



NO ADVERSE IMPACT FLOODPLAIN MANAGEMENT AND THE COURTS

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PREFACE

The following paper discusses selected legal issues 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 suits. 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 in the last sixteen years. Research 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 cases carried out by the author 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 the author on related subjects see, e.g., 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. Legal 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*, Wis. L. Rev. 35 (1970).

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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.

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	4
PART 1: INTRODUCTION	6
Introduction.....	6
The No Adverse Impact Goal	6
Legal Issues.....	8
PART 2: NO ADVERSE IMPACT AND THE COMMON LAW.....	9
Successful Common Law Suits Against Governmental Units	9
Examples of Flooding, Drainage, and Erosion Cases.....	14
Liability for Entirely “Natural” Flood and Erosion Damages	16
Liability for Affirmative Acts Which Increase Flood and Erosion Damage	17
Factors Relevant to Reasonableness	19
Government Failure to Adopt Regulations	20
Failing to Adequately Consider Flooding in Permitting.....	21
Acceptance of Dedicated Storm Sewers, Street, Other Facilities	22
Inadequate Inspections.....	22
Inadequate Enforcement of Regulations	23
Legislative Modification of Common Law Rules	23
PART 3: THE CONSTITUTIONALITY OF A NO ADVERSE IMPACT REGULATORY STANDARD.....	25
Uncompensated “Takings”	25
Regulations Exceeding NFIP Minimum Standards	31
Simultaneous Constitutional Challenges	32
Factors Considered by the Courts in a Takings Case	33
Performance Regulations and Denial of All Economic Use.....	35
Attachment of Conditions to Permits.....	37
Restrictive Regulation of High Risk Areas.....	38
Parcel as a Whole Doctrine.....	39
Open Space Zoning.....	41
When the Only Economic Uses Threaten Public Safety or Cause Nuisances	42
How “Safe” is “Safe”?	44
Summary, Constitutional Challenges to Regulations	44
PART 4: KEEPING OUT OF LEGAL TROUBLE	45
Summary & Conclusion.....	47
SELECTED BIBLIOGRAPHY.....	50

EXECUTIVE SUMMARY

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

The paper first considers the relationship of a No Adverse Impact 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.

We conclude that:

A) No Adverse Impact approach is consistent with common law rights and duties;

B) It will reduce the potential for successful suits 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*, 107 S. Ct. 1232 (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 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 community decision-making and activities which 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 storm water management facilities, construction of flood control works, grading, construction of public buildings, approving subdivisions and accepting dedications of public works, and issuing permits.

C) 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 regulations. 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 make a nuisance of herself 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., set backs) 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.

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

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.

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 four fold, approaching \$6 billion annually. Damages in the last two years 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 structures are suddenly prone to damages because of the actions of others in the floodplain. These actions raise flood heights and velocities and erosion potential.

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.¹ 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 induce additional flooding and damage.

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.

¹ 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 CFR 60.3(a)(1). In addition, the regulations on the flood program specifically state that "(a) any community 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)?

- > 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 still rising and so are not yet tallied, but estimates are that Katrina-Rita 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.

When individuals are damaged by flooding or erosion, they often file law suits 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 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.

Box 1 Legal Theories or Grounds for Liability
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<p>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., <i>Sandifer Motor, Inc. v. City of Rodland Park</i>, 628 P.2d 239 (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.</p>

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 *Hadfield v. Oakleim County Drain Com'r*, 422 N.W.2d 205 (Mich., 1988). 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.

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 will be the subject of a paper to be issued by the Association of State Floodplain Managers shortly.

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 man” 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 and Light Company*, 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 which 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 Construction Co. v. United States*, 585 F.2d 998 (Ct. Cl., 1978) (U.S. government liable for subsidence due to excavation next to existing buildings.)

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 drain pipe).

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 are suable 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 Commission*, 497 P.2d 340 (Col., 1972.)

--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 Commission*, 497 P.2d 340 (Col., 1972.) See also, *Lang et. al v. Wonneberg et. al*, 455 N.W.2d 832 (N.D., 1990); *Keystone Electrical Manufacturing, 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.

--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 generally Annot., “Architect’s Liability for Personal Injury or Death Allegedly Caused by Improper or Defective Plans or Designs,” 97 *A.L.R.3d* 455 (2000). 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.

--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 Development Co.*, 164 Cal App. 3d 165 (Cal., 1985); See, e.g., *Lea Company v. North Carolina Board of Transportation*, 304 S.E.2d 164 (N.C., 1983).

--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 U.S. lies 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); Annot, *Liability of Municipality or Other Governmental Subdivision in Connection with Flood Protection Measures*, 5 A.L.R.2d 57 (1949 and 2003 update). 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 of suits include:

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

--United States v. Kansas City Life Insurance Co., 70 S. Ct. 885 (S.Ct., 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, 713 F.2d 504 (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.)

--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 and Parks Commission, 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 (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 Development 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*, 76 S. Ct. 122 (S.Ct. 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.

Some governments believe they may avoid **all** liability for hazard losses by avoiding various **future** affirmative actions which increase flood hazards by filling, grading, construction of bridges, flood control works, etc. This will 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.

At the expense of belaboring the point, 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 through flood hazard planning and plan implementation with a No Adverse Impact standard.

LIABILITY FOR AFFIRMATIVE ACTS WHICH 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? Of waters in rivers, streams, and other channels?

As stated above, 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 in Box 1 for both increasing flood and erosion damage from surface waters and waters in rivers, streams, 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 pleased without regard to the consequences that might be suffered by his 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. L.J.* 197 (1962).

As recently as 1993 the State of Missouri abrogated the “common enemy doctrine” in no uncertain terms:

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. See, *Heins Implement v. Hwy. & Transp. Com’n*, 859 *S.W.2d* 681 (1993).

On the other hand, Arizona reaffirmed that “the common enemy doctrine” was still in effect as recently as 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. See, *White v. Pima County*, 161 *Ariz.* 90 (App. 1989) 775 P.2d 1154 (1989)

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*, 341 A.2d 735 (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.”

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 man” must exercise great care. See *Blue-flame 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 man” 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 only 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.

--**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 Servs.*, 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 man 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.

--**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 and Light Company*, 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., Ind.*, 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

May a governmental unit be liable for failure to adopt floodplain regulations?

In general, governmental units have no duty to adopt regulations and no liability results from failure to adopt a regulation. See, for example, *Hinnigan v. Town of Jewett*, 94 A.D.2d 830 (N.Y., 1983) (N.Y. 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. Village 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 *NRCD v. NYSDEC*, 668 F. Supp. 848 (S.D.N.Y., 1987) (State liable for failing to adopted regulations as required.). See also *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 adequately consider 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 Associates 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. U.S.*, 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 Ga. V. Smith*, 316 S.E.2d 761 (Ga., 1984) (City may be held liable for approving construction project resulting in flooding.)

--*Pickle v. Board of County Comm'r 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.)

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, 86 S.W.3d 693 (Tex., 2002) (City liable for approving subdivision plat and acquiring easement which increased flood damage on other property.)

--Kite v. City of Westworth Village, 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, Mo, 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 home buyers 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 ocean-front house which did not meet zoning setback which was constructed pursuant to a permit issued by city. City was aware of violation before construction.)

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*, 35 S. Ct. 678 (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 (Okl., 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 Service, 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
REGULATORY STANDARD**

Would a community which adopted a No Adverse Impact performance standard in floodplain, zoning, subdivision control or other regulations be subject to successful landowner suits for “taking” private property without payment of just compensation? Would it be subject to successful suits if it adopted more specific implementing regulations such as a zero rise floodway restriction, stream setbacks, 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 like uses of entire properties. This will be explained below.

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 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 floodplain regulations which severely restrict the use of private property. In such situations landowners sometimes claim “inverse condemnation” of their lands. However, very few of these suits have succeeded.

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, and no clearly demonstrated unique or quasi-unique hazard associated with the site in question. Thus far there are fewer than a dozen appellate cases which hold 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 locations and the prevention of harm. Nevertheless, local governments particularly are often con-

cerned 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* (No. 04-163, decided May, 23, 2005). That unanimous opinion of the Court sets forth four ways to pursue a Regulatory Taking Case:

A) 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.

B) 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; (Note, the Court said that if Lucas was a “nuisance” under State law it might not be a Taking, but how could it be a nuisance if there were only two lots undeveloped on miles of Beach? What was the State plan to abate those nuisances?)

C) 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.

D) 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 road side 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 eco-

nominically 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.*

E) 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 tremendously 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.

Other Recent US Supreme Court Cases

A) *Kelo v. New London*, U.S. Supreme Court, No.04-108, Decided June 23, 2005.

Kelo 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.

B) *San Remo Hotel v. City and County of San Francisco*, U.S. Supreme Court No. 04-340 decided June 20, 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.

Box 2
Other Supreme Court Decisions
With Special Relevance to Floodplain Regulations

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 Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 (2002) (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, 121 S.Ct. 2448 (2001) (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, 114 S.Ct. 2309 (1994) (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, 119 S.Ct. 1624 (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, 112 S.Ct. 2886 (1992) (Court held that state beach statute prohibiting building of a house which prevent “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.)

--Nollan v. California Coastal Commission, 107 S.Ct. 3141 (1987) (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.)

--First English Evangelical Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). (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 redetermine 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 Association v. De Benedictis, 107 S. Ct. 1232 (1987) (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 cited 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)

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 Assn. v. De-Benedictis*, 107 S. Ct. 1232, 1245 (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 Brothers*, 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

A) *Gove v. Zoning Board of Appeals of the Town of Chatham*, Massachusetts Supreme Judicial Court, decided July, 26, 2005.

The Town of Chatham zoned several areas, including its Special Flood Hazard Areas (the area identified by the Federal Emergency Management Agency as being subject to at least a one-percent annual chance of flooding), in such a way that a variance is 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. 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.

This decision by the Massachusetts Supreme Judicial Court very much 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.

B) *Palazzolo v. State*, 2005 R.I. Super. LEXIS 108 (R.I. Super. Ct. July 5, 2005).

Palazzolo, an important Taking 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 land-owner. 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. 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. A link to the case is: <http://www.olemiss.edu/orgs/SGLC/casealert.htm>. This case could conceivably be appealed by Palazzolo to the Rhode Island Supreme Court. An appeal back through the federal courts is conceivable, but somewhat unlikely in view of the *San Remo* decision explained above. The Palazzolo case is not necessarily "over and final". However, the Superior Court has written an extremely well reasoned opinion that should strongly resist challenge on appeal.

C) *Smith v. Town of Mendon*, 4 No. 177 New York Court of Appeals, decided Dec. 21, 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.

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.

REGULATIONS EXCEEDING NFIP MINIMUM STANDARDS

Courts have sustained a wide range of floodplain regulations which 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 a minimum, strain city resources and impose unnecessary hardship on city residents."

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

--American Cyanamid v. Dept. of Envir. 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 "Indeed, 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. Cowlth, 1997) (Court held that landowner as 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 of the floodplain along a road by 1 foot.)

--Reel Enterprises 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." However, the court decision was partially overruled on other grounds.)

--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.)

Courts have only held flood-related regulations to be a taking in a small number of cases where regulations denied landowners all economic 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 Construction Co. v. Thatcher*, 15 N.E.2d 587 at 592 (N.Y., 1938), held that "An 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." See also discussion below.

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.

Landowners have apparently never succeeded (I could find no appellate case) in attacking floodplain regulations as lacking adequate goals. For a case upholding goals see, e.g., *Society for En-*

Environmental Economic Development v. New Jersey Department of Environmental Protection, 504 A.2d 1180 (N.J., 1985). Landowners have also very rarely succeeded in attacking floodplain regulations as lacking 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.) 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. Board of County Commissioners 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:

--**The nature of landowner's property interest.** Courts ask: Does the landowner own the floodplain area or is it owned by the public? 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. Kasson, 733 A.2d 1232 (N.J. 1999), 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.

--**The nature of the government action and the need for regulation.** Courts ask: Has the regulation been adopted to serve adequate goals? See above. 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 a harm (e.g., a public nuisance)? See cases cited below.

--**The impact of the regulation on the landowner.** Courts inquire: What has the landowner paid for the land? What are the taxes? Does the landowner have some existing economic use of the land (e.g., a residence, agriculture, forestry, etc.)? What are the landowner's investment-backed expectations? What is the diminution in value due to the regulations? See, e.g., *McElwain v. County of Flathead*, 811 P.2d 1267 (Mont. 1991) (Court upheld 100 foot set back 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*, 98 S.Ct. 2646 (S. Ct., 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*, 112 S.Ct. 2886 (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.

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. This 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."

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.)

--*Beverly Bank v. Illinois DOT*, 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 (Okl., 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 Commissioners, 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 Board, 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 Resources 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 Part v. Planning Board 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 Environmental 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 Resources 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.)

--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 Hearing Board 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 except 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, 114 S.Ct. 2309 (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 International 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. Examples include:

--Wyer. v. Board of Environmental Protection, 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.)

--Our Way Enterprises, 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 Environmental Protection, 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 ocean-front 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, 122 S.Ct. 1465 (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, 121 S.Ct. 2448 (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 Association v. De Benedictis, 107 S.Ct. 1232 (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 Transportation Co. v. City of New York, 98 S.Ct. 2646 (S. Ct., 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, 47 S.Ct. 675 (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. See, for example:

--K & K Const. Inc., v. Department of Natural Resources, 575 N.W.2d 531 (Mich., 1998) (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. Commissioner of the Dept. of Environmental Management, 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 providing 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 Committee of the Township of Bedminster, 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 Commission*, 107 S. Ct. 3141 (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*, 114 S.Ct. 2309 (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. Board of Environmental Protection, 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 Tp., 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.)

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 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, 82 S. Ct. 987 (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.)

--Consolidated Rock Products 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 author was, 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 man against himself."

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 which also are 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 house in a high risk hazard area (flash flooding, avalanche, mudslide, landslide, earthquake, fault line) may not only place himself 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, 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 un rebutted 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.

HOW “SAFE” IS “SAFE”?

Who is decide 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*, 66 S. Ct. 850 (1946) 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 could 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 set backs, 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 (Part 2, above), a community could:

1. **Adopt a No Adverse Impact standard for public works projects.** Liability will be reduced by not increasing flood and erosion on adjacent lands.
2. **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.
3. **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.
4. **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, 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.
5. **Encourage private landowners to purchase insurance.** Landowners are less likely to sue governments for increases in flood and erosion damages if they are compensated by insurance for any losses.
6. **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:

1. **Apply a No Adverse Impact standard in regulations** and implement the standard fairly and uniformly to building permits and site plan review, subdivision approval, acceptance of dedicated open space and storm water facilities, building code inspections and enforcement. Courts provide great support for regulations which are fairly and uniformly implemented.
2. **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 who may be damaged by the increased flood heights and velocities.
3. **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 there is the possibility of a taking challenge based on denial of all economic uses.
4. **Reduce real estate taxes.** Many states allow local governments to reduce real estate taxes for wetlands, agricultural lands, and other open spaces.
5. **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.
6. **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.
7. **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.

Summary & Conclusion

Stormwater and floodplain managers can be heartened by the recent decisions and opinions in three Supreme Courts cases and in three 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 *Smith v. Town of Mendon*, 4 No 177 New York Court of Appeals (highest court in New York State) decided December 21, 2004; in contrast to the unfortunate cases of *Annicelli v. Town of South Kingston*, 463 A.d 133 (1983); and *Lopes v. Peabody* 417 Mass. 299 (1994).
- 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.

When you consider its basic concept, 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 *compensation 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

So how will folks who want to fight your efforts to plan and regulate proceed? They will likely use three approaches:

- I) Bluster and Threats;
- II) Allegation that the Regulator has deprived a Developer of a Constitutional Right "Under the Color of Law". See, 42 USC Section 1983/1988; and
- III) "Class of One" Allegations of Discriminatory Treatment Based on Personal Animus, or Other Inappropriate Factors.

A) So, how does NAI help with Bluster and Threats? First by ensuring 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.

B) 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.

C) 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.

Local Officials should understand that:

- ▲ 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 programs

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.

- ▲ 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!

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