

## Unit 10

# Enforcement of the Ordinance

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*Sound and consistent enforcement of the ordinance is the cornerstone of the local floodplain regulatory process.*

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## Overview

This unit covers a number of topics that frequently arise in the enforcement of the local ordinance with additional treatment of how to address variances. Legal considerations and issues encountered in enforcement of the ordinance are also covered.

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## **A. Introduction**

This third in a series of units on administering the local ordinance is devoted to enforcement. Even if the community has a well-written ordinance, one that addresses community problems and the remedies available through the regulatory process, it is ineffective if not properly enforced.

Land use regulations are often contentious. Owners have expectations, sometimes unrealistic, as to how they intend to use their properties. Because floods may occur infrequently in some communities, citizens often do not view the need for special controls over development in designated floodplains. As discussed in earlier units, one of the more challenging tasks of those responsible for administering the ordinance is to gain public acceptance of the need for floodplain regulations. This can be strengthened by tying other community needs and goals to the regulations. Once an adequate degree of public acceptance by those being regulated is achieved, compliance follows. Enforcement is also made easier.

This unit deals with three topics:

- Enforcement of the local regulations (perspective, methods).
- What happens when a property owner disagrees with the outcome of the permit process (the variance issue).
- How floodplain regulations operate in the context of state constitutional law and enabling legislation (legal issues), including “taking” issues and liability.

## **B. Enforcement of Regulation Provisions**

Enforcement is one of the most important aspects of the local floodplain management program. This part of the unit covers: (1) The methods of enforcement the community has at its disposal and (2) The NFIP sanctions that a community faces if it does not adequately enforce its floodplain management regulations. But first, enforcement will be considered from a broader perspective.

## **A Perspective on Enforcement**

As in zoning ordinances and building codes, floodplain management regulations present unique problems relative to other kinds of community regulations when it comes to enforcement.

- An offender is generally thought to be different from the person who violates other laws that impose criminal penalties.
- Land use and development regulations are perceived to impose unequal burdens.
- Property rights enjoy a high degree of protection under common law and federal and state constitutions.
- Infractions may be difficult and expensive to correct, especially when they involve an after-the-fact modification to a building.

Because enforcement can be costly and cumbersome to achieve, it is all the more important to place special emphasis on sound, thorough and consistent administration of the regulations. For these reasons, the administrator needs to enforce the local ordinance using a wide range of talents and oversight, particularly during the permit application review process.

## **Methods of Enforcement**

Enforcement activities include inspecting permitted projects, making periodic tours of the floodplain, acting on reported violations from citizens or other government officials, and working with property owners or through the courts to correct violations. Adequate, uniform and fair enforcement means two things: 1) All development in the floodplain must have a permit, and 2) All development with a permit must be built according to the approved plans. Once a violation is discovered or reported, several methods of enforcement may be utilized.

### **Administrative Methods**

The method of enforcement to be imposed depends on when the violation is discovered and on the violation and penalty provisions of the regulations.

The following assumptions are contingent on the actions which the local code authorizes the responsible official to take.

- If the administrator confirms that floodplain development is underway without permit or that a project is being built contrary to the permitted plans, the property owner should be notified immediately, in writing, of the nature of the violations and the administrator should order corrective measures to be taken. In addition to a written notification, the administrator should post the property and make an attempt to contact the property owner or building contractor in person or by telephone to explain his/her concerns.
- If the infraction is found during an inspection of ongoing construction, the administrator can take initial steps to have the problem corrected by pointing out the deficiency to the builder or developer and following up with another timely visit to ensure compliance.
- If the violation is a serious one, or if the problem still exists after the follow-up inspection, the administrator can issue a stop-work order or institute summary procedures to revoke the permit.
- If the violation continues, then more formal legal action will have to be taken by the community's attorney.

## **Fines**

Fines are commonly cited penalties. Usually a maximum fine is established per offense, and each day of a violation is a separate offense. This approach encourages a quick remedy to the problem. How well this works is questionable.

A per-day fine for a summary offense from a local district justice or magistrate can be difficult to obtain simply because of the general belief that such a severe financial penalty does not fit the infraction. However, the threat of seeking the fine may be the bargaining tool to convince a property owner to remedy the violation.

## **Injunctions**

Another enforcement method is to seek an injunction.

- The immediate advantage of seeking injunctive relief is the opportunity to obtain a court order to direct the defendant to cease any further noncompliant conduct. This is usually in the form of a temporary restraining order if the activity can be shown to be a danger to the public and that immediate irreparable harm can occur.
- Once the illegal activity is stopped, the community can proceed to request a mandatory injunction to abate the violations as a public nuisance.

## Enforcement Ordinances

Due to the expense and difficulty common in obtaining injunctions or getting assistance from the community attorney, creation of a separate land-use enforcement ordinance could be explored. Such ordinances generally provide for issuance of a citation into “county court” (like a traffic court), if initial verbal and written warnings are ignored. The citation and often the initial warnings are issued by uniformed deputies who assist with enforcement proceedings.



### Pilot Inspection Program in Florida Keys

The floodplain management standards require enforcement provisions to properly administer Flood Damage Prevention Ordinances. Enforcement provisions require that, as a condition for continued participation in the National Flood Insurance Program (NFIP), a local government must identify and provide corrective action on all such violations.

Monroe County and the Village of Islamorada have stated that their regular Code Enforcement Program and procedures could not handle the large number of structures, which may have illegal lower area enclosures. Therefore, Monroe County requested the Federal Insurance Administration, Federal Emergency Management Agency to institute an inspection program before renewal of the Standard Flood Insurance Policy. Specifically, the pilot inspection program requires the owner of an insured building to obtain an inspection from community officials as a condition of renewing the Standard Flood Insurance Policy.

The inspection procedure is concluded in one of the following ways:

- (1) The building is inspected. No violations are identified and the policy is renewed.
- (2) The building is inspected. Violations are identified and the policy is renewed. However, the community would have to undertake an enforcement action to remedy the violation to the maximum extent possible. The flood insurance policy will be reviewed for possible re-rating.

If after one year, the community demonstrated that it has taken all enforcement actions within its authority to remedy the violation to the maximum extent possible, including a notice to the property

owner to remedy the violation and appropriate legal action, and the property owner has not corrected the violation, the community would submit a declaration of violation and request a denial of flood insurance under 44CFR§73, Implementation of Section 1316 of the National Flood Insurance Act of 1968.

- (3) The building is not inspected, or the inspection report is not submitted, then the policy is not renewed. If the policy holder does not obtain an inspection or if obtained, does not submit an inspection report with the renewal premium payment, the flood insurance policy would not be renewed. The insurer would send a notice to the insured, to the agent, and to the mortgagee that the flood insurance policy expired and cannot be re-issued without the community inspection report. All flood insurance policies that were not renewed under the inspection procedure would be identified on a list of ineligible properties for the sale of flood insurance that would be sent to insurers that write and service NFIP policies.

## **NFIP Sanctions**

The FEMA regional office or state NFIP coordinating agency conducts periodic community assistance visits (CAVs) or community assistance contacts (CACs), with a two-fold purpose:

- On-site technical assistance.
- Review the community's floodplain management program and permit records.

A community that fails to adequately enforce local floodplain management regulations meeting minimum NFIP standards may face sanctions as specified in 44 CFR §59.24(b) and (c). For example, a community that allows new or substantially improved residential structures to be constructed with the lowest floor (including basement) below the 100-year flood level may be subject to sanctions.

## **Probation**

When a community fails to adequately enforce its floodplain management regulations and fails to correct identified deficiencies, it may be placed on probation. Probation represents formal notification to the community's

chief executive officer (CEO) that FEMA regards the community's floodplain management program as non-compliant with the NFIP criteria.

Prior to imposing probation, FEMA provides the community a 90-day written notice and lists the specific deficiencies and violations. It also notifies all policyholders of the impending probation and the additional \$70.00 premium that will be charged on policies sold or renewed during the probation period.

During the 90-day period prior to the effective date of probation, the community has the opportunity to avoid this sanction by demonstrating compliance with the NFIP requirements through correcting program deficiencies and identified violations.

Probation may be continued for up to one year after the community corrects all program deficiencies.

### **Suspension**

Suspension of a community, usually after a period of probation, may occur when a community fails to remedy its program deficiencies during this period. A community will automatically be suspended if it fails to adopt revisions to its floodplain ordinance in response to flood map revisions or amended minimum NFIP standards, following due notice.

Prior to suspending a community, FEMA grants a community 30 days to show why it should not be suspended. FEMA may also conduct a written or oral hearing before suspension takes effect. Suspension of a community from the NFIP can have significant consequences including:

- No issuance of new policies
- No renewal of existing policies (a policy which has expired is not renewed; upon reinstatement, a new policy must be issued and the 30-day waiting period applies)
- No federally backed mortgages [e.g., Federal Housing Administration (FHA), Veterans Administration (VA), and Farmers Home Administration (FmHA)] in Special Flood Hazard Areas
- No federal grants or loans for buildings in SFHAs, especially from the Small Business Administration (SBA)
- No federal disaster assistance for permanent reconstruction in the SFHA

Because of all the above consequences, it is in a community's interest to maintain good standing in the NFIP.

### **Conditions for Reinstatement**

A community suspended under the NFIP may apply to the FEMA regional office for reinstatement by submitting the following:

- A local legislative or executive measure reaffirming the community's intent to comply with the NFIP criteria.
- Evidence that all program deficiencies have been corrected, and that any violations have been remedied to the maximum extent possible.
- In addition, if the community has permitted actions to take place that have aggravated the existing flood hazard, reinstatement may be withheld until the community submits evidence that it has taken action to remedy the increased hazard.

Based on recommendations from the regional director, FEMA will determine whether to:

- Reinstatement the community to full program status.
- Reinstatement the community to a probationary status.
- Withhold reinstatement for up to one year after a satisfactory submission from the community.

Please complete Learning Check # 1 before proceeding.





### Learning Check # 1

**Purpose:** To review key points about enforcement of ordinance provisions.

**Directions:** Answer the following questions.

1. List three methods of enforcement that can be used when a violation of the community's floodplain management ordinance is discovered.

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2. What are the consequences of community suspension from the NFIP?

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## C. Variances

*What happens when a property owner disagrees with the outcome of the permit process?* Commonly, a **variance** is requested.

**New Term**

Variance

An applicant who has been denied a permit to conduct some form of development in a Special Flood Hazard Area (SFHA) may appeal the decision or apply for a variance. The procedure that must be followed is outlined in the community's regulations. Since the authority to regulate the SFHA is derived from differing statutory authorizations, the local code must be consulted.

A variance is a grant of relief by a community from the terms of a land use, zoning, or building code regulation. The Standard State Zoning Enabling Act prepared by the U.S. Department of Commerce in 1926 has served as the basis of many state-enabling acts. The standards for granting variances contained in the 1926 model have been copied by many states, as well. They were first applied in the zoning resolution for the City of New York. Since then, various court cases have developed and refined this general and vague concept into a more specific and practicable term.

Generally, a variance from the local flood ordinance involves allowing development that is contrary to good floodplain management practices. The result can be an increased risk to life and property. A community must carefully examine the impacts of each variance application.

The authority to award variances is limited. Administrative boards are restricted in providing relief within the review standards contained in the regulations. They are not empowered to change the ordinance or grant variances that are unwarranted. Such actions are a misuse of authority, injurious to property owners, and could be an affront to community regulatory and planning efforts. The NFIP requires adoption by communities of ordinance language that prohibits floodway variances.

### Unnecessary Hardship

The NFIP variance criteria are based on the general principle of zoning law that variances pertain to a piece of property and are not personal in nature. Examples of the kinds of characteristics that might give rise to a hardship that might justify a variance to certain other building or zoning ordinances would include an irregularly shaped lot, a parcel with unstable soils, or a parcel with an unusual geologic condition below the ground

surface. However, it is hard to imagine any physical characteristic that would give rise to a hardship sufficient to justify a variance to the flood elevation requirements of the floodplain management ordinance.

**New Term**

Unnecessary hardship

The concept of **unnecessary hardship** is the cornerstone of all variance standards, and strict adherence to the definition of unnecessary hardship is widely used throughout the country in limiting the granting of variances.

Unnecessary hardship is defined as:

- Loss of *all* beneficial or productive use.
- Deprivation of reasonable return on property.
- Deprivation of all or any reasonable use.
- Rendering property valueless.
- Inability to develop property in compliance with the regulations.
- Reasonable use cannot be made consistent with regulations.

*The applicant has the burden of proving unnecessary hardship. The proof must be compelling and reasons for granting the variance substantial. Mere economic or financial hardship alone is not exceptional. Inconvenience, aesthetic considerations, physical handicaps, personal preferences, or the disapproval of one's neighbors also do not qualify.*

In determining whether or not an applicant has established a hardship sufficient to justify a variance, the local board weighs the applicant's hardship against the purpose of the ordinance. Only a truly exceptional, unique hardship on the part of an individual property would persuade local officials to set aside provisions of an ordinance designed with the entire community's safety in mind.

In the case of variances from floodplain elevation requirements, this would mean asking which is more serious: the hardship that this applicant must face or the community's need for strictly enforced regulations that protect its citizens from dangers and damages from flooding and the long-term risk to the owners and occupants of the building.

## **Fraud, Victimization, Public Safety**

Properly granted variances must not cause fraud or victimization of the public. In examining this requirement, local boards should consider the

fact that every newly constructed building adds to local government responsibilities and remains a part of the community for the indefinite future.

Buildings that are permitted to be constructed below the BFE are subject to increased risk of damage from floods, while future owners of the property and the community as a whole are subject to all the costs, inconvenience, danger, and suffering that those increased flood damages may bring. In addition, future owners may purchase the property, unaware that it is subject to potential flood damages and can be insured only at very high flood insurance rates.

### **Increased Risk—Increased Flood Insurance Rates**

*NFIP participating communities must notify variance applicants in writing that variances to construct the lowest floor below BFE will result in increased flood insurance rates.* Insurance premium rates for new construction and substantial improvements are determined by statute according to actuarial risk and will not be modified by granting a variance.

### **NFIP Variance Criteria in Section 60.6**

NFIP criteria in 44 CFR §60.6 contain multiple procedures that must be followed before a variance can be properly granted. Table 10.1 provides specific references to variance criteria as they appear in §60.6. Variations in states' enabling legislation make it difficult to establish definite standards for all communities participating in the NFIP. Also, many communities invoke additional variance standards beyond those required for participation in the NFIP.

The criteria are designed to screen out those situations in which alternatives other than a variance are most appropriate. It is not surprising that when these guidelines are followed, very few situations qualify for a variance.

### **Variance Guidance**

In addition to the NFIP criteria, the following guidance should be helpful. Note that some of this is repeated from the previous discussions.

- A variance may only be issued if the applicant shows good and sufficient cause; this includes a determination that failure to grant a variance

<b>Table 10-1. Variance Criteria in Section 60.6 of 44 CFR</b>	
60.6(a) (1)	“Variances shall not be issued by a community within any designated regulatory floodway if any increase in flood levels during the base flood discharge would result;”
60.6(a) (2)	“Variances may be issued by a community for new construction and substantial improvements to be erected on a lot of one-half acre or less in size contiguous to and surrounded by lots with existing structures constructed below the base flood level, in conformance with the procedures of paragraphs (a) (3), (4), (5) and (6) of this section;”
60.6(a) (3)	“Variances shall only be issued by a community upon...”
60.6(a) (3) (i)	“a showing of good and sufficient cause,”
60.6(a) (3) (ii)	“a determination that failure to grant the variance would result in exceptional hardship to the applicant, and”
60.6(a) (3) (iii)	“a determination that the granting of a variance will not result in increased flood height, additional threat to public safety, extraordinary public expense, create nuisances, cause fraud on or victimization of the public, or conflict with existing local laws or ordinances;”
60.6(a) (4)	“Variances shall only be issued upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief;”
60.6(a) (5)	“A community shall notify the applicant in writing over the signature of a community official that...”
60.6(a) (5) (i)	“the issuance of a variance to construct a structure below the base flood level will result in increased premium rates for flood insurance up to amounts as high as \$25 for \$100 of insurance coverage and;”
60.6(a) (5) (ii)	“such construction below the base flood level increases risks to life and property. Such notification shall be maintained with a record of all variance actions as required in paragraph (a) (6) of this section; and”
60.6(a) (6)	“A community shall...”
60.6(a) (6) (i)	“maintain a record of all variance actions, including justification for their issuance, and”
60.6(a) (6) (ii)	“report such variances issued in its annual or biennial report submitted to the Administrator.”
60.6(a) (7)	“Variances shall be issued by a community for new construction and substantial improvements and for other development necessary for the conduct of a functionally dependent use provided that...”
60.6(a) (7) (i)	“the criteria of paragraphs (a) (1) through (a) (4) of this section are met, and”
60.6(a) (7) (ii)	“the structure or other development is protected by methods that minimize flood damages during the base flood and create no additional threats to public safety.”

would result in exceptional hardship and would not result in increased flood heights or threaten public safety.

- A variance should be the minimum necessary to afford relief.
- No variance may be issued within a regulatory floodway that will result in any increase in 100-year flood levels.
- A variance may be issued for the reconstruction, rehabilitation, or restoration of historic structures listed in the National Register or State Inventory of Historic Places, or that contribute to a historic district, if the variance is the minimum necessary to preserve the historic character and design of the structure. In addition, the changes to the structure must not destroy or alter the characteristics that factored its inclusion on either of the lists.
- Either a certified local historic board or the state historic preservation officer (SHPO) must review and approve restoration, preservation, or repair to historic structures prior to the granting of a variance to the substantially impacted standard.

<p><b>Insufficient Reasons</b></p> <ul style="list-style-type: none"> <li>• Less than a drastic depreciation of property</li> <li>• Convenience of property owner</li> <li>• Circumstances of owner not the land</li> <li>• Property similar to others in neighborhood</li> <li>• Hardship created by owner's own actions</li> </ul>
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If this criterion is met, a formal variance is usually not required to grant this exemption. Whatever mitigative measures can be taken to reduce future flood damage must be required (e.g., elevating air conditioner, flood resistant materials, etc.).

- A variance is for floodplain management purposes only. Changes that affect variations from the standard floodplain management requirements, such as conformance to the base flood elevation, will likely affect insurance rates.
- The community must notify the applicant, in writing, that a variance to build a structure below the base flood elevation will result in increased flood insurance premium rates (up to amounts of \$25 per \$100 of coverage) and that construction below the BFE increases risk to life and property.
- A variance may be issued for new construction, substantial improvements, and other development necessary for the conduct of a "functionally dependent use." A functionally dependent development cannot perform its intended purpose unless it is located or carried out in close proximity to water, such as a docking or port facility necessary for the unloading of cargo or passengers, shipbuilding, and ship repair.

A functionally dependent use variance could be issued provided that: there is good and sufficient cause for providing relief from the regulations; the variance will be the minimum necessary to provide

relief; and the variance does not cause a rise in the 100-year flood level within a regulatory floodway. The structure or other development must be protected by methods that minimize flood damage (e.g., elevating mechanical equipment, locating offices above BFE, using ground fault interrupt electrical circuits).

### **Recording Variance Action**

It is recommended that the variance findings, conditions, and authorization be recorded in the county deed records. This provides a means of permanently notifying future or prospective owners about the terms and conditions of the variance.

### **Accountability for Variances**

The FEMA regional office or the state NFIP coordination agency will review all variance actions as part of a Community Assistance Visit (CAV). The granting of unjustified variances may lead to probation, with the possibility of eventual suspension from the NFIP.

### **Summary**

Because the obligation for local governments to help protect their citizens from flooding is so compelling, and the implications of the cost of insuring a structure built below flood level are so serious, variances from the flood elevation or from other requirements in the flood ordinance should be quite rare.



Please complete Learning Check # 2 before proceeding.

## Learning Check # 2



**Purpose:** To provide practice in analyzing variance requests and deciding whether variances should be granted.

**Directions:** Read the following problem-solving scenarios and make a decision about whether or not to issue a variance.

### Problem 1

Ten years ago, Mr. and Mrs. Smith purchased a streamside property as a future site for their retirement home. The property is three acres and is located along a state highway leading to the nearest town, which is five miles away. There is a picnic pavilion and a small boat dock that the Smiths have used routinely since buying the property. The property owners on each side of the Smiths have built recreational homes. Their units are elevated above the 100-year flood level. One house is elevated on reinforced columns eight feet above the surrounding ground level while the other was constructed on five feet of fill.

Mr. Smith recently retired and is ready to build his home. When he applied for a building permit, the building permit officer told him that the property is in the floodplain. As a result, the lowest floor, including the basement of the house, will have to be elevated to or above the 100-year flood elevation, which is about seven feet higher than the existing ground elevation on the site. Clearly frustrated with the prospect, Mr. Smith explains that to elevate to such an extent is out of the question and says he is going to the variance board to straighten the matter out.

As part of the variance application, the Smiths argue that:

“Because Mrs. Smith is confined to a wheelchair, it will be necessary to build a ranch-style home with the first floor at ground level for easy access. To fill the area so that the lowest floor and surrounding ground elevation are above the 100-year flood elevation would cost an additional \$8,000 over the estimated cost. Being on a fixed income, we cannot handle this added financial burden. If the township does not give us a variance, we will not be able to build our dream home. We know there is a potential for flooding and we would be able to elevate the lowest floor two feet above the existing ground level, but no more. If you deny our request, we are prepared to take legal action against the city.”

Consider the following rationale to assist in deciding whether or not to approve the variance.



**Problem 2**

Molly and Meghan McGill want to build a home for their mother on a vacant lot within a residential district. They purchased the lot 30 years ago when the area first began to be converted from farmland to housing subdivisions. The neighborhood is completely developed with one-story ranch style homes on 1/4 acre lots. The entire neighborhood is in the floodplain, and flood depths average four to six feet. The lot in question is rectangular in shape: 50 feet wide and 75 feet deep. The local zoning ordinance establishes the following building setbacks: side yards - 10 feet, rear yard - 20 feet, and front yard - 25 feet.

After reading over the town's floodplain management and zoning regulations, the McGills discovered that to build a house on that particular lot would require some form of relief from the regulations. They then contacted the town's Floodplain Management Administrator to further discuss the problem and to find out what it would take to request a variance. After further thought, Molly and Meghan decided to offer the following options for the Zoning Board of Appeals to consider in resolving the problem. In addition, the regulations for the zoning district stipulate a minimum habitable floor area of 980 square feet for residential structures and maximum building height of 25 feet.

- Option 1.** A request to elevate the lowest floor to three feet below the BFE in order to comply with all other zoning restrictions.
  
- Option 2.** A request for a three-foot variance to the height requirement so that the house can be constructed to a height of 28 feet in compliance with the floodplain management regulations and other zoning requirements.
  
- Option 3.** A request to elevate the lowest floor to one foot above the existing grade and to build a one-story ranch-style house with 780 square feet of habitable floor area.

In the letter outlining these options, the McGills indicated their preference for Option 3, citing their mother's deteriorating health and mobility and the aesthetic advantage to the neighborhood.

Aware of the situation, the Neighborhood Association is absolutely opposed to options 1 and 2, indicating that such structures would appear out of place in their area and result in the devaluation of all adjacent properties. They have hired an attorney to represent

their interests in the event the Board makes an unfavorable decision and it becomes necessary to appeal the decision in county court.

1. Because of the shape of the lot, it cannot currently be used to build a residential home that complies with floodplain management and zoning regulations. Do the McGill's have any recourse?
  - a. Yes, because the lot is zoned residential; therefore some form of relief must be provided to allow it to be used as such.
  - b. No, because the lot is in the floodplain.
  - c. No, because building the lot would create a public nuisance and community hazard.
2. Can the circumstances as presented be decided solely through the Administrator's discretion?
  - a. Yes, because the situation only involves a decision about building to meet the NFIP standards for base flood elevation.
  - b. No, because some requirements must be eased which will require a hearing before the Zoning Board of Adjustment.
  - c. Yes, because the McGill's won't be able to build the home because the existing regulations won't allow it.
3. Based on the following rationale, which of the three options presented by the McGill's would be most acceptable?
  - a. Option 1 because it will be built to meet NFIP regulations regarding base flood elevations.
  - b. Option 2 because three additional feet in height should not detract from the appearance of the neighborhood and it poses the least problem to the health and safety of the residents.
  - c. Reject all options, but suggest that the McGill's request a variance from the setback requirements.

## **D. Legal Issues**

Floodplain management regulations are not adopted or enforced by local communities in a vacuum, but rather, operate in the context of state constitutional law and enabling legislation.

Regulation of floodplain management is primarily a local government responsibility, but, generally, states must enact enabling legislation to permit local governments and state agencies to exercise regulatory authority over floodplains.

Virtually every state in the country has adopted legislation permitting various local units of government to adopt local laws restricting and regulating the use of both public and private lands. However, such regulations must be for a public purpose or benefit, or promote the health and safety of the public. These laws fall under what are referred to as “police powers.”

State enabling legislation permits regulation of floodplains and other hazard areas by the local government through the use of:

- Floodplain management ordinances.
- Building codes to ensure safe construction.
- Zoning powers which control land use.
- Review and approval authority for subdivisions or other development of land.
- Stormwater management regulations which try to control runoff and erosion.
- General police powers that enable a local unit of government to protect the general health and safety of residents through specific regulation.
- Official policies denying the extension of utilities and facilities that encourage or support additional floodplain development.

## Taking Issues and Liability

Two important legal issues concerning the adoption and enforcement of the floodplain management measures through state and local ordinances are the question of:

- **Taking** of private lands.
- Liability.

An in-depth discussion of these two issues follows.

## Taking, Eminent Domain, Inverse Condemnation

### Taking

The Fifth Amendment of the Constitution states “nor shall property be taken for public use without just compensation.” The Constitution contains this provision because in England the King could take property and use it for his own purpose (quartering of troops, hunting, farming, etc.) without compensation. In recent years there has been increasing interest in the taking issue, mostly related to wetlands and endangered species issues. There is some controversy about the taking of property.

### Eminent Domain

Under statutory authority, governmental bodies possess the right to acquire, usually through official condemnation proceedings, privately owned land if that acquisition clearly is for a demonstrably public purpose. This is called the power of **eminent domain**.

The governmental unit, in exchange for taking the land, is obligated to compensate the landowner for the fair market value of that land. Some common examples of this process are:

- The acquisition of land for roads and public works projects.
- The development of public park land.
- Utility acquisition of **rights of way** for transmission lines, etc.

## **Inverse Condemnation**

In a regulatory sense, a taking may occur when the government enacts a law, standard, or regulation that limits the use of the land to the extent that the owner has been deprived of all of their economic interest in using the property. Thus, the government has “taken” the property. This is known as inverse condemnation.

In cases where a court has found a taking, the governmental body has been required to compensate the property owner. Often, though, the regulations are retracted as applied to that property.

## **Do State or Local Floodplain Management Regulations Constitute a Taking?**

In a word, no. However, very restrictive floodplain regulations have been challenged as a taking of property. Usually courts undertake a complicated balancing of public and private interests in deciding the “taking issue.” The courts will consider such factors as:

- Harm posed by uncontrollable development (e.g., rise in flood heights, more lives and property at risk, etc.).
- Reasonableness of the regulations.
- Regulatory objectives.
- Severity of economic impact upon the private property owner.

The above factors are most important. However, courts can consider other factors in making a decision.

Although the topic of taking is complicated and the rules vary somewhat from state to state, some general observations and conclusions can be summarized here.

With respect to constitutional claims against governmental units for reducing property values by floodplain regulations of the type required for community participation in the NFIP, case law shows that the potential for successful suits is extremely low.

The land use standards of the NFIP have been challenged as a taking in a number of cases. However, the courts have consistently, and sometimes overwhelmingly, upheld land use regulations because of the direct impact

on the safety of the public. In other words, a locality is on sound legal ground in implementing the provisions of its local floodplain management ordinance.

Because the standards for community participation in the NFIP contain construction criteria that apply to all floodprone areas, so that any floodprone site may be built on, the presence of this inclusive construction criteria means that, if appropriately applied, the local regulations would never result in inverse condemnation. Therefore, *not a single taking case has succeeded based upon the performance-oriented standards of the National Flood Insurance Program*. This is a highly significant fact given the existence of more than 18,500 community floodplain management ordinances.

Table 10-2 summarizes the important cases that have challenged the legality or constitutionality of the NFIP or floodplain management regulations and ordinances.

## **Liability**

Another legal issue is that of liability suits initiated by those suffering flood losses as a result of incorrectly designed, maintained, or administered flood loss reduction measures.

Liability suits have been brought under common law, statutory or constitutional theories of strict liability, negligence, nuisance, contract, or inverse condemnation. The individual suffering the damages due to flooding usually claims that the community:

- Caused the hazard or increased its seriousness.
- Should have provided warning with regard to the hazard or undertaken remedial action.

Examples of liability actions include, but are not limited to:

- Issuance of building permits in violation of local regulations or approval of subdivision plats that result in increased flood, erosion, or other damage to third parties due to increased hazards.
- Negligent evaluation of permits or dissemination of permit information such as incorrect interpretation of flood elevations.
- Negligent inspection of buildings.

<b>Table 10-2. Selected Cases of Challenges to Land Use Regulations</b>		
<b>Case</b>	<b>Issue</b>	<b>Decision/Impact</b>
Village of Euclid v. Ambler Realty Company (1926)	The use of police power to regulate land use	The court upheld the basic concept of zoning.
Turnpike Realty Co. v. Town of Dedham (1972)	Challenge to the constitutionality of the NFIP	The court upheld the floodplain management regulations.
Just v. Marienette (1972)	A wetland regulatory case	The court decided that a landowner does not have the absolute and unlimited right to use the land for a purpose which is unsuited to its natural state or that will injure the rights of others.
Texas Landowners Association v. Harris (1978)	Challenge to the validity of the NFIP and its mitigation requirements	The courts held that the program was reasonable and that denial of subsidized flood insurance was a denial of benefits and not a denial of property rights. It also ruled that a community could not claim a taking if insurance or disaster relief was denied for failure to comply with NFIP standards, because they are benefits, not rights.
Responsible Citizens v. City of Asheville (1983)	Challenge to the NFIP floodplain regulations of the City of Asheville as a taking	The court held that diminution in land value due to the regulations did not constitute a taking.
First Evangelical Lutheran Church of Glendale v. Los Angeles County, LA (1987)	Whether a temporary building moratorium that was deemed a taking would require compensation	The U.S. Supreme Court held that temporary regulatory takings could require compensation. This case was sent back to the state to decide if a taking had occurred. The state endorsed the floodplain regulations and held that the regulations were not a taking.

**Table 10-2. Selected Cases of Challenges to Land Use Regulations**

<b>Case</b>	<b>Issue</b>	<b>Decision/Impact</b>
Adolph v. FEMA (1988)	Whether the parish floodplain management regulations adopted constituted a taking	The court upheld that the NFIP as a whole is not a taking, nor are the parish regulations.
April v. City of Broken Arrow (1989)	Whether two Oklahoma floodplain ordinances constituted a taking (requirement for elevation of new homes to 1 foot above the 100-year flood elevation)	The courts accepted the general proposition that local public officials must be afforded reasonable elasticity in planning and implementing legitimate state interests and held that regulations were valid.
Lucas v. South Carolina Coastal Council (1992)	South Carolina Supreme Court—whether the South Carolina Beachfront Management Act constituted a taking.  U.S. Supreme Court—whether the property owner was entitled to compensation for his alleged “total loss of value” attributed to the Beachfront Management Act	The South Carolina Supreme Court ruled that the Act did not constitute a taking and reversed the trial court’s award of \$1.2 million to Lucas.  The U.S. Supreme Court ruled that where the value of a property is essentially “destroyed” by regulation, compensation should be paid. This was a taking, but not due to NFIP regulations.
Dolan v. Tigard (1994)	Imposition of a floodplain bike path as a condition of a permit to expand commercial structures	The U.S. Supreme Court found that the business owners should not be required to construct a bike path to obtain the permit. Although interpreted by some as a taking, this was a narrow decision.

The test or standard applied by most courts is one of reasonable care. Except in a few instances, governments are not liable for naturally occurring flood damages. Government has no duty to construct dams, adopt regulations, or carry out other hazard reduction activities unless required to do so by a statute. It is only where a governmental unit causes flood damages or increases natural flood damages that liability may arise.

From the personal perspective of the employee, the good news is that, although local governments may be liable for a broad range of negligent actions on the part of their employees, such employees are usually not personally liable for planning, permit issuance, or their actions. However, this raises a question with regards to variances. Can a future owner who suffers flood damages sue a community for granting a previous owner a variance to the floodplain management requirements?

Please complete Learning Check # 3 before proceeding.





### Learning Check # 3

**Purpose:** To review the legal issues concerning floodplain management.

**Directions:** Answer the following questions.

1. Define “taking.” \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

2. Why have the courts consistently upheld the NFIP regulations upon which many ordinances are based? \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

3. Name two examples where liability actions may be taken against the community.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

## Answers to the Learning Checks

### Answers to Learning Check # 1

1. List three methods of enforcement that can be used when a community's overall floodplain management programs are inadequate or not being enforced.
  - a. **Administrative methods**
  - b. **Fines**
  - c. **Injunctions**
  
2. What are the consequences of suspension from the NFIP?
  - a. **No new policies may be issued in the community and existing policies may not be renewed.**
  - b. **Lending institutions will be prevented from providing federally related financing for floodprone properties.**
  - c. **No federal financial assistance for acquisition and construction in identified floodplain areas, including federal disaster assistance.**

### Answers to Learning Check # 2

#### Problem One:

Will you approve the variance?

**No. The Smiths have not proved unnecessary hardship.**

#### Problem Two:

1. Because of the shape of the lot, it cannot currently be used to build a residential home that complies with floodplain management and zoning regulations. Do the McGill's have any recourse?
  - a. **Yes, because the lot is zoned residential; therefore some form of relief must be provided to allow it to be used as such.**

2. Can the circumstances as presented be decided solely through the Local Administrator's discretion?
  - b. No, because some requirements must be eased which will require a hearing before the Zoning Board of Adjustment.**
  
3. Based on the following rationale, which of the three options presented by the McGill's would be most acceptable?
  - b. Option 2 because three feet in height should not detract from the appearance of the neighborhood and it poses the least problem to the health and safety of the residents.**

### Answers to Learning Check # 3

1. Define "taking."

**A taking occurs when private property is taken from the owner(s) without payment of just compensation.**
  
2. Why have the courts consistently upheld the NFIP regulations?

**Because the NFIP standards and requirements are performance based and are not an outright prohibition on development in the floodplain. Also, because they protect the health and safety of the public.**
  
3. Name two examples where liability actions may be taken against the community?

**Issuance of permits or approvals in violation of local regulations.**

**Negligent evaluation of permits.**

**Negligent dissemination of permit information such as incorrect elevations for building construction.**

**Negligent inspection of buildings with resultant noncompliant construction.**