



Floodplain Management Legal Issues

***Making the Case for a No
Adverse Impact Approach***

THERE'S THE
FLOODPLAIN.
NOW WHERE
DO WE GO FROM
HERE?





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 are more likely to be successfully sued for permitting risky development than for preventing it.
- You are your community's first and last line of defense against tomorrow's flood disaster.

City, county face lawsuit by Farmers Insurance for April 2013 flooding

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Farmers Insurance v Lisle, Illinois

The common, central and fundamental issue in this action is whether the Defendants have failed to safely operate retention basins, detention basins, tributary enclosed sewers and tributary open sewers/drains for the purpose of safely conveying stormwater.



Farmers Insurance v Lisle, Illinois

- Farmers says that because of climate change, heavy downpours are occurring more often, and municipalities know it.
- Farmers also claims that when local municipalities adopted the "Chicago climate action" plan several years ago, they were officially admitting that flooding was likely to occur, yet they did little to reduce the damage.



Farmers Insurance v Lisle, Illinois

Plainfield Mayor Michael Collins said he did not think the suit has any basis. "It's really hard to write rules and regulations for Mother Nature," Collins said of the flooding, which saw a portion of downtown Plainfield submerged by the swollen DuPage River last year, as well as flooding along a creek that forced the overnight evacuation of a subdivision street. "There was very little we could do."



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



Legal Research Findings

- Most successful suits against communities result from actions such as inadequate construction or inadequate maintenance of dams, levees, roads, and bridges which increase flood damages on other lands.
- “Act of God” defense is less and less defensible. Even rare floods are predictable. As are residual risks from levees and dams.
- If a community permits development that results in an adverse impact, your community may be liable, even if you meet code standards.



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



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 any 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.



Beverly Bank v. Illinois Department of Transportation

- 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



Gove v. Chatham Zoning Board of Appeals (2005)

- Mass. Supreme Judicial Court upheld Town of Chatham's restrictive zoning standards that required a variance to build a house. The Court said:

“It is undisputed that [the parcel at issue] falls within a floodplain, and that its potential flooding would adversely affect the surrounding areas if the property were developed. Reasonable government action mitigating such harm . . . typically does not require compensation.”
- A special permit could have been obtained for other uses, including the construction of piers, boathouses and boat shelters
- Testimony of first responders and adverse impacts to them was important



Harris Co. Flood Control Dist v. Kerr (2015)

- Texas Supreme Court . The Court said:
“It is undisputed that [the parcel at issue] falls within a floodplain, and that its potential flooding would adversely affect the surrounding areas if the property were developed. Reasonable government action mitigating such harm . . . typically does not require compensation.”
- A special permit could have been obtained for other uses, including the construction of piers, boathouses and boat shelters
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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)



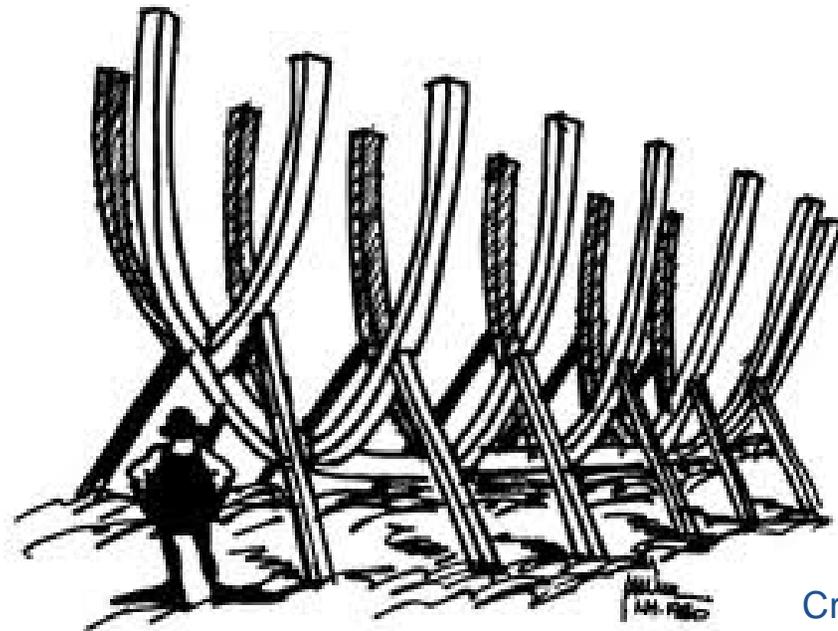
Key Points

- You are more likely to be successfully sued for permitting risky development than 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!



Resources

www.floods.org > publications and policy papers > legal papers



Credit given to the Natural Hazards Observer and Rob Pudim for all illustrations in this presentation