COMMON LEGAL QUESTIONS PERTAINING TO THE USE OF FLOODPLAINS AND WETLANDS

prepared for
The Association of State Floodplain Managers
by
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This publication was prepared for the Association of State Floodplain Managers by Jon A. Kusler, Attorney at Law, Chester, Vermont, and Rutherford H. Platt, Associate Professor of Geography and Planning Law, University of Massachusetts at Amherst. Case citations and more detailed discussion may be found in a background report: Kusler, Floodplain Regulations and the Courts, 1970-1981, available for $5.00 as Special Publication 5, Natural Hazards Research and Applications Information Center, Institute of Behavioral Science, University of Colorado, Boulder (Campus Box 482, Boulder, CO 80309). Readers are also referred for further details to a draft casebook: Kusler and Platt, The Law of Floodplains and Wetlands: Cases and Materials, available from the American Bar Association, Special Committee on Housing and Urban Development, 1800 M Street, NW, Washington, DC 20036.

The opinions expressed in this document are those of the authors and do not necessarily reflect the view of the Association of State Floodplain Managers.

The reader is advised not to rely upon this booklet to resolve specific legal questions. Advice of legal counsel or program officials in the state or community in question should be obtained.

COMMON LEGAL QUESTIONS
Pertaining to
The Use of Floodplains and Wetlands

1. Q. What roles do the courts play with regard to the use of floodplains?

A. The Courts play three roles. First, they arbitrate conflicts and determine liability for damage arising from flooding and drainage problems. Private landowners may sue each other or non-federal governmental bodies to recover damages for flood losses caused by modified drainage or obstructions to flood flows. Such suits may be based on the common law theories of issuance, trespass, negligence, or riparian rights. Plaintiffs usually seek compensation for increased flood losses and/or injunctions requiring removal of fill or other encroachments. In some states, courts have entertained suits by purchasers of flood prone property against sellers under certain circumstances. (See Q. 3.)

Second, courts interpret and enforce federal, state, and local laws and regulations pertaining to floodplains and wetlands. These include such measures as floodplain zoning, building codes, subdivision controls, as well as federal regulations concerning flood insurance and disaster assistance.

Third, courts determine the constitutionality of statutes, regulations, and other governmental actions such as the acquisition of property. Only a small portion of court suits addressing floodplains and wetlands deal with constitutional issues although these receive the most publicity. (See Q. 11.)

2. Q. Are private property owners liable for causing increased drainage problems or flooding on someone else's land?

A. This is a difficult question. Liability depends on the law of the state in which the case arises, as well as the nature and purpose of the defendant's alteration of the previous drainage patterns or stream flow and the type of waters affected. In general, a property owner is liable for causing substantial and damaging increases in flooding.

Traditionally, the issues of liability for drainage or flood flow modification has been decided on the basis of one or the other of two contrasting rules. The "Common Enemy Rule," followed by a dwindling number of states, views storm drainage and flood waters a "common enemy" against which every property owner has a right to take

This essentially amounts to "every person for him or herself." In contrast, the "Civil Law Rule" subjects all landowners to a duty to maintain natural drainage and flowage patterns. Anyone who alters the location or intensity of surface drainage may be liable to upstream or downstream property owners who incur significantly increased flood damage as a result. The "Civil Law Rule" applies in many states under conditions which should have been reasonably anticipated but is sometimes suspended in event of a flood of such magnitude that it is considered and "act of God."

In recent years, many states have embraced a compromise "Rule of Reasonable Use." This rule holds that a property owner may alter natural drainage patterns if the benefits of doing so outweigh the costs to other property owners in terms of increased flooding. The "Reasonable Use Rule" is sometimes invoked in urbanizing metropolitan circumstances where drainage alteration is inevitable. It requires courts to decide the issue of reasonableness on the facts of each case and therefore provides a less predictable guideline to property owners than the more traditional role stated previously. In general, however, anyone undertaking modification of natural drainage and flood flows does so at his or her peril.

3. **Q. Are subdividers and builders liable to purchasers for subsequent flood damage?**

A. At common law, sellers had no duty to investigate or disclose flood or other hazards, although they could not misrepresent known hazards or intentionally mislead buyers. This doctrine of "Caveat Emptor" (let the buyer beware) has been partially or substantially modified in many states by statutes requiring that subdividers investigate and disclose information concerning wet soils or flood hazards. In addition, courts have modified common law rules in an increasing number of jurisdictions to hold sellers liable for flood damages, particularly when sellers implicitly or explicitly represent that the land or buildings on it are suitable for particular purposes such as residential dwellings.

4. **Q. Are banks liable to mortgage borrowers for failing to disclose flood hazards.**

A. Under the Federal Disaster Protection Act of 1973, federal agencies and lending institutions regulated or insured by the federal government are required to disclose to prospective mortgagees insurance is available. Several federal courts have held that banks are liable for subsequent flood damages to borrowers who are not so informed. However, other federal courts have held that no liability results from violation of the statute.

5. **Q. Are governmental bodies liable when their actions (a) cause or (b) fail to remedy flooding of private property?**

A. In general, governmental bodies are not liable for failing to prevent flood damages but they may be liable for causing flooding. This depends in part upon the level of government. The federal government is generally immune from liability for failing to prevent or causing certain types of flooding associated with flood control projects or programs. 33 U.S.C. Section 702c declares: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or floodwaters at any place . . ."

In contrast state governments, counties, special districts, and local governments may be held liable for "misfeasance." Where a non-federal public entity undertakes to control flooding but does so ineffectively, liability may result. For example, a flood control district may be liable for negligence in constructing a levee which causes overflow of lands not otherwise subject to flooding. A municipality may also be liable for failing to clean out debris from a flood control basin or for approving a subdivision plan or issuing a building permit which results in flood damages on land in the vicinity of the project. For example, a village in Ohio was held liable for flooding damage where it provided a storm sewer system which was inadequate to cope with flooding caused in part by the industrial park development approved by the village.

6. **Q Are public employees personally liable to property owners whose rights may be/are infringed by public regulations or other governmental actions?**

A. Traditionally public employees have not been held liable to private property owners from governmental activities which infringe upon private property rights. This immunity extends to most federal employees, state legislatures, and locally elected officials. There is some speculation that state and local agency staff may now be liable under certain circumstances for infringing private rights under Section 1983 of the Federal Civil

held a public official personally liable for providing inaccurate flood data or for implementing floodplain regulations or flood control measures.

7. Q. What is a "regulatory floodplain"? A "regulatory wetland"?

A. A "regulatory floodplain" is frequently defined by state or local regulations to include all land within reach of a "one-hundred year" flood, i.e., a flood with a probability of occurring in any given year of one percent. This standard has also been adopted by the National Flood Insurance Program which refers to this level of flooding as the "base flood."

Executive Order 11988 issued by President Carter in 1977 imposes a higher degree of restriction in the case of "critical facilities," such as hospitals or public utilities, where federal subsidy or licensing is involved. Such facilities, whose inundation would be publicly disastrous, are required to be located outside the "five-hundred year floodplain" (having a 0.2-percent chance of flooding in a given year). If detailed maps of the one-hundred year or five-hundred year floodplains are not available, states and communities should at least manage and regulate those areas which have been flooded in the past or which the community has reason to expect to be flood prone, based upon the best available data and local knowledge.

A "regulatory wetland" is defined by the U.S. Army Corps of Engineers under regulations adopted to implement Section 404 of the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977 to include:

> ". . . those areas that are included or saturated by surface or ground water at a frequency or duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."

Similar definitions are frequently expressed in state and local regulations, which also may list indicator wetland plant species.

8. Q. What are the basic regulatory techniques available to communities for managing and regulating their floodplains and wetlands?

A. Local and state programs utilize five types of legal measures: Floodplain and wetland zoning specifies the location, usage, and density of new structures in regulated areas. Structures in existmally protected as legal "non-conforming uses." Such structures may continue to be occupied and used for the same purpose, but they may not be expanded or changed to a new purpose. Special exceptions may be granted for structures related to agriculture, to water-dependent activities such as marinas, or to other facilities which must be located in regulated areas.

Building codes regulate the design, elevation, and construction materials of new structures. Generally, new structures must be elevated or floodproofed to the one-hundred year flood level. Building codes are generally administered on a state-wide basis.

Subdivision regulations control the process of subdividing a large parcel of land into smaller lots for resale. As a condition to approving a proposed subdivision, a local community may require the developer to refrain from building in regulated areas and to install suitable drainage facilities. The subdivider may also be required to dedicate wetlands and floodplains for use as subdivision recreation areas.

Sanitary and well codes establish minimum standards for on-site waste disposal and water supply systems. They may prohibit such facilities in areas of high ground water and flood hazards.

Special watercourse, wetland, or floodplain encroachment statutes or ordinances are sometimes adopted by states or local governments to control wetlands and floodplains. Within these areas, any proposed structure, fill, dredging or other alteration must receive a permit from the appropriate public authority.

9. Q. Do state enabling acts for zoning and subdivision control authorize adoption of floodplain and wetland regulations?

A. Local general purpose governments in all states possess sufficient power to adopt floodplain and wetland regulations. At least thirty-three states specifically authorize floodplain zoning and thirty-two authorize subdivision control related to flooding. In other states, general enabling acts authorize regulations for protection of the "public health, safety, and welfare." These have been held broad enough to authorize flood regulations. No local floodplain or wetland regulation has been held to be invalid due to lack of enabling authority. Power to regulate these areas may also be derived from local home rule statutes, charters, or constitutional provisions.

10. **Q. Do state programs on floodplain or wetland management violate local home rule powers?**

A. Courts have universally held that state floodplain and wetland regulations do not violate local home rule powers. Floodplain and wetland protection have been considered "greater than local significance" and, therefore, not exclusively a matter of local concern.

11. **Q. Which constitutional provisions limit the exercise of floodplain and wetland regulations by public authorities?**

A. The principal constitutional limitations on floodplain and wetland regulations are:

1. The due process clause (U.S. Constitution, Fifth and Fourteenth Amendments);

2. The equal protection clause (Fourteenth Amendment);

3. The taking clause (Fifth Amendment).

Most state constitutions contain provisions similar to these. "Constitutionality" thus refers both to federal and state constitutions.

12. **Q What is the meaning of "due process"?**

A. The Fifth Amendment says "that no person shall be . . . deprived of life, liberty, or property, without the due process of law . . ." The Fourteenth Amendment repeats the same language as a limitation upon state power. Court decisions have distinguished two different forms of "due process" protection. "Procedural Due Process" requires that the adoption of any public regulation shall be strictly in accordance with the requirements of the applicable statute, including provision for public notice and hearing. Procedural defects may nullify any otherwise valid regulation.

"Substantive Due Process" requires that a regulation be fair and reasonable in its application. The meaning of "reasonable" is the subject of many judicial opinions. Basically, a regulation is considered "reasonable" if it (a) addresses a proper public concern such as the reduction of flood losses, and (b) the measure is fairly perceived to accomplish the objective in question and is not unnecessarily restrictive.

13. **Q. What are valid purposes and goals of floodplain and wetland regulations?**

A. Regulations must serve legitimate public goals. Courts have strongly endorsed regulations designed to prevent increased flood heights or velocities which may be caused by inadequate drainage facilities, obstructions in floodplains, or unsafe dams. They have also upheld tight regulations in coastal areas subject to extreme hazard to life and property damage from storms and hurricanes. Prevention of water pollution has also been strongly endorsed. Less weight has been given to the protection of wildlife and aesthetic values, although this is changing. Courts have usually held that regulations may not be used to depress property values prior to acquisition. Nor can regulations obtain public access to private property without payment of "just compensation."

14. **Q. What is the meaning of "equal protection"?**

A. The Fourteenth Amendment declares: ". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." This clause is normally interpreted to mean that property owners which are "similarly situated" must be treated alike. Thus owners of property with a similar risk of flooding should be zoned in the same manner. But where properties differ in their elevation, ground water table, proximity to a water course, wetland values, or state of development, regulations may impose different degrees of restriction upon such properties without denying "equal protection." Several courts have sustained statutes applying one type of regulatory control to coastal wetlands and another to inland areas. No court has held that all streams in a community, region, or state—or even all reaches of a certain stream—must be studied and regulated simultaneously.

However, one court has invalidated floodway restrictions which were applied to one side of a stream but not to the other. Courts tend, in most cases, to defer to legislative judgment concerning priorities based upon available budget, urgency of problems, and other administrative factors.

15. **Q. May new development in floodplains and wetlands be regulated more restrictively than existing development?**

A. Courts have permitted more restrictive control of new development than existing activities. The latter are usually protected as "legal nonconforming uses" subject to limitation on expansion or change of use.

16. **Q. What is an unconstitutional "taking"?**

A. The Fifth Amendment declares " . . . nor shall private property be taken for public use without just compensation." State constitutions contain similar language. Courts have uniformly held that if private land is seized for actual use by the public as for a park, school site, or parking lot, the owner is entitled to "just compensation," i.e., fair market value. A harder question arises where the public does not seek to "use" the private land but imposes regulations which effectively curtail the owner's uses. Has the public "taken" the value of the land? This is the "taking issue."

More than one hundred state and federal court opinions on floodplain and wetland regulations have attempted to define how far public regulation can go in restricting the owner's use of the land. All courts agree that regulations may substantially reduce the value of property without unconstitutionally "taking" such property where a strong need for regulation is demonstrated. Where actual flooding has occurred on the site, courts have almost unanimously upheld public regulations since 1970. Where flood hazards are extreme and well documented, private use, however, may be limited to agriculture, forestry, or "open space" activities. Similarly, wetlands which are flood prone or of unusual ecological importance may be restricted to private uses which substantially maintain their natural character. This is particularly true where the owner can use other portions of the property not subject to flooding or wetland limitations for development. The most important factor is whether a property owner is allowed to make some economic use of the total property even though the most profitable use is not possible.

17. **Q. Must governmental bodies comply with locally adopted zoning?**

A. In general, federal agencies are exempt from local zoning although they must comply with Executive Orders 11988 (Floodplain Management) and 11990 (Protection of Wetlands) which incorporate standards similar to those found in local zoning. State agencies are usually exempt from local zoning but must comply with state executive orders and statutes pertaining to floodplains and wetlands. Local agencies must comply with state and federal requirements. They must comply with their own land use regulations when functioning in a "proprietary" capacity. When operating in a "government" capacity, they usually do not

ernmental functions" are those which inherently must be performed by a governmental body such as the construction of a road system. Proprietary functions include those which could be performed by a non-public entity such as trash and garbage collection. Many activities are difficult to classify as governmental or proprietary and the distinction has been abolished in many jurisdictions. In such states, the local government would be advised to follow its own regulations.

18. **Q. Must floodplain regulations be based on detailed engineering studies and maps?**

A. Courts have upheld the sufficiency of flood studies which lack "state of the art" engineering specificity. Only one decision has invalidated floodplain regulations due to lack of data, and in this case there was no theoretical or physical evidence of flood hazard. The sufficiency of data in a given case inpart depends upon the degree of restriction based upon such data as well as upon the availabiliy of procedures for developing more refined data in the process of considering specific developments.

19. **Q. What is the result if experts differ as to the elevation or boundaries of floodplains or wetlands?**

A. Generally, when there is a valid difference of professional opinion among experts, courts will uphold the action of the state or local community. There is a long-standing presumption that local legislative actions are valid in the absence of evidence that they are "arbitrary, capricious, or unreasonable." Courts generally defer to government experts on technical matters and will not normally disturb a selected methodology.

20. **Q. After a flood occurs may a community impose a temporary moratorium on permits for new or replacement construction pending the adoption of floodplain zoning or other measures?**

A. The answer is yes, for a reasonable period of time. Moratoria of several months to several years in duration have been upheld. Local units of government often adopt temporary regulations pending the completion of detailed flood studies, adoption of comprehensive regulations, the preparation of a re-use plan, or construction of flood control works.

Ordinances which "freeze" virtually all new development or replacement construction in the floodplain are the most common interim approach. These are typically based upon unquantified flood or wetland data including "eyeball" estimates of approximate floodplain and wetland boundaries. Alternatively, a moratorium may freeze development within a specified distance of a stream such as 100 feet either side of the centerline, or below a stated elevation.

For further information,

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