Liability as a Dilemma for Local Managers

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Local governments may be sued if they tightly regulate uses in flood, erosion, avalanche, or natural hazard areas, or undertake other mitigation measures. They may also be sued if they issue permits for hazard-causing uses, increase natural or technological hazards, or fail to design or maintain adequately mitigation measures such as flood control works.

How should local governments react to this dual and often serious threat of litigation? Given the current trends in the courts, are immediate constitutional challenges and claims for damages or long-term "liability" suits a greater potential problem? How can the chances of high jury awards, which can bring a local government to the verge of bankruptcy, be avoided?

The following discussion focuses on this "action, no action" dilemma not only because it is an increasingly important issue for local governments, but because the dilemma illustrates a broad range of legal issues in hazards management.[1] The discussion of legal issues and trends in the courts begins with an overview of hazards litigation. Constitutional challenges to government issuance or denial of permits, planning, zoning, mitigation measures are then considered. Liability suits and trends in litigation are next examined. Finally, strategies for reducing potential liability are suggested.

Forms of Litigation

Hazard forms of litigation take two general forms: constitutional challenges to disaster mitigation regulations and other measures; and, "liability" suits by those suffering hazard losses. Liability suits are brought under common law, statutory, or constitutional theories of strict liability, negligence, nuisance, contract, or inverse condemnation. The individual suffering the hazard loss usually claims that the municipality caused the hazard or increased its seriousness, or that the municipality should have provided warning with regard to the hazard or undertaken remedial action. The two types of suits overlap since some constitutional suits involve claims for damages or for payment of "just compensation" for "taking"[2] private property.

Constitutional Challenges

Constitutional challenges receive widespread publicity because they pit government police power against private property interests. A landowner challenging the constitutionality of a plan, regulation, denial of a permit, or other government action designed to mitigate a natural or technological hazard may make several types of constitutional arguments: that the government action violated due process guarantees of the U.S. or state constitutions in that such action failed to conform with statutory procedures, that it was discriminatory, that it failed to serve valid objectives, that it was unreasonable, or that it confiscated or "takes" private property without payment of just compensation. Sometimes the landowner concedes the general power of the municipality to regulate development, but argues that the regulations in question have gone too far in restricting private property.

Although constitutional challenges attract widespread publicity, private property owners rarely win. Judicial support for hazard mitigation measures has been overwhelming. Most of the court decisions involving natural hazards have involved flooding. In the 100 appellate court decisions challenging floodplain regulations over the last two decades, courts have found the regulations valid in 90 and invalid as applied to particular lands in only 10, most of which were prior to 1970.[3] In all 100 decisions, the courts strongly endorsed the general concept of hazard control regulations by local government. The 10 successful challenges involved gross legal problems: failure to follow statutory procedures for adoption of regulations, blatant lack of hazard maps of data, and, in a few instances, overly restrictive regulations. Even where the regulations were found invalid, there was an award of damages or compensation in only two cases. Court decisions for other types of hazards have been similarly favorable although there are fewer decisions.[4]

No appellate court has apparently ever held a "performance standard" regulation for a flood hazard, earthquake, erosion, or other natural hazard area invalid nor has it ever invalidated a regulation where there was any real evidence that a proposed use would have threatened health and safety or increased hazards on other lands. Performance standards permit projects in hazard areas if they are designed to withstand hazards

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and the damages will not be increased on other lands.

Open space regulations have been upheld in a variety of contexts, even where there was no "practical use" for the lands. In contrast, denial of all "practical," "economic," or "reasonable" use in nonhazard contexts has usually led to successful constitutional challenges based upon "taking" arguments. In upholding hazard mitigation regulations, courts have reasoned that no land owner has a right to threaten public safety or cause nuisances. For example, a California court[5] upheld a local open space zoning ordinance prohibiting sand and gravel operations in a flood hazard area where there was evidence that there was "no appreciable economic value for any other purpose" because the dust from such operations would have posed a health threat to a nearby area which was a haven for sufferers of respiratory ailments. The court concluded that it was not enough for the landowner to show that the land had no other economic use. In a similar vein, the U.S. Supreme Court and state courts have repeatedly and consistently upheld regulations controlling new uses and even, in some instances, regulations requiring the abatement of existing uses where there was an issue of public safety or the uses were nuisance-like in their surroundings.[6]

Courts give hazard regulations a strong presumption of constitutionality and the burden is on the landowner to prove unconstitutionality. In a "taking" context this requires proof that the regulations deny some economic or practical use of the land. Hazards may render uses uneconomic. For example, a New Jersey court upheld the beach setback line for the town of Beach Haven which prohibited reconstruction in a coastal area where houses were destroyed by the Ash Wednesday storm of March 1962 despite a showing that no economic use could be made of the setback area.[7] Noting that there was "great peril to life and health arising through the likely destruction of streets, sewer, water and gas mains, and electric power lines in the . . . area in an ordinary storm," and that there was testimony that the "regulation prescribed only such conduct as good husbandry would dictate that plaintiffs should themselves impose on the use of their own lands" the court concluded that the landowners had not sustained the burden of proving that the ordinance resulted in the taking of any "beneficial economic use" of their land.

The "taking" and other constitutional issues become a serious legal restraint upon hazards management only where government action is not sufficiently related to "public health, safety or welfare,"[8] or where government acts unreasonably or discriminatorily, or attempts to promote a public policy at private expense (e.g., using zoning to lower future land acquisition costs).[9]

Constitutional challenges to hazard mitigation measures have rarely succeeded except in circumstances where private property was actually appropriated for public use. For example, the New Jersey court, in another case held that construction by the U.S. Army Corps of Engineers of a dune on private property to provide storm protection for back-lying lands was a "taking" of the private beach front.[10]

To withstand constitutional challenges, it is clear that regulations need not address all hazards at once or all instances of a particular hazard. Hazard area maps need not be totally accurate.[11] The local government must apply an adequate hazard analysis methodology but need not utilize "state of the art" technology, particularly when it is very expensive. But there must be some reasonable basis for distinguishing between similarly situated individuals;[12] and, mitigation actions must be reasonably grounded in fact.

Courts generally defer to local legislative bodies or expert agencies to decide acceptable levels of risk. They rarely substitute their opinions on factual matters for those of the legislature or regulatory agency. For example, the U.S. Supreme Court[13] sustained a New York "Multiple Dwelling Law" which required that lodging houses of nonfireproof construction in existence prior to the enactment of the statute be modified to comply with the new safety requirements. The Supreme Court held that the wisdom of the legislation was a question for the legislature, not the Court, and rejected the due process argument stating that "the legislature may choose not to take the chance that human life will be lost in lodging house fires and adopt the most conservative course which science and engineering offer. . . ." Similarly, a Massachusetts court[14] sustained denial of a permit pursuant to floodplain regulations for the town of Canton despite testimony that a proposed use would have raised flood heights only 1/4 inch because it is the "board's [board of adjustments] evaluation of the seriousness of the problem, not the judge's which is controlling."

Trends in the courts do mean that local governments (acting reasonably) can be increasingly confident of winning constitutional challenges

Liability

Hazard-related "liability" suits are a far more serious long-term threat. Municipalities will increasingly face the threat of successful litigation if someone suffers damage from a natural or technological hazard. A property owner or lessee (private or public) suffering a hazard loss can recover in court if he or she can show that (1) another individual (or unit of government) owned a duty to the property owner or lessee to avoid, prevent, or mitigate such loss, (2) that this individual failed to carry out such a duty, and (3) that the owner or lessee suffered damage as a result of such failure. Individuals or municipalities charged with failure to carry out a duty may defend themselves by claiming (1) no duty existed, (2) there was no failure to carry out an acknowledged duty, (3) the property owner or lessee was not damaged as claimed by the failure to carry out the duty, or (4) other defenses exist such as sovereign immunity, contributory negligence, or statute of limitations.

Courts are tending to hold local governments responsible for a broad range of negligent (and, in some instances non-negligent) actions which result in hazard losses such as:

- The construction of roads, levees, seawalls, government buildings, storm sewers, in a manner which increases private hazard losses;[15]
- The negligent maintenance of storm drains, dams, levees, resulting in hazard losses;[16]
- The issuance of building permits in violation of local regulations[17] or approval of subdivision plats[18] which result in increased flood, erosion, or other damage to third parties due to increased hazards;
- The negligent evaluation of permits[19] or dissemination of permit information such as incorrect interpretation of flood elevations; and
- The negligent inspection of buildings.[20]

The increase in suits against both public and private parties in the last decade has been due to several factors.

- Courts have recognized broadened concepts of duty and responsibility[21] on the part of local governments, landowners, sellers, design professionals and contractors to avoid activities which may increase damage on adjacent lands, mislead innocent purchasers, or otherwise result in hazard losses.
- The doctrine of *caveat emptor*[22] (let the buyer beware) has been abrogated or substantially modified in most jurisdictions, resulting in many suits between buyers and sellers of hazard-prone lands and, in some instances, between buyers and local governments that have permitted hazard-prone development
- The "act of God"[23] defense to natural hazards losses has been severely diminished in most jurisdictions due to hazard maps and improved prediction systems and the unwillingness of courts to allow units of governments, landowners, and sellers to escape liability when hazards should or could have been known.
- Improved data bases and hazard modelling capability have facilitated proof of causation and damages (e.g., impact of a fill in a stream and flooding of adjacent lands).[24]
- The "sovereign immunity" defense of states, local governments, and the federal government has been substantially modified through case law and statutes (such as state tort claims acts) making it possible for damaged individuals to sue local governments for a wide range of actions.[25]

The law of local government liability for hazards is complicated and rapidly evolving and yet the trend across the nation is unmistakable. Local governments are liable for damages resulting from natural or technological hazards where the local government had or should have had knowledge of the potential hazards and participated in some way (even if quite passively) in an action which resulted in hazard losses.

Local governments are not, of course, responsible for all private hazard losses. Traditionally local governments have not been held liable for "no action" with regard to hazards including failing to remedy natural hazards.[26] However, this exemption from liability is no longer so clear. For example, the California Supreme Court[27] recently held that a landowner may need to take precautionary measures to reduce off-site damage from naturally-occurring flooding and mudslide hazards if such measures are not too difficult and the threatened harm is substantial. The Court held that a standard of "reasonableness" was to be applied in judging the need for affirmative action to remedy natural conditions.

Courts have also held that local governments are not liable for failing to adopt regulations[28] unless they are under some statutory duty to do so. This has led some municipal attorneys to advise local legislators to "do nothing" as a way of avoiding liability. This is increasingly poor advice since states are rapidly creating statutory duties for their local governments. More than 30 states have adopted floodplain regulation statutes, most of which mandate some measure of local regulation. California, Colorado, North Carolina (coastal areas) and several other states now require local governments to identify and regulate geologic hazard areas. Texas has mandated local governments to develop disaster preparedness plans.

As a practical matter it is often impossible for a city to truly "do nothing" with regard to hazard areas in order to avoid liability. Public roads, bridges, storm sewers, sanitary sewers, and public buildings often have already been constructed (or will be) in such areas. Virtually all cities and most counties and towns also have adopted zoning, subdivision controls, building codes or other special codes which apply broadly to community lands including hazard areas (although they may not have been identified as such). Seventeen thousand communities have adopted flood plain regulations in order to qualify for the National Flood Insurance Program. Once adopted, these ordinances create duties and are often considered by the courts to establish a standard of care for municipalities.[29]

Local governments may also be liable to the federal government for national flood insurance losses resulting from failing to enforce floodplain regulations. The Federal Emergency Management Agency is now suing Jefferson and Bernard Parishes in Louisiana for $130 million in insurance losses due to an alleged failure to enforce floodplain regulations required by the National Flood Insurance Program. A federal court has ruled that FEMA has standing to sue although the case as a whole has not been decided. FEMA has also initated suits in other communities.

In a typical liability suit, the standard applied by the court is usually one of "reasonable care," not strict liability. Reasonable care depends upon what a reasonable prudent individual would do in the circumstances. In other words, a municipality is not liable automatically if someone is damaged. The damaged individual must show that the municipality failed to act reasonably in

light of the foreseeability of the harm, its seriousness, the cost of action, and other factors. In general, the more serious the anticipated hazard, the greater the care required.

Municipal liability, in a given instance, depends also upon a broad range of factors including the precise language of the state "tort claim" act (if one exists), the general law of private liability in the state, the nature of the action (or inaction) taken by the municipality, and whether the action was taken by an employee in contrast with the governing board of the municipality.

At common law, and pursuant to most state tort claim acts, local governments are usually not liable for "planning," or "legislative" functions involving policy matters such as selection by a governing body of a bridge aperture to pass 50-year versus 100-year flood flows.[30] But the municipality may be liable for negligently performed "ministerial" or administrative functions such as negligent inspection of a dwelling.

Does a local government have a duty to warn private landowners of potential hazards on private lands? Traditionally, local units of government have had no duty to provide warnings of natural hazards unless the government unit created or exacerbated the hazard or a special relationship existed between the government unit and the damaged individual. For example, a federal court held that the U.S. Weather Service was not liable for inaccurate flood warnings along the Missouri River, based, in part, on a federal statute exempting federal agencies from liability for flood control measures.[31] However, state court decisions in California and Washington have held that governmental units could be liable for failure to warn if there is a statutory duty or negligence in warnings, once some attempt to warn is made.[32]

Although local governments are liable for a broad range of negligent actions of their employees, such employees are usually not personally liable for planning, permit issuance, or other actions. Personal liability is limited where the local government employee acts in good faith, within the scope of his or her powers, and without malice.[33] Successful lawsuits for hazard-related damages against individuals under common law theories or pursuant to Section 1983 of the Civil Rights Act for hazard-related activities are practically non-existent. Elected officials are also essentially immune from suit in their personal capability.[34]

In summary, hazard-related liability suits are an increasingly serious municipal problem and deserve attention in municipal planning and decision making.

Reducing Potential Liability

What strategies might a municipality follow to reduce potential liability? They can:

(1) Avoid municipal actions which may cause or worsen hazards such as operation of a landfill in an area of high ground water or construction of a dike in a floodway. The avoidance of such activities can be facilitated by an inventory of hazards and the mapping of natural hazard areas. Such information then can be reflected in the public facilities plan, the land use plan, and community regulations. If community activities are to occur in hazard areas, the community should comply with all applicable federal, state, and local regulations including their own, and they should design and maintain structures consistent with sound geologic, architectural, and engineering practices.

(2) Prevent private actions which will increase hazards or hazard losses. Land owners have no "right" to create or exacerbate hazards. The control of private actions can be accomplished through upgraded zoning subdivision control, building codes or other special codes, and careful evaluation of permit applications. Developers can be made to submit much of the information needed for analysis. Certifications of "safety" and compliance by registered architects, engineers, geologists can also be required. To the extent possible, responsibility for mitigating hazards on private lands should be placed squarely in the laps of those wishing to use such lands.

(3) Require disclaimers of public liability when private uses are permitted in a hazard area (e.g., a bluff erosion area). Such disclaimers can help reduce potential liability suits by successors in title to the permittee although disclaimers are no panacea, particularly where negligence is involved.

(4) Submit all policy-related decisions to the local governing body for debate and approval so they become "discretionary," "planning," or "legislative" rather than "ministerial" acts.

(5) Develop a hazard preparedness plan to deal with problems when (or if) they occur such as a hurricane evacuation plan. This may help support the reasonableness of community action.

(6) Carefully comply with state and federal statutory requirements and its own regulations in planning, regulation, acquisition, and other activities to avoid due process problems and possible subrogation suits (e.g., the National Flood Insurance Program).

(7) Ensure that all hazard mitigation measures including permit approvals and denials are based upon adequate data; also, provide equitable and even-handed administration and enforcement of hazard regulations to avoid due process and possible "taking" challenges.

(8) Encourage private landowners in hazard areas to carry insurance (e.g., flood insurance, earthquake insurance). A landowner compensated by insurance after a loss, is less likely to sue the municipality.

(9) Upgrade hazard mitigation plans and measures as data, mitigation technologies, and mitigation strategies improve.[35]

Summary

Local governments should "bite the bullet" with regard to regulation of hazardous lands and activities. They are more likely to win suits challenging regulations or other mitigation measures than later lawsuits by those who may be damaged by uncontrolled development. An "ounce of prevention" philosophy is legally sound.

Notes

1. This paper extracts material from a broader report *Natural Hazards and the Courts A Summary* prepared by the author for the State and Local Programs Directorate of the Federal Emergency Management Agency
2. The Fifth Amendment to the U S Constitution provides that "no person shall be . . deprived of life, liberty, or property without due process of law . . ." The Fourteenth Amendment repeats the same language as a limitation upon state power
3. See J Kusler, *Regulation of Flood Hazard Areas to Reduce Flood Losses,* Vol. 3 (Washington, D.C.: U.S. Government Printing Office, 1982)
4. See J Kusler, *Natural Hazards and the Courts: A Summary,* note 1, *supra.*
5. Consolidated Rock Products Co v. Los Angeles, 370 P.2d 342 (Calif , 1962), appeal dismissed 371 U S. 36.
6. See, e g., Northwestern Laundry v. Des Moines, 239 U S. 486 (1916); Hadacheck v Sebastian, 239 U S 486 (1916); Reinman v. Little Rock, 237 U S 171 (1915)
7. Spiegle v Beach Haven, 218 A 2d 129 (N.J., 1966)
8. See, e.g., Sturdy Homes v. Tp. of Redford, 186 N W 2d 43 (Mich., 1971)
9. See, e.g , Burrows v City of Keene, 432 A.2d 15 (N H , 1981).
10. Lorio v. Sea Isle City, 212 A 2d 802 (N.J., 1965).
11. See, e g , Turnpike Realty Co v Dedham, 284 N E 2d 891 (Mass., 1972), *cert. denied,* 409 U.S. 1108 (1973).
12. Welch v Mitchell, 121 S E 165 (W Va., 1924).
13. Queenside Hill Realty Co v. Saxl, 328 U S 80 (1937)
14. Subaru of New England, Inc v. Board of Appeals, 395 N E 2d 880 (Mass , 1979)
15. See cases cited in Annot , "Municipalities' Liability from Negligence or Other Wrongful Act in Carrying Out Construction or Repair of Sewers and Drains," 61 ALR 2d 874 (1958).
16. *Ibid.*
17. See, e.g., Stewart v. Schneider, 376 So.2d 1046 (La , 1979). See also Annot . "Liability of Government Entity for Issuance of Permit for Construction Which Caused or Accelerated Flooding," 62 ALR 3d 514 (1975).
18. *Ibid.* See, e.g., Myotte v. Village of Mayfield, 375 N E 816 (Oh , 1977)
19. See note 26, I&B Development Co., Inc. v. King County, 631 P.2d 1002 (Wash., 1981).
20. See notes 26, 28. Weese v. Village of Modina, New York, 443 N Y.S. 2d 529 (N.Y . 1981)
21. See, e.g , Lummis v. Lilly, 365 Mass. 41 (1982); Enghauser Manufacturing Company v. Erikson Engineering, Ltd., 451 N E 2d 228 (Oh., 1983). See also cases cited in note 30
22. See, e.g., cases cited in note 31 See also Hartley v Ballou, 201 S.E.2d 712 (N.C , 1979); McDonald v. Mianeck, 398 A.2d 1283 (N.J., 1979); Sims v. Lewis, 374 So.2d 298 (Ala , 1979); Brown v Sandwood Develop. Corp., 291 S E 2d 375 (S.C., 1982)
23. See, e.g., Barr v. Game Fish and Parks Commission Colorado, 497 P.2d 340 (Col., 1972); Mark Downs, Inc. v McCormick Properties, Inc , 441 A 2d 1119 (Md., 1982)
24. See, e g., Young Plumbing and Heating Co. v. Iowa Natural Resources Council, 276 N.W.2d 377 (Iowa, 1979).
25. See, e.g., County of Clark v. Powers, 611 P.2d 1072 (Nev., 1980); Enghauser Manufacturing Company v Erikson Engineering, Ltd , 451 N E 2d 228 (Oh., 1983)
26. See, e.g., Blink v. McNabb, 287 N.W.2d 596 (Iowa, 1980), Wells v. Chicago and Northwestern Transp. Co . 283 N.W.2d 471 (Wis., 1979)
27. Sprecker v Adamson Companies, 636 P 2d 1121 (Cal., 1981).
28. See, e.g., Bell v. City of Medlothian, 414 N.E 2d 104 (Ill , 1980)
29. See, e.g., French v. City of Springfield, 357 N.E.2d 438 (Ill., 1976); Harvey v Board of Comm'rs of Wabash County, 416 N E.2d 1296 (Ind. App., 1981).
30. See, e.g., Valley Cattle Company v. U.S , 258 F Supp. 12 (D.C., 1966)
31. National Manufacturing Co. v U S , 210 F 2d 263 (C.A., 1954)
32. Connolly v State, 84 Cal Rptr. 257 (Cal , 1970); Brown v. MacPherson's Inc , 545 P.2d 13 (Wash., 1975).
33. See note 34, York v City of Cedartown, 648 F.2d 231 (C.A , 1981), Stearns v. Smith, 551 F Supp. 32 (D C , 1982).
34. See, e.g . Zisk v. City of Roseville, 127 Cal. Rptr. 896 (Cal , 1976).
35. See, e g , A.H. Smith Sand and Gravel Co. v. Dept. of Water Resources, 313 A.2d 820 (Md , 1974)