



Association of State
Floodplain Managers



Floodplain Management

*Making the Case for a No
Adverse Impact (NAI)
Approach*

THERE'S THE
FLOODPLAIN.
NOW WHERE
DO WE GO FROM
HERE?





Disclaimer

This presentation is neither intended to be, nor may it be taken as legal advice. For legal advice, consult with an attorney licensed to practice in your jurisdiction and demonstrating expertise in applicable subject matter.

Statements of fact and opinions expressed are those of the presenters individually and, unless expressly stated to the contrary, are not the opinion or position of the Association of State Floodplain Managers.



What Keeps You Up at Night?

- Are you afraid of being sued for a takings?
- Are you worried about your liability for enforcing standards, or not enforcing standards?
- Do you think you have enough legal standing to take an enforcement action?
- Are your standards good enough? Do citizens complain to local officials about flooding in areas that were properly permitted?



Key Points

- **You may be as likely to be sued for permitting risky development as you are for preventing it.**
- **You are your community's first and last line of defense against tomorrow's flood disaster.**

City, county face lawsuit by Farmers Insurance for April 2013 flooding

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Updated: Apr 26, 2014 5:55 PM CDT

By Larry Yellen, FOX 32 News Legal Analyst - [bio](#) | [email](#)





Common Law Liability

- Under common law, no landowner—public or private—has the right to use his/her land in a way that substantially increases flood or erosion damages on adjacent lands.
- Liability lawsuits are commonly based upon one of four causes of action:
 - Negligence
 - Nuisance
 - Trespass
 - Law of Surface Water



Common Law Liability

- Negligence
 - What is the “standard of care” for reasonable conduct? Evolving from a FPM perspective
 - The standard of conduct is that of a reasonable person in the circumstances
 - This is the primary legal basis for public liability for:
 - Improper design of flood control structures
 - Improperly prepared or issued warnings
 - Inadequate processing of permits



Legal Research Findings

- Most successful suits against communities result from actions such as inadequate construction or maintenance of public infrastructure (dams, levees, roads, and bridges) that increase flood damages on private lands.
- “Act of God” defense is less and less convincing. Even rare floods are predictable. As are residual risks from levees and dams.
- If a community permits development that meets code standards, but results in an adverse impact, there may be liability. Prohibiting reasonable development may be a regulatory “taking.” Negotiating development in the absence of standards may be “arbitrary and capricious.”



What about the NFIP?

- Under the minimum NFIP standards, properly permitted development allows:
 - Floodwaters to be diverted onto other properties
 - Channel and conveyance areas to be reduced
 - Valley storage to be filled
 - Changes in water velocities
- In general if the permitted development results in an adverse impact, your community may be liable!



What Constitutes a Taking?

- Physical occupation of private land
- Regulation that “goes too far”
- Permit condition lacks a rational connection or “essential nexus” with a valid public purpose
- No “rough proportionality” between permit condition and impact of development
- Total deprivation of economic use
- Interference with “reasonable investment-backed expectations”
- Compensable taking may occur even when restriction is temporary



Legal Research Findings

- No cases found where a landowner prevailed in a regulatory takings suit against a community's denial of use, where the proposed use would have had substantial offsite impacts or threatened public safety.
- Courts have broadly supported restrictive regulations for high risk flood areas based upon public safety, nuisance prevention, public trust and other concerns.



Beverly Bank v. Illinois Department of Transportation

- Illinois Supreme Court upheld state regulation prohibiting residential structures in 100-year floodway
- State argument focused on protecting health and welfare including
 - Risk to first responders
 - Risk to property owners who would be stranded
 - Increased expenditure of public funds



Avoiding a Taking

- Clearly Relate Regulation to Preventing Harm. (Gove)
- Avoid interfering with owner's right to exclude. (Loretto)
- Avoid denial of all economic uses. (Lucas)
- Consider Transferable Development Rights or similar residual rights and uses to retain economic value. (Penn Central)
- Demonstrate relationship between permit condition and harm avoided. (Koontz)



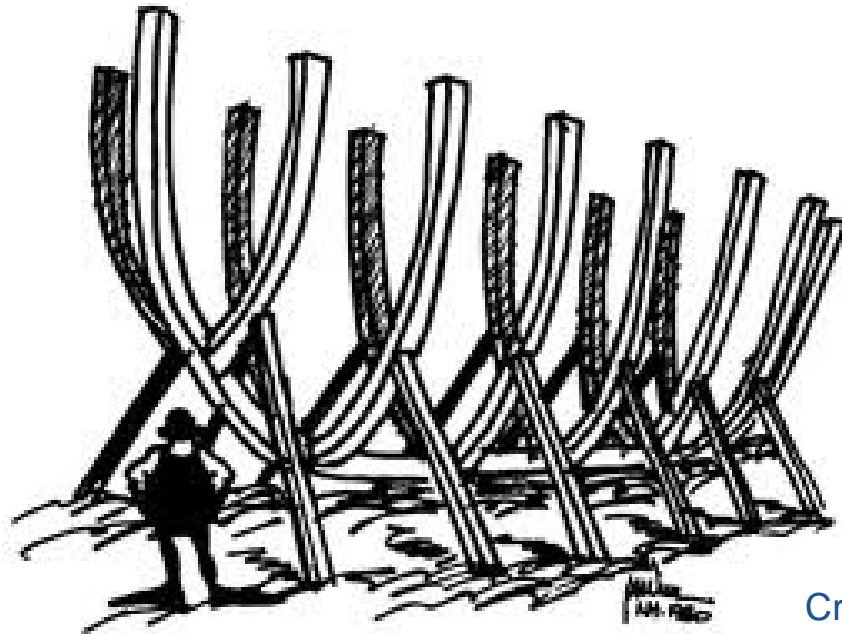
Key Points

- **You may be as likely to be sued for permitting risky development as you are for preventing it.**
- **Take a “No Adverse Impact” approach to flooding issues to reduce liability and minimize takings claims.**
- **You are your community’s first and last line of defense against tomorrow’s flood disaster!**



Resources

www.floods.org > publications and policy papers > legal papers



Credit given to the Natural Hazards Observer and Rob Pudim for all illustrations in this presentation



Association of State
Floodplain Managers



Florida Floodplain Management

Peril of Flood legislation

and

Post-Disaster Redevelopment Plans



SUNKEN CONDOS—Donald Fagen (2012)

**SUPER STORM SANDY—(Eastern and
Northeastern US Atlantic Coast (2012))**



Super Storm Sandy (2012)





Peril of Flood Act/Regulations/Requirements

May 21, 2015—Governor signs Laws of Florida Chapter 2015-69: An act relating to the peril of flood.

Amended Florida Statutes chapters:

- 163 regarding requirements of Coastal Management elements in local government Comprehensive Plan
- 472 regarding processing of Elevation Certificates; and
- 627 regarding “Flexible” Flood Insurance



Coastal management element

F.S. §163.3178

163.3178 Coastal management.—

(1) The Legislature recognizes there is significant interest in the resources of the coastal zone of the state. Further, the Legislature recognizes that, in the event of a natural disaster, the state may provide financial assistance to local governments for the reconstruction of roads, sewer systems, and other public facilities. Therefore, it is the intent of the Legislature that local government comprehensive plans restrict development activities where such activities would damage or destroy coastal resources, and that such plans protect human life and limit public expenditures in areas that are subject to destruction by natural disaster.



Coastal management element

F.S. §163.3178

(2) Each coastal management element required by s. [163.3177](#)(6)(g) shall be based on studies, surveys, and data; be consistent with coastal resource plans prepared and adopted pursuant to general or special law; and contain:



Coastal management element

F.S. §163.3177(6)(g)

- (6)(g) For those units of local government identified in s. [380.24](#), a coastal management element, appropriately related to the particular requirements of paragraphs (d) [Conservation] and (e) [Recreation and Open Space] and meeting the requirements of s. [163.3178](#)(2) and (3). The coastal management element shall set forth the principles, guidelines, standards, and strategies that shall guide the local government's decisions and program implementation with respect to the following objectives:



Florida Coastal Management Act

380.21 Legislative Intent.

380.24 Local government participation.—

* * *

Such units of local government shall be eligible to receive technical assistance from the state in preparing coastal zone protection elements and shall be the only units of local government eligible to apply to the department for available financial assistance.

* * *

380.26 Establishment of coastal building zone for certain counties.

380.27 Coastal infrastructure policy.

* * *



Coastal management element

F.S. §163.3177(6)(g)

- (6)(g) For those units of local government identified in s. [380.24](#), a coastal management element, appropriately related to the particular requirements of paragraphs (d) [Conservation] and (e) [Recreation and Open Space] and meeting the requirements of s. [163.3178](#)(2) and (3). The coastal management element shall set forth the principles, guidelines, standards, and strategies that shall guide the local government's decisions and program implementation with respect to the following objectives:



Coastal management element

F.S. §163.3178

(2) Each coastal management element required by s. [163.3177](#)(6)(g) shall be based on studies, surveys, and data; be consistent with coastal resource plans prepared and adopted pursuant to general or special law; and contain:

(3) [Ports]



Coastal management element

F.S. §163.3177(6)(g)

(6)(g) . . . set forth the principles, guidelines, standards, and strategies that shall guide the local government's decisions and program implementation with respect to the following objectives:

- Maintain, restore, and enhance the coastal zone environment
- Preserve all species of wildlife and marine life.
- Protect all living and nonliving coastal zone resources.
- Avoid irreversible and irretrievable loss of coastal zone resources.
- Use ecological principles when permitting development.
- Limit public subsidies for development in coastal high-hazard areas.
- Protect human life against the effects of natural disasters.
- Ports
- Preserve historic and archaeological resources



Coastal management element

F.S. §163.3177(6)(g)

(6)(g)10. At the **option** of the local government, develop an **adaptation action area** designation for those low-lying coastal zones that are **experiencing coastal flooding** due to extreme high tides and storm surge and are **vulnerable to the impacts of rising sea level**.

- Local governments that adopt an **adaptation action area** may **consider policies** within the coastal management element to improve resilience to coastal flooding resulting from high-tide events, storm surge, flash floods, stormwater runoff, and related impacts of **sea-level rise**.
- **Criteria** for the **adaptation action area** may include, but need not be limited to, **areas for which the land elevations are below, at, or near mean higher high water, which have a hydrologic connection to coastal waters, or which are designated as evacuation zones for storm surge**.



Coastal management element

F.S. §163.3178

(2) Each coastal management element required by s. [163.3177](#)(6)(g) shall be based on studies, surveys, and data; be consistent with coastal resource plans prepared and adopted pursuant to general or special law; and contain:



F.S. §163.3178(2)

- (a) A land use and inventory
- (b) An analysis of the environmental, socioeconomic, and fiscal impact of development and redevelopment proposed in the future land use plan, with required infrastructure to support this development or redevelopment, on the natural and historical resources of the coast and the plans and principles to be used to control development and redevelopment to eliminate or mitigate the adverse impacts on coastal wetlands; living marine resources; barrier islands, including beach and dune systems; unique wildlife habitat; historical and archaeological sites; and other fragile coastal resources.
- (c) An analysis of the effects of water quality and quantity
- (d) A component that outlines principles for hazard mitigation
- (e) A component that outlines principles for protecting existing beach and dune systems and restoring altered systems.



Peril of Flood—F.S. §163.3178(2)(f)

(f) A redevelopment component that ~~which~~ outlines the principles that must ~~which shall~~ be used to eliminate inappropriate and unsafe development in the coastal areas when opportunities arise. The component must:

1. Include development and redevelopment principles, strategies, and engineering solutions that reduce the flood risk in coastal areas . . . from . . . related impacts of sea-level rise.
2. Encourage . . . the removal of coastal real property from [FEMA] flood zone designations.
3. Site development techniques and best practices [to] reduce [flood] losses flood insurance claims.
4. [C]onsistent with, or more stringent than, the Florida Building Code and [FEMA} flood regulations 44 C.F.R. part 60.
5. Construction seaward of the coastal construction control lines must be consistent with chapter 161.
6. Encourage local governments to participate in the NFIP CRS to achieve flood insurance premium discounts for their residents.



Key Points

- **In addition to the existing statutory requirements for Coastal Management elements, a “redevelopment component” is required.**
- **Local governments who exercise the option to develop and designate adaptation action areas have additional latitude to tailor Comprehensive Plan policies to address coastal flooding.**



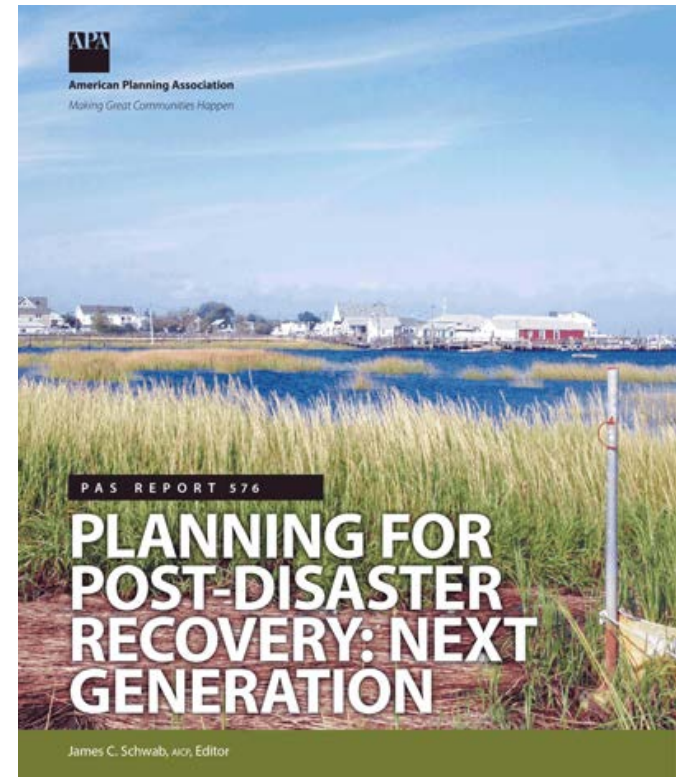
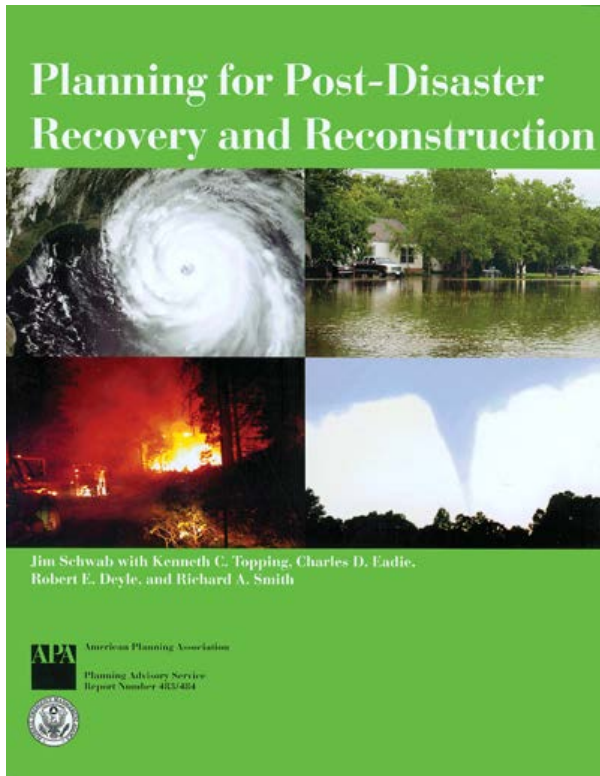
F.S. §163.3178(2)(f)— Post-Disaster Redevelopment Plans

Redevelopment component.

1. Development and redevelopment principles, strategies, and engineering solutions.
2. Incentives to remove real property from coastal flood zones.
3. Site development techniques and best practices [to] reduce [flood] losses flood insurance claims.
4. [C]onsistent with, or more stringent than, the Florida Building Code and [FEMA] flood regulations 44 C.F.R. part 60.
5. Construction seaward of the coastal construction control lines must be consistent with chapter 161.
6. Incentives for local governments to participate in the NFIP CRS to achieve flood insurance premium discounts for their residents.



APA PLANNERS ADVISORY SERVICE (PAS) TEXTS





STATE OF FLORIDA PDRP GUIDE



POST-DISASTER REDEVELOPMENT PLANNING

A Guide for Florida Communities



FLORIDA DEPARTMENT OF COMMUNITY AFFAIRS | FLORIDA DIVISION OF EMERGENCY MANAGEMENT



STATE OF FLORIDA PDRP GUIDE

Chapter 1. Getting Started

- What is a Post-Disaster Redevelopment Plan?
- Why Should My Community Develop a PDRP?
- Different Approaches to Plan Development
- Key Ingredients for Plan Success

Chapter 2. Planning Process

- Initiating the Process
- Getting Buy-In
- Capacity Assessment
- Vulnerability Analysis
- Facilitating Input

Chapter 3. Plan Topics

- Land Use
- Housing
- Economic Redevelopment
- Infrastructure and Public Facilities
- Health and Social Services
- Environment

Chapter 4. Implementation Considerations

- Pre-Disaster Implementation
- Post-Disaster Implementation
- Financing Implementation
- Including the Public in Implementation
- **References and Resources 121**



STATE OF FLORIDA PDRP GUIDE

POST-DISASTER REDEVELOPMENT PLANNING

*Addressing Adaptation
During Long-Term Recovery*

Second Revised Edition, June 2018

Florida Department of Economic Opportunity | Florida Division of Emergency Management

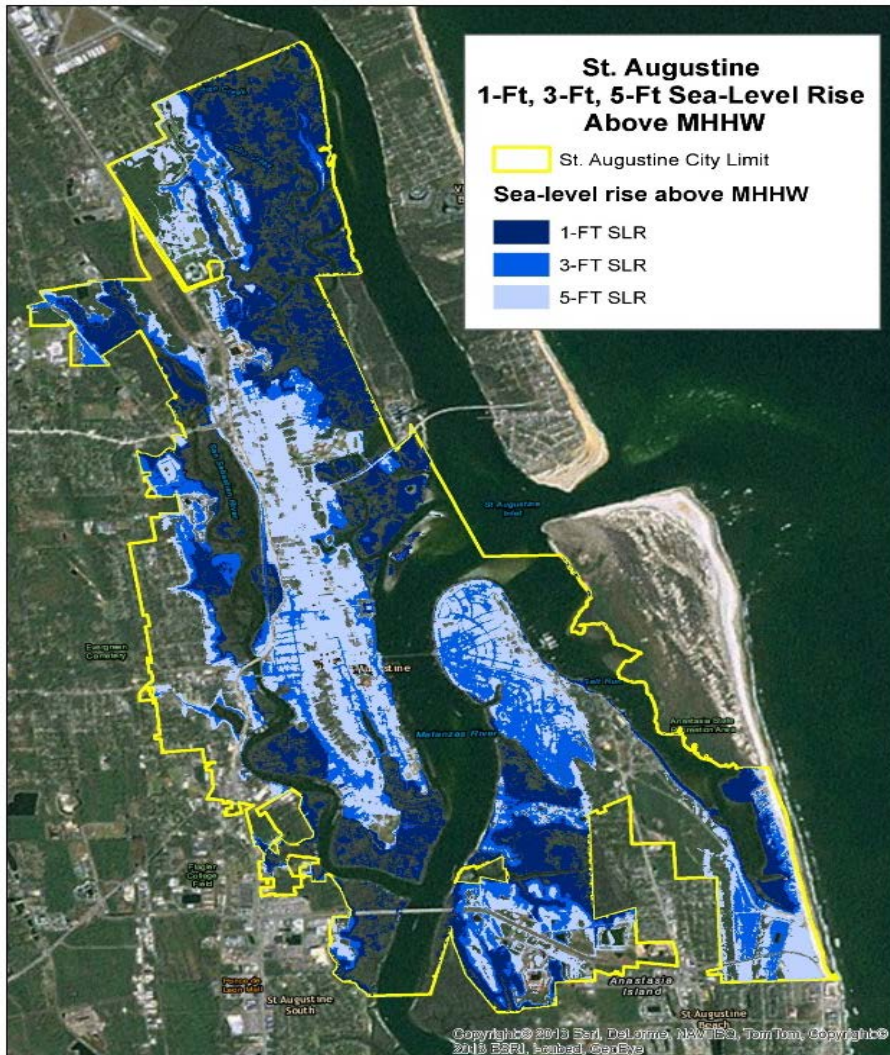


So Tell Me Something I Don't Know...



Adapting to Rising Tides

Coastal Resilience in St. Augustine: Baseline of Our Past, Beacon for Our Future



St. Augustine 1-Ft, 3-Ft, 5-Ft Sea-Level Rise Above MHHW

St. Augustine City Limit

Sea-level rise above MHHW





Stormwater Control: Concrete and Engineering





Stormwater Control: Design with Nature





COMPARISONS





Bishan Park – aerial view



Badjao – over water





Learning from Stiltsville





Floating on the water





Floating during flooding





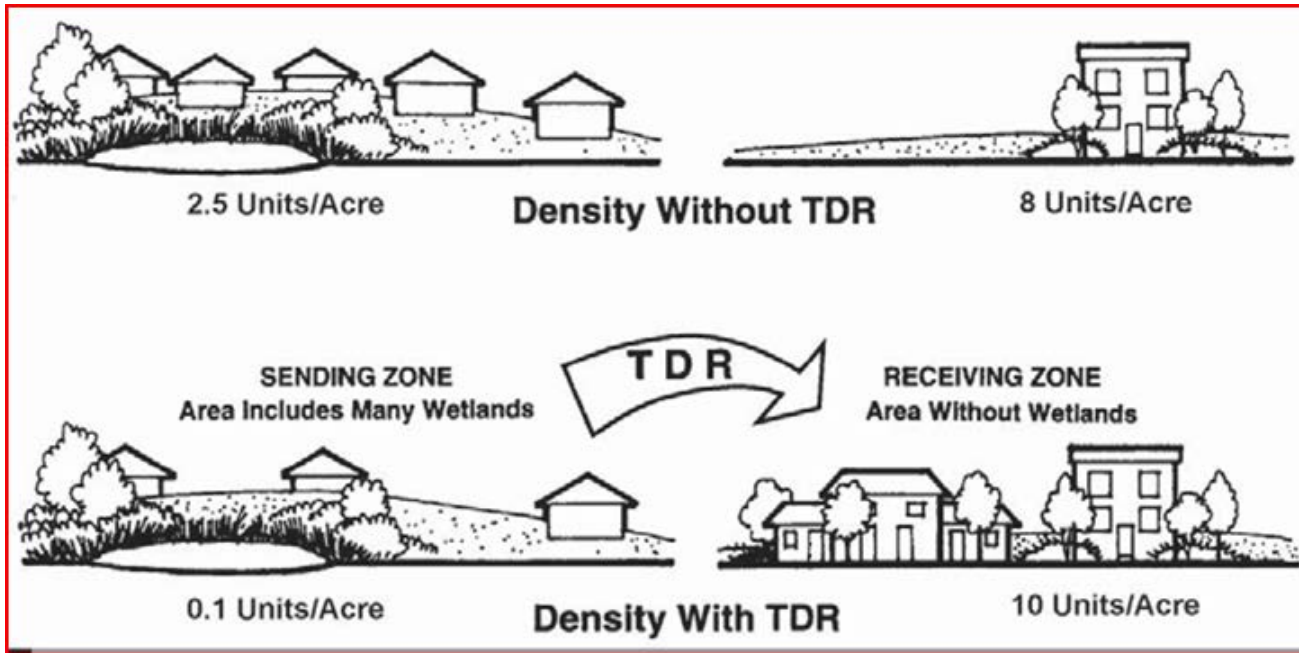
Movable homes

Movable homes





Transferring development to safer locations





Under Water







UNIVERSITY OF FLORIDA RESILIENT COMMUNITIES INITIATIVE (UFRCI)

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Mission:

The College of Design, Construction and Planning (DCP) and the Program for Resource Efficient Communities (PREC) in the Institute for Food and Agricultural Sciences (IFAS) are engaged in collaborative efforts related to creating and sustaining local communities and regions faced with various threats, including natural hazards and resource constraints, as well as market hazards resulting from public and private actions. The concept of resiliency encompasses the capacity to overcome adversities through a combination of preplanning and post-disaster mitigation, typically based upon the development of community resiliency plans and a network of local stakeholders committed to implementing recovery and sustainability strategies.

Website: <http://frci.dcp.ufl.edu/>



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