



Property Rights and Community Liability

The Legal Framework for Managing Watershed Development

The “prevention of harm” principle is the foundation of the No Adverse Impact approach to floodplain management. The goal of this NAI Legal Fact Sheet is to help local officials and others understand how to use the tools of NAI Floodplain Management to confidently protect people and property in a fair and effective way, while avoiding lawsuits – even those alleging takings.

Managing our Nation’s floodplains and watersheds is a challenging task that is sometimes erroneously thought to create a direct conflict between the duty of local government to protect people and property vs. property rights. Most local officials wish to reduce the harm and costs associated with coastal and riverine storm damage, and recognize that unwise development can increase these negative impacts. Unfortunately, as our society has grown more litigious, it may appear to be more difficult for local and state officials to prevent or condition projects, even when there is good evidence that these projects may create problems for others. A No Adverse Impact (NAI) approach to land use management is a legally defensible way to address this problem.

Why NAI is legally sound?

NAI doesn't take away property rights – it protects them. NAI prevents one person from harming another's property. *NAI is not an arbitrary or inflexible “no” to construction.* It is a performance-based standard. *Courts consistently favor public entities performing their fundamental function of protecting people.* The NAI approach can help communities create balanced and legally strong regulations.

While nothing can prevent all legal challenges, following the NAI approach to floodplain and watershed management can help to: 1) reduce the number of lawsuits filed against local governments and 2) greatly increase the chances that local governments will win legal challenges arising from their floodplain management practices. The legal system has long recognized that when a community acts to prevent harm, it is not just “doing its job”; it is fulfilling a critical duty. The rights of governments to protect people and property are well recognized by the legal system since ancient times. Courts throughout the nation, including, the U.S. Supreme Court have consistently shown great deference to governments acting to prevent loss of life or property, even when protective measures restrict the use of private property.

Remember:

- 1. Communities have the legal power to manage coastal and inland floodplains and**
- 2. Courts may find that communities have the legal responsibility to do so.**

How NAI can help your community avoid lawsuits

The best way to avoid losing in court is to stay out of court. One of the strengths of the NAI approach is that its performance-based nature fosters and encourages cooperation between landowners and regulators as they work together to try to find solutions to the problems associated with proposed projects. This approach is less confrontational than traditional regulatory systems that dictate (without discussion) when development is and is not allowed. Under the NAI approach both landowners and regulators have the chance to resolve their concerns.

When avoiding court isn't possible, following the NAI approach can greatly increase the chances that local governments will win in lawsuits arising from their floodplain management practices. The most common and historically problematical challenge that local officials face while trying to regulate use of private property is a "constitutional taking."

Takings background: Property owners file takings cases when they believe regulations violate their constitutional property rights. The legal basis for these arguments can be found in the Fifth Amendment of the U.S. Constitution, which prohibits the government from taking private property for public use without compensation. The interpretation of the courts through the years has clarified that the Fifth Amendment encompasses more than an outright physical appropriation of land. Under some circumstances, the courts have found that regulations may be so onerous that they effectively make the land useless to the property owner, and that this total deprivation of all beneficial uses is equivalent to physically taking the land. In such a situation, courts may require the governing body to either compensate the landowner or repeal the regulation.

“Not all the uses an owner may make of his property are legitimate. When regulation prohibits wrongful uses, no compensation is required.”

– The Cato Institute

Needless to say, with local budgets strapped and land values in most floodplain and coastal areas skyrocketing, it is rarely economically feasible for local governments to

compensate landowners for public safety regulations when, for example, they prohibit a house on a solid foundation in an area known to flood or prohibit the construction of a seawall to protect a home on an eroding bluff, NAI options should be explored.

NAI to the Rescue: It's critical that management decisions respect property rights, and follow the law, (See, sidebar) but courts have made it very clear that property rights have limits. For example, both State and federal law acknowledge that property owners never have the right to be a nuisance, to violate the property rights of others (for example, by increasing flooding or erosion on other properties), to trespass, to be negligent, to violate reasonable surface water use or riparian laws, or to violate the public trust. The courts have made it very clear that preventing projects that could harm others cannot constitute a taking, since the alleged right being violated never existed.

Legal Dos and Don'ts of floodplain management

- Do clearly relate regulations to hazard prevention.
- Do help landowners to identify economic uses.
- Do apply identical principles to government's own activities.
- Don't neglect your duty to manage the floodplain. A hands-off approach is the surest way to be successfully sued.
- Don't apply regulations inconsistently or arbitrarily or abuse your power.
- Don't interfere with landowners' rights to exclude others.
- Don't deny all economic uses. Consider the use of Transferable Development Rights in valuable, heavily regulated areas

The best way to understand how the NAI approach helps to prevent takings challenges is to look specifically at what the courts have decided may constitute a regulatory taking. In 2005, the U.S. Supreme Court ruled on a precedent-setting case (*Lingle v. Chevron*) that clearly established regulatory taking guidelines. In a unanimous decision, the Court determined that there are only four ways for a regulation to be a taking. **Each is briefly discussed below, with a layperson's explanation of how they apply to NAI-based regulations. For a detailed legal explanation of these cases, see, *No Adverse Impact Floodplain Management and the Courts*, published by the Association of State Floodplain Managers at http://www.floods.org/NoAdverseImpact/NAI_Legal_Paper_102805.pdf.**

- 1. A physical intrusion.** Governments may not, without compensation, place anything on a piece of private property against the wishes of the owner. The case discussed (*Loretto v. Teleprompter Manhattan*) involved a New York City requirement that residential buildings owners allow the cable company to install a small cable box and cables on every residential building. **If a community's NAI plan involves the placement of structures (culverts, for example) on private property, this ruling makes it clear that the community may well be required to compensate the landowner. Generally, this prohibition will not apply to NAI type regulations.**
- 2. A total or near total regulatory taking.** The Court clarified that if a regulation restricts property rights to such a degree that it eliminates all or nearly all economically viable uses of a piece of property, that this may constitute a taking. The case reviewed (*Lucas v. South Carolina*

Coastal Council) was filed by a landowner who was prohibited from building a home on a barrier beach. **In their opinion the Court clearly states that regulations aimed at preventing nuisance don't constitute takings. South Carolina might find that, under the background principles of State law that the proposed use was a nuisance. However the Court also indicated that if the proposed use were to be considered a nuisance, then the State would need to demonstrate what it planned to do with any existing similarly situated nuisances. Using a NAI approach can help your community to articulate how proposed projects may cause harm. Preventing nuisance like behavior or other harm can and should be prohibited without any issue of a taking. In situations where a regulation eviscerates a property's market price, transferable development rights may be considered.**

3. A significant, but not nearly total regulatory taking. Courts determining whether or not a regulation is a taking are instructed to consider: a) the magnitude of the economic impact, b) how severely the regulation affects “investment-backed expectations,” and c) character of the government in action. The central case discussed (*Penn Central v. City of New York*) was a denied expansion of Grand Central Station in New York City. **The regulation reviewed in this case (an historic preservation restriction on an addition to a building) doesn't aim to prevent harm to individuals or property; rather it seeks to preserve the quality of life – two very different things in the eyes of the law. The U.S. legal system requires governments to compensate landowners when regulations interfere with property rights. However, nobody ever has the right to use or develop land in a way that harms others, even if that use maximizes the economic potential of a particular site in question. There is no constitutional or legal right to a good return on investments. Unfortunately, some people may invest in land with erroneous ideas about what they may legally do with it, and when they are forbidden to do as they wish, may argue that regulations have devalued their property. The courts have made it clear, though, that regulations designed to prevent harm do not decrease the *true* value of a piece of land, and hence NAI-based regulations cannot trigger a taking.**

4. Insufficient relationship between the requirement and the articulated government interest. The Court clarified that the requirements of the regulation must be related to the goals of the regulation. In the two cases discussed (*Nollan v. the California Coastal Commission and Dolan v. Tigard*), the landowners were required to provide a public right-of-way as a permit condition, even though the proposed developments did not reduce public access.

With the NAI approach, regulations are tightly correlated with the specific goals of preventing harm, so this type of taking won't apply. This legal theory was recently tested and proven to be true in the Commonwealth by the Massachusetts Supreme Judicial Court's ruling on *Gove v. Zoning Board of Appeals of Chatham*. In this case, the town successfully prevented the construction of a new home in a flood-hazard area by clearly establishing that allowing the construction would put both the homeowners and rescue workers at unnecessary risk.

With these and other decisions, the U.S. Supreme Court and other courts, have made it clear that governments may regulate land without compensation if they do so with the intent of preventing harm. When appropriately applied:

***No Adverse Impact Regulations make the
"Taking Issue" a non-issue.***

It's worth noting that even property interest groups agree with this assessment. The Cato Institute, which seeks to broaden the parameters of public policy debate to allow consideration of the traditional American principles of limited government, individual liberty, free markets and peace, notes:

Owners may not use their property in ways that will injure their neighbors. Here the Court has gotten it right when it has carved out the so-called nuisance exception to the Constitution's compensation requirement. Thus, even in those cases in which regulation removes all value from the property, the owner will not receive compensation if the regulation prohibits an injurious use.

- **Roger Pilon**, Senior Fellow and Director, Cato Institute
[Addressing the U.S. House of Representatives, February 10, 1995](#)

Why you must manage your floodplains

Protecting people and property is one of the fundamental duties of all levels of government. One of the most effective ways that local governments protect people and property is through the permitting process. Here, local officials should reduce the likelihood that the development or use of property will harm other people or property. Communities should be aware that if a governing body approves a project or activity that causes damage to other properties (for example, development that increases stormwater runoff onto surrounding properties), the affected property owners can sue the

Examples of projects communities may be sued for improperly permitting:

- Development interfering with natural processes.
- Paved surfaces that cause increases in storm flow velocity.
- Construction that channelizes storm flow and increases scour of surrounding properties.
- Roads blocking drainage.
- Stormwater systems that increase flow.
- Structures blocking watercourses.
- Bridges built without adequate openings.
- Flood control structures that increase flooding.

permitting authority, claiming that the agency/board was negligent in its duties when it permitted the action that caused the damage. Courts regularly favor the plaintiff in these cases. A community may be a hundred times more likely to lose a lawsuit for *allowing* improper development than for *prohibiting* it. One can infer from numerous court cases that the surest way for a local government to get into legal trouble is to take a “hands-off” (possibly considered negligent) approach to managing its floodplain.

The take-home lesson: *As a local official, you have been given the responsibility and the legal rights to manage coastal and inland floodplains. If you do so in a way that expressly seeks to prevent harm, the courts will support you. If you fail to regulate, you may be sued.*

For more information . . .

To answer specific legal questions *please see an attorney licensed in your jurisdiction*. To learn more about the general legal framework of NAI-based floodplain management see:

- *No Adverse Impact Floodplain Management and the Courts* for an excellent overview of the case history of NAI. While this document is designed for Attorneys, it is useful for everybody working in floodplain management (http://www.floods.org/NoAdverseImpact/NAI_Legal_Paper_102805.pdf).
- *The Coastal NAI Handbook* at <http://www.floods.org>
- The NAI section at the Association of State Floodplain Managers website at <http://www.floods.org>.
- The American Planning Association’s 1995 *Policy Guide on Takings* at <http://www.planning.org/policyguides/takings.html>.



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Note: *This publication is based on a draft provided by Wes Shaw, a NOAA Fellow at the Massachusetts Office of Coastal Zone Management, in cooperation with an Attorney licensed in Massachusetts, Edward A. Thomas Esq. LLC. However, land use law is a complex mixture of local, state, and federal laws, coupled with the specific peculiarities of the site in question. This publication is not and cannot be legal advice.*

For legal advice, see an attorney licensed your jurisdiction.