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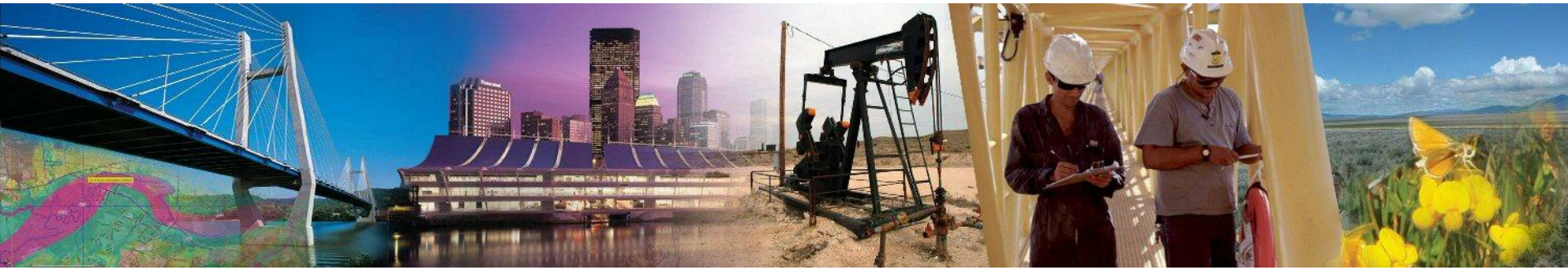

Rocky Mountain Land Use Institute

No Adverse Impact Floodplain Management
Myth or Reality?

Maher Hazine PE

Edward A. Thomas Esq.

Doug Plasencia PE

March 9, 2007

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Land Use Regulations Are Local Within A State And Federal Context

The Views Expressed Are those of the Authors and Do not Necessarily Reflect Approval Of Any Organization.

This is Not Professional Advice-It is a Lecture on General Principles of Engineering and Law. For Engineering or Legal Advice See a Professional Licensed in Your Jurisdiction.

Part I:
Doug Plasencia PE

- Introduction
- Trends in Flood Damages
- Review of No Adverse Impact Floodplain Management

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Part II
Ed Thomas Esq.

- **Legal Roots of No Adverse Impact**
- **NAI and the Constitution**
- **Avoiding a Taking**
- **Property Rights And The "Constitution in Exile**

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Part III
Maher Hazine PE

- State Cases
- Partnerships
- Summary

Part IV

- Comments
- Questions
- Discussion

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Introduction

- **Among of the Most Clear Lessons of The Horrific Aftermath of Hurricane Katrina:**
- **We Need Housing for Employees to Have Businesses and Industry-to Have an Economy**
- **There Is No Possibility of A Sustainable Economy Without Safe Housing and Safe Locations for Business and Industry to Occupy**

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Colorado and the Arid West Are Also Seriously Hazard Prone

- **NATURAL HAZARDS RISK ASSESSMENT**
- **FOR THE STATE OF COLORADO**
- **Prepared by:**
- *GEOG 4230/5230 –*
- *Hazard Mitigation & Vulnerability Assessment Class*
- *University of Colorado at Denver and Health Sciences Center*
- *Instructor: Dr. Deborah Thomas*
- Fall, 2004
- **In support of:**
- Colorado State Hazard Mitigation Plan, 2004
- State of Colorado, Division of Emergency Management

- Natural Hazards Risk Assessment for the State of Colorado 1

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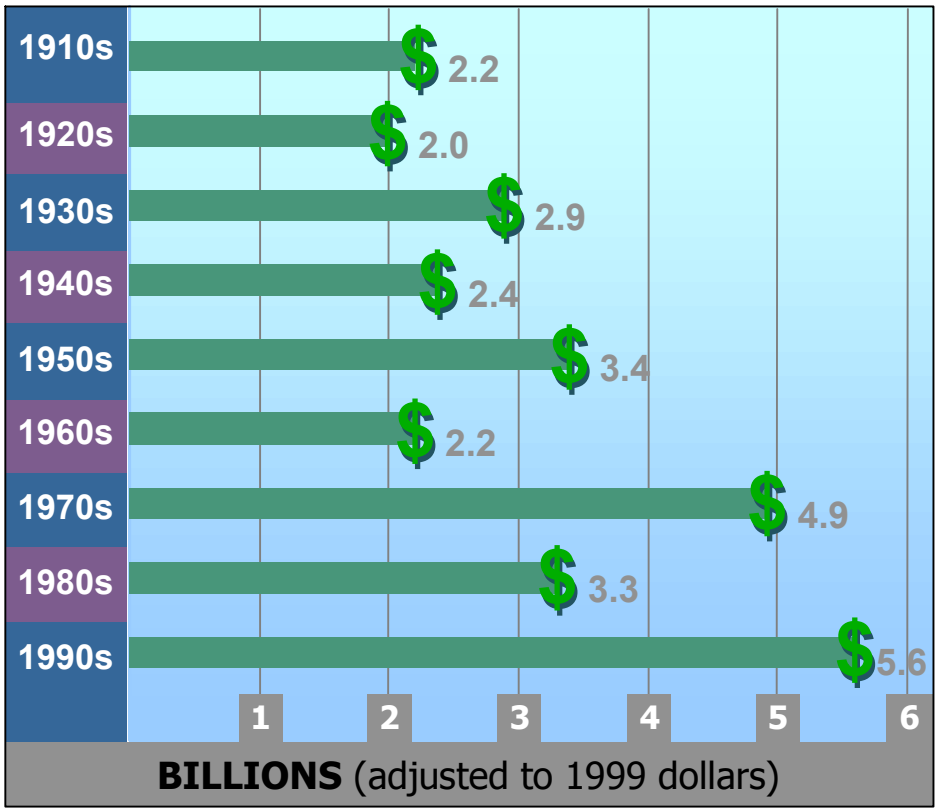
Trends in Flood Damages

- $6 billion annually
- Four-fold increase from early 1900s
- Per Capita Damages increased by more than a factor of 2.5 in the previous century in real dollar terms



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Central Message

Even if we perfectly implement current standards,

damages will increase.

Remember, we have done a number of positive things, both non-structural and structural, but…
We'll discuss why that is…

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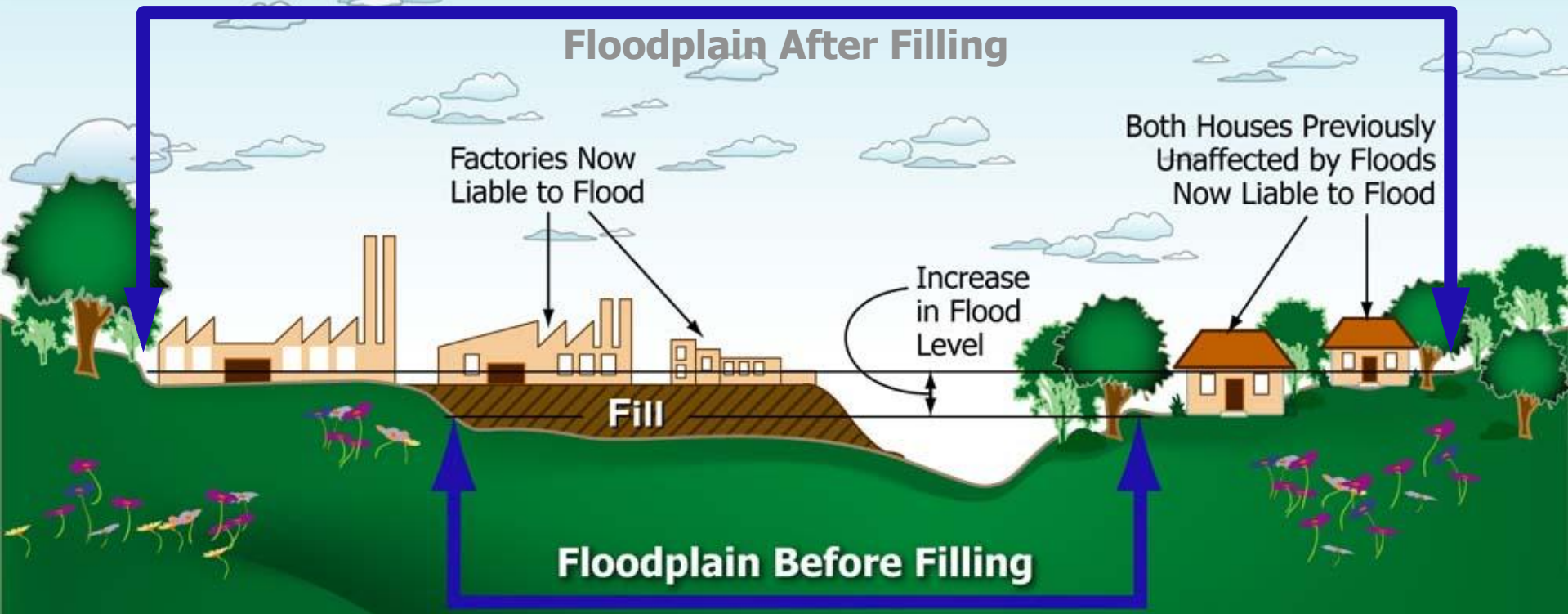
Today's Floodplain Is Not Necessarily Tomorrow's Floodplain



If large areas of the floodplain are filled, then there will be an increase in the land area needed to store flood waters. This means your home or business may be impacted.

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A Solution

No Adverse Impact Principle for:

Development Decision-making

Planning

Emergency Preparedness

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Why No Adverse Impact?

Flood damages are rapidly increasing ***unnecessarily!***

Current approaches deal primarily with *how to build in a floodplain vs. how to minimize future damages*

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No Adverse Impact Floodplain Management

- **What is No "Adverse Impact Floodplain Management"?**
- **ASFPM Defines it as "…*an Approach that ensures the action of any property owner, public or private, does not adversely impact the property and rights of others*"**

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No Adverse Impact Explained

NAI is a concept/policy/strategy that broadens one's focus from the built environment to include how changes to the built environment potentially impact other properties.

NAI broadens property rights by protecting the property rights of those that would be adversely impacted by the actions of others.

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No Adverse Impact

Activities that could adversely impact flood damage to another property or community will be allowed only to the extent that the impacts are mitigated or have been accounted for within an adopted community-based plan.

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No Adverse Impact Roles

State & Local government is the key

- Develop and adopt NAI community-based plans
- Adopt NAI strategies
- Educate citizens on the "Good Neighbor Policy"

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How To Follow The No Adverse Impact Principle?

- Identify ALL the Impacts of a Proposed Development
- Determine ALL the Properties Which Will be Impacted
- Notify Impacted Persons of the Impact of Any Proposed Development

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How To Follow The No Adverse Impact Principle?

- Design or Re-Design the Project to Avoid Adverse Impacts
- Require Appropriate Mitigation Measures Acceptable to the Community and the Affected Members of the Community

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What Is The Result Of Following The No Adverse Impact Principle?

With NAI, the Persons Who May be Victimized By Improper Development Are Made Aware and Can Have their Concerns Voiced to Community Officials.

- **Really Turns the Usual Development Process Around!**
- **Leads To Principled Negotiations Along the Line of "Getting to Yes."**

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No Adverse Impact Floodplain Regulation

- Consistent with the Concept of Sustainable Development
- Provides a Pragmatic Standard for Regulation
- Compliments Good Wetland and Stormwater Regulation
- Makes Sense on a Local and Regional Basis
- May be Rewarded by FEMA's Community Rating System, Especially Under the New CRS Manual.

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Part II
Ed Thomas Esq.

- **Legal Roots of No Adverse Impact**
- **NAI and the Constitution**
- **Avoiding a Taking**
- **Property Rights And The "Constitution in Exile**

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What Is The Result Of Following the No Adverse Impact Principle?

- **PROTECTION OF THE PROPERTY RIGHTS OF ALL**
- **Legally Speaking, Prevention of Harm is Treated Quite Differently Than Making the Community a Better Place.**
- **Prevention of Harm to the Public Is Accorded Enormous Deference by the Courts.**

No Adverse Impact Floodplain Management

- **New Concept?**
- ***"Sic utere tuo ut alienum non laedas"***
- **Detailed Legal Paper by Jon Kusler and Ed Thomas available at: *www.floods.org***
- **More Information in ASFPM**

  A Toolkit on Common Sense Floodplain Management at: www.floods.org

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NO ADVERSE IMPACT FLOODPLAIN MANAGEMENT AND THE COURTS

November 2005 Edition

By:
Jon A. Kusler, Esq. and
Edward A. Thomas, Esq.

Prepared for the Association of State Floodplain Managers

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The Constitution Of The United States

- **Fifth Amendment to the Constitution:** ***"…nor shall private property be taken for public use without just compensation."***
- **Was this Some Theoretical Thought, or Passing Fancy?**
- **Which Part of this Directly Mentions Regulation?**
- ***Pennsylvania Coal Company vs.Mahon 260 US 293 (1922). But See, Keystone Coal 480 US 470, 1987.***

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Increase In Cases Involving Land Use

- **There Has Been a Huge Increase in Taking Issue Cases, and Related Controversies Involving Development**
- **Thousands of Cases Reviewed by Jon Kusler, Me and Others.**
- **Common thread? Courts Have Modified Common Law to Require an Increased Standard of Care as the State of the Art of Hazard Management Has Improved.**

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Taking Lawsuit Results

- **Hazard Based Regulations Successfully Held to be a Taking - Almost None!**

- **Many, Many Cases where Communities and Landowners Held Liable for Harming Others**

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Examples of Situations Where Governments May Be Held Liable

- Construction of a Road Blocks Drainage
- Stormwater System Increases Flows
- Structure Blocks Watercourse
- Bridge Without Adequate Opening
- Grading Land Increases Runoff
- Flood Control Structure Causes Damage
- Filling Wetland Causes Damage
- Issuing Permits for Development Which Causes Harm to a Third Party

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Landowner Does Not Have All Rights Under The Law

- No "Right" to be a Nuisance
- No "Right to Violate the Property Rights of Others
- No Right to Trespass
- No Right to be Negligent
- No Right to Violate Laws of Reasonable Surface Water Use; or Riparian Laws
- No Right to Violate "Public Trust"

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Public Entities Do Not Have The Right To Do Just Anything Either!

- No Right to Use Public Office To Wage Vendettas
- No Right To Abuse the Public
- No Right To Use Regulation To Steal From a Landowner

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Governmental Rights and Duties

- Does Government Have a Right to Regulate to Prevent Harm?

- Does Government Have an Affirmative Duty to Regulate to Prevent Harm?

Extremely Important US Supreme Court Case on Takings

- **Lingle v. Chevron,** ***US Supreme Court No. 04-163 Decided May 23, 2005***

Here Is The Gas Station in Lingle

In Lingle, the Supreme Court States How to Determine If There Is a Taking I

Physical Intrusion ***See, Loretto v. Teleprompter Manhattan 458 US 419 (1982);***

Loretto Apartment Building: Physical Intrusion

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In Lingle, The Supreme Court States How To Determine If There Is A Taking II

Total, or Near Total Regulatory Taking. ***See, Lucas v. South Carolina Coastal Council 505 US 1003 (1992);***

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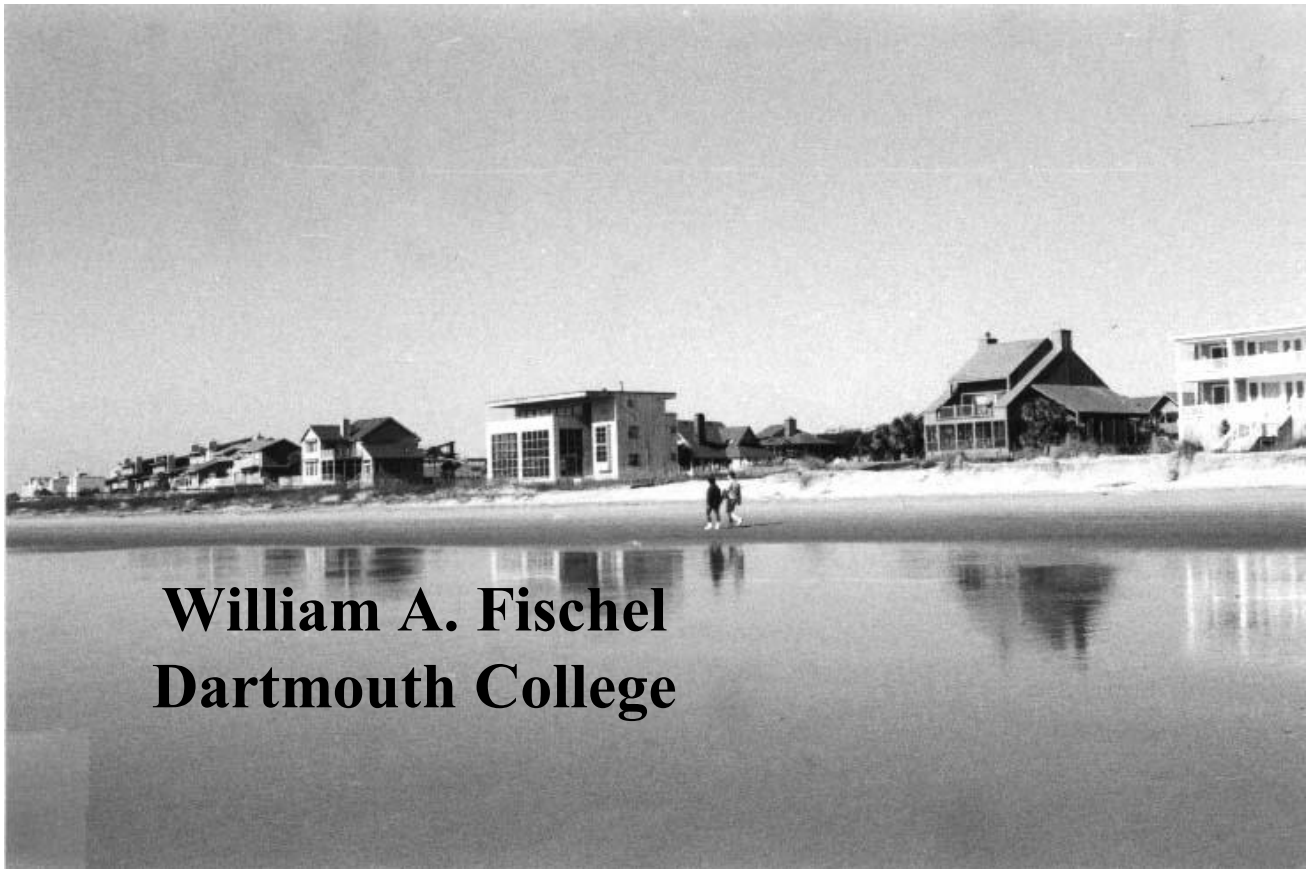
Lucas Sites Pre-Development



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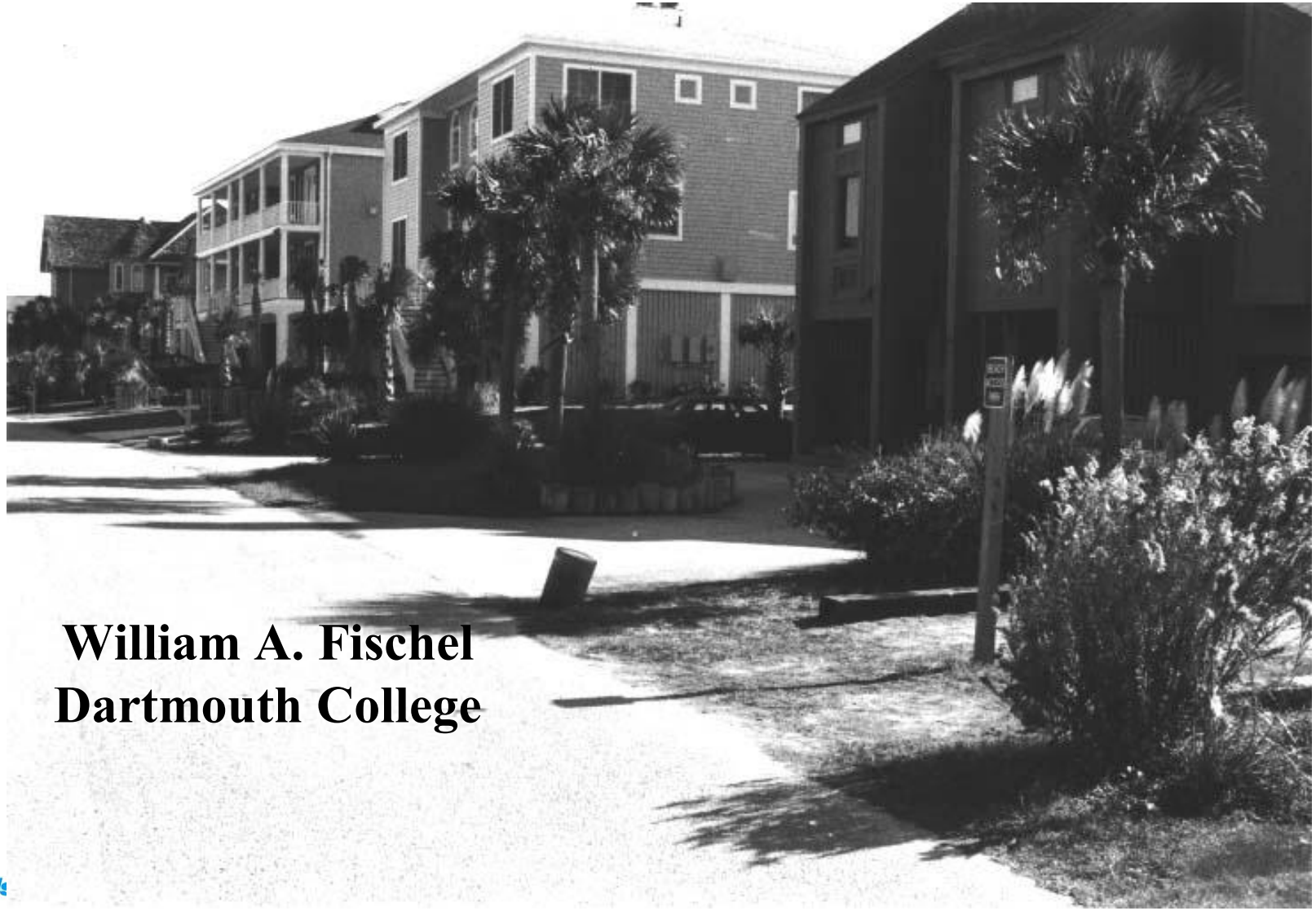
Lucas From Street



William A. Fischel
Dartmouth College

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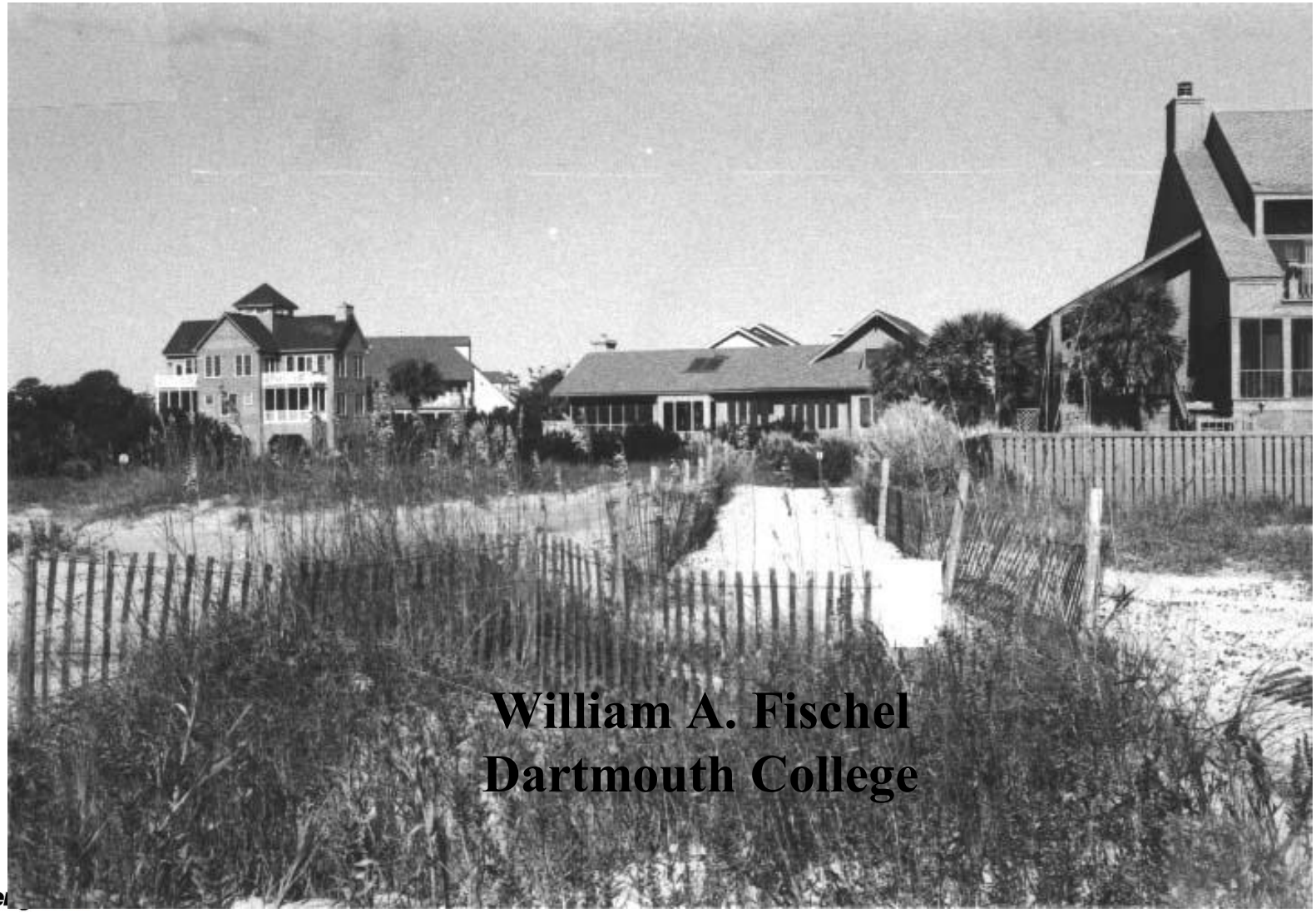
Lucas Area



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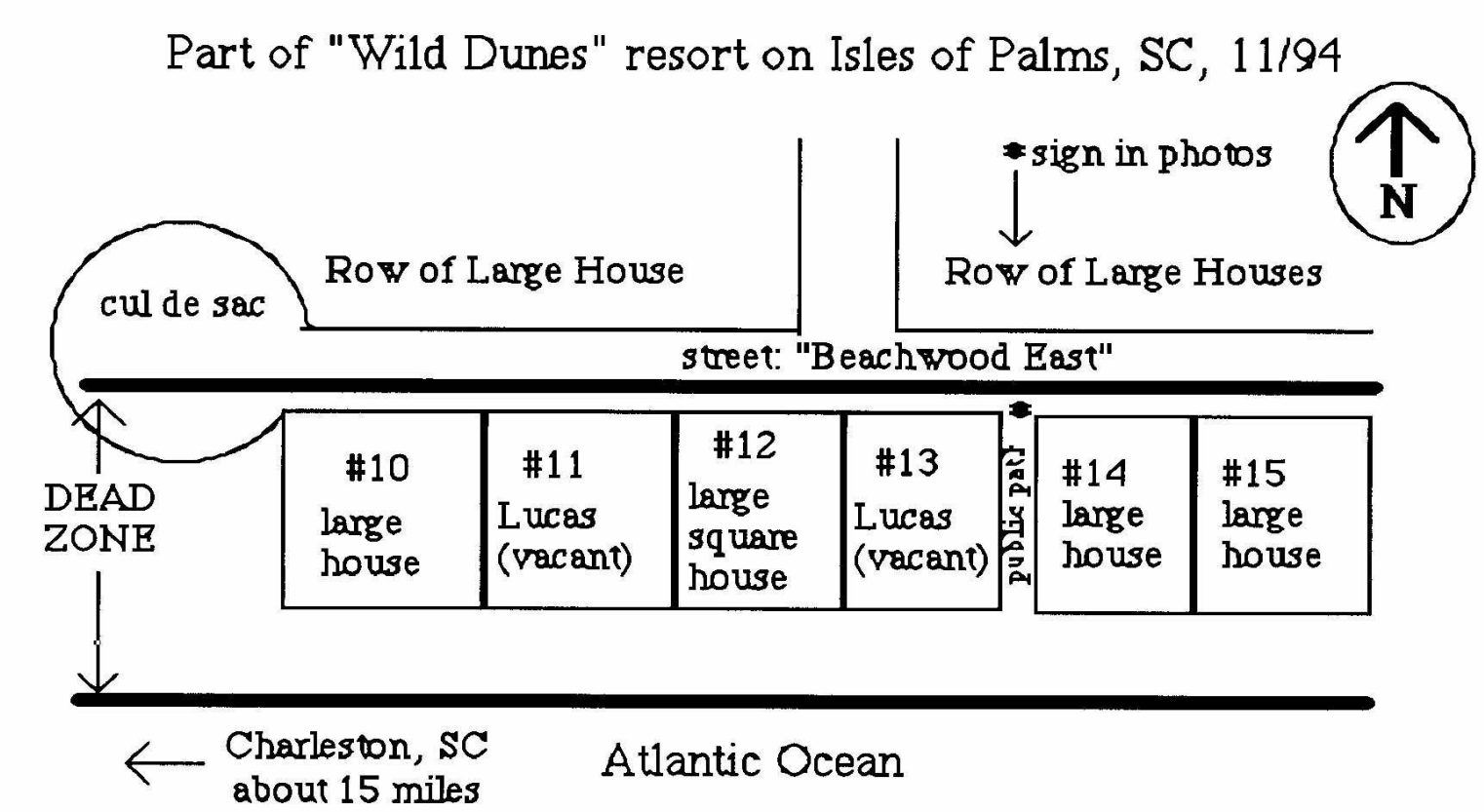
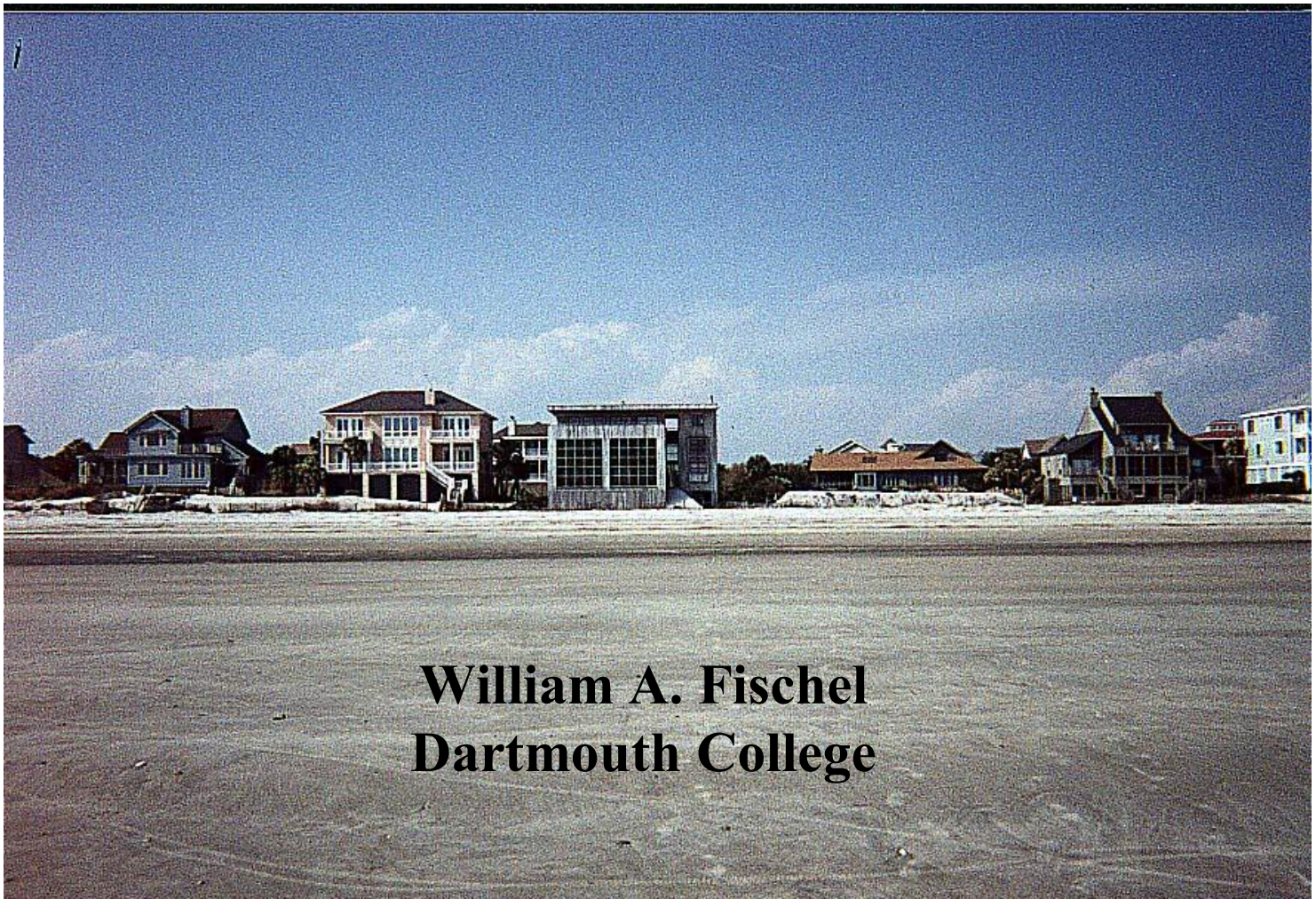
Lucas Extinguishing Legitimate Investment Backed Expectations



Lucas Post Development Of One Lot



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In Lingle, The Supreme Court States How to Determine If There Is A Taking III

A "Penn Central Taking".

See, Penn Central v. City of New York 438 US 104 (1978);

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Grand Central Station, New York

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Grand Central, With New Design

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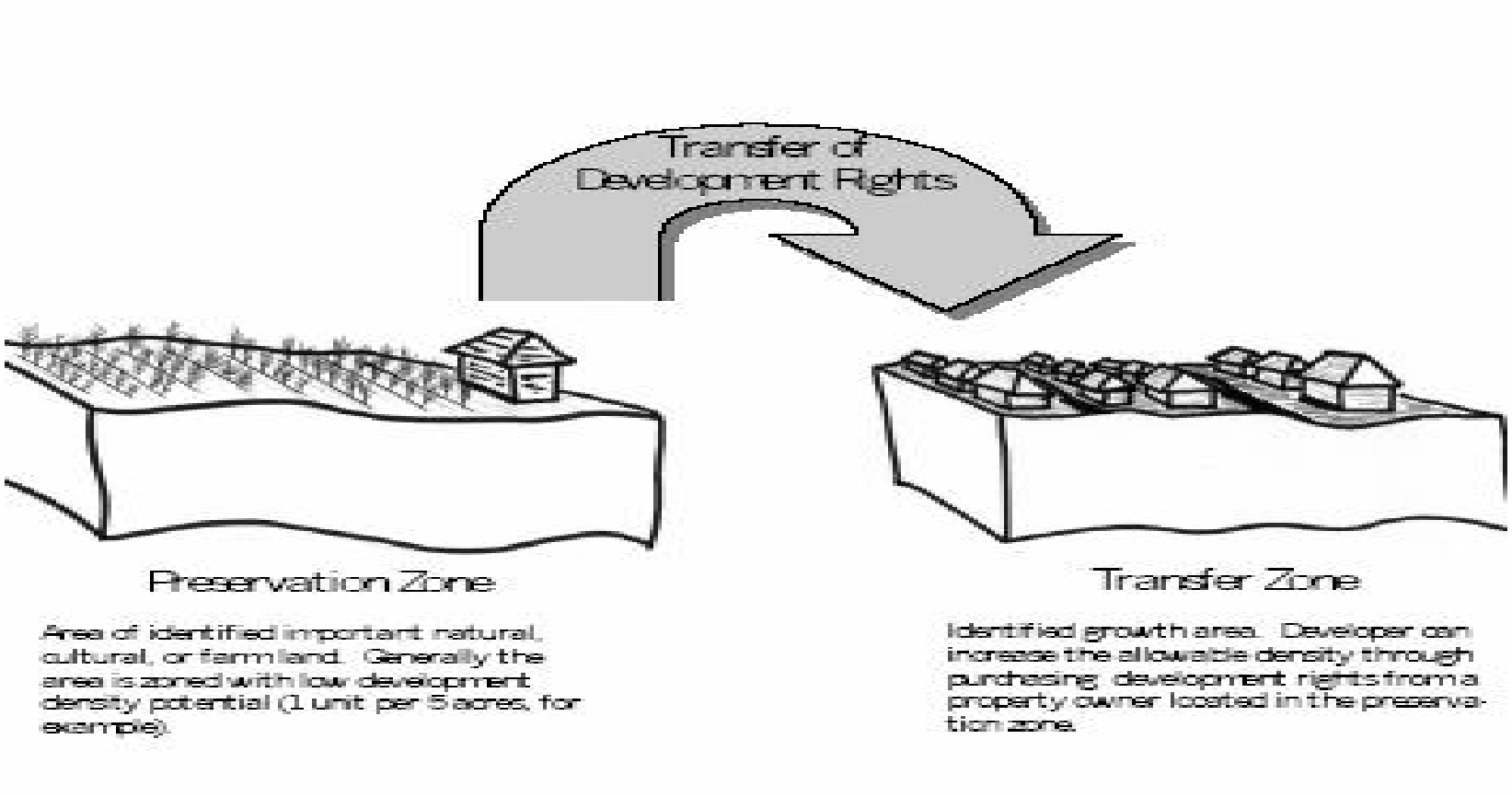
Transfer of Development Rights



In Lingle, The Supreme Court States How to Determine If There Is A Taking IV

A land use exaction which has little or no relationship to the "property". *(sic)*. I think they meant to say little or no relationship between the exaction and the articulated government interest. *(Nollan; and Dollan).*

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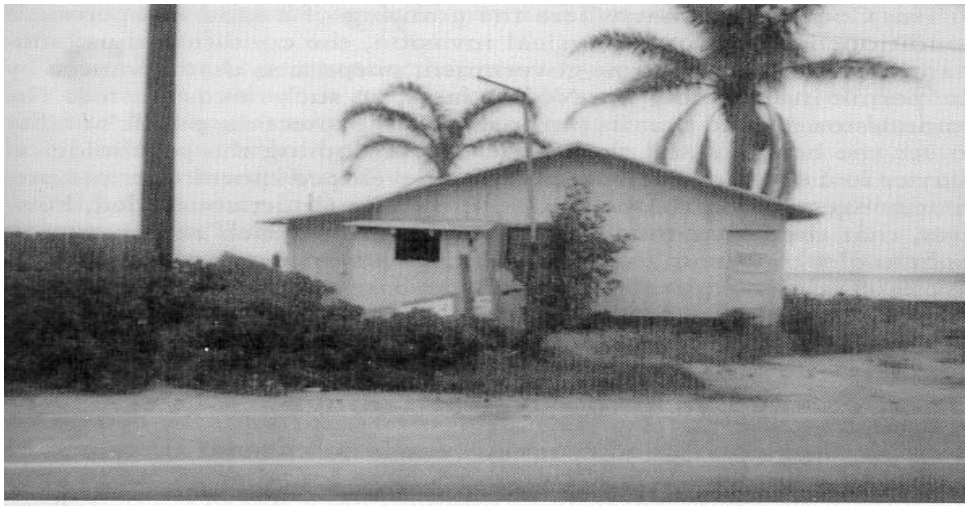
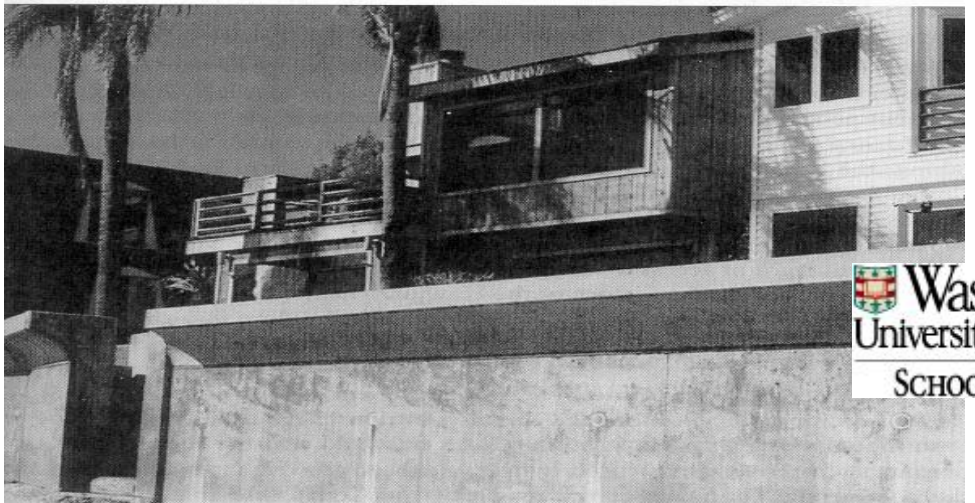
Nollan House from Road





Washington University in St. Louis
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Nollan House from Beach

Washington University in St. Louis
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Dolan From Street

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Washington University in St. Louis
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Dolan Floodplain and Bike Path

Washington University in St. Louis
School of Law

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Court Also Says What Test It Will Not Use

- **The Court States That it Will No Longer Use the First Part of the Two Part Test in *Agins* v. City *of Tiburon.*** 447 US 255 (1980 **: "whether the regulation substantially advances a legitimate state interest…."**
- **This Test Had Been Used For Years By Courts To Second Guess Legislative Actions**

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In Lingle, The Supreme Court States How To Determine If There Is A Taking

- The Court went on to say that the Tests articulated **"...all aim to identify regulatory actions that are functionally equivalent to a direct appropriation of or ouster from private property"**

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In Lingle, The Supreme Court States How To Determine If There Is A Taking

In Addition, in His Concurring Opinion, Justice Kennedy Indicates that the Decision Left Open the Possibility of Litigating a Regulation Which Was "so arbitrary or irrational as to violate due process."

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Avoiding a Taking

- **Avoid Interfering with the Owners Right to Exclude Others. (Loretto)**
- **Avoid Denial of All Economic Use. (Lucas)**
- **In Highly Regulated Areas Consider Transferable Development Rights or Similar Residual Right so the Land Has Appropriate Value. (Penn Central)**
- **Clearly Relate Regulation to Preventing a Hazard. See, Different results in *Gove* cited previously and *Annicelli v. Town of South Kingston*, 463 A.d 133 (1983); *and Lopes v. Peabody*.**

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Hazard Based Regulation And the Constitution

- **Hazard Based Regulation Generally Sustained Against Constitutional Challenges**

- **Goal of Protecting the Public Accorded ENORMOUS DEFERENCE by the Courts**

So, That Means Everything is OK?

- **Yes, But We Do Need To Talk About Two Other Major Areas Related to the Law that Impact on Floodplain Management and No Adverse Impact Hazards Planning:**
- ***"The Constitution in Exile Movement" and***
- ***"The Property Rights Movement."***

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The Constitution in Exile

- **Richard Epstein, a Professor of Law at the University of Chicago is the Intellectual Force Behind a Movement that Feels that Many US Supreme Court Cases in the Twentieth Century were Wrongfully Decided.**

- **Examples of Federal Laws Which they Feel are Unconstitutional: Social Security; Minimum Wage Laws; EPA;OSHA**

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The Constitution in Exile

- **The Cato Institute Indicates 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."

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The Property Rights Movement

- **"The Property Rights Movement May Well be the Most Significant Land Use and Environmental Movement in the United States in Recent Decades." (Professor Harvey Jacobs-University of Wisconsin).**
- **Twenty-eight States Have Enacted Property Rights Legislation(1991-2006).**

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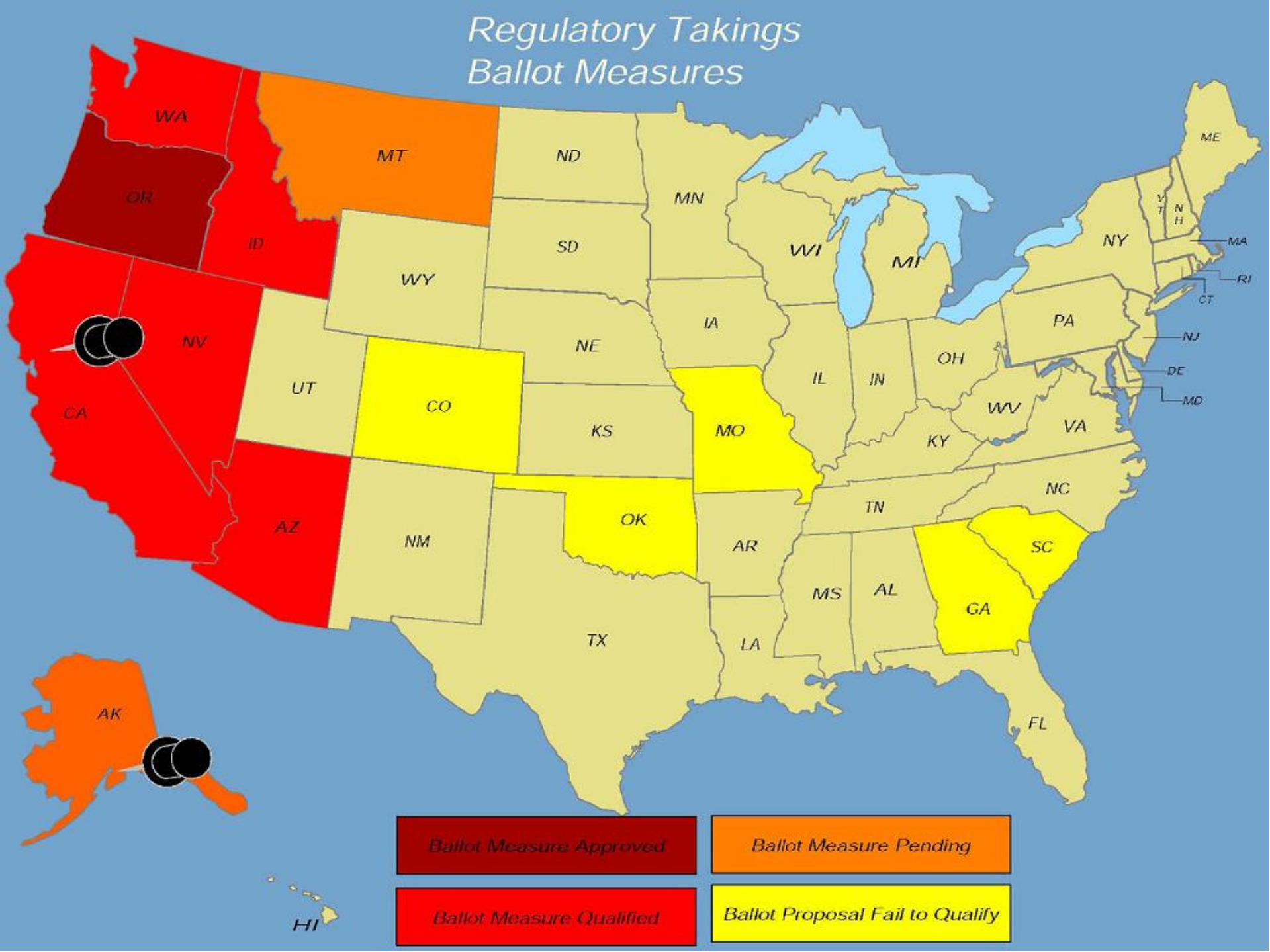
Land Use and Property Rights in America

- **Oregon Measure 37 Adopted November 2, 2004. Requires State and Local Governments"…must pay owners, or forego enforcement, when certain land use restrictions reduce property value."**
- **Harris Act in Florida (1995). No Claims Paid to Date, Many Claims Made.**
- **We Must Acknowledge the Very Real Emotional Appeal of Land and Property Rights to the Public.**


Regulatory Takings
Ballot Measures
WA
OR
CA
ID
NV
MT
WY
UT
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CO
NM
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SD
NE
KS
OK
TX
MN
IA
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AR
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KY
TN
AL
OH
WV
GA
FL
SC
NC
VA
PA
NY
VT
NH
ME
MA
RI
CT
NJ
DE
MD
AK
HI
Ballot Measure Approved
Ballot Measure Pending
Ballot Measure Qualified
Ballot Proposal Fail to Qualify

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No Adverse Impact Hazard Regulation Is a Winning Concept

- So How Do We Proceed?
- Planning
- Partnerships
- Planning
- Multi-Use Mapping and Engineering
- Planning
- Fair Regulation to Prevent Harm

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Courts Give Floodplain Managers An Opportunity to Partner

- **Rapanos et ux., et al. v. United States, U.S. (2006) Nos. 04-1034 and 04-1384, 2006 WL 1667087 (U.S.)**
- **involving the geographic extent of the area that the federal government may regulate as "wetlands" under the Clean Water Act of 1972.**
- **Courts Want a Link Between the Wetland Regulated and Waters of the United States**
- **One Link is Through Floodplain Management**
- **Further Information-ASFPM News and Views of August 2006; National Wetlands Newsletter of September-October 2006.**

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Part III
Maher Hazine PE

- **State Cases**
- **Partnerships**
- **Summary**

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Recent State Cases I

- ***Gove v. Zoning Board of Appeals*, 444 Mass.754 (2005) Massachusetts Supreme Judicial Court, decided July 26, 2005.**

Recent State Cases II

- ***In Re Woodford Packers Inc.*, 175 VT 60, 830 A. 2d 100 (2003).**
- **Court gave the State considerable latitude in selecting a methodology for the designation of floodways much broader than the FEMA minimum standard, based on fluvial erosion**

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Recent State Cases III

- ***Wild Rice River Estates, Inc. v. City of Fargo*** **705 N.W.2d. 850 (2005).**
- **City had a 21 Month moratorium on development while FEMA mapped the floodplain/floodway of an area which had recently flooded.**
- **Court said OK, City had reasons to stop development while it determined what floodplain management measures were needed**

Partnerships With Other Hazard Managers

- 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, Possibly Through the FEMA CTP Program! Other Partners :EPA Wetlands, Watershed, USGS, Others?

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Landowner Does Not Have All Rights Under The Law

- No "Right" to be a Nuisance
- No "Right to Violate the Property Rights of Others
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Public Entities Do Not Have The Right To Do Just Anything Either!

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- No Right To Use Regulation To Steal From a Landowner

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NAI And The Law

- **Is NAI a Silver Bullet?**
- **Use of NAI Will Significantly Reduce the Probability of a Loss in Court!**
- **Even Better Odds if There is Flexibility in the Regulation and the Community Applies the Principle to Their Own Activities.**

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Local, Regional and State Planners and Community Staff

- Should Be Confident!
- Should Be Assertive Protecting the Public and the Landowner!
- Should Consider Partnering With Other Regulators
- Should Use Hazard Regulators as Advisors to Build a Firm Foundation for Sustainable Development

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Regulators Have The Law on Their Side!

- Neither Communities Nor Developers Need to Be Enemies!
- They Can and Should Work Together
- Think About "Getting to Yes!"
- NAI Helps Promote Negotiations

Question for the Group

- **CAN FAIRLY AND REASONABLY APPLIED HAZARD BASED REGULATIONS DIMINISH:**

A) THE VALUE OF SOMEONE'S PROPERTY?

B) THE MARKET PRICE?

Final Comments for Now

- Questions
- Comments
- Discussion

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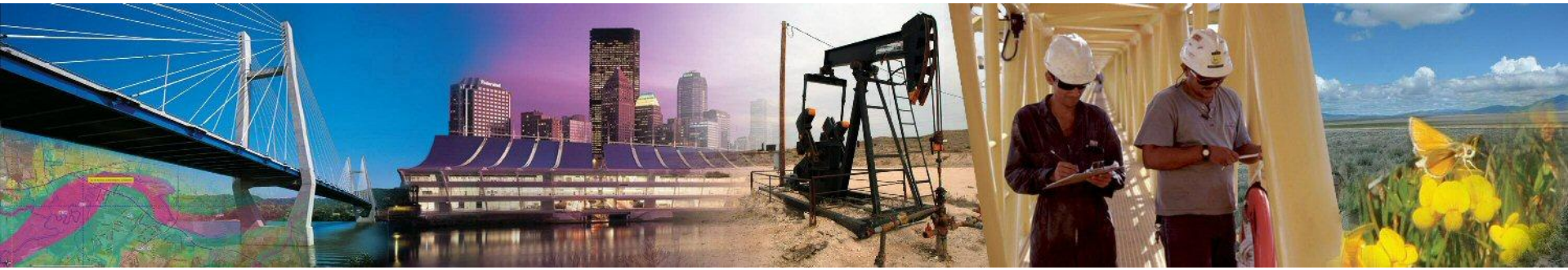

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