

Acknowledgements

This summary was prepared for the Association of State Floodplain Managers (ASFPM) by Jon Kusler, Esq., Associate Director of the Association of State Wetland Managers. Preparation involved a review of the legal literature on floodplain regulations as well as the last 15 years of federal and state case law concerning floodplain regulations. Detailed reviews of cases from the period 1960–1990 were prepared by Kusler in an earlier document.

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COMMON LEGAL QUESTIONS ABOUT FLOODPLAIN REGULATIONS IN THE COURTS



COMMON LEGAL QUESTIONS

Have courts continued to uphold the overall constitutionality of state and local floodplain regulations?

Yes. Courts at all levels, including the U.S. Supreme Court, have broadly and repeatedly upheld the general validity of floodplain regulations in the last 15 years. They have, however, held regulations as unconstitutional “takings” of private property in several cases where certain regulations, not clearly based on principles of hazard prevention or “no adverse impact,” denied all economic use of lands, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) or permitted the public to enter private property, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Does general validity mean that regulations are valid for all properties?

No. A landowner may attack the constitutionality of regulations as applied to his or her property even where regulations in general are valid. Regulatory agencies need to be able to support the validity of the regulations as applied to particular properties. However, the overall presumption of validity for regulations and a presumption of correctness for regulatory agency information gathering and regulatory decisions help the agency meet its burden of proof. Courts have broadly supported state and local floodplain regulations as applied to particular properties. A court decision that regulations are unconstitutional as applied to specific property will not necessarily determine site-specific constitutionality or unconstitutionality as applied to other properties.

Has judicial support for floodplain regulations weakened in recent years?

No. Quite the contrary. The U.S. Supreme Court has recently issued a series of opinions strongly endorsing planning to prevent damage from hazardous development. State courts continue to strongly uphold floodplain regulations in the more than 125 appellate cases over the last decade, including many challenges to regulations as “takings” of private property. See, for example:

- *Beverly Bank v. Illinois Department of Transportation*, 579 N.E.2d 815 (Ill. 1991), in

which the court held that the Illinois legislature had the authority to prohibit the construction of new residences in the 100-year floodway and that a taking claim was premature

- *State of Wisconsin v. Outagamie County Board of Adjustment*, 532 N.W.2d 147 (Wis. App., 1995), in which a variance for a replacement fishing cottage in the floodway of the Wolf River was barred by the county’s shoreland zoning ordinance
- *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, et al.*, 94 N.Y. 2d 96 (N.Y., 1999), in which the court rejected the claim that the rezoning of a 150-acre golf course property important for flood storage from “residential” to “solely recreational use” was a taking of private property
- *Wyer v. Board of Environmental Protection*, 747 A.2d 192 (Me., 2000), in which the denial of a variance to sand dune laws was held not to be a taking because the property could be used for parking, picnics, barbecues, and other recreational uses.

At the same time there is a national movement, referred to by some commentators as the “property rights movement,” which supports landowners who challenge regulations. Courts are examining floodplain regulations with greater care than they did a decade ago.

What have been the most common challenges to regulations in the last 15 years?

The most common challenges to regulations have been claims that regulators permitted construction that later caused harm. There are dozens of cases that allege damage caused by development that caused problems. On the other hand, there are very few cases that allege unconstitutional over-regulation of property. Those few include: 1) challenges to floodway regulations and floodway restrictions; 2) coastal dune and high hazard area restrictions, and buffer and setback requirements; and 3) variances and regulations for nonconforming uses. Generally speaking, courts have broadly upheld these hazard prevention restrictions against claims that they take private property without payment of just compensation, have been adopted to serve invalid goals, are unreasonable (lack adequate nexus to goals) or discriminate.

May local governments regulate floodplains without express statutory authority to do so?

Yes. Courts have upheld local floodplain zoning regulations adopted as part of broader zoning. Courts have also, in some cases, upheld local floodplain ordinances adopted pursuant to “home rule” powers. But this is rarely an issue since states have broadly authorized local governments to adopt floodplain regulations.

May a local government adopt floodplain regulations that exceed state or federal (National Flood Insurance Program) minimum standards?

Yes. Local government regulations may exceed both state and federal regulations. There is no preemption issue. The National Flood Insurance Program regulations specifically encourage state and local regulations that exceed federal standards (see 44 *CFR* §60.1(d)).

May states and local governments regulate some floodplains and not others?

Yes. Typically states and local governments only regulate mapped floodplains.

Are the factual determinations of federal, state, or local floodplain regulatory agencies (e.g., mapping of floodways and flood fringe boundaries) presumed to be correct?

Yes. The burden is on landowners to prove their incorrectness. Courts overturn agency fact-finding only if they find that such fact-finding lacks “substantial evidence.” Courts are particularly likely to uphold factual determinations of federal and state “expert” agencies. However, courts look more closely at the adequacy of the information-gathering in instances where regulations have severe economic impact on specific properties.

How closely must regulatory standards (including conditions) be tailored to regulatory goals?

Courts have broadly upheld floodplain and other resource protection regulations against challenges that they lack reasonable nexus to regulatory goals. But, as indicated above, courts have required a stronger showing of nexus where regulations have essentially extinguished all value in the property. They also increasingly require a showing that conditions attached to regulatory permits are “roughly proportional” to the impacts posed by the proposed activity if dedication of

lands is involved, see *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Must a regulatory agency accept one mapping or other flood analysis method over another?

No. Not unless state or local regulations require the use of a particular method. Courts have afforded regulatory agencies considerable discretion in deciding which scientific or engineering approach to accept in fact-finding as long as the final decision is supported by “substantial” evidence. Also, courts have held that regulatory agencies do not need to eliminate all uncertainties in fact-finding.

Does an agency need to follow the mapping, floodway delineation or other technical requirements set forth in its enabling statute or regulations?

Yes. Agencies must comply with statutory, administrative, regulatory and ordinance procedural requirements. They must also apply the permitting criteria contained in statutes and regulations.

Are floodplain and floodway maps invalid if they contain some inaccuracies?

No. Courts have upheld maps with some inaccuracies, particularly if there are regulatory procedures available for refining map information on a case-by-case basis.

Can landowners be required to carry out floodplain delineations on impacts of proposed activities on flood elevations or provide various types of floodplain assessment data?

Yes. Courts have held that regulatory agencies can shift a considerable portion of the assessment burden to landowners and that the amount of information required from a landowner may vary depending upon the issues and severity of impact posed by a specific permit. And, agencies can charge reasonable fees for permitting. But the burdens must be reasonable and courts may consider the costs of such data gathering to be relevant to the overall reasonableness of regulations and whether a taking has occurred.

May a regulatory agency be liable for issuing a regulatory permit for an activity that damages other private property?

Yes, quite possibly. In fact a careful analysis of hundreds of cases in which the lawsuit involved

permitting indicates that a municipality is vastly more likely to be sued for issuing a permit for development that causes harm than for denying a permit based on hazard prevention or “no adverse impact” regulations. The likelihood of a successful lawsuit against a municipality for issuing a permit increases if the permitted activity results in substantial flood, erosion or other physical damage to other private property owners. However, some states specifically exempt state agencies and local governments from liability for issuing permits.

Do local governments need to adopt comprehensive land use plans before adopting floodplain regulations?

Statutes authorizing local adoption of floodplain ordinances and bylaws do not require prior comprehensive planning. However, many local zoning enabling acts require that zoning regulations be in accord with a comprehensive plan. Traditionally courts have not strictly enforced this requirement and have often found a “comprehensive plan” within the zoning regulations.

Courts have also endorsed comprehensive planning and regulatory approaches as improving the rationality of regulations although they have also upheld regulations not preceded by such planning in many instances.

Under what circumstances is a court most likely to hold that floodplain regulations “take” private property?

Courts are likely to find a “taking” in circumstances where: 1) the regulation is not clearly based on hazard prevention or “no adverse impact;” 2) regulations deny all “reasonable” economic uses of entire properties, that is, the value of the property is reduced to zero or very near zero; or 3) proposed activities will not have offsite “nuisance” impacts. Landowners are also more likely to succeed if the property owner purchased the land before adoption of the regulations.

Are highly restrictive floodplain regulations, including buffers and large lot sizes, valid?

Courts have upheld highly restrictive floodplain regulations in many contexts, particularly where a proposed activity may have nuisance impacts on other properties. However, courts have also held floodplain regulations to be a “taking” without payment of

compensation in a few cases (mostly older) where the regulations denied all economic use of entire parcels of land and there was no showing of adverse impact on other properties.

Would a no adverse impact performance standard incorporated in local or state regulations be sustained by courts?

Yes. Courts are very likely to support this standard if it is reasonably and fairly applied and if government agencies take measures to avoid successful “takings” challenges where regulations deny all economic, non-nuisance-like uses for entire properties.

How can a local government avoid successful “takings” challenges?

Local governments can help avoid successful “takings” challenges in a variety of ways:

- Apply a no adverse impact floodplain management performance standard fairly and uniformly to all properties.
- In local regulations, include special exception and variance provisions that allow the regulatory agency to issue a permit in instances where denial will deprive a landowner of all economic use of his or her entire parcel **and** the proposed activity will not have nuisance impacts.
- For floodplain areas, adopt large-lot zoning, which permits some economic use (e.g., residential use) on the upland portion of each lot.
- Allow for the transfer of development rights from floodplain to non-floodplain parcels.
- Fairly tax and levee assessments based on what development will actually be allowed.