fact sheet 2

stormsmart coasts

No Adverse Impact and the Legal Framework of Coastal Management

How communities can protect people & property while minimizing lawsuits

Managing coastal floodplains is a challenging endeavor that sometimes is incorrectly thought to put local government's duty to protect people and property in direct conflict with property rights. Most local officials want to reduce the harm and costs associated with coastal storms, and recognize that unwise development can worsen the situation. Unfortunately, as our society has grown more litigious, it may seem harder for municipal governments to stay out of land court when preventing or conditioning development projects, even when there is good evidence that these projects may create problems for others. However, the No Adverse Impact (NAI) approach to land use management is an appropriate way to protect people, property, and property rights. (To learn more about NAI, see the StormSmart Coasts Fact Sheet 1, *Introduction to No Adverse Impact (NAI) Land Management in the Coastal Zone*.)

While nothing can prevent all legal challenges, following the NAI approach can help to: 1) reduce the number of lawsuits filed against local governments, and 2) greatly increase the chances that local governments will win legal challenges to their floodplain management practices. The legal system has long recognized that when a community acts to prevent harm, it is fulfilling a critical duty. The rights of governments to protect people and property have been well recognized by the legal system since ancient times. Courts from the Commonwealth of Massachusetts to the U.S. Supreme Court have consistently shown great deference to governments acting to prevent loss of life or property, even when protective measures restrict the use of private property. This "prevention of harm" principle is the foundation of the NAI approach. The goal of this fact sheet is to provide local officials with information on how to use the NAI tools to confidently protect people and property in a fair and effective way, while avoiding lawsuits (even those alleging takings).

Two key points:

1. **Communities have the legal power to manage coastal and inland floodplains.**
2. **Courts may (and often do) find that communities have the legal responsibility to do so.**

These Sandwich homeowners proactively protected their property by planting beach grass. Vegetating dunes and banks can reduce erosion and slow floodwaters without adversely impacting other properties.

Photo: Massachusetts Office of Coastal Zone Management.

HOW NAI CAN HELP YOUR COMMUNITY AVOID LAWSUITS

The best way to avoid losing in court is to stay out of court. One of the strengths of the NAI approach is that its clear goal (the prevention of harm) fosters and encourages cooperation between landowners and regulators as they work together to try to find solutions to the problems associated with proposed projects. Such collaboration is a great way to stay out of land court.

When avoiding court isn't possible, following the NAI approach can greatly increase the chances that local governments will win in lawsuits arising from their floodplain management practices. The most common and historically problematical challenges that local officials face while trying to regulate use of private property are allegations of "constitutional takings."

Takings background: This fact sheet summarizes a complex body of law under the so-called "Takings Clause" of the Fifth Amendment to the U.S. Constitution. This summary is not

"Not all the uses an owner may make of his property are legitimate. When regulation prohibits wrongful uses, no compensation is required." – *The Cato Institute*

intended to be legal advice for any particular situation, and may not be relied upon as such. To determine whether a particular regulation would cause a taking, communities should consult with an attorney. Property owners file takings cases when they believe regulations violate their constitutional property rights. The legal basis for these arguments can be found in the Fifth Amendment of the U.S. Constitution, which prohibits the government from taking private property for public use without compensation. The interpretation of the courts through the years has clarified that the Fifth Amendment encompasses more than an outright physical appropriation of land. In certain situations, the courts have found that regulations may be so onerous that they effectively make the land useless to the property owner, and that this total deprivation of all beneficial uses is equivalent to physically taking the land. In such a situation, courts may require the governing body that has imposed the regulation to either compensate the landowner or repeal the regulation.

Needless to say, with local budgets strapped and coastal land values skyrocketing, it is rarely economically feasible for local governments to compensate landowners when, for example, prohibiting a house on a solid foundation in an area known to flood, or preventing the construction of a seawall to protect a home on an eroding bluff.

NAI to the Rescue: It is critical that management decisions respect property rights and follow general legal guidelines (see the "Legal Dos and Don'ts of Floodplain Management" text box). The courts have made it very clear that property rights have limits. For example, both Commonwealth of Massachusetts and federal laws acknowledge that property owners do not have the right to: be a nuisance, violate the property rights of others (for example, by increasing flooding or erosion on other properties), trespass, be negligent, violate reasonable surface water use and riparian laws, or violate the public trust.

THE FOUR TYPES OF REGULATORY TAKINGS

The best way to understand how the NAI approach helps to prevent takings challenges is to look specifically at what the courts have decided may constitute a regulatory taking. In 2005, the U.S. Supreme Court ruled on a precedent-setting case (*Lingle v. Chevron*), which clearly established regulatory taking guidelines. In their unanimous decision, the Court determined that there are four ways for a regulation to be a taking. **Each way is briefly discussed below, with a non-technical explanation of how they are relevant to an NAI approach.** (For a more detailed legal explanation of these cases, see the latest edition of *No Adverse Impact Floodplain Management and the Courts*, published by the Association of State Floodplain Managers at www.floods.org.)

1. A physical intrusion. Governments may not, without compensation, place anything on private property against the wishes of the owner. The case discussed (*Loretto v. Teleprompter Manhattan*) involved a New York City requirement that building owners allow the cable company to install a small cable box and cables on all residential buildings. **Because the NAI approach doesn't generally promote structural solutions, this type of regulatory taking is unlikely to apply. However, if a community's NAI plan involves the placement of structures (culverts, for example) on private property, this ruling makes it clear that the community may be required to obtain the permission of the landowner or pay compensation.**

WHY NAI IS LEGALLY SOUND

NAI doesn't take away property rights—it protects them. NAI prevents one person from harming another's property.

NAI is not an arbitrary or inflexible "no" to construction. It is a performance-based standard. It is neither pro- nor anti-development.

Courts consistently favor public entities performing their fundamental function of protecting people. The NAI approach can help communities create fair and legally strong regulations.

2. A total or near-total regulatory taking. If a regulation restricts property rights to such a degree that it eliminates all or essentially all economically viable uses of a piece of property, this may constitute a taking. The case reviewed (*Lucas v. South Carolina Coastal Council*) was filed by a landowner who was prohibited from building a home on a barrier beach. **In their opinion, the Court clearly states that regulations aimed at preventing nuisance don't constitute takings. It warns, though, that governing bodies arguing that specific regulations are designed to prevent nuisances will need to demonstrate how they are addressing similarly situated nuisances (i.e., regulations may not be**

applied arbitrarily). The NAI approach can help your community to consistently articulate how potentially harmful projects are nuisances. When designing land use regulations, your community should always try to ensure that the owner retains at least some economically beneficial uses. This is both fair and helps establish the legal reasonableness of your regulations. Note that land uses that harm others are not legal or beneficial, and that beneficial uses don't necessarily include building residences or other structures, especially in hazardous areas. Where new regulations, even hazard-based regulations, could sharply decrease the market price of property, consider allowing the transfer of development rights to areas where your community would like growth to occur. To learn about transferable development rights, see www.mass.gov/envir/smart_ growth_ toolkit/pages/mod-tdr.html.

3. A significant, but not near-total regulatory taking. Courts hearing takings arguments should consider three factors that have "particular significance" - a) the magnitude of the economic impact, b) how severely the regulation affects "investment-backed expectations," and c) the character of the government in action. The central case discussed (*Penn Central v. City of New York*) concerned a denied expansion of Grand Central Station in New York City. **The historic preservation regulation reviewed in this case seeks to protect neighborhood character—not to prevent physical harm.** These are two very different things in the eyes of the law. The U.S. legal system sometimes requires governments to compensate landowners when property rights are compromised for community improvement, but less frequently when they prevent potential harm. **There is no property right to use or develop land in a way that harms others, *even if that use maximizes the particular site's economic potential*. There is no constitutional or legal right to a good return on investments.** Unfortunately, some people invest in land with erroneous ideas about what they are legally allowed do with it, and when forbidden to do as they wish, may argue that regulations have devalued their property. The courts have made it clear that while regulations designed to prevent harm may reduce the market value of a piece of property, they do not decrease its true value, and hence NAI-based regulations cannot trigger this aspect of a taking test. A 2005 Massachusetts Supreme Judicial Court decision upheld a coastal town's regulation prohibiting new residences in its coastal floodplain because the town successfully established that this regulation was designed to prevent harm and did not render the land valueless.

LEGAL DOS AND DON'TS OF FLOODPLAIN MANAGEMENT

Do clearly relate regulations to hazard prevention.

Do help landowners to identify economic uses.

Do apply identical principles to government activities.

Don't neglect your duty to manage the floodplain. (A hands-off approach is the surest way to be successfully sued.)

Don't apply regulations inconsistently or arbitrarily.

Don't interfere with landowners' rights to exclude others.

Don't deny all economic uses. Consider the use of transferable development rights in valuable, heavlily regulated areas.

For more information, see the StormSmart Coasts Fact Sheet 3, *A Cape Cod Community Prevents New Residences in Floodplains*.

4. Insufficient relationship between the requirement and the articulated government interest. If a community conditions a permit, the requirements it exacts from the landowner must be related to the goals of the regulation and must be "roughly proportional" to the predicted impacts of the proposed development. In the two cases, *Nollan v. the California Coastal Commission* and *Dolan v. City of Tigard*, landowners were required to provide a public right of way as a permit condition, even though the proposed developments did not reduce public access. The NAI approach avoids this type of taking by tightly binding regulations to the specific goal of preventing harm.

With these and other decisions, the courts have made it clear that governments may regulate land without compensation if they do so with the intent of preventing harm. **Fairly applied No Adverse Impact regulations make the "takings issue" a non-issue.**

From the property rights perspective, it's worth noting that the Cato Institute, which advocates for limited government, individual liberty, and free markets, agrees that preventing landowners from causing harm to others does not constitute a taking:

> *"Owners may not use their property in ways that will injure their neighbors. Here the Court has gotten it right when it has carved out the so-called nuisance exception to the Constitution's compensation requirement. Thus, even in those cases in which regulation removes all value from the property, the owner will not receive compensation if the regulation prohibits an injurious use."*
>
> –Roger Pilon, Senior Fellow and Director
> Cato Institute (to the U.S. House of Representatives, 2/10/95)

"The takings clause was never intended to compensate property owners for property rights they never had."

– Massachusetts Supreme Judicial Court

WHY YOU SHOULD MANAGE YOUR FLOODPLAINS

Protecting people and property is a fundamental duty 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 can and should do what they can to reduce the likelihood that the development or use of property will cause harm.

Communities should also be aware that in a growing number of states, courts are favoring plaintiffs that sue local governments for permitting projects that later cause damage to property (for example, permitting the construction of roads that back-up streams and increase flooding in the community). For more information on this trend, see *No Adverse Impact Floodplain Management and the Courts* (available at www.floods.org), where the authors found that a community is vastly more likely to be successfully sued for allowing improper development that causes harm than for prohibiting it.

The take-home lesson: As a local official, you have been given the responsibility and the legal rights to manage coastal and inland floodplains. If you do so in a way that expressly seeks to prevent harm, the courts will support you.

FOR MORE INFORMATION . . .

This is not and cannot be legal advice. To answer specific legal questions please see an attorney licensed in your jurisdiction. To learn more about the general legal framework of NAI-based floodplain management see:

- *No Adverse Impact Floodplain Management and the Courts* for an excellent overview of the case history of NAI at www.floods.org. While this document is designed for attorneys, it is useful for anyone working in floodplain management.
- The StormSmart Coasts Fact Sheet 3, *A Cape Cod Community Prevents New Residences in Floodplains*, which examines a community's successfully defended NAI-type bylaw.
- The *Coastal NAI Handbook* at www.floods.org.
- The NAI section of the Association of State Floodplain Managers website at www.floods.org.
- The Institute for Local Government's one-page publication, *10 Tips for Avoiding Takings Claims,* at cacities.org/index.jsp?displaytype=11&zone=ilsg&section=land&sub_sec=land_property&tert=&story=20219.
- The American Planning Association's 1995 *Policy Guide on Takings* at www.planning.org/policyguides/takings.html.
- The StormSmart Coasts website at www.mass.gov/czm/stormsmart.

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For further information on StormSmart Coasts, visit www.mass.gov/czm/stormsmart.

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