

CHAPTER VII

FLOODPLAIN REGULATIONS AND THE COURTS

Introduction

Between 1970 and 1980, judicial support for floodplain regulations was overwhelming. State supreme or appellate courts issued at least 55 reported decisions on floodplain regulations and 25 on wetland regulations. Federal courts addressed flood insurance issues in at least 25 decisions and Section 404 permit issues at least 20 times. The goals and techniques of floodplain regulation (outlined in Table 8) were unanimously endorsed. Problems, where they arose, concerned procedural matters and lack of data in evaluating permits. Courts held denial of a specific permit invalid in only seven cases, and those took place early in the decade. Even in these cases, the courts supported the general validity of regulations. In six of these there was either lack of evidence of flooding or a failure to show that the proposed use would have adverse individual or cumulative effects on flooding.¹

Floodplain regulations raise constitutional issues similar to those involved in broader land use regulatory efforts. In determining the constitutional validity of regulations, courts look first at the general validity of the regulations and then at their specific validity as applied to a particular landowner. They first decide whether the unit of government or agency adopting the regulation was authorized to do so by an act of Congress or a state statute, and whether statutory procedures were followed. Having found sufficient statutory powers and compliance with statutory procedures, they then decide whether the regulations (1) serve valid police power objectives, (2) have a reasonable tendency to achieve or aid in the achievement of those objectives, (3) afford equal treatment to similarly situated landowners, and (4) permit reasonable private use of land so that a "taking" of private property does not occur.

TABLE 8
REGULATORY GOALS AND TECHNIQUES

Goal	Regulatory Technique
1. Prevent land uses which will increase flood heights or velocities, resulting in flood damage.	<ol style="list-style-type: none"> 1. State and local regulations requiring permits for dams, levees, channel straightening, structures, or fill in floodway areas. 2. Zoning, subdivision and encroachment regulations preventing obstruction of floodways 3. Zoning ordinances controlling the types and densities of uses in flood storage areas 4. Subdivision or drainage regulations controlling drainage design 5. Soil conservation regulations requiring land treatment (soil and water conservation practices)
2. Prevent land uses which will cause other nuisances.	<ol style="list-style-type: none"> 1. Zoning, building codes, and other regulations controlling hazardous uses of the floodplain such as chemical treatment plants, oil and gas storage facilities, and nuclear power plants which may cause fires or other hazards during floods 2. Zoning and other regulations restricting storage of materials, placement of mobile homes, construction of wooden residences or other uses involving material that may be carried by flood waters onto other lands thereby increasing the force of flood waters and causing debris problems 3. Zoning and other ordinances regulating uses with water pollution potential such as sewage treatment plants, chemical plants, and solid-waste disposal sites

TABLE 8 (continued)

Goal	Regulatory Technique
3. Prevent victimization and fraud	<ol style="list-style-type: none"> 1. State and federal interstate land sale acts requiring that an accurate descriptive statement of the land be filed with appropriate regulatory agencies and prospective buyers 2. Zoning, building codes, state permits and subdivision review acts requiring that lands be physically suitable for intended uses
4. Reduce the costs of community services	<ol style="list-style-type: none"> 1. State and local capital improvement plans that restrict sewers, water lines, roads or other public facilities in flood hazard areas or require floodproofing of them 2. Zoning regulations requiring that utility connections to private structures be elevated to the flood level or protected in some other manner 3. Subdivision regulations requiring that developers install floodproofed facilities in new subdivisions
5. Promote most suitable use of land throughout a community, region or state	<ol style="list-style-type: none"> 1. Community-wide planning and zoning regulations based on land suitability guiding development away from sensitive areas 2. State or local regulations protecting prime agricultural lands, mineral resources and coastal areas 3. State statutes and local ordinances requiring environmental impact statements for development or subdivisions

During the last decade, most lawsuits contesting floodplain regulations did not challenge the general validity of restrictions (adequacy of basic power and compliance with statutory procedures), but rather contested the constitutionality of regulations as applied to a particular property in the context of these four basic tests. This "pinpoint" approach to the determination of constitutionality derives in part from two U.S. Supreme Court decisions issued in the 1920s. In *Village of Euclid v. Ambler Realty Co.*² the Court upheld the basic concept of zoning--the division of a community into various districts and the application of different land use standards to each of the districts. Two years later, in *Nectow v. City of Cambridge*³ the Court again endorsed the general concept of zoning, but held that the regulations at issue were invalid as applied to particular lands. In this case, the Court faced a difficult dilemma. To have struck down the ordinance as a whole would have left the community without zoning and would have invalidated the regulations even where they made sense. Taking a compromise position, the Court held that zoning regulations could be valid in general but invalid as applied to particular property.

This approach has been followed by courts across the nation in floodplain and other cases. When arguing their claims, landowners may concede the general validity of a floodplain, wetland, or other regulation but argue that it is irrational, arbitrary, or capricious as applied to their land or that it "takes" their property without "just compensation". A court may find that the regulation is in fact unconstitutional as applied to particular property, but this will not stand as a determination of the constitutionality of the regulation as applied to other lands. A pinpoint approach favors general judicial acceptance of floodplain regulations; however, it has led to a fair amount of litigation.

General Judicial Responses

In 1969 and 1970 when Volumes 1 and 2 of Regulation of Flood Hazard Areas To Reduce Flood Losses were prepared, a considerable number of floodplain cases and more than 12,000 land use control cases had already been decided.⁴ From these it was possible to identify general trends in judicial decisions and to suggest how courts would likely treat floodplain issues that had not yet been resolved. Even so, many issues needed clarification and the issue of "taking" had not yet been widely litigated, particularly for open space flood fringe regulations. How well has the legal analysis of Volumes 1 and 2 fared? What clarifications have been provided or new directions developed in the past decade?

During the 1970s courts responded to the following general legal requirements for floodplain and resource protection regulations.

(1) The agency or local government adopting regulations must be authorized to do so by an enabling statute or home rule powers. Inadequately authorized regulations fail to meet due process requirements; they are considered ultra vires and invalid by the courts. Volumes 1 and 2 concluded that statutes authorizing local zoning, subdivision controls, building and other codes were sufficient to authorize floodplain zoning, subdivision control, or other regulations in virtually all states.⁵

In the 1970s no court invalidated regulations for lack of enabling authority. In fact, several cases commented upon the sufficiency of general enabling statutes, and several upheld the power of special districts to adopt regulations.* In addition, some courts held that local units had a duty to adopt floodplain regulations or consider flooding when required to do so by a particular statute: those courts directed compliance with the statutes.

* These and other cases will be cited in the more detailed discussion to follow.



Devastation at Klamath, California, after flooding in 1962; in Turner v. County of Del Norte, a California court upheld regulations prohibiting building of permanent structures in the area.

Photo source: U.S. Army Corps of Engineers

(2) Statutory procedures for adoption and amendment of regulations must be carefully followed, otherwise regulations violate due process requirements and are ultra vires. Volumes 1 and 2 concluded that prior comprehensive planning was not required for most floodplain regulations but that other procedural requirements must be followed.⁶

This general requirement was adhered to in the 1970s. One court held that an informally adopted floodplain "resolution" did not regulate because the local government had not followed procedures required for a formal ordinance. Several cases held the denial or approval of a special exception permit invalid because statutory procedures had not been followed. A Minnesota court, however, upheld adoption of an ordinance in an emergency without statutory notice and hearing because of the extraordinary conditions involved (flood waters were rising and the community needed to qualify for flood insurance).

(3) State land use regulations must not, in general, pertain to matters of exclusively local concern, otherwise state regulations may contravene local home rule statutes or constitutional provisions adopted in at least 35 states.⁷ Volumes 1 and 2 concluded that state or state-supervised floodplain regulations do not violate home rule powers because flooding is a multijurisdictional issue and of more than local concern.⁸

In the 1970s no court invalidated state regulations as violating local home rule powers. Courts in at least three cases specifically upheld regulations against claims that state regulations violated home rule provisions, concluding that flooding is a matter of greater than local concern. In addition, courts in at least six cases have upheld state coastal zone, wild and scenic river, and similar resource regulations against home rule arguments with no adverse decisions for such resource-based state regulations.

(4) Regulations must serve legitimate police power objectives.

Regulations that fail to do so violate due process requirements. Volumes 1 and 2 concluded that regulations designed to prevent landowners from increasing flood damages on other lands, threatening public safety, or causing victimization were clearly designed to serve valid objectives.⁹ The reduction of losses to the landowners themselves (which indirectly affect society) and the reduction of the need for flood control works at public expense were also considered valid objectives, although few cases had yet been decided on these points.¹⁰

Cases in the 1970s provided strong support for protection of public safety, and prevention of nuisances and victimization. Courts in some cases endorsed not only these traditional objectives but also regulations adopted to protect owners from flooding, protect flood storage, qualify a community for flood insurance, reduce flood losses, protect floodways until public purchase was possible, and reduce the cost of public services. No floodplain case invalidated regulations for failing to promote valid objectives; a number of cases specifically endorsed broad objectives.

Based on case law at that time, Volumes 1 and 2 gave guarded support to floodplain regulations adopted to serve wetland protection objectives.¹¹ This underestimated judicial response: cases in the 1970s gave overwhelming legal support for wetland and other environmental regulations. Floodplain regulations may now be adopted, with some confidence, to achieve not only hazard reduction but also wetland protection, dune protection, coastal zone management, and erosion control.

(5) Regulations must be reasonable; that is, the regulatory standards and procedures must have some tendency to accomplish the regulatory goals such as reduction in flood losses. If regulations are not reasonable, they violate due process requirements. Volumes 1 and 2

concluded that, in order to avoid due process problems, regulations must be based on sound flood data;¹² the degree of restriction must be reasonably related to the actual threat of flooding;¹³ and the restrictions must have some real tendency to reduce flood problems.¹⁴

Courts in the 1970s examined the factual base for regulations more carefully than in the preceding decade. Cases suggest that maps must be reasonably accurate but need not be at very large scale, particularly where procedures are available for refining data as individual permits are considered. Under most enabling authorities, regulatory agencies may consider the cumulative impacts of development in carrying out flood studies and determining floodway limits. Courts in five states specifically endorsed the determination of flood heights or floodway boundaries or the evaluation of development impacts that take into account cumulative impact of projected floodplain or watershed development. Regulations requiring protection to the 100-year flood level were specifically endorsed in several cases. However, courts in several other cases held the denial of a particular permit invalid in specific circumstances due to lack of sufficient evidence of flooding or erosion.

(6) Standards for agency action must not be vague or indefinite, otherwise regulations violate due process requirements. Volumes 1 and 2 concluded that broad hazard reduction standards were sufficient for issuance of special permits and variances by local zoning boards, planning boards, and state and federal agencies.¹⁵

In the 1970s courts sustained broad statutory and ordinance standards for issuance of special permits and variances when they were challenged. However, as noted above, some courts have found an insufficient factual basis (of erosion or flooding, for example) to deny or justify issuance of permits.

(7) Regulations must not discriminate between similarly situated landowners, otherwise regulations violate 14th Amendment due process requirements. Volumes 1 and 2 suggested that floodway regulations might need to provide equal conveyance of floodwaters along both sides of a stream to avoid due process problems and that similarly situated landowners may be required to elevate to similar elevations.¹⁶ However, Volumes 1 and 2 concluded that new uses could validly be treated differently from existing uses.¹⁷

In only a few floodplain cases were discrimination questions specifically considered. None invalidated regulations on this ground, although some suggested that regulations would be held invalid if found to be discriminatory. Courts strongly endorsed equal degree of encroachment and cumulative impact standards in floodway restrictions and quite often focused on equity considerations in deciding whether regulations were a taking of private property.

(8) Regulations must not "take" private property without payment of just compensation, otherwise regulations violate 14th Amendment and 5th Amendment requirements of due process and prohibitions against taking. Volumes 1 and 2 concluded that floodway and coastal high hazard area restrictions, subdivision regulations to prevent victimization, and elevation requirements for outer flood fringe areas do not take property, even where such restrictions severely affect private landowners.¹⁸ However, based upon cases up to that time, Volumes 1 and 2 warned that very strict regulation of outer fringe areas and "wetland restrictions" might be held a taking.¹⁹

With few exceptions, in the 1970s courts upheld floodplain regulations against taking challenges. Restrictions upheld included highly restrictive regulations for outer areas as well as for floodway and coastal high hazard zones.

(9) Units of government may not, under most circumstances, increase flooding or flood damages to private lands. Volumes 1 and 2 concluded that units of government ordinarily are not responsible for flood damages resulting from natural causes nor are they required to adopt regulations, provide insurance, undertake flood control works, or provide utilities.²⁰ However, under certain circumstances, government bodies may be responsible for increased flood damage on private lands under theories such as taking, nuisance, and trespass when the governmental unit constructs, operates or maintains flood control works, roads, or other public structures or facilities.

Despite a growing trend during the 1970s to hold governments responsible for positive actions resulting in increased flood losses, governments were not held responsible for failing to provide flood insurance, disaster assistance, flood control works, or floodplain regulations. Several federal court decisions refused to hold the Federal Insurance Administration liable for failure to broadly advertise the National Flood Insurance Program (NFIP). The courts held that the program had been adequately advertised. A relatively large number of decisions have addressed NFIP responsibility for payment of local insurance claims. Most of these involved interpretation of the flood insurance statutes.

A court held that individual members of a city council were not responsible for adopting floodplain regulations. Similarly, courts denied liability for operation of dams when damage resulted from an extremely severe flood. However, some courts have found local governments liable for operation and maintenance of inadequate drainage facilities, including those constructed by a subdivider and dedicated to the city.

In conclusion, the cases within the last decade have been, with minor exceptions, consistent with the legal analyses and conclusions of Volumes 1 and 2. Some points have been clarified. Most important, judicial support for floodplain and other resource management programs has been even stronger than expected.

Cases From The 1970s

What sorts of floodplain regulations have been litigated in the 1970s? Have the standards of the National Flood Insurance Program (NFIP)--which have become minimum standards for more than 17,000 communities--been widely contested?

The NFIP standards that require protection of floodway areas (where floodway maps are available) so that development will not increase flood heights more than one foot, and those that require elevation of structures in coastal and riverine flood areas to the 100-year flood elevation have not been widely litigated. Apparently, landowners or their attorneys have considered the chances of successful litigation remote. Instead, many of the 55 cases brought in the last decade have addressed regulations more restrictive than those required by the NFIP. As noted earlier, all but six decisions sustained the regulations and even these endorsed the concept, disagreeing only with the denial of a particular permit. In light of this overwhelming support, future disapproval of minimum NFIP standards is unlikely.

Floodway Regulations

Many states and localities have adopted restrictions for floodway areas that equal or exceed NFIP standards, which permit a one-foot increase in the height of the 100-year flood. Floodways as well as floodplains are calculated according to existing watershed conditions. Floodway restrictions, including some more restrictive than those of the NFIP, have been contested in several cases.

In Krahl v. Nine Mile Creek Watershed District,²¹ the Minnesota Supreme Court sustained a watershed district's floodway regulations that were intended to preserve flood storage and conveyance. The regulations required that encroachments in the floodplain not exceed 20% of the total floodplain area.

In Young Plumbing and Heating Co. v. Iowa Natural Resources Council, the Iowa Supreme Court sustained state regulations which required removal of a structure in a 200-foot-wide floodway where an individual structure and fill would have increased flood heights about .3 foot with a 1.7-foot calculated increase, assuming equal degrees of encroachment.

In Subaru of New England, Inc. v. Board of Appeals,²³ the Massachusetts Appeals Court sustained floodplain and floodway regulations designed to protect flood storage in the town of Canton where there was evidence that, although the particular development would have increased flood heights only 1/4 inch, potential cumulative impact might have been significant.

In Foreman v. State Department of Natural Resources,²⁴ the Indiana Court of Appeals sustained restrictive floodway regulations. Calculated flood heights took into account future watershed conditions.

In Maple Leaf Investors, Inc. v. State Department of Ecology,²⁵ the Washington Supreme Court upheld denial of a state permit for proposed houses in the floodway of the Cedar River pursuant to state regulations that prohibited habitable structures in floodway areas.

In Usdin v. State Department of Environmental Protection,²⁶ a New Jersey Superior Court upheld state restrictions prohibiting construction within a floodway area.

Control of Both Floodway and Fringe Areas

Courts upheld floodplain regulations exceeding NFIP standards by prohibiting or virtually prohibiting development in entire floodplains in several instances.



The Iowa Supreme Court in Young Plumbing and Heating Co. sustained the Iowa Natural Resources Council's refusal to issue a permit and ordered removal of this condominium, which was built without permit in a floodway. The condominium was subsequently torn down.

Photo source: Iowa Natural Resources Council