II. No Adverse Impact and the Law

This is an excerpt from the ASFPM No Adverse Impact Legal Guide for Flood Risk Management.

The entire document is available at no.floods.org/NAI-Legal

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II. No Adverse Impact and the Law

II.A. Lawsuits

The United States has long been known as a litigious nation. Issues involving flooding, floodplains, and land use controls related to these issues have contributed their fair share of lawsuits to our judicial system. When government causes flooding, property owners think that government caused flooding, or property owners believe that government regulation has gone "too far" in trying to address flooding, lawsuits may result. In fact, lawsuits are often difficult to avoid and will be even more so in the future as climate change and sea-level rise exacerbate flooding and increasingly overwhelm drainage and flood-protection infrastructure.

Floodplain managers already understand this; a 2021 survey of members of the Association of State Floodplain Managers demonstrated real concern about liability for their activities. "Liability" is defined as being legally responsible for something. How liability may apply to local governments in the context of flooding varies greatly, but one common thread arises: for local government to be held liable, someone has to sue the local government. Here we provide a very brief introduction to lawsuits for the general public, noting that this Legal Guide is designed to help floodplain managers, planners, and other appointed and elected state and local government officials communicate more effectively with their lawyers even as the legal analyses also serve as a resource for lawyers seeking to assist their client governments in avoiding liability related to flooding or activities designed to decrease flood risk.

To state the obvious: local governments should, when reasonable, try to avoid lawsuits. However, it is not necessarily always reasonable for a local government to avoid a lawsuit. For example, it may be unreasonable to avoid a lawsuit if the only way to do so is to not enact regulations that help protect people and property from flooding. The desire to protect public health and safety and protect property should be balanced by a desire to avoid lawsuits since lawsuits can come with many drawbacks. For example, there is a saying in law that "Bad facts make for bad law." To avoid this, local governments should be certain that their processes are clear, open, understandable, reasonable, and defensible under the law.

Lawsuits can cost local governments dearly. Even when local government wins, lawsuits related to flooding or infrastructure impacts can still prove costly to local governments. Win or lose, lawsuits are expensive and consume scarce local resources. However, this does not mean that local governments and floodplain managers need to lose most of those lawsuits. Careful attention to floodplain management, design and placement of development, drainage system requirements, maintenance procedures for the local stormwater systems, and good

communication with citizens can all decrease the likelihood of a local government facing a lawsuit and possibly losing.

It is so hard for local governments to avoid lawsuits because anyone can bring a lawsuit. When a person—or business entity—believes that it has been harmed by government action, the person or entity may file a lawsuit. The lawsuit will require a legal theory that supports why the defendant should be liable in some way to the person bringing the lawsuit, the plaintiff.

Most lawsuits related to flooding and floodplain management issues are either brought under tort law or under constitutional or statutory protections for private property rights. Much of the substance of the law of torts is created, defined, amended, and applied through adjudication; this is also known as being "judge-made" or "common" law. For someone to call upon a lawyer for help, they must: be aware of possibly having a valid claim of "injury" or wrong; decide to pursue that claim; be unable or unwilling to handle the matter without the assistance of legal representation; and be willing to incur the costs—both pecuniary and psychological—of invoking the legal process.

Protections of private property rights exist in the U.S. Constitution, state constitutions, and sometimes in state statutes. While some states may use the same legal standards and case law as the U.S. Supreme Court uses in its jurisprudence on property protections appearing in the Fifth Amendment to the U.S. Constitution, other states may use different standards in their constitutions or have additional protections in state statutes.

Lawsuits may include more than one legal theory, meaning that a plaintiff may file a lawsuit that argues both a tort and a violation of private property protections. In fact, the legal complaint that begins a lawsuit may even include legal theories that contradict one another.

Once the complaint is submitted or filed with a court of competent jurisdiction, the party or parties against whom the complaint is filed, the defendant(s), have an opportunity to respond to or "answer" the complaint. The court may allow these "pleadings" to be amended numerous times until the pleadings of the parties are "perfected." These pleadings constitute the controversy that the court is convened to adjudicate. There are also numerous opportunities for the parties to "settle" the controversy between or among themselves without court action. A settlement may or may not be memorialized by the court, depending on the disposition of the case at the time of settlement. Courts generally prefer the litigants settle the matter among themselves and will promote that disposition throughout the legal process. As appropriate, "discovery" will also take place after pleadings are submitted and before trial.

If no settlement is reached between or among the parties, a trial will be scheduled, at which time the court will hear testimony from the litigants, sworn witnesses, subject matter experts, and anyone else that the court or the litigants believe will assist in the just resolution of the matter in controversy. Once the testimony has been received, legal arguments have been made and closed, and the parties' lawyers "rest" their case arguments, the court—whether judge or jury—renders a "verdict," or decision.

Decisions of lower courts can be appealed to higher, appellate courts, who may uphold, revise, or reverse a lower court decision. Appellate cases are generally published and compiled or "reported" and added to the corpus of the common law. Controversies that rise to the level of the United States Supreme Court ("the Court") are the primary focus of this version of the Legal Guide. It is hoped that as time goes by and floodplain managers and their collaborating lawyers utilize this Guide, they will report the results of relevant litigation of local and state prominence to help expand the purview of this Guide as ASFPM maintains it as a living document.

II.B. Venue – state courts, federal district courts, and federal court of claims

II.B.1. Introduction to the Court System and Jurisdiction

This section provides a very brief introduction to basics of the U.S. court system with links to a limited section of information for attorneys representing floodplain managers to consider in advising floodplain managers, especially when the local governments represented by floodplain managers and their attorneys are confronted with threatened or actual litigation.

Before considering the overall structure of court systems in the United States, it is important to understand the varying sources of law in the United States as context. The three primary sources of law in the United States are constitutions, statutory law (e.g., federal statutes, state statutes, agency regulations, and local ordinances), and "common law."[16] Common law is the "body of law derived from judicial decisions and opinions rather than from statutes or constitutions."[17] Common law is applied when no specific statutes control. The tendency has been to increasingly replace the common law by writing statutes that either codify existing common law principles or supersede them by legislatures creating statutes that modify the common law rules.

The United States' federal form of government includes sovereignty at both the state and federal levels. This includes separate court systems at federal and state levels.[18] To hear cases, courts must be able to exercise "jurisdiction." There are many types of jurisdiction that give courts power over cases; one legal dictionary lists 25 sub-types of jurisdiction.[19] Here, the focus is strictly on subject matter jurisdiction, which is a type of jurisdiction "over the nature of the case and the type of relief sought."[20]

[16] In addition to statutory and common law, regulations represent a different type of law not specifically addressed here.

[17] Bryan A. Garner, Black's Law Dictionary, Pocket Edition 113 (West Publishing 1996).

[18] State court systems include state-system courts at the municipal and county levels.

[19] Bryan A. Garner, Black's Law Dictionary, Pocket Edition 350-52 (West Publishing 1996).

[20] Bryan A. Garner, Black's Law Dictionary, Pocket Edition 352 (West Publishing 1996).

In general, the jurisdiction of state courts is very broad, including any type of legal case except for a limited set of cases against the United States involving some federal criminal, anti-trust, bankruptcy, patent, copyright, or maritime cases.

While state court jurisdiction is easiest to define by what it does not include, federal courts are far more constrained. Federal courts are established on the authority of the U.S. Constitution's Article III, which provides for the Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish."[21] Congress has utilized this authority and established several "inferior" courts. Currently the United States has a federal court system with a primary court system and some specialty courts. The primary is the Federal Court System, which is divided into three tiers: the district courts (trial courts), the circuit courts (first level of appeals courts), and the United States Supreme Court.[22] The specialty courts include bankruptcy courts, the Court of International Trade, and the U.S. Court of Federal Claims.[23] For the purposes of floodplain managers, the courts of concern, as will be seen below, are usually limited to the Federal Court System's district and circuit courts, the U.S. Supreme Court, and the U.S. Court of Federal Claims.

In general, federal courts focus on cases in which the United States is a party; cases including violations of the U.S. Constitution or federal laws; cases between citizens of different states (when the amount in controversy is greater than $75,000); and bankruptcy, copyright, patent, and maritime law cases.[24]

A long-standing challenge of this system of multiple courts has been determining which cases and claims may be brought in which court. In the language of the law, the question is "Which court(s) have *jurisdiction* over the case?" The breadth of state court jurisdiction combines with the limited, but not exclusive, nature of some federal jurisdiction to result in some cases that may be brought in either state or federal court; other cases may only be heard in one or the other. Many different sources of law help determine jurisdiction for different courts. For example, the U.S. Constitution includes phrases that have been held to limit the jurisdiction of federal courts,[25] whereas states are able to establish their own rules for jurisdiction of their own

[21] U.S. CONST., art I, §1.

[22] United States Department of Justice, Office of the United States Attorneys, Introduction to the Federal Court System, https://www.justice.gov/usao/justice-101/federal-courts (last visited Nov. 29, 2022).

[23] United States Courts, Court Role and Structure, https://www.uscourts.gov/about-federal-courts/court-role-and-structure, (last visited Nov. 29, 2022).

[24] United States Department of Justice, Office of the United States Attorneys, Introduction to the Federal Court System, https://www.justice.gov/usao/justice-101/federal-courts (last visited Nov. 29, 2022).

[25] *See, e.g.,* U.S. Const. art. III, § 2, cl. 1 (limiting federal court jurisdiction to actual cases or controversies, thus prohibiting advisory opinions or ruling on cases that have become moot); U.S. Const. art. II, § 2, cl. 2 (determining original and appellate jurisdiction for federal courts).

courts.[26] The U.S. Constitution both grants federal jurisdiction and may also limit access to the federal court system. For example, there remains significant controversy and difference of opinion—even among federal courts themselves—as to how the Eleventh Amendment may limit access to federal courts.[27]

While some jurisdictional aspects emanate from the U.S. Constitution, much of the law determining the jurisdiction of federal courts resides in federal statutes.[28] The most relevant two sources of federal court jurisdiction for most cases involving floodplain management, flooding, torts, and takings of private property are jurisdiction granted to federal courts by the Tucker Act[29] and by 28 U.S.C. §1331.[30] The following section first describes these two sources of jurisdiction as they impact constitutional claims of takings of properties. Next, comes a brief mention of tort claims, and finally, the jurisdiction discussion concludes with a diagram to simplify understanding of the jurisdictional issues discussed.

The Tucker Act[31] provides that the Court of Federal Claims has *exclusive* jurisdiction over claims against the federal government for money damages greater than $10,000 based on a Fifth Amendment takings claim.[32] The Tucker Act also provides federal district courts concurrent

[26] However, states are not free to grant their courts jurisdiction over cases that federal law assigns exclusively to federal courts.

[27] *Compare* Zito v. N.C. Coastal Res. Comm'n, 8 F. 4th 281 (4th Cir. 2021) (finding that the U.S. Supreme Court's decision in *Knick* did not undermine Eleventh Amendment sovereign immunity) *with* Allen v. Cooper, 2021 U.S. Dist. LEXIS 156349 (E.D.N.C. 2021) (finding that *Knick's* reasoning required a conclusion that it abrogated state sovereign immunity). *Allen v. Cooper* was decided just nine days after *Zito v. N.C. Coastal Res. Comm'n*. In theory, the Fourth Circuit Court of Appeals' decision in *Zito* on Eleventh Amendment sovereign immunity should overrule the holding of *Allen v. Cooper* since *Allen* was decided by a trial court within the appellate jurisdiction of the Fourth Circuit Court of Appeals. However, what likely occurred is that the lawyers and judges in *Allen* were not aware of the *Zito* case as its final decision had only been filed days before the *Allen* court's decision.

[28] *See, e.g.,* Judith Resnik & Kevin C. Walsh, National Constitution Center, Article III, Section 2, https://constitutioncenter.org/interactive-constitution/interpretation/article-iii/section/203 (accessed April 4. 2022).

[29] 28 U.S.C. § 1491 and 28 U.S.C. § 1346(a).

[30] This federal statute states that "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." In addition, for cases arising from litigation regarding payouts of insurance issued pursuant to the National Flood Insurance Program, the federal district court where the loss occurred has exclusive jurisdiction over the claim. Sanchez v. Selective Ins. Co., 2019 U.S. Dist. LEXIS 34, *2 (S.D. Fla. 2019) (citing to 42 U.S.C. § 4072, 44 C.F.R. Part 61, App. A(1), Article VII(R), and 28 U.S.C. § 1331).

[31] 28 U.S.C. § 1491 and 28 U.S.C. § 1346(a).

[32] 28 U.S.C. § 1491(a)(1). For a recent example of a federal district court refusing to exercise jurisdiction over a Fifth Amendment takings claim due to the Tucker Act's grant of exclusive jurisdiction to the United States Court of Federal Claims, *see* Christopherson v. Bushner, 2021 WL 1692151 ("This claim, however, would not be properly before this [Federal District] Court because the Tucker Act grants

jurisdiction with United States Court of Federal Claims for Fifth Amendment takings claims against the federal government, but only when the amount at issue is under $10,000.[33] Thus, it is usually not possible to file a federal takings claim against the federal government or its agencies outside of the Court of Federal Claims under the Tucker Act since, under the "Little Tucker Act," the claim would have to be under $10,000.[34] While the Tucker Act specifically states that the Court of Federal Claims' jurisdiction *does not* extend to tort cases,[35] the court still may exercise jurisdiction over a case that is presented as a takings claim but could also be framed as a tort claim.[36] In which court a claim is filed may, in some instances, be so important as to even determine the outcome of the case.[37]

Due to its virtually exclusive jurisdiction over takings claims against the federal government, the United States Court of Federal Claims and its appellate court, the Federal Circuit, are important sources of takings jurisprudence,[38] though it should be noted that Federal Circuit precedent is only binding on the Court of Federal Claims and *not* on the federal district courts. This provides an example of why *which* court a claim is in can matter.

As claims against the federal government and its agencies of a Fifth Amendment taking of private property typically must be brought in the Court of Federal Claims, where can a plaintiff file a Fifth Amendment claim against state or local governments or agencies? These may be filed in state courts and, since the 2019 U.S. Supreme Court decision in *Knick v. Township of Scott*,[39] such claims may also be filed directly in federal district courts. Federal district courts have

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the Court of Federal Claims exclusive jurisdiction over such claims. . . . . .Under the Tucker Act, claims against [the] United States exceeding $10,000 founded upon [the] Constitution . . . are in [the] exclusive jurisdiction of Court of Federal Claims." Mullally v. United States, 95 F.3d 12, 14 (8th Cir. 1996) (citing 28 U.S.C. § 1491) (additional citation omitted). This rule applies to claims against both "the United States and its agencies." State of Minn. by Noot v. Heckler, 718 F.2d 852, 857 (8th Cir. 1983). Here, Plaintiffs have requested $1.5 million in damages from FEMA. (Doc. 1-1 at 1.) Accordingly, this Court would lack subject matter jurisdiction over proposed Count VIII.").

[33] 28 U.S.C. §1346(a)(2).

[34] Robert Meltz, Dwight H. Merriman & Richard M. Frank, The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation 26 (Island Press 1999).

[35] 28 U.S.C. §1491(a)(1).

[36] Taylor v. United States, 959 F.3d 1081 (Fed. Cir. 2020).

[37] *See, e.g.,* Thomas Ruppert, *Castles—and Roads—in the Sand: Do All Roads Lead to a "Taking"*?, 48 ENVT'L L. REPORTER 10914, 10930-32 (2018) (comparing the state law holding in Jordan v. St. Johns County, 63 So. 3d 835 (Fla. Dist. Ct. App. 2011) with the Federal Circuit Court of Appeals' decision in St. Bernard Parish Gov't v. United States, 887 F.3d 1354 (Fed. Cir. 2018)).

[38] Robert Meltz, Dwight H. Merriman & Richard M. Frank, The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation 46 (Island Press 1999).

[39] Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019). This case is discussed at greater length in the section on Ripeness.

subject matter jurisdiction over such cases based on 28 U.S.C. § 1331.[40] State courts have jurisdiction based on their broad jurisdiction, but which states courts have jurisdiction may depend on state rules. Even if a federal claim is brought in a state court, the federal Full Faith and Credit Statute requires federal courts to give full recognition and legal effect to state court rulings.[41] This prevents claimants from bringing a claim in state court and then attempting to bring the same claim in federal court.

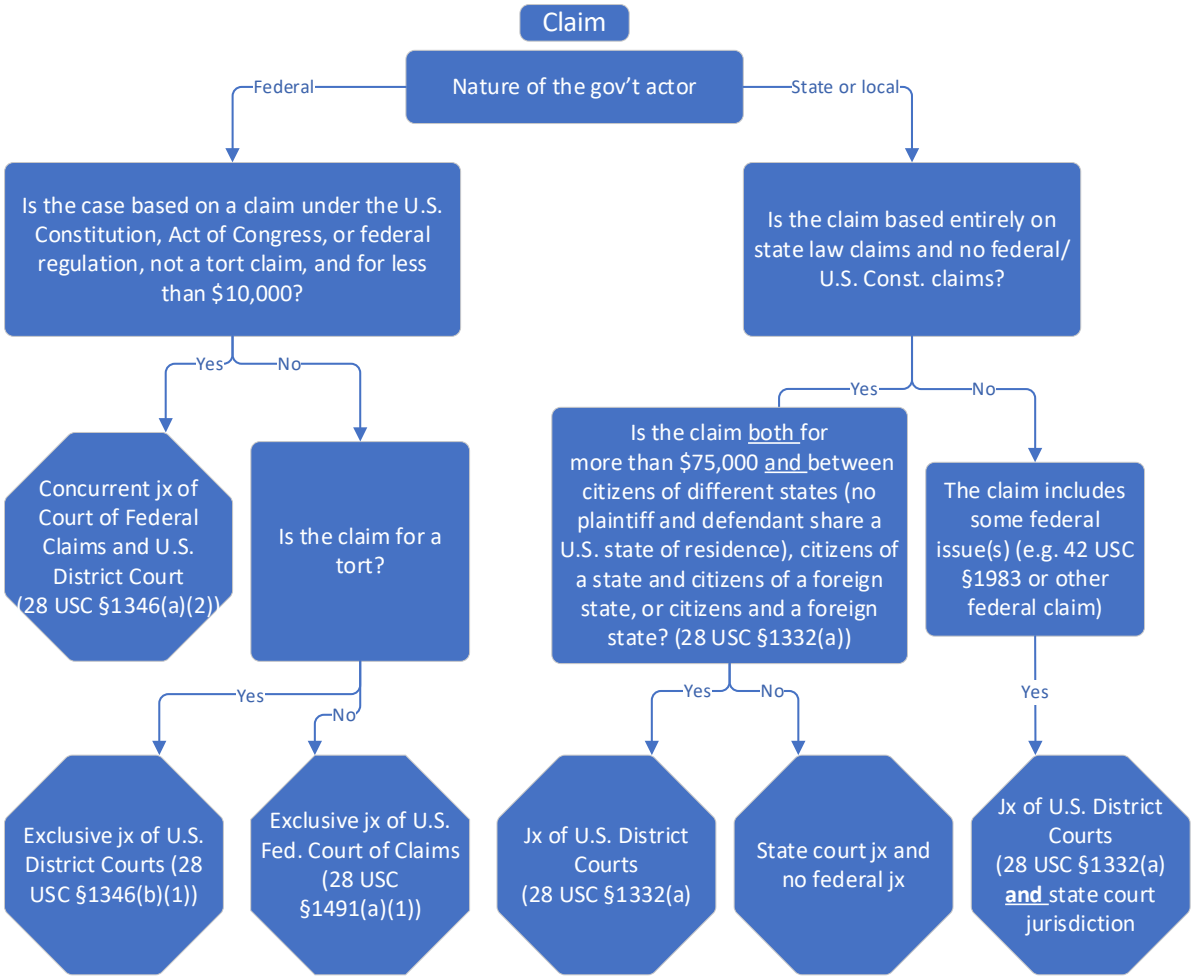

Figure 1: Navigating federal, state and local claims

Tort claims have their own jurisdictional rules. Tort claims may be against the federal government and related agencies or against state/local government and their agencies. Tort

[40] "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331.

[41] 28 U.S.C. §1738 (2022).

claims against the federal government are limited almost exclusively to federal district courts.[42] Furthermore, the Federal Tort Claims Act ("FTCA") allows some tort lawsuits against the federal government, but the FTCA also preserves large swaths of immunity from tort suits for the federal government.[43] For more on these issues, see the section on the Federal Tort Claims Act.

II.B.1.a. Choosing Venues, If You Can

If a state or local government entity is sued for an alleged taking of property rights contrary to the U.S. Constitution's Fifth Amendment or is sued in tort for some law, ordinance, or action related to floodplain management, there may be options for the state/local government entity to change the venue—i.e., which court—where the case is heard. If, as discussed above, a claim is filed in state court, a defendant may consider whether a federal venue might be more advantageous.

When seeking to choose jurisdiction, keep in mind that once a takings claim has been litigated in state court, even if a federal court would have had jurisdiction over the case, federal courts will typically decline the case so that the plaintiff does not have a "second bite at the apple."[44] This is also true of the converse: a loss in federal court will preclude relitigating the same case in state court.

Some factors to consider when thinking about which venue might be best for a government defendant include, among others, who makes substantive decisions in the case,[45] how quickly the government wants the case to proceed,[46] potential differences in judges and juries in each

[42] 28 U.S.C. § 1346(b)(1). *See also,* Jonathan M. Gaffney, Congressional Research Service, The Federal Tort Claims Act ("FTCA"): A Legal Overview, CRS Report R45732, p. 6 (Nov. 2019). R45732 (congress.gov).

[43] Jonathan M. Gaffney, Congressional Research Service, The Federal Tort Claims Act ("FTCA"): A Legal Overview, CRS Report R45732, pp. 58 (Nov. 2019). R45732 (congress.gov).

[44] San Remo v. San Francisco, 125 S.Ct. 2491 (2005). *See also,* Alicia Gonzalez & Susan L. Trevarthan, *Deciding Where to Take Your Takings Case Post*-Knick, 49 STETSON L.R. 539, 551-53 (2020). However, if a takings claim is based on a state constitution—or state statute—that utilizes different legal standards than the standards used for takings under the U.S. Constitution's Fifth Amendment, it may be possible for a litigant in a state court to expressly argue the state claim and clearly note in the record that the claimant reserves the right to litigate the federal claim in a federal court. *Id.* at 552 n.81. However, many, but not all, states interpret their state constitutional protections of private property coextensively with the U.S. Constitution's Fifth Amendment.

[45] Alicia Gonzalez & Susan L. Trevarthan, *Deciding Where to Take Your Takings Case Post*-Knick, 49 STETSON L.R. 539, 558-60 (2020).

[46] Alicia Gonzalez & Susan L. Trevarthan, *Deciding Where to Take Your Takings Case Post*-Knick, 49 STETSON L.R. 539 560-64(2020).

forum,[47] possible liability for attorneys' fees and experts' fees,[48] and any potential differences in substantive law applied.[49] Each of these are discussed in more detail in *Deciding Where to Take Your Takings Case Post*-Knick.[50]

State court might be a more favorable venue for takings plaintiffs, and consequently less favorable for government defendants, in some cases. For example, a state court system might have evidentiary, procedural, discovery, locations, or times that a plaintiff finds more favorable. Or a state might have statutory language slightly different from the U.S. Constitution's Fifth Amendment protection of property; this could be interpreted to offer more expansive protection than the U.S. Constitution's Fifth Amendment. Some states also have statutory private property rights statutes explicitly intended to grant more rights to property owners than does the Fifth Amendment.[51] If state law offers different or additional property rights from the Fifth Amendment, claimants have various options. Claimants may file takings claims against state/local governments in state courts or federal district courts even if the claim also contains related state-law claims as federal courts may, under limited circumstances, exercise "supplemental jurisdiction" over state-law claims.[52] If a claimant files a takings claim based on the U.S. Constitution's Fifth Amendment in state court, government defendants may remove such case to federal court, along with related state claims.[53] Additionally, a claimant with both federal and state claims could conceivably separate the claims, filing only a state-based claim in state court while reserving the federal claim, or file only the federal claim in federal court and reserve the state claim. However, these options bring a risk of losing the reserved claim through "issue preclusion," also known as "collateral estoppel," which prevents relitigating a determination of law or fact made by another court as part of its decision, even if the attempt to relitigate is in the context of a legally distinct claim.

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[47] Alicia Gonzalez & Susan L. Trevarthan, *Deciding Where to Take Your Takings Case Post*-Knick, 49 STETSON L.R. 539, 565-66 (2020).

[48] Alicia Gonzalez & Susan L. Trevarthan, *Deciding Where to Take Your Takings Case Post*-Knick, 49 STETSON L.R. 539, 566-69 (2020).

[49] *See, e.g.* note 37 and accompanying text (noting that "[i]n which court a claim is filed may, in some instances, be so important as to even determine the outcome of the case).

[50] Alicia Gonzalez & Susan L. Trevarthan, *Deciding Where to Take Your Takings Case Post*-Knick, 49 STETSON L.R. 539 (2020).

[51] Robert Meltz, Dwight H. Merriman & Richard M. Frank, The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation 20-23 (Island Press 1999). For a somewhat dated list of states' property protections and whether they are interpreted coextensively with the U.S. Constitution's Fifth Amendment or more broadly, see *id.*

[52] 28 U.S.C. §1367(a).

[53] 28 U.S.C. §1441. Note that not all state claims will necessarily qualify for the supplemental jurisdiction of the federal court. 28 U.S.C. §1441(c). For more on topics of choosing venue and the complications between state and federal court, *see generally* Alicia Gonzalez & Susan L. Trevarthan, *Deciding Where to Take Your Takings Case Post*-Knick, 49 STETSON L.R. 539 (2020).

Recommendations for local government defendants: When faced with a takings claim, early on you want to evaluate whether the case would allow for removal to different venue that might be more favorable based on some of the considerations listed above.

II.C. Property

II.C.1. What is "Property" and Where Does It Originate?

"At the center of today's debate [about property] . . . Lies a collective failure on our part to think clearly and intently about the institution [of property], how it works, why it exists, and many shapes it can take, in terms of landowner rights and responsibilities. In operation, [the right to property] is less an individual right than a tool society uses to promote overall social good. Important truths about this arrangement have largely passed from our collective memory. We need to regain these truths."[54]

"The individual's sole dominion over a parcel of land—to the exclusion of others in the community or the public at large—is a myth, despite the prevalence of this view in conventional U.S. property law."[55]

The history of property in the United States teems with difficult discussions about the fundamental nature and basis of what we call "property."[56] While some commentators have focused on the debates between the "natural rights" theory of property ownership championed by John Locke[57] and the "positivist" school of thought that the state creates property rights,[58]

[54] Eric T. Freyfogle, The Land We Share: Private Property and the Common Good (2003).

[55] Kamaile A.N. Turčan, *U.S. Property Law: A Revised View*, 45 WM. & MARY ENVTL. L. & POL'Y REV. 319 (2021).

[56] *See, e.g.,* Danaya C. Wright, A Requiem for Regulatory Takings: Reclaiming Eminent Domain for Constitutional Property Claims, 49 Envtl. L. 307 (2019) (repeatedly pointing out the debates about a "positivist" versus "natural rights" approach to the foundations of property law).

[57] *See, generally,* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (A. Millar et al. eds., 6th ed. 1764) (1689). John Locke went on to argue that the primary purpose for which men—and it was men in Locke's time—formed government was to protect the property granted to them by natural law. *Id. at* § 222. While John Locke is credited with the growth of the "natural law" school of thought on property (i.e., that property exists as a right of nature), Locke also recognized that without law, private property ceased to exist. ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 204-05 (2003). Furthermore, John Locke's theory of natural law has often been invoked to justify hoarding of property one has attained or wealth that one has created or earned. However, Locke himself pointed out that under conditions of extreme scarcity, "he that hath, and to spare, must remit something of his full satisfaction, and give way to the pressing and preferable title of those who are in danger to perish without it." JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT §183.

[58] *See, e.g.,* STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 94-107 (2011); J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*,

the late 19th century saw one of the greatest American thinkers of the century[59] dispute that private property should exist at all.[60] While that argument has certainly ebbed in the last century,

73 LA. L. REV. 69, 72 (2012) (noting that "the Supreme Court's conservative majority has pursued an ideal of essential, or natural, property rights unchangeable without compensation, [whereas] the dynamic physical transformations promised by sea-level rise show the need for a more lenient and flexible constitutional approach recognizing that property rules do and must evolve in accord with social and ecological change." [citing Joseph L. Sax, Property Rights and the Economy of Nature, Understanding Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433 (1993).]); A. Dan Tarlock, *Local Government Protection of Biodiversity: What is its Niche?*, 60 U. CHI. L. REV. 555, 588 (1993). *See also* Thomas T. Ankersen & Thomas Ruppert, *Defending the Polygon: The Emerging Human Right to Communal Property*, 59 OKLAHOMA L. REV. 681, 693 (2007); Thomas T. Ankersen & Thomas Ruppert, *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, in LÉON DUGUIT AND THE SOCIAL OBLIGATION NORM OF PROPERTY- A TRANSLATION AND GLOBAL EXPLORATION 225-27 (Paul Babie & Jessica Viven-Wilksch, eds., 2019, Springer Press).

[59] *See, e.g.,* https://en.wikipedia.org/wiki/Henry_George#cite_ref-48 (under the heading "Legacy," notes 86-99 and accompanying text).

[60] While Henry George agreed with John Locke that people had a natural law right to the fruits of their labor, *see, e.g.,* Henry George, The Land for the People, Address Delivered on July 11, 1889, in Toomebridge, County Derry, Ireland (p.2 as published on CD-ROM by Lincoln Land Inst.), George disagreed that this made the *land* subject to private ownership. HENRY GEORGE, THE LAND QUESTION, chapt. VIII, p. 45. Rather, George insisted that all land "is an entailed estate—entailed upon all the generations of the children of men, by a deed written in the constitution of Nature, a deed that no human proceedings can bar, and no prescription determine." HENRY GEORGE, THE LAND QUESTION, chapt. VIII, p. 45. Henry George proposed that rather than taking land away from those that claimed it as owners, the land should be taxed at its full rental value, with the proceeds being used to fund government and provide what has more recently been termed "universal basic income." *George, Henry (1901) [1885]. "The Crime of Poverty". Our Land and Land Policy: Speeches, Lectures and Miscellaneous Writings.* Doubleday and McClure Company. *pp. 217–218.* ISBN 978-0526825431. Henry George critiqued the ability of land speculators to "earn" money for nothing more than ownership of land that accrues in value because of the growing community around it; this was, George argued in his book *Progress and Poverty*, unjust and a driver of increasing inequitable wealth. This idea lends supports the legal academic literature discussing "givings" of land as opposed to "takings" of land. See, e.g., Abraham Bell & Gideon Parchmovaky, Givings, 111 Yale L.J. 547 (2001). Some prominent economists remain Georgist. See, e.g., Gaffney, Mason and Harrison, Fred. The Corruption of Economics. (London: Shepheard-Walwyn (Publishers) Ltd., 1994) ISBN 978-0856832444 (paperback). Henry George, however, only opposed private property in land. George might have agreed with Locke that laboring on something to alter or capture it gave one increased private rights. This "labor theory of property" was not alien even to the indigenous people of North America:

"Water, seed, and hunting areas, minerals and salt deposits, etc., were freely utilized by anyone. But once work had been done upon the products of natural resources (mixed labor with them) they became the property of the person or family doing the work. Willow groves could be used by anyone, but baskets made of willows belonged to their makers. Wild seeds could be gathered by anyone, but once harvested, they belonged strictly to the family doing the task. . . ." (Steward 1934, 253).

Terry L. Anderson, Conservation Native American Style, PERC Policy Series, Issue Number PS-6, July 1996, https://www.perc.org/wp-content/uploads/2018/02/ps6.pdf.

we seem no closer to agreement on what property is and what it means than we have ever been.

The inability to agree on what property really is stems from the fact that, first and foremost, property is *not* a tangible "thing."[61] Rather, it is a social construct;[62] property is the set of relationships among people that regulate our social interactions with regard to things.[63] The social construct of property evolves and changes as those with the power to influence its definition change what they seek to accomplish with property.[64] Since we do not all agree on what we want property to accomplish, the meaning of property remains contested.[65]

Who has the right to change property? The public? Courts? Legislatures? In reality, the answer is a mix of all of these. The public contributes to changing the law through inventions that challenge traditional notions of what can be owned[66] and through their expectations about property.[67] Courts have long changed property through their decisions and common law

[61] *See, e.g.,* Joseph William Singer, Introduction to Property §1.1.1. (2d ed. 2005); Stuart Banner, American Property: A History of How, Why, and What We Own 101-06, 289 (2011).

[62] Jack Beermann & Joseph William Singer, The Social Origins of Property , 6 Canadian Journal of Law & Jurisprudence 217 (1993), at: https://scholarship.law.bu.edu/faculty_scholarship/2296, last visited March 6, 2023; Fennie Van Straalen, Thomas Hartmann & John Sheehan, *Introduction, in* PROPERTY RIGHTS AND CLIMATE CHANGE: LAND USE UNDER CHANGING ENVIRONMENTAL CONDITIONS 5 (Fennie Van Straalen, Thomas Hartmann & John Sheehan eds., 2018) ("This book takes the stance that property rights are a social construction of environmental conditions. Changing environmental conditions reveals inherent and underlying notion of this social construction that would have been hidden otherwise.").

[63] Joseph William Singer, Introduction to Property §1.1.1. (2d ed. 2005).

[64] STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 289 (2011). *See also, id. at* 129 (noting that the growth of property rights in sound were divided based on a century of power struggles by interested parties rather than any rational plan).

[65] Stuart Banner, American Property: A History of How, Why, and What We Own 289-91 (2011).

[66] *See, generally,* STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN (2011) (providing numerous examples of changing "property rights" due to technological changes). *See also* JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY §1.3.3. (2d ed. 2005) (noting how long-standing reliance, social customs and norms can impact how "property" is interpreted even above formally adopted rules in some cases).

[67] People's attitudes about what property is and is not influence courts, particularly through the "reasonable investment-backed expectations" analysis. *See, e.g.,* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1034-35 (1992) (Kennedy, J., concurring) ("There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some circularity must be tolerated in these matters, however, as it is in other spheres. The definition, moreover, is not circular in its entirety. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.") (internal citations omitted).). WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 19-50 (1996) (discussing use of the law principle *salus populi suprema lex est* "the good of the people is the supreme law"). *C.f. e.g.,* Thomas Ruppert, *Reasonable Investment-*

interpretations of property.[68] And legislators also have the power to alter property law as property law is state law, though the power of the states to alter property law is constrained by the U.S. Constitution's protections of property.[69] Changes to property law by courts and legislatures have sparked disagreement over who has the right to alter property and how.[70]

Court cases finding of a property right in one instance but not in another defy easy understanding. For example, in the case of *Sauer v. City of New York*, the U.S. Supreme Court noted that "an owner of land abutting on the street has easements of access, light and air as against the erection of an elevated roadway by or for a private corporation for its own exclusive purposes, but that he has no such easements as against the public use of the streets or any structures which may be erected upon the street to subserve and promote that public use."[71]

Backed Expectations: Should Notice of Rising Seas Lead to Falling Expectations for Coastal Property Purchasers?, 26 J. LAND USE & ENVTL. LAW 239, 255-57 (2011) (discussing how "reasonable investment-backed expectations" are shaped by policy and law and how they also shape law themselves as what is considered reasonable evolves). *See also* the section on RIBE.

[68] *See, generally,* Stuart Banner, American Property: A History of How, Why, and What We Own (2011).

[69] Murr v. Wisconsin, 137 S. Ct. 1933, 1944-45 (2017). *See also* Palazzolo v. Rhode Island, 533 U.S. 606, 626-27 (2001) ("Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation. [PARAGRAPH BREAK IN ORIGINAL] The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation.") (internal citations omitted).

Munn v. Ill., 94 U.S. 113, 134 (U.S. 1876) ("Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.").

[70] ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 258-65 (2003) (discussing relative roles, strengths, and weaknesses of courts versus legislators altering the definition of property; STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 90, 92 (2011) (noting tensions between judicial and legislative changes to notions of property).

[71] Sauer v. City of New York, 206 U.S. 536, 547-48 (1907). Note, however, that *Sauer* was actually argued on the basis of the Fourteenth Amendment's protection of individuals from deprivation of property without due process of law. Nonetheless, its use here is instructive in determining the scope of what constitutes "property" for purposes of cases claimed to arise under the U.S. Constitution.

For another frequently cited example of the difficulty of logically coherent interpretation of U.S. Supreme Court decisions on property, compare *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) with *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470 (1987). Both cases involved

Several factors make "property" hard to understand: Multiple authorities and public attitudes can all impact the definition of property; property is a social creation on which not everyone agrees as to its exact purpose; the "public interest" on which much property law is based can itself be a moving target that is much disputed; and technological changes constantly challenge us with new potential types of property and arguments about the public interest.[72] While shifting of property rights sometimes has occurred as a result of concentrated efforts by organized interest groups,[73] it appears that often the shifts may have occurred because various individuals or groups with sufficient power and influence all pushed in the same direction although they were not coordinated in their push.[74] In any case, the conception of property constantly evolves. As most people are unaware of this, it merits careful consideration in any effort to understand property.

II.C.2. The Plasticity of Property

The greatest current misconception about property is that it represents something permanent and unchangeable, and that any attempt to change the definition of property constitutes governmental overreach.[75] Nothing could be further from the truth. Just as we protect private property based on a belief that protecting private property serves our greater interests as a society, so too must the concept of property evolve along with our society and technological changes. While this may sound strange, even heretical, to the general public, it has long been well understood by courts[76] and by historians of law and property.[77]

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challenges to Pennsylvania state laws that required owners of subsurface estates for coal mining to leave some coal in the ground to prevent surface collapse. In *Mahon* the Court found that this constituted a taking, whereas in *Keystone Bituminous* the Court found no taking of private property resulted from the regulation.

[72] *Cf., e.g.,* Joseph William Singer, Introduction to Property §1.3. (2d ed. 2005).

[73] Stuart Banner, American Property: A History of How, Why, and What We Own 290 (2011).

[74] *Id. See also*, Morton J. Horwitz, The Transformation of American Law, 1780-1860, 34 (1977).

[75] Eric T. Freyfogle, On Private Property: Finding Common Ground on the Ownership of Land xvii-xix, 145-56 (2007).

[76] The U.S. Supreme Court, in its seminal regulatory takings case of *Penn Central*, indicated that its evaluation of that case was based on the facts as they then existed and noted that "[t]he city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be 'economically viable,' appellants may obtain relief." Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 138, FN 36 (1978).

[77] Robert Meltz, Dwight H. Merriman & Richard M. Frank, The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation 26 (Island Press 1999) (noting that "[P]roperty rights change over time; they are not as absolute and immutable as conservatives like to describe them."); J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 L.A. L. Rev. 69,

Property law has always evolved in response to our changing society.[78] For example, increasing population density can provoke needed changes in property law to protect the rights of other property owners and the public's right to be free from harms from private property uses.[79] This means that what was at one point an expressly allowed use of land may become a nuisance that could subsequently be prohibited.[80] Or what was formerly understood as an acceptable use of

104 (2012) ("A characteristic of our property law is its accommodation of changes in ownership and ownership rights over time."); ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 102-04 (2007); STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 184 (2011); Danaya C. Wright, *A Requiem for Regulatory Takings: Reclaiming Eminent Domain for Constitutional Property Claims*, 49 ENVTL. L. 307 (2019) ("The law, and property rights, must grow and change with the public welfare, new technologies, and environmental pressures."); ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 123 (2003).

[78] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 at 31-40 (1977) (Discussing the differing bases used during the eighteenth century to justify the extent of "property" and how this evolved in response to increasing population and technological change). *Kaiser* Aetna, 444 U.S. 164, 177 (1979) (noting that "as Mr. Justice Holmes observed in a very different context, the life of the law has not been logic, it has been experience.").

[79] *See, e.g.,* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) ("The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the State, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly. With the growth and development of the State the police power necessarily develops, within reasonable bounds, to meet the changing conditions. . . ."); *id*. at 387 ("Such [zoning] regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.").

[80] *See, e.g.,* Mugler v. Kansas, 123 U.S. 623, 666-67 (1887) (noting that the U.S. Supreme Court, in Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667, upheld enforcement of an ordinance that forbid a fertilizer plant from operating in a location that was previously expressly authorized because the use "had become a nuisance to the community in which it was conducted, producing discomfort, and often sickness, among large masses of people"); *id.* at 669-70. *Cf. also* Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 U.C.L.A. L. REV. 77, 80-88 (1995) (discussing the changing view of wetlands from places that should be drained for the public good to places that should be preserved for the public good).

an easement may be expanded due to changes in technology.[81] Similarly, changes in technology and business practices required the concept of "property" more broadly to evolve.[82]

II.C.2.a. Early Common Law of Property

Quiet Enjoyment & sic utere tuo, ut alienum non laedas

Bequeathed to the colonies by English law, the doctrine of "quiet enjoyment of property," or just "quiet enjoyment," formed a foundational part of the common law of property in England, the New World colonies, and early United States history.[83] The right to quiet enjoyment of property during the early European history of America included the right to use of land free from interference.[84] In the context of a primarily rural and agrarian culture, this meant that no neighboring landowner had the right to disturb a property owner using land for agriculture or as a homestead. However, as industrialization began, this created a serious problem: an unlimited right to quiet enjoyment effectively gave prior landowners a veto right to stop more

[81] *See, e.g.,* Nantucket Conservation Foundation, Inc. v. Russell Management, Inc., 402 N.E.2d 501, 504-05 (Mass. 1980); Sauer v. City of New York, 206 U.S. 536, 555 (1907) (noting that it may be a "reasonable adaptation" of the purposes for which streets were laid out to also allow them to be used for subways and viaducts). Powell on Real Property--Desk Edition, Sec. 34.02[2][d] (2009) (noting that historically easements appurtenant only existed when the easement served an agricultural purpose of the dominant estate. However, "As uses of land have become more diversified in modern society, it has become necessary to recognize the serviceability to the dominant tenement can exist even when the dominant tenement is devoted to business purposes. . . . ").

[82] *See, e.g.,* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1447-49 (1993); STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN (2011) (generally discussing "new" and changing "property rights" in response to change); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, 74-86 (1977) (discussing historical changes to nuisance law acquiescing in private harms to adjacent properties as a way to allow industrial/ "modern" development).

Munn v. Ill., 94 U.S. 113, 133 (U.S. 1876) ("Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.").

[83] *See, e.g.,* Eric T. Freyfogle, The Land We Share: Private Property and the Common Good 56-58 (2003).

[84] Melanie Sand, *Costs and Benefits: Why Economic Quantification in Hazard Mitigation Policy Threatens Culture in Coastal Louisiana, in* PROPERTY RIGHTS AND CLIMATE CHANGE: LAND USE UNDER CHANGING ENVIRONMENTAL CONDITIONS 88 (Fennie Van Straalen, Thomas Hartmann & John Sheehan eds., 2018).

intensive neighboring uses that might disturb the prior owner's use of their property for agriculture or as a residence. This veto power could then act as a brake on development.[85]

Courts often protected the right of quiet enjoyment through the application of the doctrine of *sic utere tuo, ut alienum non laedas* (hereinafter "*sic utere*") as the foundation for many nuisance court decisions.[86] The phrase means *use your own property so as to not harm another's*.[87]

References to the idea underlying *sic utere* go back almost a millennium in western law even if the Latin term itself only came to be known in the later sixteenth and early seventeenth centuries.[88] Blackstone's Commentaries included *sic utere* as part of the definition of a nuisance,[89] and nuisance and *sic utere* have remained closely associated with each other. As early as the twelfth century, nuisance was on its way to becoming part of the common law protection of the right to free enjoyment of property without undue interference.[90] The developing doctrine of nuisance was an early complement to the protection of property offered by trespass; trespass protected a property owner from physical invasion of property, while nuisance offered protection when activities outside of the land somehow interfered with societally protected uses.[91]

Particularly in its early understandings, nuisance—like *sic utere*—was defined entirely as the effects on the suffering property owner's use of property rather than as the product of a specific action.[92] Thus, that one person's action caused a nuisance on another's property meant that the person causing the nuisance was responsible for the harm of the nuisance *no matter what*, and

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[85] Eric T. Freyfogle, The Land We Share: Private Property and the Common Good 68-70 (2003).

[86] Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 492 (S.Ct., 1987); Mugler, 123 U.S. at 667; Fertilizing Co. v. Hyde Park, 97 U.S. (7 Otto) 659, 667 (1878); Munn v. Illinois, 94 U.S. 113, 124 (1877); Pennsylvania vs. Plymouth Coal Co., 81 A. 148, 151 (Penn. 1911); Empire State Insurance Co. v. Chafetz, 278 F.2d 41 (CA5 1960). *See also* Elmer E. Smead, *Sic Utere Tuo Ut Alienum Non Laedas A Basis of the State Police Power* , 21 CORNELL L. REV. 276, 280 (1936), at: http://scholarship.law.cornell.edu/clr/vol21/iss2/3.

[87] Elmer E. Smead, *Sic Utere Tuo Ut Alienum Non Laedas A Basis of the State Police Power*, 21 CORNELL L. REV. 276, 280 (1936), at: http://scholarship.law.cornell.edu/clr/vol21/iss2/3.

[88] Elmer E. Smead, *Sic Utere Tuo Ut Alienum Non Laedas A Basis of the State Police Power*, 21 CORNELL L. REV. 276-77, 280 (1936), at: http://scholarship.law.cornell.edu/clr/vol21/iss2/3.

[89] R. Makowski, *Torts: The Nature of Nuisance*, 33 MARQ. L. REV. 240 (1950) (citing to 3 Black. Com. 216-217), at http://scholarship.law.marquette.edu/mulr/vol33/iss4/4 (last visited Feb. 20, 2023).

[90] R. Makowski, *Torts: The Nature of Nuisance*, 33 MARQ. L. REV. 240 (1950), at http://scholarship.law.marquette.edu/mulr/vol33/iss4/4 (last visited Feb. 20, 2023).

[91] R. Makowski, *Torts: The Nature of Nuisance*, 33 MARQ. L. REV. 241 (1950), at http://scholarship.law.marquette.edu/mulr/vol33/iss4/4 (last visited Feb. 20, 2023).

[92] R. Makowski, *Torts: The Nature of Nuisance*, 33 MARQ. L. REV. 242 (1950), at http://scholarship.law.marquette.edu/mulr/vol33/iss4/4 (last visited Feb. 20, 2023). *Id. at* 243 ("[A] nuisance is a condition and not an act.").

this implied no specific fault or moral wrong doing of the person causing the harm other than the harm itself.[93] In other words, the same action might be acceptable were the harm to another's property not to result from it.[94] In early English law, *sic utere* was accepted and applied as an unquestioned rule of law.[95]

The idea of *sic utere tuo ut alienum non laedas* was frequently cited by courts in the 1700s to impose tort liability on neighboring property owners whose use somehow interfered with more "natural" use of land, which, at the time, was agricultural.[96] This "right" to stop anyone else from using their land in a way that interfered with more settled, "undeveloped" notions of agrarian land use effectively served as a way to stifle development, which was why alternative legal theories, such as negligence, arose; these theories were more development-friendly.[97]

However, even after courts had begun to limit the protections of the related doctrines of nuisance and *sic utere* due to such protections inhibiting industrialization, the phrase *sic utere* continued to appear in court decisions broadly interpreting it to include protecting neighboring property owners *and* the general public's interest in being free from the harms of property uses.[98]

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[93] R. Makowski, *Torts: The Nature of Nuisance*, 33 MARQ. L. REV. 243-44 (1950) (noting that negligence was not part of the law of nuisance during the mid- to late-1800s), at http://scholarship.law.marquette.edu/mulr/vol33/iss4/4 (last visited Feb. 20, 2023).

[94] R. Makowski, *Torts: The Nature of Nuisance*, 33 MARQ. L. REV. 242 (1950), at http://scholarship.law.marquette.edu/mulr/vol33/iss4/4 (last visited Feb. 20, 2023).

[95] Elmer E. Smead, Sic Utere Tuo Ut Alienum Non Laedas A Basis of the State Police Power , 21 Cornell L. Rev. 279-80 (1936) Available at: http://scholarship.law.cornell.edu/clr/vol21/iss2/3

[96] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, 32-33 (1977). *See, also, id., at* 101-02 (noting that the concept of *sic utere* was the main foundation for courts addressing conflicting uses of land prior to 1825).

[97] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 309-10 (3d ed. 2007); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, 32-33, 99 (1977). As industrialization progressed, the need for water power to power mills grew quickly, leading to an explosion in cases wherein plaintiffs frequently argued that their existing use of a mill had been negatively impacted by a new mill, thus violating the right of quiet enjoyment. *Id. at* 34-40. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 472-78 (1997) (noting that Supreme Court decisions in the late 1800s and early 1900s focused heavily on private economic rights and prevention of regulation of business and the economy as part of courts' switch to favoring industrialization over the historic notion of "quiet enjoyment" that had essentially provided neighboring landowners veto power over more intense land uses and industrialization).

[98] *See, e.g.,* Munn v. Illinois, 94 U.S. 113, 145-46 (1876) (Field, J., dissenting) ("The doctrine that each one must so use his own as not to injure his neighbor -- *sic utere tuo ut alienum non loedas* -- is the rule by which every member of society must possess and enjoy his property; and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of State authority"; "It is true that the legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals,

We have passed beyond the reactionary phase against "quiet enjoyment" as an impediment to industrialization and more intensive land uses. We have now entered an age in which we have ever-increasing evidence that the cumulative effects of our changing of land uses dramatically affects all of us. Combine this realization with the current and projected impacts of climate change on the frequency and intensity of precipitation events, and we have the formula that explains our ever-increasing number of $1 billion+ weather-related disasters, of which flooding leads the way.[99]

II.C.2.b. Recent Changes in the Idea of Property

How has the notion of what constitutes real property continued to evolve over the last century? Court cases continue to note that property law evolves, as it must, to address changing circumstances.[100]

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and health of the community, comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the police power of the State, which, from the language often used respecting it, one would suppose it to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects."). *See also, id. at* 147-48 ("But though property be thus protected, it is still to be understood that the law-giver has the right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public. The government may, by general regulations, interdict such uses of property as would create nuisances and become dangerous to the lives, or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community.") (quoting Chancellor Kent, Commentaries on American Law, 2 Kent, 340).

[99] National Centers for Environmental Information, U.S. Dept. of Commerce, Billion-Dollar Weather and Climate Disasters, at www.ncei.noaa.gov/access/billions/ (last visited March 1, 2023).

[100] *E.g.,* Lucas v. South Carolina Coastal Commission, 505 US 1003, 1035 (1992) (Kennedy, J., concurring) ("The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment. I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions."). *Cf. also, e.g.,* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) ("The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the State, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly. With the growth and development of the State the police power necessarily develops, within reasonable bounds, to meet the changing conditions. . . ." citing The Supreme Court of Illinois, in City of Aurora v.

And even after so much change to the doctrine of *sic utere* to accommodate industrialization, in the early 20th century, *sic utere* remained a touchstone for defining the outlines of property.[101]

Just as property law changed from protection of the use of quiet enjoyment to protecting rights to more intensive uses as long as the harm was not too great and there was no negligence involved, as the environmental impacts of industrialization grew clearer, the latter part of the 20th century began to see some again asserting that ownership of property came with certain *internal* limitations based on the public good.[102] This change started to seem more realistic as more and more people gained a greater understanding of the flexibility of property law over time.[103]

Of course not *all* common law protecting other property owners or the public disappeared entirely; nuisance law remained. And even today's treatment of nuisance law as an *internal* limitation on property rights, as opposed to an *external* limit, remains part of our dominant narrative about property,[104] though the very existence of the strong distinction that some have sought to create between "nuisance" as internal to property and "regulation" as external to property, itself is a product of ideology seeking to define property as providing more individual

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Burns)); *id*. at 387 ("Such [zoning] regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.").

[101] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) ("In solving doubts [about the line between legitimate and illegitimate exercises of the policy power], the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew."). Shore v. Maple Lane Farms, LLC, 411 S.W.3d 405, 415 (Tenn. 2013) ("The right to the free use and enjoyment of property has long been recognized as an important facet of ownership. However, this+ right is not an unrestricted license to use property without regard for the impact of the use on others. The legal maxim— sic utere tuo ut alienum non laedas —directs landowners not to use their property in a way that injures the lawful rights of others. Thus, since the earliest days, Tennessee's courts have recognized that "[e]very individual, indeed, has a right to make the most profitable use of that which is his own, so that he does not injure others in the enjoyment of what is theirs." Neal v. Henry, 19 Tenn. (Meigs) 17, 21 (1838). This longstanding principle is the cornerstone of a common-law nuisance claim. 1 Kenneth H. Young, Anderson's American Law of Zoning § 3.03 (4th ed. 1995)."). *But, see*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031 (1992) (noting, dismissively, that "to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*.").

[102] Eric T. Freyfogle, The Land We Share: Private Property and the Common Good 94-99 (2003).

[103] Eric T. Freyfogle, The Land We Share: Private Property and the Common Good 98-99 (2003).

[104] For the clearest example of this, see the nuisance exception in *Lucas v. South Carolina Coastal Commission*, 505 US 1003 (1992). Murr v. Wisconsin, 137 S. Ct. 1943, (2017).

rights to use property as the owner wishes with less regard for potential externalities to other property owners or the public.[105] In fact, some American property lawyers concluded that the separation of property from many of its *internal* limitations could be remedied by adding private property *obligations* to the private property *rights* of individuals.[106]

II.C.3. Property Law and Flooding

Property law has long protected property owners from flooding caused by the government. But private property protections do not protect property owners from the vicissitudes of nature or actions by anyone other than government.[107] How can local governments seek to use land use planning, zoning, building/development regulations, and other available land-use tools to minimize flooding without violating protections of private property rights? The concept of *sic utere* remains a potentially powerful force in addressing increasing flooding as *sic utere* can adapt to our changing situations. Just as it adapted to allow more intensive uses during industrialization, it could adapt now to our need to protect our environment, our waters, and our air.[108] However, due to the increasing hostility of U.S. Supreme Court decisions to state legislative alterations of property rights as had long been accepted practice in the United

[105] *Cf.* Eric T. Freyfogle, The Land We Share: Private Property and the Common Good 261-62 (2003).

[106] *See, e.g.,* Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. QUARTERLY 1, 8-30 (1927), as cited by ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 90 (2003). While Freyfogle notes that the of "obligations" accompanying property rights "would languish," this may be a distinctly United States-centric perspective as in Europe and much of the rest of the world, the idea of the "social function doctrine" of property was taking hold at the same time Morris Cohen was writing. *See, e.g.,* Thomas T. Ankersen & Thomas Ruppert, *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, in LÉON DUGUIT AND THE SOCIAL OBLIGATION NORM OF PROPERTY- A TRANSLATION AND GLOBAL EXPLORATION (Paul Babie & Jessica Viven-Wilksch, eds., 2019, Springer Press).

[107] DeShaney vs. Winnebago Dept. of Social Services, 489 U.S. 189 (1989) ("Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" & "[Constitutional protections] generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.").

[108] *See, generally,* ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD. *See, also,* Danaya C. Wright, *A Requiem for Regulatory Takings: Reclaiming Eminent Domain for Constitutional Property Claims*, 49 ENVTL. L. 307 (2019) (proposing to revive earlier conceptions of eminent domain and nuisance law as antidotes to the confusion over regulatory takings law in the United States).

States,[109] the process may need to take place via courts, just as the process of limiting the doctrine of quiet enjoyment occurred: in a disjointed and somewhat chaotic process over a long period of time. This process could start with some fundamental reframing of the ideas of property and property rights in public discussion and in argumentation in property law cases.

Today, when there is regulation of property, such regulation is often characterized as government "limiting" the use of the property holder's property rights,[110] setting up the supposed "David-versus-Goliath" dynamic of the property owner fighting against the government to protect the property owner's property rights.[111] Such a characterization is driven as much by ideology and lack of understanding of the nature and evolutionary history of property as it is by reality.

First, it is necessary to understand that no one's "property rights" are unlimited; they cannot, by definition, be unlimited. If I were to have unlimited property rights understood as the right to do whatever I want on my property—the modern understanding of Blackstone's "absolute dominion"[112]— I could choose to place a nightclub in the middle of a residential neighborhood. However, my exercise of my right to use my property would then conflict with my neighbors' rights to use of their property for peaceful sleep at night.[113] If government steps in to prevent the nightclub, government is favoring the right of quiet enjoyment of their property by those that want to sleep at night; if the government does not step in to stop the nightclub from keeping the neighborhood awake, then the government is favoring the intensive use of the nightclub owner over that of neighboring residents. Thus, it becomes clear that there is no such thing as a "neutral" or "pro-private property rights" stance on many issues. Rather than asking whether a policy or court decision is "pro-" or "anti-property rights," the question is actually a matter of *which* property rights will be favored.

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[109] *See, e.g.,* Cedar Point Nursery, 141 S. Ct. 2063 (2021); Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015); and Lucas v. South Carolina Coastal Com'n, 505 US 1003 (1992). *But see,* Murr v. Wisconsin, 137 S. Ct. 1933 (2017).

[110] *See, e.g.,* Joseph William Singer, Introduction to Property §1.1.4 (2d ed. 2005).

[111] *Cf.* Joseph William Singer, Introduction to Property §1.1.4 (2d ed. 2005]

[112] It is curious how many property scholars take Blackstone's "sole despotic dominion" language to mean that an owner could do whatever they wanted with their property in light of the fact that such an attitude would, in a crowded city, lead to chaos and conflict. Rather, the unusual assumption by American property theorists that "sole despotic dominion" meant "doing whatever you wanted" originated more from the unusual experience of those in the New World having so much space, compared to their European counterparts, that it was far easier to not bother neighbors if they were far away. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 at 31, 37 (1977); ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 68-69 (2003).

[113] *See, e.g.,* Joseph William Singer, Introduction to Property §1.1.4 (2d ed. 2005). *See also,* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, 31 (1977).

Second, it is important to note that historically, the scope of property and private property rights and responsibilities had been defined through the courts in the common law.[114] However, as the common law doctrine of *sic utere* and nuisance law evolved in response to industrialization, the decreased protection provided to neighboring property owners and others from the impacts of those choosing to use their land more intensively created a problem: the aggregate or cumulative impacts to the environment and public health from all of the new, more intensive land uses. Since the *internal* law of property (i.e., the very definition of property as the "despotic dominion" to stop any interference with an owner's quiet enjoyment, as realized through the doctrine of *sic utere*) had been undermined as a tool to protect neighboring property owners and the public, government regulation stepped in to address these aggregate harms through regulation of use of property. This change then allowed those wanting to use their property in ways that, individually or in the aggregate, cause harm to human health, safety, and welfare to argue that government regulation is "anti-private property rights" since government is now regulating property.[115] This fails to understand that the "new" government regulations protecting neighboring landowners and the public were not doing anything really new; rather, the regulations simply were taking on the role that the now-weakened doctrines of *sic utere* and quiet enjoyment had done previously: address the off-property impacts of what is done on private property. The mere fact that the protections of others from landowners' uses had been transferred from part of the very definition of property, as largely controlled by the courts, to local, state, and federal legislatures that were crafting statutory and regulatory protections, gave rise to the notion that protecting others from uses of property that have externalities for the larger public is "anti-private property rights" rather than merely being part of the nature of the relationships inherent in societal establishment of rules that create property.

As we develop more and more property, disrupting natural ecosystems and covering land with impervious surfaces that increase runoff, we increase flooding harms. The impacts of climate change exacerbate this through increased intensity of precipitation events, even as sea-level rise

[114] The arguments presented in this paragraph largely stem from JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY §1.1.4. (2d ed. 2005) and Harvey M. Jacobs and Kurt Paulsen, *Property Rights: The Neglected Theme of 20th-Century American Planning*, 75 J. Am. Planning Assoc. 134 (2009) as well as elements from many others, including MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 68-69 (2003); and ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND (2007).

[115] Harvey M. Jacobs and Kurt Paulsen, *Property Rights: The Neglected Theme of 20th-Century American Planning*, 75 J. Am. Planning Assoc. 134 (2009) ("When government regulation is properly based on protecting public safety, health, and welfare from the negative impacts of others' use of their properties, this is not "anti-private property rights." It is merely defining the rights and responsibilities of property ownership and use in a way that accomplishes what the very institution of property is supposed to do: promote the public good.").

exacerbates flooding in low-lying areas near coastlines. There are cases where courts already are struggling with how to adapt to a changing present and future.[116]

More effectively addressing where and how development and land use occur in order to protect people, property, and the public from the harms of increased flooding, we need to promote a robust discussion that includes the history of property law so that courts, legislators, and the public all understand their roles in changing the definitions of property so that we may, collectively, address increasing loss and suffering due to flooding. This section has sought to highlight some of the ways that the legal history has contributed to an understanding of how our property law has changed in the past so that we can reframe the debate from "pro-" versus "anti-private property rights" to *which* property right should be favored[117] and *why*. Using historical precedent as a guide, a cogent argument exists that legislative bodies have the right to regulate to protect the public from harms due to private uses of land, and courts have the right to interpret private property protections to protect the public from those that would utilize our social construct of private property rights for individual benefit at the expense of the very public that creates private property.

Local governments seek to accomplish this through floodplain stewardship, and this No Adverse Impact Legal Guide provides case law and analysis supporting use of No Adverse Impact approaches to decrease flood losses and decrease the potential for successful property rights claims against local governments *both now and in the future*.

[116] *See, e.g.,* South Carolina Coastal Conservation League, Appellant, v. South Carolina Department of Health and Environmental Control, KDP, II, LLC, and KRA Development, LP, Respondents. Appellate Case No. 2019-000074 At: http://nsglc.olemiss.edu/casealert/june-2021/sc-coastal-consv-league.pdf (noting that ongoing movement of a coastal "critical area" due to geomorphological processes meant that a permit issued just outside of the "critical area," but that would come to be in the "critical area" by the ongoing erosion, meant it was error *not to apply* permitting criteria relevant to "critical areas"). *See also,* Argos Properties II, LLC v. Virginia Beach, case no. CL18-2289, Bench Trial-Vol. II of II, Judge's Ruling and Final Order (Circ. Ct. of Virginia Beach, April 24, 2019) (indicating that city was within its rights to deny a rezoning request in part of consideration of current *and* future flooding from sea-level rise even though the city's ordinances and permit review did not specifically include accounting for sea-level rise).

[117] Harvey M. Jacobs and Kurt Paulsen, *Property Rights: The Neglected Theme of 20th-Century American Planning*, 75 J. AM. PLANNING ASSOC. 134 (2009) ("Throughout the history of planning in the United States, the question has not been whether private property or government intervention will prevail, but rather whose property rights and interests are to be given more protection.").

II.D. Sovereign Submerged Land[118]

II.E. Land Use Limitations

II.E.1. State Police Powers

Land use limitations are typically most associated with local government even though some state and federal policies also effectively limit land use.[119] The Tenth Amendment to the U.S. Constitution says that, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This provides very broad authority to states to control land use, and states often delegate much or all of this authority to local governments. For more on this, see the section on Home Rule vs. Dillon's Rule States. [ADD LINK TO "Home Rule vs. Dillon's Rule States"] The broad police powers of the state are not undermined by contracts between individuals or even between individuals and the state.[120]

The broad power retained by states and local governments to regulate land use is usually referred to as "the police power."[121] The police power is one of the broadest and least clearly

[118] This section currently under review and will be added to this *Guide* in the next revision.

[119] For example, federal laws such as the Endangered Species Act may result in a state developing a habitat conservation plan that imposes limits on land use. The federal Clean Water Act also sometimes imposes land use limitations, such as limitations on adding fill in wetlands, that affect property.

[120] *See, e.g.,* Manigault v. Springs, 199 U.S. 473, 480-81 (1905) (noting that "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.").

[121] Mugler v. Kansas, 123 U.S. 623, 631, 632 (1887).

defined powers of government. [122] The police power has been interpreted so broadly[123] as to even allow states to destroy property without compensation in some instances.[124] One case defined the basis of the police power as the government's right to regulate any business to avoid "injurious consequences of that business" which "prejudicially affect the rights and interests of the community,"[125] as determined by the legislative branch and subject only to the constraints of the Constitution.[126] Judicial review of the propriety of government action based on the police power typically uses the very deferential standard of "rational basis" review.[127]

Despite the breadth of the police power, it does not provide government *carte blanche* "to arbitrarily deprive the citizen of rights protected by the Constitution under the guise of

[122] Berman v. Parker, 348 U.S. 26, 32 (1954); Dobbins v. Los Angeles, 195 U.S. 223, 235-36 (1904) ("[E]very intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community." And, a legislative "determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."); The Slaughterhouse Cases, 83 U.S. (16 Wallace) 36, 62 (1872) (noting that the police power "is, and must be from its very nature, incapable of any very exact definition or limitation."). *See, also,* Munn v. Ill., 94 U.S. 113, 124 (1877) ("From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, 'are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good."). *See also, id.* at 126.

[123] Mugler v. Kansas, 123 U.S. 623, 659 (1887) (noting that states have the right to "to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the Constitution of the United States. The power to establish such regulations, as was said in Gibbons v. Ogden, 9 Wheat. 1, 203, reaches everything within the territory of a State not surrendered to the national government."). The U.S. Supreme Court has noted that the police power is "one of the most essential powers of government, one that is the least limitable." Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915).

[124] Mugler v. Kansas, 123 U.S. 623, 631, 632 (1887).

[125] Mugler v. Kansas, 123 U.S. 623, 660 (1887).

[126] Mugler v. Kansas, 123 U.S. 623, 661, 663-64 (1887). *See, also* Dobbins v. Los Angeles, 195 U.S. 223, 235 (1904).

[127] *See, e.g.,* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487-488, 75 S.Ct. 461, 464-465, 99 L.Ed. 563 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it"); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952) ("Our recent decisions make it plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.... [S]tate legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare").

exercising the police powers reserved to the States."[128] Thus, courts have to rule on the validity of laws passed based on the very broad and amorphous police power.

The U.S. Supreme Court articulated the test for the validity of an action under the police power in Lawton v. Steele, 152 U.S. 133, where the Court established a two-part test: "[F]irst, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."[129]

For many years, "takings" law and evaluation of the validity of a legislative action under the police power were often intertwined or even confused in takings law, eventually encompassing doctrinal confusion of substantive due process, the police power, and takings.[130] Beginning in 2005, the U.S. Supreme Court finally sought to effectively distinguish police power/substantive due process questions from takings.[131] While some praised the analytical clarity and more rational framework this made for takings law,[132] it did not last as a subsequent Supreme Court decision ultimately again confused the supposed separation between courts reviewing the validity of a regulation and whether the regulation or action constituted a taking.[133] Thus, while formerly it appeared that the U.S. Supreme Court had essentially used the same standard for takings law and the scope of the police power,[134] clearly this is no longer the case as subsequent

128 Dobbins v. Los Angeles, 195 U.S. 223, 236-37 (1904) (citing to Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 558 for the proposition that no matter how broad the police powers of the states, they are exercised in subject to the constraints of the U.S. Constitution and its protections).

129 Lawton v. Steele, 152 U.S. 133, 137.

130 *Compare, e.g.,* Agins v. City of Tiburon, 447 U.S. 255 (1980) *to* Lingle v. Chevron, 544 U.S. 528 (2005).

131 Lingle v. Chevron, 544 U.S. 528 (2005). *See, also,* sections on Exactions and Substantive Due Process

132 John D. Echeverria, Koontz: *The Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 49-50 (2014).

133 *See, e.g.,* John D. Echeverria, Koontz: *The Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1 (2014).

134 *See, e.g.,* Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) ("A vested interest cannot be asserted against [the police power] because of conditions once obtaining. Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67, 78. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground…"). *See, also,* Goldblatt v. Town of Hempstead, 369 U.S. 590, 596 (S.Ct., 1962) ("Our past cases leave no doubt that appellants had the burden on "reasonableness." E. g., Bibb v. Navajo Freight Lines, 359 U.S. 520, 529 (1959) (exercise of police power is presumed to be constitutionally valid); Salsburg v. Mary-land, 346 U.S. 545, 553 (1954) (the presumption of reasonableness is with the state); United States v. Carolene Products Co., 304 U.S. 144, 154 (1938) (exercise of police power will be upheld if any state of facts either known or which could

cases have found takings of private property even when the police power would allow the exercise of the contested governmental authority *if* accompanied by compensation.[135]

Confusion arises because the U.S. Supreme Court does not, when examining a Fifth Amendment takings claim, have license to judge the effectiveness of legislation[136] or undertake a "least restrictive analysis."[137] That a land use regulation might be "somewhat overinclusive or underinclusive is [] no reason for rejecting it."[138] This doctrinal confusion is at its worst when courts are examining claims of an "exaction." For more information on this, please see the section on Exactions.

Arguably, the whole point of *Munn* and other cases broadly interpreting the policy power is that when private land owners use their land in a way that affects the public, and the public, as individuals, has little power to overcome the negative impacts of the private use and decision-making, that is the quintessential role of government to act through the police power.

II.E.2. Local Governments

As a federal form of government, the United States has long maintained significant powers at the state level. And states, in turn, have granted more or less extensive police powers to local governments, depending on the structure of the state constitution and whether local governments are "home rule" or the state is a Dillon's Rule state, as discussed in this section. Maintenance of significant police powers at the local and state levels recognizes how close local and state governments are to people and their issues.[139]

be reasonably assumed affords support for it). This burden not having been met, the prohibition of excavation on the 20-acre lake tract must stand as a valid police regulation.").

[135] *Cf, e.g.,* Lingle v. Chevron, 544 U.S. 528, 537 (2005) (the Takings Clause "is designed not to limit the government interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise property interference amounting to a taking.").

[136] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 , 487 n. 16 (S.Ct., 1987). *See also*, Lingle v. Chevron, 544 U.S. 528, 544-45 (2005).

[137] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 , 487 n. 16 (S.Ct., 1987).

[138] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 , 487 n. 16 (S.Ct., 1987) (citing Euclid v. Ambler Realty Co., 272 U.S. 365, 388-389 (1926).).

[139] "State Legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts, unless clearly arbitrary and unreasonable." Gorieb v. Fox 274 U.S. 603, 608 (1927).

II.E.2.a. Dillon's Rule vs. Home Rule

The Tenth Amendment delegates power to the states,[140] but the Constitution is silent on the power of local governments. This means that local governments derive their powers from the states. The delegation of that power can be done in many ways, and that is why local governments across the United States have differing grants of power. These differing approaches are typically categorized as either Dillon's Rule or Home Rule.

II.E.2.a.i. Dillon's Rule

Dillon's Rule is a narrowly construed interpretation of local government power, which says that local governments can only engage in activity that is explicitly granted or authorized by the state. Dillon's Rule is named after two separate judicial decisions issued months apart in 1868 by Iowa judge John Forest Dillon.

The first opinion, *City of Clinton v. Cedar Rapids & Mo. River Railroad Co.*, upheld the right of a state-chartered railroad company to use dedicated city streets for its railroad track over the objection of the municipality.[141] The court ruled in favor of the railroad because "[m]unicipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature."[142] The court came to this conclusion because the state legislature, by special act, had conferred on the railroad the right to use the streets. A month later, Judge Dillon elaborated further on his holding in a separate opinion, *Merriam v. Moody's Executors*, which said, "a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power."[143]

The U.S. Supreme Court ultimately upheld Judge Dillon's narrow interpretation of local government control in *Hunter v. City of Pittsburgh*.[144] The opinion confirmed that "[m]unicipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them." "The . . . nature . . . of the powers conferred upon these corporations . . . rests in the absolute discretion of the

[140] U.S. CONST. amend. X.

[141] 24 Iowa 455 (Iowa 1868).

[142] *Id.* at 475.

[143] 25 Iowa 163, 171 (Iowa 1868).

[144] 207 U.S. 161 (U.S. 1907).

state." "The state, therefore, at its pleasure, may modify or withdraw all such powers . . . ."[145] Since then, these decisions have shaped how local governments legislate throughout the United States. States vary in the amount of power they delegate to local governments, but all Dillon's Rule states agree that if there is reasonable doubt as to whether a local government has been delegated a power, then the power has not been delegated.

II.E.2.a.ii. Home Rule

Dillon's Rule greatly restrained local government action, and because of the slow-moving nature of state legislatures, many states began to grant local governments more power. This led to the creation of Home Rule provisions. Home Rule limits state interference and creates local autonomy. Home Rule power differs from state to state; it could be delegated to counties or municipalities, can be found in state constitutions or statutes, and can apply to specific fields or be more general.

The National League of Cities published Principles of Home Rule for the Twenty-First Century, which is a comprehensive look at the evolution of Home Rule in the United States.[146] The publication notes different waves of Home Rule laws -- the first, when states empowered local governments to adopt charters, giving the ones who did so the power to act on local or municipal affairs; and the second, granting even more legislative authority.[147]

II.E.2.a.iii. Dilution of Dillon's Rule in the Land Use Context

Many states grant general police powers to local governments, meaning that they have the ability to protect the public health, safety, morals, or general welfare of their communities. These police powers give local governments land use authority. In the article "Death of Dillon's Rule: Local Autonomy to Control Land Use," John Nolon found that in at least forty states the clutch of Dillon's Rule has been overruled by constitutional provisions, state legislation, judicial decisions, or a combination of the three, in the land use context.[148] This means that even in many states that still consider themselves burdened by Dillon's Rule, local governments have the ability to enact many land use policies within their borders.

II.E.2.a.iv. Floodplain Management

[145] *Id.* at 178–79.

[146] Nat'l League of Cities, Principles of Home Rule for the 21st Century (2020), https://www.nlc.org/sites/default/files/2020-02/Home%20Rule%20Principles%20ReportWEB-2.pdf.

[147] *Id.* at 11–12.

[148] John Nolon, Death of Dillon's Rule: Local Autonomy to Control Land Use, 36 J. Land Use & Envt'l Law 1 (2020).

Home Rule and Dillon's Rule are significant to floodplain management planning. As mentioned, most land use planning activities are well established. However, innovative planning techniques sometimes create concern or hesitation for local governments as they are unsure as to whether they have the power to implement them. It is clear from the findings above that in most circumstances Dillon's Rule constraints do not impact local government's ability to engage in effective floodplain stewardship.

II.E.2.b. Local Land Use Regulations

II.E.2.b.i. Planning

The 10th Amendment of the Constitution reserves to the states all powers not delegated by the U.S. Constitution to the federal government nor prohibited to the states.149 This includes the power to adopt regulations that advance public health, safety, and welfare, commonly referred to as police powers.150 Some of these areas of regulation, if delegated by the state, are the responsibility of localities. States have sweepingly delegated land use planning powers to local governments.151

Planning is a legislative function. At the local level, this includes enaction and control of planning-related laws for their community. Planning is a land use management tool used to control growth and development.[152] Planning includes zoning, subdivision approval, special use permitting, site plan regulation, or any other regulation that impacts the use or scale of property. Many local communities have planning boards who implement planning regulations.[153] Planning boards typically bring their recommendations before the local legislature for final approval and assist in the development of new laws.

Home rule states give local governments the broad authority to make legislative decisions, and a majority of states have at a minimum provided home rule authority to local governments when it comes to land use. Supreme Court Justice Brandeis said that states are laboratories of

[149] U.S. Const. amend. X.

[150] LEGAL INFORMATION INSTITUTE, CORNELL LAW SCHOOL, POLICE POWERS, at https://www.law.cornell.edu/wex/police_powers (last visited Feb. 17, 2023).

[151] ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, LAND-USE PLANNING SYSTEMS IN THE OECD: UNITED STATES FACT SHEET 2 (OECD 2017), at https://www.oecd.org/regional/regional-policy/land-use-United-States.pdf (last visited Feb. 17, 2023).

[152] LEGAL INFORMATION INSTITUTE, CORNELL LAW SCHOOL, LAND USE, at https://www.law.cornell.edu/wex/land_use (last visited Feb. 17, 2023).

[153] https://dos.ny.gov/planning-board-overview; Mass. Gen. Laws ch. 41, § 81B; https://www.orlando.gov/Our-Government/Records-and-Documents/Citizen-Advisory-Boards/Municipal-Planning-Board.

democracy[154] and municipal governments should be seen in the same manner. Localities are encouraged to try innovative policies; this is increasingly important because of climate change and the flooding that accompanies it. Localities should utilize experimental and innovative solutions. Since it is not as easy for politics to align at the federal level or even the state level, the local government is where swifter change can be made, and the successful planning tools can then be mirrored in other localities or expanded to the state and national levels.

II.E.2.b.ii. Comprehensive planning

Comprehensive planning is a critical part of the community development process. It is the thoughtful, forward-looking process of planning utilized by local governments, and it includes influence from the community.[155] The United States Department of Commerce created the Standard City Planning Enabling Act[156] in 1928. Like the Standard State Zoning Enabling Act, it was written as a tool state government could use and adopt as their own.[157] The Standard City Planning Enabling Act more precisely defined and described comprehensive planning, and in doing so, spread the notion that comprehensive planning should precede the creation of zoning ordinances.[158] Not all states have required local governments to plan comprehensively; however, many that don't offer incentives to the local governments that do.[159]

The comprehensive plan is the byproduct of the comprehensive planning process. Though the plan itself it very important, the process is what makes comprehensive planning so important for communities.[160] The goal is often to identify and connect a wide range of issues that impact a community.[161] In order to make sure that the town is being looked at holistically, stakeholders

[154] New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

[155] The World Bank, Master Planning, at https://urban-regeneration.worldbank.org/node/51 (last visited Feb. 20, 2023).

[156] ADVISORY COMMITTEE ON CITY PLANNING AND ZONING, U.S. DEPT. OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928), at https://www.govinfo.gov/content/pkg/GOVPUB-C13-955faaa3558a7c44c6a9edbbc01f5cd5/pdf/GOVPUB-C13-955faaa3558a7c44c6a9edbbc01f5cd5.pdf (last visited Feb. 20, 2023).

[157] Id.

[158] Id.

[159] E.g., "To encourage local governments' engagement in comprehensive planning, Georgia incentivizes it by allowing cities and counties with DCA-approved comprehensive plans access to a special package of financial resources to aid in implementing their plans." https://www.dca.ga.gov/local-government-assistance/planning/local-planning/local-comprehensive-planning (last visited March 20, 2023).

[160] https://www.planning.org/educators/whatisplanning/

[161] Id.

and community members are brought into the process.[162] Critical components of comprehensive plans are the objectives and goals, which create a roadmap in order to establish the municipality's desired community.[163] Comprehensive plans consider many community issues, such as equity, traffic, tourism, and sustainability, just to name a few.

Despite the importance of comprehensive planning, many local governments do not have a comprehensive plan or have an outdated comprehensive plan. This can create many issues. Many state laws require that zoning conforms to a comprehensive plan, if one exists.[164] An out-of-date plan stagnates innovative zoning techniques and suppresses needed change. However, a comprehensive plan does not always need to be a formally adopted single document.[165] Courts will often refer to a scheme or pattern in planning or in the laws themselves.[166]

Legal Ramifications

One reason why having a comprehensive plan is important is that when planning decisions are challenged, courts will use it to determine whether land use regulations are in conformance with the community's expressed objectives. Zoning regulations that are not adopted in accordance with a comprehensive plan are vulnerable to lawsuits.[167] In *Udell v. Haas*, the New York court called a comprehensive plan the "essence of zoning."[168] Without it, "there can be no rational allocation of land use."[169] Without a comprehensive plan, or with an out-of-date comprehensive plan, local governments leave themselves open to judicial influence that could negatively impact the town. As mentioned above, courts can look for patterns in past decisions and consider them to be a plan. Local governments do not want courts making planning decisions on behalf of their community, especially when addressing climate change impacts and in the wake of excessive flooding, because decisions may stray from those made in the past. Comprehensive plans are make or break for land use planning. They can not only make

[162] Id.

[163] Id.

[164] Code of Virginia § 15.2-2297(A)(viii); New York General City Law §20(25); Town Law §263; Village Law §7-704.

[165] Neville v. Koch, 173 A.D.2d 323 (1st Dept., 1991).

[166] "A well-considered plan need not be contained in a single document; indeed, it need not be written at all. The court may satisfy itself that the municipality has a well-considered plan and that authorities are acting in the public interest to further it by examining all available and relevant evidence of the municipality's land use policies." Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 131 (1988).

[167] Udell v. Haas, 21 N.Y.2d 463 (N.Y. 1968).

[168] Id.

[169] Id.

communities better and lead to innovative land use solutions, but also shield local governments from liability.

Climate Change

The comprehensive plan is the ideal place to address sustainability in a community's planning process.[170] When communities include climate change and sea-level rise in their comprehensive plan, it requires them to develop a plan of action. Additionally, when the local government passes regulations that inhibit property rights, there will be a clear record of the objective. Additionally, including language about how the municipality specifically plans to deal with climate change puts community members on notice, and the public engagement aspect of the process gives community members the opportunity to express their concerns.

Recommendations

Comprehensive plans are necessary, but comprehensive planning is also expensive. There are state and federal[171] grant programs that assist with the costs, but they are not always accessible and can be limiting. Additionally, comprehensive plans should be looked at as living documents that change with the times and community needs. Goals and the paths to those goals can and should shift as needs change, demographics change, environmental concerns change, etc. It will always be imperative to include the community in the planning process in as many ways as possible. Putting the community on notice and getting them onboard not only will lead to the best community for all of its members, but also can help protect the municipality from excessive lawsuits.

II.E.2.b.iii. Zoning

In 1916, New York City introduced the first comprehensive zoning ordinance to protect the city's economy, private property values, and public health and safety.[172] Since zoning is legislative, local governments are limited to the powers delegated from the state. As contemplated above, this made it necessary for the states to grant this power to the municipalities. In 1922, the

[170] *See* the American Planning Association's Sustaining Places initiative as a resource for comprehensive plan standards that serve as a resource for the development of local comprehensive plans. https://www.planning.org/sustainingplaces/compplanstandards/

[171] https://www.hud.gov/program_offices/administration/hudclips/guidebooks/7485.3G

[172] City of New York, Board of Estimate and Apportionment, Building Zone Resolution (Adopted July 25, 1916), at https://www.nyc.gov/assets/planning/download/pdf/about/city-planning-history/zr1916.pdf (last visited Feb. 17, 2023).

United States Department of Commerce published the Standard State Zoning Enabling Act,[173] a model statute, to promote the adoption of zoning. The Supreme Court upheld the constitutionality of zoning in their 1926 decision, Euclid v. Ambler Realty.[174] The 1920s saw the expansive use of zoning regulations in municipalities across the country.[175] However, a local government's ability to interfere with private property rights through zoning is not unlimited. Zoning regulations must relate to the public health, safety, morals, or general welfare of the community, but these requirements are broadly interpreted by the courts.

II.E.2.c. Special Use / Exception Permit or Conditional Use

Special use permits are a tool used by local governments, along with zoning, to regulate land uses. Special use permits, sometimes referred to as "special exception" or "conditional use" permits[176], allow in a specific zoning district, when approved by the board of adjustment, zoning appeals board, or other local body, a "permitted use."[177] If the ordinance does not permit the proposed use with one of these permits, it is ineligible.[178] Unlike as-of-right zoning, special use permits have special criteria and conditions attached to their permission. Special use permits allow flexibility in zoning and contemplate additional accepted uses that are in harmony with the zoning, but may create problems if they are developed as-of-right.[179] A quintessential example is a church in a single-family residential neighborhood. The legislature may conclude that a church should be permitted in a residential district subject to conditions ensuring the size,

[173] Advisory Committee on Zoning, Dept. of Commerce, A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations (1926 rev'd ed.), at https://www.govinfo.gov/content/pkg/GOVPUB-C13-18b3b6e632119b6d94779f558b9d3873/pdf/GOVPUB-C13-18b3b6e632119b6d94779f558b9d3873.pdf (last visited Feb. 20, 2023).

[174] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[175] Advisory Committee on Zoning, Dept. of Commerce, A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations 5 (1926 rev'd ed.), at https://www.govinfo.gov/content/pkg/GOVPUB-C13-18b3b6e632119b6d94779f558b9d3873/pdf/GOVPUB-C13-18b3b6e632119b6d94779f558b9d3873.pdf (last visited Feb. 20, 2023).

[176] The terms vary based on jurisdiction. See, e.g., *Zoning Bd. of Adjustment v. Liberty Bell Medical Center*, 17 Pa. Commw. 213, 331 A.2d 242 (1975) (using the term "use certificate"); *Overbrook Farms Club v. Zoning Bd. of Adjustment*, 45 Pa. Commw. 96, 405 A.2d 580 (1979) (using the term "adjustment certificate").

[177] A use allowed by special exception is a permitted use. 3 Zoning Law and Practice § 21-1 (2022).

[178] Id.

[179] Id.

layout, parking, etc. are carefully designed so that the neighborhood is not disturbed. Requirements and conditions for these permits will vary from state to state and town to town.

Variances are another tool used by local governments, along with zoning, to regulate land uses. Unlike special use permits, specific variances are not contemplated in zoning ordinances at all. A variance grants permission to deviate from existing legal requirements, typically based on a finding of hardship.[180] It has been described as "an administrative or quasi-judicial act permitting minor deviations from land use regulations and avoiding undue hardship for the property owner without violating the overall scheme of land use regulation."[181] Special use permit applicants must show that they meet the conditions contained in the ordinance contemplating the special use, while variance applicants must show that a variety of factors are met, depending on the jurisdiction.

For example, a Pennsylvania court balanced two factors when reviewing a variance awarded by the City of Pittsburgh.[182] These factors include: (1) that an unnecessary hardship exists,[183] and (2) the variance will not alter the essential character of the neighborhood, or impair neighboring properties.[184] Similarly, in New York, the court said that the hardship test must primarily weigh the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community, along with these five additional factors: (1) is there an undesirable change to the character of the neighborhood, (2) can the benefit be sought by some other method, (3) is the request substantial, (4) is there an adverse impact on physical or environmental conditions, and (5) was the hardship self-created.[185]

Local floodplain regulation should have parameters set with regards to the issuance of variances and special permits.[186] When floodplain regulations are set within the zoning ordinances, these parameters are more obvious and typically more robust. But, when floodplain regulations are

[180] *Cf.* 3 Zoning Law and Practice § 20-1 (2022).

[181] *Id.* (citing *Milagra Ridge Partners, Ltd. v. City of Pacifica*, 62 Cal. App. 4th 108, 72 Cal. Rptr. 2d 394 (1998)).

[182] Larsen v. Zoning Board of Adjustment of the City of Pittsburgh

[183] *Id.* The unnecessary hardship cannot be self-created and it must be caused by unique characteristics of the property. In this case, the court found that a desire to have more room for children to play is not an unnecessary hardship. Also, they found that the hardship was created by the applicants because of the way they built on the lot, and that because most lots on the road had similar topography the variance was inappropriate.

[184] *Id.* In this case, the construction would have blocked neighboring views of the river and there was fear that if this variance was granted, other properties would do the same.

[185] *Sasso v. Osgood*, 657 N.E.2d 254 (1995).

[186] FEMA, *Unit 7: Ordinance Administration*, National Flood Insurance Program (NFIP) Floodplain Management Requirements: A Study Guide and Desk Reference for Local Officials, 7-5, https://www.fema.gov/pdf/floodplain/nfip_sg_unit_7.pdf.

imbedded into building codes, subdivision regulations, sanitary regulations, or are standalone ordinances, there may be a lack of coordination between zoning processes, like the issuance of variances and special permits, and floodplain management.[187]

The appeal processes for special use and variance applicants are generally stipulated by state law.[188] There must be a process in place to refer differing interpretations of the ordinance to a board of appeals to settle disputes.[189] NFIP regulations set construction standards for buildings in NFIP-regulated areas but do not address special use permits. Communities differ in what should and should not be allowed in a floodway, and local governments must follow the procedures set forth in local and state law. In all cases, an official body needs to determine if a special use permit is appropriate.[190]

Variances may expose insurable property to a higher flood risk, so NFIP regulations set guidelines for granting them.[191] Variances in a floodplain mean that minimum standards of the NFIP may not be met and therefore should not be handed out unless there is good and sufficient cause and an exceptional hardship.[192] The FEMA guide *National Flood Insurance Program (NFIP) Floodplain Management Requirements: A Study Guide and Desk Reference for Local Officials* notes that justifying a variance below flood elevation requirements should be very unlikely, because there are usually alternative ways to construct a compliant building.[193] The guide also notes that variances should never be granted for multiple lots or entire subdivisions.[194] It is important for floodplain managers to remember the community-wide floodplain management goals and face the difficult task of denying requests even when personal circumstances evoke sympathy.[195]

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[187] *Id.* at 7-6–7-12. In an effort to address the problem of lack of integration of plan aspects within local governments, a research team from Texas A&M University developed a system to evaluate multiple local government plans for how well they coordinate. Jaimie Hicks Masterson, Philip Berke, Matthew Malecha, Siyu Yu, Jaekyung Lee & Jeewasmi Thapa, Plan Integration for Resilience Scorecard Guidebook (May 25, 2017 draft).

[188] FEMA, *Unit 7: Ordinance Administration*, National Flood Insurance Program (NFIP) Floodplain Management Requirements: A Study Guide and Desk Reference for Local Officials, 7-48, https://www.fema.gov/pdf/floodplain/nfip_sg_unit_7.pdf.

[189] Id.

[190] Id.

[191] 44 CFR 60.6(a).

[192] FEMA, *Unit 7: Ordinance Administration*, National Flood Insurance Program (NFIP) Floodplain Management Requirements: A Study Guide and Desk Reference for Local Officials, 7-49, https://www.fema.gov/pdf/floodplain/nfip_sg_unit_7.pdf.

[193] Id.

[194] *Id.* at 7-50.

[195] Id. at 7-51

II.E.2.d. Rebuilding Limitations and Amortization of Non-conforming Uses

II.E.2.d.i. Limitations on Rebuilding Damaged Structures[196]

Whether as a means of complying with the rules for participation in the National Flood Insurance Program (NFIP) or simply for the purpose of reducing flood damage, local governments in flood-prone areas have been enacting structural requirements for buildings, such as minimum elevation, through floodplain ordinances. While property law generally requires that nonconforming uses (i.e., buildings that do not meet the structural requirements) that existed prior to new zoning laws are allowed to remain[197], local governments may require that when a nonconforming structure is destroyed to a certain extent, the property owner must reconstruct the building in compliance with existing zoning ordinances.[198] As detailed below, the standard in general for when compliance with new zoning requirements can be compelled is when a nonconforming structure is destroyed to the extent that repairs or reconstruction cost more than 50% of the property's fair market value before the damage.[199]

Thus far, enforcing compliance with floodplain ordinances during rebuild of nonconforming structures has been generally successful. State courts have widely upheld decisions by zoning boards and the like to require reconfiguration or elevation of nonconforming structures when rebuilt after being destroyed. However, it appears that three issues have consistently arisen: (1) as a preliminary matter, what evidence is sufficient to declare that a property has been destroyed beyond 50% of its original market value?; (2) when only one or some structures among multiple structures on a parcel of land are destroyed, is the 50% assessment made only for the damaged structures or must the destruction constitute more than 50% of the value of the entire property?; and (3) when it is impossible for a structure to be rebuilt in a way that complies with both the floodplain ordinance and other zoning requirements, such as yard setbacks, which rule is given priority? The cases set out below illustrate the stances that many local governments and state courts have taken on these conflicts.

[196] This section benefited from the writing and research skills of William Schwartz, J.D.

[197] Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 127 (1978).

[198] Patricia E. Salkin, Abandonment, Discontinuance and Amortization of Nonconforming Uses: Lessons for Drafters of Zoning Regulations, 38 REAL EST. L.J. 486, 505-06 (2010).

[199] Oswalt v. Ramsey County, 371 N.W.2d 241, 245-46 (Minn. Ct. App. 1985).

II.E.2.d.ii. Legal Authority for Nonconformities and Rebuild Limitations

The principle for allowing the continuance of a nonconforming use that existed prior to the enactment of a zoning ordinance derives from the takings clause of the fifth amendment.[200] The idea is that by regulating the landowner's use of the property to the extent that the owner is deprived of his or her investment-backed expectations, the government has committed a taking without just compensation.[201] To avoid any takings claims, local governments therefore usually include in new zoning ordinances a provision allowing for nonconforming uses to continue subject to certain restrictions.[202]

Usually, these restrictions involve the limitation on the right to "change, expand, alter, repair, [or] restore" the nonconforming structure as well as a prohibition on recommencing the use after it has been abandoned for a certain amount of time.[203] One type of restriction often used which is of particular relevance in floodplains is requiring property owners to rebuild or repair damaged property in a way that complies with all zoning ordinances in place at the time of the damage.[204] These ordinances usually include a minimum degree of damage that must occur (usually based on the value of the property) in order to force the owner to reconstruct the building in compliance with existing ordinances.[205] While the amount of damage varies from state to state, the most widely used calculation is explained below.

II.E.2.d.iii. The 50% Rule Generally

As already mentioned, one tool local governments employ to eliminate building configurations that do not conform with floodplain ordinances is requiring that the structures are rebuilt to fully comply with the ordinance(s) in place when those structures are destroyed by natural disasters or other unforeseen circumstances, such as a fire. The "typical treatment of nonconforming uses in zoning ordinances" is that when the structure has been destroyed to the extent that the cost to rebuild the property exceeds 50% of the property's assessed value, the structure must be rebuilt to conform with all zoning requirements in place at the time of the

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[200] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[201] Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 127 (1978).

[202] *Nonconforming Use*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/nonconforming_use.

[203] Patricia E. Salkin, Abandonment, Discontinuance and Amortization of Nonconforming Uses: Lessons for Drafters of Zoning Regulations, 38 REAL EST. L.J. 486 (2010).

[204] Patricia E. Salkin, Abandonment, Discontinuance and Amortization of Nonconforming Uses: Lessons for Drafters of Zoning Regulations, 38 REAL EST. L.J. 486, 505-06 (2010).

[205] *Id.*

damage.[206] The code in the City of New Brighton in Minnesota reads "If any nonconforming use is destroyed by any means, including floods, to an extent of fifty (50) per cent or more of its assessed value, it shall not be reconstructed except in conformity with the provisions of this chapter."[207] The zoning ordinance adopted by the Village of Pelham Manor in New York, which has been upheld by the New York Court of Appeals, states "no building or structure which has been damaged structurally by fire or other causes to the extent of more than fifty percent of its value, exclusive of foundations, shall be repaired or rebuilt, or thereafter occupied except in conformity with the provisions of this ordinance."[208] The City of Pacific in Missouri has phrased its ordinance as:

> "In the event that any non-conforming structure or any structure devoted in whole or in part to a non-conforming use is extensively damaged or becomes extensively deteriorated or is destroyed by any means to an extent equaling greater than fifty percent (50%) of its fair market value, such structure shall not be restored except in conformity with all applicable provisions of this Chapter including the regulations of the zoning district in which the building is situated."[209]

Most local governments have included compliance with flood-related ordinances as part of this rule, and state courts across the country have enforced this. The *No Adverse Impact Toolkit for Common Sense Floodplain Management* describes four areas of regulation for communities who wish to participate in the National Floodplain Insurance Program.[210] Regarding nonconforming structures in existence at the time of joining the NFIP, the fourth category mandates that

> "a 'substantially improved' building is treated as a new building in that further construction must meet the NFIP minimum standards for new construction. The NFIP regulations define "substantial improvement" as any reconstruction . . . the cost of which equals or exceeds 50 percent of the market value of the structure before the start of construction . . . This requirement also applies to buildings that are substantially damaged, whether by flood or other means."[211]

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[206] Oswalt v. Ramsey County, 371 N.W.2d 241, 245-46 (Minn. Ct. App. 1985).

[207] *Id.* at 245 n. 2.

[208] Pelham Esplanade, Inc. v. Board of Trustees of Village of Pelham Manor, 565 N.E.2d 508, 510 (N.Y. 1990).

[209] State ex rel. Heck v. City of Pacific, 616 S.W.3d 387, 395 (Mo. Ct. App. 2020).

[210] NAI Steering Committee, No Adverse Impact; A Toolkit for Common Sense Floodplain Management 39 (2003).

[211] Id.

Hence, the NFIP requires participants to also apply the 50% rule to buildings that are destroyed which did not previously comply with the enacted floodplain ordinances.

II.E.2.d.iv. Evidence Necessary to Declare Damage beyond 50% of Market Value

Of course, while these local regulations appear clear ostensibly, specific issues have arisen that have been addressed at the state court level. For example, what must a local building officer show to prove that property damage exceeds 50% of the prior market value? In *State ex rel. v. Heck*, discussed in more detail in the next section, the owners of a damaged nonconforming use questioned the validity of a FEMA-produced computer program employed by the city's floodplain manager so as to calculate the percentage of flood damage[212] and objected to the admission of the resulting data reports into evidence.[213] The court held that the reports were admissible and that the validity of the reports in appraising the damage was an issue to be determined at trial.[214] On the basis of the admitted reports, the court held that the damage did indeed exceed the 50% standard and restricted reconstruction.[215]

In *Oswalt v. Ramsey County*, it was the building official for the City of New Brighton, located in Ramsey County, that informed the plaintiff that "damage to the house exceeded fifty percent of its value," meaning that the plaintiff "must comply with the floodplain ordinance."[216] The official did not provide the plaintiff with any basis for his assessment.[217] Because the floodplain ordinance in question, which was enacted after the plaintiff purchased the home, did not allow for residences in the "floodway district" where the property was located, the officer told the plaintiff that reconstruction was not even an option.[218] The plaintiff was thereafter essentially evicted from his property and the home was sold in foreclosure when he defaulted on his mortgage.[219] He then filed the lawsuit. [220] Once the case reached the Court of Appeals of Minnesota, the court ruled that the City had not followed the proper procedure to apply the 50% standard: "the city made no 'determination' that appellant's house was damaged to an extent such that reconstruction was prohibited . . . it used that standard without the

[212] State ex rel. Heck v. City of Pacific, 616 S.W.3d 387, 390-91 (Mo. Ct. App. 2020).

[213] *Id.* at 392.

[214] *Id.* at 394.

[215] *Id.* at 398.

[216] Oswalt v. Ramsey County, 371 N.W.2d 241, 244 (Minn. Ct. App. 1985).

[217] Id.

[218] Id.

[219] Id.

[220] Id.

determination it would necessarily make if it exercised force openly under the ordinance."[221] The court therefore held that the condemnation of the house constituted a taking and that the plaintiff was entitled to compensation.[222]

In both cases, plaintiff homeowners challenged the grounds on which the city governments classified their damage as exceeding 50% of the properties' value. While the government officials in *Heck* were able to present reliable data,[223] at the trial in *Oswalt*, the City only used the expert testimony of a few real estate appraisers.[224] The lesson to be learned here is that local governments should have a clear and reliable methodology for calculating the cost to repair damage to nonconforming properties – only then can they ensure that they have fail-safe data to present to tribunals if property owners protest via the court system.

II.E.2.d.v. **Properties with Multiple Structures**

Another issue that has been addressed is, for a nonconforming property that consists of multiple structures, when only a portion of the structures are damaged, is the fifty percent calculation made for each individual structure or is it done based on the conglomerate of all structures on the property?

In *Buss v. Johnson*, the respondent owned a horse farm that functioned as a riding academy, which became a nonconforming use as new county ordinances came into existence.[225] When the owner sought a permit to rebuild one out of three horse barns that was destroyed in a fire, the county relator contested the permit granted by the county board of adjustment on the basis that the barn had been destroyed beyond 50% of its market value.[226] When the case reached the Minnesota Court of Appeals, the court concluded that the legislature intended the percentage calculation to encompass all structures involved in the nonconforming use, not just one building that was a single component.[227] The court thus allowed the permit for the respondent to rebuild the barn to stand.[228]

[221] *Id.* at 247.

[222] Oswalt v. Ramsey County, 371 N.W.2d 241, 248 (Minn. Ct. App. 1985).

[223] State ex rel. Heck v. City of Pacific, 616 S.W.3d 387, 393 (Mo. Ct. App. 2020).

[224] Oswalt v. Ramsey County, 371 N.W.2d 241, 244 (Minn. Ct. App. 1985).

[225] Buss v. Johnson, 624 N.W.2d 781, 782-83 (Minn. Ct. App. 2001).

[226] *Id.* at 783-84.

[227] *Id.* at 786.

[228] *Id.* at 789.

The Court of Appeals of New York, the state's highest court, had to face essentially the same issue in *Pelham Esplanade*.[229] There, the Board of Trustees of the Village of Pelham Manor denied property owners a permit to rebuild a "nonconforming multiple-family dwelling" when just one of two apartment buildings on the property was destroyed by a fire.[230] The owners argued that because the aggregate of structures on the single parcel were not destroyed beyond 50% of their combined value, the 50% rule should not apply.[231] Unlike in *Buss*, however, the Court of Appeals of New York chose to respect the discretion of the Board in deciding what constitutes the nonconforming structure and upheld the denial of the permit.[232]

In these two cases, we see opposite results regarding rebuild limitations when one structure among multiple is destroyed beyond 50% of its standalone value. A good example of this issue arising in the context of a floodplain ordinance specifically is *State ex rel. Heck v. City of Pacific*.[233] In *Heck*, already mentioned in the previous section, the plaintiffs owned a manufactured home park having 15 homes which conformed with all zoning requirements at the time they were installed.[234] However, Pacific subsequently enacted a floodplain ordinance (section 420.210 of the City code) which deemed the plaintiffs' property to be within a "Floodway Fringe District" where there were certain standards for how manufactured homes "must be anchored and elevated on permanent foundations."[235] At that time, the area containing the home park was also rezoned as a "light industrial area" that prohibits residences.[236]

Despite initially being allowed to maintain the park as a nonconforming use, 10 of the 15 homes were thereafter destroyed in a flood, and according to the reports produced using the FEMA software, nine of the 10 homes were damaged "such that repairs/reconstruction would cost more than 50% of the homes' pre-damage market values."[237] The City of Pacific subsequently refused to grant to the owners the requisite tenant occupancy permits because "almost all of the manufactured homes" were damaged beyond the 50% standard.[238] When the issue was brought to court, the judge held that while the floodplain ordinance would in theory allow for reconstruction of the damaged homes in a manner compliant therewith, the location of the

[229] Pelham Esplanade, Inc. v. Board of Trustees of Village of Pelham Manor, 565 N.E.2d 508 (N.Y. 1990).

[230] *Id.* at 509.

[231] Id.

[232] *Id.* at 512.

[233] State ex rel. Heck v. City of Pacific, 616 S.W.3d 387 (Mo. Ct. App. 2020).

[234] *Id.* at 389.

[235] *Id.* at 395.

[236] *Id.* at 389.

[237] *Id.* at 390-91.

[238] *Id.* at 390.

home park within the industrial zone precluded reconstruction altogether.[239] As for whether the rebuild was prohibited for all of the homes or only those with the excessive damage, the judge opted for the latter: it prohibited rebuild of the nine homes damaged beyond fifty percent of their value while allowing the plaintiffs to restore the tenth home that suffered lesser damage.[240]

In essence, the court took an approach that mirrored the holding in *Pelham Esplanade*, evaluating the damage for each structure individually rather than overall damage on the entire parcel. Ironically, this approach was probably more favorable to the plaintiffs: since the majority of homes (nine out of 15) were destroyed beyond 50% of their value, if the court had assessed the percentage in terms of the entire property, the plaintiffs would have likely lost their right to rebuild the tenth manufactured home as well.

In light of this persistent confusion over whether the assessment for damage should be made for each individual structure or for an entire piece of real estate, it would make sense for local governments drafting floodplain ordinances to include a provision defining the scope of property included in the assessment; the provision should answer the question of whether building officials should evaluate each building individually or consider the combined value of all structures involved in the nonconforming use.

II.E.2.d.vi. **Conflicting Zoning Requirements**

There have also been instances when adhering to a floodplain ordinance requirement that reconstruction comply with the specifications thereof has conflicted with other rules regarding nonconforming structures and uses. The good news for those looking to prioritize preventing flood damage is that courts tend to favor compliance with flood rules over other zoning requirements. In *Mayer-Wittmann v. Zoning Board of Appeals of Stamford*, for example, the Connecticut Supreme Court chose to forgo compliance with yard setbacks and height restrictions in favor of ensuring that the reconstructed residence met the elevation minimum for the flood zone.[241]

The homeowner in *Mayer-Wittmann*, whose residence was destroyed in Hurricane Sandy, encountered the issue of not being able to comply with both the elevation requirement for flood-prone areas and the property line setback requirements and building height restrictions.[242] Not only would elevating the damaged sea cottage to comply with the minimum flood elevation have caused the dwelling to violate the maximum allowable height, but the soil

[239] State ex rel. Heck v. City of Pacific, 616 S.W.3d 387, 390 (Mo. Ct. App. 2020).

[240] *Id.* at 398.

[241] Mayer-Wittmann v. Zoning Bd. of Appeals of Stamford, 333 Conn. 624 (Conn. 2019).

[242] Mayer-Wittmann v. Zoning Bd. of Appeals of Stamford, 333 Conn. 624 (Conn. 2019)

beneath the original structure was not strong enough to support the new elevation, meaning that the reconstructed building would have to be moved even closer to the property line.[243]

When the Stamford planning board granted a variance for the owner to rebuild the cottage at the elevated height in violation of the setback and height requirements, the owner's next door neighbor appealed this decision to the trial court.[244] Both the trial court and the Connecticut Supreme Court agreed that the inability to comply with both the flood-prone area requirements and the height maximum and yard setback rules constituted an "unusual hardship"[245]– the requisite condition for the granting of a variance[246]– and concluded that compliance with the flood-related ordinance should be given priority:

> "It is important to recognize that, unlike regulations governing setbacks, building height and property use, which are designed to address concerns that are largely aesthetic in nature, the minimum flood elevation requirements are intended to "promote the health, safety and welfare of the general public, [to] limit public and private property losses and diminish expenditures of public money for costly flood protection projects and relief efforts, and [to] minimize prolonged governmental and business interruptions."[247]

In *Mayer-Wittman*, the court's decision was based largely on public policy considerations and not on any specific provision of an ordinance. The Town of Dewey Beach in southern Delaware, after dealing with a similar issue, actually amended its floodplain ordinance to include the express language that "any and all ordinances and regulations in conflict herewith are hereby repealed to the extent of any conflict."[248] The problem first arose in the case of *Laird v. Board of Adjustment of the Town of Dewey Beach*, decided in 2014.[249] In *Laird*, a nonconforming home that was destroyed in the same storm as *Mayer-Wittman* a few hundred miles down the coast had previously failed to comply with both the elevation requirement of the town code's "flood damage resistant provisions" and also with laws regarding required yard setbacks and building density on multi-resident lots.[250] The Dewey code also included a provision (§185-59) that allowed a nonconforming structure "damaged by fire, storm, infestation or other peril" to be

[243] *Id.* at 629-30.

[244] *Id.* at 630.

[245] *Id.* at 648.

[246] *Id.* at 640.

[247] *Id.* at 634.

[248] W & C Catts Family Limited Partnership v. Dewey Beach, 2018 WL 6264709, 6 (Del. Super. Ct. 2018).

[249] Laird v. Bd. Of Adjustment of Dewey Beach, 2014 WL 6886953, at *2 (Del. Super. Ct. 2014).

[250] Laird v. Bd. Of Adjustment of Dewey Beach, 2014 WL 6886953, at *2 (Del. Super. Ct. 2014).

rebuilt to "essentially the same configuration" but prohibited the property from being "reconfigured or expanded unless it is done in accordance with the zoning code."[251]

After the house was destroyed, the Dewey Beach Building Officer informed the owners that they would have to rebuild in conformity with the flood damage-resistant provision (at least one foot above the 100-year flood elevation).[252] The Building Officer granted them a permit to build four feet above the elevation, but shortly thereafter, backtracked and informed the owners that they could actually only build to the minimum one foot above elevation.[253] He reasoned that raising the property that was already noncompliant regarding setback and density would constitute a "reconfiguration" of a nonconforming use, in violation of §185-59, and thus allowing only the minimum amount of elevation would remedy the conflicting laws.[254]

The homeowners appealed to the town's Board of Adjustment, which overruled the Building Officer's decision.[255] Subsequently, a group of unhappy Dewey residents appealed the Board's decision to the Delaware Superior Court, asserting that the Board violated their rights without allowing comment at a public hearing.[256] The court affirmed the decision of the Board, reasoning that because the floodplain management section of the code "provides for variances where 'compliance with the elevation of floodproofing requirements of this chapter would result in an exceptional hardship' for a property owner" and because the Building Officer did not initially require the couple to obtain a variance when he issued the permit, §189-59 was never triggered. [257]

In December of 2014, following the case, the Dewey Beach Town Council made the above-described amendment to the code.[258] The amendment came into play when the conflict between that provision and §185-59 was raised again in the case *W&C Catts Family Limited Partnership v. Town of Dewey Beach*.[259] The Plaintiff in *W&C Catts* argued that the flood elevation requirement only applied to residential properties after his restaurant was destroyed by a fire.[260] The Superior Court of Delaware found, however, that the amendment to the rule along with the holding in *Laird* meant that properties that are destroyed can be reconstructed at

[251] *Id.* at *1.

[252] *Id.* at *2.

[253] Id.

[254] Id.

[255] Id.

[256] Laird v. Bd. Of Adjustment of Dewey Beach, 2014 WL 6886953, at *4 (Del. Super. Ct. 2014).

[257] Id.

[258] W & C Catts Family Limited Partnership v. Dewey Beach, 2018 WL 6264709, *6 (Del. Super. Ct. 2018).

[259] Id.

[260] Id.

both a higher elevation and with the same configuration, thereby complying with both the floodplain ordinance and §185-59.[261] The court also held that the floodplain ordinance did indeed also apply to commercial properties.[262] In other words, under the Dewey Beach code, when any property in the town that is nonconforming with both floodplain requirements and other zoning requirements is destroyed, the structure can retain its configuration and thus legal nonconforming status while simultaneously being elevated to comply with the flood rule.

As the Dewey Beach situation demonstrates, the simple inclusion of a short provision by local legislatures stating that the floodplain ordinance requirements supersede all other existing regulations allows courts to give priority to the flood elevation requirements without having to overanalyze facts and existing law. It makes sense for local legislatures to clarify where their floodplain ordinances stand in relation to other structural requirements so as to provide clarity to homeowners, zoning boards, and courts alike when a potential conflict arises. As demonstrated by the evolution of the application of the law in *Laird*, followed by the amendment and then application of the updated version in *WC Catts*, it is important for local lawmakers to be aware of any other reconstruction-related rules that may conflict with the floodplain ordinance and thus draft the floodplain ordinance with language that ensures that it preempts the other existing regulations.

II.E.2.d.vii. **Conclusion and Recommendations**

The most obvious and far-reaching takeaway from the case law regarding rebuild limitations is that when these issues reach state courts, the judges always look first to the plain language of the local regulation. In *Heck*, the court began its discussion by stating that "multiple zoning and floodplain ordinances of the city code apply and affect this case. 'Where the language of an ordinance is clear and unambiguous, we will give effect to the language as written.'"[263] In *Mayer-Wittman*, the judge stated that "the process of statutory interpretation involves the determination of the meaning of the statutory language [or the relevant zoning regulation] as applied to the facts of the case . . . we begin our analysis with the language of article IV, § 10 (C), of the Stamford Zoning Regulations . . ."[264] In *Buss*, the judge pointed out that the multi-structure issue could have been easily resolved if the language of the statute provided clarity: "We first consider clauses of a statute together to give words their plain meaning . . . The statute makes no distinction between a building that is part of a larger conforming use and a building that is coextensive with the nonconforming use."[265] And finally, in *W&C Catts*, the court made it clear that "a Board decision which reviews [sic] clear and unambiguous ordinance, but

[261] Id.

[262] *Id.* at *8-9.

[263] State ex rel. Heck v. City of Pacific, 616 S.W.3d 387, 394 (Mo. Ct. App. 2020).

[264] Mayer-Wittmann v. Zoning Bd. of Appeals of Stamford, 333 Conn. 624, 632 (Conn. 2019).

[265] Buss v. Johnson, 624 N.W.2d 781, 785-86 (Minn. Ct. App. 2001).

misinterprets the language, may be subject to reversal as an error of law. In that case, 'it is the intent of the ordinance and the plain meaning of its language that are controlling.'"[266]

In almost every single case, the litigation went all the way up to an appellate court because a conflict could not be resolved by simply looking at the plain language of the applicable rule. Furthermore, the judge always made a point that when a statute (or rule) is unambiguous on its face, it must be followed as such. Floodplain ordinances do not exist in a vacuum; they are built into a framework of many other laws and must also consider the logical ways in which humans approach things when not provided with specific instructions (e.g., how does one define "50%" of something?). Plain language within the statute itself can easily indicate to local governments and courts where the floodplain ordinances stand in this greater framework. Having the types of conflicts that usually arise in mind, such as those described above, local governments can draft or amend their floodplain ordinances with specific language that makes the rebuild requirements crystal clear before anything ever has to reach a zoning board or state court.

II.E.2.e. Liability for Problems Due to Permitting

> "Protecting people and property is one of the fundamental duties of all levels of government. One of the most effective ways that local governments protect people and property is through the permitting process. Here, local officials should reduce the likelihood that the development or use of property will harm other people or property. Communities should be aware that if a governing body approves a project or activity that causes damage to other properties (for example, development that increases stormwater runoff onto surrounding properties), the affected property owners can sue the permitting authority, claiming that the agency/board was negligent in its duties when it permitted the action that caused the damage."[267]

When government permits projects that result in additional flooding to existing properties, the government may be liable for such flood damage either through tort or takings claims. However, different court jurisdictions are split on how readily such liability will be found. Some jurisdictions lean towards a rule that local governments that approve development that causes flooding of pre-existing development bear liability for the resulting flood damage.[268] However,

[266] W & C Catts Family Limited Partnership v. Dewey Beach, 2018 WL 6264709, at *5 (Del. Super. Ct. 2018).

[267] Association of State Floodplain Managers, Property Rights and Community Liability: The Legal Framework for Managing Watershed Development 5-6 (2007), https://s3-us-west-2.amazonaws.com/asfpm-library/Legal/NAI_Legal_Framework_Watershed_Development_2007.pdf.

[268] *See, e.g.*, Columbus v. Smith, 316 S.E.2d 761 (Ga., 1984) (finding that a government entity that regulated construction along a stream had a duty to protect property along the stream from the construction permitted by the government); Kite v. City of Westworth Village, 853 S.W.2d 200 (Tex., 1993) (finding the City liable for approving subdivision plat and acquiring easement which increased

some jurisdictions are more likely to find no liability for additional flooding or other harms due to permitting of new development.[269]

Nonetheless, some jurisdictions do allow property owners to file tort or takings claims based on increased flooding due to permitting.[270] The basis of liability may be a claim of negligence for administrative failures, such as the inadequate processing/review of permits[271] or lacking

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flood damage on other property); City of Columbus v. Myszka, 272 S.E.2d 302 (Ga., 1980) (finding the City liable for continuing nuisance for approving and accepting uphill subdivision which caused flooding); Hutcheson v. City of Keizer, 8 P.3d 1010 (Ore., 2000) (finding City liable for approving subdivision plans which led to extensive flooding).

Cf. also, Hurst v. United States, 739 F.Supp. 1377 (D.S.D, 1990) (finding U.S. Army Corps of Engineers potentially liable for failing to regulate building obstructions in navigable waters, which increased erosion damage) and Fitzpatrick v. Okanogan County, 238 P.3d 1129 (2010) (finding no governmental immunity from a takings claim based on assertion that a flood-control project caused erosion that washed away much of the property owners' land).

[269] Frits v. Washoe Cty., 2017 Nev. Dist. LEXIS 2012, *19 (Nev. Dist. Ct., Washoe Cty. 2017) ("the mere approving of subdivision maps, on its own, does not convert the private development into a public use that gives rise to inverse condemnation liability."); Davis v. Lawrence, LEXIS 687, *13, 797 P.2d 892 (Kan. App. 1990) (finding no taking for flooding since there was no affirmative government action that contributed to the flooding, even though the government had continued to permit development that the stormwater system was inadequate to manage effectively); *id.* at *7 ("'A fortiori, a municipality is not liable to a property owner for the increased flow of surface water over or onto his property, arising wholly from the changes in the character of the surface produced by the opening of streets, building of houses, and the like, in the ordinary and regular course of the expansion of the municipality.'" 205 Kan. at 7 (quoting 18 McQuillin, Municipal Corporations § 53,141 (3d ed. rev. 1963).); Johnson v. County of Essex, 538 A.2d 448 (N.J., 1987) (finding no local government liability for approving plats and building permits which increased flow of water under pipe because of an existing statutory plan and immunity for design and discretionary function immunity); Phillips v. King County, et al., 968 P.2d 871 (Wash., 1998) (finding not liable for approving a developer's drainage plan which resulted in flooding).

[270] Kite v. City of Westworth Village, 853 S.W.2d 200 (Tex., 1993) (holding that a "taking" without payment of just compensation potentially occurred where City approved a plat resulting in a diversion of water from its natural course and resulting consequent damage); Wilson, 86 S.W.3d 693 (Tex., 2002) (finding City liable for flood damages due to City approving subdivisions based upon City's drainage plan but then failing to acquire 2.8 acres to implement the drainage plan); County of Clark v. Powers, 611 P.2d 1072 (Nev., 1980) (County is found liable for flood damage caused by county - approved subdivision.).

[271] Pickle v. Board of County Comm'r of County of Platte, 764 P.2d 262 (Wyo., 1988) (holding that the county had a duty to exercise reasonable care in reviewing subdivision plan and was potentially liable in negligence for flooding and problems with waste disposal because of a failure to use such care); McCloud v. Jefferson Parish, 383 So. 2d. 477 (La. App. 1st Cir. 1980) (finding liability of a parish for flooding caused by approval of subdivisions despite evidence that such additions would overtax the drainage system and cause flood damage); Myotte v. Village of Mayfield, 375 N.E.2d 816 (Oh., 1977); Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739 (Ia., 1977) (Approval of a permit for a project by a state administrative agency does not preclude a private lawsuit. In this case, an Iowa court

inspections,[272] with the assertion that negligence on the part of the government or private actor led to flood damage.[273] For instance, in *Myotte v. Village of Mayfield*, the village was held liable for flood damage caused by runoff that was proximately caused by the issuance of a building permit for an industrial park. In this case, a neighboring property owner experienced substantial flooding whenever it rained due to the development of the industrial park.[274] The court found that the village could have implemented a solution to the flooding at a relatively small cost compared to the serious harm to the value of the property owner's land if the flooding were to continue.[275]

Disagreements about the extent to which subsequent development permits have contributed to flood damage represent a recurrent problem in flooding disputes. No easy rule settles whether flooding caused or exacerbated by new development creates liability for the local government entity that permitted the new development. If the claim is for a takings, a local government defense asserting that the local government followed the permitting process will not usually serve as a defense.[276]

This also relates to the issues of inspections. For example, does an inspection or review of permit materials potentially subject local government to liability for an inspection that fails to identify problems or for reviewing and then issuing a permit authorizing development that causes additional flooding? Some jurisdictions have found that there is a duty to exercise reasonable

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held that approval by a state agency of a stream channelization project did not preclude judicial relief to riparian landowners for damage from the project); City of Columbus v. Myszka, 272 S.E.2d 302 (Ga., 1980) (finding City liable for a continuing nuisance for approving and accepting an uphill subdivision that caused flooding); Barnhouse v. City of Pinole, 183 Cal. Rptr. 881 (Cal.,1982) (finding liability for a continuing, abatable nuisance by the City for approving and accepting an uphill subdivision that caused flooding since the City approved the permit with an inadequate drainage system for which the City accepted responsibility); *see also* McGlashan v. Spade Rockledge Terrace Condo Dev. Corp., 402 N.E.2d 1196 (1980).

[272] Tuffley v. City of Syracuse, 442 N.Y.S.2d 326 (N.Y., 1981) (Even though this is a minority rule, some courts have held governmental units responsible for inadequate inspections. This case is an example in which the court held that a city was liable based upon a theory of inverse condemnation for acts of city engineer in failing to adequately inspect a building site and determine that a culvert running under the site was part of a city stormwater drainage system). For a recent decision highlighting the majority rule, *see* Richardson v. Cty. of Mobile, 327 So. 3d. 1130 (Ala. 2020) (The court found that county review of the work of a private engineer that certified system compliance with county requirements did not create a duty on the part of the county to particular landowners who were flooded when the system did not, in fact, work properly).

[273] Kunz v. Utah Power & Light Co., 526 F.2d 500 (9th Cir., 1975); Pickle v. Board of County Comm'r of County of Platte, 764 P.2d 262 (Wyo., 1988).

[274] Myotte v. Village of Mayfield, 375 N.E.2d 816 (Oh., 1977).

[275] Id.

[276] Bartolf v. Jackson Twp. Bd. of Educ., 2018 N.J. Super. Unpub. LEXIS 2361, *15-*16 (N.J. Super. 2018).

care in reviewing development plans[277] and that failure to adequately inspect may result in liability,[278] particularly if there were any sort of "special relationship" between the property owner and the City.[279] However, other jurisdictions shield government from liability for damage resulting from permits allowing development since permit issuance is a "discretionary function."[280]

On the issue of following established procedures and reviewing documents, jurisdictions are split on whether inspections and reviews by local government alone are sufficient to lead to negligence liability. Many jurisdictions adhere to a rule that if the permitting process is followed correctly by the government, this will not subject government to liability for any failure on the part of private parties' work that is supposed to comply with the permit but fails to do so.[281] In *Richardson*, the plaintiff failed on appeal to demonstrate that the trial court erred in granting summary judgement to the defendant City even though the City had approved the permit for an uphill development that resulted in flooding of the plaintiff's property. The permit standard was that runoff would not increase substantially, but it did. The court said that the city engineer's review of the stormwater design for code compliance did not mean that the city engineer had to do the work of the private engineer. Rather, the process was to ensure that a licensed engineer prepared the plans to demonstrate compliance with the code. This also provides the correct defendant (private engineer) if there is a problem with the stormwater system. While this result may seem unfair to the property owner to some, the countervailing argument by the courts is that they are hesitant to imply local government liability for review of permit applications since this could discourage permitting processes and local government from reviewing and issuing permits at all for fear of creating liability.

Adherence to floodplain regulations at the local level to implement the National Flood Insurance Program are so important that even when local officials mistakenly issue a permit for construction that violates local floodplain regulations, the local government is, at most, potentially liable for negligence but not for a taking.[282]

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277 See, e.g., Pickle v. Bd. of County Comm.'s of County of Platte, 764 P.2d 262 (Wyo., 1988).

278 Brown v. Syson, 663 P.2d 251 (Ariz., 1983) (finding that home purchaser's action against City for negligent inspection of home for violations of building codes was not barred by doctrine of sovereign immunity and public duty doctrine).

279 Tuffley v. City of Syracuse, 82 A.D.2d 110 (N.Y., 1981) (finding the City liable based upon a theory of inverse condemnation for acts of a city engineer in failing to adequately inspect building site and determine that culvert running under site was part of a city stormwater drainage system).

280 Wilcox Assoc. v. Fairbanks North Star Borough, 603 P.2d 903 (Ala. 1979).

281 Richardson v. Cty. of Mobile, 2020 Ala. LEXIS 170, *2, 2020 WL 6932809 (Ala. Nov. 25, 2020);

282 Bunnell v. Vill. of Shiocton, 2020 WL 2100097 (E.D. Wis. 2020) ("The defendants' actions, as noted above, appear to amount to negligence, but they do not amount to a taking of private property for public use.")

II.E.2.e.i. **Recommendations**

Local governments can minimize potential liability by not accepting private infrastructure that may be causing problems or may cause problems in the future.[283]

"[G]overnments are caught on the horns of a dilemma with regard to regulations. If governments fail to regulate natural hazard areas, natural hazard losses to private individuals and to government will increase with an increased community costs, conflicts and law suits. But, if governments tightly regulate private activities, they may also be sued by disgruntled landowners for Constitutional 'takings' of private property without payment of just compensation or due process violations."[284] This creates a difficult balancing act for local governments: How to best protect people and property while not exposing local government to legal liability *either* for issuing permits *or* not issuing permits.

As continued development in at-risk areas is expected to drive large increases in future flood losses,[285] local governments would be well-advised to apply the No Adverse Impact approach to floodplain management through local ordinances that clearly outline the evidence supporting the need for careful floodplain management to protect human health and safety, especially in light of climate change and sea-level rise impacts.

[283] Martinovich v. City of Sugar Creek, Missouri, 617 S.W.2d 515 (Mo., 1981)

[284] JON KUSLER, FLOOD RISK IN THE COURTS: REDUCING GOVERNMENT LIABILITY WHILE ENCOURAGING GOVERNMENT RESPONSIBILITY 41 (2011), https://biotech.law.lsu.edu/blog/Kusler2011-Flood-Risk-In-The-Courts-Reducing-Government-Liability-While-Encouraging-Government-Responsibility.pdf.

[285] *See, e.g.,*Oliver E. J. Wing, William Lehman, Paul D. Bates, Christopher C. Sampson, Niall Quinn, Andrew M. Smith, Jeffrey C. Neal, Jeremy R. Porter & Carolyn Kousky, *Inequitable patterns of US flood risk in the Anthropocene*, 12 NAT. CLIM. CHANGE 156 (2022).

No Adverse Impact Legal Guide for Flood Risk Management

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Cover Photos (clockwise from top left):
Hurricane Ian flooded houses in Florida residential area;[1] U.S. Supreme Court;[2] Untitled image of road inundated with floodwater.[3]

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[1] Bilanol. Accessed May 2023. Hurricane Ian flooded houses in Florida residential area. https://www.canva.com/photos/MAFOfc76ibY-hurricane-ian-flooded-houses-in-florida-residential-area-natural-disaster-and-its-consequences/. Used under Canva Pro Content License.

[2] OZinOH. Accessed May 2023. Supreme Court IMG_2952. https://www.flickr.com/photos/75905404@N00/3049421552/. Used under Creative Commons Attribution-NonCommercial 2.0 License.

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Table of Contents

Introduction to This *Guide*

This *No Adverse Impact Legal Guide for Flood Risk Management* (a.k.a., the *NAI Legal Guide)* provides legal resources to inform the decisions of community representatives and municipal attorneys who design, implement, and defend NAI programs. It includes:

- Detailed resources for legal professionals, and
- Legal essentials for floodplain managers and community officials.

This Guide supplements other NAI documents that present tools and guidance for integrating NAI principles into local regulations, policies, and programs. It will help readers to understand, anticipate, and manage legal issues that may arise when a community implements activities that enhance flood resilience, especially when those activities exceed state and federal requirements for floodplain management.

This *Guide* is divided into five sections:

Section I – Introduction to No Adverse Impact
Section II – Introduction to Legal Concepts for No Adverse Impact
Section III – Torts
Section IV – The Constitution and Its Protection of Property Rights
Section V – Federal Laws

Section One is an introduction to the concept of No Adverse Impact for those not familiar with its application to flood risk reduction. Section Two focuses on introducing common legal concepts, which is then followed by the detailed legal memos found in Sections Three, Four and Five.

After reviewing this *Guide*, it is recommended that a community conduct an assessment of its flood risk management activities to see if those activities are legally sound, and where they can be improved by using NAI techniques to better protect its population and natural floodplain functions.

No Adverse Impact Toolkit, prepared by the Association of State Floodplain Managers, identifies tools for implementing NAI.

NAI How-to Guides

A series of How-to Guides provide usable information to help communities implement NAI practices:

- Hazard Identification and Floodplain Mapping
- Regulations and Development Standards
- Education and Outreach
- Emergency Services
- Planning
- Mitigation
- Infrastructure

Common Terminology

Many of the following definitions are derived from NFIP floodplain management; others are specific legal definitions; and yet others relate to NAI tools and approaches. This section is not all-inclusive of the flood risk management and legal terms used in this *Guide;* additional definitions may be provided elsewhere for ease of reference.

Base flood: The flood having a one percent probability of being equaled or exceeded in any given year (previously called the 100-year flood). This is the design flood for the NFIP and is used to map Special Flood Hazard Areas and to determine Base Flood Elevations. Modeling of the base flood uses historic flood data.

Base Flood Elevation (BFE): The modeled elevation of floodwater during the base flood. The BFE determines the level of flood protection required by NFIP floodplain development standards.

Building (structure): A walled and roofed building with two or more outside rigid walls and a fully secured roof that is affixed to a permanent site, as well as a manufactured home on a permanent foundation. The terms "structure" and "building" are sometimes used interchangeably in the NFIP. However, for NFIP floodplain management purposes, the term "structure" also includes a gas or liquid storage tank that is principally above ground.

Within the NFIP, residential and non-residential structures are treated differently. A residential structure built in a Special Flood Hazard Area must be elevated above the Base Flood Elevation. A non-residential structure may be elevated or dry floodproofed so that the structure is watertight to prevent the entry of water.

Climate change: Climate change refers to long-term shifts in temperatures and weather patterns. These shifts may be natural, such as through variations in the solar cycle. But since the 1800s, human activities have been the main driver of climate change, primarily due to the burning of fossil fuels like coal, oil and gas.[5]

Community: The NFIP definition of a community is a political subdivision that has the authority to adopt and enforce floodplain management regulations for the areas within its jurisdiction. The term usually means cities, villages, townships, counties, and Indian tribal governments. For the purposes of this *Guide*, a "community" also includes a neighborhood, unincorporated settlement, or other non-governmental subdivision where people live or work together.

Conservation Zone: An area indicated on a map or plan adopted by a local jurisdiction, municipality, or other governing body within which development is governed by special regulations in order to protect and preserve the quality and function of its natural environment.

Community Rating System (CRS): The NFIP Community Rating System is a program that provides reduced flood insurance premiums for policyholders in communities that go above and beyond the minimum NFIP criteria. For more information see https://www.fema.gov/floodplain-management/community-rating-system.

Federal Emergency Management Agency (FEMA): The federal agency under which the NFIP is administered.

Flood: A community may adopt a more expansive definition of "flood" than is used by the NFIP in order to include additional sources of water damage, such as groundwater flooding of basements or local washouts associated with a drainage ditch. The NFIP definition of a flood is:

> (a) A general and temporary condition of partial or complete inundation of normally dry land areas from:
>
> (1) The overflow of inland or tidal waters.
>
> (2) The unusual and rapid accumulation or runoff of surface waters from any source.
>
> (3) Mudslides (i.e., mudflows) which are proximately caused by flooding as defined in paragraph (a)(2) of this definition and are akin to a river of liquid and flowing mud on the surfaces of normally dry land areas, as when earth is carried by a current of water and deposited along the path of the current.
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> (b) The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water

[5] Source: United Nations, "What is Climate Change?" webpage, accessed March 2023, https://www.un.org/en/climatechange/what-is-climate-change.

> exceeding anticipated cyclical levels or suddenly caused by an unusually high water level in a natural body of water, accompanied by a severe storm, or by an unanticipated force of nature, such as flash flood or an abnormal tidal surge, or by some similarly unusual and unforeseeable event which results in flooding as defined in paragraph (a)(1) of this definition.

For NFIP flood insurance claims, a flood must inundate two or more acres of normally dry land area or two or more properties.

Flood Insurance Rate Map (FIRM): An official map of a community on which the Federal Emergency Management Agency has delineated the boundaries of Special Flood Hazard Areas. In some areas, FIRMS (with associated maps and studies) may also indicate Base Flood Elevations and regulatory floodways. FIRMs and other mapping products can be viewed and downloaded at FEMA's Map Service Center – https://msc.fema.gov/portal/home.

Floodplain: Nature's floodplain is the land area susceptible to being inundated by water from any source. This includes:

- Special Flood Hazard Areas (SFHAs) mapped by FEMA for the NFIP program;
- Flood-prone areas near waterbodies for which SFHAs have not been mapped;
- Areas outside of the SFHA that are subject to inundation by larger flood events or floods that are altered by debris or other blockages;
- Areas subject to smaller, more frequent, or repetitive flooding;
- Areas subject to shallow flooding, stormwater flooding, or drainage problems that do not meet the NFIP mapping criteria;
- Areas affected by flood-related hazards, such as coastal and riverine erosion, mudflows, or subsidence; and
- Areas that will be flooded when future conditions are accounted for, such as climate-related issues, sea-level rise, and upstream watershed development.

The Special Flood Hazard Area mapped for the NFIP is only part of a community's flood risk area, with 40 percent of flood insurance claims occurring outside of the SFHA.[6] To represent a community's true flood risk, the term "floodplain" is used in this *Guide* instead of "SFHA."

Floodplain stewardship: Caring for and protecting the beneficial biologic and hydrologic functions of areas where the risk of flooding is expected, while managing human uses to minimize the potential for adverse impacts and flood damage.

Floodproof: Floodproofing means any combination of structural and non-structural additions, changes, or adjustments to buildings or other structures that reduce or eliminate flood damage to real estate or improved real property, water and sanitary facilities, structures, and their contents. This term includes dry floodproofing, in which a structure is watertight, with walls

[6] Federal Emergency Management Agency, 2021, "Myths and Facts About Flood Insurance," https://www.fema.gov/fact-sheet/myths-and-facts-about-flood-insurance-1.

substantially impermeable to the passage of water. NFIP development standards allow dry floodproofing of non-residential structures in lieu of elevating the lowest floor.

Freeboard: A factor of safety, usually expressed in feet above the Base Flood Elevation, that determines the required level of flood protection.

Future conditions flood: The flood having a one percent probability of being equaled or exceeded in any given year based on future-conditions hydrology. Also known as the "1%-annual-chance future conditions" flood.

Liability: A party is liable when they are held legally responsible for something. Unlike in criminal cases, where a defendant could be found guilty, a defendant in a civil case risks only liability.[7]

Mitigation: Hazard mitigation is any sustained action taken to reduce or eliminate any long-term risk to life or property from a hazard event. Mitigation is most often thought of as being applied to existing at-risk development. Examples of flood mitigation activities include: floodproofing, elevating, relocating or demolishing at-risk structures; retrofitting existing infrastructure to make it more flood resilient; developing and implementing Continuity of Operations Plans; structural mitigation measures such as levees, floodwalls and flood control reservoirs; detention/retention basins; and beach, dune, and floodplain restoration.

National Flood Insurance Program (NFIP): Federal program that maps flood hazard areas and provides flood insurance in participating communities that agree to regulate new construction in mapped high flood hazard areas. Most community floodplain maps and floodplain management standards have been adopted to meet the NFIP's criteria. Learn more at www.fema.gov.

Natural floodplain functions: The functions associated with the natural or relatively undisturbed floodplain that moderate flooding, maintain water quality, recharge groundwater, reduce erosion, redistribute sand and sediment, and provide fish and wildlife habitat. One goal of NAI floodplain stewardship is to preserve and protect these functions, in addition to protecting human development.

Police powers: Police powers are the fundamental ability of a government to enact laws to coerce its citizenry for the public good, although the term eludes an exact definition. The term does not directly relate to the common connotation of police as officers charged with maintaining public order, but rather to broad governmental regulatory power. *Berman v. Parker*, a 1954 U.S. Supreme Court case, stated that "[p]ublic safety, public health, morality, peace and quiet, law and order. . . are some of the more conspicuous examples of the traditional

[7] Source: Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/wex/liability. Liability is "[t]he quality or state of being legally obligated or responsible." BLACK'S LAW DICTIONARY: NEW POCKET EDITION (1996).

application of the police power;" while recognizing that "[a]n attempt to define [police power's] reach or trace its outer limits is fruitless."[8]

Regulatory floodway: The channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood (with a 1% annual probability) without cumulatively increasing the water surface elevation more than a designated height.

Resilience: "The ability to prepare for and adapt to changing conditions and withstand and rapidly recover from disruptions," as defined in FEMA's *National Disaster Recovery Framework*.

Riparian buffer: Zone of variable width along the banks of a stream, river, lake, or wetland that provides a protective natural area adjacent to the waterbody.

Sovereign immunity: Sovereign immunity refers to the fact that the government cannot be sued without its consent.[9]

Special Flood Hazard Area (SFHA): An area mapped on the NFIP FIRM that shows the area subject to inundation by the base flood (with a one percent or greater probability of flooding in any given year). SFHAs have been mapped for flooding caused by rivers, lakes, oceans, and other larger sources of flooding.

Standard of care: The watchfulness, attention, caution, and prudence that a reasonable person in the circumstances would exercise. If a person's actions do not meet this standard of care, then their acts fail to meet the duty of care, which all people (supposedly) have toward others.[10]

Substantial damage: Damage of any origin sustained by a structure (building) whereby the cost of restoring the structure to its before damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred.

Substantial improvement: Any reconstruction, rehabilitation, addition, or other improvement of a structure (building), the cost of which equals or exceeds 50 percent of the market value of the structure before the start of construction for the improvement. This term includes structures that have incurred substantial damage, regardless of the actual repair work performed. NFIP

[8] Source: Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/wex/police_powers. Police power has also been defined as "1. [a] state's Tenth Amendment right, subject to due process and other limitations, to establish and enforce laws protecting the public's health, safety, and general welfare, or to delegate this right to local governments. 2. Loosely, the power of the government to intervene in privately owned property, as by subjecting it to eminent domain." BLACK'S LAW DICTIONARY: NEW POCKET EDITION (1996).

[9] Source: Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/wex/sovereign_immunity.

[10] Source: Law.com Dictionary, https://dictionary.law.com/Default.aspx?selected=2002.

development standards require that a substantially improved building be regulated as new construction.

Sustainable: Able to "meet the needs of the present without compromising the ability of future generations to meet their own needs," as defined by the United Nations.

Takings: A taking is when the government seizes private property for public use. A taking can come in two forms. The taking may be physical, meaning the government physically interferes with private property; or the taking may be constructive (also called a regulatory taking), meaning that the government restricts the owner's rights to such an extent that the governmental action becomes the functional equivalent of a physical seizure.[11]

Tort: A tort is an act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which courts impose liability. In the context of torts, "injury" describes the invasion of any legal right, whereas "harm" describes a loss or detriment in fact that an individual suffers.[12]

Watershed: The land area that channels rainfall and snowmelt to creeks, streams, and rivers, and eventually to outflow points, such as reservoirs, bays, and the ocean. Also known as a basin or catchment area.

[11] Source: Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/wex/takings. A taking may also be defined as "[t]he government's actual or effective acquisition of private property either by ousting the owner and claiming title or by destroying the property or severely impairing its utility." BLACK'S LAW DICTIONARY: NEW POCKET EDITION (1996).

[12] Source: Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/wex/tort.