



**Protecting the Property Rights of All:
No Adverse Impact Floodplain and
Stormwater Management**

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The Rocky Mountain Land Use Institute

Sustainable Community Development Code
Research Monologue Series:
Natural Hazards



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Urban Form, Transportation

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About the Research Monologue Series

The Sustainable Community Development Code, an initiative of the Rocky Mountain Land Use Institute, represents the next generation of local government development codes. Environmental, social, and economic sustainability are the central guiding principles of the code. Supporting research for the code is represented by a series of research monologues commissioned, presented and discussed at a symposium held at the University of Denver in September of 2007. RMLUI and the University of Denver's Sturm College of Law extend its gratitude to the authors of the papers who have provided their talents and work pro bono in the service of the mission of RMLUI and the stewardship of the creation.

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About the Author

Ed Thomas is a Floodplain Manager, and Disaster Response and Recovery Specialist, who is also an Attorney. His primary concern is the prevention of misery to disaster victims, the public purse, and to the environment. The Law is his chosen method of accomplishing this goal.

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I. Background

The question of the rights, duties, and prerogatives attendant to the ownership of land has bedeviled attorneys, philosophers and governments since ancient times. Some philosophers, such as John Locke, advocate an expansive view of property rights that would very much minimize governmental restriction. This philosophy is expressed wonderfully in books such as *Property Rights in 21st Century America* by Timothy Sandefur, The Cato Institute 2006. Other philosophers such as Benjamin Franklin advocate a view of property rights that emphasize the primacy of the needs of the society of a whole at the expense of the individual landowner. Books such as *The Land We Share*, by Eric T. Freyfogle, Island Press 2003, beautifully express the philosophy of the primacy of societal needs in evaluating property rights.

The founding fathers of this nation seemed to advocate a somewhat middle course between the philosophies of Locke and Franklin. The debate surrounding the point at which private property rights become subordinate to the overall needs of the society continues to rage on today in courts, articles, and daily interaction between property owners and governments. This paper does not attempt to reconcile these differing philosophies. However, one thing upon which virtually all legal philosophers agree is that nobody possesses a right to use their land to harm others. This paper suggests that the prevention of harm to the community is an excellent place to start developing land use regulation. The Association of State Floodplain Managers (ASFPM) has developed a phrase that attempts to capture the concept of managing land use in such a manner as to not harm one's neighbors: "No Adverse Impact Floodplain Management." NAI or No Adverse Impact is defined as "...an approach that ensures the action of any property owner, public or private, does not adversely impact the property and rights of others." This principle makes a community look at what really needs to be done to prevent damage to people, property, and the environment. This concept requires looking beyond business as usual, including rote reliance on local, Federal and State Minimum Standards.

Since the late 1980's there have been a series of cases from the United States Supreme Court which have confused many people about the point at which land use regulations so restricts the rights of a landowner that a compensable taking of property has occurred under the Fifth Amendment to the Constitution. These cases are usually referred to as "Taking Issue" cases. This has led to serious concern and uncertainty on the part of planners and other regulators as to just what extent property can be fairly, properly and legally regulated.

In 2005, the United States Supreme Court unanimously issued an important ruling *Lingle v. Chevron*, 544 US 528, 125 S. Ct 2074 (2005) which significantly clarifies "Takings" jurisprudence. In *Lingle*, the court held that there is a four part test to determine if a regulation is a taking: a) physical intrusion; b) denial of "all economically beneficial use;" c) a significant, but not complete denial of beneficial use; d) a land use exaction which has little or no relationship between the exaction and the articulated government interest; e) in addition, Justice Kennedy noted in concurring with the unanimous court that the decision did not foreclose the possibility of litigating a regulation which was "so arbitrary or irrational as to violate due process." This decision by the nation's highest court enormously supports the fair and thoughtful "No Adverse Impact" regulation.

In cooperation with the Association of State Floodplain Managers (ASFPM), the author has both authored and co-authored a series of publications and presentations addressing critical issues pertinent to the No Adverse Impact concept. These are summarized below¹:

- a) Review the truly ancient legal roots of the National Flood Insurance Program and the “No Adverse Impact” floodplain management concept;
- b) Demonstrate how using the Flood Insurance Program as well as the “No Adverse Impact” standard avoids much, if not all, of the uncertainty surrounding the US Supreme Court’s taking issue cases;
- c) Demonstrate that long standing property rights principles overwhelmingly support the Land Use Regulations of the Flood Insurance Program as well as “No Adverse Impact” based regulation of hazardous areas;
- d) Challenge planners and regulators to be bold in regulating hazardous locations; but, at the same time, be fair and sensitive to the deep and abiding concerns of the property rights movement. Failure to recognize the deep passion for “civil rights” on the part of some members of this movement could lead to success in becoming a successful “civil rights” struggle, which changes ancient doctrines of property rights in such a way as to seriously erode the capability of government to regulate hazardous areas.
- e) Demonstrate that a “No Adverse Impact Approach” is not anti-development; but, rather significantly protects the property rights of everyone in the community by providing a fair and pragmatic foundation for safe and proper development. This safe foundation in turn should lead to the creation of a sustainable community which includes housing and other community facilities which are decent, safe, sanitary and affordable.

The first of these lectures was presented at the 2004 National Hazards Conference in Boulder, Colorado. Over fifty lectures and Workshops have since been deployed around the country to organizations as varied as the American Planning Association; the Academies of Science, Disasters Roundtable; the Association of State Floodplain Managers National Conferences; the National Association of Flood and Stormwater Management Agencies; and the Center for American and International Law-American Bar Association.

II. No Adverse Impact Floodplain and Stormwater Regulation.

Recent court cases nationally, overwhelmingly support the National Flood Insurance Program (NFIP) and the concept of No Adverse Impact (NAI). NAI, which is a further extension of the

Notes:

¹ Pro bono lectures and workshops around the country have been presented by the author and are available at the ASFPM web site: www.floods.org.

philosophy of the NFIP, has profoundly deep legal roots, and if properly applied should resist legal challenge as much as anything can in this uncertain world.

NAI is a *principle* that leads to a *process* which is legally acceptable, non-adversarial (neither pro- nor anti-development), understandable, and palatable to the community as a whole. It is built on and is a further extension of the philosophy of the NFIP.

The National Flood Insurance Program has, in the opinion of the author, been the most cost effective program of hazard mitigation in history. It has induced approximately 20,000 local governments to adopt zoning, building codes, and other regulations designed to reduce flood losses. Implementation of those regulations at the local level prevents an estimated annually loss of 1.2 billion dollars, and untold misery to disaster victims and to the environment. In addition, other than the catastrophic losses caused by Hurricanes Rita and Katrina, the NFIP has been self-supporting since 1981. Claims are paid by premiums received from flood-prone policyholders. This self-supporting aspect of the program has saved the federal taxpayer an estimated \$5 billion in IRS casualty losses, disaster payments and related costs.

The National Flood Insurance Program serves as the foundation and conceptual basis of No Adverse Impact Floodplain Management. The NFIP is the most cost-effective Hazard Mitigation Program in history. The NAI Principle kicks the NFIP up a notch or two!

How does one follow the Principle of NAI?

- a) Attempt to identify all the impacts of a proposed development.
- b) Attempt to determine all the properties which will be impacted.
- c) Notify potentially impacted persons of the impact of any proposed development.
- d) Design or re-design the project to avoid adverse impacts.
- e) Require appropriate mitigation measures acceptable to the community and the affected members of the community.

What is the result of following the NAI Principle?

- a) The Property Rights of Everyone in the Community are respected and protected;
- b) With NAI, the people who may be victimized by improper development are made aware and can voice their concerns to community officials;
- c) Prevention of harm to the public is accorded enormous deference by the courts;
- d) Rather than an adversarial approach, developers and regulators work together; and
- e) The Federal Emergency Management Agency's (FEMA) Community Rating System² gives credits for most NAI floodplain management activities, which may lead to lower flood insurance premiums in eligible communities.

The NAI process clearly establishes that the "victim" in a land use development is not the developer, but rather the other members of the community who would be adversely

² Further information concerning the Community Rating System can be obtained on FEMA's web site at: <http://www.fema.gov/business/nfip/crs.shtm>

affected by a proposed development. The developer is liberated to do what American private industry does best: solve problems. The development team can work with community officials to plan and engineer their way to a successful, beneficial development.

Benefits of NAI:

- a) Consistent with no net loss of ecological functions;
- b) Can seriously help communities in arid areas;
- c) Provides a pragmatic standard for regulation;
- d) Complements all water resources programs: including water quality, water quantity, as well as good wetland and stormwater regulation
- e) Makes sense on a local and regional basis

III. Case Review

Is NAI some new concept that the Association of State Floodplain Managers cooked up? No, it is a very old idea. So old, in fact, it is a maxim of ancient Roman law expressed in Latin as, "Sic utere tuo ut alienum non laedas." In English, "Use your own property so that you do not injure another's property." The bottom line, No Adverse Impact is consistent with both ancient common law and the United States Constitution. The Fifth Amendment to the Constitution of the United States says, "...nor shall private property be taken for public use without just compensation." Several Supreme Court cases have clarified this subject. Notably, *Pennsylvania Coal Company vs. Mahon*, 260 US 293 (1922) 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.

**Examples of Situations where Governments
Have Been Held Liable**

- Construction of a Road Blocks Drainage
- Stormwater System Increases Flows
- Structure Blocks Watercourse
- Bridge Built Without Adequate Opening
- Grading Land Increases Runoff
- Flood Control Structure Causes Damage
- Filling Wetland Causes Damage
- Issuing Permits for Development that Causes Harm to a Third Party

Over the last few decades, there has been an increase in taking issue cases and related controversies involving development. One might think from listening to some commentators that they were winning and governments were retracting their regulations. However, some of us in the field have reviewed these cases as they applied to protecting people and property from a hazard. We have seen a common thread: *the courts have modified common law to require an increased standard of care as the state of the art of hazard management has improved.*

State and local governments are vastly more likely to be successfully sued for permitting development resulting in problems such as roads, stormwater systems, and bridges than they are for prohibiting such development. Almost no hazard-based regulations have been held to be a taking. On the other hand, there have been many cases where communities and landowners were held liable for harming others.

In review of these cases, there is a common theme that clarifies what communities failed to do:

- a) They did not do No Adverse Impact planning.
- b) They did not identify the impacts of the development activity.
- c) They did not notify the soon to be afflicted members of the community.
- d) They did not redesign or reconsider the project.
- e) They did not require appropriate and necessary mitigation measures.

A Landowner Has Many Rights but Does Not Have All Rights under the Law

- No Right to be a Nuisance
- No Right to Violate the Property Rights of Others
- No Right to Trespass
- No Right to be Negligent
- No Right to Violate Laws of Reasonable Surface Water Use; or Riparian Laws
- No Right to Violate The "Public Trust"

The United States Supreme Court recently issued a ruling in the case of *Lingle V. Chevron*, 125 S.Ct. 2074 (2005). That unanimous opinion of the Court sets forth four methods to pursue a regulatory taking case.

- a) **Physical invasion** as in *Loretto v. Teleprompter Manhattan*, 458 US 419 (1982). The *Loretto* Case involved a New York City requirement that all residential buildings must permit a cable company to install cables, and a cable box the size of a cigarette pack. The Court held that any physical invasion must be considered a taking.
- b) **The total, or near total regulatory taking** as exemplified by the Case of *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992), where plaintiff Lucas was prohibited from building a home on the only vacant lots left on an otherwise fully developed barrier beach just outside Charleston (Note, the Court said that if *Lucas* was a "nuisance" under State law it might not be a taking. But, how could it be a nuisance if there were only two lots undeveloped on miles of beach? What was the state plan to abate those nuisances?).

- c) **A significant, but not nearly total taking** as exemplified by the *Penn Central Transportation Company v. New York City*, 438 US 104 (1978), where the Penn Central Company was not permitted to build above Grand Central Station in New York City to the full height permitted by the overlay zoning in the area, for Historic Preservation reasons, but was provided transferable development rights. In *Penn Central* the Court used a three part test: a) economic impact, b) how regulation affects “investment-backed expectations”, c) character of the government action.
- d) **Land use exactions** which are not really related to the articulated government interest, as in *Nollan v. California Coastal Commission*, 483 US 825 (1987), where the California Coastal Commission conditioned a permit to expand an existing beachfront home on the owner granting an easement to the public to cross his beachfront land. The articulated government interest was that the lateral expansion of the home would reduce the amount of beach and ocean the public on the road-side of the home could see. The Court indicated that preserving public views from the road really did not have an essential nexus with allowing folks to cross a beach. The Court also cited the *Dolan v. Tigard*, 512 US 374 (1994) case expansion of a plumbing store required granting an easement within an adjacent flood plain property for a bike path on the basis of a possible increase in traffic caused by the expansion of the store. Again, in *Dolan*, the court indicated that there was no relationship or nexus between the government interest and the exaction attempted.

In *Lingle*, the court specifically indicated it will no longer use the first part of the two-part test for determining a Taking set forth in *Agins v. City of Tiburon*, 447 US 255 (1980): a) whether the regulation substantially advances a legitimate state interest, b) denies owner an economically viable use of land. The removal of this “substantially advances a legitimate state interest” prong of a takings test is a huge help to floodplain managers, to the concept of NAI, and to planning in general. In essence, the question of whether an action by a legislative body “substantially advanced a legitimate state interest” had provided a mechanism for judicial second-guessing of the relative merits of legislative action. The Supreme Court indicates it will defer to legislative decisions unless there is no real relationship between what the legislative body desires and the action taken, or there is some other due process or equal protection issue. See, *Nollan, supra*; *Dolan supra*.

The Court summed up its reasoning by stating that the tests articulated in *Lingle*, “...all aim to identify regulatory actions that are functionally equivalent to a direct appropriation of or ouster from private property...” This clear statement by the nation’s highest court tremendously supports both the principles of the National Flood Insurance Program (NFIP) and No Adverse Impact (NAI) floodplain and stormwater management. Both the NFIP and NAI seek to require the safe and proper development of land subject to a hazard. Neither the NFIP nor NAI floodplain and stormwater management require or support government regulations that oust people from their property.

IV. Other Recent US Supreme Court Cases:

Kelo v. New London, 126 S. Ct. 326 (2005).

Kelo involved condemnation, a “paid taking” of residences. The case concerned whether economic development in a community was considered a “public use” for purposes of a taking as described in the Constitution. The five-to-four decision that, yes, economic development can be considered a public use, shows how much deference the majority of the Justices are willing to give to local decision makers who, in this case, had decided to condemn private land so that commercial redevelopment could take place. Pro-government and planning associations cheered the decision. However, the announcement of the decision was also greeted by widespread public concern, outrage, and proposed legislative correction of the decision from property rights advocates and groups concerned about the rights of minorities. This widespread concern illustrates the extreme sensitivity of issues involving property rights. For floodplain and stormwater managers, the primary lesson of this case is that the Court was willing to give enormous deference to local decisions about what is best for a community, thus offering support to the concepts and principles of the Flood Insurance Program and No Adverse Impact floodplain/stormwater management.

San Remo Hotel v. City and County of San Francisco, 125 S. Ct. 2491 (2005).

This unanimous decision in a case involving fees charged to permit the change of use of a hotel does not directly relate to hazard regulation. Nevertheless, it is important to floodplain managers because it indicates that takings claimants who have already litigated an alleged “taking” in state court do not get another “bite at the apple” in Federal court.

V. Summary

Stormwater and floodplain managers can be heartened by the decisions and opinions in three Supreme Courts cases and three state cases, all of which support the concept of government management of areas prone to flooding, as summarized below.

- a) Four tests for a “taking” have been clearly delineated by the Supreme Court, all of which tend to restrict takings to fairly narrow circumstances.
- b) The Court indicated that deference will be given to local decisions in matters of land use and community development—a stance helpful to stormwater and floodplain management because it underscores the responsibility for and prerogatives of localities for management of land within their jurisdictions.
- c) Two influential states’ high courts have supported communities’ zoning, regulations, and other management techniques intended to protect development from hazards, prevent development from having adverse impacts on other property, and to preserve environmentally sensitive areas.
- d) When NAI planning is practiced and the community’s plans and regulations look like they may meet resistance from landowners and developers, here are some hints to help frame the regulation to avoid a “taking” ruling:

- i. Avoid interfering with the owner's right to exclude others. See, e.g., *Loretto v. Teleprompter Manhattan* 458 US 419 (1982).
- ii. Avoid denial of all economic use. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992).
- iii. In highly regulated areas consider transferable development rights or similar residual right so the land has appropriate value. See, *Penn Central Transportation Company v. City of New York* 438 US 104 (1978).
- iv. Clearly relate regulation to preventing a hazard, if and only if the Regulation is in fact designed to prevent harm. See, the very favorable court rulings in *Gove v. Zoning Board of Appeals of Chatham, Massachusetts*, 444 Mass. 754 (2005) and *Smith v. Town of Mendon*, 822 N.E./ 2d. 1214 (2004); in contrast to the unfortunate cases of *Annicelli v. Town of South Kingston*, 463 A.d 133 (1983); and *Lopes v. Peabody* 417 Mass. 299 (1994).
- v. Improve your odds with flexibility in the regulation and applying the principle to the local government's own activities.
- vi. See also the American Planning Association (APA) *Policy Guide on Takings* adopted in 1995.

When one considers its basic concept, NAI has broad support. For example, the Cato Institute is a conservative think tank closely associated with the "Constitution in Exile," the "Property Rights Movement" and other similar causes. The Institute stated that *compensation is not due when*, "...the government acts to secure rights – when it stops someone from polluting his neighbor...it is acting under its police power...because the use prohibited...was wrong to begin with."³ The Institute also testified before Congress about legislation requiring government paying landowners for regulations limiting what a property owner can do. The Institute testified that there should be provided a, "...nuisance exception to the compensation requirement....*When regulation prohibits wrongful uses, no compensation is required*" (emphasis added).⁴

Local Officials should understand that, (a) hazard based regulations are generally sustained against constitutional challenges; and (b) the goal of protecting the public is afforded enormous deference by the courts. Therefore local officials should, (a) be confident; (b) be assertive protecting the public and the landowner; and (c) partner with other hazard regulators, such as wetlands programs. One can follow the NAI approach and set the regulatory standards needed to protect the property rights of all in the community, including developers.

The ASFPM's NAI tool kit proposes seven essential building blocks that require consideration and adjustment to achieve an NAI outcome. These are:

1. Hazard Identification- e.g. Floodplain m\Maps and other tools

³ "Protecting Property Rights from Regulatory Takings" (the Cato Institute, 1995, Chapter 22, p.230).

⁴ Testimony of Roger Pilon, Senior Fellow and Director, Center for Constitutional Studies, Cato Institute, Before the Subcommittee on Constitution, Committee on Judiciary, US House of Representatives, February 10, 1995.

2. Education and Outreach
3. Planning
4. Regulations and Development
5. Hazard Mitigation
6. Infrastructure location and design
7. Emergency Services

It should be noted that achieving a sustainable outcome will most likely require integration of some or all of these elements and that single land use code strategy would only partially achieve an NAI outcome. Master planning is essential when one looks at development because NAI does not suggest that every property can have no flooding impact rather, it suggest that these impacts should be accounted and the potential flood risk mitigated.

Potential sustainability measures:

1. Reduction in financial and human losses from flooding.
2. Improvement in the ecological health of riparian complexes.
3. Increase in natural flood storage capacity within watershed
4. Improved water quality

Land Use Code Strategies:

Removing Obstacles

1. Discarding policies and regulations that are based upon the notion that individual property rights trump the collective property rights of the entire community with respect to nuisance and adverse impacts.
2. Update or discard zoning and building code standards that recognize only the minimum standards of the Flood Insurance Rating program. For example, regulations that permit construction within the 100 year flood zone provided first floor elevations are 1 foot above the 100 year flood.
3. Eliminate or revise standards that do not restrict appropriate and beneficial uses within floodplains such as agriculture.
4. Remove artificial organizational and substantive barriers between professions and local governmental departments.

Incentives

1. Use of FEMA's Community Rating System (CRS) program that provides insurance rate reductions for many of the practices outlined in the "NAI Toolkit"

Regulations⁵

⁵ Foundation is basic regulations of the National Flood Insurance Program enforced by 20,000 communities in the nation.

1. Establish floodplain zone districts or overlay zone districts in riparian corridors, floodplains, and floodplains.
2. Require all land parcels, lots or site plans to have sites for buildings above flood level.
3. Establish a “no net decrease” in floodplain hydrological capacity...
4. Establish additional minimum height, or freeboard,⁶ requirement of a foot or greater above the base flood elevation to provide an additional margin of safety against risk.
5. Require hydrologically equivalent compensatory storage within flood fringe areas (define?) to offset fill.
6. Establish vegetation buffer zones along riparian areas and shorelines to reflect the sensitive nature of these ecosystems. These provide protection from shore line bank erosion and filter stormwater.
7. Incorporate floodplains into required open space dedications and transfer of development rights programs.
8. Require for all development applications a comprehensive review of off-site impacts to public and private interests in order to establish appropriate mitigation measures.
9. Require full disclosure and notification of proposals, impacts, and mitigation measures to all affected parties, stakeholders—with special attention given to vulnerable populations.
10. Broaden definition of floodway to limit encroachments that lead to transfer of adverse flooding impacts.

Strategic Success Factors:

1. Establish Floodplain management plans that incorporate “No Adverse Impact” principles. These address mapping needs, repetitive loss areas, regulatory standards and procedures, sites that should be acquired and cleared, possible corrective actions, outreach projects, and additional flood protection measures.
2. Establish Special Area Management Plans (SAMPs) for areas where, due to the multiplicity of local, state, and federal authorities, there is ineffective coordination and cooperation in addressing coastal development on an ecosystem basis.
3. Establish Stormwater management plans that incorporate “No Adverse Impact” principles.. Focusing on specific watersheds, these may address detailed hydrologic and hydraulic studies, water quality, habitat protection
4. Make use of open space for floodwater storage in addition to recreational, or other natural and beneficial functions.
5. Make use of techniques that mitigates for increased floodwaters. These include storage basins, easements, modified building standards, easements, and purchase of flood insurance for impacted parties.
6. Educating the profession regarding current practices that silently transfer flooding onto an unwitting property owner is both a public safety problem and a taking of that person's rights to enjoy and use their property.
7. Educating that properly implemented floodplain management and NAI is not a taking

⁶ Freeboard is an additional height requirement above the base flood elevation.

This Article is a pro bono presentation on behalf of the Rocky Mountain Land Use Institute. It reflects the personal views of the author. The statements and views contained in this article are not legal advice, but rather a statement of general principles of law. The Law, especially Property Law is enormously driven by the individual facts of a situation as well as State and local law. For legal advice see an attorney licensed in your jurisdiction.

My thanks to the Michael Baker Jr., Inc. which is providing generous financial support to enable me to conduct the research necessary to develop this Article as well as the series of lectures on behalf of the Association of State Floodplain Managers (ASFPM) which explain the concepts set forth in this Article in much more detail.

Detailed Legal Paper by Jon Kusler, and Ed Thomas is available without charge at: www.floods.org

More Information in several Articles, brochures designed for non-Attorneys and especially ASFPM's A Toolkit on Common Sense Floodplain Management on the web-site of the Association of State Floodplain Managers at: www.floods.org