

Legal Aspects

**NO ADVERSE IMPACT:
A Common Sense Approach to
Flood Risk Management**

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, ASFPM Foundation, New York State Floodplain and Stormwater Managers Association, or National Committee on Levee Safety.

Briefing Overview

Background

The Public Trust Doctrine

5th Amendment Takings

From *Paterno* to *Katrina* to Sandy

NAI & Legal Liabilities

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Policies Contribute to Risk

Federal Policies

- NFIP & the 100-Year Standard
- Emphasis on structural approaches
- Disaster relief environment

States & Communities

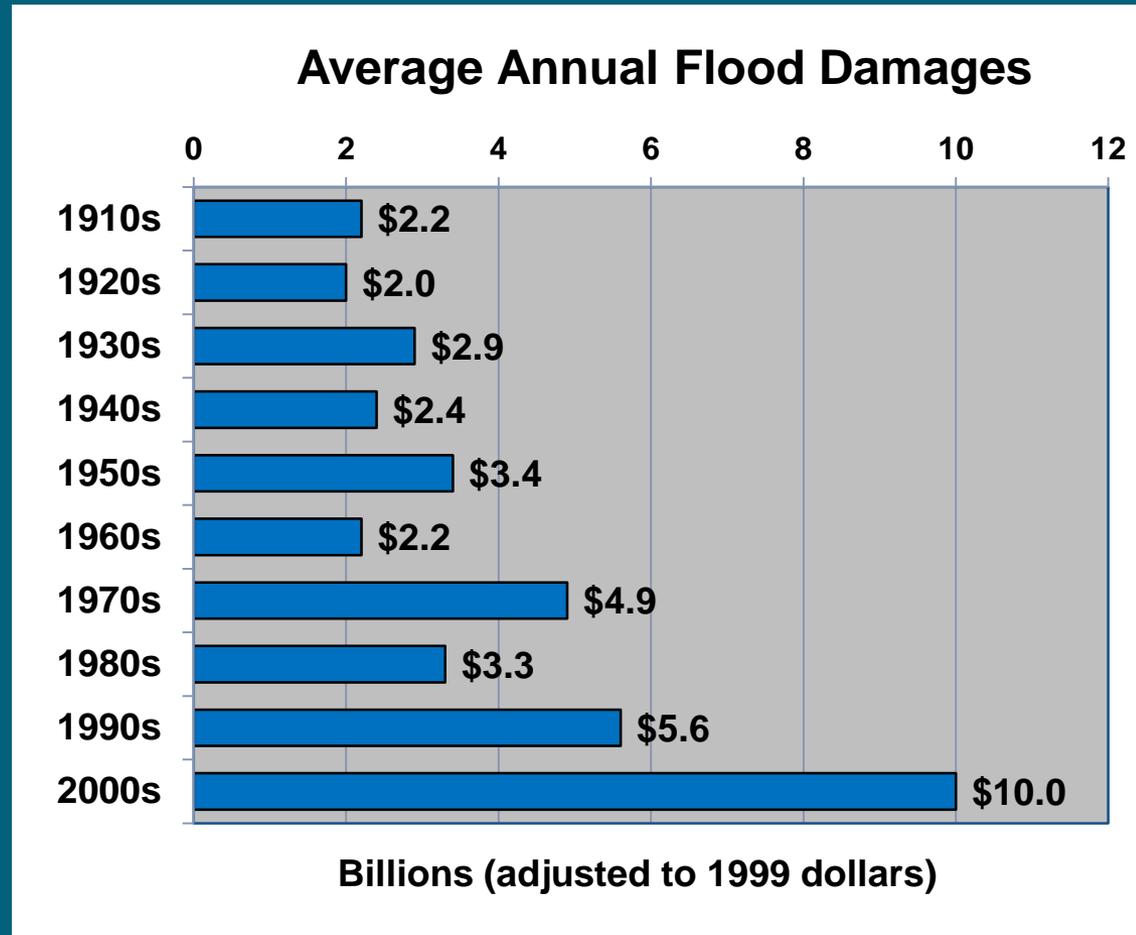
- Control land use for short-term benefits
- Perceive flooding to be a federal problem
- Externalize the costs & consequences

Public

- Unaware of – or unwilling to accept - residual risk
- Misplaced concern about having to obtain flood insurance

Trends in Flood Damages

- 30-Year Average Annual Flood Loss = \$8.17 Billion
- Four-fold increase from early 1900s
- Per capita damages increased by more than a factor of 2.5 in the previous century in real dollar terms



Flood Losses 2000-2011

(in millions)

Katrina: 1/3 of losses insured
Sandy: < 1/10 of losses insured*

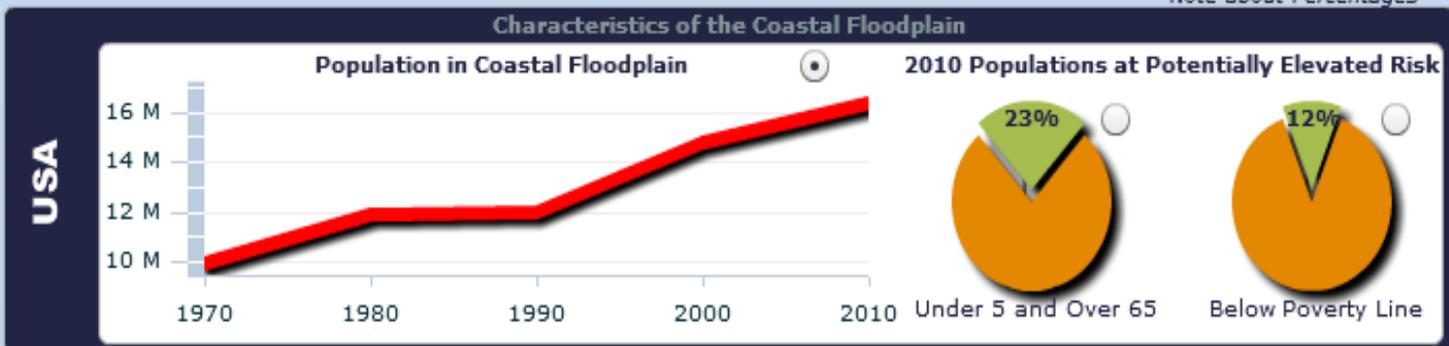
2012	\$496
2011	\$8,640
2010	\$5,329
2009	\$1,044
2008	\$6,405
2007	\$2,787
2006	\$4,497
2005	\$52,516
2004	\$18,277
2003	\$3,452
2002	\$1,725
2001	\$10,726
2000	\$2,003

Source: NOAA, NCDC; FEMA

Population in the Coastal Floodplain: 1970-2010



Note about Percentages



Damage Drivers

Federal Policy Increases Risk:

- Allows new development and redevelopment in hazardous areas**
- Ignores adverse impacts to adjacent and downstream properties**
- Undervalues natural protective coastal and floodplain functions**

- These impacts may result in successful common law or “takings” suits brought against a developer or a community despite community compliance with minimum federal standards.



- In general, if your community permits development that results in an adverse impact, your community may be liable, even if you meet the minimum federal standards.

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Public Trust Doctrine: Legal Origins

By the law of nature these things are common to all mankind, the air, running water, the sea and consequently the shores of the sea... The seashore extends as far as the greatest winter flood runs up.



- Institutes of Justinian
535 CE

Public Trust Doctrine: Legal Origins

US Constitution

Amendment X (1791):

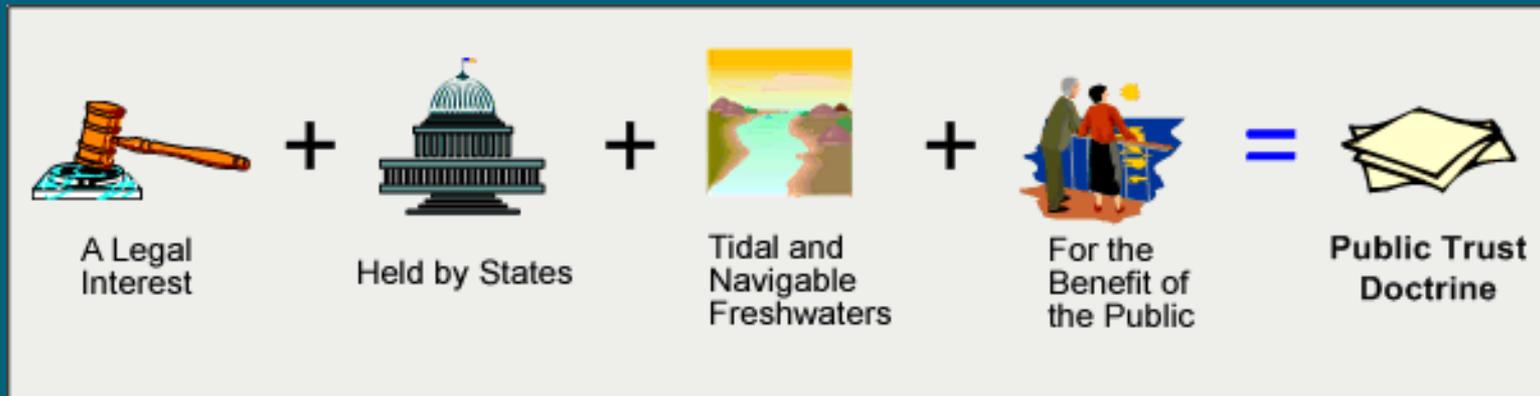
“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”



Public Trust Doctrine: Legal Origins

US Constitution

- States retain ownership of the lands beneath navigable waters
- Federal government retains supreme, but not exclusive, control over navigation

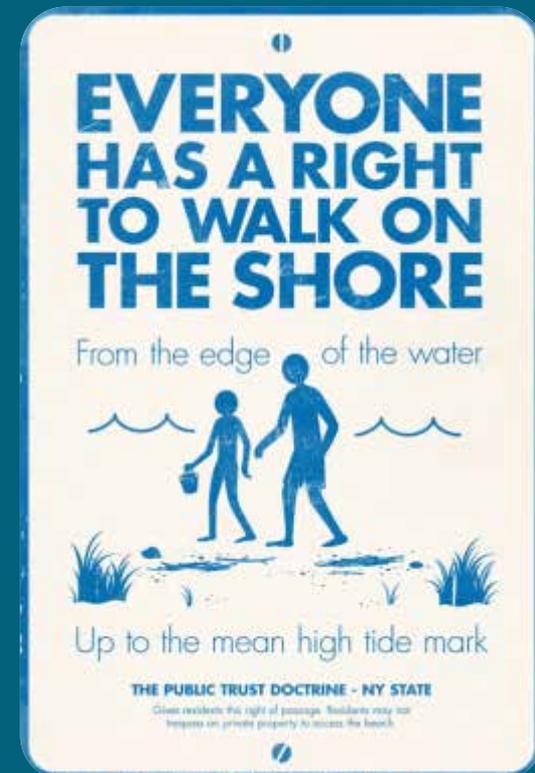


The Public Trust Doctrine

Source: NOAA <http://www.csc.noaa.gov/ptd/>

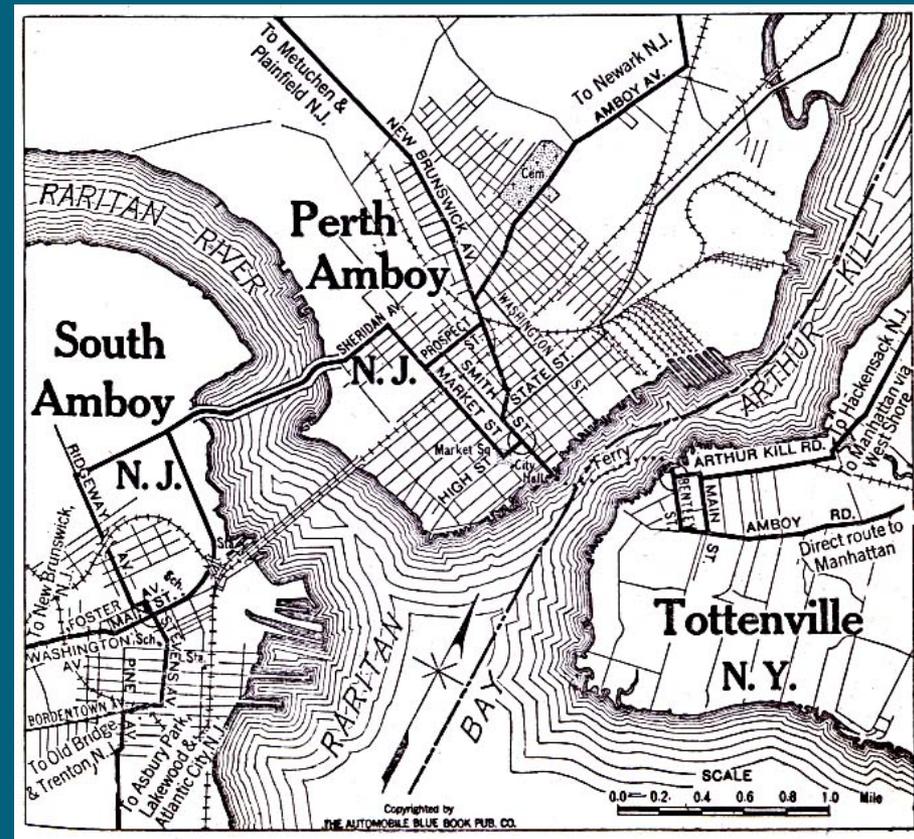
Public Trust Doctrine

- Colonies followed English common law
- Recognized public rights in navigable waters & their shores
- Modern Era => Public Uses
 - Ø Access for commerce & transportation
 - Ø Environmental protection
 - Ø Recreation



Arnold v. Mundy (1821)

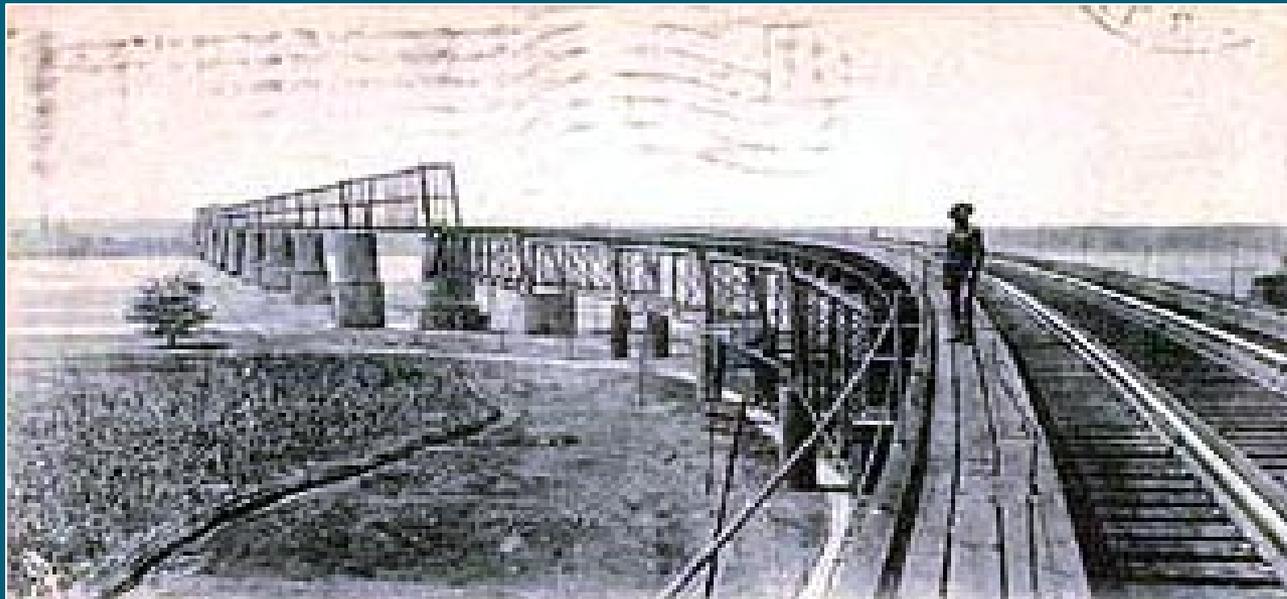
- New Jersey Supreme Court
- “Navigable rivers, where the tide ebbs and flows, the ports, bays, coasts of the sea...are common to all the people of New Jersey.”
- First major articulation of the public trust doctrine in the United States



Illinois Central RR v. Illinois (1892)

U.S. Supreme Court held that the State had abdicated its responsibility to preserve the waters for public use.

“The common-law doctrine as to the dominion, sovereignty, and ownership of lands under tide waters on the borders of the sea applies equally to the lands beneath the navigable waters of the Great Lakes.”



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5th Amendment to US Constitution

No person shall be ... deprived of life, liberty or property, without due process of law;
Nor shall private property be taken for public use without just compensation.



Key Takings Cases

Penn Central v. The City of New York (1978)

Restrictions on proposed development of Grand Central Station did NOT amount to a taking, since Penn Central could use transferrable development rights and secure a reasonable return on the property.



Key Takings Cases (cont.)

- *Loretto v. Teleprompter Manhattan CATV Corporation* (1982) - Any physical occupation is a taking, no matter how de minimus.
- *First English Evangelical Church of Glendale v. Co of Los Angeles* (1987) – Where the government’s activities have already effectuated a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.

Key Takings Cases (cont.)

Nollan v. California Coastal Commission (1987)

- The Nollans appealed from a decision of the California Court of Appeal, which ruled that the California Coastal Commission could condition its grant of permission to rebuild their house on the transfer to the public of an easement across their beachfront property.
- Court concluded that unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not valid regulation of land use but an out and out plan of extortion.
- Land use regulation does not constitute a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land.



Key Takings Cases (cont.)

Lucas v. South Carolina Coastal Council (1992)

When the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.



Key Takings Cases (cont.)

Dolan v. City of Tigard (1994)

In this case Dolan (Petitioner) challenges the decision of the Supreme Court of Oregon, which held that the City of Tigard could condition the approval of her building permit on the dedication of a portion of her property for flood control and traffic improvements.

The Court extended Nollan's essential nexus test to require "rough proportionality" between development impacts and conditions on development.



Key Takings Cases (cont.)

Palazzolo v. Rhode Island (2001)

Enactment of the wetlands act did not automatically amount to a valid regulation by virtue of Petitioner's succeeding to ownership after the regulation was passed. If the regulation accomplished a taking under the constitutional precedents, then the mere fact that Petitioner took exclusive ownership after the regulation could not bar a claim for compensation.

A State may not evade the duty to compensate on the premise that the landowner is left with a token interest. Here, however, the evidence showed that Petitioner was left with more than a token interest.



Key Takings Cases (cont.)

- 2002 – *Tahoe-Sierra Preservation Council v. Tahoe Regional Pln. Agency* – Sanctioned the use of moratoria & reaffirmed the “parcel-as-a-whole” rule for takings review. Moratoria on development not a per se taking under the 5th amendment, but should be analyzed under the multi-factor Penn Central test.
- 2005 – *Lingle v. Chevron* - case was brought by Chevron based on an Agins-type claim that one of Hawaii’s statutes did not “substantially advance legitimate state interests.” Justice Connor, however, ruled that even though Governor Lingle could not be upheld on that issue, it did NOT overturn the 1980 Agins case in the whole.
- 2005 – *Kelo et al. v. City of New London* – A taking by eminent domain will be upheld as long as it is “rationally related to a conceivable public purpose” and “just compensation” is paid to the owner. A valid public purpose can be found in a plan for economic rejuvenation of an overall condemned community, even though some individual properties within that community may not be blighted.



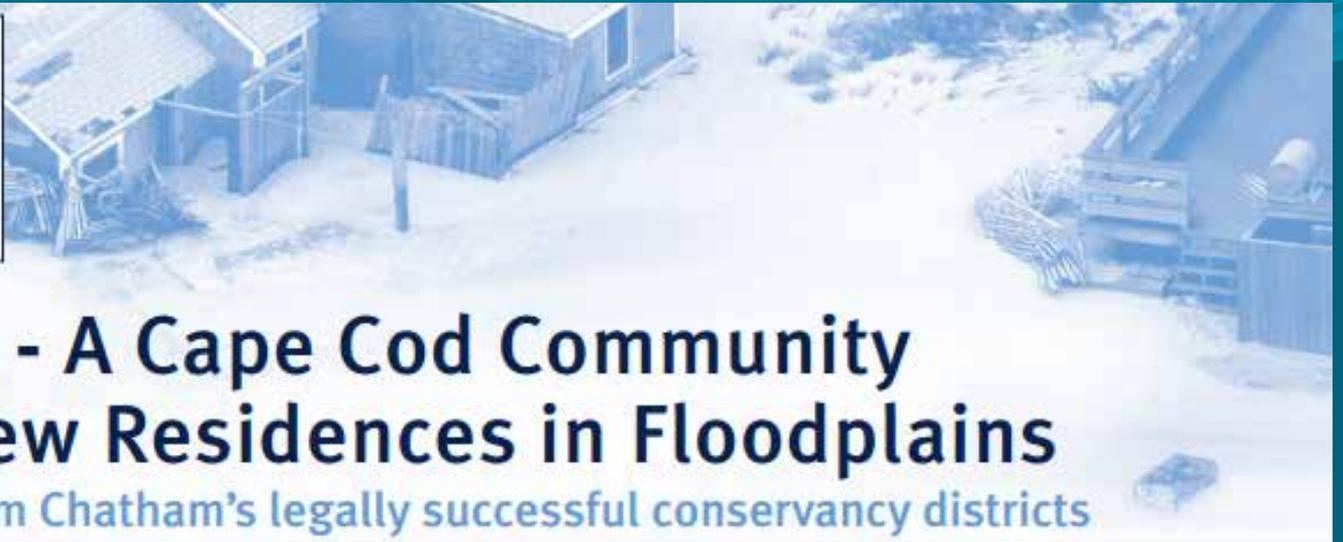
Case Study - A Cape Cod Community Prevents New Residences in Floodplains

Lessons learned from Chatham's legally successful conservancy districts

Gove v. Chatham (444 Mass. 754) (2005)

“It is undisputed that [the parcel at issue] falls within a floodplain, and that its potential flooding would adversely affect the surrounding areas if the property were developed. Reasonable government action mitigating such harm . . . typically does not require compensation.”

Testimony of first responders was significant.



Case Study - A Cape Cod Community Prevents New Residences in Floodplains

Lessons learned from Chatham's legally successful conservancy districts

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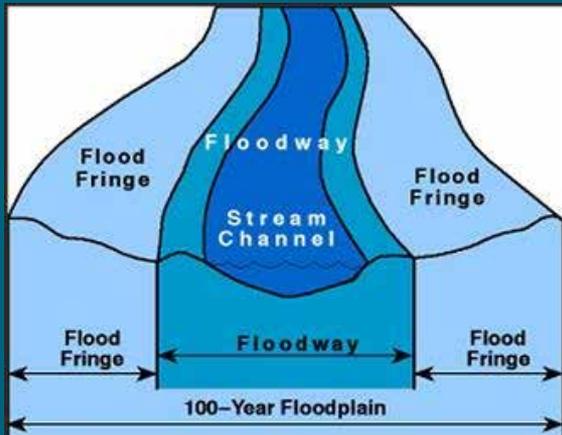
- Bylaw designed to protect people & property
- Bylaw fair & consistently applied
- Allows for alternative uses
- Testimony of risk to emergency workers
- Town willing to defend itself

Key Takings Cases (cont.)

Mansoldo v. New Jersey (187 N.J. 50) (2006)

When action by government denies *all* economically beneficial or productive use of land, the regulatory agency must provide just compensation to the affected property owner unless background principles of the State's law of property and nuisance would restrict the owner's intended use of the property.

Remanded to follow *Lucas*.



FRANCES MANSOLDO AND
RONALD G. MANSOLDO,

Plaintiffs-Appellants,

- versus -

STATE OF NEW JERSEY,

Defendant-Respondent.

SUPREME COURT OF NEW JERSEY

Docket No. 58,344

Civil Action

On Appeal from the Superior Court of
New Jersey, Appellate Division,
Docket No. A-3109-03T1,
Hon. H. Weissbard and
Hon. H. Hoens

**BRIEF OF AMICUS CURIAE ASSOCIATION OF STATE FLOODPLAIN
MANAGERS, INC. IN SUPPORT OF THE STATE OF NEW JERSEY**

Key Takings Cases (cont.)

Stop the Beach Renourishment, Inc. v. FL DEP (2010)

- Unanimous that artificial avulsions = NOT a taking
- Judicial Takings?
- Four Justices: Yep



Key Takings Cases (cont.)

Koontz v. St. John's River Water Mgmt. District (2013)

- The government's demand for property from a land-use permit applicant must satisfy the *Nollan/Dolan* requirements even when it denies the permit.
- Governments may choose whether and how a land use permit applicant is required to mitigation the impacts of a proposed development,...

BUT, may not leverage its legitimate interest in mitigation to pursue ends that lack an essential nexus and rough proportionality to those impacts. Does not matter whether the government approves a permit with conditions or denies a permit when applicant refuses to cede to those conditions.



Key Takings Cases (cont.)

Koontz v. St. John's River Water Mgmt. District (2013)

- The Nollan-Dolan standard of nexus and rough proportionality applies to conditions requiring off-site mitigation.
- The Nollan-Dolan standard of nexus and rough proportionality applies expenditures of funds, such as fees-in-lieu.

SCOTUS: Permissible to impose the full costs of development impacts on permit applicants.



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

Avoiding A Taking

1. Clearly Relate Regulation to Preventing Harm. *Gove v. Zoning Board of Appeals*, 444 Mass.754 (2005)
2. Avoid interfering with owner's right to exclude. (*Loretto*)
3. Avoid denial of all economic uses. (*Lucas*)
4. Consider Transferable Development Rights or similar residual rights and uses to retain economic value. (*Penn Central*)
5. Demonstrate relationship between permit condition and harm avoided. (*Koontz*)

Landowner Rights Limited

- **No Right to be a Nuisance**
- **No right to Violate the Property Rights of Others**
- **No Right to Trespass**
- **No Right to be Negligent**
- **No Right to Violate Laws of Reasonable Surface Water Use; or Riparian Laws**
- **No Right to Violate the Public Trust**

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Paterno v. State of California (1999)

74 Cal. App. 4th 68

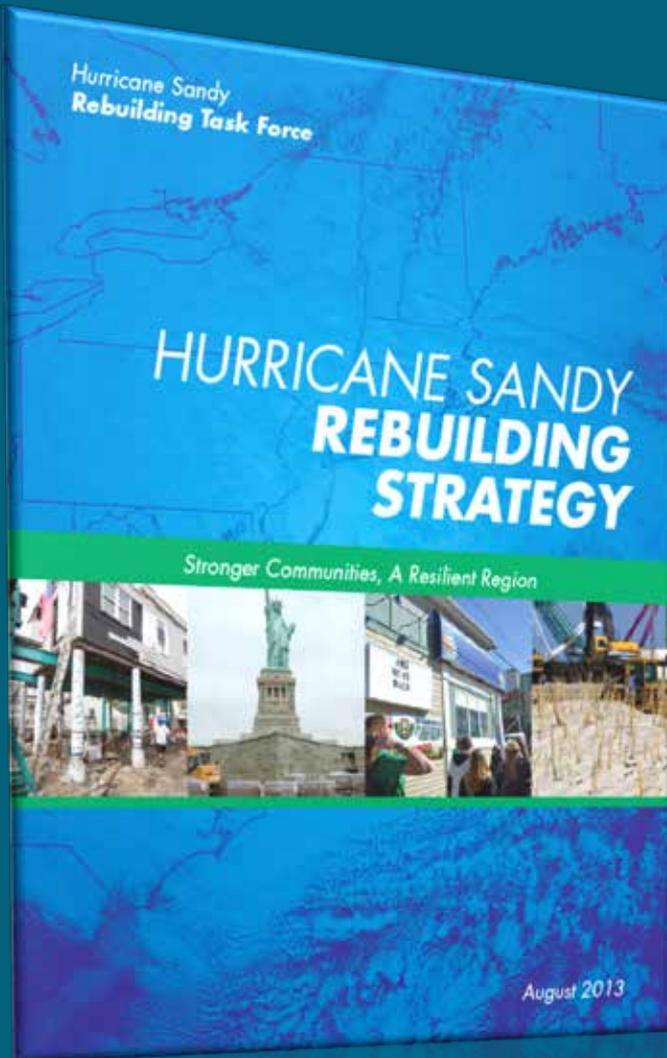
- As operator of levee which had been built almost a century previously with porous, uncompacted mining debris, State was liable, under inverse condemnation theory, for damages caused by unreasonable state plan which resulted in failure of levee.
 - Failure was foreseeable,
 - Levee system benefited all of California and saved billions of dollars, and
 - Landowner could not be required to bear cost of partial failure of that system caused by construction, operation, and deferred maintenance of unstable levee.

Katrina Consolidated Litigation

- The Mississippi River Gulf Outlet (MRGO)
- The Federal Flood Control Act & Sovereign Immunity
- Federal Tort Claims Act & the Discretionary Function Exception
- Environmental Impacts & Negligence
- Foreseeability & Liability



Federal Policy Responses to Flood Disasters



- **Supplemental Appropriations**
- **Water Resources Development Act**
- **Principles and Guidelines**
- **Executive Orders**
- **Federal Sandy Rebuilding Task Force**
 - **Sea Level Rise Planning Tool**
 - <http://www.globalchange.gov/what-we-do/assessment/coastal-resilience-resources>
 - **Uniform Flood Risk Reduction Standard:**
 - **Best-available-data for elevation plus 1' freeboard**
 - <http://portal.hud.gov/hudportal/HUD?src=/sandyrebuilding/FRRS>

Federal Policy Responses to Hurricane Sandy

Uniform Flood Risk Reduction Standard:

The specific steps that these types of structures will need to take include:

- Elevating – the standard would require structures to elevate their bottom floor one foot higher than the most recent flood risk guidance provided by FEMA; and/or
- Flood-proofing – in situations where elevation is not possible, the standard will require structures to prepare for flooding a foot higher than the most recent flood risk guidance provided by FEMA – for example, by relocating or sealing boilers or other utilities located below the standard elevation

<http://portal.hud.gov/hudportal/HUD?src=/sandyrebuilding/FRRS>

Federal Policy Responses to Hurricane Sandy

Uniform Flood Risk Reduction Standard:

Only those that have funding for construction agencies in the Sandy supplemental (Public Law 113-2) are involved. This includes:

- Department of Transportation (FHWA Emergency Relief Program; FTA Public Transportation Emergency Relief Program)
- Department of Housing and Urban Development (CDBG-DR)
- U.S. Army Corps of Engineers (Construction; Operations & Maintenance)
- Federal Emergency Management Agency (Disaster Relief Fund)
- Environmental Protection Agency (State and Tribal Assistance Programs)
- Department of Health and Human Services (Social Services Block Grants)

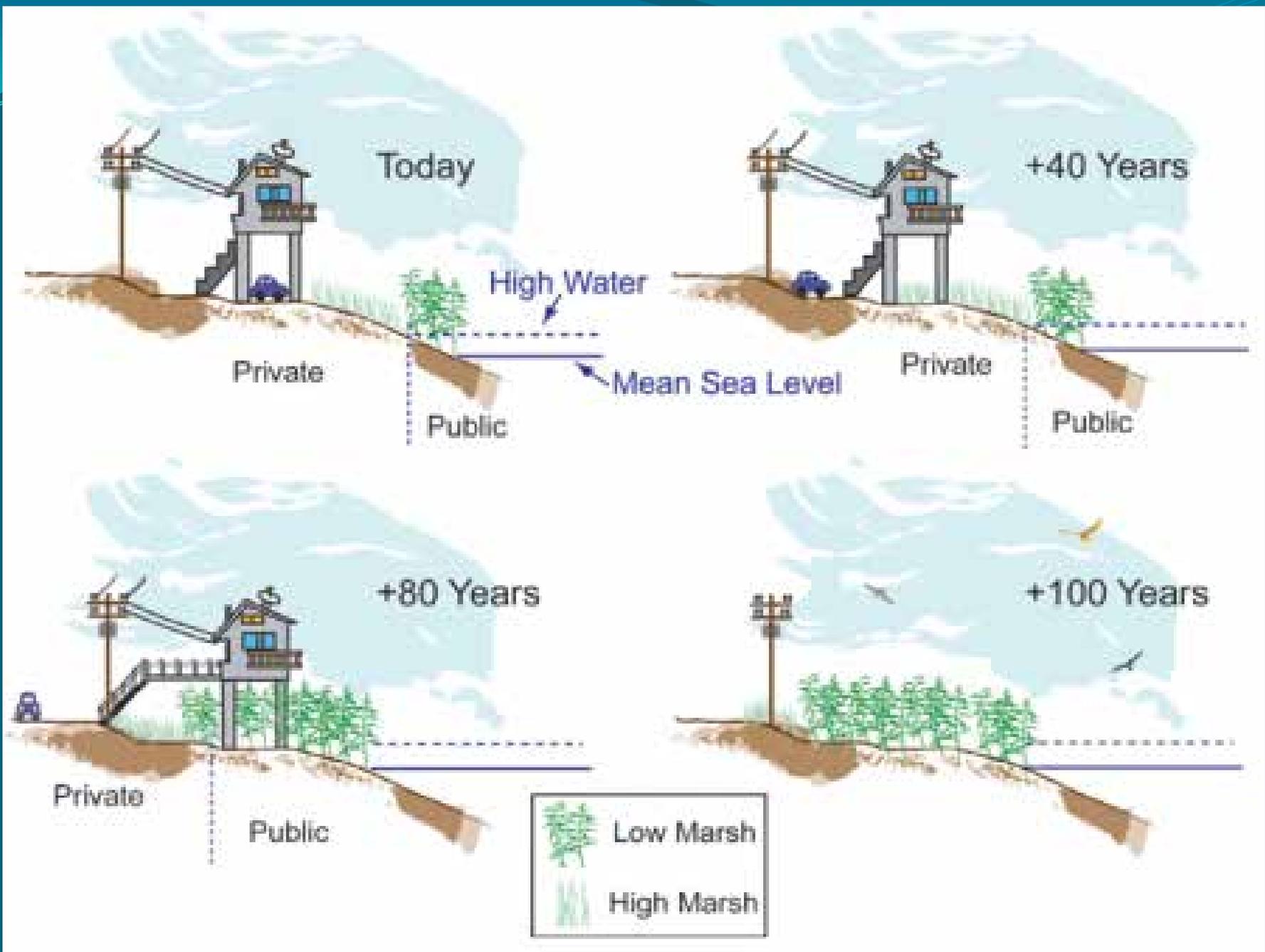
<http://portal.hud.gov/hudportal/HUD?src=/sandyrebuilding/FRRS>

Sidebar: Rolling Easements

Premise: Some low-lying coastal lands must give way to the rising sea.

Designing a rolling easement policy requires deciding:

- The specific rights that will be altered, and**
- The legal approach to alter those rights.**



Sidebar: Rolling Easements

Local Authority: Zoning is typically required to accomplish the purposes of a locality's comprehensive plan for land use. Therefore, two questions will typically be:

1. Does sea level rise fit within the authorized purposes for comprehensive planning?
2. Do the restrictions fit within the zoning authorization?

Sidebar: Rolling Easements

Constraints on State and Local Authority

1. The common law of property limits the ability of private parties to voluntarily transfer some property rights;
2. State laws have abolished or limited options that the common law allowed;
3. State law limits the power of local governments; and
4. The federal constitution prevents property from being taken for a public purpose without just compensation; some state constitutions do so as well.

Sidebar: Rolling Easements

If the land will otherwise be developed but later abandoned to the rising sea, a rolling easement can:

- Reduce unexpected losses and disruption;
- Avoid the hazards associated with shore protection that subsequently fails;
- Lower flood insurance rates if the National Flood Insurance Program community rating system gives the community credit for planning for sea level rise;
- Promote community awareness and dialogue about long-term sea level rise; and
- Reduce potential community liabilities associated with flood damage to private property.

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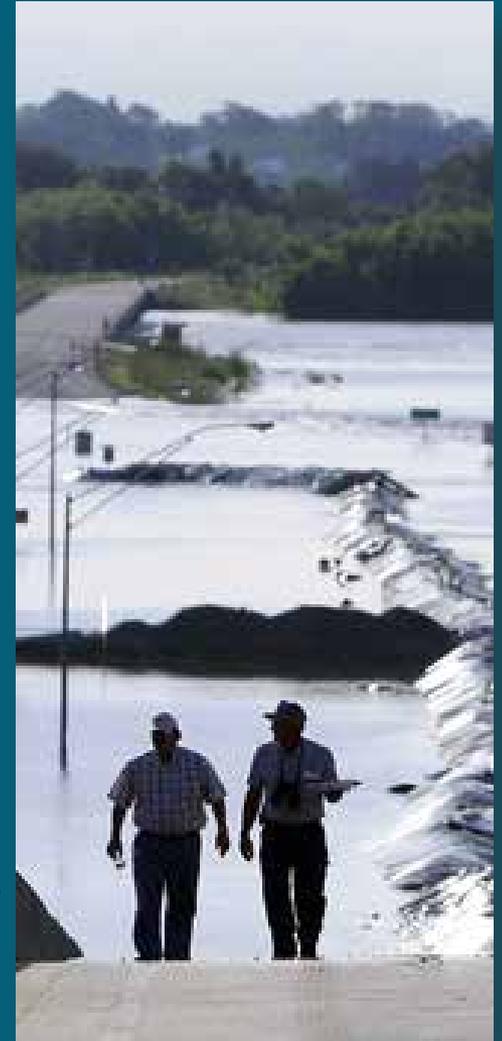


NAI Defined...

Activities that could adversely impact (increase flood risk or damage potential) another property or community will be allowed *only* to the extent that the impacts are mitigated or have been accounted for within an adopted community-based plan.

Potential Community Liabilities

- **Construction of a Road Blocks Drainage**
- **Stormwater System Increases Flows**
- **Structure Blocks Watercourse**
- **Bridge Built Without Adequate Opening**
- **Permitting development at risk**
- **Failure to maintain flood control structure**



Potential Community Liabilities

- **Grading Land Increases Runoff**
- **Flood Control Structure Causes Damage**
- **Filling Wetland Causes Damage**
- **Issuing Permits for Development that Causes Harm to a Third Party**



Local Planning & Regulations I

- Incorporate Flood Mitigation in Local Planning
- Raise Public Awareness
- Form Partnerships to Support Floodplain Management
- Limit or Restrict Development in Floodprone Areas
- Adopt and Enforce Building Codes and Development Standards
- Align Floodplain and Stormwater Planning and Management
- Adopt Policies to Reduce Stormwater Runoff



Local Planning & Regulations II

- Update Community Hazard Mitigation Plan
 - Robust Flood Risk Assessment
 - Plan for gradual restoration of floodplains
- Remove and Prohibit Critical Facilities from Floodprone Areas
- Join NFIP Community Rating System
- Establish Local Funding Mechanisms for Flood Mitigation
- Conduct Regular Maintenance of Drainage Systems and Flood Control Structures



Local Planning & Regulations III (Sea-Level Rise)

- Map and Assess Vulnerability
 - Adopt the “Substantive Knowledge Standard”
- Manage Development in High-Risk Areas
 - New Development
 - Redevelopment
 - Infrastructure
- Restore and Protect Natural Buffers
- Tie Land Use Planning and Regulations to Public Safety



NAI Benefits

- **Helps ensure the actions of any community or property owner do not adversely impact others/coastal resources**
- **Incorporates multi-objective-management and watershed planning principles**

NAI Benefits (cont.)

Benefits of NAI to your community:

- § Reduce your flood losses and costs over time**
- § Reduce likelihood of your actions increasing flood damage to others**
- § Reduce challenges and lawsuits**

NAI Benefits (cont.)

Benefits of NAI to your community:

- § Reduce flood insurance premiums through the Community Rating System**
- § Incorporate multiple objectives**
- § Protect natural resources and values of floodplains**

Summary

- You are more likely to be successfully sued for permitting risky development than for preventing it.
- You are your community's first and last line of defense against tomorrow's flood disaster.
- NAI Steps:
 - Adopt higher standards tied to public safety and tailored to your community.
 - Identify ALL the Impacts of a Proposed Development.
 - Notify Potentially Impacted Property Owners and Communities of the Impacts of Any Proposed Development.
 - Mitigate Impacts.

Today's Choices Avoid or Create Tomorrow's Disasters

If we continue to encourage at-risk development and ignore the impact to others, can we accept the consequences...

... and, are you willing to pay for it?

Thank you!

