

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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