rolleston v. State*, 266 S.E.2d 189 (Ga., 1980) (Georgia's Shore Assistance Act requiring permits for altering the shore is valid and not a taking.)

- *Kopelzke v. County of San Mateo, Bd. of Supervisors*, 396 F. Supp 1004 (D. Cal., 1975) (County regulations requiring a geologic report concerning soil stability not a taking.)

- Denials of individual permits or variances or refusal to approve subdivisions for failure to comply with performance standards have also been broadly held not to be a taking. See, for example:

- *Wilkerson v. City of Pauls Valley*, 24 P.3d 872 (Okla., 2002) (Mobil home park operator failed to demonstrate that city's denial of his request for variance for placement of additional homes on existing lots was abuse of discretion, contrary to law, or clearly against weight of evidence provided.)

- *Gregory v. Zoning Board of Appeals of the Town of Somers*, 704 N.Y.S.2d 638 (N.Y., 2000) (Court upheld denial of a variance to a landowner to build a single-family residence with frontage on only a dirt road subject to ponding, deep ruts, abrupt grade and vegetation because the condition of the dirt road made "emergency response difficult.)

- *Sarasota County v. Purser*, 476 So. 2d 1359 (Fla., 1985) (Court upheld denial of a special except for a 350-unit mobile home park in the floodplain.)

- *Rolleston v. State*, 266 S.E. 2d 189 (Ga., 1980) (Denial of permit for bulkheading pursuant to Georgia Shore Assistance Act not a taking.)

- *Creten v. Board of County Comm'rs*, 466 P.2d 263 (Kan., 1970) (Court sustained denial of county permit for mobile home park in an industrial area subject to odor nuisances and flooding.)

- *Falcone v. Zoning Board of Appeals*, 389 N.E.2d 1032 (Mass, 1979) (Court held that zoning board of appeals did not exceed its authority in denying subdivision application for failure to comply with floodplain ordinance.)

- *Kraiser v. Zoning Hearing Bd.*, 406 A.2d 577 (Pa., 1979) (Court upheld decision of zoning hearing board of township denying a variance for a duplex residential dwelling in a 100-year floodplain conservation zone based upon substantial evidence of drainage and flooding problems and the possibility of increasing hazards to other buildings.)

- *Vartelas v. Water Res. Comm'n*, 153 A.2d 822 (Conn., 1959) (Court upheld denial of a single permit with a particular design and construction materials pursuant to a Connecticut state level floodway program.)

This is not to suggest that performance standards could not be held unreasonable or a taking if they made no sense (e.g., adoption of flood-related performance standards for an area not subject to flooding) or if they, in effect prevented all economic, non-nuisance activities.

ATTACHMENT OF CONDITIONS TO PERMITS

May governments attach conditions to permits to reduce the impacts of proposed activities on flooding and to protect structures? For example, might a state or federal agency attach a condition to a floodplain permit that requires the permittee to acquire flood easements from other potentially damaged property owners?

Courts have, with very little exception, upheld the conditional approval of permits or subdivision plats, providing the conditions are reasonable and proportional to the impacts of the permitted activity. Such conditional approvals are common with performance standard hazard-related regulations. Conditions may include design changes, preservation of floodways, dedication of certain floodplain areas to open space uses, adoption of deed restrictions for certain high-risk areas, installation of stormwater drainage and detention areas, etc. This support for hazard mitigation conditions is due to the strong judicial support for hazard prevention and reduction goals and the clear relationship (in most instances) between the conditions and these goals. Examples of cases sustaining conditions include:

- *New City Office Park v. Planning Bd. of Town of Clarkstown*, 533 N.Y.S.2d 786 (N.Y., 1988) (Denial of site plan for office park was justified because it did not comply with planning board's requirements for building in the floodplain. Regulations required compensatory storage.)

- *Wilson v. Dept. of Envtl. Conserv.,* 524 N.Y.S.2d 45 (1988) (State could condition a building permit upon obtaining septic tank permit.)

- *Board of Supr's of Charlestown Tp., v. West Chestnut Realty Corp.,* 532 A.2d 942 (Pa., 1987) (Court held that a condition to preliminary approval of a detailed stormwater plan was justified prior to final subdivision approval.)

- *Osborn v. Iowa Natural Res. Council*, 336 N.W.2d 745 (Ia., 1983) (Court held that conditions for an after-the-fact permit for a levee and straightening a creek channel were valid. These conditions included widening the channel, relocation of the levee, realignment of the channel, and providing a strip of land along the channel for wildlife habitat.)

- *Cohalan v. Lechtrecker*, 443 N.Y.S.2d 892 (1981) (City may rezone property conditioned upon private declaration of covenant restricting use.)

- *Metropolitan St. Louis Sewer District v. Zykan*, 495 S.W.2d 643 (Mo., 1973) (Court upheld regulations of the Metropolitan Sewer District requiring construction of drainage facilities in subdivisions and ordered both specific performance and payment of damages.)

There are limits to local authority. Courts are more likely to strike down a local regulation that:

- Deprives the landowner of all economically beneficial use of land
- Treats similarly situated applicants differently
- Is not directly related to protecting public health or safety
- Even if tied to valid public purpose, the regulation does not promote that purpose under specific facts alleged
- Requires that a portion of the property be dedicated that is not reasonable or proportional
- Applicant can demonstrate was arbitrary, capricious, or motivated by bias or animosity.

- *Longridge Estates v. City of Los Angeles*, 6 Cal. Rptr. 900, (Cal., 1960) (Court held that city could reasonably charge subdivider for connection to use municipal storm drains and sewers where fees went exclusively for the construction of outlet sewers.)

- *City of Buena Park v. Boyar*, 8 Cal. Rptr. 674 (Cal., 1960) (Court upheld condition that $50,000 be paid by developer to permit municipal construction of a drainage ditch to carry away surface waters from subdivision as a reasonable condition for subdivision plat approval.)

- *County Council for Montgomery County v. Lee*, 148 A.2d 568 (Md., 1959) (Court held that county could require that subdivider obtain drainage easements for construction of storm drainage outlet and file a performance bond to assure that the easements would be acquired.)

In broader land use control contexts, courts have sometimes disapproved conditions as a violation of Due Process or, in some instances, as a taking where the statute or ordinance did not expressly authorize such conditions, the conditions were unreasonable (not related to the regulatory goals), or the condition was not proportional to the impact of the proposed use. For example, in *Paulson v. Zoning Hearning Bd. of Wallace*, 715 A.2d 785 (Pa. Cmwlth., 1998), a court held that efforts to restrict the hours of operation of a go-cart operation in the floodplain in issuing a special exception for a floodplain were not reasonably related to ordinance goals.

The U.S. Supreme Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) held that a public beach access dedication requirement did not bear a reasonable relationship (nexus) to regulatory goals and was a taking of private property. The U.S. Supreme Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) further held that regulations adopted by the City of Tigard which required a floodplain

landowner to dedicate a bike path along a stream was unconstitutional and taking because the bike path requirement was not "roughly proportional" in "nature and extent to the impact of the proposed development". The Supreme Court clarified this requirement in the *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S.687 (1999) by stating that it applied to "land use decisions conditioning approval of development on the dedication of property to public use."

There was some concern that courts would broadly disapprove conditions in light of the *Nollan* and *Tigard* decisions. However, this has not proven to be true. State and federal courts continue to approve reasonable conditions including dedications. See, e.g., *City of Annapolis v. Waterman*, 745 A.2d 1000 (Md., 2000) for a particularly thorough analysis and many case citations. But see *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 990 P.2d 429 (Wash., 1999) in which the court held unconstitutional an across the board 30% lot area dedication requirement.

A possible way for a community to address case-by-case determinations of "rough proportionality" with regard to dedication requirements is suggested by an Oregon case, *Lincoln City Chamber of Commerce v. City of Lincoln City*, 991 P.2d 1080 (Ore. 1999). In this case the court upheld an ordinance requiring dedication of "easements for drainage purposes" and "to provide storm water detention, treatment and drainage features, and facilities." The ordinance further required that, "[i]f the applicant intends to assert that it cannot legally be required, as a condition of building permit or site plan approval, to provide easements or improvements at the level otherwise required by this section, the building permit or site plan review application shall include a 'rough proportionality' report, prepared by a qualified civil or traffic engineer…."

RESTRICTIVE REGULATION OF HIGH-RISK AREAS

May a government unit adopt tight regulations for high-risk areas such as floodways and velocity zones and dunes to implement a No Adverse Impact standard?

Courts have upheld highly restrictive regulations for high-risk areas even when in some instances there were few economic uses for the lands because of the potential nuisance impacts of activities in these areas and because of public trust and public ownership issues.

Flooding on Lake Travis in 1997, Texas. Image credit: Lower Colorado River Authority.

In *Gove v. Zoning Bd. of Appeals*, 444 Mass. 754 (Mass. 2005), the Town of Chatham zoned several areas, including its Special Flood Hazard Areas, in such a way that a variance was required to build. Gove sold a 1.8-acre parcel of land on the condition that a building permit for a single-family home would be issued. The Town declined to issue the permit, and Gove sued, alleging a taking. In this decision, Massachusetts' highest

court emphasized that the Town of Chatham had identified unique hazards on this erosion-prone coastal A-Zone property. The court found that the plaintiffs had not sufficiently shown that they could construct a home in this area without potentially causing harm to others.

This decision by the Massachusetts Supreme Judicial Court very much validates and supports the NFIP, the concept of No Adverse Impact floodplain management, and hazards-based regulation in general. While the decision is binding only on Massachusetts courts, it should have persuasive effect in other jurisdictions.

As noted above, the US Supreme Court in *Lucas v. South Carolina Coastal Commission,* 505 US 1003 (1992) found that Lucas's lots had been rendered valueless by a statute to protect barrier islands. In 1986, Lucas bought two residential lots on the Isle of Palms, a South Carolina barrier island. He intended to build single-family homes as on the adjacent lots. In 1988, the state legislature enacted a law which barred Lucas from erecting permanent habitable structures on his land. Lucas sued and won a large monetary judgment. The state appealed, and in a 6-to-2 decision, the Court relied on the trial court's finding that Lucas's lots had been rendered valueless by the state law. "[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good...he has suffered a taking."

In *Annicelli v. Town of South Kingston*, 463 A.2d 133 (R.I. 1983), the court ruled that denial of a permit to build a single family dwelling on a barrier beach was a taking "for a public good" that deprived the owner of all economic use of the property. Although it recognized the ecological significance of barrier beaches, the court reasoned that "the police power may properly regulate the use of property only where uncontrolled use would be harmful to the public."

Additional examples include:

- *Wyer. v. Bd. of Envtl. Prot.*, 747 A.2d 193 (Me., 2000) (Court upheld denial of a variance for a sand dune area against claims of taking because the property had uses for parking, picnics, barbecues and other recreational uses and was of value to abutters.)

- *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Ore., 1993) (Court held that denial of permit to build a sea wall as part of development for motel or hotel use in a flood area was not a taking.)

Courts are even more likely to support regulation of proposed development that affects a floodway. Examples include the following cases.

- *Our Way Enter., Inc. v. Town of Wells, et al.*, 535 A2d 442 (Me., 1988) (Court upheld a 20 feet coastal setback from seawall.)

- *Usdin v. State Dept. of Envtl. Prot.*, 414 A.2d 280 (N.J., 1980). (Court upheld state floodway regulations prohibiting structures for human occupancy, storage of materials, and depositing solid wastes because of threats to occupants of floodway lands and to occupants of other lands.)

- *Maple Leaf Investors, Inc. v. State Dept. of Ecology*, 565 P.2d 1162 (Wash., 1977). (Court upheld denial of a permit for proposed houses in floodway of the Cedar River because there was danger to persons living in a floodway and to property downstream.)

- *Turner v. County of Del Norte*, 24 Cal. App. 3d 311 (Cal., 1972) (Court upheld county floodplain

zoning ordinance limiting areas subject to severe flooding to parks, recreation, and agricultural uses.)

- *Spiegle v. Beach Haven*, 218 A.2d 129 (N.J., 1966) (Court sustained dune and fence ordinances for a beach area subject to severe storm damage where buildings had been destroyed in a 1962 storm. The regulation effectively prevented all building or rebuilding on several lots. The Court held that the plaintiff had not met his burden in proving a taking because the plaintiff had failed to prove "the existence of some present or potential beneficial use of which he has been deprived.")

- *McCarthy v. City of Manhattan Beach*, 264 P.2d 932 (Cal., 1953). (Court sustained a zoning ordinance which restricted oceanfront property to beach recreation uses for an area subject to erosion and storm damage due, in part, because there were questions as to the safety of the proposed construction at the site.)

PARCEL AS A WHOLE DOCTRINE

Can governmental units adopt very stringent regulations such as setbacks and floodway regulations applying to only portions of lots?

Floodway regulations, beach setbacks, bluff setbacks, fault line setbacks and other regulations for high risk areas which prohibit development in narrow strips of land pose less severe taking problems than regulations applied to broader areas because the U.S. Supreme Court and lower federal and state courts have usually examined the impact of the regulation upon entire parcels in deciding whether a taking has occurred. Lot sizes, therefore, also becomes important. Examples of U.S. Supreme Court cases in which the court refused to divide single parcels into discrete segments for a taking analysis include:

- *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (Court upheld temporary ordinances for "high hazard" (steep slope) zones near Lake Tahoe. The Court applied a "whole parcel" analysis to duration of regulation to decide that no taking had occurred.)

- *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (Court held that test for taking was the impact on value of the entire parcel and not simply the wetland portion.)

- *Keystone Bituminous Coal Assoc. v. De Benedictis*, 480 U.S. 470 (1987) (Court considered the impact of regulations restricting the mining of coal upon the entire property not simply the areas where coal could not be removed.)

- *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (Court upheld denial of air rights over Grand Central Station as not a taking and looked at the impact of the regulations on the entire property.)

- *Gorieb v. Fox*, 274 U.S. 603 (1927) (Court sustained a street setback of approx. 35 feet.)

Many examples can be also cited of lower courts sustaining regulations which tightly restrict only a portion of a property. In *City of Coeur d'Alene v. Simpson*, 136 P.3d 310 (Id. 2006) the Idaho Supreme

Court ruled that plaintiffs might be able to establish a taking based on a regulation prohibiting any structures, including fences, along the shorefront of Lake Coeur d'Alene. The court concluded that the trial court had erred in ruling that the waterfront lot, which plaintiffs had apparently transferred to their sons for tax avoidance purposes, should be considered as part of the same parcel as the plaintiffs' upland lot. The court remanded the case for reconsideration of the parcel issue, focusing on (1) whether the transfer was made for the purpose of manufacturing a taking claim, and (2) if so, based on such factors as whether the lakefront and upland lots were subject to different regulations, the fact that the lots were separated by a road, and the fact that the lots were separately taxed.

- *K & K Const. Inc., v. Dept. of Natural Res.*, 705 N.W.2d 365 (Mich. App., 2005) (Three contiguous parcels should be considered in deciding whether wetland regulations are a taking.)

- *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis., 1996) (Landowner's whole property needed to be considered, not just portion subject to wetland restriction, to determine whether a taking had occurred.)

- *MacLeod v. County of Santa Clara*, 749 F.2d 541 (9th Cir., 1984), cert. denied 472 U.S. 1009 (1985) (Denial of a permit for a timber operation on part of a parcel not a taking.)

- *Deltona Corp. v. United States*, 657 F.2d 1184 (Cl. Ct., 1984) (U.S. Court of Claims held that denial of a permit by the Corps of Engineers to dredge and fill a mangrove wetland in Florida did not take private property because the denial of the permit would affect the usefulness of only a portion of the property.)

- *Moskow v. Comm'r of the Dept. of Envtl. Mgmt.*, 427 N.E.2d 750 (Mass., 1981) (Court upheld a state restrictive order for a wetland area important in preventing floods in the Charles River Watershed against claims of taking.)

- *Krahl v. Nine Mile Creek Watershed District*, 283 N.W.2d 538 (Minn., 1979) (Minnesota Supreme Court held that watershed district's floodplain encroachment regulations tightly controlling development in 2/3 of an 11-acre tract were not unconstitutional taking of property.)

Because courts usually look at the impact of regulations upon an entire property, large lot zoning for hazard areas may make sense not only in proving greater potential for safe building sites on each lot but in insuring the constitutionality of regulations. Courts have often sustained large lot zoning for hazard-related areas as serving proper goals. See, for example:

- *Kirby v. Township Comm. of the Twp. of Bedminister*, 775 A.2d 209 (N.J., 2000) (Court sustained 10 acres minimum lot size area for environmentally sensitive area which included some floodplain.)

- *Grant v. Kiefaber*, 181 N.E.2d 905 (Ohio, 1960), affirmed 170 N.E.2d 848 (Ohio, 1960) (Court sustained 80,000 square foot lot size for a flood prone area.)

- *Gignoux v. Kings Point*, 99 N.Y.2d 285 (N.Y., 1950) (Court sustained 40,000 square foot lot size for swampy area and observed that the "best possible use of this lowland would be in connections with its absorption into plots of larger dimensions.")

Although courts have, in general, examined the impact of regulations upon an entire property, there

are exceptions. For example, the U.S. Supreme Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) held that an attempt by the California Coastal Commission to require a landowner to dedicate a beach access agreement as a condition to receiving a building permit was a taking although this dedication affected only a portion of the property. However, this factual situation was different from most others because the Court held that this restriction lacked adequate relationship to the regulatory goals and attempted to allocate a portion of the land to active public use. See also *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and discussion above.

OPEN SPACE ZONING

Could government units apply open space zoning in implementing a No Adverse Impact standard?

Quite a large number of courts have sustained regulations restricting entire hazard areas to open space uses although there are some adverse decisions as well where the regulations were found to deny all economic use. Examples of cases upholding regulations include:

- *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, et al.*, 94 N.Y.2d 96 (N.Y., 1999) (Court held that recreation zoning was not a taking for a golf course which was partially floodplain.)

- *Dodd v. Hood River County*, 136 F.3d 1219 (C.A. 9, 1998) (Court held that prohibition of homes in a forest zone was not a taking.)

- *Hall v. Bd. of Envtl. Prot.*, 528 A.2d 453 (Me., 1987) (Court held that sand dune law was not a taking despite a prohibition of year-round structures since the owner could live in or rent out spaces for motorized campers connected to utilities.)

- *Krahl v. Nine Mile Creek Watershed District*, 283 N.W.2d 538 (Minn., 1979). (Court held that watershed district's floodplain encroachment regulations affecting 2/3 of an 11-acre tract were not an unconstitutional taking.)

- *Turnpike Realty Co. v. Town of Dedham*, 284 N.E.2d 891 (Mass., 1972), cert. denied, 409 U.S. 1108 (1973) (Court upheld zoning regulations essentially limiting the floodplain to open space uses despite testimony that the land was worth $431,000 before regulations and $53,000 after regulation.)

Several, older, contrary cases exist, however, where courts held that regulations prevented all economic use of entire lands. But in these cases, the courts found that proposed uses would not cause safety threats or cause nuisances, or the regulations were subject to other infirmities. See, for example:

- *Dooley v. Town Plan & Zoning Comm'n*, 197 A.2d 770 (Conn., 1964) (Court held that open space floodplain zoning ordinance which denied all economic use of specific land was a taking.)

- *Morris County Land Imp. Co. v. Parsippany-Troy Hills Twp.,* 193 A.2d 232 (N.J., 1963) (Court invalidated in total a wetland conservancy district which permitted no economic uses where the district was primarily designed to preserve wildlife and flood storage.) However, the New Jersey Supreme Court subsequently questioned that decision, holding that, "[w]here the effect of the governmental prohibition against use is not in furtherance of a governmental activity, such as flood control or preservation of land for a park or recreational area, but rather to preserve the land for ecological reasons in its natural environment without change, the consideration of the

reasonableness of the exercise of the police power must be redetermined." *Gardner v. N.J. Pinelands Comm'n*, 125 N.J. 193 (1991).

WHEN THE ONLY ECONOMIC USES THREATEN PUBLIC SAFETY OR CAUSE NUISANCES

Can governmental units prohibit uses and activities which may threaten safety or cause nuisances where these activities may be the only economic use of specific hazard areas?

In the case of *In re Woodford Packers, Inc.*, 2003 VT 60 (Vt. 2003), the Supreme Court of Vermont vacated a development permit for construction determined to be in a floodway. The state's decision to use fluvial geomorphology instead of flood insurance program maps to determine the presence of a floodway did not constitute creation of a rule that had to be adopted under Vermont's Administrative Procedure Act. Moreover, the record supported the Board's findings that the development would be located in a floodway.

In a fair number of cases, courts have held regulations valid even where the regulations prevent all economic use of lands if proposed would be nuisance-like, threaten public safety, or be "unreasonable" in terms of the rights and duties of all landowners. Here is where common law rights and duties, discussed above, become important. Examples include:

- *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (Supreme Court upheld ordinance which prohibited extraction of gravel below the groundwater level against taking claim due, in part, to the possible safety hazards posed by such open water pits. This ordinance effectively prevented an economic use of the land.)

- *Consol. Rock Prod. Co. v. Los Angeles*, 370 P.2d 342, appeal dismissed, 371 U.S. 36 (Cal., 1962) (Court held that regulations which prevented the extraction of sand and gravel in a floodplain were not a taking despite the fact that extraction was the only economic use for the land because extraction of sand and gravel would have had nuisance-impacts upon the suffers of respiratory ailments who lived nearby.)

- *McCarthy v. City of Manhattan Beach*, 264 P.2d 932 (Cal., 1953), cert. denied, 348 U.S. 817 (1954) (Court held that open space beach regulations designed, in part, to prevent construction in areas subject to flooding and erosion were not a taking as applied to the facts of the case because the plaintiff did not show that the proposed use would have been safe.)

The authors were, in fact, unable to find a single case from any jurisdiction where a landowner prevailed in a taking suit where a proposed use would have caused a nuisance or would have threatened public safety.

A somewhat more difficult issue arises where the proposed activity will not threaten adjacent lands but will primarily cause damage to the landowner if the proposed activity is located in a high-risk area. For example, a landowner may wish to locate his or her home in a coastal wave or erosion zone. This may not increase flood or erosion losses on other property although the home may be destroyed. It has been argued that prohibition of such an activity is, in fact, "protecting a person against himself."

However, courts recognize that floodplain development poses public safety risks appropriate for local regulation. Arthur C Nelson, Ph.D., ASCE, FAICP notes that a single-family home can be reasonably expected to last 150 years, essentially a time bomb for future generations.

Prohibition of activities which may damage the landowner does have some support in other legislation. For example, legislatures have adopted vehicle seat belt, motorcycle helmet, and other laws primarily designed to reduce injuries to individuals from risks they consciously assume. Such laws have been upheld in most instances. See, Kusler, J., et al., Vol. 1, *Regulation of Flood Hazard Areas to Reduce Flood Losses*, (1971) at p. 309 et. seq. Part of the justification for such laws is that seriously injured individuals often do not pay the medical costs or the long-term disability costs which are born by society as a whole.

This may also be true for construction of a home in a flood or erosion area. The individual constructing his/her or "a" house in a high-risk hazard area (flash flooding, avalanche, mudslide, landslide, earthquake, fault line) may not only place him/herself in danger but his family, friends, and guests. Subsequent purchasers may also be unaware of and threatened by hazards. This can be a real problem because vacation properties (e.g., beach, mountainside) have a high turnover rate and are often purchased by visitors not familiar with the area. In addition, many of these private structures are, over time, converted to rental units and condominiums with broader public exposure to risk. The costs of extending public services to these areas may be high and such services may be repetitively damaged at public expense. If emergency rescue is necessary during a hazard event, police, fire, or other rescue personnel may be put at risk. Finally, governments often end up paying much of the bill for private occupation of high-risk areas through disaster assistance, flood loss reduction measures, tax write offs, etc.

Public safety and welfare arguments, therefore, can be made that development (or at least development lacking extensive safety measures) is unreasonable in high-risk areas even where such development lacks common law nuisance impacts. For example, in *Spiegle v. Beach Haven*, 218 A.2d 129 (N.J., 1966), the New Jersey Supreme Court held that a beach setback line that prevented building in an area subject to severe storm damage was not a taking, in part, because the proposed activities were not "reasonable" in the circumstances given the severe storm hazard. The language of the court is interesting and may be similar in other high-risk situations (*Id*. at 137):

> Plaintiffs failed to adduce proof of any economic use to which the property could be put. The borough, on the other hand, adduced unrebutted proof that it would be unsafe to construct houses oceanward of the building line (apparently the only use to which lands similarly located in defendant municipality had been put) because of the possibility that they would be destroyed by a severe storm--a result which occurred during the storm of March, 1962. Additionally, defendant submitted proof

> that there was great peril to life and health arising through the likely destruction of streets, sewer, water and gas mains, and electric power lines in the proscribed area in an ordinary storm. The gist of this testimony was that such regulation prescribed only such conduct as good husbandry would dictate that plaintiffs should themselves impose on the use of their own lands. Consequently, we find that plaintiffs did not sustain the burden of proving that the ordinance resulted in a taking of any beneficial economic use of their lands.

More recently, Judge Cathell, then a Judge of the Maryland Court of Special Appeals, applied the nuisance exception in *Erb v. Dep't of Envmt.*, 676 A.2d 1017 (Md. App. 1996). The court found that the denial of an on-site septic system did not constitute a taking where permitting the system would allow for the maintenance of a nuisance. *Id.* at 1026-27. Writing for a unanimous panel, Judge Cathell explained as follows:

> Appellant's property has not been taken for public use; rather, his development of it has been restricted to prevent public harm. In general, a property owner must use his property so as not to injure others, and a state is allowed to promulgate regulations that achieve this result. Along the same lines, a property owner generally has the constitutional right to make any use of his property he desires, so long as he does not endanger or threaten the health and safety of the general public… There is no right, and there has never been any, incidental to the use of private property to create, conduct, or permit a nuisance thereon. A regulation prohibiting a nuisance is not, and cannot be, the taking or interference with a right incident to the use of private property. A right to maintain a nuisance does not exist in the first instance.

Id. at 264-66, 676 A.2d at 1026-28 (citations omitted).

CIVIL RIGHTS CLAIMS & SECTION 1983

Title 42, § 1983 of the U.S. Code provides a vehicle for seeking redress for an alleged deprivation of a litigant's federal constitutional and federal statutory rights by an official's abuse of position. Increasingly, landowners and developers use § 1983 to elevate a claim to federal court, requiring local officials to defend their ordinances or permitting decisions in venues often hundreds of miles away. Section 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Congress passed 42 U.S.C. § 1983 in 1871 as Section 1 of the "Ku Klux Klan Act." The statute did not emerge as a tool for checking the abuse by state officials until 1961 when the Supreme Court decided *Monroe v. Pape*. In *Monroe*, the Court articulated three purposes for passage of the statute: (1) "to override certain kinds of state laws"; (2) to provide "a remedy where state law was inadequate"; and (3) to provide "a federal remedy where the state remedy, though adequate in theory, was not available in

practice." After *Monroe* opened the door of the federal courthouse, plaintiffs seeking monetary damages sued not only state officials but began to sue cities and counties as well. They also sought prospective injunctive relief against state officials. Ultimately, the federal court became the venue to reform the governmental practices of states and community leaders.

To establish a prima facie case under 42 U.S.C. § 1983, plaintiffs must successfully allege two elements: (1) the action occurred "under color of law" and (2) the action is a deprivation of a constitutional right or a federal statutory right. *Parratt v. Taylor,* 451 US 527, 535 (1981). The first element involves a fact-specific inquiry wherein the court must examine the relationship between the challenged action and the government. When a plaintiff sues a governmental entity, such as a city or county, for a constitutional violation arising from its policy or custom, action under color of law is present because the entity was created by state law. See, e.g., *Monell v. Department of Soc. Servs.,* 436 U.S. 658, 690–91 (1978). Because a governmental entity generally acts only through its agents or employees, all regulatory actions associated with development review, approval, and enforcement occur under color of law. The second element involves the alleged deprivation of selected constitutional rights. When a plaintiff asserts the violation of a right specifically enumerated in the Bill of Rights or protected under the due process clause, the violation is complete at the time of the challenged conduct and the § 1983 remedy is available. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

Governments may exercise eminent domain authority in ways that give rise to actions under § 1983. While liberty interests may be derived directly from the due process clause of the Constitution or created by state law, property interests "are created from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). In *La Raza Unida of Southern Alameda County v. Volpe*, 440 F. Supp. 904 (N.D. Cal. 1977), plaintiffs sought to halt the acquisition of land for highway construction that would displace them from their homes. Plaintiffs based their claim on, in part, provisions of the Uniform Relocation Assistance and Real Property Act of 1970, which entitled those displaced by federal construction projects to various forms of assistance in relocation. The court held that under the Act, state officers were obligated to determine that, ''comparable, decent, safe, and sanitary replacement housing will be available for displaced persons prior to displacement,'' and their failure to do so was actionable under section 1983. *Id.* at 912, quoting H.R. Rep. No. 91-1656, 91st Cong., 2d Sess.

Section 1983 operated in the floodplain context in *Wozniak v. County of Du Page,* 569 F. Supp. 813 (D. Ill. 1983), where county officials denied a permit for proposed development on the grounds that the property was prone to flooding. In a letter opinion, the 18th Judicial District, DuPage County, Illinois, ordered the permit issued in March 1980, whereupon the property owner alleged in federal court that the county violated their due process rights, not based on mere mistake of floodplain determination, but as part of a conspiracy to preserve their property for a future public roads project. The district court concluded that, since it was "conceivable that if the Wozniaks were successful in proving that the flood plain decision was a sham, was in violation of applicable standards and appropriate guidelines, and was made only to improperly preserve the land for another purchaser, their federal claim could proceed to judgment." *Id.* at 816.

In another case, *A.A. Profiles, Inc. v. City of Fort Lauderdale*, the landowner sought relief under 42 U.S.C. § 1983 for the taking of property without just compensation in violation of the fifth amendment and the deprivation of property without due process in violation of the fourteenth amendment. 850 F.2d 1483 (11th Cir. 1988), cert. denied, 490 U.S. 1020 (1989). The court first held that the case was ripe for adjudication under § 1983, because city's action was final. The court distinguished between the finality of the administrative action and the exhaustion of administrative remedies. No adequate remedy, administrative or otherwise, was available to appellant. The court considered that the city had previously approved development of the land, and the owner had expended a great deal of time and money in pursuing the development. The court also concluded that the city's rezoning of his land was an unconstitutional taking.

Municipalities can be held liable under §1983 for failure to adequately train its officials, employees, and agents. The US Supreme Court reached this conclusion in the 1989 decision in *City of Canton v. Harris,* 489 U.S. 378, noting that:

> [I]f a city employee violates another's constitutional rights, the city may be liable if it had a policy or custom of failing to train its employees and that failure to train caused the constitutional violation. In particular, we held that the inadequate training of police officers could be characterized as the cause of the constitutional tort if--and only if--the failure to train amounted to ''deliberate indifference'' to the rights of persons with whom the police come into contact.

Id. at 388. Subsequently, lower courts have considered property interests in the context of § 1983 claims, and reinforced the importance of due process, transparency, notice, and consistency in the application of local standards for communities wishing to avoid civil rights challenges.

In *Staubes v. City of Folly Beach,* the South Carolina Court of Appeals considered whether the city's denial of permits for reconstruction of a substantially damaged structure manifested a taking, and whether the city's action violated the property owner's procedural due process rights under § 1983. 500 S.E.2d 160 (S.C., 1998). The court held that the City's actions in revoking property owner's building permit for repair of damage following Hurricane Hugo did not deprive owner of all economically viable use of his land, and thus was not a temporary taking. Additionally, the city did not inform owner that he could not repair duplex under any circumstances but, rather, that he was required to comply with applicable building codes for new construction before undertaking repairs.

However, the City had failed to substantiate the revocation of Staubes's building permit with evidence of its estimated cost of repairs exceeding fifty percent of the building's pre-Hugo market value. As a result, the court remanded to the trial court for determination as to whether the City's actions were sufficiently negligent to support Staube's claim under the South Carolina Torts Claims Act. Oddly, Staube's claims were dismissed in 2001 because he was not able to demonstrate that he owned the property. 2001 WL 35835129 (S.C.Com.Pl., 2001). Even so, *Staubes v. City of Folly Beach* still provides support for landowner claims of gross negligence where a city fails to support actions with clear, meaningful, and expert evidence where needed.

Floodplain mapping and determination can be controversial subjects of litigation. States, through enabling legislation, often grant discretion to municipal authorities to regulate land use to prevent damage to persons and property due to flood. Since local governments that participate in the NFIP adopt, enforce, and help maintain flood insurance rate maps (FIRMs), they may regulate flood hazard

areas beyond the boundaries shown on an effective FIRM. Court have upheld this local practice where it is congruent with enabling statutes and designed to secure safety from hazards like flooding.

The District Court for the District of Connecticut affirmed this principle in *Ravalese v. East Hartford*, 608 F. Supp. 575 (D. Conn. 1985), when the plaintiff landowner claimed that the town's use of a more restrictive floodplain map deprived him of his property without due process of law and without compensation, and that the actions of town, therefore, constituted violations of the fifth and fourteenth amendments redressable under 42 U.S.C. § 1983. The court upheld the town's authority to regulate from its own maps, rather than those of the state or federal governments, and concluded that the ordinance "simply regulates construction and use so that development in such a zone does not increase the potential for personal and economic harm from a flood." *Id.* at 580.

More recently, in *Ahern v. Fuss & O'Neill, Inc.,* a developer filed a § 1983 action against a Connecticut town in connection with its adoption of revised floodplain map that reflected a higher flood elevation for redevelopment site. The map revision resulted from the belated discovery of a discrepancy in previously existing documents describing the floodplain, and required that the developer to modify the proposed development in such a way that, in the developer's view, rendered the site unsuitable. The court concluded that the town's adoption of revised map did not represent its own policy decision but rather was an adoption of federal flood elevation levels consistent with the town's policy of participation in the National Flood Insurance Program. *Ahern v. Fuss & O'Neill, Inc.,* 78 Conn. App. 202 (Conn., 2003).

The Floodplain Administrator for Canadian County, Oklahoma was sued individually and in her official capacity by a plaintiff landowner who claimed violations of the takings clause of the Fifth Amendment, and his right to procedural and substantive due process under the Fourteenth Amendment. *Glen Eagles of Canadian County, L.L.C. v. Bd. of County Comm'rs*, 2006 U.S. Dist. LEXIS 27266 (D. Okla. 2006). In particular, the plaintiff asserted that the county, "by placing [the plaintiff's] land in the flood plain," had "taken" his property. The plaintiff also asserted a state law claim against the county and its officials for inverse condemnation, state law claims of intentional interference with contractual relations and civil conspiracy against the officials as individuals. The district court found the claims not ripe for review, since the landowner had not filed a complete permit application and the county had rendered no final decision. The court relied on a Supreme Court case to conclude that "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations . . . cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 7, (citing *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 191 [1985]). Since the federal takings claim was not ripe, the court considered all of the related constitutional claims to be "coextensive" and also not ripe.

In *York v. Cedartown,* the plaintiffs filed a § 1983 claim that the city's negligently designed and constructed street and drainage system diminished the value of their property and constituted a continuing nuisance. The Fifth Circuit held that the damages may be actionable in tort, but did not suggest the level of abuse of governmental power necessary to elevate the claim to a constitutional civil rights violation. *York v. Cedartown,* 648 F.2d 231 (5th Cir., 1981). See also, *Baranan v. Fulton County,* 299 S.E.2d 722 (Ga., 1983); *City of Watauga v. Tayton,* 752 S.W.2d 199, (Tex., 1988).

Courts have consistently found that State compensation procedures may be available and must be exhausted for landowners to pursue their action in federal court. For example, inverse condemnation actions brought under Fifth Amendment are subject to this ripeness requirement. If, and only if, a

landowner is unable to obtain remedy at the administrative and state court levels, landowners may pursue action in federal court for taking without just compensation. See, e.g., *Bensch v. Metropolitan Dade County*, 952 F.Supp. 790 (S.D. Fla., 1996); *Anderson v. Chamberlain*, 134 F.Supp.2d 156 (D. Mass., 2001); *Clear Channel Outdoor v. City of Lakewood*, Not Reported in F.Supp.2d, 2005 WL 1354609 (W.D. Wash., 2005).

However, a Minnesota court upheld a jury award of damages for county negligence where a public project altered the water flow, causing severe structural damage to a home. *Oswalt v. Ramsey County*, 371 N.W.2d 241 (Minn.App.,1985). Because appellant's residence was present prior to the enactment of the city's floodplain management ordinance, it could remain as a nonconforming use, but the ordinance prohibited reconstruction of a nonconforming use destroyed to an extent of fifty percent or more of its assessed value. When the city condemned the home under the Minnesota statute on hazardous buildings, the plaintiff homeowner vacated and eventually defaulted on his mortgage. The court found that the city exercised its authority under the state's safe building laws, "but it effectively applied a standard enacted as part of the floodplain ordinance [and] used that standard without the determination it would necessarily make if it exercised force openly under the ordinance." *Id.* at 247. (The property was later sold to and repaired by a developer who did not include his labor in the cost of repairs.)

In addition to due process grounds, the U.S. Constitution provides for claims of violations of equal protection rights, as in *Willowbrook v. Olech,* 528 U.S. 562, decided February 23, 2000. Mrs. Olech's complaint alleged that the municipality demanded a 33-foot easement as a condition of connecting her property to the municipal water line, whereas only a 15-foot easement was required from other property owners in her subdivision. Further, she claimed that the municipality's demand for additional footage was irrational and wholly arbitrary and that the homeowner ultimately connected her property after receiving a clearly adequate 15-foot easement. On certiorari, the Supreme Court held that Mrs. Olech had successfully stated a cognizable equal protection claim.

Mrs. Olech's home, 120 feet from road. Image credit: Dwight Merriam.

In the case of *O'Mara v. Town of Wappinger*, 2007 U.S. App. LEXIS 8608 (2d Cir. 2007), property owners and their property management company, filed an action against defendant town and asserted a claim for declaratory judgment of ownership free and clear of restriction, a claim under § 1983 for violation of their substantive due process rights, and state law claims for fraud and negligent misrepresentation. Prior to closing on a purchase, the property owners had a title search done, but the search made no mention of open space or "no build" restrictions on either parcel. It was brought to the town's attention by one of the heirs of the original owner of the property that the property was not supposed to be developed, and the town zoning administrator issued a stop work order to the property owners. The town offered to grant the property owners a certificate of occupancy upon the contingency that the rest of the two parcels of property would be designated as open space. The court found that because the restriction on developing the property was not properly recorded, the restriction was not enforceable against a bona fide purchaser for value, which the property owners were.

In *Clubside, Inc. v. Valentin*, 468 F.3d 144 (2d Cir. 2006), the town board's denial of a developer's petition to extend a sewer district did not violate Fourteenth Amendment substantive due process rights because the developer did not have a constitutionally protected interest where N.Y. Town Law § 194(1)(d) granted the board discretion to conside

In *Niefert v. Dep't. of Env.,* 395 Md. 486 (Md. App. 2006), plaintiff landowners sought damages and attorneys' fees from the Department and, pursuant to § 1983 , from the officials responsible for the permit denials, claiming the denial of equal protection and an unconstitutional taking under both the United States and Maryland Constitutions. The court denied the equal protection and takings claims, noting that "although the septic denials rendered appellants' lots undevelopable, the denials did not constitute a taking because they fall within the takings 'nuisance exception' recognized by the Supreme Court in *Lucas*. Nuisances that are recognized at common law and prohibit all economically beneficial use of land do not constitute a taking." *Id.* at 518-19 (citations omitted). As the body of property-rights related § 1983 jurisprudence continues to mount, public officials can take comfort in the continued support from the courts for No Adverse Impact principles.

Property rights have limits. For example, developers and landowner have no right to:

- Adversely impact the property of others
- File lawsuits designed to intimidate regulators into granting permits
- Obtain a permit to develop without adequate notice and opportunity for hearing from potentially affected neighbors
- Take a claim to court before exhausting administrative remedies, that is, before local officials have reached a final decision regarding the application of the regulations to the property at issue.

HOW "SAFE" IS "SAFE"?

Who decides how "safe" is "safe"? To what extent will courts defer to legislative bodies on this issue?

This is still an open question when the risks are small. However, courts have afforded legislative bodies broad discretion in deciding acceptable and unacceptable limits when public health and involved. See, for example, the U.S. Supreme Court case, *Queenside Hills Realty Company v. Saxl*, 328 U.S. 80 (l946) in which the Court upheld a New York "Multiple Dwelling Law" which required that lodging houses of non-fireproof construction in existence prior to enactment of the statute be modified to comply with safety requirements. The owner of such a building argued that the cost of installing such a system (about $7500) was too great. The Court rejected the due process arguments with language that can easily be applied to earthquake or flood retrofitting as well regulation of new development (Id. at 83):

> [T]he legislature may choose not to take the chance that human life will be lost in lodging house fires and adopt the most conservative course which science and engineering offer. It is for the legislature to decide what regulations are needed to reduce fire hazards to a minimum…. [I]n no case does the owner of property acquire immunity against exercise of police power because he constructed it in full compliance with the existing laws.

SUMMARY, CONSTITUTIONAL CHALLENGES TO REGULATIONS

Courts are likely to uphold a performance-oriented, No Adverse Impact standard in floodplain regulations and more specific implementing regulations against claims of taking or unreasonableness. Such community regulations can and should be more stringent than existing FEMA minimum standards or state standards. FEMA encourages state and local regulations more restrictive than FEMA standards. They could require additional freeboard, establish rational hazard protection based setbacks, impose

tighter floodway restrictions, and very tightly regulate high-risk areas. However, communities should approach with particular care situations where regulations prevent all economic use of entire properties, particularly where there are economic uses for these lands which pose no threats to safety or lack “nuisance” impacts. Consideration could be given to creating a residual value in the property through transferable development rights, seasonal recreational usage, or open space usage in conjunction with adjacent properties.

PART 4: KEEPING OUT OF LEGAL TROUBLE

What, then, can a community do to reduce potential common law legal liability from increased flood or erosion damages by applying a No Adverse Impact approach? How can it avoid Constitutional problems with No Adverse Impact regulations for private properties?

To reduce potential liability from landowner suits due to community-induced increased flood or erosion damages, a community could:

- **Adopt a No Adverse Impact standard for public works projects.** Liability will be reduced by not increasing flood levels, velocities and erosion or other adverse impacts on adjacent lands.

- **Incorporate the No Adverse Impact standard in master plans and policies.** Implement this standard, in part, through master plans for community public lands and infrastructure construction, and management, including bridge and road construction and reconstruction, sewer and water installation, use of public parks and other public lands, construction of public buildings, construction of flood control structures, and other activities. We don't mention community development plans—comprehensive plans and regulations--they should be on the list.

- **Conduct a liability audit.** Conduct an "audit" of existing potential liability situations by determining where increased flooding or erosion is likely on private lands due to inadequate culverts or bridges, public roads or fills, increased runoff due to urbanization, and flooding due to approval of subdivisions and acceptance of dedicated storm water facilities. Hazard mitigation measures can then be focused on these areas to reduce potential liability.

- **Carry out hazard reduction planning.** Develop and implement plans for reducing potential flood and erosion losses and liability through improved flood mapping, warning systems, evacuation plans, re-develop plans and standards, relocation of flood prone structures, resizing of bridges and culverts, acquisition of flood easement, and flood control measures can also reduce the potential for successful liability suits.

- **Encourage private landowners to purchase flood insurance.** Landowners are less likely to sue governments for increases in flood and erosion damages if they are compensated by insurance for any losses.

- **Adopt floodplain regulations for private property.** A community may reduce landowner suits claiming that the community has increased flood heights or velocities by adopting regulations restricting intensive use of such lands. For example, it can adopt large lot zoning, setbacks, and increased elevation requirements for private structures in such areas.

To reduce potential takings liability from floodplain regulations incorporating a No Adverse Impact standard (Part 3 above) a community could:

- **Apply a No Adverse Impact standard in development standards and regulations** and implement the standard fairly and uniformly to building permits and site plan review, subdivision approval, acceptance of dedicated open space and stormwater facilities, building code inspections and enforcement. Courts provide great support for regulations which are fairly and uniformly implemented.

Communities that share a watershed collaborate for higher development standards. Image credit: Texas Colorado River Floodplain Coalition.

- **Ensure that development standards expressly relate to public health and safety** through statements of purpose, resolutions, and statements to the record of commission and council proceedings. Purposes should tie safety to floodplain regulations, but they also may refer to general welfare considerations such as protection of air and water quality, agricultural and forestlands, wetlands, floodplains as habitat, and sites of historic or archeological value. Furthermore, the public purpose must be linked clearly to the specific restriction or permit condition on a property.

- **Require flood easements for increases in flood heights or velocities.** Allow landowners to increase flood heights and velocities only through special exception or variance processes. Allow such increases only if landowners will acquire flood easements from anyone whose property is impacted by the increased flood heights, velocities, erosion, etc.

- **Prepare detailed and accurate maps.** Develop particularly accurate flood and erosion maps and other flood and erosion information where regulations must tightly control development (e.g., an urban floodway and coastal high risk areas) and there is the possibility of a taking challenge based on denial of all economic uses.

- **Reduce real estate taxes.** Many states allow local governments to reduce real estate taxes for wetlands, agricultural lands, and other open spaces.

- **Undertake education efforts.** Work actively with landowners to educate them with regard to flood hazards and to help them prevent future increases in flood hazards. Such measures can help reduce their potential liability to other private landowners for increasing flood heights and velocities.

- **Help landowners identify economic uses.** Work actively with landowners to help them identify economic uses for their floodplain lands, particularly where regulations may severely limit development on existing lots. Such uses many include farming, forestry, parking areas, use of floodplains as recreation areas in subdivisions, use of floodplains as open spaces to meet minimum lot size requirements for residential zoning with placement of structures on uplands, ecotourism, and other activities.

- **Undertake selective acquisition.** Actively acquire and place in public ownership selected floodplain areas as part of post flood relocation¸ greenway, stormwater management, parks and recreation, and other programs. Acquisition may be particularly appropriate where regulations may deny all economic use of low risk private lands.

- **Develop, publicize, and equitably implement development review procedures.** Local practices regarding development review, negotiations with developers, approval of proposed development, and enforcement of development standards present specific opportunities for communities to reinforce sound standards, demonstrate commitment to consistent application of those standards, and promote sustainable projects as part of the each local leader's legacy. However, these processes also present possible pitfalls through inconsistent, inequitable, and other than transparent application of those standards. To avoid these pitfalls, it is the responsibility of each local official – elected, appointed, or hired – to establish and implement procedures for development review, approval, and enforcement that are agreed upon through collaboration with planners, inspectors, code enforcement staff, law enforcement, legal teams, and municipal courts. Communities considering the adoption or modification of procedures should ensure that the process is transparent to and inclusive of the interests of allied staffs and the public.

- **Ensure that staff having development review and standards enforcement responsibilities receives proper training, resources, and support.** Communities are most vulnerable where development occurs without review or with approvals that are not informed by careful review of potential hazards and liabilities. Every community participating in the National Flood Insurance Program designates a local Floodplain Administrator who needs training, resources, and support to perform effectively their duties.
    - Training is available through numerous sources, including ASFPM, the Emergency Management Institute, online programs, and others.
    - Resources include funding for adequate staffing, administrative tools, and materials for outreach to encourage sustainable economic development. Additionally, Floodplain Administrators need the time and ability to visually inspect the designated floodplains and other potentially flood-prone areas of the community.
    - Support demonstrates that governing bodies will seek and consider the recommendations of the Floodplain Administrator regarding all proposed development.

PART 5: SUMMARY & CONCLUSION

Stormwater and floodplain managers can be heartened by the recent decisions and opinions in Supreme Courts cases and in several states, all of which support the concept of government management of areas prone to flooding. Four tests for a "taking" have been clearly delineated by the Supreme Court, all of which tend to restrict takings to fairly narrow circumstances.

The Court has indicated that deference will be given to local decisions in matters of land use and community development -- a stance helpful to stormwater and floodplain management because it underscores the responsibility for and prerogatives of localities for management of land within their jurisdictions. Two influential states' high courts have supported communities' zoning, regulations, and other management techniques intended to protect development from hazards, prevent development from having adverse impacts on other property, and to preserve environmentally sensitive areas. .

When NAI planning is done and the community's plans and regulations look like they may meet resistance from landowners and developers, here are some hints to help frame the regulation to avoid a Taking ruling:

- Avoid Interfering with the Owners Right to Exclude Others. See, e.g., *Loretto v. Teleprompter Manhattan,* 458 US 419 (1982).
- Avoid Denial of All Economic Use. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992).
- In Highly Regulated Areas Consider Transferable Development Rights or Similar Residual Right so the Land Has Appropriate Value. See*, Penn Central Transportation Company v. City of New York,* 438 US 104 (1978).
- Clearly Relate Regulation to Preventing a Hazard. See, the very favorable court rulings in *Gove v. Zoning Board of Appeals of Chatham, Massachusetts* and *Palazzolo v. State*, 71 F.3d 1233, (R.I. 2005*).;* in contrast to the unfortunate cases of *Annicelli v. Town of South Kingston*, 463 A.2d 133 (1983); and *Lopes v. Peabody* 417 Mass. 299 (Mass. 1994). See also the recent Minnesota case of Dean Croat Construction v. Stearns County Board of Commissioners, Court of Appeals of Minnesota, 2006 Minn. App., Unpub., LEXIS 877, July 11, 2006. In that case the court overturned a local denial of a building permit for water quality reasons, since the local government had use vague, unsupported reasons to deny the permit. Had the local Board looked at future conditions hydrology and specific reasons for concern about water quality, the result might well have been different.
- Even Better Odds if there is Flexibility in the Regulation and the Community Applies the Principle to their Own Activities.
- See, also American Planning Association (APA) *Policy Guide on Takings* adopted in 1995 as well as the suggestions from the Institute for Local Government "Tips for Avoiding Takings Claims" located on the ILG website at http://www.ilsg.org/.

When you consider its basic concept, as a Property Rights Protection Program, the concept of NAI has broad support. For example, the Cato Institute is a conservative think tank closely associated with the "Constitution in Exile," the "Property Rights Movement" and other similar causes. The Institute stated that c*ompensation is not due when:*

"…the government acts to secure rights -- when it stops someone from polluting his neighbor…it is acting under its police power…because the use prohibited…was wrong to begin with." "Protecting Property Rights from Regulatory Takings" (the Cato Institute, 1995, Chapter 22, p.230).

The Institute has also testified before Congress about legislation requiring government paying landowners for Regulations limiting what a property owner can do. The Institute testified that there should be provided a "…nuisance exception to the compensation requirement….When regulation prohibits wrongful uses, no compensation is required." (Testimony of Roger Pilon, Senior Fellow and Director, Center for Constitutional Studies, Cato Institute, Before the Subcommittee on Constitution, Committee on Judiciary, US House of Representatives, February 10, 1995.)

- So How Do We Proceed?
- Planning
- Partnerships
- Planning
- Multi-Use Mapping and Engineering
- Planning
- Fair Regulation to Prevent Harm
- DHS/FEMA is embarking on a Five Year Flood Map Modernization Program.
- As Part of that Effort there is a Cooperating Technical Partners Program.
- Think of Other Hazard Managers With Whom to Partner on NAI, Other Partners could include: EPA Wetlands, Watershed, USGS, Others.

Local officials throughout a watershed can work together on federal legislation. Image credit: Texas Colorado River Floodplain Coalition.

So how will folks who want to fight your efforts to plan and regulate proceed? Based on what is taught to developers' attorneys they will likely use some or all of these six approaches:

1. Bluster and Threats;
2. Allegation that the Regulator has deprived a Developer of a Constitutional Right "Under the Color of Law." See, 42 USC Section 1983/1988; and
3. "Class of One" Allegations of Discriminatory Treatment Based on Personal Animus, or Other Inappropriate Factors;
4. Claims of State Law Violations, such as enabling legislation and open meetings acts
5. Claims of Procedural Due Process Violations
6. Claims of Substantive Due Process Violations

So, how does NAI help with Bluster and Threats? First by ensuring that the affected portions of the community are notified, and can express their concern to elected officials, and second by putting the burden on the developer to show how she will not harm others.

How does NAI help with Allegations of Depriving Someone of Property under the "color of law"? At a recent American Bar Association course, a developer's attorney acknowledged that from a purely legal perspective, there was essentially no chance for a successful "Takings" lawsuit against hazard-based regulation. However, he said that property owners might well succeed by essentially rolling over government because States and Municipalities did not have the legal information to fight back. Now you do.

Courts are so deferential to government efforts to prevent harm that the Defendant Government or Official can easily allege that the Plaintiff and Plaintiff's Attorney should be sanctioned for bringing a frivolous lawsuit under Rule 11 of the Federal Rules of Civil Procedure or similar State Rules; and/ or Bar Regulator Ethics Rules.

How does NAI help with Class of One Allegations? First, NAI reduces the confrontation between regulator and developer; and second NAI makes the development process a collegial problem solving effort. YOU can help this one by not reacting to threats in a way which can bite you later.

How does NAI help assure compliance with state law? Communities working to adopt and implement NAI principles should examine their enabling legislation and state open meetings acts to assure compliance in an open and inclusive planning process.

How does NAI help assure Procedural Due Process? Procedural due process imposes constraints on governmental decisions that deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendments to the US Constitution. Procedural due process requires that a deprivation of a property interest "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974) (hearing required); *McVeigh v. United States*, 78 U.S. (11 Wall.) 259, 267 (1870) (right to notification and a hearing); *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223 (1863) (same).

Communities working to incorporate NAI principles into their planning and development review processes should assure their citizens' opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). Changes to development codes, plans, or standards of review benefit from informed public participation and buy in. Additionally, when proposed development may impact adjacent or downstream neighbors, NAI principles call for their advanced notification and opportunity to voice concerns.

How does NAI help assure Substantive Due Process? Where the primary concern of procedural due process is that government officials provide public notice and opportunity to be heard, substantive due process concerns whether the government's deprivation of life, liberty, or property is justified by a sufficient purpose. Substantive due process is a constitutionally imposed limitation designed "to prevent government from abusing its power, or employing it as an instrument of oppression." *Norton v. Village of Corrales*, 103 F.3d 928, 932 (quoting *Sylvia Development Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995). Violations of substantive due process may take the forms of arbitrary and capricious decisions, or those that fall beyond the standards of decency.

Courts have determined that substantive due process is violated when a government action lacks any reasonable justification or fails to advance a legitimate governmental objective. To withstand a claim that principles of substantive due process have been violated, a government action must (1) serve a legitimate governmental objective; (2) use means that are reasonably necessary to achieve that objective; and (3) not be unduly oppressive. Violation of substantive due process requires invalidation of the violating government action rather than the payment of just compensation

NAI principles reflect and provide for the government purpose of protecting life and property from poorly planned development. Additionally, NAI provides for the consistent, transparent, and equitable bases for review of all proposed development, thereby deflecting possible plaintiff assertions that governmental bias or animosity may be the true reasons for a regulatory decision.

LESSONS FOR LOCAL OFFICIALS

- Hazard Based Regulations Are Generally Sustained Against Constitutional Challenges
- Goal of Protecting the Public Is Afforded ENORMOUS DEFFERENCE by the Courts
- Therefore local officials should:
    - Be Confident!
    - Be Assertive Protecting the Public and the Landowner!
    - Partner With Other Hazard Regulators, such as wetlands and other health, safety programs
- You Do Not need to be a Punching Bag!
- Be Ready with the NAI Tools, fairly Applied!
- There are Serious Sanctions Available for Frivolous Lawsuits!

You can follow the NAI approach and set the regulatory standards needed to protect people and property in your community. Remember, you have the law on your side.

RESOURCES AVAILABLE ON THE INTERNET

Association of State Floodplain Managers..... http://www.floods.org/

Association of State Wetlands Managers ..... http://www.aswm.org/

Community Resources Counsel ..... http://www.communityrights.org/

Georgetown Environmental Law and Policy Institute ..... http://www.law.georgetown.edu/gelpi/

Institute for Local Government..... http://www.ilsg.org/index.jsp?zone=ilsg

National Sea Grant Law Center..... http://www.olemiss.edu/orgs/SGLC/lawcenterhome.htm

Pace Law School..... http://www.law.pace.edu/landuse/landuse_library.html

Vermont Law School Land Use Institute..... http://www.vermontlaw.edu/landuse/

Washington University School of Law ..... http://law.wustl.edu/landuselaw/

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