Making the Case for a No Adverse Impact (NAI) Approach

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Disclaimer

This presentation is neither intended to be, nor may it be taken as legal advice. For legal advice, consult with an attorney licensed to practice in your jurisdiction and demonstrating expertise in applicable subject matter.

Statements of fact and opinions expressed are those of the presenters individually and, unless expressly stated to the contrary, are not the opinion or position of the Association of State Floodplain Managers.
What Keeps You Up at Night?

• Are you afraid of being sued for a takings?

• Are you worried about your liability for enforcing standards, or not enforcing standards?

• Do you think you have enough legal standing to take an enforcement action?

• Are your standards good enough? Do citizens complain to local officials about flooding in areas that were properly permitted?
Key Points

• You may be as likely to be sued for permitting risky development as you are for preventing it.

• You are your community’s first and last line of defense against tomorrow’s flood disaster.
There's the floodplain. Now where do we go from here?
City, county face lawsuit by Farmers Insurance for April 2013 flooding

Posted: Apr 21, 2014 5:55 PM CDT
Updated: Apr 26, 2014 5:55 PM CDT

By Larry Yellen, FOX 32 News Legal Analyst - bio | email
Common Law Liability

• Under common law, no landowner—public or private—has the right to use his/her land in a way that substantially increases flood or erosion damages on adjacent lands.

• Liability lawsuits are commonly based upon one of four causes of action:
  – Negligence
  – Nuisance
  – Trespass
  – Law of Surface Water
Common Law Liability

• Negligence
  – What is the “standard of care” for reasonable conduct? Evolving from a FPM perspective
  – The standard of conduct is that of a reasonable person in the circumstances
  – This is the primary legal basis for public liability for:
    • Improper design of flood control structures
    • Improperly prepared or issued warnings
    • Inadequate processing of permits
The Walkerton Tragedy

- In May 2000, the Walkerton water supply became contaminated with E. coli: 2321 people became ill due to contamination (1346 people were treated, and 7 died from their illness)
- Leading up to the tragedy:
  - Regulatory shortcomings
  - Technology deficits
  - Insufficient training and knowledge
  - Privatization of water testing
  - Budget cuts to Ontario Ministry of the Environment
  - Human negligence

Nuisance


Common Law Liability

• Nuisance
  – No landowner, public or private,
  – has a right to use his/her land in a manner
  – that substantially interferes, in a physical sense,
  – with the use of adjacent lands.
  – "Reasonable conduct" is usually no defense against a nuisance suit.
Trespass

NO TRESPASSING
VIOLATORS WILL BE SHOT, BEATEN, AND STABBED.
SURVIVORS WILL BE PROSECUTED
Common Law Liability

• Trespass
  – Landowners can file trespass suits for
  – certain types of public and private actions
  – that result in physical invasion of private property
  – such as increased flooding or drainage.
Common Law Liability

- Law of Surface Water
  - In most states
  - Landowners cannot 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.
  - Landowners are liable for damages caused by their interference with the natural flow of surface water when their actions are ‘unreasonable’.
Legal Research Findings

• Most successful suits against communities result from actions such as **inadequate** construction or maintenance of public infrastructure (dams, levees, roads, and bridges) that increase flood damages on private lands.

• “Act of God” defense is less and less convincing. Even rare floods are predictable. As are residual risks from levees and dams.

• If a community permits development that meets code standards, but results in an adverse impact, there may be liability. Prohibiting reasonable development may be a regulatory “taking.” Negotiating development in the absence of standards may be “arbitrary and capricious.”
What about the NFIP?

- Under the minimum NFIP standards, properly permitted development allows:
  - Floodwaters to be diverted onto other properties
  - Channel and conveyance areas to be reduced
  - Valley storage to be filled
  - Changes in water velocities
- In general if the permitted development results in an adverse impact, your community may be liable!
What Constitutes a Taking?

- Physical occupation of private land
- Regulation that “goes too far”
- Permit condition lacks a rational connection or “essential nexus” with a valid public purpose
- No “rough proportionality” between permit condition and impact of development
- Total deprivation of economic use
- Interference with “reasonable investment-backed expectations”
- Compensable taking may occur even when restriction is temporary, i.e., “temporary taking”
Legal Research Findings

• No cases found where a landowner prevailed in a regulatory takings suit against a community’s denial of use, where the proposed use would have had substantial offsite impacts or threatened public safety.

• Courts have broadly supported restrictive regulations for high risk flood areas based upon public safety, nuisance prevention, public trust and other concerns.
• NAI is a philosophy that looks at the impacts of land use decisions, identifies adverse impacts and mitigates them through a variety of actions.

• Through NAI, flood losses can be reduced, property can be protected and lives can be saved!
NAI involves more than local floodplain managers -- planners, public works officials, zoning officials, development officials, regulatory (review) agencies, stormwater professionals, wetland managers, environmental engineers and environmentalists, emergency responders, disaster preparedness coordinators, hazard mitigation specialists, design professionals and design engineers, architects, landscape professionals, local officials, governing bodies, politicians and the public at large – the "whole community" - all have a role.
• Illinois Supreme Court upheld state regulation prohibiting residential structures in 100-year floodway

• State argument focused on protecting health and welfare including
  – Risk to first responders
  – Risk to property owners who would be stranded
  – Increased expenditure of public funds
Avoiding a Taking

- Clearly Relate Regulation to Preventing Harm. (Gove)
- Avoid interfering with owner’s right to exclude. (Loretto)
- Avoid denial of all economic uses. (Lucas)
- Consider Transferable Development Rights or similar residual rights and uses to retain economic value. (Penn Central)
- Demonstrate relationship between permit condition and harm avoided. (Koontz)
Key Points

• You may be as likely to be sued for permitting risky development as you are for preventing it.
• Take a “No Adverse Impact” approach to flooding issues to reduce liability and minimize takings claims.
• You are your community’s first and last line of defense against tomorrow’s flood disaster!
Credit given to the Natural Hazards Observer and Rob Pudim for all illustrations in this presentation.
Super Storm Sandy (2012)
Planning for Post-Disaster Recovery and Reconstruction


American Planning Association
Planning Advisory Service
Report Number 576

American Planning Association
PLANNING FOR POST-DISASTER RECOVERY: NEXT GENERATION

James C. Schwab, MPA, Editor
Stormwater Control: Design with Nature
Bishan Park – aerial view
Badjao – over water
Learning from Stiltsville
Floating on the water
Floating during flooding
Floating during flooding

Resiliency Through Floating
Permanence of Historic Grid
Silvia Abisio

The project is located in the north area of the island, between Longbeach and Whitney Plaza, where a historic settlement will be affected by sea level rise. This area does not need to be abandoned. Instead, it can strategically grow to provide coastal protection, introducing a new type of resilient settlement that will address sea level rise. The proposed operation implies the relocation of the inhabitants in different residual floating typologies that will form a new piece of the town that extends itself into the canal. This can happen by maintaining the existing road grid and binding it to the urban fabric of the Key while preserving the identity of the place. The new residential typology is designed to simplify the relationship of the residence with the water through the introduction of an open room as a boat ramp for small boats that links the street directly with the canal. To defend the island from the threat of sea level rise, it is also planned to create soft marshes by the mangrove islands that, according to new scientific research, could potentially accumulate and build soil. The new mangroves could be installed as modular structures that, growing, could become a spectacular public waterfront park. This project includes the redesign of Whitney Plaza, as a new public venue with shops, restaurants, an inner square, a multilevel parking structure and a garden bridge that links this leisure and commercial point with the beach and becomes a landmark for the north entrance of the island.
Movable homes

Movable homes
Resilient Podium Community

The project is located on the site of the Manufactured home community. It proposes its substitution. Houses in this area are vulnerable and crowded. For providing better living conditions and more public space to residents, a new community sense is created. The site is located in the middle portion of Longboat Key. The proposed high rise buildings will give residents a chance to get views of both the gulf side and bay side because the distance between two sides in this area is quite minimal. High rise buildings can achieve a density that helps produce more public space. To deal with sea level rise, the new public ground floor is lifted up to level two. The space on the ground will be used for entertainment, relaxation and parking. The platform will be as new ground after sea level rise. There is a bridge stretched out from the platform that will offer people a way to reach the beach directly crossing over Gulf of Mexico Drive. On the bay side, the project proposes a marina for the residents’ navigation purposes. The high rise components of the project are designed following the “8 queens puzzle” in chess to arrange all 8 buildings to make sure they will not shade each other and get the best views. The number of residential units will depend on market potential for different size typologies, and on code permitting regarding permissible heights. As determined in the project, it is composed by 480 residential units, providing an increase of 50% in residential numbers.
Transferring development to safer locations

2.5 Units/Acre  
Density Without TDR  
8 Units/Acre

SENDING ZONE  
Area Includes Many Wetlands

TDR

RECEIVING ZONE  
Area Without Wetlands

0.1 Units/Acre  
Density With TDR  
10 Units/Acre
Under Water
QUESTIONS ???
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