Floodplain Management
Legal Issues

Making the Case for a No Adverse Impact Approach
The Association of State Floodplain Managers

- ASFPM began more than 45 years ago as a grassroots organization of floodplain managers in the Midwest and now includes more than 16,000 members worldwide.

- Our mission has always been to:
  - help develop and implement national flood policy and programs that reduce damages, human suffering and taxpayer costs of flooding;
  - mitigate the losses, costs, and human suffering caused by flooding;
  - protect the natural and beneficial functions of floodplains.
By the law of nature these things are common to all mankind, the air, running water, the sea and consequently the shores of the sea… The seashore extends as far as the greatest winter flood runs up.

- Institutes of Justinian 535 CE
Public Trust Doctrine

• Colonies followed English common law

• Recognized public rights in navigable waters & their shores

• Public uses
  – Access for commerce and transportation
  – Environmental protection
  – Recreation
Illinois Central RR v. Illinois (1892)

- State had abdicated its responsibility to preserve the waters for public use
Navigable Waters

- Federal definition: capable of interstate commerce

- State definitions:
  - all tidewaters, regardless of actual navigability
  - navigable freshwaters and the lands beneath
  - Adjacent wetlands (varies greatly among States)
Who Owns the Beach?

The Public Owns:

- **Access along the wet beach only for hunting, fishing, and navigation**
- **Wet Beach Below High Water**
- **Wet and Dry Beach**
- **Wet Beach; Access Along Dry Beach**
Legal Origins

- US Constitution
  - States retain ownership of the lands beneath navigable waters
  - Federal government retains supreme, but not exclusive, control over navigation
Federal, State and Local Roles

• The Constitution of the United States of America

• Amendment X (1791):
  The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States Respectively, or to the people
Property Rights

Each stick represents a right or stream of benefits

**Individual rights to:**
- Sell
- Lease
- Mortgage
- Subdivide
- Grant easement

**Public rights to:**
- Tax
- Take for public use
- Control use of
- Dispose of in case of death
Landowner Does Not Have All Rights under the Law

There is no right to:

- Be a nuisance;
- Violate the property rights of others;
- Trespass;
- Be negligent;
- Violate laws of reasonable surface water use or riparian laws; or
- Violate “public trust.”
Police Powers

Procedural Due Process: Government decision-making must:

1. Be unbiased;
2. Include notice and hearing;
3. Allow for cross-examination;
4. Be based on record; and
5. Involve no undue influence.

Substantive Due Process: All laws, rules, and regulations must:

1. Advance a legitimate public purpose; and
2. Be rationally related to the government objective.
Three U.S. Supreme Court Cases

- **Village of Euclid v. Ambler Realty** (1926): 10th Amendment to the U.S. Constitution
- **Nectow v. City of Cambridge** (1928): 14th Amendment to the U.S. Constitution
- **Kelo v. City of New London** (2005): 5th Amendment to the U.S. Constitution (Eminent Domain)
Police Powers

Takings: Regulations that “go too far”

- Public Purpose Test
- Relationship Test
- Economic Impact
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
Government May be Held Liable if:

- Construction of a road blocks drainage;
- Stormwater system increases flows;
- Structure blocks watercourse;
- Bridge is built without adequate opening;
- Grading land increases runoff;
- Flood control structure causes damage;
- Filling wetland causes damage; or
- **Permits issued for development cause harm to a third party.**
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.
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.
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
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
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)
Upland Land Use Management

• National Government – No Jurisdiction - Incentives
• State Government – Authority Remains with States
• Local Government – Authority and/or requirements come from the State
Congressional Incentives

- Clean Water Act – navigable waters
- Coastal Zone Management Act – coastal zone
- Coastal Barrier Resources Act – mapped areas
- National Flood Insurance Act – nation-wide
What about the NFIP?
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
U.S. Flood-Related Statistics

- Over 5.6 million flood insurance policies are in effect.
- Over $1.2 trillion in insurance coverage.
- Flood losses reached $10 billion annually by 2010; a 3-fold increase from early 1900s.
- Per capita damages increased by more than a factor of 2.5 in the previous century--in real dollar terms.

**Average Annual Flood Damages**

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<th>Damages (adjusted to 1999 dollars)</th>
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Floodway Assessment

Addressing Cumulative Effects of Floodplain Encroachments
FEMA’s regulations (Section 59.1) state: “A floodway is defined as the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water-surface elevation by more than a designated height.”
NFIP Regulations

• CFR Title 44, Part 60, Section 60.3
  – No Floodway Defined
    • 60.3 (c) (10)
    • no new construction … (including fill) … permitted unless the cumulative effect … will not increase WSE more than one foot
NFIP Floodway Definition

• CFR Title 44, Part 60, Section 60.3
  – Designating Floodway
    • 60.3 (d) (2) When provided with BFEs … community shall … select and adopt a regulatory floodway … without increasing the water surface elevation (WSE) of that flood more than one foot.
Equal Degree of Encroachment – Cumulative Impacts

100-year (base) floodplain

Fringe

Floodway

1 foot

Fringe

Channel
Floodplain Description
About 9,000 square miles of flood-prone lands are delineated as floodways and protected from future development (2002).

The conveyance function of floodplains is protected (e.g., the floodway), most others are not.

The map revision process (e.g., LOMR-Fs) and other NFIP criteria indirectly promote the filling and channeling of the floodplain.

The NFIP has not emphasized the protection of NBF and has few tools to help restore them, once they are impaired.
NAI is a concept/policy/strategy that broadens one's focus from the built environment to include how changes to the built environment potentially impact other properties.

NAI broadens property rights by protecting the property rights of those that would be adversely impacted by the actions of others.
No Adverse Impact

Seven “building blocks:”

1. Hazard identification and floodplain mapping
2. Education and outreach
3. Planning
4. Regulations and development standards
5. Mitigation
6. Infrastructure
7. Emergency services
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.
Resources

[Link to website]

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