

FLOOD RISK IN THE COURTS: REDUCING GOVERNMENT LIABILITY WHILE ENCOURAGING GOVERNMENT RESPONSIBILITY

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Hurricane Katrina

PREFACE

This paper is one of several prepared by the author for the Association of State Floodplain Managers dealing with legal issues in floodplain management. This paper has been prepared to help governments administratively and/or legislatively reduce liability for flood losses and better meet “taking” challenges to regulations while maintaining government responsibility in addressing flood problems. It addresses a series of questions: Why is flood-related liability a concern of governments? What governmental units are most susceptible to suits? Are government staff personally liable? Is government liability consistent with sound public policy? How does degree of flood risk affect liability based upon common law legal theories? Constitutional theories? What measures can governments take to reduce successful suits based upon common law or Constitutional legal theories while, simultaneously, acting responsibly?

For other papers prepared by the author for the Association of State Floodplain Managers see Jon Kusler, Esq. and Ed Thomas, Esq., *NAI and the Courts: Protecting the Property Rights of All Updated* (2008); Jon Kusler, Esq., *A Comparative Look at Public Liability for Flood Hazard Mitigation* (2009); Jon Kusler, Esq., *Professional Liability for Construction in Flood Hazard Areas* (2007). All of these are available as “legal papers” on the Association of State Floodplain Managers web site: <http://www.floods.org/index.asp?menuID=301&firstlevelmenuID=188&siteID=1>.

For other related papers also located or referenced on the ASFPM web site see Ed Thomas, Esq. & Sam Riley Medlock, JD, CFM, *Mitigating Misery: Land Use and Protection of Property Rights Before the Next Big Flood*, 9 Vt. J. Envtl. L. 155 (2008); Ed Thomas, NAI *Protecting the Property Rights of All: NAI Floodplain and Storm Water Management* (2007). See web site, above, for a broader list of publications. See also footnote 157 below.

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The paper incorporates some materials from earlier papers by the author and by the author and Ed Thomas, Esq. dealing with liability for flood risks. The excellent work by Ed over a period of years and suggestions to me on the content of the present paper are much appreciated.

I wish to thank particularly Sam Riley Medlock for her contributions to the substance of this paper and for her editorial assistance. Her help was way beyond editing. Thanks Sam!

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The paper should not be considered “legal advice” because case law, statutes and regulations vary from state to state. For specific legal advice you should contact a lawyer in your jurisdiction.

EXECUTIVE SUMMARY; RECOMMENDATIONS

Courts are increasingly holding governments liable for flood damages including the “residual” flood risks from dikes, levees, stormwater systems and other flood reduction structures. Structures often decrease hazards on some lands and increase it on others, particularly for larger, less frequent floods which exceed design flows. The more severe the flood hazard risk including residual risks, the greater the potential for successful suit and the greater the care which governments must exercise.

On the other hand, courts are continuing to provide strong judicial support for floodplain regulations when challenged as an unconstitutional taking of private property without payment of just compensation. These include but are not limited to restrictive regulations for high risk areas such as coastal barrier islands and beaches, inland flash flood areas, dunes floodways and other areas with nuisance or public safety concerns.

In general, the greater the degree of hazard, the greater the judicial support for restrictive regulations, providing the hazards are properly documented and some economic uses remain for lands. Courts have upheld restrictive regulations even where few or no economic uses remain when uses have nuisance characteristics (e.g., block flood flows damaging adjacent lands) or threaten public safety.

Government employees are not, in general, personally liable for government actions which increase flood damages on private lands or for the adoption of floodplain regulations providing they act within the scope of their government duties and in good faith.

Governments have available to them a range of administrative actions to reduce liability based upon common law theories. These include government avoidance of actions which increase flood hazards and flood damages such as construction of roads which block flood flows, installation of bridges and culverts which increase flood heights and velocities, channelization which increases runoff, and construction of dams and levees which decrease flood heights and velocities in some contexts or events while increasing damages in others (e.g., overtopping or collapse of an urban levee). These include adoption of a “no adverse impact” policy as recommended by the Association of State Floodplain Managers which will both reduce government liability and encourage government responsibility.

States, the federal government, and local governments can also, through a variety of administrative actions, reduce the chances of successful Constitutional challenges to floodplain regulations. Most important are development of sound hazard information and adoption of performance standard regulations.

States and Congress can legislatively modify the rules of common law liability by statute through state and federal tort claim acts, emergency management statutes, or other statutes.¹ However this may also have unintended results and discourage responsible government actions. It should be done with great care and consideration of long term implications that may add to the flood risk.

If responsible² government decision-making as well as reduction in law suits is the goal, legislatures should avoid limitations upon liability which discourage long term consideration of hazards such as adoption of relatively short time frame statutes of repose for architects and engineers (e.g., 2-5 years) which begin to run from the time the architectural or engineering service is performed rather than the time injuries become apparent during a natural hazard event. It is often only then that design flaws are revealed.³ Such limitations on liability reduce government and private liability but they also discourage government responsibility.

If legislative bodies wish to reduce damage awards while still maintaining common law rules of liability for levees, they might provide some measure of liability protection for governments and contractors for “good faith” certification of compliance with specified design guidelines.

Should governments be held responsible for all losses? Governments need to be held responsible for their actions. But there should, arguably, be limits to government responsibility, particularly where landowners place themselves in harm’s way.

More specific issues pertaining to flood-related liability include the following. Each of issues, which are stated as questions, will be briefly addressed in this summary and then examined in greater detail in the paper:

Why is flood-related liability a growing problem for governments? As flood damages have increased and the foreseeability of flood events have increased, the number of flood and erosion-related law suits has also increased. Successful liability suits based upon natural hazards have not only become more common but the damage awards larger.

¹ For example, Recommendations for a National Levee Safety Program: A Report to Congress from the National Committee on Levee Safety provides, in part, http://www.nfrmp.us/ncls/docs/NCLS-Recommendation-Report_012009_DRAFT.pdf (March 2009):

Recommendation #8: Congress should swiftly address growing concerns regarding liability for damages resulting from levee failures through exploration of a range of measures aimed at reducing the potential liability of engineering firms and/or government agencies that perform engineering services for levee systems (e.g., inspections, evaluations, design, construction administration, certification, or flood fighting.”

² The term “responsible” government action is used in this paper to mean government flood-related actions which avoid “externalities”. For example, governments can responsibly construct bridges and install culverts with apertures large enough to conduct flood flows without increasing flood heights on adjacent lands.

³ See, e.g., *Farash Const. Corp. v. Stanndco Developers, Inc.*, 527 N.Y.S.2d 940 (N.Y., 1988).

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