



Issuing permits in SFHAs based on certifications or affidavits: Is that acceptable?

Is this happening in your part of the country? Have development interests lobbied lawmakers to authorize (or require) communities to accept affidavits by registered design professionals stating proposed development is designed to satisfy the applicable requirements?

In some states, the law might say local officials don't even have to look at any documentation! Most developers and land owners are anxious to get their projects under construction—the ever-present “time is money” argument.

Because we're floodplain managers and we know communities that participate in the National Flood Insurance Program have a responsibility to the NFIP, let's consider the affidavit scenario from that perspective.

The National Flood Insurance Program requires communities that participate in the program to agree to adopt and enforce regulations that meet or exceed the minimum requirement of the NFIP (44 Code of Federal Regulations Parts 59 and 60).

The NFIP regulations require communities to review proposed construction or development in special flood hazard areas. Specifically, the Section 60.3 states: “Minimum standards for communities are as follows: (a) . . . the **community shall**: . . . (1) Require permits for all proposed construction or development . . . ; (2) Review proposed development to . . . ; (3) Review all applications to . . . ; (4) Review subdivision proposals and other new development . . .” <https://www.govinfo.gov/app/details/CFR-2011-title44-vol1/CFR-2011-title44-vol1-part60>

In my opinion, this means communities have a responsibility to the NFIP to review applications for development in special flood hazard areas even if the use of affidavits or certifications is authorized by state law or regulation.

And I think the same responsibility applies to inspecting for compliance with flood requirements. Does this mean communities can't accept affidavits for other aspects of development? As the saying goes, I'm not a lawyer but...in my opinion, the commitment to the NFIP is related to floodprone development, which I think should be interpreted to mean communities could rely on affidavits for other aspects of the development.

Has the “Plain Language” Movement Come to Floodplain Regulations?

Read through just about any community floodplain management regulations and you'll find them replete with the auxiliary verb “shall.” Among the senses listed in Merriam-Webster online definition is this: “used in laws, regulations, or directives to express what is mandatory.”

By their very nature, laws and regulations specify things that are mandatory, thus use of “shall” abounds. The NFIP regulations are no different. The word appears 25 times in the pertinent parts of those regulations in 44 CFR Section 60.3.

From time to time I’ve mentioned that I support the Florida NFIP State Coordinator by working with communities to tailor a model ordinance that was approved by FEMA in 2013. A defining feature of the ordinance is it relies on the flood provisions of the Florida Building Code (but that’s another story). The 26-page “Zones V and A” version of that ordinance uses “shall” nearly 140 times.

Some time ago a community asked for a “plain language” version. Of course, our first thought was any change to the model had to be approved by FEMA. So we drafted the changes we thought appropriate and submitted to the folks in FEMA Region IV. With an OK from FEMA HQ (and presumably a lawyer or two), the plain-language model ordinance was approved.

If your community is interested, be sure to check with your NFIP State Coordinator or FEMA regional office first. The following “rules” worked for Florida:

1. Shall is changed to will when it is used to indicate a requirement imposed or performed by the community (i.e., the Floodplain Administrator will do X, Y, and Z).
2. Shall is changed to must when used to indicate a requirement imposed on the applicant or the development (i.e., the applicant must submit....the lowest floor must be elevated to or above the BFE plus one (1) foot”).
3. Shall is changed to may in places where a decision is made and the decision isn’t guaranteed (i.e., a variance may be issued only upon a finding that...).

NFIP Guidance Publications

Look carefully at FEMA pubs and you’ll see descriptions of requirements use “must,” while additional guidance is phrased using “should.” Here’s an example: the NFIP regs say enclosures “shall be useable solely for parking of vehicles, building access, or storage,” while guidance might say storage “should be limited and not include hazardous materials.”

Want to learn more about the Feds and plain language? <https://www.plainlanguage.gov/>

Check out the Plain Language Action and Information Network (PLAIN), a group of federal employees from different agencies and specialties who support the use of clear communication in government writing. Its goal is to promote the use of plain language for all government communications.

Look in the Law and Requirements tab—a law was passed in 2010, various presidential Executive Orders were signed, and guidelines for federal agencies were issued. All emphasize the need for plain language. (Fun fact: the 2010 Act runs just over two pages long and uses “shall” nine times!)

Submit your own items or suggestions for future topics to column editor Rebecca Quinn, CFM, at rcquinn@earthlink.net. Comments welcomed!

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