

State of Montana

Building Thriving Community Resilience and Sustainability: Floodplain Legal and Sustainable Development Workshop

Property Rights and Floodplain Management

July 25, 2013

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President
Natural Hazard Mitigation Association



Good morning, again!

Any questions from previous presentation?

This still cannot be legal advice.

This is a statement of general principles of policy.

The Choice of Development or No Development is a False Choice!

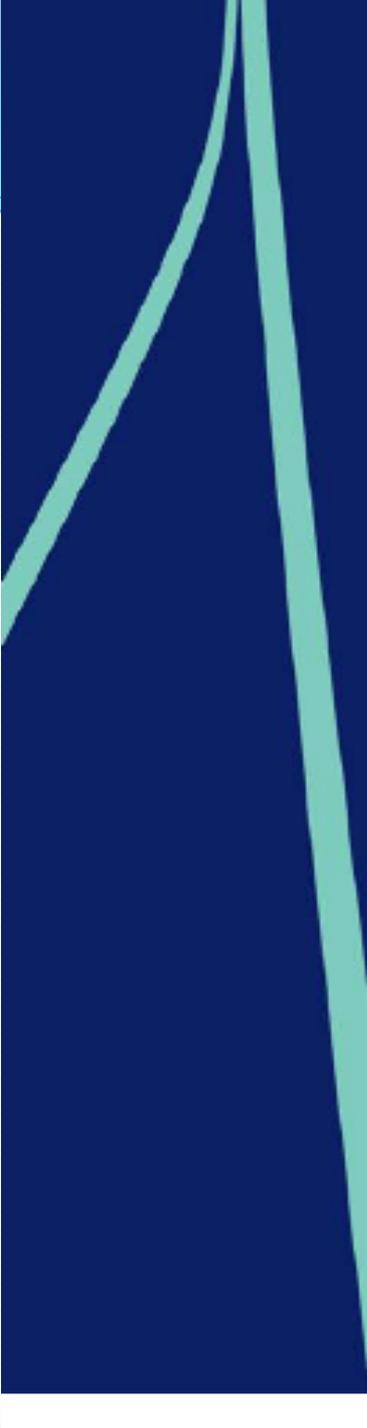
The Choice We Have as a Society is Rather Between:

1. Well planned development that protects people and property, our environment, and our precious Water Resources while reducing the potential for litigation; or
2. Some current practices that are known to harm people, property, and natural floodplain functions-... and may lead to litigation and other challenges

Why Are Governments Not Acting To Prevent Harmful Development?

NOAA recently completed a study which surveyed planners as to impediments to safe development

- Two major reasons cited:
 - Fear of the “taking” issue
 - Economic pressure



Hazard and Resiliency Planning: Perceived Benefits and Barriers Among Land Use Planners

Final Research Report

**National Oceanic and Atmospheric
Administration Coastal Services Center**

April 26, 2010

Submitted to:
Human Dimensions Program
NOAA Coastal Services Center
2234 South Hobson Ave.
Charleston, SC 29405

Submitted by:
Booz Allen Hamilton
8283 Greensboro Drive
McLean, VA 22201

Booz | Allen | Hamilton

Reason #1 For Insufficient Standards: Economics and Externality

- When one group pays maintenance or replacement of something yet different person or group uses that same something, we often have problems
- Disaster assistance is a classic example of externality
 - **Who Pays For Disaster Assistance?**
 - **Who Benefits?**

Who Pays For Disaster Assistance?

- Costs of flooding are usually largely borne by:
 - a) The federal and sometimes the State taxpayer through IRS Casualty Losses, SBA loans, Disaster CDBG funds, and the whole panoply of Federal and private disaster relief described in the Ed Thomas et al. publication:

Planning and Building Livable, Safe & Sustainable Communities: The Patchwork Quilt Approach
 - b) By disaster victims themselves

Cui Bono? (Who Benefits?).....

- From Unwise or Improper Floodplain Development -
 - a) Developers?
 - b) Communities?
 - c) State Government?
 - d) Mortgage companies?
 - e) The occupants of floodplains?
Possibly in the short-term, but
definitely NOT in the long-term

Why Should Government Do Something About This?

- Fundamental duty
- Protect the present
- Preserve a community's future
- Be a Responsible Trustee of the "Public Trust"

Why Else Should Government Do Something About This?

- In a Word:

Liability

Litigation for Claimed Harm Is Easier Now Than In Times Past

- Forensic hydrologists
- Forensic hydraulic engineers
- Forensic Wildfire, and other Experts

New Trend In The Law

- Increasingly states are allowing lawsuits against communities for alleged “goofs” in permitting construction or in conducting inspections
- Excellent paper By Attorney Jon Kusler PhD for The Association of State Floodplain Managers (ASFPM) Foundation available online at www.floods.org

Three Ways to Support Reconstruction Following Disaster Damage

1. Self help: loans, savings, charity, neighbors
2. Insurance: disaster relief is a combination of social insurance and self help
3. Litigation

The preferred alternative is...
to have NO DAMAGE
due to land use and hazard mitigation

Ka Loko Reservoir

Kauai 2006



Civil Damages **and a Criminal Case For Manslaughter** Following This Flood

Examples of Situations Where Governments and Landowners May Be Held Liable

- Construction of a Road Causes Damage *See, e.g., Wheeler v. Lewis & Clark County*, 1999 Mont. Dist. LEXIS 490, 2-8 (Mont. Dist. Ct. 1999)
- Stormwater System Increases Flows
- Development 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

Neat Old Montana Case

- *Wine v. Northern Pac. Ry.*, 48 Mont. 200 (Mont. 1913)

“The placing of an obstruction in a natural watercourse in such a way as to cause the water to leave the channel and flood and injure the lands of a riparian owner is a trespass to said lands....”

“The flooding of private lands is a taking within the constitutional prohibition....”

A More Modern Case

- *State by Department of Highways v. Feenan*, 231 Mont. 255 (Mont. 1988)
- The landowners claimed that flooding caused by the expansion of the highway rendered the remainder of their property unsuitable for commercial use and sought damages for that land
- The Court Said: “...the State was required to compensate the landowners for the reduction in the value of their remaining land.”

Wait-How About Immunity?

Moreover, we recognized that the amendments "make clear that a governmental entity is no longer immune for all its actions," only those actions considered to be legislative. *See, Kelly Constr. L.L.C. v. City of Red Lodge*, 2002 MT 241, P83-P84 (Mont. 2002)

“The Montana Supreme Court has consistently held that a city or county is liable for damages with respect to maintaining a nuisance in the same manner as a private individual. *See, Knight*, 252 Mont at 246, 827 P.2d at 1279. It is a generally recognized exception that governmental immunity does not extend to a suit for abatement of a nuisance. *Id.* at 246, 827 P.2d at 1279 (citing 58 Am.Jur.2d Nuisance, Section 55). *See, Wheeler v. Lewis & Clark County*, 1999 Mont. Dist. LEXIS 490, 2-8 (Mont. Dist. Ct. 1999)

Impact of Arkansas Game and Fish

- We will also be discussing *Arkansas Game and Fish*, a US Supreme Court Case from the 2012-2013 Term later this morning
- This is a “Takings” Case which very much touches on Immunity

Katrina Legal Situation

- Katrina Lawsuits
- 500,000 Plaintiffs
- \$278 Billion in Damages Requested
- **Approximately 1,000 Plaintiffs Attorneys Involved-
Learning About Levees, Floods, and Liability**
- A Copy of an Article on This Topic Appeared in the National Wetlands Newsletter and is available at:
www.floods.org/PDF/ET_Katrina_Insurance_082907.pdf
- For The First Time In Many Years, Lenders Will Lose Considerable Money on Mortgages in A Disaster Area

Liability Can Sometimes Be Established Under A Variety of Theories: Failure To Follow Your Own Plan

- *Keystone Elec. Mfg. Co. v. City of Des Moines*, 586 N.W.2d 340, 343 (Iowa 1998)
- “We conclude that the City's decisions concerning how to fight the flood do not fall under the discretionary function exception to liability under Iowa Code section 670.4(3) of Iowa's Tort Liability of Governmental Subdivisions Act....”

Plaintiffs Do Not Always Win: Is Damage Foreseeable?

- The owners' land was flooded when the district's canal became clogged with ice and caused water to overflow the banks. The court held that:(A) although ice jams were known to occur, they were unpredictable, and it was nearly impossible to design an irrigation system to prevent flooding due to ice jams, therefore, the **flooding was unforeseeable**. *Gaudreau v. Clinton Irrigation Dist.*, 2001 MT 164 (Mont. 2001)

Government Does Not Always Loose: Texas Lawsuit Dismissed on Procedural Grounds

- Homeowners Find Out That They Are in a Special Flood Hazard Area of the Floodplain
- Then They Get Flooded
- Sue Municipality and Local Officials
- Court Says They Should Have Sued Within Two Years of Learning of the Problem
- Suit Barred By Statute of Limitations
- *Campbell v. Hays County*, TX Court of Civil Appeals, 2003 Tex. App. LEXIS 8501, 2003

Actual Ad From Local New York Paper

SUPERSTORM SANDY LITIGATION

Dear Homeowner / Business Owner:

Flood claim deadline: If you don't file a lawsuit for your flood insurance claim **by October 28, 2013** your ability to file a lawsuit to recover 100% of your covered flood damage will be lost forever.

Immediately after Sandy, did your insurance company send a helpful claims adjustor (from out of town) to explain how the insurance company was going to help you? A few months later were you assigned a new claims adjustor asking you to resubmit your claims information? Now, 7 months later, has insurance paid only part of your flood or homeowner claims?

We are representing over 500 of our neighbors on their flood and homeowner claims. I was born and raised in Rockaway. My family has owned a house on 129th Street for 45 years. Our house was damaged during Sandy. We made a claim. The insurance company denied it at first then made a low offer. Then my sister and brother-in-law on 132nd Street got a low offer from their insurance company. Then we found out everyone was either denied or got low offers.

In order to fight for the rights of homeowners and business owners damaged by Sandy, my law firm joined forces with the law firm that handled the Hurricane Katrina litigation. This was the firm hired by the Attorney General of Louisiana to protect the rights of insurance policyholders after Katrina. They recovered over \$100 million from insurance companies who wrongfully denied claims


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& WILLIAMS**
Attorneys at Law

Attorney Advertisement

or offered low settlements. In the Sandy litigation, we will execute the same exact legal strategy with the same exact legal team.

It worked in Katrina. It will work in Sandy.

Don't accept low offers or denials from insurance companies. Our team (the team that won in Katrina) of attorneys, engineers, meteorologists, insurance experts and adjustors will fight the flood and homeowners insurance companies to pay in full for the damage.

**This is not a class action.
We handle each claim individually.**

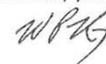
It costs you nothing unless we win more for you than you've already received. We are going after the flood or homeowners insurance money that you've been denied.

Don't let an insurance company steal your future.

Join the Sandy litigation.

Go to www.mccarthykelly.com click on Sandy, print retainer and fax to (212) 732-6323.

Sincerely yours,



William P. Kelly
McCarthy | Kelly LLP



MCCARTHY | KELLY LLP
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NEW YORK, NY 10007
(212) 732-6000



Insurance Subrogation: Actively Discussed Post-Sandy

- Extract from: Property Casualty 360 from National Underwriter
- “In the first hurricane season following Superstorm Sandy, you may assume that such natural disasters do not present subrogation opportunities. However, it’s critical to investigate subrogation potential in such losses. Natural disasters do not automatically preclude subrogation.”
- The entire article is at:
http://www.propertycasualty360.com/2013/06/24/hurricane-claims-assessing-subrogation-potential?eNL=51cbod32150ba0a0740000b3&utm_source=ClaimsConnection&utm_medium=eNL&utm_campaign=PC360_eNLs&_LID=118409549

Lincoln, Nebraska

Flooded Homes

Developer, engineer, and realtor settle with homeowners
City at first held liable; then wins in Nebraska Supreme
Court– City “owed no duty to homeowners”



Photo: Lincoln Star Journal

From California..... January 2008:

- Lawsuit seeks \$1 billion in Marin flood damage; The plaintiffs – 265 individuals and businesses – are each seeking \$4.25 million in damages
- Lawyers representing the victims could collect more than \$66 million in fees

Marin, California

Lawsuit seeks \$1 billion for Marin flood damage

Government agencies blamed for failing to prevent disaster

By Tad Whitaker
IJ reporter

Victims of last winter's devastating flood in Marin are seeking more than \$1 billion in damages from a laundry list of government agencies that they say share blame for the destruction.

The plaintiffs — 265 individuals and businesses — are each seeking \$4 million in damages and another \$250,000 in legal fees, according to lawyer Herb Rowland, who is defending San Anselmo. Lawyers representing the victims could collect more than \$66 million in fees.

The scope of the lawsuit, first filed last fall, and the cost to fight it have rankled some officials who believe the flood — which began on Dec. 31, 2005 — was the result of unique circumstances. The storm damaged about 1,200

LAWSUIT

The suit resulted from the Dec. 31, 2005, flood that damaged about 1,200 homes and 200 businesses in Marin.

PLAINTIFFS

A total of 265 residents and businesses.

DEFENDANTS

Those being sued include: San Anselmo, Mill Valley, Ross, Fairfax, Corte Madera, Larkspur, Marin County, the Marin Municipal Water District, the state of California, the Ross Valley Sanitary District, Tamalpais Union High School District and the Marin County Flood Control and Water Conservation District.

homes and 200 businesses.

Lawrence Mann, one of the attorneys representing the

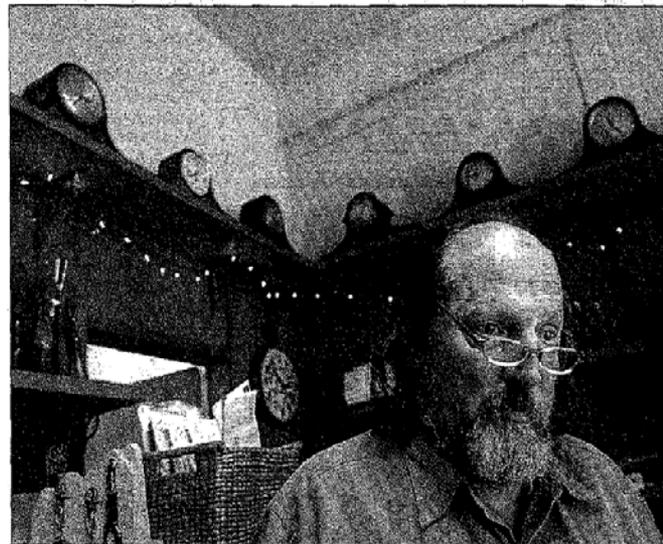
plaintiffs, said the goal is to win the maximum allowed by each entity's insurance policy so the settlement does not affect municipal budgets. Officials have estimated that total damage exceeded \$110 million, although Mann puts it above \$300 million. He said some of his clients have expressed interest in directing at least a portion of the proceeds toward flood solutions.

"Most people would like to see some of the money used to prevent flooding," he said.

Supervisor Hal Brown, whose district covers much of the flooded area, laughed when asked about people donating settlement money toward flood repairs.

"That to me isn't human nature," he said. "I think there are more positive directions to go in."

See Lawsuit, page A7



IJ photo/Alan

SUES: Drew McEachern of San Anselmo, owner of Antique Timepieces, is among those merchants joining a class-action lawsuit against numerous public agencies over the flood on Dec. 31, 2005. McEachern said "it's negligence" that the agencies didn't do enough to prevent a recurrence of the 1982 flood that also damaged his property.

City Of Half Moon Bay, California November, 2007

- City Liable for nearly \$37,000,000 under the Federal and State Takings Clauses, as well as the Common Law Doctrines of Nuisance and Trespass, for constructing a storm water drainage system which flooded many folks

Fernley, Nevada:

- “Class-action lawsuit updated in Fernley flood case”
- “The lawsuit names the Truckee-Carson Irrigation District, Lyon County, the city of Fernley, and companies that built and sold homes in the area flooded when a storm-swollen irrigation canal ruptured” Nevada Appeal, 1/26/08

1986 Sacramento River Flood California Law Changes

- 1 levee rupture
- + 50,000 people evacuated
- + 9,000 families left homeless
- + 29 counties declared
- + \$532 million in damages
- + almost 2 decades of litigation



= Paterno, a landmark court decision in 2003

Damages - \$464 Million

Katrina Legal Situation

- Katrina Lawsuits
- 500,000 Plaintiffs
- \$278 Billion in damages requested
- **Approximately 1,000 plaintiffs attorneys involved - learning about levees, floods, and liability**
- A copy of an article on this topic appeared in the National Wetlands Newsletter and is available at: www.floods.org/PDF/ET_Katrina_Insurance_082907.pdf
- For the first time in many years, lenders will lose considerable money on mortgages in a disaster area

In These Examples Of Community Legal Liability For Permitting Or Undertaking Activity

Is There A Theme?

YOU BET!!!

What is that Theme?

The Theme

- They did not do Safe and Proper **Planning!!!**
- They did not adopt the higher standards of the CRS Program!!
- They did not **identify the impacts** of the development activity
- They did not **notify** the soon-to-be afflicted members of the Community
- They did not **re-design or re-consider** the project
- They did not require appropriate and necessary **mitigation** measures

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 the public trust

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

Can Government Adopt Higher Standards Than FEMA Minimums?

- FEMA Regulations Encourage Adoption of Higher Standards-”... **any floodplain** management regulations adopted by a State or a community which are **more restrictive** than (the FEMA Regulations) **are encouraged** and shall take precedence.” 44CFR section 60.1(d). (emphasis added)



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

Why Go Beyond the Current Minimum Standards?

Flood damages are continuing and/or increasing unnecessarily!

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

Safe Development or No Adverse Impact (NAI)

(Such as higher standards for Stormwater & 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”

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.

What Is The Result Of Implementing Higher Standards?

- **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**

Higher Standards:

- Are consistent with the concept of sustainable development
- Can significantly assist in meeting Water Quality standards
- Provide a pragmatic method for regulation
- Make sense on a local and regional basis
- May be rewarded by FEMA's Community Rating System, especially under the new CRS Manual
- Can reduce the potential for litigation against a community

No Adverse Impact Floodplain Management

- New concept?
- No, it is a modern statement of an Ancient Legal Maxim
“Sic utere tuo ut alienum non laedas”
Use your property so you do not harm others
- Detailed Legal Papers by Jon Kusler and Ed Thomas available at: www.floods.org
- More information in ASFPM’s *A Toolkit on Common Sense Floodplain Management* at: www.floods.org

According To the Writings of One of Our Greatest Moral Philosophers -Mohandas K. Gandhi:

- *“Sic Utere Tuo Ut Alienum Non Laedas”*

That Is, In English: Use Your Property So You Do Not Harm Others is:

- *“A Grand Doctrine Of Life And The Basis Of (Loving Relationships) Between Neighbors”*

Who Else Likes Sic Utere...?

- One of Many, Many Examples:
- Colorado Supreme Court
- The police power is an attribute of sovereignty and exists without any reservation in the constitution, being founded upon the duty of the state to protect its citizens and provide for the safety and good order of society. * * *
It is founded largely on the maxim sic utere tuo, ut alienum non laedas."

People v. Hupp, 53 Colo. 80, 83 (Colo. 1912)

Who else Likes *Sic Utere*...?

- Montana Supreme Court
- *Fordham v. Northern Pacific Railway*, 30 Mont.421, 76 P.1040 (1904)
- Ancient Rule of Common Law Imposes “no undue hardship...”

US Supreme Court

- The US Supreme Court seems also to very much like the truly ancient concept of not harming ones neighbor.
- Justice Alito wrote in the majority opinion in *Koontz*, another case we will be discussing later:
- "Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack. See *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926)."

Nobody Owns the Right to Use Their Property to Harm Others!

- Legally
- Morally
- Equitably

Group Exercise!

- Do reasonable, fairly applied hazard based regulations decrease the **VALUE** of a property?
- Not the price, the **VALUE**?

Hint: The problem of The Purloined Purse.

The Purloined Purse Defense

- Fifth Amendment to the Constitution of the United States: “... *nor shall private property be taken for public use without just compensation.*”

Result

- ***“The taking clause was never intended to compensate property owners for property rights they never had.” – Massachusetts Supreme Judicial Court***

Gove v. Zoning Board of Appeals

444 Mass.754 (2005) Massachusetts Supreme Judicial Court,
decided July 26, 2005

How About Another Defense?

- I have a permit to snatch wallets and purses?
- Right here - look!
- Legislature passed a law to help raise funds for Local Government

Purloined Purse In A Flood Context

- Defendants built flood control works knowing that they could cause upland flooding, and such works were a substantial concurring cause of the injury.

Akins v. California, 48 Cal. App. 4th 832 (Cal. App. 3d Dist. 1996)



Recent Legal Research by Ed Thomas

- Many Cases Where Communities Try to Prevent Building in a Hazardous Area
- Refuse the Requested Permit Based on Reasons Which Seemed Nebulous to a Court, such as Water Quality, Environmental or Aesthetic Concerns
- And They Lose
- If they Clearly Related Permit Refusal to Harm Prevention-Very Likely a Different Result

Reason #2 Why Safer Standards Are Not Implemented:

Concerns About A “Taking”

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.

CONSTITUTION OF THE STATE OF

Montana: Declaration of Rights

Montana Const. art. II § 29

- “Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.”
- *Broader than its federal counterpart because it protects not only property that is "taken," but also property that is "damaged." See, e.g., Buhmann v. State, 2008 MT 465 (Mont. 2008)*

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
- **Government is vastly more likely to be sued for undertaking activity, or permitting others to take action which causes harm than it is for strong, fair regulation**

Taking Lawsuit Results:

- Regulations clearly based on hazard prevention and fairly applied to all: successfully held to be a Taking – almost none!
- Many, many cases where **communities and landowners held liable for harming others**

We Need To Also Recognize A Third Major Impediment To Safe Development: A Perception of Immunity

- Some public officials believe that they are immune from suit for the consequences of actions they take which harms others**
- Many Floodplain Managers have told me that such an attitude is making their jobs much more difficult**
- This topic was covered at some length in a FEMA funded Workshop put on by the Arkansas Association of Floodplain Managers through the Association of State Floodplain Managers; we will spend a few minutes on Immunity later this morning**
- PowerPoints and a CD of the Workshop will soon be available on the Arkansas Floodplain Managers and the NHMA websites**

Can Government Adopt Higher Standards Than FEMA Minimums?

- FEMA Regulations Encourage Adoption of Higher Standards-”... **any floodplain** management regulations adopted by a State or a community which are **more restrictive** than (the FEMA Regulations) **are encouraged** and shall take precedence.” 44CFR section 60.1(d). (emphasis added)

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

Why Go Beyond the Current Minimum Standards?

Damages from foreseeable natural hazards are continuing and/or increasing unnecessarily!

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

Climate Change

- A few thoughts:
- Many folks think that the subjects of “climate change” and “sustainability” are actually part of a vast left wing conspiracy
- I have written an article for the American Bar Association which essentially says, even if that is your belief, one must do climate change adaptation just as much as if one were a fervent believer in climate change

Hurricane Damage and Global Warming How Bad Could It Get and What Can We Do About It Today? A Report By: Daniel Sutter for The Competitive Enterprise Institute

- *“Current public policies encourage risky and inefficient coastal development by shifting the cost of hurricane damage to third parties.”*
- *“...while insurance reform and building code enforcement are not normally considered as policies to address potential adverse effects from global warming, they should be.”*

A Solution: Follow the Principles of Emergency Management

- **Hope for the Best Plan for the Worst**
 - Go Beyond Flood Insurance and Other Current Regulatory Minimum Standards
- Higher Standards for:
- Development Decision-making
 - Planning
 - Emergency Preparedness

But, Must Climate Change Adaptation Mean Set-Back?

- I do not Believe Set-Backs are the **ONLY** Answer to Climate Change
- One Example:
- August-September Issue of APA's Planning Magazine
- "First Tsunami Evacuation Building Planned"
- City Hall to be Constructed in Oregon
- Will Double as a Tsunami Shelter for 40 Foot Tall Waves
- Under Design at Oregon's Hinsdale Wave Research Facility

Can Adaptation Include Elevation?



From Planning Magazine August–September 2010

How About Setbacks?

- This Is An Area About Which Our Friends In The Property Rights Movement Are Quite Active
- Questions for Us to Ask:
 - Why Is There A Set-Back?
 - Parcel As A Whole Rule-Still Reasonable
 - Investment Backed Value
- See, e.g., *City of Coeur d'Alene v. Simpson*
Pacific Legal Foundation Brief

Great Montana Case on Setbacks

- *McElwain v. County of Flathead*, 248 Mont. 231, (1991)
- Setback of 100' from Floodplain for Septic System
- Court Says Regulations Presumed To Be Valid
- Plaintiff Has Remaining Uses Though 1/3 Devaluation
- Very Powerful Dissent – Why 100 feet?
- Why not Thirty Feet or a Mile?

Another Case on Setbacks

- *City of Coeur D'Alene v. Simpson*, 142 Idaho 839; 136 P.3d 310 (2006)
- All Construction Within 40 Feet of Shoreline Forbidden
- Plaintiff Builds a Fence
- Community Says Remove Fence
- Is There A “Taking”?
- What is The Parcel “As a Whole” to Be Considered By the Court
- Current Status as Divided Into Two Separate Parcels?
- Previous Recorded Ownership
- Very Powerful Dissent

A Conservative View of Property-Rights

- The Cato Institute Indicates that **Compensation is Not Due When:**

“... regulation prohibits wrongful uses, no compensation is required.”

“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.”

What is a “Wrongful Use”?

- Will Courts Accept the **Theory** of Climate Change? Especially if the Regulation is the Equivalent of an Ouster from Private Property?
- Fundamental Principal of Emergency Management is:
- Hope for the Best...
- Plan for the Worst.

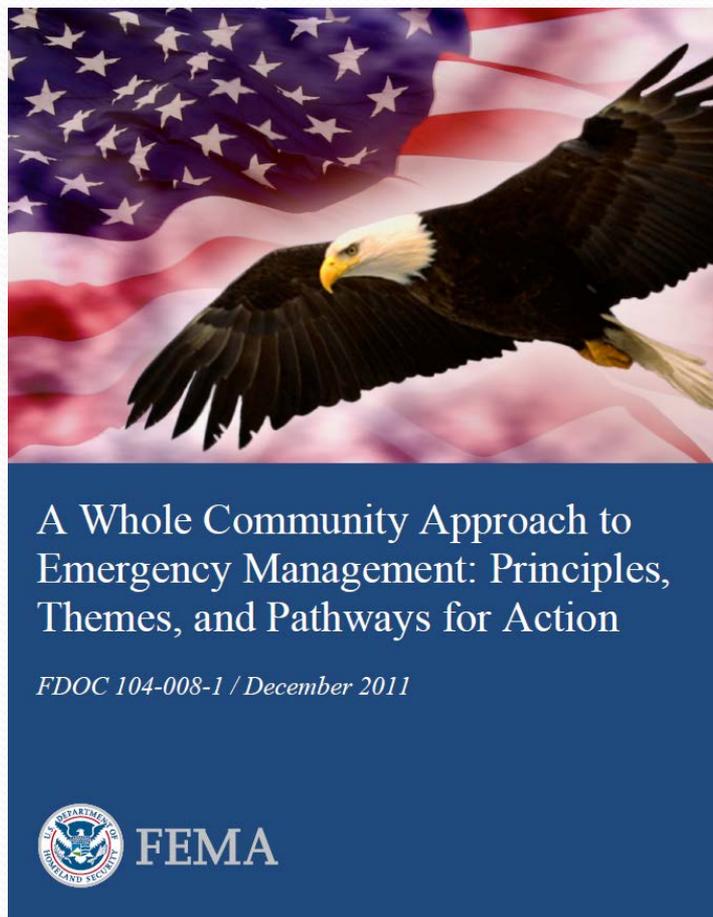
In Deciding Whether Regulations “Take”, Courts Examine

- Impact of regulations on private property owners
 - Does the owner “own”?
 - Is the area subject to public trust?
 - Are the proposed activities nuisance-like?
 - Diminution in value?
 - Denial of all economic use?
 - Impact on whole property
 - Impact on reasonable investment backed expectations?
- The nature of the government actions
 - Adequacy of goals?
 - Factually supported?
 - Nondiscriminatory?

Avoiding A Taking

- Avoid Interfering with the Owner's 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 v. Zoning Bd. of Appeals*, 444 Mass. 754 (Mass. 2005) and *Annicelli v. Town of South Kingston*, 463 A.d 133 (1983); and *Lopes v. Peabody*.
- Establish a Fair Variance Procedure

Recommended Reading:



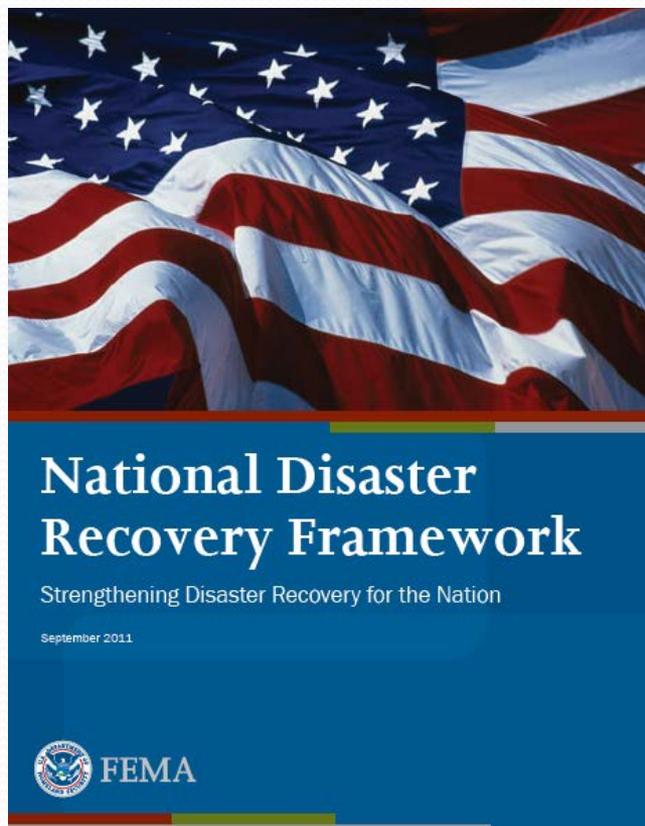
A Whole Community Approach to
Emergency Management: Principles,
Themes, and Pathways for Action

FDOC 104-008-1 / December 2011



FEMA

There is a Significant Role for the Planning Community in this Important Publication



Planning is Stressed Throughout the Disaster Recovery Framework-A Huge Step Forward for Planners

Table 6: Recovery Mission Area Capabilities and Preliminary Targets¹⁶

Recovery Mission Area Capabilities and Preliminary Targets	
Planning	<p>Conduct a systematic process engaging the whole community as appropriate in the development of executable strategic, operational, and/or community-based approaches to meet defined objectives.</p> <ol style="list-style-type: none"> 1. Convene the core of an inclusive planning team (identified pre-disaster), which will oversee disaster recovery planning. 2. Complete an initial recovery plan that provides an overall strategy and timeline, addresses all core capabilities, and integrates socioeconomic, demographic, accessibility, and risk assessment considerations, which will be implemented in accordance with the timeline contained in the plan.
Public Information and Warning	<p>Deliver coordinated, prompt, reliable, and actionable information to the whole community through the use of clear, consistent, accessible, and culturally and linguistically appropriate methods to effectively relay information regarding any threat or hazard and, as appropriate, the actions being taken and the assistance being made available.</p> <ol style="list-style-type: none"> 1. Reach all populations within the community with effective recovery-related public information messaging and communications that are accessible to people with disabilities and people with limited English proficiency, protect the health and safety of the affected population, help manage expectations, and ensure stakeholders have a clear understanding of available assistance and their roles and responsibilities. 2. Support affected populations and stakeholders with a system that provides appropriate, current information about any continued assistance, steady state resources for long-term impacts, and monitoring programs in an effective and accessible manner.

Presidential Policy Directive 8 (PPD-8)

- Issued by President Obama in March 2011
- Implementation planning and documentation development underway
- PPD-8 deals with the nation's preparedness for dealing with catastrophic results from natural or human caused events
- Includes significant planning and hazard mitigation elements
- Definitely many opportunities for additional input
- Additional input from grass-roots planners much needed

FEMA Sponsored the First of Several Stakeholder Meetings

- The NHMA Representative, at the meeting, Darrin Punchard of AECOM, has prepared a short report available to any of you who desire a copy
- Any individuals can provide their own input, thoughts or ideas to FEMA at: fema.ideascale.com (click on the link for 'Presidential Policy Directive 8'). At this site you also may view, comment and vote on those ideas submitted by others.

A Solution

- Go Beyond Existing and NFIP & State Minimum Standards for
 - Safe Development-FEMA CRS Type:
 - Development decision-making
 - Planning
 - Emergency Preparedness

Might All Montana Communities Wish To Consider These Higher Standards?

Consider:

- A) Uncertainties in flood elevations-50% confidence
- B) Consequences if a factory, water treatment plant or other critical facility is flooded
- C) 50% chance that 1% flood will be exceeded within 70 years
- D) Changes in flood heights and velocities due to factors such as upstream wildfires and mud slides/mudflow
- E) Climate variability and climate change
- F) Effect of poor development practices on threatened and endangered species

Other Contributing Factors:

- Think about the following scenarios-
 - Debris blockage (models assumes no blockage)
 - Wildfires (exacerbated flows from burned vegetation-hydrophobic soils etc.)
 - Technical assumptions and other uncertainties



Think About:

- Black Swan Events
- Limitations of existing NFIP models
 - Debris blockage (models assumes no blockage)
 - Wildfires (exacerbated flows from burned vegetation-hydrophobic soils etc.)
 - Technical assumptions and other uncertainties

Implementing Safe Development in the Real World

- Comprehensive watershed future conditions water resources mapping looking at water supply-water quality-stormwater management and flooding
- Interim Measure
 - Require a demonstration that **all** development does not change the hydrograph for the 1-10-50-100-500 year BOTH flood and storm
- Later in this excellent conference we will have some presentations about how to do this:

Low Impact Development (LID)

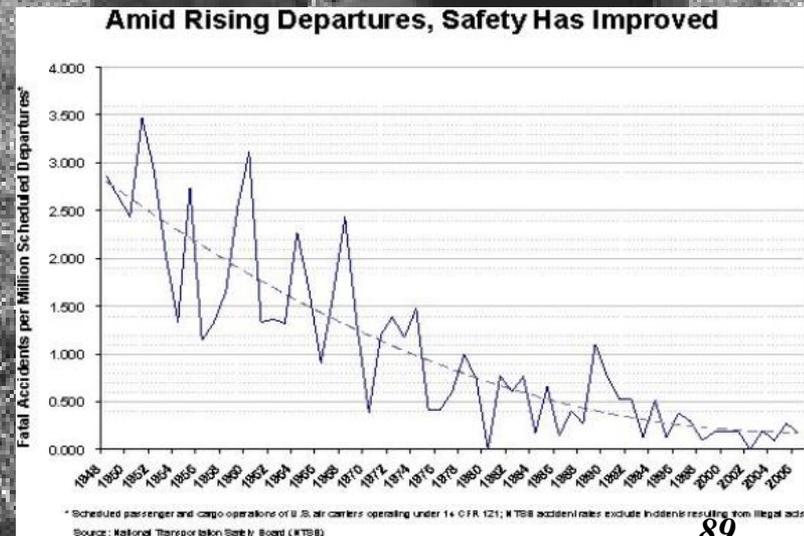
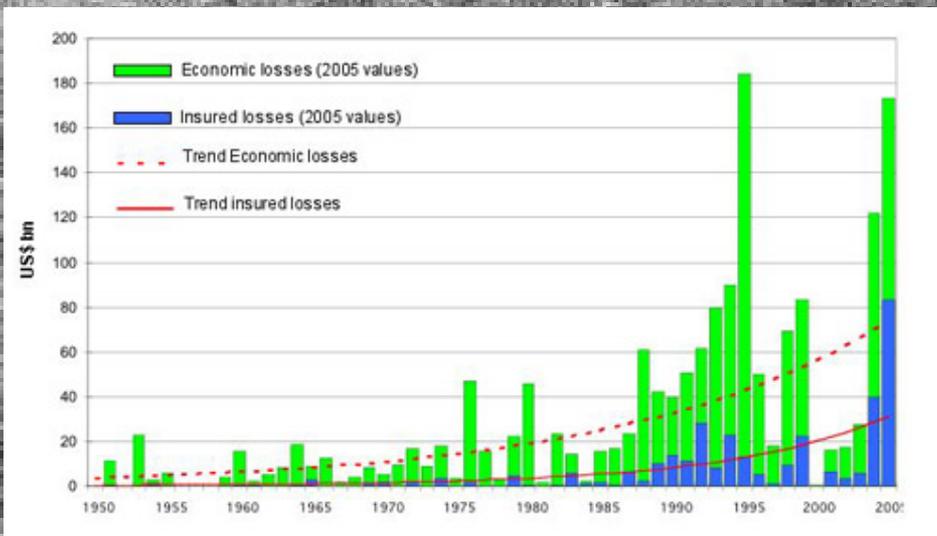
So What Can We Do?

- Six Models I Would Like To Discuss:
 - A) Reduction in Incidence of Airplane Disasters
 - B) Reduction in Incidence of Urban Fires
 - C) Partnership with other Water Resource Managers
 - D) Activities of the Urban Drainage and Flood Control District (UDFCD)
 - E) American Society of Landscape Architects Stormwater Case Studies
 - F) Montana Activities

A) Reduction in Incidence of Airplane Disasters

Enormous Success
in the
20th Century

...learning from experience



B) Reduction in Urban Fires

FEMA Publication

America at Risk

America Burning Re commissioned

FA-223/June 2002

FA-223/June 2002

Fire Loss in Urban United States

“One hundred years ago, American cities faced a devastating challenge from the threat of urban fires. Whole cities had become the victims of these events. Entire neighborhoods lived with the very real threat that an ignited fire would take everything, including their lives.”

From: *America at Risk*

America Burning Recommissioned

FA-223/June 2002

Fire Loss in Urban United States

“Today, the threat of fires is still with us. But we have done a lot to address the risk, minimize the incidence and severity of losses, and prevent fires from spreading. **Our states and localities have an improving system of codes and standards; most of us are aware of the risks;** We have accomplished a lot, but we have much more to do.”

From: *America at Risk*

America Burning Re commissioned

FA-223/June 2002

Build On Our Success

“Today, we must not only continue and reinvigorate our successes, but also expand them to include the natural and man-made threats that each of our counties, cities, towns and villages face every day – floods, earthquakes, hurricanes, hazardous material spills, highway accidents, acts of terrorism, and so much more.”

From: *America at Risk*

America Burning Re commissioned

FA-223/June 2002

C) Partnerships With Other Hazard Managers

- DHS/FEMA is Continuing Its Efforts to Modernize Flood insurance Maps
- 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?

Courts Give Water Resource 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

Partnership

- A Call To Work Together With Other Interested Parties

Rapanos

- Especially Important In The Arid West
- Articles On This In FMA Newsletter, ASFPM Newsletter, National Wetlands Newsletter, etc.

D) Urban Drainage and Flood Control District

- Many Possible Examples of Success by UDFCD Could Be Cited
- In the Interest of Time I Would Like To Mention Three:
 - A) Cornerstar Negotiation
 - B) Levees
 - C) Publication on Economic Basis for Proper Design and Construction

E) American Society of Landscape Architects

- Excellent Site Containing Stormwater Case Studies
- <http://www.asla.org/stormwatercasestudies.aspx>
- One From Montana:
Lindner Project - C. J. Austin and Co, Missoula

F) Ongoing Work in Montana

- **This Conference**
- **Workshops and Other Activities of the State National Flood Insurance Coordinator & the Association of Montana Floodplain Managers (AMFM)**
- **Montana Watercourse**
- **So Many Other Organizations**

Some Messages to Floodplain & Emergency Managers From My Training Session Tomorrow

- Stormwater, Floodplain & Emergency Managers have to stop being the “Abominable No People”!!

Find A “Yes”

- We are for development
- We are for safe places for our citizens to live
- We must consider others when we develop
- Channel any emotion into action

If It Is A Good Project...

- Yes.
- Yes.
- **Yes!**

Take Away Message

- Community leaders have responsibility for public safety and need to be aware:
 - Many areas can flood, or be damaged by foreseeable natural events
 - Uninsured victims will likely sue- and will try to find someone to blame
 - Fair harm prevention regulations help everyone

Summary

- Fundamentally our society must and will choose either:
- Better standards to protect resources and people
- or
- Standards which inevitably will result in destruction and litigation

The higher regulations of the FEMA Community Rating System are, I think, taking us in the right direction

Each of you will play a key role in helping create a safe and sustainable future; or in continuing & making worse the incredible mess in which we are, already

You have made a choice towards helping make things better by learning how, right here.

Please keep going!

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