



Association of State  
Floodplain Managers



# ***Making the Case for a No Adverse Impact (NAI) Approach—NAI and the Law***

**CHARM Resilience Workshop  
Virtual Lower Rio Grande Valley  
March 24, 2021**



# 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 opinions or positions of the Association of State Floodplain Managers or the University of Florida.



## WHAT KEEPS YOU UP AT NIGHT?

- Are you afraid of being sued for a “taking”?
- Are you worried about your liability for enforcing standards?

Not enforcing standards?

- Are your standards good enough?
- Do citizens complain to local officials about flooding in areas that were properly permitted?<sub>3</sub>





## Key Points

You are as **likely to be sued** for permitting risky development as you are for preventing it.

You are your community's first and last line of defense against tomorrow's flood **disaster**.

# Options and Actions to Address Flood Insurance Affordability







# Farmers Insurance Co. v. MWRD of Greater Chicago



**City, County face Lawsuit by Farmers Insurance for April 2013 flooding**



# Common Law Liability—Causes of Action

- Under **common law**, no landowner—public or private—has the right to use their land in a manner that substantially increases flood or erosion damages on adjacent lands.
- **Liability** lawsuits are commonly based upon one (1) of four (4) causes of action:
  - Negligence
  - Nuisance
  - Trespass
  - Law of Surface Water



# Common Law Causes of Action—**NEGLIGENCE**

## NEGLIGENCE

What is the “standard of care” for reasonable conduct?

- Evolving from a Floodplain Management perspective:
- The standard of conduct is that of a **reasonable** person in the circumstances.
- This is the primary legal basis for **public** liability for:
  - **Improperly** designed flood control structures
  - **Improperly** prepared or issued warnings
  - **Inadequately** processed permits



# NEGLIGENCE

## The Walkerton Tragedy

- In May 2000, the Walkerton water supply became contaminated with E. coli: 2321 people became ill due to contamination (1346 people were treated, and 7 died from their illness)
- Leading up to the tragedy:
  - Regulatory shortcomings
  - Technology deficits
  - Insufficient training and knowledge
  - Privatization of water testing
  - Budget cuts to Ontario Ministry of the Environment
  - Human negligence

The Walkerton Water Tower



Escherichia coli







# Common Law Causes of Action—**NUISANCE**



<http://floodlist.com/wp-content/uploads/2015/09/nuisance-flooding.jpg>

<https://www.palmspringsca.gov/government/departments/public-works-engineering/waste-water-treatment-plant/west-nile-virus-and-nuisance-water-drains>



# Nuisance

No landowner, public or private,

- has a right to use his/her land in a manner
- that substantially interferes, in a physical sense,
- with the use of adjacent lands.

"Reasonable conduct" is usually not a defense against a nuisance suit.



# Common Law Causes of Action—Trespass







# Trespass

Landowners can succeed in trespass suits for

- certain types of public and private actions
- that result in physical invasion of private property
- Including increased flooding or drainage.



# Cause of Action: **The Law of Surface Water**



<https://www.bing.com/images/search?view=detailV2&ccid=A1REDQxs&id=AEA8C96DE16F05DBA1D18055CBE4E54774BD5601&thid=OIP.A1REDQxsg7uS4nTKczrIOQHaE-&mediaurl=http%3a%2f%2fwww.omafra.gov.on.ca%2fenglish%2fengineer%2ffacts%2f98-015f4.jpg&exph=338&expw=503&q=law+of+surface+water&simid=608022877299214074&selectedIndex=11>



# Law of Surface Water

In most states landowners cannot substantially damage other landowners

- by blocking the flow of diffused surface waters,
- increasing that flow, or channeling that flow to a point other than the point of natural discharge.

Landowners are liable for damages caused by their interference with the natural flow of surface water when their actions are **‘unreasonable’**.



# Legal Research Findings

- Most successful suits against communities result from actions such as inadequate construction or maintenance of public infrastructure (bridges, dams, levees, roads, etc.) that increase flood damages on private lands.
- *Force majeure* or “Act of God” defenses are less and less convincing. Even rare floods are foreseeable, as are residual risks from dam and levee failures.
- If a local government permits development that meets code standards, but results in an adverse impact, there may be liability. Prohibiting reasonable development may be a regulatory “taking.” Negotiating development in the absence of standards may be “arbitrary and capricious.”





## What about the NFIP?

Under the **minimum** (non-CRS) NFIP standards, properly permitted development may still allow:

- Floodwaters to be diverted onto other properties
- Channel and conveyance areas to be reduced
- Valley storage (the floodway) 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 by government 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 development permit requirement and impact of development
- Total deprivation of economic use
- Interference with “reasonable investment-backed expectations”
- Compensable taking may occur even when restriction is temporary, i.e., “temporary taking”



# Avoiding a Successful Takings Claim

- 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, similar residual rights and uses, and alternative development options to retain economic land use value. (*Penn Central*)
- Demonstrate relationship between permit condition and harm avoided. (*Koontz*)



## 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 **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.





## No Adverse Impacts (NAI) Approach

NAI is a philosophy regulatory approach that looks at the potential impacts of land use decisions, identifies foreseeable adverse impacts, and seeks to mitigate these adverse impacts through a variety of higher regulatory standard actions.

Through NAI, flood losses can be reduced, property can be better protected, and lives saved!



## NAI Approach

NAI involves more than local floodplain managers.

Planners, public works officials, zoning officials, development officials, regulatory (review) agencies, stormwater professionals, wetland managers, environmental engineers, emergency responders, disaster preparedness coordinators, hazard mitigation specialists, design professionals, architects, civil engineers, landscape professionals, local officials, governing bodies, politicians, and the public at large—the "whole community"—all have a role.



## *Beverly Bank v. Illinois Department of Transportation*

The Illinois Supreme Court upheld state regulation prohibiting residential structures in 100-year floodway.

State's argument focused on protecting health, safety, and welfare including

- Risk to first responders
- Risk to property owners who would be stranded
- Increased expenditure of public funds



## Key Points

- You may be as likely to be sued for permitting risky development as you are for preventing it.
- The “**bar**” would appear to be moving toward increased personal responsibility—**data and analysis**.
- Prioritize a “No Adverse Impact” (NAI) approach to flooding issues to minimize takings claims and reduce common law tort liability.
- You are your community’s first and last line of defense against tomorrow’s flood disaster!





# Resources

<https://www.floodsciencecenter.org/products/elected-officials-flood-risk-guide/>



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



# QUESTIONS ???

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