

Overcoming Legal Challenges: A Perfect Storm of Opportunities

Most people would consider children playing on a highway full of speeding automobiles and trucks to be acting foolishly, in a manner that would almost inevitably lead to tragedy and misery. Yet all too often, the development decisions we make as a society, in areas we know are affected by wildfires, floods, earthquakes, tornadoes, and other natural processes of our planet, are just as foolish as children playing in traffic.

While these hazards do not go unnoticed, the decision-making process for development is often complicated by legal issues and challenges pertaining to hazards-based regulations. This article will look at two major impediments to safe and proper development in the United States—one real, the other illusory—and how we can take advantage of recent events to resolve them.

These impediments are inadequate involvement in the development process by those of us who understand and can educate local officials about natural hazards that should be considered in development and the realities of the law as it pertains to protecting the public from poor development decisions. Local officials often indicate that they fear that limiting what property owners can do with their own property might be considered an interference in property rights or an unconstitutional taking of private property. This concern is essentially unfounded with respect to fairly applied, rationally established hazards-based regulation.

No Adverse Impact

To address the impediment of involvement and education, the Association of State Floodplain Managers has been actively advocating a No Adverse Impact (NAI) approach to development in flood hazard areas. Simply stated, NAI “ensures the action of any property owner, public or private, does not adversely impact the property and rights of others.” NAI requires looking beyond local, federal, and state minimum standards and is legally acceptable, nonadversarial (neither pro- nor antidevelopment), understandable, and largely unobjectionable to all community members.

The concept of NAI is supported by numerous recent court cases, as well as by truly ancient legal and moral concepts. NAI has profoundly deep legal roots, and if understood and properly applied should resist legal challenge as much as anything can in this uncertain world. The NAI process clearly establishes that the victim in a land use dispute is not the developer. Rather, it is the other members of the community who are adversely affected by ill-conceived development. With this understanding, the developer can work with the community to plan and engineer successful, beneficial development.

The Takings “Nonissue” in Hazards Regulation

NAI is fully in accord with modern law. The Fifth Amendment to the Constitution of the United States says, “nor shall private property be taken for public use without just compensation.” There have been some famous court cases that clarified this, notably *Pennsylvania Coal Company v. Mahon*, which stated that a government regulation can restrict the owner’s freedom to use his property to such an extent that it can constitute a “taking” of that property without compensation. This legal concept is often referred to as the takings issue.

A careful review of takings cases discloses a common thread: the courts have modified common law to require an increased standard of care by governments as the state of the art of hazards management has improved. While the takings issue has gotten its greatest publicity as a property rights dispute between governments and developers, the reality is that state and local governments are vastly more likely to be successfully sued for permitting development that causes problems and restricts property use, such as roads, stormwater systems, and bridges, than they are for prohibiting such development. There have been almost no hazards-based regulations, such as those espoused by NAI, held to be a taking—almost none! On the other hand, there have been many, many cases where communities and landowners were held liable for harming others. In other words, the interference in legitimate property rights and the takings issue as it has been commonly understood, are nonissues in hazards regulation.

Four Events—One Large Window of Opportunity

A confluence of four recent, major events has brought the issue of unwise development decisions into the spotlight. More importantly, it has created an opportunity to address how we as a nation can best deal with hazards created and exacerbated by government-sanctioned human occupancy of areas particularly afflicted by natural hazards. These four events are the failure of the levees in New Orleans during Hurricane Katrina, the large financial settlement resulting from the failure of levees in California (*Paterno*), the recent U.S. Supreme Court joint decision for two wetland regulations cases (*Rapanos-Carabell*), and the Federal Emergency Management Agency’s (FEMA) Map Modernization, a nationwide effort to update flood insurance rate maps.

So much has been written about the Hurricane Katrina disaster from the perspective of a hazards manager that we need say little about it. U.S. policy paints the picture of a nation committed to encouraging the provision of housing for all Americans that meets four criteria: decent, safe, sanitary, and affordable. Katrina serves as a

reminder to all involved in community development that housing that does not consider natural hazards cannot be deemed decent, safe, or sanitary and is not affordable by disaster victims or their communities, municipalities, states, or nation. In the wake of this tragedy, we as hazards managers can provide local officials with information about natural hazards and NAI and the truth about takings to help build a sustainable foundation for decent, safe, sanitary, and affordable communities.

Looking for an example to support the argument for NAI and further hazards-based regulation? You'll find one in the *Paterno* case, where the State of California was required to pay nearly one-half billion dollars to recompense a large number of property owners for the failure of levees. As a result of the 2003 ruling, California has embarked on a massive program to prevent future levee failures. What this case teaches us is that courts are willing to apply the underpinnings of the NAI philosophy to rulings about who will pay for damages caused by poor development decisions—and it is not the victims. Take this example and share it with your local development officials. Help them understand the consequences, legal and financial, of making development decisions that do not consider natural hazards.

The case of *Rapanos-Carabell*, a confusing opinion issued by the U.S. Supreme Court, has become a call-to-action for anyone concerned about water management: stormwater, floodplain, and wetland managers alike. The issue was whether wetlands adjacent to tributaries of “navigable waters” were protected by the Clean Water Act. In its decision, the court ruled that to qualify for protection, there must be a demonstrable relationship between wetlands and other waters and that this must be addressed on a case-by-case basis. Floodplain and emergency managers can help identify that relationship and offer valuable information about the effects of filling and other development-related wetlands activities, which could lead to increased flooding or risks to public safety.



Another opportunity to get the word out is in conjunction with FEMA's effort to digitize and update all the flood insurance rate maps in the country. As part of this effort, some state and municipal hazards managers are conducting studies that show that, in certain situations, if floodplains are fully developed, future flood heights may increase by as much as six feet above present levels. Hazards managers need to share this information with

community officials who are making uninformed development decisions and make it clear what their decisions could mean for the future. The threat of adverse court cases should encourage better and safer NAI-based state and local development decisions. This is the time for communities to consider partnering with FEMA to develop better flood maps using future conditions hydrology and other mapping improvements.

Wrapping It Up

The concept of No Adverse Impact and the legal foundation it is built on can help develop win-win relationships between hazards managers and community development officials, developers, emergency managers, wetland managers, water quality managers, stormwater managers, and others to reduce or eliminate both impediments discussed herein: involvement and education and concerns about the takings issue. As we have discussed, hazards-based regulations are generally sustained against constitutional challenges, and the goal of protecting the public is afforded enormous deference by the courts. By providing our local officials with a better understanding of the laws that affect them, especially those that are nonissues, we as hazards managers can help them diminish or prevent the misery caused by improper development. Our ability to supply this sort of information, to get involved, in a post-Katrina world of heightened awareness of natural hazards, should give hazards managers a welcome place at the table as development decisions are made. Nevertheless, we must aggressively seek that place at the table, and we must act fast.

Edward A. Thomas (ethomas@mbakercorp.com)
Michael Baker Jr., Inc.

Resources

No Adverse Impact (Association of State Floodplain Managers)

www.floods.org/

No Adverse Impact Floodplain Management and the Courts

www.floods.org/NoAdverseImpact/NAI_Legal_Paper_102805.pdf

Peter Paterno et al. v. State of California et al.

<http://caselaw.lp.findlaw.com/data2/californiastatecases/c040553.pdf>

John A. Rapanos et ux., et al. v. United States and June Carabell, et al. v. United States Army Corps Of Engineers, et al.

www.supremecourtus.gov/opinions/05pdf/04-1034.pdf

Map Modernization

www.fema.gov/plan/prevent/fhm/mmm_main.shtml

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