

# Zoning Bulletin

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## Validity of Ordinance—Residents, Town Dispute Whether Ordinance is Zoning Ordinance Requiring County Approval

### Ordinance requires permit for “nonmetallic mining”

Citation: *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, 2012 WL 386392 (Wis. 2012)

WISCONSIN (02/08/12)—This case addressed the issue of whether a town’s “Nonmetallic Mining Ordinance” was a zoning ordinance.

**The Background/Facts:** The Town of Cooks Valley (the “Town”) had a Nonmetallic Mining Ordinance (the “Ordinance”). The Ordinance required a permit for the operation of nonmetallic mining. “Nonmetallic mining” was defined as including commercial sand and gravel pits, along with their associated activities.

Several residents (the “Residents”) of the Town brought a declaratory judgment action against the Town. They asked the court to declare that the Ordinance was invalid. The Residents contended that the Ordinance was a zoning ordinance, which required county approval. They argued that because the Ordinance did not have county approval, it was invalid.

#### Contributors

Corey E. Burnham-Howard

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Here, the Town was located in a county that had enacted countywide zoning but the Town had not adopted the county's zoning ordinance. Therefore, under Wisconsin statutory law, Wis. Stat. § 60.62(3), the Town could only adopt a zoning ordinance with approval of the county board. The Town had adopted the Ordinance without county board approval.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the circuit court issued summary judgment in favor of the Residents. The court agreed that the Ordinance was a zoning ordinance that required county approval. The court concluded that because the Town had not obtained county board approval of the Ordinance, the Ordinance was invalid.

The Town appealed.

**DECISION: Reversed.**

The Supreme Court of Wisconsin held that the Ordinance was a non-zoning police power ordinance, not a zoning ordinance, and thus county board approval of the Ordinance was not required.

The court explained that all ordinances enacted under a municipality's police power are not zoning ordinances. In determining whether the challenged Ordinance was a zoning ordinance, the court said that there was no bright-line rule governing what constitutes a zoning ordinance. Rather, the court said it must determine whether the Ordinance is a zoning ordinance "using a functional approach." To determine whether the Ordinance should be classified as a zoning ordinance—and thus, here, needing county approval—the court said that it needed to: "compare the characteristics and purposes of the Ordinance to the characteristics and purposes of traditional zoning ordinances."

Here, the court found that "many traditional characteristics of zoning ordinances [were] absent from the Ordinance." Specifically, the court noted that, here, the Ordinance: did not create multiple districts, but applied with equal force to any location in the Town; did not confine nonmetallic mining to any particular area in the Town; did not directly affect where an activity could take place, but rather governed how an activity must be conducted thus limiting where it could be conducted; did not automatically permit or prohibit any land use, but instead operated entirely on a case-by-case basis; and did not comprehensively address a wide range of potential classes of land use, but instead spoke only to a single, specific land use.

Still the court found similarities of the Ordinance to a zoning ordinance: its features included conditional allowance of a land use and exemption of preexisting land uses; it clearly regulated the use of land "in a potentially dramatic way"; and it regulated nonmetallic mining in many respects and in great detail.

However, the court also found that the Ordinance did not seem "even loosely similar to zoning" in its purpose: While the purpose of zoning

was “to separate incompatible land uses, ... [t]he Ordinance [did] not explicitly separate different land uses, nor [did] it explicitly declare any land uses incompatible with any others.”

After examining and comparing the traditional characteristics of zoning ordinances to the characteristics and purposes of the Ordinance, the court concluded that, despite having some similarities to traditional zoning ordinances, the Ordinance was not a zoning ordinance. Thus, the court held that the Ordinance did not need county board approval, and was a valid exercise of the Town’s nonzoning police power.

See also: *Heitman v. City of Mauston Common Council*, 226 Wis. 2d 542, 595 N.W.2d 450 (Ct. App. 1999).

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*Case Note:* In its holding, the court identified, in-depth, the “characteristics that are traditionally present in a zoning ordinance.”

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## Zoning Inspections—Residents Refuse Zoning Inspection of Property

### They argue zoning inspection violates their Fourth Amendment rights

Citation: *Town of Bozrah v. Chmurynski*, 2012 WL 371893 (Conn. 2012)

CONNECTICUT (02/14/12)—This case addressed what burden must be proved before a court may issue an order permitting a zoning enforcement officer to enter and search a particular property. More specifically, the case addressed the following issues: (1) whether the reasonableness requirement of the Fourth Amendment applies to zoning inspections; (2) how that requirement is satisfied; and (3) whether the proper procedural vehicle for determining whether such an inspection should be authorized is seeking a court-ordered injunction.

**The Background/Facts:** The Chumurynskis resided on property (the “Property”) that they owned in the town of Bozrah (the “Town”). In August 2007, the Town’s zoning enforcement officer (the “ZEO”) was asked to inspect the Property for “unregistered motor vehicles and other junk” in violation of §§ 2.20 and 10.4 of the Town’s zoning regulations. The Chumurynskis refused to allow the ZEO to inspect their property. The Town then brought an action seeking a temporary and permanent injunction to enjoin the Chumurynskis from refusing consent to an inspection of the Property.

The trial court eventually issued an order authorizing the ZEO to inspect the Property.

The Chumurynskis appealed. They claimed that the trial court’s order authorizing the zoning inspection of the Property violated their Fourth

Amendment right to be free from unreasonable searches and seizures. Specifically, they claimed that before conducting an inspection of the Property, the ZEO was required to obtain a warrant supported by a finding of probable cause.

**DECISION:** Reversed, and matter remanded.

The Supreme Court of Connecticut held zoning inspections are “searches” within the meaning of the Fourth Amendment. As such, administrative searches of residences must comply with the Fourth Amendment. When a proposed search is not part of a periodic or area inspection program, but is a targeted search, the search must be “reasonable” under the Fourth Amendment. This requirement is satisfied “when a judicial officer orders a search upon a showing by municipal authorities that probable cause exists to believe that a zoning violation will be discovered upon inspection of the premises,” said the court.

The court explained that a zoning inspection would not violate the Fourth Amendment so long as it was “reasonable.” While general, routine, area zoning inspections, required only a “relaxed” probable cause showing of a “valid public interest,” the court said that a targeted administrative search—such as in the case at hand—“demand[ed] a more particularized showing of probable cause ... .” The court said this more traditional standard of probable cause was required in targeted zoning inspections “in order to properly ‘safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges’ while simultaneously providing ‘fair leeway for enforcing the law in the community’s protection.’”

The court held that before a court may issue an order permitting a zoning enforcement officer to enter and search a particular property, there must be: “a preliminary showing of facts within the knowledge of the zoning officer and of which that officer has reasonably trustworthy information that are sufficient to cause a reasonable person to believe that conditions constituting a violation of the zoning ordinances are present on the subject property.”

The court also concluded that “an injunction is an appropriate procedural vehicle through which a municipality may seek judicial authorization to conduct a zoning inspection.”

See also: *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

See also: *Brinegar v. U.S.*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).

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**Case Note:** Because the trial court had not applied the correct standard in making its finding of probable cause, the appellate court reversed the trial court’s judgment.

*Case Note:* In its discussion, the court noted that there was a “relaxed showing” of a “valid public interest” for area zoning inspections. In the administrative context, zoning inspections that are part of a general administrative plan for the enforcement of a statutory scheme are reasonable within the meaning of the Fourth Amendment if “reasonable legislative or administrative standards for conducting an area inspection” demonstrate “a valid public interest.” “Particularized suspicion for choosing an individual residence within the area searched is unnecessary.”

## Open Meetings—Site Visit Conducted by Board of Appeals in Reviewing Special Exception Application Not Completely Open to Public

### Opponents contend site visit violated open meetings laws and violated due process

Citation: *Bowie v. Board of County Com'rs of Charles County*, 2012 WL 361987 (Md. Ct. Spec. App. 2012)

MARYLAND (02/03/12)—This case considered the due process and open meetings limitations on a site visit of an affected property by members of a county board of appeals.

**The Background/Facts:** WSG Holdings, LLC (“WSG”) leased property in Nanjemoy, in Charles County (the “County”) in Maryland. WSG intended to build an office building and other facilities related to personal security training, including: a firing range and a driving track. Because those activities were not permitted uses under the County zoning ordinance, WSG applied for a special exception. The special exception application was opposed by certain residents of Nanjemoy (the “Opponents”).

The County Board of Appeals (the “Board”) held three hearings on the matter. Board members also conducted a site visit on the WSG property. Both WSG and the Opponents were permitted to send representatives to the site visit. However, the Board prohibited others from attending. The Board did not keep minutes or a transcript from the site visit.

Eventually, the Board approved WSG’s special exception.

The Opponents appealed. Among other things, the Opponents argued that the Board’s site visit violated due process and open meetings requirements.

The circuit court rejected the Opponents’ allegations of procedural deficiencies in the site visit. Specifically, the court found the Opponents had not preserved the site visit issue for review.

The Opponents appealed. Again, among other things, the Opponents contended that the Board violated due process and open meetings requirements by conducting a meeting (i.e., the site visit) closed to some members of the public at which the merits of the case were discussed, not made a part of the record, but nevertheless were relied upon by the Board.

**DECISION:** Reversed, and matter remanded.

The Court of Special Appeals of Maryland first determined that the Opponents' objections to the site visit were preserved for the court's review. Next, the court agreed with the Opponents that, in conducting the site visit, the Board violated the State's Open Meetings statute and the Board's open meetings rule.

In so holding, the Court noted that both Rule III of the Board's Rule and the State Open Meetings Law required all meetings of a board of appeals be open to the public. In the court's view, here, the Board's site visit was a "meeting," even though it occurred in an "unconventional venue" and on private property. Accordingly, because this "meeting" was not completely open to the public, the court determined that it violated the open meeting requirements of the laws.

The court further held that the Board's failure to disclose information obtained during the site visit and to allow the Opponents to challenge evidence gathered from the site visit through cross-examination or other means constituted a denial of due process.

See also: *Heath v. Mayor and City Council of Baltimore*, 187 Md. 296, 49 A.2d 799 (1946).

See also: *Powell v. Calvert County*, 137 Md. App. 425, 768 A.2d 750 (2001), judgment rev'd, 368 Md. 400, 795 A.2d 96 (2002).

## Substantive Due Process—Flood Control Regulations Restrict Construction in Floodway

### Landowner argues regulations violate her substantive due process

Citation: *Craddock v. Yakima County*, 2012 WL 313995 (Wash. Ct. App. Div. 3 2012)

WASHINGTON (02/02/12)—This case addressed the issue of whether flood control regulations restricting construction in a floodway violated a landowner's substantive due process rights.

**The Background/Facts:** Elizabeth Craddock ("Craddock") owned Sun-Tides Mobile Home Park (the "Park") in Yakima County (the "County"). In October 2009, a mobile home on lot 17 in the Park was abandoned and in disrepair. Craddock had it destroyed. Thereafter, a construction contractor applied to the County for a construction permit

to put a used mobile home on lot 17. The County Building Official denied the permit. The denial was based on a determination that the Park was in a floodway, per a November 2009 revised FEMA map. State law, RCW 86.16.051 (Flood Plain Management Ordinances), prohibited new residential construction in floodways. The County's flood management ordinance, 16A.0520 YCC, adopted the state statute's restrictions on floodway construction.

Cradduck petitioned the court to review the County's decision. Among other things, she argued that the decision violated her rights to substantive due process.

The court agreed, finding the statutes were unduly burdensome to Cradduck. The court reversed the County's denial of the permit.

The County and the State's Department of Ecology appealed.

**DECISION: Reversed.**

The Court of Appeals of Washington, Division 3, held that the statute and ordinance, prohibiting construction in floodways, did not violate Cradduck's substantive due process rights.

In so concluding, the court applied a three-prong analysis, which asked: (1) whether the regulations were aimed at achieving a legitimate public purpose; (2) whether the regulations used means that were reasonably necessary to achieve that purpose; and (3) whether the regulations were unduly oppressive on the land owner (i.e., Cradduck).

The court found that preventing flood damage was most certainly a legitimate public purpose. The goals of the regulations (i.e., the statute and the County ordinance) were to prevent damages to private property and to protect public health and safety—thus supporting legitimate public purposes.

The court also found that the regulations used means that were reasonably necessary to achieve those purposes. Regulations met this "reasonably related" standard, said the court, if they tended to solve a public problem. Here, found the court, the statute and ordinance tended to solve the problem of reoccurring flood damage to private property with its attendant risk to public health and safety. "Prohibiting new residences from building built and prohibiting repairs to residences that are more than 50 percent destroyed in floodways tends to solve the problem of flood damage ... because there will be less reoccurring flood damage to private property if there are fewer people living in homes in the floodway."

Finally, after balancing the public interest against Cradduck's interest, the court concluded that the regulations were not unduly oppressive on Cradduck. The court found the statute and ordinance "protect[ed] the public against a serious threat on one hand, while trying to minimize burdens to floodway landowners on the other hand." The statute did not "force out those who live or work in the floodplain." Rather, it actually allowed re-

pairs of structures in floodways of up to less than 50% of the structure's value so long as the ground floor area is not increased. So, although the regulations could eventually require Craddock to give up the Park one day, she was now allowed to continue to operate the Park, only losing some income due to the floodway construction prohibition. In other words, noted the court, Craddock was not being required to directly pay for a public problem in the monetary sense. Rather, she was only being required to limit an activity that would likely contribute directly to a public problem.

Having found the regulations' construction prohibitions passed all three prongs of the substantive due process test, the court found they did not violate Craddock's substantive due process rights.

See also: *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 787 P.2d 907, 21 *Env'tl. L. Rep.* 21010 (1990).

See also: *Maple Leaf Investors, Inc. v. State, Dept. of Ecology*, 88 Wash. 2d 726, 565 P.2d 1162 (1977).

See also: *Duckworth v. City of Bonney Lake*, 91 Wash. 2d 19, 586 P.2d 860 (1978).

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**Case Note:** In its decision, the court noted that the County had valid police power to discontinue nonconforming uses: it is reasonable to prohibit the continuance of nonconforming uses after abandonment or amortization. Accordingly, the court found it similarly reasonable to prevent nonconforming uses from being newly constructed.

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## Conditional Use Permit—City Ordinance Provides Height Restrictions can be Waived by Obtaining Conditional Use Permit

County argues waiver of zoning ordinance requires a variance, not a conditional use permit

Citation: *Burns Holdings, LLC v. Teton County Bd. of Com'rs*, 2012 WL 206010 (Idaho 2012)

IDAHO (01/25/12)—This case addressed the issue of whether a conditional use permit ("CUP") could be used to waive a zoning ordinance requirement.

**The Background/Facts:** Burns Holdings, LLC ("Burns") owned a 6.5-acre parcel of property (the "Property") in Teton County (the "County")

near the City of Driggs (the "City"). The Property was located in an unincorporated part of the County that was within the City's area of impact. Pursuant to an agreement between the County and the City, the City's zoning laws applied to that area of impact, and thus the Property.

Burns sought to construct a concrete batch plant on the Property. Burns' plans included erection of a structure that was 75 feet high. The City's zoning ordinance provided that "[a]ny building or structure ... erected shall not exceed forty-five (45) feet in height unless approved by [CUP]." Accordingly, Burns applied for a CUP.

The City planning and zoning department approved the CUP to increase the height limitation on Burns' Property to 75 feet. The matter was sent to the County for its approval.

The County denied the CUP.

Burns appealed to court. For the first time, the County argued that Burns' application for a CUP had to be denied because Idaho Code § 67-6516 of the Local Land Use Planning Act ("LLUPA") required a variance in order to obtain a waiver of a zoning provision limiting the height of buildings.

The court rejected the County's argument that Burns should have applied for a variance rather than a CUP because: the ordinance allowed for a CUP; and the County's argument came too late. Nevertheless, the court upheld the denial of the CUP on other grounds.

Burns appealed.

**DECISION: Affirmed.**

The Supreme Court of Idaho did not address the issues raised by Burns on appeal. Instead, it held that a CUP could not be used to waive a provision of a zoning ordinance limiting the maximum height of buildings and structures. Height restrictions can be waived only by a variance, not a CUP, said the court. It concluded that Burns was required to seek a variance in order to obtain a waiver of the maximum height limitation in the zoning ordinance.

In so holding, the court explained that "[a] variance is a means of obtaining a waiver of certain requirements of a zoning ordinance." Idaho Code § 67-6516 of LLUPA defined a variance as:

"a modification of the bulk and placement requirements of the ordinance as to lot size, lot coverage, width, depth, front yard, side yard, rear yard, setbacks, parking space, height of buildings, or other ordinance provision affecting the size or shape of a structure or the placement of the structure upon lots, or the size of lots.

Thus, pursuant to the statute, a variance was required to waive requirements limiting the height of buildings.

In comparison, noted the court, a CUP concerns the proposed use of property, not the waiver of zoning ordinance requirements such as the maximum height of buildings. If a proposed use is not conditionally permitted in an ordinance, it is not eligible for a CUP. The waiver of a zoning ordinance restriction is not a proposed use of property, noted the court.

The court concluded that: to the extent the City's ordinance allowed waiver of the height limitations by a CUP, it violated LLUPA, and was therefore void.

The court concluded that because Burns could not obtain a waiver of the height restriction by a CUP, the County did not err in denying the CUP.

See also: *Gardiner v. Boundary County Bd. of Com'rs*, 148 Idaho 764, 229 P.3d 369 (2010).

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*Case Note:* The court found the failure of the County to raise the variance requirement until two years after the CUP application was submitted to it did not authorize the waiver of the height restriction by a CUP. The County had no authority to waive the requirements of Idaho Code § 67-6516, nor did the district court.

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## Zoning News from Around the Nation

### MARYLAND

A measure was recently introduced in the state Senate that "would allow table games like blackjack at casinos and make it possible to build a casino in Prince George's County." Currently, Maryland only allows slot machines at casinos. "The bill ... would put both the table games component of the legislation and the provision allowing a sixth casino in the state before voters in November."

Source: CBS News; <http://www.cbsnews.com>

### MASSACHUSETTS

The state's House of Representatives recently passed a bill that allows "all capped municipal landfills to serve as sites for solar projects, even if previous state capping grants had restricted their future use to recreational purposes."

Source: GazetteNet; <http://www.gazettenet.com>

## PENNSYLVANIA

The Marcellus Shale Bill—a compromise version of Senate Bill 1100 and House Bill 1950—has been passed by both chambers of the legislature and was expected to be signed by Governor Corbett. Reportedly, among other things, under the new bill, “most oil and gas operations, including frack wells, pipelines and impoundment pits ... will be required to be permitted uses in all districts. Compressor stations, processing plants and some activities at impoundment pits may be restricted from residential zones, but must be allowed as permitted uses in agricultural and industrial zones.” In residential zones, wells and drilling rigs would have to be setback 500 feet from any existing building, and well pad and impoundment pit setbacks would be 300 feet from any existing building. Localities will be prohibited from imposing restrictions on hours of operation on the drilling of wells, “subterranean operations”, or activities at compressor stations or natural gas processing plants. Additionally, an “impact fee” will be imposed on each well.

Source: *Switchboard*; <http://switchboard.nrdc.org/blogs>

## WISCONSIN

Reportedly state lawmakers are “readying legislation that would take aim at the state’s regulation of nonconforming structures, principally by allowing unlimited maintenance and repair and moving state shoreland zoning standards from administrative rule rubric to statutory standard.” The legislation is aimed at removing uncertainty as to what can and cannot be done with nonconforming structures. Among other things, the legislation would: allow property owners to perform unlimited maintenance and repair without limitations on the dollar value of such maintenance or repairs; and effectively prohibit local governments from enacting and enforcing regulations that are more restrictive.

Source: *The Lakeland Times*; [www.lakelandtimes.com](http://www.lakelandtimes.com)

## WYOMING

Sweetwater County now has a nine-month moratorium on Commercial Wind Farms. The moratorium is intended to “bring county regulation on par with state wind farm regulations.”

Source: *The Green River Star*; <http://www.greenriverstar.com>

# ZONING PRACTICE

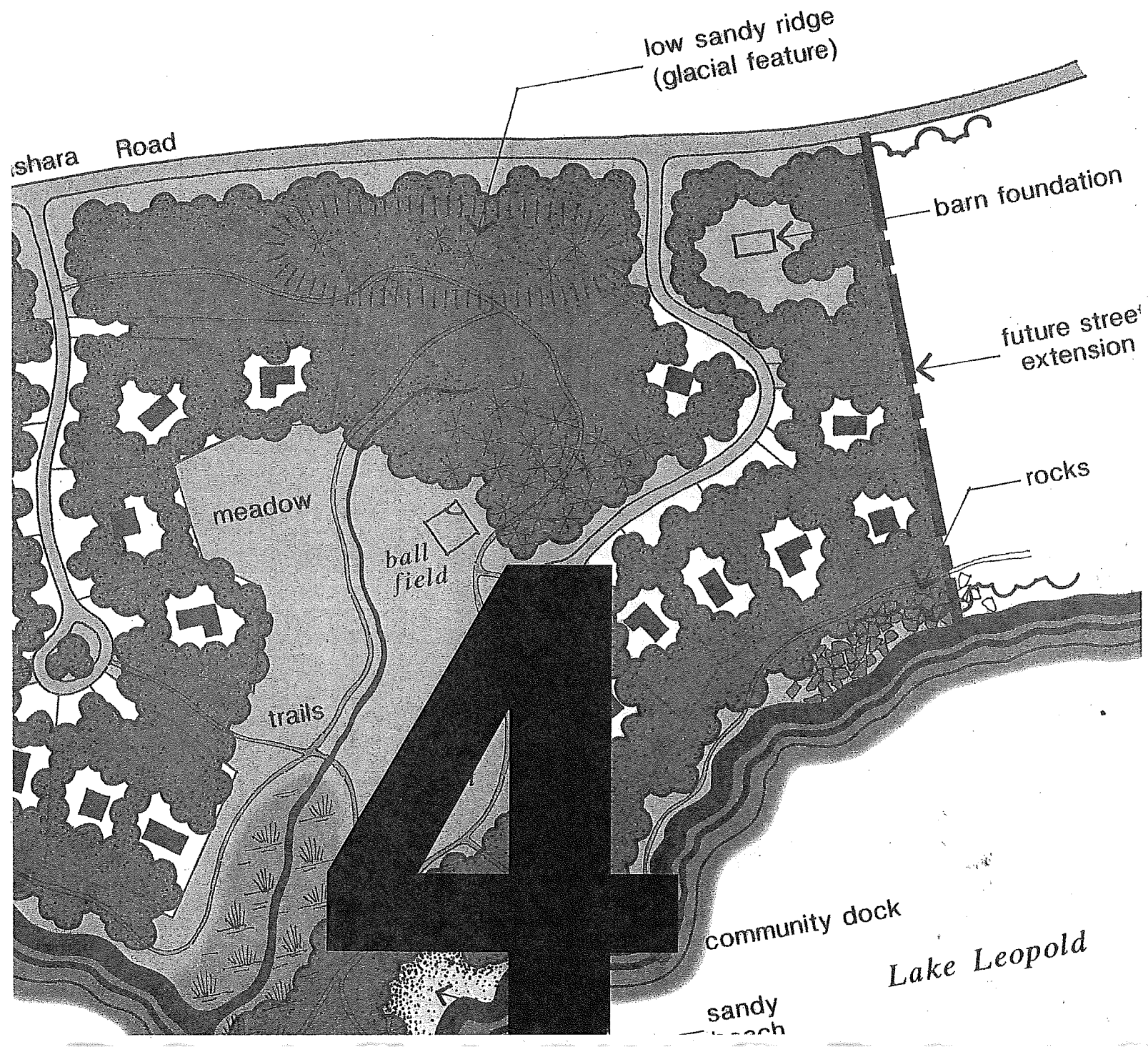
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## PRACTICE FLOOD RESILIENCY



# Promoting Flood Resiliency Through the Regulatory Process

By Terri L. Turner, AICP

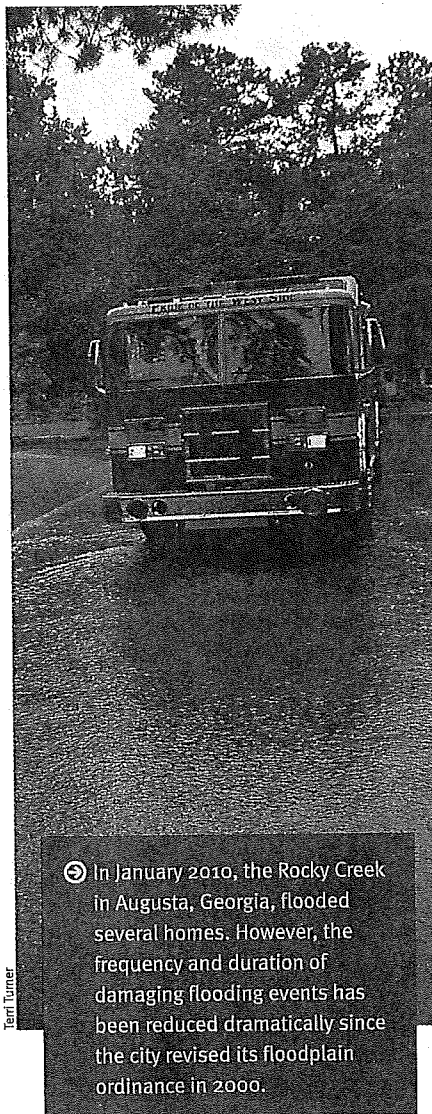
Flooding occurs in all regions of the United States and at all times of the year.

One in three disaster declarations is a result of flooding, and an increase in population, increased development in flood-prone areas, and a predicted increase in intensified rain events due to climate change will only exacerbate those numbers.

Flood resiliency can be defined as the integration of roles, responsibilities, and governance necessary to adapt to the various risks associated with flooding and the ability to withstand and rapidly recover from disruptions in function after a flood event.

Successful flood resiliency should begin at the community level with individuals taking personal accountability for their relationship to the environment around them and the associated risk that this environment can impose. Unfortunately, resiliency is, all too often, viewed by the general public as being the exclusive responsibility of local, state, or federal governments. Many mitigation and planning practitioners attribute this mindset to a lack of public outreach and education about risk and resiliency. In other words, we haven't done enough to foster a culture in which hazards, such as flooding, are identified, planned for, and then mitigated so that the vulnerability to the disaster is lessened and the community's ability to withstand and rapidly recover from the disaster is increased.

The regulatory process is an essential tool in the arsenal of fighting floods and promoting flood resiliency. Zoning, building codes, and other regulatory measures can ensure that fewer vulnerable structures are built in flood-prone areas, fewer lives are put at risk, and fewer losses, to both prop-



Terri Turner

⊙ In January 2010, the Rocky Creek in Augusta, Georgia, flooded several homes. However, the frequency and duration of damaging flooding events has been reduced dramatically since the city revised its floodplain ordinance in 2000.

erty and people, are incurred due to unwise development patterns.

## A LOOK AT THE NFIP

The National Flood Insurance Program (NFIP) was developed in 1968 as a part of the National Flood Insurance Act. The NFIP is a voluntary agreement between the federal government and participating communities in which the federal government offers subsidized flood insurance to communities that agree to adopt and enforce a flood ordinance that, at a minimum, meets the federal standards to reduce future flood risk to new construction in floodplains. Flood insurance, now provided to nearly 20,000 communities across the United States through the NFIP, was designed to provide an insurance alternative to disaster assistance and also to reduce the escalating costs of repairing damage to buildings and their contents after a flood event. Buildings constructed in accordance with minimum NFIP building standards suffer approximately 80 percent less damage annually than those buildings not built in compliance with the minimum standards.

Without homes and workplaces that are resilient to natural disasters, there is no chance of a sustainable local economy. While the NFIP has been the most cost-effective hazard mitigation tool in the history of this nation, flood losses in the United States continue to worsen. In fact, these increasing flood losses can be attributed, in part, to federally backed flood insurance that encourages at-risk development in the Special Flood Hazard Area (SFHA). Consequently, there is still a gap in land-use regulation

## ASK THE AUTHOR JOIN US ONLINE!

Go online during the month of April to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. Terri L. Turner, AICP, will be available to answer questions about this article. Go to the APA website at [www.planning.org](http://www.planning.org) and follow the links to the Ask the Author section. From there, just submit your questions about the article using the e-mail link. The author will reply, and Zoning Practice will post the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of Zoning Practice at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA Zoning Practice web pages.

### About the Author

Terri L. Turner, AICP, is the development administrator/floodplain manager/hazard mitigation specialist for the Augusta Planning & Development Department in Augusta, Georgia, as well as the No Adverse Impact Committee Cochair and the Region 4 Director of the Association of State Floodplain Managers. She is an ASFPM Certified Floodplain Manager.

that must be filled in order to promote flood resiliency.

### PLANNING FOR FLOOD RESILIENCY

The purpose of the local comprehensive plan is to articulate a long-term community vision for growth and change. Consequently, it is important for the comprehensive plan to address the community's propensity to hazards and the likely effects of climate change on the overall makeup of the community. The plan should also include goals and policies to promote community resiliency. While comprehensive plans are not law, most states require local development regulations to be in conformance with the vision presented in the plan.

Another important document for promoting flood resiliency is the climate action plan, which may be a stand-alone plan or adopted as an element of the local comprehensive plan. The purpose of a climate action plan is to outline mitigation and adaptation strategies to help the community cope with changing climate conditions, such as a higher frequency of extreme storm events.

Similarly, hazard mitigation plans form the foundation for a community's long-term strategy to reduce disaster losses. Communities that embrace the mitigation planning process generally recover rapidly from floods and other disasters and thus are found to be more prepared, sustainable, and resilient places to live and work. Furthermore, a 2005 study conducted by the Multihazard Mitigation Council concluded that every dollar spent on mitigation saves

society an average of four dollars on damage and recovery.

### FLOODPLAIN MANAGEMENT ORDINANCES

The single most important local regulatory tool for flood resiliency is the floodplain management ordinance. Successful floodplain management ordinances typically exceed the minimum standards of the NFIP and include, but are not limited to, provisions addressing the following:

- Increased freeboard
- Higher protection standards for critical facilities (e.g., hospitals, schools, and government buildings)
- Prohibitions against hazardous materials in the SFHA
- Prohibitions against relocating channels or watercourses or erecting barriers that cause an impact to flood heights both up- and downstream
- Prohibitions against fill in the SFHA
- Requirements for compensatory storage in the floodplain
- Mapping and regulating areas known to flood, or where there is historical evidence of flooding, that are not mapped on the Flood Insurance Rate Map (FIRM)

- Preservation of parts of the community's floodplains as open space
- Higher regulatory standards for riparian areas (riparian buffers)
- Habitat protection
- Designation of Coastal High Hazard Areas and associated regulatory requirements such as planned development requirements or clustering requirements
- Zero-rise (regulatory) floodways

It is important for the comprehensive plan to address the community's propensity to hazards and the likely effects of climate change on the overall makeup of the community.

- Designation of planning areas with special objectives, which may include protection and preservation of fishery and wildlife habitats, scenic and recreational areas, and other natural resources.

Many of these provisions are found in the Community Rating System (CRS)—a voluntary incentive program of the NFIP, which recognizes and encourages floodplain management activities that exceed the minimum standards of the NFIP. The aim of the program is to reduce and avoid flood damage to insurable property, strengthen and support the insurance aspects of the NFIP, and to foster comprehensive floodplain management. The "reward" to those

communities that successfully implement the higher regulatory standards found in the CRS is lower flood-insurance premiums for the property owners in the community. CRS discounts on flood insurance range from five to 45 percent and are based on the classification the community receives based on the effectiveness of their local program. Activities that increase the community's public safety, reduce property damage, avoid economic disruption and loss, and protect the environment may be counted for CRS credit. Additionally, the program encourages innovative ways to prevent or reduce flood damage.

(2000) floodplain areas and the newly projected floodplain, the county discovered there would be an estimated \$333 million in additional damages under maximum build out. In response to these findings, the county revised its zoning code and land-use regulations based on the projected change in the floodplain. A new minimum base flood elevation for future development (one foot above the level to which flood waters are expected to rise) and set of stream setback requirements limit development to areas outside of the floodplain and protects against losses from future flooding.

nances or added to the zoning code as an overlay.

**Iowa City, Iowa**

Iowa City adopted its current SAO in 2005. With respect to flood hazard areas, the SAO establishes a 50-foot buffer between development activity and the Iowa River floodway; a 30-foot buffer between development and floodways of tributaries to the Iowa River; and 15-foot buffers on either side of an assumed 30-foot-wide stream corridor for blue-line tributaries without a delineated floodway. The SAO increased distances between development activity and bodies of water and remains an effective means of preserving flood storage areas, reducing the likelihood of flood damage to structures, and providing opportunities for recreational trails and open space.

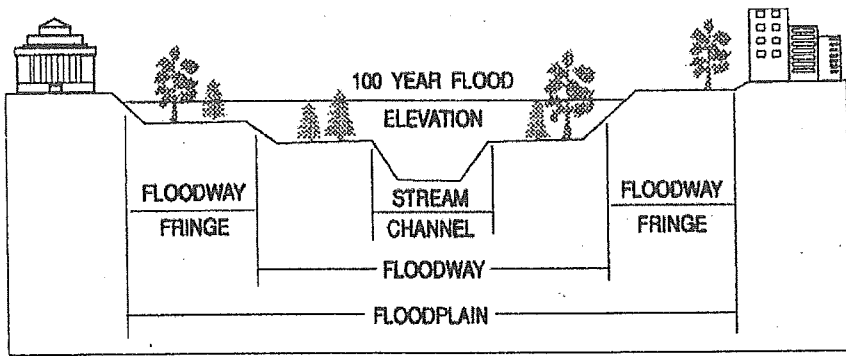
In 2010 Iowa City incorporated new floodplain management standards into its zoning ordinance. According to Julie Tallman, Iowa City's developmental regulation specialist, "having been employed at City Hall since 1993, it is my opinion that the combination of our SAO and the new floodplain regulations have strengthened our ability to preserve the natural functions and beauty of the surrounding landscape, reduce the potential risk to structures, and protect our population."

**STORMWATER MANAGEMENT ORDINANCES**

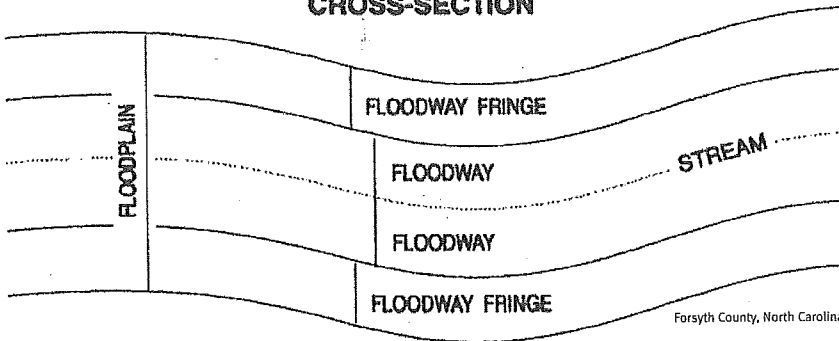
A number of communities use stormwater management ordinances (SWMOs) to regulate the amount of stormwater runoff that can leave new developments. SWMOs often require higher runoff standards in watersheds and basins with a propensity to flood. Additionally, the SWMO may require higher standards for best management practices (BMPs) and higher standards for protecting natural and beneficial functions of water courses that far exceed the state or federal standards. This may include provisions such as stream buffers, which prohibit disturbing vegetation along the banks of a watercourse. In many states this buffer is regulated as part of the state's National Pollutant Discharge Elimination System program.

**BUILDING CODES**

Communities can also incorporate higher standards into their building codes to promote flood resiliency. Requiring new buildings to be constructed on flow-through



**CROSS-SECTION**



**PLAN VIEW**

➡ In order for property owners to be eligible for flood insurance through the NFIP, community floodplain ordinances must restrict all building in the floodway and must require all habitable structures to be raised above the 100-year flood elevation.

**Charlotte-Mecklenburg, North Carolina**

In Charlotte-Mecklenburg County, North Carolina, planners have used their current land-use zoning regulations to analyze maximum build out of future development and how the potential development will affect current floodplain designations. Comparing the potential flood damages that would likely occur under the maximum build-out scenario with both the current

**SENSITIVE AREAS ORDINANCES**

Many communities have areas of special environmental sensitivity, such as wetlands, frequently flooded areas, aquifer recharge zones, fish and wildlife habitat corridors, and geologically sensitive areas. To guard these features some communities adopt sensitive area ordinances (SAOs) to limit development on or near sensitive lands. SAOs may be stand-alone ordi-

foundations rather than on fill is useful for floodwater storage. Local building codes may also require an increased elevation standard (freeboard) above the base flood elevation. This ensures that structures are elevated on properly designed and constructed foundations and have the required flood openings and will result in lower flood insurance premiums.

Furthermore, having a Building Code Effectiveness Grading Schedule classification of 5 or better from the Insurance Services Office or having adopted all or part of the higher regulatory standards of the International Building Code may be a vital tool in promoting flood resiliency in the community. Another source for more stringent building code requirements is the American Society of Civil Engineers' (ASCE)

### CONSERVATION SUBDIVISION STANDARDS

In a conservation subdivision, the residential density is typically the same or, in some cases, higher than in a conventional subdivision. However, in a conservation subdivision the residential units are clustered together on smaller lots, leaving a large percentage of the total site undisturbed. Steering development away from the floodplain and other environmentally sensitive areas of a site without reducing the potential density of the site can be a politically palatable way to reduce potential flood damage and help maintain flood storage and conveyance capacity. Consequently, many communities have adopted provisions sanctioning conservation design in either their subdivision or zoning ordinances.

Augusta's decisions to accept greenspace from conservation subdivisions are based, in part, on the city's community greenspace plan. The state of Georgia's Community Greenspace Program provides funding to help urban and rapidly developing cities and counties set aside 20 percent of their land as permanent open space. As part of Augusta's participation in this program, the city has adopted a community greenspace plan that includes policies and specific proposals to provide permanent protection of environmentally sensitive areas.

### OVERLAY DISTRICTS

Overlay districts superimpose additional regulations on underlying mapped zoning districts. Like conventional zoning districts,



Wikimedia Commons/Phil Guest

Myrtle Beach uses its Coastal Protection zoning overlay to limit new development seaward of the 50-year erosion control line.

Flood Resistant Design and Construction standard (ASCE 24-05). ASCE 24-05 requires a one-foot freeboard for most structures and up to three feet for critical facilities. Compliant building codes also

- account for instability and decreased structural capacity associated with erosion, scour, and shoreline movement as part of foundation design for buildings in coastal areas and
- prohibit construction of structures in certain high-risk areas such as alluvial fans, flash-flood areas, mudslide areas, erosion-prone areas, high-velocity-flow areas, and ice-jam and debris areas.

### Augusta, Georgia

Augusta's zoning ordinance permits conservation subdivisions in a number of low-density residential districts by right when all lots are at least 60 percent of minimum district lot sizes and by special exception when one or more lots are less than 60 percent of minimum district lot sizes. To qualify, the minimum tract size must be 20 acres and a minimum of 40 percent of the overall acreage of the tract must be permanently protected as greenspace. The developer may either dedicate the greenspace to a public entity, a home owners' association, or a land trust, subject to approval of a greenspace management plan by the city.

overlays consist of both mapped boundaries and zoning text. The boundaries of an overlay may not correspond to the boundaries of underlying zoning districts or even to parcel boundaries. For example, many communities use zoning overlay districts to protect floodplains and riparian areas whose boundaries seldom follow property lines.

### Overlays in Vermont

Communities in Vermont often use flood hazard districts to impose additional site and building standards for development located within a mapped flood hazard area. Similarly, a number of counties in Vermont use fluvial erosion hazard corridor overlay

## GLOSSARY

- *Base Flood Elevation (BFE)* is the computed elevation to which floodwater is anticipated to rise during the one percent annual chance flood (the base flood). The BFE is the regulatory requirement for the elevation or the floodproofing of structures, both commercial and residential. The relationship between the BFE and a structure's existing elevation determines the flood insurance premium.
- *Coastal High Hazard Areas (CHHA)* is the area of special flood hazard extending from offshore to the inland limit of a primary frontal dune along an open coast and any other area subject to high-velocity wave action from storms or seismic sources. The CHHA is identified as Zone V on Flood Insurance Rate Maps (FIRMs). Special floodplain management requirements apply in V Zones, including the requirement that all buildings be elevated on piles or columns.
- *Compensatory storage* is that area that is required, for storage of floodwaters, to offset the impacts of buildings, fill, and impervious surfaces within the floodplain.
- *Flood Insurance Rate Map* is a map on which the 100-year (one percent annual chance) and the 500-year (0.2 percent annual chance) floodplains, Base Flood Elevations (BFEs), and regulatory floodways are delineated to enable insurance agents to accurately rate flood insurance policies for home owners and business owners in communities participating in the National Flood Insurance Program.
- *Freeboard* is a factor of safety, usually expressed in feet above a known flood level, for purposes of floodplain management, and usually expresses the height above the BFE at which insurable structures must be built.
- *Regulatory floodway* means 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 more than a designated height. Communities must regulate development in these floodways to ensure that there are no increases in upstream flood elevations.
- *Special Flood Hazard Area* is the area subject to inundation by a flood that has a one percent or greater chance of being equaled or exceeded during any given year. This type of flood is commonly referred to as the "100-year flood" or the "base flood".
- *Zero-rise (regulatory) floodways* is a designated regulatory floodway where no increase in flood heights occurs during the base flood, even those increases that are negligible and do not change the BFE. In communities that use a zero-rise floodway, the Federal Emergency Management Agency floodway is generally enlarged to include almost the entire floodplain. Fill and other encroachments are not allowed in the zero-rise floodway.

districts to prohibit new structures and fill in the SFHA. Additionally, in Calais, Vermont, the use of large lot sizes in the city's Upland Overlay District protects sensitive upland areas from the adverse effects of inappropriate or high-density development.

### Myrtle Beach, South Carolina

Myrtle Beach uses its Coastal Protection (CP) overlay zone to control erosion, preserve and maintain a recreational beach, safeguard property, and promote public safety. The overlay prohibits seawalls and new structures in an area bound by the top of the primary frontal dune system adjacent to the Atlantic Ocean and marked landward by drawing a line parallel to the primary frontal dune line equivalent to 50 times the annual beach erosion rate (which exceeds the state standards by 10 times the erosion rate). The regulations apply to all oceanfront property, with slight exemptions given to two historic pier structures located in the city limits. According to Allison Hardin, the city's planner and former floodplain manager, "in cases of reconstruction, if retreat is not possible, it is intended that existing buildings may be replaced without exceeding the gross square footage of the existing building and without any portion of the footprint of the building located in the CP district being exceeded."

### TRANSFER OF DEVELOPMENT RIGHTS

Transfer of development rights (TDR) is a land preservation tool wherein a property owner yields some or all of the right to develop or use his or her property in exchange for the right to develop or use another parcel of property more intensively. Communities with TDR programs designate sending areas (where development rights can be purchased) and receiving areas (where purchased development rights can be applied).

### Kent County, Delaware

Kent County has had a TDR program, administered by its planning department, since 2005. Under the county's program, participants must record an irrevocable preservation easement to memorialize the separation of the development rights from the property. Property owners who have transferred development rights from their land may continue to use the land for any purpose or use permitted by right by their zoning district *except* residential subdivision. While ownership of the land may be transferred, the residential development restriction remains with the land in perpetuity.

## ENGINEERING CERTIFICATIONS

Finally, some communities, such as DuPage County, Illinois; Greenville, South Carolina; and Arlington, Texas, require engineering certifications to insure adherence to sound floodplain management standards. Bill Brown of the City of Arlington describes the theory: "Requiring strong technical analysis and establishing technical performance standards goes a long way to facilitate development that is safer from flood risks, while avoiding the takings issues." As Brown explains, the city is not saying *no*, but by imposing this certification requirement, some projects that would otherwise proceed become financially impractical. "The traditional method of zoning has limited liability at best," says Brown. "The strong technical analysis and performance standards that are signed by a licensed professional carry (personal and professional) liability."

## THE TAKINGS ISSUE

Obviously, there are many regulatory tools at the community's disposal to oversee development and promote flood resiliency. Sadly, many communities fail to adequately regulate through zoning or other regulatory mechanisms, in relation to flood prevention, for fear of the takings issue. Yet a failure to regulate may set a community up for common law liability suits.

According to a 2008 article by Edward A. Thomas and Sam Riley-Medlock in the *Vermont Journal of Environmental Law*, there have only been a handful of successful challenges to floodplain regulations as a taking. In those cases, a nearly complete prohibition of building on the property was found to have occurred with no clearly demonstrated hazard-related benefit for the community. The Thomas-Medlock research concluded that the trend is for the courts to sustain government regulation of hazardous activities for the prevention of harm.

In communities that fail to adequately administer their own regulations, however, governments have been held liable for negligence or nuisances where the government has issued a development permit that increased flood heights, flood magnitudes, or flood intensity on other property. In research prepared for the Association of State Floodplain Managers (ASFPM) Foundation, Jon Kusler explained that courts have supported regulations that exceed the NFIP standards, provided those regulations were enacted in furtherance of public safety and do not deny all use.

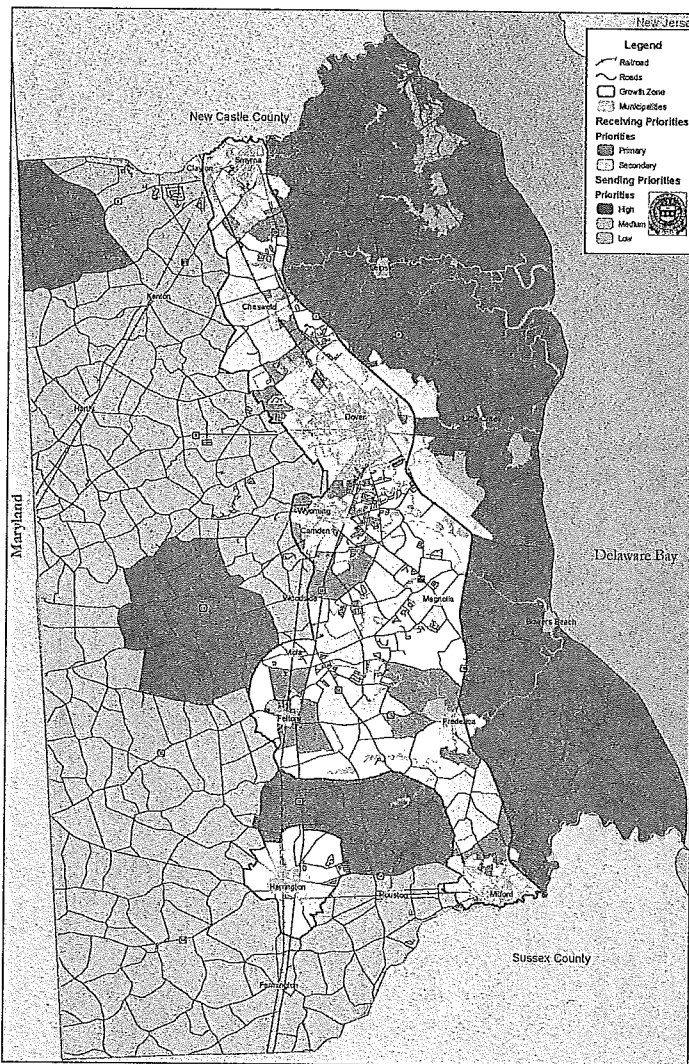
**LOOKING FORWARD WHILE LOOKING BACK**

Local governments are challenged daily to regulate hazardous locations, while at the same time being sensitive to the deep and abiding concerns of the property-rights movement. Many believe that the answer is in 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." One thing upon which virtually all legal philosophers agree is that nobody possesses a right to use their land to harm others.

ASFPM has developed a philosophy 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). ASFPM defines NAI 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.

In 1543, when Hernando De Soto's expedition observed the earliest recorded significant flood of the Mississippi River, they noted that the indigenous communities "built their houses on the high land, and where there is none, they raise mounds by hand and here [took] refuge from the great flood." Fast forward from 1543 to modern day, where, in the last 100 years, more than 9,000 people have died as result of inland flooding in the United States.

Obviously, the nation must rethink its basic approach to flood-risk reduction and floodplain management. Roles must be defined, responsibilities must be assigned, and governance, via the regulatory process, must be at the forefront of all we do within the community in order to adapt to the various risks associated with flooding and in order to have the ability to withstand and rapidly recover from disruptions in function after a flood event. What we do today can shape the future of our communities, in terms of flood resiliency, and significantly impact the lives of millions of Americans. We have a conscious choice: Do we take personal responsibility and move forward, carefully and cautiously, adapting our regulations to promote flood resiliency as we proceed, or do we continue on the path of least resistance, perpetuating the cycle of build-damage-rebuild-damage, that far too many communities have traveled on in the past?



➔ Kent County, Delaware, uses a transfer of development rights program to preserve land outside of the county's designated growth zone.

Cover Image: Conservation design encourages the protection of environmentally sensitive areas without reducing residential densities. Source: Randall Arendt

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AMERICAN PLANNING ASSOCIATION

205 N. Michigan Ave.  
Suite 1200  
Chicago, IL 60601-5927

1030 15th Street, NW  
Suite 750 West  
Washington, DC 20005-1503



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Tim Gladhill  
City of Ramsey  
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