

The Legal Aspects of the National Flood Insurance Program

Larissa Womack
Senior Attorney
MEMA

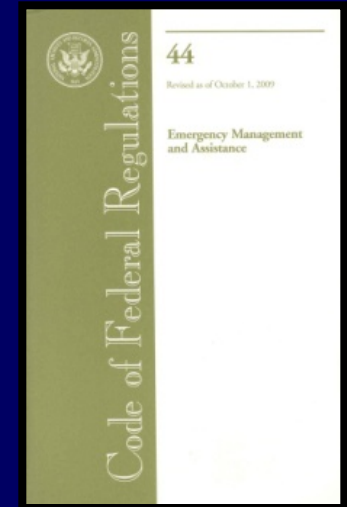


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This is not and cannot be legal advice. For legal advice, see your jurisdiction's lawyer.

Legal Basis of the NFIP

- National Flood Insurance Act of 1968 as amended (42 U.S.C. 4001-4129).
- NFIP regulations are found at 44 Code of Federal Regulations (CFR) Parts 59-78.
- Participation in the National Flood Insurance Program is voluntary for States and communities.



Dubuque, Iowa 1965

Topeka, Kansas
1951



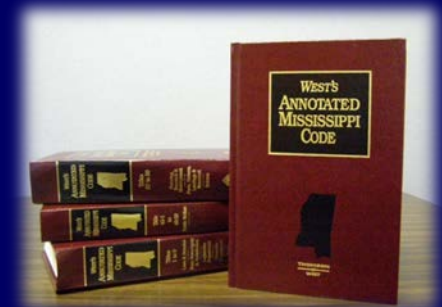
NFIP Background & Purpose

- Designed to be a uniform, nationwide program
 - State law preempted
- Does not operate differently per storm or per location
- Overview: www.fema.gov/national-flood-insurance-program

Legal Basis for Local Floodplain Management Regulations

State laws:

- Provide communities with the authorities necessary to adopt and enforce floodplain management ordinances.
- Usually establish procedural and other requirements that communities must follow in adopting and implementing land use ordinances.



State Law

Miss. Code §17-1-15: Governing authority of each municipality and county shall provide for the manner...

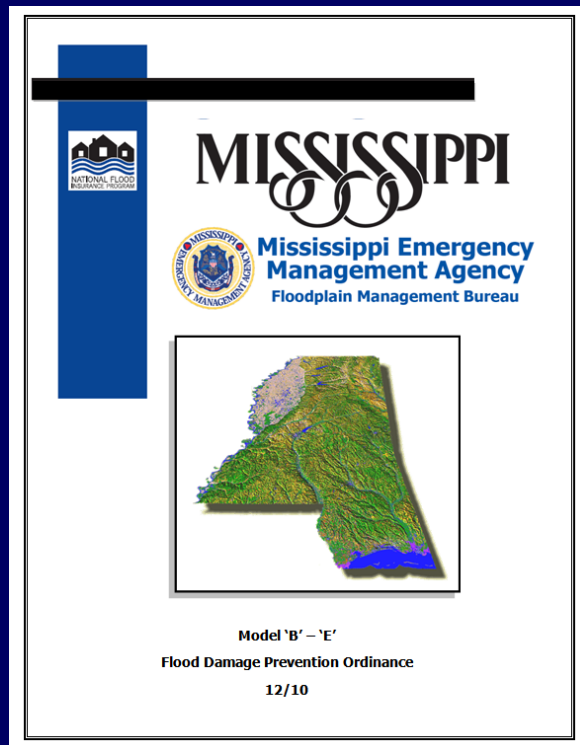
-Miss. Code §21-19-13:

“A municipality may perform drainage work on private property for the purpose of alleviating flooding, erosion or other problems, provided that such improvements are not made for the purpose of benefitting only one land owner.”
MS AG Op., Tyner (May 29, 2012).

State Law

“Hunting and fishing camps are still exempt from local building codes except with regard to ordinances or regulations required for a county to participate in the NFIP. Thus, the county may enforce its local Flood Mitigation Ordinance against hunting and fishing camps if necessary for eligibility in the NFIP.” MS AG Op., *Chism* (April 11, 2012); MS AG Op., *Ross* (May 1, 2012).

Community Flood Damage Prevention Ordinance



State provided model Flood Damage Prevention Ordinance, last updated 2011.

Provides assistance in complying with the minimum participating criteria of the NFIP.

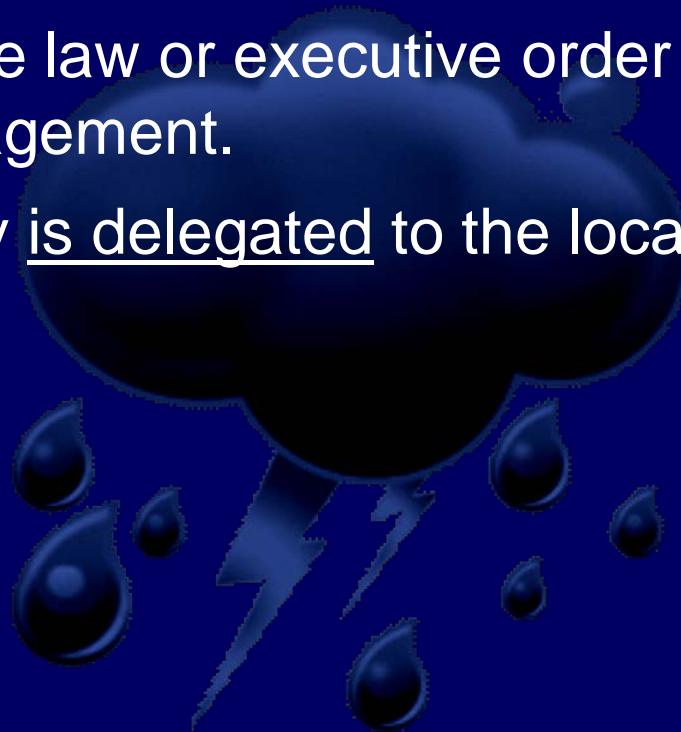
Legal Basis for Local Floodplain Management Regulations (Continued)

Other considerations:

- Communities that fail to properly regulate flood hazard areas may face lawsuits;
- Failure to adopt and enforce ordinances is grounds for suspension from the NFIP, and;
- Adoption and enforcement of ordinances that exceed minimum NFIP standards may be credited by the NFIP's Community Rating System (CRS).

State Approaches: Mississippi Floodplain Management Authorities

- There is no state law or executive order concerning floodplain management.
- All responsibility is delegated to the local communities.



Important Points: NFIP Minimum Floodplain Management Requirements

- The NFIP requirements have only two basic purposes:
 - Protecting buildings from flood damages, and
 - Preventing the actions of one property owner from increasing flood damages to adjoining property owners.
- Most NFIP requirements are performance standards.

Important Points: NFIP Minimum Floodplain Management Requirements (Continued)

NFIP Requirements:

- May have the effect of increasing the cost of a development or limiting the size of a development.
- Seldom will prevent all use of a property.
- Ordinances that meet NFIP minimum requirements have not been found to be a “taking.”

Hazard Based Regulation and the Constitution

- Hazard-based regulation generally sustained against constitutional challenges.
- Goal of protecting the public is accorded enormous deference by the Courts
- *Koontz v. St. Johns River Water Mgmt. Dist.* (June 25, 2013), the Supreme Court seems to agree with safe development based planning.

Local Role



- Adopt local floodplain management laws in compliance with Federal / State laws;
- Issue or deny development / building permits, and;
- Inspect development and maintain records.



First, what is Development ?

Development means any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials.



New Construction



Substantial Improvement

Community Floodplain Regulations

- Legally enforceable;
- Applied uniformly;
- Take precedence over any less restrictive conflicting laws, ordinances, or codes, and;
- Address requirements of Section 60.3 of 44 CFR.

Potential Community Liability for Increased Flood Damages

- Community was aware of a flood problem, but took no action;
- Failure to account for the flood problem when taking an action;
- Community allows improper development that increases the flood hazards for others;
- Community undertakes an action that increases the flood hazard;

Potential Community Liability for Increased Flood Damages (Continued)

- Community owns or operates a flood protection system that is poorly designed, constructed, or maintained;
- Community fails to warn citizens of a known flood hazard, and;
- Community inconsistently administers its floodplain management regulations.

Examples Where Governments May Be Held Liable

- Construction of a road that blocks drainage and increases flooding;
- Storm-water system increases flood flows;
- Structure blocks a watercourse and increases flood heights, and;
- Bridge or culverts built without adequate opening to pass floodwaters.

Examples Where Governments May Be Held Liable (Continued)

- Grading land increases runoff or diverts flood flows;
- Flood control structure fails or causes increased flooding to adjoining properties;
- Filling of a wetland increases flood flows and causes increased flood damage, and;
- Issuing permits for a development that causes increased flood damage to a third party.

Examples Where You May be Liable

- Issuing Variances that are inconsistent with the minimum requirements of the NFIP;
- Improper plans review or site inspections that allows construction below the BFE, and;
- Improper uses allowed below the Base Flood Elevation.

Variance Liability

- Insufficient reasons for granting a variance to the Flood Damage Prevention Ordinance;
- Convenience of property owner;
- Financial considerations;
- Hardships created by owner's own action, and;
- Circumstances of owner, not the land.

Procedures for granting of variances by a community can be found in 44 CFR § 60.6.

Community Liability

- State and local governments are more likely to be successfully sued for permitting development that causes increased flooding than they are for prohibiting such development.

When Administering Your Ordinance

- Follow the rules—stick to the procedural requirements in the ordinance.
- Uniformly apply your ordinance—be fair and consistent.
- Be confident—ordinances that meet or exceed NFIP minimum standards are almost invariably upheld by the courts.

Community Enforcement Options

- Administrative Methods
- Fines
- Imprisonment
- Injunctions
- Section 1316

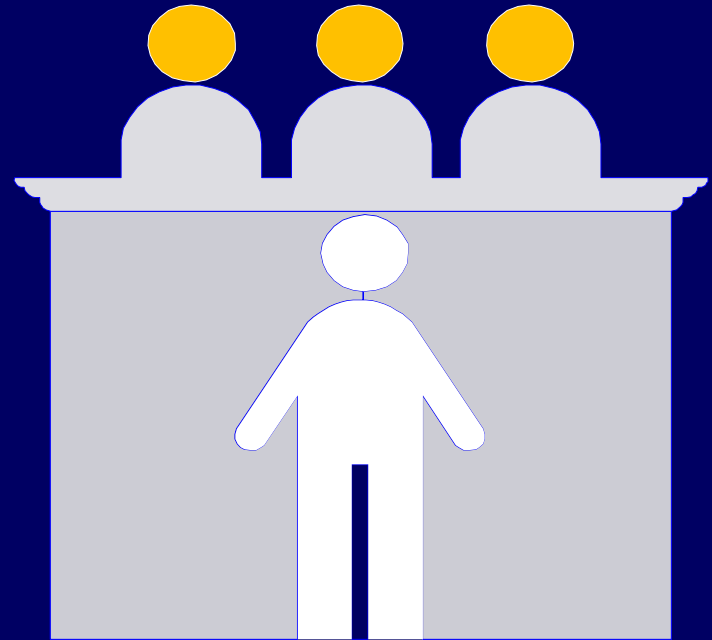


NFIP Compliance

- Communities which allow violations of floodplain regulations or have program deficiencies may be subject to enforcement action by FEMA.
- However, if certain objectives are met, then FEMA's remedies can be avoided.

FEMA's Enforcement Options

- Probation
- Suspension
- Subrogation
- Section 1316



Suspension

NFIP Insurance no Longer Available

- No resident will be able to purchase a NFIP flood insurance policy
- Policies currently in effect will not be renewed

No Federal Grants or Loans

- Private buildings in SFHA ineligible for grants
- Public buildings in SFHA ineligible for grants

No Federal Disaster Assistance

- Permanent restorative construction and grants in SFHA

No Federal Mortgage Insurance

- Current loans and mortgages could become immediately due upon loss of flood insurance

Local Governing Body

- Susceptible to liability by its lack of enforcement, withdrawal from the NFIP, or nonparticipation because their action;
- Denies the ability of its citizens to purchase federally backed flood insurance, and;
- Does not take positive steps to reduce the exposure of life and property in the face of authoritative scientific and technical data.

Subrogation

- This is an action brought by FEMA when flood damages have occurred;
- Flood insurance has been paid to the policyholder, and;
- All or part of the damage can be attributed to acts or omissions by a community or other third party.

Subrogation...

FEMA then sues the third party to recover the flood insurance claims it has paid.

Questions?

Mississippi State Hazard Mitigation
Officer:

Jana Henderson, MEMA

jhenderson@mema.ms.gov

601-933-6622

