

COMMON LEGAL QUESTIONS

ABOUT

FLOODPLAIN REGULATIONS

IN THE COURTS

2003 UPDATE

**Prepared by Jon A. Kusler, Esq.
for the
Association of State Floodplain Managers**

Preface

This summary was prepared for the Association of State Floodplain Managers (ASFPM) by Jon Kusler, Esq., Associate Director of the Association of State Wetland Managers. Preparation involved a review of the legal literature on floodplain regulations as well as the last 15 years of federal and state case law concerning floodplain regulations. It is based upon a larger paper with case law citations also prepared by Jon Kusler for the Association: No Adverse Impact Floodplain Management and the Courts and Jon Kusler, Wetland Assessment in the Courts, Association of State Wetland Managers, 2003. Detailed reviews of cases from the period 1960–1990 were prepared by Kusler in an earlier document.

Acknowledgements

Edward A. Thomas, Esq. provided extensive review of this document. Funding was provided by The McKnight Foundation and the ASFPM Foundation. Opinions expressed in the document are those of the authors and do not necessarily reflect the view of the sponsoring organizations.

COMMON LEGAL QUESTIONS

Have courts continued to uphold the overall constitutionality of state, and local floodplain regulations?

Courts at all levels of government have broadly and repeatedly upheld the general validity of floodplain regulations despite several U.S. Supreme Court cases which have held that hazard-related regulations might be unconstitutional in certain circumstances. For example, the Supreme Court held that South Carolina beach protection regulations which denied all economic use of lands (i.e., a coastal setback line) could be invalid as applied to this specific property. It also held in an Oregon case that dedication requirements for a bike path in a floodplain were unconstitutional because the regulatory conditions were not “roughly proportional” to burdens on the public created by the commercial use.

Does general validity mean that regulations are valid for all properties?

No. A landowner may attack the constitutionality of regulations as applied to his or her property even where regulations are valid in general. Regulator agencies need to be able to support the validity of the regulations as applied to particular properties. However, the overall presumption of validity for regulations and a presumption of correctness for regulatory agency information gathering and regulatory decisions helps the regulatory agency meet its burden of proof. And, courts have broadly supported state and local floodplain regulations as applied to particular properties. A court decision that regulations are unconstitutional as applied to a specific property will not determine site-specific unconstitutionality as applied to other properties.

Has judicial support for floodplain regulations as applied to particular properties weakened in recent years?

No, courts continue to strongly uphold floodplain regulations. Courts have only held regulations invalid in a few of the more than 125 appellate state and federal cases addressing floodplain regulations over the last decade including many challenges to regulations as a taking of private property. For cases upholding regulations, see, for example *Beverly Bank v. Illinois Department of Transportation*, 579 N.E.2d 815 (Ill. 1991) (Court held that Illinois legislature had the authority to prohibit the construction of new residences in the 100-year floodway and that a taking claim was premature.). *State of Wisconsin v. Outagamie County Board of Adjustment*, 532 N.W.2d 147 (Wis. App., 1995) (Court held that variance for a replacement of fishing cottage in the floodway of the Wolf River was barred by county shoreland zoning ordinance.). *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, et. al*, 94 N.Y.2d 96 (N.Y., 1999) (Court rejected claim that the rezoning of 150 acre golf course property important for flood storage from residential to solely recreational use was a taking of private property.). *Wyer v. Board of Environmental Protection*, 747 A.2d 192 (Me. 2000) (Court held that denial of a variance under sand dune laws not a taking because property could be used for parking, picnics, barbecues, and other recreational uses.)

But landowners are more often challenging regulations and courts are examining floodplain regulations with greater care than several decades ago.

What are the most common challenges to regulations in the last fifteen years?

The most common have been challenges to highly restrictive regulations: floodway restrictions, coastal dune and high hazard area restrictions, buffer and setback requirements, stringent requirements for variances, and very tight nonconforming use regulations. Despite challenges, courts have broadly upheld these restrictions against claims that they take private property without payment of just compensation, have been adopted to serve invalid goals, are unreasonable (lack adequate nexus to goals), or discriminate.

May local governments regulate floodplains without express statutory authority to do so?

Yes. Courts have upheld local floodplain zoning regulations adopted as part of broader zoning. Courts have also, in some cases, upheld local floodplain ordinances adopted pursuant to “home rule” powers. But this is rarely an issue since states have broadly authorized local governments to adopt floodplain regulations.

May a local government adopt floodplain regulations which exceed state or federal (FEMA) minimum standards.

Yes. Local governments regulations may exceed both state and federal regulations. There is no preemption issue. The FEMA program encourages state and local regulations exceeding federal standards through the Community Rating System. Courts have, in specific cases, sustained a variety of regulations exceeding FEMA standards such as:

- Regulating activities consistent with the 500 year flood rather than the 100 year flood,
- Prohibiting residences in floodplains,
- Establishing more stringent floodway standards such as preventing activities which would cause any substantial increase in flood heights,
- Establishing buffer and set back requirements for coastal development and development adjacent to riverine floodplains,
- Establishing tight restrictions on the use of septic tank/soil absorption fields in floodplains,
- Establishing open space zoning for some floodplains, and
- Establishing tight restrictions on the rebuilding of nonconforming uses.

May states and local governments regulate some floodplains and not others?

Yes, typically states and local governments only regulate mapped floodplains.

Are federal, state, or local floodplain regulatory agency factual determinations (e.g., mapping of floodways and flood fringe boundaries) presumed to be correct?

Yes. The burden is on landowners to prove their incorrectness. Courts overturn agency fact-finding only if it finds that such fact-finding lacks “substantial evidence.” Courts are particularly likely to uphold factual determinations of federal and state “expert” agencies. However, courts look more closely at the adequacy of the information gathering where regulations have severe economic impact on specific properties.

How closely must floodplain regulatory standards (including conditions) be tailored to regulatory goals?

Courts have broadly upheld floodplain and other resource protection regulations against challenges that they lack reasonable nexus to regulatory goals. But, as indicated above, courts have required a stronger showing of nexus where regulations have severe economic impact on property owners. They also, increasingly require a showing that conditions attached to regulatory permits are “roughly proportional” to the impacts posed by the proposed activity where dedication of lands to public use is involved.

Must a regulatory agency accept one mapping or other flood analysis method over another?

No, not unless the agencies regulations require the use of a particular method. Courts have afforded regulatory agencies considerable discretion in deciding which scientific or engineering approach to accept in fact-finding as long as the final decision is supported by “substantial” evidence. Also, courts have held that regulatory agencies do not need to eliminate all uncertainties in fact-finding.

Does an agency need to follow the mapping, floodway delineation, or other technical requirements set forth in its enabling statute or regulations?

Yes. Agencies must comply with statutory, administrative regulation and ordinance procedural requirements. They must also apply the permitting criteria contained in statutes and regulations.

Are floodplain and floodway maps invalid if they contain some inaccuracies?

No. Courts have upheld maps with some inaccuracies, particularly if there are regulatory procedures available for refining wetland map information on a case-by-case basis.

Can landowners be required to carry out floodplain delineations or determine the impacts of proposed activities on flood elevations? Provide other types of floodplain assessment data?

Yes. Courts have held that regulatory agencies can shift a considerable portion of the assessment burden to landowners and that the amount of information required from a landowner may vary depending upon the issues and severity of impact posed by a specific permit. And, agencies can charge reasonable fees for

permitting. But, the burdens must be reasonable and the costs of such data gathering may be considered by courts relevant to the overall reasonableness of regulations and whether a “taking” has occurred.

May a regulatory agency be liable for issuing a regulatory permit for a private activity which damages other private property?

In some states, yes, particularly if the permitted activity results in substantial flood, erosion, or other physical damage to other private property owners. However, some states specifically exempt state agencies and local governments from liability for issuing permits.

Do local governments need to adopt comprehensive land use plans prior to adoption of floodplain regulations?

Statutes authorizing local adoption of floodplain ordinances and bylaws do not require prior comprehensive planning. However, many local zoning enabling acts require that other types of zoning regulations be in accordance with a comprehensive plan. Courts have also endorsed comprehensive planning and regulatory approaches as improving the rationality of regulations although they have also upheld regulations not preceded by such planning in many instances.

Under what circumstances is a court most likely to hold that floodplain regulations “take” private property?

Courts are likely to find a taking only where regulations deny all “reasonable” economic uses of entire properties and where proposed activities will not have offsite “nuisance” impacts. Landowners are also more likely to succeed in challenging regulations where the property owner purchased the land prior to adopt of the regulations.

Are highly restrictive floodplain regulations including buffers and large lot sizes valid?

Courts have upheld highly restrictive floodplain regulations in many contexts, particularly where a proposed activity may have nuisance impacts on other properties. However, courts have also held floodplain regulations to be a “taking” without payment of compensation in a few cases (mostly older) where the regulations denied all economic use of entire parcels of land and there was no showing of adverse impact on other properties.

Would a no adverse impact performance standard incorporated in local or state regulations be sustained by courts?

Yes. Courts are very likely to support this standard if it is fairly applied and if government agencies permit some economic, conditional use for entire parcels of lands where regulations may otherwise prevent all economic use of land. For example, courts are likely to support a requirement that landowners purchase flood easements from other property owners if their proposed activities will damage other property owners.

How can a local government help avoid successful “taking” challenges?

Local governments can help avoid successful taking challenges in a variety of ways:

1. Adopt a no adverse impact floodplain overall performance standard which applies fairly and uniformly to all properties.
2. Include special exception and variance provisions in regulations which allow the regulatory agency to issue a permit where denial will deny a landowner all economic use of his or her entire parcel and the proposed activity will not have nuisance impacts.
3. Adopt large lot zoning for floodplain areas which permits some economic use (e.g. residential use) on the upland portion of each lot.
4. Allow for the transfer of development rights from floodplain to non floodplain parcels.
5. Reduce property taxes and sewer and water levees on regulated floodplains.