New Floodplain Maps for a Coastal New Hampshire Watershed and Questions of Legal Authority, Measures and Consequences

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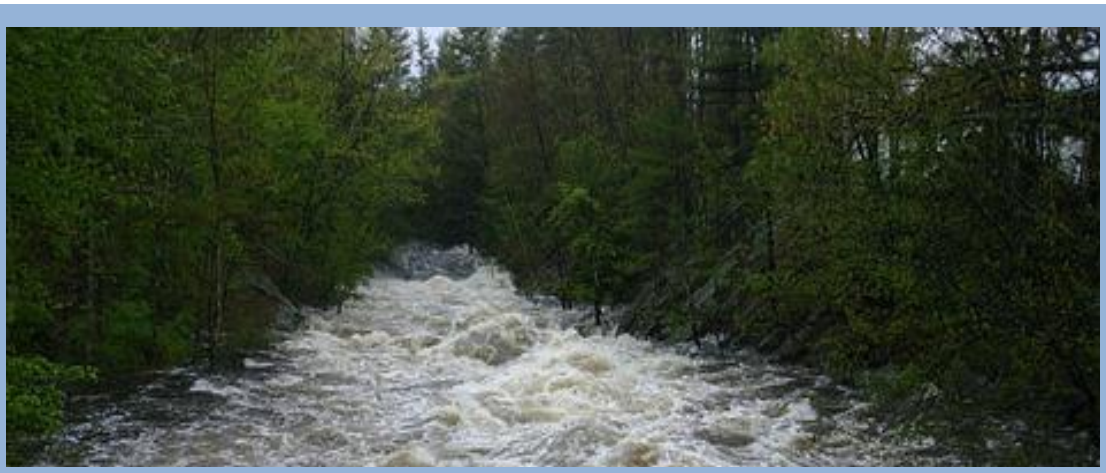

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1.1 Rationale and Societal Benefits

The effects of climate change are likely to include sea level rise, coastal erosion, shifting habitats, more intense storms, and increased flooding. In light of these anticipated effects, some coastal communities in New Hampshire have expressed a need for more up-to-date climate-related information and technical assistance to increase their preparedness to protect life, health, property, and infrastructure. At the same time, local officials have expressed some concern that policies they might adopt to protect health and property from climate effects might be considered unreasonable restrictions on development and increase their vulnerability to legal challenges.

Federal disaster declarations and costs related to flooding are on the rise in New Hampshire (NH Climate Action Plan, 2009). Up-to-date information regarding the extent of flood zones is needed to better reflect current conditions. In response to this need, a National Oceanic and Atmospheric Administration (NOAA) funded University of New Hampshire(UNH)-led team is developing new 100-year floodplain maps for the Lamprey River watershed in southeastern New Hampshire based on current and projected precipitation data and land use patterns.[1] The legal research effort reflected in this report is designed to help communities overcome barriers posed by legal uncertainties about using the "new" floodplain data and information as they attempt to build resiliency through improved plans and policies. This research addresses potential community liability associated with using or not using the new floodplain data and analysis; policy and implementation options; acceptable standards for scientific reliability in guiding regulation; legal authority for towns to develop policy based on current or projected conditions, rather than past

[1] Assessing Flood Risk in the Lamprey River Watershed, http://100yearfloods.org.

conditions; and concerns about potential regulatory takings exposure if communities proceed to impose regulatory controls based in part on projected environmental conditions.

Land use, municipal infrastructure, property development, and emergency management professionals will benefit from the combined efforts of environmental and legal research teams addressing questions about existing and potential future flood zones. Although this particular project focuses on the use of new floodplain maps, the legal questions posed are broader, and many are likely to be applicable to similar climate-related effects.

1.2 Legal Research Objectives

The primary objective of this project is to provide legal research and analysis to address the following five questions relating to whether local governments can and should rely upon UNH's new flood mapping information in planning for projected environmental conditions.

1. What is the potential liability of government, particularly of the municipalities within the Lamprey River watershed, if it fails to take steps to reduce the vulnerability of its landowners and other citizens to the risk of flood and storm damage as revealed by UNH's research efforts and mapping information?

2. What legal and policy approaches may communities in the Lamprey River basin adopt to reduce the risks to property owners and other citizens in the expanded flood hazard area as revealed by the new floodplain maps?

3. Do New Hampshire communities have the legal authority under the state planning and zoning enabling legislation, or other state legislation, to design and implement regulatory controls based on current and predicted environmental conditions, specifically projected flooding levels?

4. What legal standard of scientific and technical reliability must planners and other local officials meet in order to support regulatory measures that are based on current and future — as opposed to past — environmental conditions?

5. What is the potential regulatory takings exposure of New Hampshire communities if they impose regulatory controls that are designed at least in part to address anticipated future environmental conditions?

1.3 Executive Summary

This paper assesses various types of legal risks communities in the Lamprey River Watershed may be concerned about as a result of adopting new flood management regulations and policies. To assess these risks we identified four potential legal challenges related to: (1) municipal liability, (2) enabling authority, (3) the use of climate maps as evidence, and (4) takings.

In general, the risk of municipal liability is low, so long as municipalities follow sound planning principles. Not only is the level of risk low, the federal government *encourages* communities to enact certain types of regulations designed to reduce flood hazards. This encouragement provides states and municipalities an additional layer of assurance with respect to adopting and defending revised or new flood regulations. Under federal floodplain guidelines, states and municipalities are encouraged to establish more stringent regulations above and beyond minimum federal requirements. For example, the Federal Emergency Management Agency (FEMA) advises communities to enact stricter regulations through a program called the Community Rating System.[2] This document, provides a list of additional regulatory and non-regulatory tools communities can use to both help reduce risk of flood hazards and avoid legal quandary.

With emphasis on New Hampshire, we provide examples, case studies, and legal review of relevant judicial precedents to help communities in the Lamprey River Watershed reduce risk as follows:

[2] See *infra* p. 70 and note 207.

Municipal Liability: Municipalities are very unlikely to be held liable for failure to adopt new floodplain maps. This rule is based on several rulings by the courts that defer to decisions (or non-decisions) made by government employees. The most likely way for a town to ever be found liable is under the law of negligence, where a municipality has a legal duty to an individual or group and fails to perform that duty. Municipalities owe no duty to the general public. This rule is based on the fact that the government would not provide services at all (particularly fire and police) if it were held liable when those services failed to protect citizens.

Even if a municipality was found negligent, it would very likely be immune from liability. Towns are generally immune from liability based on actions involving discretionary judgment. It is very unlikely that a municipality could be held liable for a planning activity, such as the policy choice to reference or adopt floodplain maps.

> **Recommendations:** There is no need for municipalities to take action related to municipal liability for failing to adopt floodplain maps. Note that it is possible – though extremely unlikely – that the New Hampshire legislature may reverse municipal liability protections.

Enabling Authority: In New Hampshire, towns cannot enact regulations unless they are authorized to do so under enabling statutes. There are many potential sources of enabling authority for regulations based on floodplain maps. We provide a list of statutes in section 4. Courts almost always find that New Hampshire municipalities soundly act within their enabling authority. Unless a statute specifically describes the limits of the authority and the municipality exceeds an express limit, the regulation will be upheld.

> **Recommendations:** Clearly identify the enabling statute or statutes authorizing municipal floodplain ordinances. Check the language of the statute to make sure specific authorizations are not being exceeded. When enacting new ordinances related to or referencing new floodplain maps, use the list of potential enabling statutes from this document as a resource.

The Use of Projected Future Climate Conditions: Climate science may be challenged in court and during administrative hearings as being unreliable. The municipalities within the Lamprey River Watershed may rely in part on new climate data or climate projections based on model output to justify the enactment of new regulations. Given the susceptibility of climate data and model output in court, it is important to know whether climate science could be questioned if an ordinance based on current or future climate conditions is challenged. In New Hampshire, scientific data is very rarely needed to justify the enactment of ordinances.

> **Recommendations:** To ensure the use of future climate conditions and related floodplain maps stands up in court, identify in the ordinance the reason you are adopting or referencing the maps. As long as you have a reasonable justification for using the maps, the maps will be upheld. Examples of a reasonable basis for an ordinance include protecting the health and welfare of the community from the dangers of flood hazards.

Takings: A municipality can be subject to takings claims when a regulation deprives a landowner of all economically viable uses of his land or when the regulation goes "too far" and infringes on private property rights.

> **Recommendations:** Regulatory mechanisms should be enacted in a way that preserves some economically viable use of the land. For example, do not create distance requirements for setbacks that cover an entire parcel and thereby prohibit the landowner from being able to build on any part of the property.
> Indicate that the purpose of the regulation is to promote hazard mitigation. Make the basis for floodplain regulation clear in the master plan. If necessary, amend your plan to include goals and policies for floodplain management and indicate that the purpose includes the health, safety, and welfare of citizens in the community.

This guidance document analyzes each of the four legal risks in detail. The document may be used as a reference and resource for municipalities drafting new ordinances or facing legal challenges to flood management based ordinances. Several cases are analyzed for the benefit of local planners, decision makers, and legal staff, as well as the general public

interested in flood management. The decisions and outcomes of these cases are applied to the most likely situations municipalities in the region will face in the coming years. Specific recommendations are provided on how to reduce legal risk.

2. Municipal Liability

What is the potential liability of government, particularly of the municipalities within the Lamprey River watershed, if it fails to take steps to reduce the vulnerability of its landowners and other citizens to the risk of flood and storm damage as revealed by UNH's research efforts and mapping information?

2.1 Introduction

This discussion focuses narrowly on the tort of negligence as the most likely claim against towns based on an alleged failure to address flood hazards. Even when a municipality is negligent, it may be immune from liability. Section 2.2 explores the laws of municipal liability, immunity and negligence in New Hampshire. Section 2.3 broadens this discussion, examining trends in municipal tort liability in other jurisdictions.

2.2 Municipal Liability in New Hampshire

"The law of municipal liability and immunity [in New Hampshire] historically has been composed of a patchwork of judicial decisions and statutory enactments."[3] Consequently, determining the extent of municipal (and state) liability in New Hampshire is largely a fact driven exercise, whereby a court must determine which particular patchwork a given tort claim falls under and apply the appropriate legal rule to the particular case. In general, New Hampshire statutes provide governmental entities immunity from injuries arising out of land use planning activities. Apart from the set of claims that are completely proscribed by statute, a governmental entity is further protected by the "discretionary function" doctrine that provides a defense for injuries resulting from government actions characterized as an exercise of discretion or judgment.

[3] Schoff v. City of Somersworth, 137 N.H. 583, 585 (1993).

2.2.1 Tort Liability

Although potential litigants could level many theories of tort liability against Lamprey River watershed municipalities, negligence is probably the most plausible claim based on a government's failure to address flood hazards as most other tort claims require an affirmative action by a defendant. Negligence is "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation."[4] For any person or government to be held liable for the tort of negligence generally there must be four elements: duty, breach, causation, and harm. While any element can be the lynchpin of a court's decision in a negligence case, in cases with municipal defendants duty tends to overshadow the other elements.[5]

2.2.1.1 Duty

Duty refers to "'whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.'"[6] The New Hampshire Supreme Court rarely concludes that municipalities hold a duty to individual plaintiffs, especially when plaintiffs assert financial interests.[7] In *Island Shore Estates* the owners of condominiums sued a municipality for negligently conducting building inspections prior to issuing certificates of occupancy.[8] The court rejected the claim, ruling that

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[4] BLACK'S LAW DICTIONARY 1133(9th ed. 2009).
[5] See generally, JON KUSLER, A COMPARATIVE LOOK AT PUBLIC LIABILTY FOR FLOOD HAZARD MITIGATION, ASSOCIATION OF STATE FLOODPLAIN MANAGERS (2008)(discussing affirmative duties to provide protection from natural hazards, public duty, duty to individuals, and limited duty).
[6] Libbey v. Hampton Water Works Co., Inc., 118 N.H. 500, 502 (1978) (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53, at 325 (4th ed. 1971)).
[7] *See, e.g.*, Island Shores Estates Condominium Ass'n v. City of Concord, 136 N.H. 300, 307 (1992) (stating "However, because the duty to inspect [construction of new buildings] was not created for, nor intended to benefit, the financial interest of the land owners, we hold that the city owed no duty to the plaintiff to avoid negligent misrepresentation in its building inspection program when financial loss is alleged from the ownership of the property, and further hold that a party's financial reliance upon such a representation made in the course of a public building inspection program is unjustified," which suggests land owners might not recover for financial losses, but could recover for physical injury resulting from failure to act in regards to flood hazards)).
[8] *Id.* at 303.

the municipality owed no duty to certify the soundness of construction for the purpose of protecting the financial interests of the plaintiffs.[9] The court placed the responsibility on the buyer to assess the risks of investing in real estate.[10] Under this precedent, New Hampshire municipalities likely owe no duty to property owners to administer their land use program to protect against financial losses from flood damage. Rather, landowners have the responsibility to determine the risks prior to making the investment in real estate.

Further limiting the potential scope of municipal liability in these circumstances is the public duty rule. Originating in *South v. Maryland*,[11] this rule is based on the consideration that government would not provide services (particularly fire and police) if it were held liable when those services failed to protect citizens.[12] Accordingly, states developed the public duty rule to limit when a government entity owes a duty to a particular plaintiff. In New Hampshire, "[t]o sustain liability against a municipality or its servants, the duty breached must be more than a duty owing to the general public. A special relationship must exist between the municipality and the plaintiff, resulting in the creation of a duty to use due care for the benefit of particular persons or classes of persons."[13]

In *Hartman v. Town of Hooksett*, the New Hampshire Supreme Court held that the public duty rule precluded a claim against a local police officer for failing to warn motorists of hazardous conditions on a state maintained highway after he reported the dangerous conditions to state road maintenance officials.[14] The court said there was no special relationship between the injured motorist and the police officer,

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[9] *Id.* at 307.
[10] *Id*. at 306 ("Had the plaintiff wished to assure itself of the commercial feasibility of the construction, the duty was the plaintiff's, and could have been met by utilizing its own resources or by hiring private contractors.").
[11] 59 U.S. 396 (1855). *See* John Cameron McMillan, Jr., Note, *Government Liability and the Public Duty Doctrine*, 32 VILL. L. R. 505, 509 (1987) (noting public duty doctrine "may be traced to . . . *South v. Maryland*").
[12] *See* 18 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, Section 53.04.25 (3rd ed. 2003) (recounting the reasons why courts uphold the public duty rule).
[13] Hartman v. Town of Hooksett, 125 N.H. 34, 36 (1984) (citations omitted).
[14] *Id.* at 37.

because there were no town rules or regulations imposing a duty on local officers to warn motorists of hazards on the state highway.[15] This decision suggests that even when a municipal official knows of a hazardous situation (such as hazards revealed from more accurate flood maps), there is no duty to warn citizens of the safety risk.

The *Hartman* decision implies that the public duty rule may not protect municipal defendants that voluntarily undertake to provide a specific service for a special class of persons, thereby inducing justifiable reliance on that service.[16] Thus, municipalities might be held liable if they take on the responsibility to protect landowners and citizens from flood hazards, through the adoption of rules and regulations, and they fail to carry out this responsibility. Adoption of flood hazard ordinances and flood hazard development review (required for communities participating in the National Flood Insurance Program)[17] might meet the definition of a self-imposed duty if property owners within Special Flood Hazard Areas (SFHAs)[18] constitute a special class of persons.

If a court rejected the argument that flood hazard ordinances and flood hazard development review represent the self-imposition of a duty, a duty might still be based on a statute. The New Hampshire Supreme Court recognizes that certain state statutes impose a duty on municipalities to protect a person's individual interests, thereby creating an exception to the public duty rule. In *Schoff*, the court found that RSA 231:92 (1982) imposed a specific duty on municipalities to protect individuals from defects in municipally maintained roadways.[19] However, the state statutes pertaining to flood hazards do not seem to impose any duty on municipalities to

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[15] *Id.* at 36–37.
[16] *Id*. (citing Florence v. Goldberg, 44 N.Y.2d 189 (1978), a New York case where the police department voluntarily assumed the duty of crossing guard, the Court appears to accept the rationale from the New York case that the establishment of publicized rules, policies, or regulations serves as an indication of whether the municipality has assumed a duty).
[17] 44 C.F.R. § 59.22 (2009).
[18] The area on Flood Insurance Rate Map that would be inundated by a flood with a 1% chance of occurring in any given year (also referred to as the "base flood" or "hundred-year floodplain"). Under RSA 674:57 municipal floodplain regulations only apply to properties within SFHAs.
[19] *Schoff,* 137 N.H. at 588 (discussing N.H. REV. STAT. ANN. § 231:92 (1982).

protect citizens from flood hazards and the release of more updated maps will not alter the municipalities' legal position.

An argument could be made that RSA 674:17 imposes a duty to protect citizens from flood hazards. This statute states that when engaging in planning, municipalities must plan to "secure safety from fires, panic and other dangers" and to "promote health and general welfare." This opens the possibility that municipalities with zoning might be susceptible to liability if they engaged in planning but did so in a way that failed to promote safety, health and general welfare (e.g. using inferior maps). However, the *Schoff* court rejected a similar argument regarding RSA 231:2 (1982), which states: "[a]ll class IV highways shall be wholly constructed, reconstructed and maintained by the city or town in which they are located." It concluded this provision represented a "general control and maintenance statute" that does not create a duty on municipalities to maintain roads for the benefit of individual travelers.[20] Analogously, the language in RSA 674:17 should probably be read as a "general planning statute" that does not create a duty on municipalities to zone for the benefit of individual property owners.

2.2.1.2 Breach

Once a duty is established, courts must determine whether that duty was breached. This issue is usually resolved by applying the "reasonable person" standard: whether a reasonable person in the position of the actor would have behaved as the actor did.[21] If the municipality's action, or lack thereof is determined to be "unreasonable" then the duty was breached. Importantly, however, the plaintiff must show that the breach of duty caused the harm that they suffered.[22]

[20] *Id*. (citing N.H. REV. STAT. ANN. § 231:2 (1982)).
[21] REST. 2D. OF TORTS § 283.
[22] This survey does not focus on the issues of causation, mainly whether a cause was sufficient or proximate enough to accord liability to the actor. The reason for this is that in most of the cases surveyed, the question of causation was rarely, if ever, at issue.

2.2.1.3 Causation

Causation refers to the mechanical sequence of events that result in the alleged injuries. To demonstrate causation, the plaintiff must demonstrate that the defendant's actions were the "cause-in-fact" (but-for causation) and the "legal cause" (also referred to as "proximate cause") of the plaintiff's injuries. Cause-in-fact requires the plaintiff to establish that the "injury would not have occurred without [the defendant's negligent] conduct."[23] However, but-for causation is an open-ended test[24] and, therefore, courts employ "legal cause" to determine whether the defendant's actions and the plaintiff's resulting injuries are sufficiently connected that it is appropriate to impose liability on the defendant.[25] In New Hampshire, "legal cause requires a plaintiff to establish that the negligent conduct was a **substantial factor** in bringing about the harm."[26]

Plaintiff landowners might contend that inadequate flood hazard regulations (and/or improper implementation of those regulations) were the cause-in-fact and legal cause of their injuries. They might argue that but-for the municipality's negligence in adopting or implementing flood hazard regulations, the damages would not have occurred. Further, they might be able to plausibly contend that the negligent adoption or implementation of flood hazard regulations (that resulted in the hazardous siting of the development) was a substantial factor in the injury. However, these arguments will not necessarily increase the likelihood of a court imposing liability on New Hampshire municipalities. Historically, plaintiffs suing in tort have not had difficulty demonstrating causation or damage to their property. Rather, the challenge in prevailing on a municipal liability theory has been in

[23] Bronson v. Hitchcock Clinic, 140 N.H. 798, 801 (1996).
[24] REST. 2D. OF TORTS § 431.
[25] *See W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS* 273 (5th ed. 1984) ("whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred").
[26] Estate of Joshua T. v. State, 150 N.H. 405, 407 (2003). *See* RESTATEMENT (THIRD) OF TORTS: Liab. Physical Harm § 29 (2005) (outlining various considerations and applications of the proximate cause doctrine).

demonstrating a duty and overcoming statutory and judicial government immunity—an issue discussed in the next sections.

2.2.2 Municipal Immunity

Even if a plaintiff could demonstrate all elements of negligence, a municipality might be immune from liability based on New Hampshire statutes or judicial decisions.

2.2.2.1 Statutory Limitations on Government Liability

New Hampshire RSA 507 B:5 provides "no governmental units shall be held liable in any action to recover for bodily injury, personal injury or property damage except as provided by this chapter or as is provided or may be provided by other statute."[27] Under this statute, property is defined as "tangible property," and [the court has held that] the immunity does not apply to injuries to real property.[28]

One way the legislature can abrogate the immunity is by creating legislation that specifically allows for negligence suits. For example, a plaintiff may recover for personal injury and damages to personal property "arising out of ownership, occupation, maintenance or operation of all motor vehicles, and all premises,"[29] for suits from injuries caused by public roads with an "insufficiency,"[30] and from injuries resulting from pollution originating from government owned property.[31] The net effect of these statutory provisions appears to be that they would not offer

[27] N.H. REV. STAT. ANN. § 507-B:5 (effective August 22, 1981).
[28] N.H. REV. STAT. ANN. § 507-B:1(IV), Cannata v. Town of Deerfield, 132 N.H. 235, 242-243 (1989).
[29] N.H. REV. STAT. ANN. § 507-B:2.
[30] To prevail on this claim there must be an "insufficiency" and: (a) The municipality received a written notice of such insufficiency as set forth in RSA 231:90, but failed to act as provided by RSA 231:91; or (b) The selectmen, mayor or other chief executive official of the municipality, the town or city clerk, any on-duty police or fire personnel, or municipal officers responsible for maintenance and repair of highways, bridges, or sidewalks thereon had actual notice or knowledge of such insufficiency, by means other than written notice pursuant to RSA 231:90, and were grossly negligent or exercised bad faith in responding or failing to respond to such actual knowledge; or (c) The condition constituting the insufficiency was created by an intentional act of a municipal officer or employee acting in the scope of his official duty while in the course of his employment, acting with gross negligence, or with reckless disregard of the hazard." N.H. REV. STAT. ANN. § 231:92.
[31] N.H. REV. STAT. ANN. § 507-B:9.

any immunity to New Hampshire municipalities from negligence suits arising from alleged failure to protect property from flood hazards.

2.2.2.2 Judicial Limitations on Government Liability

Assuming a negligence claim is not barred by RSA 507-B:5, New Hampshire's judicially created government immunity doctrine may protect a municipality from liability.[32] This section discusses the history and case law that produced the state's current discretionary function immunity doctrine and analyzes how this case law will apply to negligence claims for damage to real property.

2.2.2.2.1 History of the Doctrine in New Hampshire

Early on, the New Hampshire Supreme Court adopted a total government immunity doctrine derived from English common law.[33] The doctrine was premised on the notion that "'[i]t is better that an individual should sustain an injury than that the public should suffer an inconvenience.'"[34] Historically, the doctrine insulated municipalities "from liability for torts arising out of negligence in the performance of governmental functions."[35]

However, subsequent case law slowly eroded the total government immunity doctrine. To alleviate the harshness of the results produced by the doctrine, the New Hampshire Supreme Court distinguished between municipal functions that were "governmental with immunity on the one hand, and proprietary with liability on the

[32] New Hampshire law also recognizes "official immunity" to protect government employees from personal liability when decisions, acts, or omissions are made within the scope of officials' duties while in the course of employment, that are discretionary rather than ministerial, and are not made in a wanton or reckless manner. *See* Everitt v. General Elec. Co., 156 N.H. 202, (2007). The "official immunity" doctrine is not discussed in depth because the principles and applicability of the doctrine largely trace that of "discretionary function" immunity.
[33] *See* Bow v. Plummer, 79 N.H. 23, 104 A. 35 (1918) (noting origins of New Hampshire's government immunity doctrine).
[34] Gossler v. Manchester, 107 N.H. 310, 312 (1966) (quoting Russell v. Men of Devon, 2 Term Rep. 667, 100 Eng. Rep. 359 (1789)).
[35] Opinion of the Justices, 101 N.H. 546, 548 (1957).

other hand."[36] In practice, this often artificial distinction produced results that were "confused, inconsistent and difficult".[37]

In 1974, the court further limited the doctrine in *Merrill v. Manchester*.[38] The Merrill court held that

> the immunity from tort liability heretofore judicially conferred upon cities and towns is hereby abrogated except for the following exception. They are immune from liability for acts and omissions constituting (a) the exercise of a legislative or judicial function, and (b) the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion (discretionary function).[39]

Discretionary actions involve a municipality or employee making a policy decision by weighing two or more options.[40] Ministerial actions are defined as affirmative acts made by a municipality or its employees to carry out its policies.[41] Thus, the Merrill court predicates immunity on whether the governmental action is discretionary or ministerial in nature.

2.2.2.2.2 The Modern Discretionary Function Immunity Test

In outlining the discretionary function immunity doctrine, the court in *Merrill* stated that "certain essential, fundamental activities of government must remain immune from tort liability so that our government can govern."[42] Further, the discretionary function immunity doctrine preserves separation of powers because it "limit[s]

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[36] *Gossler,* 107 N.H. at 315 (Kenison, J., dissenting).
[37] *Id. See* Gilman v. Concord, 89 N.H. 182, 185-87, (1937) (holding city employees that sprayed public owned areas near highway not liable for negligently spraying private landowner's property, thereby killing her chickens).
[38] 114 N.H. 722 (1974).
[39] *Id*. at 729. (parenthetical added).
[40] *Id*. But not all decisions weighing one or two options are necessarily discretionary. Courts and statutes tend to qualify the language "weighing one or two options" with language to the effect of "when performing a quasi-judicial or quasi-legislative function." *See*, *e.g.* Hutcheson v. City of Keizier, 8 P.3d. 1010, 1014 (Or. 2000).
[41] MCQUILLIN MUN. CORP. § 53.04.10 (West, 3rd ed. 2011)
[42] Hacking v. Town of Belmont, 143 N.H. 546, 549 (1999) (quotations and brackets omitted).

judicial interference with legislative and executive decision-making."[43] The court stated that "[t]o accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations."[44]

The court later clarified the standard application of the discretionary function immunity doctrine. In *Bergeron v. City of Manchester*,[45] the court stated, "[w]hen the particular conduct which caused the injury is one characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning, governmental entities should remain immune from liability."[46] Subsequently, the court stated that this inquiry sought to distinguish between "policy decisions involving the consideration of competing economic, social, and political factors from operational or ministerial decisions required to implement the policy decisions."[47]

2.2.2.2.3 Statutory Augmentation of the Discretionary Function Immunity Doctrine

While discretionary function immunity is a judicially created doctrine, the legislature can script the precise scope of the doctrine. For example, in *Schoff*, the court stated, "One of our primary concerns underlying the discretionary function exception is to limit judicial interference with legislative and executive decision-making. There is no such interference when the legislature broadens municipal liability to include certain discretionary functions. The legislature may also eliminate such liability."[48]

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[43] *Schoff v. City of Somersworth,* 137 N.H. 583, 590 (1993).
[44] *Gardner v. City of Concord,* 137 N.H. 253, 256 (1993).
[45] 140 N.H. 417, 421 (1995).
[46] *Id*. at 421.
[47] *Mahan v. New Hampshire Department of Administrative Services*, 141 N.H. 747, 750 (1997).
[48] *Schoff,* 137 N.H. at 590. This legislative authority is misleading in light of N.H. Const. Pt. 1, Art. 14, which reads:

> Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or

As discussed, in 1981, the legislature enacted RSA 507-B:5. This act provides governmental units general immunity from tort liability for personal injury and damage to personal property except when removed by statute. In addition, the legislature enacted RSA 507-B:2-b, which insulates the government from liability for injuries on government property, including roads, resulting from inclement weather. This statute has not been applied in the flood context,[49] though it may provide some protection for municipalities in the context of claims arising from flood hazards. The legislature has enacted legislation to limit the availability of discretionary function immunity only in a limited number of instances—for example, injuries resulting from road maintenance.[50] It has not abrogated immunity for planning and regulatory functions, and therefore the discretionary function immunity remains a strong defense to lawsuits asserting negligence in governmental land use regulations.

2.2.2.2.4 Case Law Applying Discretionary Function Immunity

The New Hampshire Supreme Court has rejected negligence claims against municipalities based on the discretionary function doctrine in a variety of contexts: *Hurley v. Town of Hudson*, 112 N.H. 365 (1972) (holding that a town's approval of a subdivision without adequate drainage, despite drainage requirements in subdivision regulations, was a discretionary activity); *Rockhouse Mt. Property Owners Assoc. v. Town of Conway*, 127 N.H. 593, 600 (1986) (holding that discretionary immunity exists for a municipality's decisions whether to lay out roads); *Cannata v. Town of Deerfield*, 132 N.H. 235, (1989) (holding that a

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> character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

However, in a previous advisory opinion the Court states "[a]s indicated in article 14 the remedies provided are to be 'conformably to the laws.' This means the rules of statutory and common law applicable at the time the injury is sustained.'" Opinion of the Justices, 113 N.H. 205, 210, (1973). Accordingly, the legislature may expand government immunity so long as plaintiffs injured prior to any enactment are permitted to move forward with their claims under the laws in effect at the time of the injury.

[49] *Id*.

[50] N.H. REV. STAT. ANN. § 231:92.

municipality's decision to install culverts qualifies as discretionary function immunity); *Sorenson v. City of Manchester*, 136 N.H. 692, 694 (1993) (holding that discretionary immunity exists for a municipality's decision on the location of parking spaces); *Gardner*, 137 N.H. at 258 (holding that discretionary immunity exists for a municipality's decision on the placement or subsequent abandonment of an alleyway on a certain street in a certain place); *Bergeron v. City of Manchester*, 140 N.H. at 422, 424 (1995) (holding that discretionary immunity exists for a municipality's decision on how to conduct traffic control); *Hacking v. Town of Belmont* 143 N.H. 546, 550 (1999) (holding that discretionary immunity exists for a municipality's decision on training and supervision of basketball coaches and referees); *Tarbell Administrator, Inc. v. City of Concord*, 157 N.H. 678 (2008) (holding that the doctrine of discretionary function immunity bars negligence claims alleging that a municipality failed to properly construct a dam and failed to properly control and regulate the water level).

Based on these decisions, it is apparent the New Hampshire Supreme Court applies a broad interpretation of discretionary function and that municipalities generally prevail in negligence actions. Therefore, a decision not to take precautions to reduce the flood and storm risks to property owners, despite the availability of more scientifically accurate maps, would most likely be considered a planning activity protected by the discretionary function immunity.

The *Tarbell* decision is particularly relevant because it involves a municipality's decision in addressing a flood hazard. The City of Concord adopted a plan to maintain specific water levels in a lake that supplied the City's drinking water in order to meet water demands and protect downstream landowners.[51] The lake was a foot above the desired level, but the City elected not to release any water because summer was coming and the associated increase in demand would lower the lake level.[52] However, the City then experienced an unusual amount of rain that caused the lake to breach the dam, resulting in damage to a downstream apartment

[51] Tarbell Administrator, Inc. v. City of Concord, 157 N.H. 678, 680 (2008).
[52] *Id*.

complex.[53] The court ruled that the City's decision not to release water based on its assessment of the flood risk was a discretionary activity marked by a weighing of costs and benefits.[54] Likewise, decisions to adopt the map, rezone properties, and amend flood hazard regulations are "policy decisions involving the consideration of competing economic, social, and political factors."[55] Significantly, the alleged injury resulted from management of municipally owned property. This suggests that even if new flood hazard maps showed that government owned property may influence flood hazards, decisions about how to manage public property in reaction to flood hazards will qualify for discretionary function immunity. Accordingly, the discretionary function immunity doctrine will likely insulate Lamprey River watershed communities from liability based on any claim arising from the alleged failure to protect landowners from flood risk.[56]

2.2.2.25 State Liability

All of the principles discussed in the preceding sections also insulate the state from liability, particularly discretionary function immunity.[57] The state can more readily avoid liability under the discretionary immunity doctrine because it engages in far less ministerial activities involving property.

2.2.3 Conclusions

The foregoing discussion demonstrates that it is difficult to prevail against a municipality for negligence, especially for inaction in a planning function. New Hampshire law does not require municipalities to update flood hazard maps. This suggests that there is no duty for municipalities to take action to protect citizens and

[53] *Id.* at 681.
[54] *Id.* at 685.
[55] *Schoff,* 137 N.H. at 590.
[56] It must be noted, however, that government entities are not eligible for discretionary function immunity when they negligently execute those discretionary functions. *See* Cannata v. Town of Deerfield, 132 N.H. 235 (1989) (holding that the town's decision to install culverts was protected by discretionary function immunity but negligent installation of those culverts was not).
[57] *See In re* New Hampshire Dept. of Transp., 159 N.H. 72 (2009) (holding that a state detour plan involving weighing alternatives and making choices with respect to public policy was protected by discretionary function immunity).

landowners currently outside of designated SFHAs who are actually at-risk for flood damage. Even if there were a general duty, plaintiffs would still need to overcome the public duty rule and the discretionary immunity doctrine as disaster planning applies broadly to the public.[58] While the law may be moving to expand municipal liability in other jurisdictions, New Hampshire appears fairly entrenched in its position to limit government liability for decisions not to act. Accordingly, the dissemination of more accurate maps will not likely create a risk of liability for government entities if they fail to protect citizens and property owners from the dangers revealed in those maps.

2.3 Municipal Tort Liability in Other Jurisdictions

Historically, the common law doctrine of sovereign immunity protected all government bodies within the United States—federal, state, and local—from tort liability.[59] The federal government waived that immunity via enactment of the Tort Claims Act in 1948.[60] The states, too, have waived immunity, initially mostly through judicial rulings, though many followed the lead of the federal government and enacted tort claims acts of their own.[61] While these waivers increased the liability of state and local entities, it is often still limited in some manner by either statute or common law.[62] A complete analysis of each jurisdiction's statutory and common law regarding municipal immunity is beyond the scope of this analysis. Even so, there are some noteworthy general trends and distinctions, explained below.

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[58] If a plaintiff were able to overcome these barriers, government entities are further protected by a statutory cap on liability of $275,000 per person and $925,000 total for any one incident or occurrence, regardless of the number of injured parties. N.H. REV. STAT. ANN. § 507-B:4.

[59] MCQUILLIN, MUN. CORP. § 53.02.05 (West, 3rd ed. 2011); ANTIEAU ON LOCAL GOVERNMENT LAW, § 35.01 (Matthew Bender & Co., 2d Ed., 2011).

[60] Federal Tort Claims Act, 62 Stat. 982, passed June 25, 1948, codified in 28 U.S.C. § 1346(b) (2006).

[61] Currently, while all states have waived complete sovereign immunity, 35 have passed inclusive tort claims acts similar to the federal act, which describe the circumstances and actions still subject to immunity, as well as any exceptions. ANTEAU, § 35.01.

[62] *Id. See also* MCQUILLIN §§ 53.02.05–53.02.20 for further explanation.

The general approach of the states to municipal immunity was summarized by the Ohio Court of Appeals as follows:

> [N]o action lies to compel a municipality to exert its governmental authority in a given arena, once an express decision is made to engage a municipality in a certain function or activity, it will be held liable for its employees' and agents' negligent acts or omissions in the performance of that function or activity the same as a private corporation or any person would be. . . . [A] governmental unit's failure to exercise its authority to enter a field of activity, public or private, in order to regulate or oversee activity is not itself actionable in the absence of a city charter, city ordinance, or statutory duty mandating that the governmental unit oversee or regulate such field.[63]

The basic justification for this rule is that while a municipal entity shares some commonalities with private entities and individuals, it also serves other unique public policy functions. Unless the municipality has taken an affirmative action or a municipal duty is expressly named in statute, courts are unlikely to rule that a municipality is responsible for damage.[64]

Liability is most common in cases that involve municipal property or infrastructure or where a municipal employee takes an affirmative action. In these instances, there is an increased likelihood that one of the exceptions to municipal immunity is outlined in a state's Tort Claims Act or other statute. Even so, this is not a guarantee of liability, and courts can be hesitant to read either an exception or a statutory duty too liberally. The following section explains the general common law regarding

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[63] [63] Singleton v. City of Hamilton, 515 N.E.2d. 8, 11–12 (Ohio App. Ct. 1986) (summarizing the law as stated in Enghauser Mfg. Co. v. Eriksson Engineering Ltd. 451 N.E. 2d 228, at paragraph two of the syllabus (Ohio 1983) and Longfellow v. Newark, 480 N.E. 2d 432, 434 (Ohio 1985)). (summarizing Cleveland, *ex rel.* Neelon, v. Locher, 266 N.E. 2d 831 (Ohio 1971). The *Lochner* case was a mandamus action, or a decision from the court compelling the municipality to act in that circumstance. 266 N.E.2d. 831. The court agreed that while a statute could compel a municipality to act, thus permitting a mandamus decision, the court could not determine the course of action if none was prescribed in the statute. *Id.* at 834. In other words, the court could tell a municipality that the law requires it to act, but the municipality could decide how it chose to act pursuant to the statute.

[64] *See Singleton*, 515 N.E.2d at 12-16 (Ohio App. Ct. 1986) (noting that any duty that the city owed to the plaintiffs must be expressly named in statute, and examining the city charter and relevant statutes). *See also* Kenney v. Scientific, Inc., 497 A.2d 1310, 1314-1315 (N.J. 1985) (discussing in detail the Tort Claims Act and its purpose in New Jersey).

municipal liability and immunity, focusing particularly on negligence claims. This section's conclusion focuses more narrowly on the implications of this survey for a municipality's potential liability based on a decision not to incorporate more detailed maps into its floodplain management regulations.

2.3.1 Negligence

As mentioned above, negligence is a common law claim that typically requires four elements: duty, breach, causation, and harm.[65] In cases with municipal defendants, duty tends to overshadow the other elements.[66] Courts will generally only recognize a municipal duty if it is explicitly described in a relevant statute.[67] For instance, in a recent Nebraska Supreme Court decision, *Stonacek v. City of Lincoln*, the court held that the City owed no duty to the plaintiffs based on the terms of a floodplain management statute.[68] Homeowners who bought lots in an approved subdivision relied on FEMA maps to determine the height of the floodplain and site their homes.[69] Although they inquired about additional maps, they were not informed of maps created by the Nebraska Department of Natural Resources (NDNR) during a subdivision review process that identified the floodplain as being 5-9 feet higher than the FEMA maps.[70] As a result, the owners dug their basements below the NDNR delineated floodplain, and they became inundated during a significant rainstorm.[71] The court examined the state's relevant floodplain management statutes and found no explicit language or implicit purpose to create a municipal duty to implement floodplain management.[72] Regarding the claim that the City was negligent in

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[65] REST. 2D. OF TORTS. §§ 281-282.
[66] See generally, JON KUSLER, A COMPARATIVE LOOK AT PUBLIC LIABILTY FOR FLOOD HAZARD MITIGATION, ASSOCIATION OF STATE FLOODPLAIN MANAGERS (2008)(discussing affirmative duties to provide protection from natural hazards, public duty, duty to individuals, and limited duty).
[67] Stonacek v. City of Lincoln, 782 N.W.2d. 900, 910 (Neb. 2010).
[68] *Id.*
[69] *Id.* at 904-905.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 909-910. The court also noted that the floodplain management statute's inclusion of language creating a remedy for landowners was "inconsistent with a purported legislative intention to create a tort duty." *Id.*

withholding a map that it was required by statute to create, the court held that even if municipal employees acted unreasonably, their actions properly fit within the misrepresentation exception to the state's Tort Claims Act.[73]

Duty does not always have to be imposed by statute; it can instead arise from the relationship between the parties.[74] For instance, a municipal riparian landowner must consider the effects of its decisions on the riparian owners downstream.[75] This does not automatically translate into liability, but it can be argued that a "special relationship" exists between riparian landowners, which impose a duty upon the municipality to downstream property owners.[76] However, if the upstream land is a privately owned development, and the municipality is involved in site plan review of its infrastructure, courts are not likely to find a special relationship between the municipality and any downstream landowners.[77]

Assuming a statutory duty exists, a city may not be liable for breaching the duty if the harm suffered by the plaintiffs is not one that the legislature intended to prevent. In *Haggis v. City of Los Angeles*, a homeowner sued the City for failing to record stabilization studies made prior to improvements by prior landowners, in violation of a city ordinance.[78] The California Supreme Court ruled that the city ordinances created an affirmative duty for city employees to record the studies, the

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[73] *Id*. at 912.
[74] At times this is called a "special relationship" between the municipality and some other party. Cootey v. Sun Investment, Inc., 718 P.2d 1086, 1089 (Haw. 1986). A special relationship essentially amounts to a duty of care toward that particular plaintiff, above and beyond the regular duties owed to all citizens. *Id.* at 1090.
[75] 18A MCQUILLIN, MUN. CORP. § 53.135 (West, 3rd ed. 2011) (explaining the extent of riparian owner's rights to beneficial use of watercourses, and the duties municipalities may have to ensure other riparian owners' reasonable beneficial use of the water).
[76] In riparian cases, for instance, the duty that the municipality had to the riparian landowner would be a duty based on common law riparian rights doctrine, and not based on any statute or based on the municipality's general duties under the police powers. This duty is special because it is owed to a small class of landowners, and only to that class. Of course, not all municipal decisions ultimately breach that duty and result in municipal liability.
[77] Sun Investment, 718 P.2d. at 1091 (Haw. 1986) (The court examined the ordinance for language of purpose when it determined that the municipality had no "special relationship" with either the developer or downstream landowners).
[78] Haggis v. City of Los Angeles, 993 P.2d. 983 (Cal. 2000).

plaintiff relied upon the land records when purchasing the property, the plaintiff was subject to an unknown risk of financial harm, and therefore the City breached its duty to the plaintiff.[79] It held, however, that the purpose of these ordinances was public safety; they were not intended to protect subsequent landowners from damage to their property.[80] In other words, because the damages the plaintiff claimed were not within that ordinance's scope of protection, the action against the City had to be dismissed.

2.3.2 Immunity

Assuming a plaintiff can prove that a municipality or a municipal employee was negligent, the municipality may still be immune from liability. Like New Hampshire, most jurisdictions differentiate between discretionary and ministerial actions.[81] When ministerial actions are performed negligently and lead to harm, a municipality is commonly held liable.[82] In contrast, discretionary actions, in most instances, do not provide a basis for immunity from liability.[83]

Still, it is not always clear whether a particular action is discretionary or ministerial, and the line between these two can vary depending upon the jurisdiction and the situation. In *Hutcheson v. City of Keizer*, the Supreme Court of Oregon addressed the question of whether specific actions in reviewing an approved subdivision plan were ministerial or discretionary.[84] The City argued that the reviews were made subsequent to a discretionary decision on whether or not to approve a plan, and

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[79] *Id*. at 989–90.
[80] *Id.* at 990 ("We agree with the City that the probable purpose of the ordinance's recordation requirement is to encourage the landowner to undertake necessary stabilization work, for if he or she does not do so, a recorded certificate of substandard condition will seriously impair the value of the property for possible sale or security. True, the recordation also may provide warning to potential purchasers and lenders . . . but that effect is aptly described as 'incidental' . . . to the ordinance's enforcement goals. Municipal Code section 91.0308(d) exists to protect the public against unsafe building and land conditions, not to regulate the marketing of real estate").
[81] MCQUILLIN, MUN. CORP. § 53.04.10 (West, 3rd ed. 2011).
[82] *Id*.
[83] *Id*.
[84] *Hutcheson,* 8 P.3d 1010 (Or. 2000).

should be considered a part of that approval process.[85] The court disagreed, noting that the negligence of city engineers who were required to, but did not, check the approved subdivision's drainage plans led to the harm suffered by the plaintiffs.[86] These actions were ostensibly ministerial, they did not involve the use of discretion, and they were performed subsequent and pursuant to the discretionary approval by the City's development board.[87]

In another similar case, several Wilmington, Delaware, property owners suffered substantial damage to their homes due to sewage backup and floodwaters after a flash flood.[88] They brought suit against the City, and the court found the cause of their damage to be the City's decision to install a particular type of culvert in its drainage system, despite knowing that this type of damage might result.[89] Importantly, there was no issue with the culvert installation itself but, rather, with the decision to install the particular culvert.[90] The City had subsequent opportunities to replace or improve the culvert and other parts of its sewage and drainage system and did not do so, despite being required to do so by statute.[91] The City agreed that the decision was discretionary, because it involved a predominantly economic decision by the City whether or not to install or improve the culvert.[92] The Delaware Supreme Court disagreed, holding that the city's decision and subsequent inaction were not discretionary actions, since they were made in the context of several affirmative duties under state and federal law.[93] Moreover, in effect, the decision and subsequent inaction amounted to the creation of a public nuisance.[94]

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[85] *Id.* at 1014.
[86] *Id*. at 1015.
[87] *Id*. at 1017.
[88] Consolidated Flood Cases, 1993 Del. Super. LEXIS 296, *2–*10 (1993).
[89] *Id*. at *20.
[90] *Id*. at *22–23.
[91] *Id*. at *30-32.
[92] *Id*. at *22–23.
[93] *Id.* at *33-35.
[94] *Id.* This is, in part, due to the circumstances of the case: "However, the Court does not herein consider a case where the County Council exercised its discretionary authority in the manner prescribed by statute. Rather, the Court considers a case where lesser agents of the state acted beyond the scope of their discretion and usurped the County Council's decision,

While courts are fairly resistant to recognizing government liability, some scholars argue that municipalities should no longer receive such legal protections. [95] Jon Kusler, an expert in municipal liability, suggests there is a general trend among the states to more readily recognize government liability for failing to protect citizens, negligently engaging in planning, and performing other activities that increase flood hazard risk.[96]In support of his position, he cites various cases from different jurisdictions. [97]

Kusler attributes this trend in the direction of expanded municipal liability in part to the professionalization and expansion of knowledge in the planning and emergency management fields and better understandings of causation.[98] Of particular note, Kusler asserts that the proliferation of flood hazard statutes and ordinances have created an increased standard of care so that government entities that violate their flood hazard regulations may be negligent per se when they do not follow their own regulations.[99] While not particularly applicable to new maps, this development is significant to New Hampshire law because of the precedent set in *Hurley*

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contributing to a public nuisance of their own creation in the process. This orderless process is beyond the pale of "discretion" under 10 Del. C. § 4011(b)(3)."

[95] JON KUSLER, FLOOD RISK IN THE COURTS: REDUCING GOVERNMENT LIABILITY WHILE ENCOURAGING GOVERNMENT RESPONSIBILITY, 9 (2011).

[96] *Id.*

[97] Barr v. Game, Fish and Parks, 497 P.2d 340 (Colo. 1972) (rejecting "act of god" defense for construction of a dam that resulted in flooding, erosion and silt deposition damage). Myotte v. Village of Mayfield, 375 N.E.2d 816 (Ohio 1977) (village liable for flood damage caused by issuance of a building permit for industrial park). County of Clark v. Powers, 611 P.2d 1072 (Nev. 1980) (county liable for increased flood damage caused by county-approved subdivision). Paterno v. State of California, 113 Cal.App.4th 998 (Cal. 2003) (holding state of California liable for negligent construction of a levee). Reidling v. City of Gainesville, 634 S.E.2d 862 (Ga. App. 2006) (holding that the Department of Transportation's plans for a parkway were exempt from sovereign immunity protection and consequentially the DOT could be held liable for a nuisance due to placement of fill and flooding). Schneider v. State, 789 N.W.2d 138 (Iowa 2010) (holding discretionary function immunity did not apply to design of bridge that obstructed floodway and increased the depth of floodwater from torrential rains).

[98] *Id*. at 2-6.

[99] *Id*. (citing Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613, 618 (Okla. 1980); Powell v. Village of Mt. Zion, 410 N.E.2d 525 (Ill. 1980).

(application of development bylaws to an individual property is not a ministerial municipal activity), which would seem to suggest that government entities are not liable if they violate their floodplain management regulations.[100]

2.3.3 Exceptions to Immunity

While discretionary decisions can be shielded from liability, exceptions do exist. Again, these vary from jurisdiction to jurisdiction. The Delaware Supreme Court's decision in the *Consolidated Flood Cases,* mentioned in the last section illustrates two of the more common exceptions: imminent harm and dangerous conditions.[101]

Inaction on the part of a municipal employee or municipal body can result in liability for the municipality if the employee is aware of imminent harm to a specific individual and does not take action to prevent that harm.[102] Generally, this exception to municipal immunity applies to a very narrow space-time window.[103] For instance, in *Evon v. Andrews*, a property inspector failed to follow through on a lessor's numerous violations of the City's fire code and, because of those conditions, a fire broke out in the tenement, resulting in the deaths of the plaintiff's relatives.[104] The court held that the imminent harm exception did not apply, noting that "[t]he risk of fire implicates a wide range of factors that can occur, if at all, at some unspecified time in the future. The class of possible victims of an unspecified fire that may occur at some unspecified time in the future is by no means a group of "identifiable persons" [within the meaning of Connecticut precedent]."[105] In contrast, the imminent harm exception has been found to apply to situations where the municipal corporation failed to train its employees to be aware of the needs of

[100] Hurley v. Town of Hudson, 112 N.H. 365 (1972) (holding that a town's approval of a subdivision without adequate drainage, despite drainage requirement in subdivision regulations, as a discretionary activity).
[101] *supra footnote 94.*
[102] MCQUILLIN, MUN. CORP. § 53.04.10 (West, 3rd ed. 2011).
[103] Evon v. Andrews, 559 A.2d 1131, 1132 (Conn.1989).
[104] *Id.* at 1134.
[105] *Id.* at 1135.

particular citizens, even if the imminence of the harm was attenuated.[106] In some jurisdictions, the imminent harm exception has been expanded by statute.[107]

In cases involving municipal infrastructure, a municipality has an affirmative duty to ensure that its infrastructure is not defective or does not present a dangerous condition.[108] A municipality or municipal employee needs to "know" about the defect or condition in order to be held liable.[109] Whether a municipality needs actual knowledge of the particular condition or defect or if constructive knowledge is sufficient to impose liability varies across jurisdictions.[110] In some cases, a municipality can be liable for damages resulting from a defective or dangerous condition on private property when municipal infrastructure incorporates or affects the property in such a way that it effectively controlled it and caused the condition.[111]

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[106] *See* Odom v. Matteo, 2010 WL 466000 (D. Conn.) (The court found that evidence that showed the municipality had failed to properly train police officers on brain-trauma survivor treatment, and the potential negative consequences of tasing them did fall under the imminent harm exception when a person immediately identifies himself or herself as a brain trauma victim during a routine traffic stop).

[107] *Compare* Andrade v. Ellefson, 375 N.W.2d 828 (Minn. 1986), *with* Loftus v. Hennepin County, 1999 Minn. LEXIS 404 (where the court noted that recent statutory changes posed stricter liabilities on the licensing and inspection of at-home day care providers, and that *Ellefson* was no longer applicable precedent).

[108] MCQUILLIN, MUN. CORP. §§ 53.04.10 (West, 3rd ed. 2011); *see also* Eschete v. City of New Orleans 245 So.2d 383 (La. 1977) (holding that a claim that the city knew about current dangerous drainage and sewage conditions and then "willfully and, therefore, maliciously" approved of further development that resulted in damage to the plaintiff's property was sufficient).

[109] City of Austin v. Leggitt, 257 S.W.3d 456 (Tex. App. Ct. 2008).

[110] *Compare id.* at 468–470 (discussing whether flooding on roadways due to a culvert spillover was an "ordinary defect" that the city only needed constructive knowledge or a "special premises defect" that required actual knowledge) *with* Torkelson v. Redlands, 198 Cal.App. 354 (1961) (holding a municipality liable for constructive knowledge of a condition that would be dangerous for children playing in city culverts—a common, unauthorized use of those culverts).

[111] Posey *ex rel*. Posey v. Bordentown Sewerage Authority, 793 A.2d 607 (N.J. 2002) (explaining that there was sufficient evidence to convince a jury that the municipality controlled a pond on private property by using it within its network of stormwater diversion).

In addition, as the Delaware court decision in consolidated cases implied, the tort of nuisance can have a particular impact on municipal liability and immunity.[112] A municipal body cannot act in a way that would create a nuisance for another, even if its actions would otherwise be lawful.[113] Moreover, the impending danger of a public nuisance serves as a "background principle" justifying land use regulations that may otherwise be considered takings under the *Lucas* test.[114] For a thorough analysis of the relationship between nuisance and takings, see the discussion in Section 6.

As a reminder, this is a survey of multiple jurisdictions and is by no means exhaustive or conclusive. While the local officials within the Lamprey watershed should look to New Hampshire law as their primary guide, cross-jurisdictional studies such as these can give an indication as to how the law in a particular area is evolving. While inaction would not likely bring liability, municipal leaders should be cautious in electing not to adopt the updated maps because of emerging trends in other jurisdictions

2.4 Conclusion

Municipal liability due to negligent actions is most common in one of the following three circumstances: (1) an affirmative, ministerial act by a particular municipality or municipal agent, (2) negligent maintenance of municipal infrastructure or property, or (3) specific language in the state or municipal laws holding the municipality liable in certain circumstances. While a municipality can be liable for "discretionary" actions in exceptional circumstances, courts tend to interpret exceptions narrowly. Moreover, even when a discretionary action may be at the heart of a particular matter, courts sometimes assign liability based on ministerial actions.

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[112] *Consolidated Flood Cases,* 1993 Del. Super. LEXIS 296, *34–*35 (Del. App. Ct. 1993). *See generally* MCQUILLIN, MUN. CORP. § 53.59.10 et. seq. (West, 3rd ed. 2011).
[113] Columbus, Ga. v. Smith, 316 S.E.2d 761 (1984).
[114] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

3. Legal and Policy Approaches

What legal and policy approaches may communities in the Lamprey River basin adopt to reduce the risks to property owners and other citizens in the expanded flood hazard area as revealed by the new floodplain maps? Consider existing and new development.

In June of 2011, the Lamprey River Advisory Group gathered to discuss a variety of municipal policy to discourage development in the floodplain and mitigate damage resulting from, and associated with, flooding. This group of advisors convened by the University of New Hampshire includes a number of individuals with extensive background in municipal land use planning and regulation. The options listed are not a comprehensive collection of all options available to municipalities in New Hampshire but reflect alternatives of interest to the advisory group.

The group discussed both options for limiting new development in the areas vulnerable to flood hazard and for dealing with existing development in the floodplain. Section 3.1 begins with a discussion of general planning strategies. Section 3.2 discusses non regulatory approaches. Section 3.3 identifies regulatory options.

While one basic way to reduce flood damage and flood flows is to limit stormwater runoff, this report does not discuss options for stormwater management. The University of New Hampshire Stormwater Center has expertise in this field and can provide guidance on regulatory options to reduce and manage stormwater. A number of communities in New Hampshire have implemented various flood-related regulations to reduce flood risk, which go above and beyond the National Flood Insurance Program (NFIP) requirements.[115]

[115] A comprehensive list of those communities and the corresponding regulations is included as an appendix to this document, and is available at:

3.1 General Planning Strategies

3.1.1 Acknowledge Uncertainty Upfront in Municipal Plan

The municipal plan provides the rational nexus between the goals and needs of a community and the regulatory tools that can be implemented to achieve those goals. It is important to address flooding concerns in the planning process and planning documents, despite the fact that flooding is unpredictable.

By addressing the uncertainty of flood hazards in comprehensive plans, municipalities have the opportunity to acknowledge the unpredictability of future conditions, while at the same time emphasizing the importance of taking action despite uncertainty. Comprehensive plans can specifically address the impacts of increased storm intensity and the presence of flood hazards in the municipality. If a municipality chooses, it can also base all planning on future conditions, such as fully built-out watersheds. The foundation for any proposed regulatory or non-regulatory flood hazard strategy must be provided in the plan. The planning process also provides opportunities for public participation, a critical part of successfully regulating to reduce flood risk in communities.

Resources for more information

- Land Use Law Center, Pace University School of Law, Local Response to Sea Level Rise, available at: http://www.csc.noaa.gov/digitalcoast/inundation/_pdf/Pace_Final_Report.pdf.

Examples

- Olympia, Washington, incorporated land use and environmental elements in its comprehensive plan to address impacts of global warming. It included provisions for waterfront zoning, protections for critical areas, coastal land buffers, sensitive land acquisition, infrastructure protection, sprawl, and

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http://www.nh.gov/oep/programs/floodplainmanagement/regulations/documents/higher_standards_communities.pdf.

emergency management. The prospect of global warming, like the risk of flooding, makes action prudent in spite of uncertainty.

- San Francisco, California, implemented a comprehensive plan to mitigate global warming effects. Its plan lays out an 8-year program to map areas likely to be inundated with water within 50 years (100 year models have a tenfold difference between lowest and highest potential increases; therefore, using a 50 year model cuts in half the uncertainties inherent in planning).

- City of Bainbridge Island, Washington, adopted a comprehensive plan that recognizes the community is prone to flooding, erosion, landslides, and soil subsidence. The plan contains a Frequently Flooded Areas element that states there will be a limitation on development and alteration of natural floodplains and preservation of stream channels and natural protective barriers. The plan also provides for a revision of the flood insurance rate maps to reflect natural migration of frequently flooded areas, as well as implementing nonstructural protective methods such as setbacks and the use of natural vegetation, and locating public sewer and water infrastructure outside of these areas.

- City of St. Pete Beach, Florida, is an island that lies entirely within the 100-year floodplain. Its comprehensive plan contains a Coastal and Conservation Element that limits public expenditures for development within high-hazard areas; requires disclosure of coastal hazards on all real-estate transfers and leases; and develops a disaster preparedness plan, post-recovery task force, and post-disaster moratoria on redevelopment.

- Pacific County, Washington, adopted a Shoreline Management Plan that states the municipality will amend land use regulations in light of continuing scientific research and requires property owners to demonstrate that drainage or pumping will not deplete groundwater or cause saltwater intrusion.

- Town of East Hampton, New York, included in its comprehensive plan a Coastal Management Element that contains a specific reference to sea level rise, provides for continuous surveillance of wetland boundary locations, takes measures to ensure wetlands can naturally retreat rather than drown (such as prohibiting bulkheads that block wetland migration), and provides for coastal setbacks as much as 150' and no-build zones in high hazard floodplains.

3.1.2 Safe Growth Audit

The purpose of a safe growth audit is to evaluate a municipality's policies, ordinances and plans to see if growth is, or will be, vulnerable to natural hazards. By linking public safety and development, a municipality can promote safe growth and resiliency both before and after a flood.

Municipalities should encourage public participation in the safe growth audit process. Community members with knowledge of the nuances of the community and natural surroundings can form a committee to create a vision for safe growth. The findings can then be incorporated into the comprehensive plan, zoning and subdivision regulations, capital improvement program, and infrastructure policies.

A safe growth vision should attempt to guide growth away from high-risk locations, locate critical facilities away from high risk zones, preserve ecosystems that defend against hazards, retrofit buildings at risk in redeveloping areas, develop knowledgeable community leaders and networks, and monitor and update safe growth plans over time. One way a municipality might choose to implement a safe growth vision is to institute a Hazard Mitigation Plan (see below).

Resources for more information

- American Planning Association. Safe Growth Audits. *Zoning Practice* 10. Oct. 2009, available at: http://www.planning.org/zoningpractice/2009/pdf/oct.pdf.

3.1.3 Hazard Mitigation Plans

Robust hazard mitigation plans provide a clear pathway for safe and comprehensive redevelopment in flood hazard areas after a flood event. A plan for thoughtful redevelopment can prove to be invaluable in the subsequent chaos of a flood by eliminating the need to make hard decisions in an emotional time. Strict adherence to these plans after emergencies, however, is critical to ensuring that communities become less vulnerable after floods instead of more vulnerable.

Municipalities may choose to participate in the National Flood Insurance Program (NFIP). NFIP is a federal program administered by the Federal Emergency Management Agency (FEMA) that manages the mapping of the nation's floodplains and makes federally-backed flood insurance available in participating communities. Municipalities that participate in NFIP gain assistance with their hazard mitigation plans and qualify for federal funding. Under NFIP, municipalities must "review all permit applications to determine whether proposed building sites will be reasonably safe from flooding,"[116] and adopt and enforce standards that "exceed the minimum criteria . . . by adopting more comprehensive floodplain management regulations."[117] Ideally, every municipality should institute its own hazard mitigation plan and incorporate it into its comprehensive plan to ensure the compatibility of flood hazard policies with municipal development. In the plan, municipalities should anticipate construction of sustainable, disaster-ready infrastructure and provide for reconstruction that ensures communities are less vulnerable to flood hazards than before. To accomplish these goals, a municipality may include moratoria on new building and requirements for new permits after a flood. A municipality might also include in a hazard mitigation plan a guide for distributing warnings, evacuation routes, rebuilding property, and a detailed rating system for property acquisition.

[116] 44 C.F.R. §60.3(a)(3).
[117] 44 C.F.R. §60.1(d).

Instituting a hazard mitigation plan has the additional benefits of increasing community awareness of potential hazards. To promote adequate public participation, a municipality may create a safe growth steering committee comprised of interested parties to offer guidance and institutional knowledge of the area.

Resources for more information:

- Thomas, E.A. and S.K. Bowen. *The Patchwork Quilt: A Creative Strategy for Safe and Long Term Post-Disaster Rebuilding*, available at: http://www.floods.org/PDF/Post_Disaster_Reconstruction_Patchwork_Quilt_ET.pdf.
- Land Use Law Center, *Pace University School of Law. Local Land Use Response to Sea Level Rise*, available at: http://www.csc.noaa.gov/digitalcoast/inundation/_pdf/Pace_Final_Report.pdf.
- American Planning Association. *Safe Growth Audits*. *Zoning Practice* 10. Oct. 2009, available at: http://www.planning.org/zoningpractice/2009/pdf/oct.pdf.
- American Planning Association. *Floodplain Management. Zoning Practice* 3. Mar. 2008.

Examples

- Hillsborough County, Florida, adopted a post-disaster redevelopment and mitigation ordinance. This plan restricts and eliminates unsafe structures, creates a decision-making matrix for post-disaster rebuilding and relocation of public infrastructure, and guides orderly redevelopment
- Tulsa, Oklahoma, created a sophisticated forecasting and alert system, as well as a master drainage plan for the entire city to decrease flood hazards.

- Town of Duck, North Carolina, provides for a short-term building moratorium to give the community time to assess damage and consider mitigation measures, including:
    - For 48 hours after a flood, the initial moratorium prohibits the issuance of building permits;
    - No permit for rebuilding a destroyed structure may be issued for 30 days following the initial moratorium;
    - All outstanding building permits issued before the flood are revoked, and re-issuing the permits is delayed for 30 days;
    - All moratoriums, except the initial one, may be extended or canceled by the Mayor or Town Council; and
    - Replacement buildings and repairs must meet applicable zoning and other code requirements to get a permit after a moratorium lifts.

3.1.4 Future-Conditions Maps

A future-conditions map takes into account the impact future growth will have on flood hazards and can be a basis for municipal zoning regulations. Historically, the flood hazard information presented on maps has been based on the existing condition of the floodplain and watersheds. Floodplains, however, can change substantially due to urban growth. For example, increases in impervious surfaces, as well as grade changes, may raise water levels making those areas more susceptible to flooding. Future-conditions maps focus exclusively on development and do not address increased flooding due to climate change.

Future-conditions maps are based on future-conditions hydrology and land use projections established by a municipality. In some communities, future-conditions maps have been included along with the existing conditions 100-year floodplain and 500-year floodplain maps.

FEMA will only require regulation of floodplain development based on the existing-conditions data, while local floodplain managers can use the future-conditions map and data to regulate development.

When creating a future-conditions map a municipality must ensure that regulation of the floodplain is supported by its plan and all its local regulations. A municipality should also consider projected population growth, areas susceptible to development, and the location of grading or other land alterations.

Resources for more information

- Federal Emergency Management Agency, *Final Guidelines for Using Future-Conditions Hydrology*, available at: http://www.fema.gov/plan/prevent/fhm/ft_futur.shtm.[118]

3.1.5 Capital Improvement Plans

Public infrastructure, such as roads, sewers, and emergency services, lead to increased development . Furthermore, certain types of development increase hazard risk due to technologies used to create flood-enforced buildings. These technologies are more expensive and do not prevent the increased likelihood of having to rebuild within hazard areas. Therefore, it is important for municipalities to ensure that the plans for repairing, replacing, and locating new and existing public infrastructure are consistent with the goal of limiting development in the floodplain.

Infrastructure itself is also at risk if located in the floodplain. When possible, new public infrastructure should be located out of the floodplain; and existing infrastructure, when in need of repair or replacement, should also be relocated outside of the floodplain. Putting limits on the amount of money spent and the kind of infrastructure located in flood hazard areas is a simple way to decrease the amount of infrastructure at risk from flooding. Municipalities can justify limited additional expenditure on public infrastructure as being necessary for public health and safety.

In addition to service-related infrastructure, infrastructure that aims to protect development in the floodplain, such as floodwalls or the equivalent, should be limited. Providing public flood control infrastructure typically leads to the use of

[118] Codified in 44 CFR Part 59 and 64.

public funds to repair damage to private property that was 'protected' by the public flood infrastructure. On the other hand, if public infrastructure is not provided, then private money will have to be used for repair and replacement.

Connection to new maps: Land use maps can have risk analysis overlays, and high-risk areas could be determined with the help of the new maps.

Resources for more information

- Land Use Law Center, *Pace University School of Law, Local Response to Sea Level Rise*, available at: http://www.csc.noaa.gov/digitalcoast/inundation/_pdf/Pace_Final_Report.pdf.
- American Planning Association, *Safe Growth Audits*, *Zoning Practice* 10. Oct. 2009, available at: http://www.planning.org/zoningpractice/2009/pdf/oct.pdf.

Examples

- Lee County, Florida, limits public expenditures in high risk areas to necessary repairs, public safety needs, services to existing residents, recreation, and open space uses. New causeways or bridges to islands are prohibited unless necessary for evacuation.

3.2 Non-Regulatory Strategies

3.2.1 Floodplain Buyout Programs

Buyout programs identify areas that provide multiple benefits for the municipality and prioritize appropriate properties for preservation. This process is preferably completed pre-flood but more often occurs after a flooding disaster. A municipality has the opportunity then to acquire the properties most suitable for its goals, as property owners unable to re-build apply for buyout assistance.

Properties that have the potential to provide multiple benefits for a municipality include properties that can create contiguous open space, preserve environmental

resources, and mitigate flood damage. Ideally, the areas that would provide the most benefit for flood control would be identified and included as part of the hazard mitigation plan. Alternatively, if properties flood multiple times, they could be included as part of a buyout program.

One of the common challenges for floodplain buyout programs is finding a source of funding before flooding occurs, as FEMA mostly provides hazard mitigation funding post-flooding. One option for funding would be to institute a drainage fee based on the amount of impervious surface on a property. This fee structure could comprise a variable rate structure for residential and business properties. There are a number of examples of drainage fees or stormwater utilities throughout the country. Seattle, Washington, and Tulsa, Oklahoma, are particularly good examples.

Connection to new maps: The new maps can help identify areas that are most vulnerable to flooding. These areas could then be targeted for floodplain buyouts, particularly if a funding source is developed for preventative buyouts.

Examples

- Tulsa, Oklahoma, initiated an ongoing floodplain clearance program in response to repeated devastating floods. Since the 1970s, the city has acquired and cleared approximately 875 buildings from its floodplains. Voters have approved $600,000 for the next phase, which will begin next year.

3.2.2 Designate Critical Areas as No-build Zones/Flood Storage Areas via Easements

Municipalities can protect strategic land that provides substantial flood storage via protective easements. Municipalities can purchase or obtain a conservation easement on important private land, on land that has water-absorbing soils, in areas expected to experience major growth in the next 20 years, and along shorelines and rivers.

Municipal zoning maps could help municipalities identify where this strategic land is located. Even if the municipality already owns some of the land that is appropriate for flood storage, a land trust may provide additional protection. Land trusts can monitor property and hold land in perpetuity to ensure future municipal councils do not decide to build up the land.

Designating critical areas as no-build zones or flood storage areas seems an obvious action for a municipality, because conservation easements provide longer-term protection. However, like all land use decision-making, a municipality should consider advantages and disadvantages before simply designating the area as open space via zoning.

Resources for more information

- American Rivers (2001) *The Multiple Benefits of Floodplain Easements*, available at: http://www.americanrivers.org/assets/pdfs/reports-and-publications/the-multiple-benefits-of-floodplain-easements.pdf.
- Land Use Law Center, *Pace University School of Law, Local Response to Sea Level Rise*, available at: http://www.csc.noaa.gov/digitalcoast/inundation/_pdf/Pace_Final_Report.pdf.

Examples

- Town of Sullivan's Island, South Carolina, protects around the low water mark boundaries of recreation and conservation districts as an area that must be preserved as a conservation area through the use of all legal means by the town. This ensures natural habitat is not disturbed, land will not be subdivided, no man-made or artificial changes will occur, and the town will use its police power to prevent altering of the area in any way. This area is conveyed to a local land trust via a conservation easement then re-conveyed to the town. The town can revoke the restrictions by a unanimous vote of the town council and a referendum approved by 75% of the citizens. Thus, the

restrictions are more permanent but not outside the control of the municipality.

3.2.3 Rolling Easements

The basic concept of a rolling easement is to allow coastal vegetation and wetlands to migrate inland if, and when, sea level rises. Such easements usually mean that coastal property owners agree not to construct sea walls or other hard structures that would prevent that inland migration.

To implement a rolling easement, a municipality decides which areas are best suited for shoreline protection, which areas it will accommodate (essentially the "wait and see" areas), and which areas it plans to retreat from (or where no shoreline protection is allowed). Retreat areas and protected areas are zoned as such, but the regulations may allow for special exceptions. Several ways to ensure that shoreline protection is not constructed are described below.

It is important to note that rolling easements address sea level rise more than floodplain regulation. A more appropriate use of the techniques below may be to incorporate them with meander easements (described in the next section).

- Conservation Easements
    - An owner agrees through a conservation easement not to use shoreline protection but retains all other rights to the land. A land trust or government agency will then hold, monitor, and enforce the easement. Costs can be low, especially if landowner does not think shoreline protection will be necessary, and owners can be compensated through tax relief.

- Covenants
    - Equitable covenants are restrictions either a developer or neighbors agree to put on a parcel that prohibits shoreline protection in all deeds within a subdivision. When neighbors agree to a restriction

they must record it at a local land office. Enforcement of these covenants can be a problem, since courts might find that the hardship is too great to stop someone from using shoreline protection.

- Legal covenants differ from equitable covenants only in the remedy provided, as a party is entitled to money instead of an injunction.

- Ambulatory Boundaries
  - Voluntary ambulatory boundaries are agreements or changes in the law, to ensure public beach access, wetland migration, etc.
  - In new communities a developer can dedicate a rolling affirmative easement on the dry beach before the parcel is subdivided, such as stating in the deed that the easement migrates with the vegetation line. Potentially, permits for subdivisions could be conditioned on obtaining the rolling easement.
  - In existing communities, the government could acquire rolling beach easements through eminent domain, purchase easements from willing sellers, or acquire them as an exaction in return for building permits or beach nourishment projects.

- Defeasible Estates
  - A land owner will own an entire parcel, but when the sea level rises four feet, the property reverts to the developer. If sea level does rise, the developer then donates land to a land trust or a government agency, if the state does not already own the land through the public trust doctrine. Anyone can own the reverter, there is no monitoring required, and it can be a more flexible option since landowners are likely to be able to own the property for a longer time than other zoning options may allow (usually at least 75 years). However, some states limit the reverter option to a few decades, which would make it difficult to implement on appropriate time scales for sea level rise. There are other options for defeasible estates, but Titus (see

resources immediately below) recommends the reverter option as the best.

Resources for more information

- Titus, J.G., 2011. *Rolling Easements*. *Climate Ready Estuaries*, EPA, available at: http://www.epa.gov/cre/downloads/rollingeasementsprimer.pdf.

3.2.4 Meander Easements

Meander easements are river corridor easements that allow for rivers to migrate back and forth within a floodplain corridor. These are often more effective in upper river reaches where there may be more agricultural or undeveloped land.

In placing a meander easement on land adjacent to a river, the landowner agrees not to build any permanent structures in the easement corridor and not to manage or attempt to control the course of the river. Riprap and other structural efforts are prohibited. Essentially, the land owner agrees to allow the river to naturally meander, even if it means that the meander temporarily takes land away from the property owner.

Streams that meander have the ability to slow floodwaters and can reduce the amount of energy and water heading downstream when it rains. Thus, it is important to prevent channeling rivers and allow for meandering. In addition to providing flood storage benefits, meander easements can also provide important habitat for wildlife and increase attenuation of chemicals such as phosphorus.

Resources for more information

- Vermont River Conservancy website available at: http://www.vermontriverconservancy.org/.

- Vermont Land Trust website available at: http://www.vlt.org/land-weve-conserved/recent-projects/sw-projects.

Examples

- The State of Vermont identifies important reaches and Vermont River Conservancy works with the landowners in these areas to establish meander easements. The Vermont River Conservancy then owns the right to manage the river and can establish 50 foot buffer zone along stream. The landowners may receive some compensation per acre.
    - *Protecting Land and Water* at the VT River Conservancy, available at: http://www.vermontriverconservancy.org/about-vermont-river-conservancy/protecting-land-and-water.

3.3 Regulatory Strategies

3.3.1 No Adverse Impact as a Performance Standard

Zoning requirements can provide a means for a municipality to encourage low density zoning in the floodplain, prohibit development in hazardous areas, and provide density bonuses to compensate developers for not building in high-risk areas. Regulations can also discourage permanent riverbed stabilization or alteration to ensure rivers can meander naturally.

One principle municipalities may use when including floodplain management provisions in municipal regulations is No Adverse Impact (NAI). NAI is a concept that asserts no new development can increase the likelihood or magnitude of flooding for other properties. It could also be extended to prohibit adverse impacts to the natural functions of floodplain ecosystems. Specifically, NAI is the principle that the action of one property owner may not adversely impact the flooding risk for other property owners, as measured by increased flood stages, flood velocity, flows, or the increased potential for erosion and/or sedimentation.

To implement such a principle, municipalities can require that all new development demonstrate, through engineering studies, that it will not cause a significant increase in flooding levels, such as by increasing the amount of impervious surface in a watershed. One standard is to show that the development will not increase water surface elevation of the 100-year floodplain more than five hundredths of a foot. This can be accomplished though on-site management of stormwater runoff. A less stringent version of this approach requires new development to first attempt to

avoid, then minimize, and then mitigate impacts to floodplains and properties caused by development. Alternatively, new development could be required to provide compensatory storage at a 1:1 ratio for volume of flood storage lost in the floodplain. Finally, a corollary to this would be to structure funding programs to reward those who take positive actions and penalize those who take risky actions so that those communities or individuals who increase flood risks do not externalize those costs on other communities and/or tax payers.

Resources for more information

- Larson, L. and D. Plasencia. (2001) *No Adverse Impact: A New Direction in Floodplain Management Policy*, *Natural Hazards Review*, Nov. 2001, IAAN 1527-6988, available at: http://www.floods.org/NoAdverseImpact/NAIjournal.pdf.

- Association of Floodplain Managers*, No Adverse Impact in the Coastal Zone*, available at: http://www.floods.org/index.asp?menuid=340.

- Massachusetts Office of Coastal Zone Management, *Stormsmart Coasts*, available at: http://www.mass.gov/czm/stormsmart/other/nai_home.htm.

- ASFPM, No *Adverse Impact: A Toolkit for Common Sense Floodplain Management*, available at: http://www.arkansasfloods.org/afma/docs/cfm/ASFPM-NAI-Toolkit.pdf.

3.3.2 Freeboard and Setback Requirements

Freeboard and setback requirements can be implemented in zoning regulations to decrease the possibility of damage in a floodplain. Freeboard requirements establish a minimum of extra feet development must be constructed above the estimated base flood elevation. Many municipalities have two or three feet minimum freeboard requirements. These requirements provide an added margin of safety for when flood levels rise above the calculated 100-year flood levels.

Setback requirements establish a minimum distance development must be from a flood hazard boundary. Two common setback requirements are setbacks from eroding banks and restrictions on basement construction near the floodplain. Some states recommend that structures be built 50 or 100 feet from the top of smaller stream banks as a minimum setback. However, municipalities should consider more aggressive setbacks for larger rivers or streams collecting drainage from a large watershed or steep slopes.

Resources for more information

- *Preparing for the Next Flood: Vermont Floodplain Management*, Land Use Institute, Vermont Law School (2009), available at: http://www.vermontlaw.edu/Documents/VLS.065.09%20LAND%20USE%20PAPER_PFF.pdf.

3.3.3 Transfer of Development Rights (TDR)

Transfer of Development Rights programs are a tool to direct development away from sensitive areas, or sending areas, to areas where increased density is desirable and can be accommodated, or receiving areas. TDR programs provide municipal governments with a means to limit or prevent development in certain areas while reducing the risks of takings claims.

In the context of floodplain management, TDR programs can be used to move development from floodplain areas to non-floodplain areas. Essentially, property owners in sending zones receive development credits based on the amount of land they own and can sell their credits to property owners in the receiving zones. Property owners in the receiving zone are allowed to develop more densely than current zoning allows when they purchase development credits from landowners in sending zones.

There are several necessary elements for a successful TDR program, including a clear and valid public purpose and visibly defined sending and receiving areas. A TDR program must also be consistent with the comprehensive plan, development

rights must be recorded through a conservation easement, and uniform standards must exist for development rights. Finally, there must be sufficient planning for public facilities and economically viable development in receiving areas to accommodate an increase in development.

Connection to new maps: The new maps could help to identify both sending and receiving areas.

Resources for more information

- Land Use Law Center, Pace University School of Law, *Local Response to Sea Level Rise*, available at: http://www.csc.noaa.gov/digitalcoast/inundation/_pdf/Pace_Final_Report.pdf.

Examples

- Collier County, Florida, instituted a TDR program establishing an overlay zone including 80% of the county. This required property owners in sending areas to create a conservation easement, or deed the land to the county, in exchange for development credits in receiving areas. The County has 3,450 acres of land protected.[119]

- Montgomery County, Maryland, implemented a successful TDR program that protects 68,000 acres of land and has substantial public support. It has created large and multiple receiving areas and includes a bonus density for using TDRs that significantly exceed base zoning density. Moreover, TDRs are the only way density can be increased in receiving areas. The demand and supply of TDRs are carefully balanced and permanent easements protect sending sites.[120]

- On Long Island, New York, the Central Pine Barrens Joint Planning and Policy Commission initiated a TDR program, which has designated 55,000 acres as a

[119] Collier County Land Development Code Chapter 2 § 2.03.07(D)(4), available at: http://library.municode.com/HTML/13992/level2/CH2ZODIUS_2.03.00ZODIPEUSACUSCOUS.html#CH2ZODIUS_2.03.00ZODIPEUSACUSCOUS_2.03.07OVZODI.
[120] Montgomery County Code Chapter 59-C- §1.33, available at: http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:montgomeryco_md_mc.

core conservation area, or sending area. The program allocates credits based on development yield of property under applicable zoning and has created a demand in receiving sites that exceeds credits generated in sending sites by a 2.5 to 1 ratio to create sufficient competition. The state (for consistency) created a TDR bank and allocated money to establish an initial market for credits.[121]

- Raleigh, North Carolina, is currently mapping for future-conditions in floodplains. The hydraulic modeling will cover 175 square miles of drainage area and 140 linear miles of stream and includes analysis of proposed future condition land use from the comprehensive plan and zoning coverage. The City expects to submit the final product to FEMA to include in the DFIRMs for the entire City.[122]

3.3.4 Non-Conforming Uses

The purpose of non-conforming use provisions is to eventually bring all uses in an area into compliance with the zoning regulations. In practice, non-conforming use ordinances can terminate a pre-existing use after passage of a stipulated amount of time, limit the expansion or enlargement of a use, disallow reestablishment of nonconforming uses after they have been discontinued for a time, or prohibit reconstruction of damaged structures.

In the context of floodplain management, non-conforming use language should require buildings in the floodplain to come into compliance with floodplain standards when a substantial improvement is made. It could also prevent significant expenditures on repairs when a significant portion of the property has been destroyed or needs repair. It could also require discontinuance of uses over time through amortization provisions. The NFIP does not recognize non-conforming uses. When a structure has been substantially improved or damaged it must be brought into compliance with the floodplain according to FEMA regulations.

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[121] Pine Barrens Credit Program website, available at: http://pb.state.ny.us/chart_pbc_main_page.htm#Plan_and_Handbook.
[122] Raleigh, NC Future Conditions Floodplain Mapping Project website, available at: http://www.raleighnc.gov/services/content/PWksStormwater/Articles/FutureConditionsFloodp.html.

Resources for more information

- Land Use Law Center, Pace University School of Law, Local Response to Sea Level Rise, available at: http://www.csc.noaa.gov/digitalcoast/inundation/_pdf/Pace_Final_Report.pdf.

Examples

- Chatham, Massachusetts, created a Conservancy Districts Overlay zone where all residential dwelling units are prohibited, no building is allowed in FEMA-designated V and V1-30 zones, and pre-existing structures are subject to non-conforming use provisions.[123]

- Soldier's Grove, Wisconsin, relocated its entire downtown uphill due to a state law that required floodplain ordinances limit the amount of money that could be spent repairing buildings in the floodplain, as well as other factors. The Wisconsin law specifically prohibits residential structures in the floodway, imposes strict development requirements for development in the flood fringe, and requires that non-conforming structures meet standards if they are destroyed substantially by floods.[124]

3.3.5 Amendment of Flood Insurance Rate Maps

A number of communities in New Hampshire have adopted flood-related regulations to reduce flood risk, which go above and beyond the National Flood Insurance Program requirements. A community cannot broaden the area covered under the NFIP by amending the Flood Insurance Rate Maps (FIRM) for the community. To initially qualify for federally-backed flood insurance under the NFIP, communities must "adopt and submit" floodplain management regulations to the Federal Insurance Administrator. Once a community joins the NFIP, they must regulate any development in the special flood hazard areas shown on the community's FIRM. The FIRM is used for floodplain management purposes and for flood insurance purposes.

[123] Chatham Massachusetts Zoning Bylaw, Section IV Overlay Districts (4), available at: http://www.chatham-ma.gov/Public_documents/chathamma_CommDev/ZBylaw.pdf.
[124] Wisconsin's Floodplain Management Program, Chapter NR 116.12 (*et seq.*), available at: http://legis.wisconsin.gov/rsb/code/nr/nr116.pdf.

After the FIRM has been established, municipalities can petition the Flood Insurance Administrator to amend them. There are two justifications identified in the statute for municipalities to petition for a FIRM amendment. The first is for a mistake, either a mathematical or mapping error or physical changes to river channel. The second is the availability of improved data.

There are a few ways that a municipality can request revisions to their community's FIRMs. It can be done during the FIRM's initial appeal period or through a Letter of Map Change process. The requirements and the process for theses revision are detailed in Chapter 44 of the Code of Federal Regulations.[125]

3.4 Liability Issues

3.4.1 Real Estate Disclosure and Acknowledgement of Risk

One way to increase knowledge of the risks associated with building and living in the floodplain is to require disclosure of these risks in real estate transactions. For example, local governments can require developers to show, through engineering studies, that the development will be protected from floods for the expected lifetime of the building. An important goal of floodplain regulation is to increase personal responsibility for flood risk. This goal is especially important for new development and properties that have been flooded multiple times. However, it is less appropriate for existing development, which may have been built before flooding risks were fully understood.

Resources for more information

- Land Use Law Center, Pace University School of Law, Local Response to Sea Level Rise, available at: http://www.csc.noaa.gov/digitalcoast/inundation/_pdf/Pace_Final_Report.pdf.

Examples

[125] 44 CFR 65.9.

- Malibu, California, requires developers to prove that banks will provide debt financing, which expresses the bank's willingness to take the risk of the developer. Approval of development is also based on several conditions that must be recorded as deed restrictions, including that developers:
    - Acknowledge and assume risk and waive future claims of damage or liability;
    - For shoreline protection structures, no future repair, maintenance, reinforcement, etc. is allowed that extends the structure seaward;
    - If geologic or engineering evaluations conclude that development can be sited in a way such that shoreline protection is not necessary, then no shoreline protection shall be used.[126]

[126] Malibu Local Coastal Program, Land Use Plan Chapter 4(C)(3) 4.42, available at: http://qcode.us/codes/malibu-coastal/.

4. Legal Authority

Do New Hampshire communities have the legal authority under state planning and zoning enabling legislation, or other state legislation, to design and implement regulatory controls based on current and predicted environmental conditions, specifically projected flooding levels?

4.1 Introduction

New Hampshire is a Dillon's Rule state. The Dillon's Rule doctrine states that "a unit of local government may exercise only those powers that the state expressly grants to it."[127] Thus, a New Hampshire municipality has no "inherent right of local self-government" and "generally no power to pass a given ordinance without express permission from the legislature to do so."[128] Express permission is given in the form of enabling statutes.

Section 4.2 identifies cases in which the New Hampshire Supreme Court has either upheld a town's ordinance as within the enabling legislation or ruled that the town exceeded its enabling authority. Section 4.3 identifies specific enabling statutes that may provide the legal authority for towns to regulate development within a floodplain. Section 4.4 discusses the scope of the police power and preemption, two issues that may affect a town's authority to enact regulations.

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[127] BLACK'S LAW DICTIONARY (9th ed. 2009). *See also*, City of Clinton v. Cedar Rapids & Mo. R.R. Co., 24 Iowa 455 (1868).

[128] *See* 1 J. DILLON, THE LAW OF MUNICIPAL CORPORATIONS §§ 98, 237 at 154, 448-49 (5th ed.1911). In contrast to Dillon's rule, home rule is defined as "the transfer of power from the state to units of local government for the purpose of implementing local self-government." Home rule provides local governments a degree of freedom from state interference as well as some ability to exercise powers and perform functions without a prior express delegation of authority from the state. Dillon's Rule. . . and the *Birth of Home Rule*, by Diane Lang, Assistant Information Services Director, reprinted from *The Municipal Reporter*, December ,1991, available at http://www.nmml.org/files/2008/01/dillon.pdf. Although Chapters 49-B, 49-C, and 49-D of the New Hampshire Revised Statutes are titled "Home Rule – Municipal Charters," "Local Options – City Charters," and "Local Options – Town Charters," these titles do not indicate that New Hampshire is a Home Rule state ("Nothing in these statutes allows a municipality to add to their authority or reduce their responsibilities under other laws."). These misleading titles simply give a New Hampshire municipality the "authority to determine the form of [its] local government but not the substance." *See* C. CHRISTINE FILLMORE, LEGAL BRIEFS - HOME RULE: DO NEW HAMPSHIRE TOWNS AND CITIES HAVE IT?, New Hampshire Legal Government Center (2010) (citing Girard v. Allenstown, 121 N.H. 268, 272-273 (1981)), available at http://www.nhlgc.org/attachments/services/legal/LegalBriefs_home_rule.pdf.

4.2 Court Decisions on Exceeding Authority Under an Enabling Statute

Towns have only the power delegated to them by the state and "[m]unicipalities that attempt to exercise this delegated power can only do so in a manner that is consistent with the provisions of the enabling statute."[129] If an ordinance is challenged as being in excess of a municipality's delegated powers, "[t]he party attacking the validity of a town zoning ordinance . . . has the burden of proving the invalidity of the ordinance or regulation."[130]

The following are examples of cases where the court either upheld a town's ordinance as within the enabling legislation or ruled that the town exceeded its enabling authority.

4.2.1 *Durant v. Town of Dunbarton*

In the case of *Durant v. Town of Dunbarton*, the New Hampshire Supreme Court looked at whether the regulation of septic tanks and sewerage fell under a specific enabling statute. Under R.S.A. 36:19, municipalities grant planning boards discretionary authority to approve subdivision plans if they have adopted subdivision regulations.[131] Here, the planning board denied a subdivision plan. The board relied on a regulation that discouraged the creation of " [l]and of such character [which] cannot be safely used for building purposes because of exceptional danger to health or peril from fire, flood or other menace." The court found regulation of septic tanks to fall within the purview of RSA 36:91, stating the "statutory delegation under RSA 36:91 is quite broad."[132] The court went on to say:

> The regulation is patterned after the enabling statute. Its obvious purpose is to give the board maximum flexibility to deal with aspects of development that could adversely affect public health and safety. Under its subdivision regulation a planning board may consider any characteristics of the land that relate to the current and future fitness of the land for building purposes. In evaluating a subdivision plan a board must consider current as well as anticipated realities.[133]

[129] Town of Tuftonboro v. Lakeside Colony, 119 N.H. 445, 448 (N.H. 1979).
[130] Town of Nottingham v. Harvey, 120 N.H. 889, 892 (N.H. 1980).
[131] 121 N.H. 352 (N.H. 1981).
[132] *Id*. at 355.
[133] *Id*. at 356.

The court also held that even though the regulations were less specific with regard to the potential for flood hazards, they were within the scope of enabling legislation.[134] The court stated that, "[w]ater courses over land clearly affect the desirability and suitability of construction on a particular piece of property, and consideration of such factors is within the ambit of the board's delegated authority."[135] This language supports the proposition that a town could deny a subdivision plan based on the potential future impacts of development.

4.2.2 *Town of Tuftonboro v. Lakeside Colony*

In the case of *Town of Tuftonboro v. Lakeside Colony*, the New Hampshire Supreme Court held that the town exceeded its enabling authority.[136] This case involved a corporation (Lakeside) that purchased 2.5 acres of lakefront property with 15 structures (cottages) from a private landowner.[137] After purchasing the property, Lakeside sold 1,500 shares of its stock to the Harrington Corporation.[138] The agreement stated that the Harrington Corporation would sell the shares in blocks of 100 and that each purchaser would then have the use of a specific cottage.[139] The stock purchasers would not own the cabin but would have full use of it and only pay maintenance costs.[140] When the town found out about this agreement they sought an injunction to force Lakeside to file a subdivision application.[141] The town had included in its definition of subdivision any divisions of land for leasing agreements.[142] This added language was more expansive than the state's enabling authority definition of what constitutes a subdivision [143] and therefore the developer argued that the town exceeded its enabling authority to regulate subdivisions.[144] The court agreed, stating, "[m]unicipalities taking advantage of the powers granted by the statute are bound by the legislative definition . . . [t]hey have no power to expand the statutory definition of

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[134] *Id*.
[135] *Id*.
[136] 119 N.H. 445, 449 (1979).
[137] *Id*. at 447.
[138] *Id.*
[139] *Id*.
[140] *Id*. at 448.
[141] *Id*.
[142] *Id*.
[143] N.H. REV. STAT. ANN. § 36:1 now N.H. REV. STAT. ANN. § 672:14.
[144] *Id*.

subdivision."[145] This case illustrates that when it is very clear what the legislature intended, towns may not exceed that authority. When the legislature establishes a specific definition of an activity subject to regulation, it will be hard for a town to adopt a more expansive definition..

4.2.3 *Chiplin Enterprises v. City of Lebanon*

Another case illustrating the limits of a municipality's ability to interpret enabling legislation is *Chiplin Enterprises v. City of Lebanon*.[146] In this case the plaintiffs appealed from a planning board decision denying their request to develop an apartment complex.[147] The plaintiff went before the board for site plan review and received preliminary approval pending a public hearing.[148] At the hearing, many concerns were raised regarding traffic problems, and the petition was denied for safety reasons.[149] The plaintiff then introduced a new proposal, which was also denied.[150] The plaintiff then challenged the ordinance as being outside the town's enabling authority.[151] The plaintiff argued that including residential property under site plan review was not within the statutory grant of power.[152] The statute at the time only allowed municipalities to conduct site plan review of non-residential uses.[153] However, the town ordinance required site plan review of any permitted use.[154] The court held that the town had exceeded its enabling authority by expanding upon the definition of uses subject to site plan review under state law .[155] This is another example of how a court will look very critically at a municipality's attempt to enact ordinances that exceed an express grant of power. It was very clear here that the enabling statute only allowed towns to conduct site plan review on non-residential developments. The court stated that, "[w]hile municipalities may have implied powers incidental to an express grant,

[145] *Id*. at 449.
[146] 120 N.H. 124 (N.H. 1980).
[147] *Id*. at 124.
[148] *Id*.
[149] *Id*.
[150] *Id*. at 125.
[151] *Id*.
[152] *Id*.
[153] *Id*.
[154] *Id*.
[155] *Id*.

they are bound by the plain meaning of the language used."[156] When statutory language is clear, towns must respect the limits of their authority.

It is important that a municipality must identify and clearly state which state enabling authority an ordinance falls under. A municipal ordinance lacking clear reference to, or outside the scope of, an enabling statute may be struck down.[157]

4.3 N.H. Enabling Statutes

There are several statutes that may give a New Hampshire municipality the authority to enact regulations related to increased flooding levels. Municipalities in New Hampshire enjoy a presumption that their ordinances are within the enabling authority. "When a municipal ordinance is challenged, there is a presumption that the ordinance is valid and, consequently, not lightly to be overturned."[158] Choosing the appropriate enabling statute depends on the substance of the proposed ordinance. The following is a list of statutes that may provide the legal authority to regulate within a floodplain:[159]

- RSA 674:16(II) – "Flexible and Discretionary" Zoning
- RSA 674:21(j) – "Environmental Characteristics" Zoning
- RSA 674:56 (I) – Floodplain Zoning
- RSA 674:56 (II) – Fluvial Erosion Hazard Zoning
- RSA 674:57 – FEMA Flood Maps
- RSA 483:10 – Rivers Corridor Management Plans
- RSA 483-B:9 – Minimum Shoreland Protection Standards
- RSA 674:55 – Wetland Regulations
- RSA 149-I:1 – Stormwater Utilities
- RSA 674:21 – Conservation Overlay Zoning

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[156] *Id*.
[157] *See* Beck v. Town of Raymond, 118 N.H. 793, 799 (1978), where the N.H. Supreme Court struck down a town "slow-growth" ordinance, because the ordinance, which affected every property in town, was enacted pursuant to the town's police powers under RSA 31:39, rather than the town's zoning authority under RSA 31:60.
[158] Town of Nottingham v. Harvey, 120 N.H. 889, 892 (N.H. 1980).
[159] A more in-depth discussion on each of these statutes is included below.

4.3.1 "Flexible and Discretionary" and "Environmental Characteristics" Zoning

Chapters 672 through 678 of Title LXIV of the New Hampshire Revised Statutes govern planning and zoning in New Hampshire. Section 674:16 grants "the local legislative body of any city, town, or county . . . [the authority] to adopt or amend a zoning ordinance . . . for the purpose of promoting the health, safety, or the general welfare of the community."[160] In addition, a municipality has "the power to adopt innovative land use controls" including "flexible and discretionary zoning" and "environmental characteristics zoning."[161] According to a handbook prepared by the State Department of Environmental Services, the innovative land use provisions in RSA 674:21 enabled a New Hampshire municipality to enact floodplain and fluvial erosion hazard ordinances before the legislature enacted specific floodplain and fluvial erosion hazard enabling legislation.[162] Presumably the "flexible and discretionary" and "environmental characteristics" zoning provisions allowed for these ordinances, but New Hampshire law does not define "flexible and discretionary" and "environmental characteristics" zoning.

4.3.2 Floodplain and Fluvial Erosion Hazard Zoning

To clarify a municipality's authority to adopt or amend a zoning ordinance relating to flood hazards, RSA 674:56 was enacted by the legislature in 2006.[163] "As part of their enrollment in the National Flood Insurance Program (NFIP),[164] municipalities may adopt floodplain ordinances either as an amendment to an existing zoning ordinance or as a separate

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[160] N.H. REV. STAT. ANN. § 674:16(I) (2011).
[161] N.H. REV. STAT. ANN. § 674:16(II) and 674:21(I)(i)-(j) (2011).
[162] *Innovative Land Use Planning Techniques – A Handbook for Sustainable Development*, DES, 270 (October 2008) and *Chapter 2.9 – Fluvial Erosion Hazard Area Zoning*, DES, 10 (September 2010), available at http://www.des.state.nh.us/organization/divisions/water/wmb/repp/documents/ilupt_complete_handbook.pdf and http://www.des.state.nh.us/organization/divisions/water/wmb/repp/dcouments/ilupt_chpt_2.9.pdf.
[163] N.H. REV. STAT. ANN. § 674:56 (2011).
[164] *The Flood Insurance and Mitigation Administration (FIMA), a component of the Federal Emergency Management Agency (FEMA), manages the National Flood Insurance Program (NFIP),* FEMA, available at http://www.fema.gov/about/programs/nfip/index.shtm. "Nearly 20,000 communities . . . across the United States . . . participate in the NFIP by adopting and enforcing floodplain management ordinances to reduce future flood damage." *Id.* "In exchange, the NFIP makes Federally backed flood insurance available to homeowners, renters, and business owners in these communities." *Id*. "Community participation in the NFIP is voluntary." *Id.*

ordinance."[165] In addition, if "a municipality has enrolled in the NFIP, special flood hazard areas shall be as designated on flood insurance rate maps (FIRMs) issued by the Federal Emergency Management Agency (FEMA)."[166] Municipalities not enrolled in the NFIP may use the enabling authority in RSA 674:21, I (j) (Environmental Characteristics Zoning) to enact floodplain management ordinances.

Recognizing that fluvial erosion also creates flood hazards, the New Hampshire legislature amended RSA 674:56 in 2009, enabling a municipality to "adopt a fluvial erosion hazard ordinance . . . as an amendment to an existing zoning ordinance or as a separate ordinance."[167] Unlike a municipal floodplain ordinance, which must be based on FIRM maps, according to the terms of the enabling legislation, "fluvial erosion hazard zoning shall be based on [a] delineation of zones consistent with any fluvial erosion hazard protocols established by the department of environmental services, in effect on the date of its adoption."[168] The plain difference in statutory language between the provision authorizing fluvial erosion hazard maps and the provision authorizing floodplain maps further suggests that DES's interpretation of the floodplain authorizing legislation is overly broad.

4.3.3 River Corridor Management Plans

Rivers Corridor Management Plans give a municipality the ability to regulate areas in the river corridor. DES guidance defines the floodplain as,

> [t]he area of land adjoining the designated portions of the river and tributaries which will be inundated by a flood which has a one (1) percent chance of occurring or being exceeded in any given year (100-year floodplain) as determined by competent hydrologic studies; or in the absence of such detailed floodplain studies, those areas which have a history of flooding or are delineated by the best available information on flooding in the area.[169]

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[165] N.H. REV. STAT. ANN. § 674:56(I) (2011). A section on preemption is found later in this document.
[166] N.H. REV. STAT. ANN. § 674:57 (2011).
[167] N.H. REV. STAT. ANN. § 674:56(II)(a) (2011).
[168] N.H. REV. STAT. ANN. § 674:56(II)(b) (2011).
[169] Available at http://des.nh.gov/organization/commissioner/pip/publications/co/documents/r-co-97-3.pdf (see page G-76).

The lack of reference to the FEMA floodplain maps suggests that any competent hydrologic study should suffice to determine the 100-year floodplain, and thus the area that can be regulated.

4.3.4 Minimum Shoreland Protection Standards

Minimum Shoreland Protection Standards are designed to minimize shoreland disturbances. Even though the program is administered by the state, municipalities do have the authority to adopt regulations more stringent than the minimum states standards. In Section 483-B:9(V), the statute states that the requirements are the minimum standards that shall apply. A municipality may enact stronger standards under this law. However, the scope is limited.[170] The reference line would be the ordinary high water mark for rivers.[171]

4.3.5 Wetland Regulations

Municipalities in New Hampshire have the ability to "enact regulations based on consideration of environmental characteristics, vegetation, wildlife habitat, open space, drainage, very promising potential for flooding, and protection of natural resources . . ."[172] The statute further gives municipalities the authority to define and delineate resources in a manner different from the common meaning and delineation of wetlands required by the rest of the statute.

4.3.6 Conservation Overlay Zoning

Conservation Overlay Zoning appears to be mainly used for historic purposes. However, at least one community in New Hampshire combined this statute with RSA 674:16 to create a Wetlands Conservation Overlay Zoning district.[173]

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[170] N.H. REV. STAT. ANN. § 483-B:9(V). The main part of this statute only applies within 50 feet of the reference line.
[171] N.H. REV. STAT. ANN. § 483-B:4(XVII)(C).
[172] N.H. REV. STAT. ANN. § 674:55.
[173] *See* Town of Wolfboro, available at http://www.epa.gov/safewater/sourcewater/pubs/techguide_ord_nh_wolfeboro_wetlandconsoverlay.pdf.

4.3.7 Supporting Documentation Speaks to Reasonableness of Municipalities Decision

When making a decision, a municipality should feel free to draw upon trusted sources of information. Respected studies, publications, and professional opinions should help to show that the municipality's decision is informed and reasonable. This supporting documentation could also take the form of an agency guidance document.

It appears that having an agency document speak to the municipality's actions will help to show that the municipality's interpretation and actions are reasonable. In the case of *Derry Senior Development v. Town of Derry*, the court held that approval by New Hampshire DES created a presumption that the proposed action was safe and adequate.[174] In this case, a developer filed for initial site plan review in order to construct an independent adult community.[175] Before submitting the application the developer had obtained approval for the project from other government entities, including DES.[176] The town opposed the proposed development in part because the size of the sewer pipes was not large enough.[177] The town listened to statements from residents that there had been problems with sewer pipes in the past, and they wanted these to be larger in diameter.[178]

The developer argued that since the town did not have specific requirements, the approval by DES should be a prima facie proof that the proposed system was sufficient.[179] The court agreed stating that "the board may not deny approval on an ad hoc basis because of vague concerns . . . [w]here, as here, another agency's approval creates a presumption that the proposal protects the public interest, the record must show . . . concrete evidence indicating that following the agency's determination in the particular circumstances would pose a real threat to the public interest."[180] Although the relevant ordinance does not expressly state that agency approval constitutes proof of adequacy of a sewage system, the court found the language of the ordinance – "'an on-site subsurface sewage disposal system may be designed and constructed *as long as* said design and construction fully complies with all

[174] 157 N.H. 441, 451 (N.H. 2008).
[175] *Id*. at 443.
[176] *Id*. at 444.
[177] *Id*.
[178] *Id*. at 445.
[179] *Id*. at 446.
[180] *Id*. at 451.

requirements of the New Hampshire Code of Administrative Rules; and the applicant has secured appropriate permits for the same from [DES]'" – creates such a presumption.[181]

In a recent unreported case, *Limited Editions Properties v. Town of Hebron*, the New Hampshire Supreme Court reemphasized the importance of an ordinance's language in creating a presumption of validity, stating that "it was the language of the town ordinances themselves that created that presumption" and "[t]he presumption does *not* . . . attach automatically."[182] Therefore, as these cases demonstrate, the use of an agency guidance document may speak to the reasonableness of a municipality's actions but only if the agency decision is referenced in the language of the ordinance.

4.4 Additional Considerations for Legal Authority

4.4.1 Police Powers

State enabling legislation grants towns the general powers necessary to make by-laws to protect health, welfare, and public safety. These general powers are referred to as the police power and are reserved to the states by the Tenth Amendment of the U.S. Constitution.[183] The New Hampshire legislation has granted municipalities police power through Section 674:16 (formerly 31:60). This grants "the local legislative body of any city, town, or county . . . [the authority] to adopt or amend a zoning ordinance . . . for the purpose of promoting the health, safety, or the general welfare of the community."[184] Municipalities have relied on this broad police power provision to justify a range of ordinances.

For instance, an ordinance that regulated height and space between buildings was upheld as a valid exercise of police power, because the municipality adopted it to protect the aesthetics of the town and prevent unsafe congestion.[185] Setback ordinances, as well as

[181] *Id*. at 450 (quoting LDCR § 170-66(A)(1)) (emphasis in original).
[182] Limited Edition Properties, Inc. v. Town of Hebron, 162 N.H. 488, 494 (N.H. 2011) (emphasis in original).
[183] U.S. CONST. amend. X, *see also* Brown v. Maryland, 25 U. S. 419, 443 (1827).
[184] N.H. REV. STAT. ANN. § 674:16(I) (2011), N.H. REV. STAT. ANN. § 31:39.
[185] Piper v. Meredith, 110 N.H. 291, 297 (N.H. 1970).

ordinances regulating space between buildings, have also been held generally to come within this police power of towns.[186]

However, the police power is not unlimited. When the "gain to the public is slight but the harm to the citizen and his or her property is great, the exercise of the police power becomes arbitrary and unreasonable and this court will afford relief under the constitution of this statute."[187] To determine whether an ordinance is arbitrary and unreasonable, the court will balance "the injury or loss to the landowner against the gain to the public."[188]

In *Beck v. Raymond*, the court addressed the limit on a municipality's police power.[189] The Town of Raymond's slow-growth ordinance allowed landowners who own fifty or more acres a year to be issued four permits, those who own between twenty-five and fifty could get three permits, those who own between ten and twenty-five could get two permits, and those who own less than ten could get one permit.[190] The plaintiff, a developer, applied for five permits and was only granted four.[191] The developer questioned whether the ordinance was a valid exercise of the police power delegated to a municipality pursuant to RSA 31:39. The lower court upheld the Town of Raymond's ordinance as a valid exercise of the police power. The Supreme Court, however, stated that, "the authority to enact land use restrictions is embodied in the power to zone under RSA 31:60."[192] The court further stated that

> while municipalities are accorded fairly wide latitude in using their general police power to develop limited types of land use controls, the general police power delegated to a municipality pursuant to RSA 31:39 may not be used as a usual and expedient mechanism for effecting zoning regulations which would otherwise fall within the scope of RSA 31:60-89.[193]

The *Beck* court articulated the following test for determining whether a land use regulation may be enacted by a town under the general police power without compliance with the

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[186] *Id.* at 295.
[187] *Id.* (citing Buskey v. Town of Hanover, 133 N.H. 318, 323 (1990)). *Id.* (citing *Buskey* 133 N.H. at 323).
[188] *Id.*
[189] Beck v. Raymond, 118 N.H. 793, 798 (N.H. 1978).
[190] *Id*. at 795.
[191] *Id*.
[192] *Id*. at 796.
[193] *Id*. at 798.

zoning enabling act: "[t]he court must consider the nature and purpose of the regulations, their relationship if any to a general plan of development, their comprehensiveness, their effect on property values and property rights, and the situation surrounding their passage."[194] The Court has stated that

> [i]f [the police power] is to serve its purpose, in the face of the magnitude and rapidity of the changes occurring today, it must be of a flexible and expanding nature to protect the public against new dangers and to promote the general welfare by allowing for different methods than those formerly employed.[195]

In the case of *Goffstown v. Thibeault*, the town adopted an ordinance that prohibited the sale of earth removed from any parcel of land located within the town.[196] Thibeault was arrested for selling gravel he excavated from a pit that had operated for over twenty-five years. He argued that the ordinance restricting the use of his land must be adopted under the statutory grant of zoning authority. The court disagreed and stated, "if a land use regulation is not intended to act as part of a comprehensive regulatory scheme, and does not substantially infringe on the rights of property owners, it is not considered to be an ordinance that must be adopted pursuant to the zoning enabling legislation."[197] The court found "the regulation of earth excavation [i]s an exercise of the police and general welfare powers of the towns, exclusive of the authority granted by the zoning enabling legislation."[198]

Courts may find ordinances valid under this broad police power provision if the ordinance was designed to promoting the health, safety, or general welfare of the community.

4.4.2 Preemption

Enabling statutes give municipalities the power to regulate certain types of behavior. At times, the state and federal government may be regulating similar types of behavior. If a

[194] Id. at 798.
[195] Opinion of the Justices, 103 N.H. 268, 270 (1961).
[196] Goffstown v. Thibeault, 129 N.H. 454 (1987).
[197] *Id*. At 457.
[198] *Id*.

municipality's regulations conflict with a state or federal law, the municipal regulation will be displaced or "preempted".

The New Hampshire Supreme Court has articulated that "[a] planning board is not bound by a determination of another agency . . . and is free to enact more exacting or protective standards."[199] For example in *Thayer v. Town of Tilton*, the court held that a state regulatory scheme enacted under RSA chapter 485-A related to sludge was not so comprehensive and detailed as to suggest a legislative intent to preempt all municipal regulation of sludge.[200]

However, as indicated in *Derry*, if a municipality fails to enact any more exacting standards, a rebuttable presumption is created that the state or federal agency regulations will prevail.[201] Despite the applicant's compliance with DES standards, the planning board in *Derry* raised concerns about the safety and adequacy of the septic plan.[202] Although the court recognized the legitimacy of the board's concerns, it found that the failure of the board to specify the more stringent standards in the ordinance precluded the board from raising such concerns during site plan review.[203] As the court stated, "the board here has enacted no other septic system standards guiding applicants as to what, beyond DES approval is required to ensure the safety and adequacy of the proposed sewage disposal system."[204]

Although more protective state or federal regulations often preempt municipal regulations, an applicant cannot rely on agency approval to bypass the permitting process. The New Hampshire Supreme Court stipulated in *Motorsports Holdings, LLC v. Town of Tamworth* that

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[199] Smith v. Town of Wolfboro, 136 N.H. 337, 343 (1992).
[200] Thayer v. Tilton, 151 N.H. 483, 489 (2004). *See also* N. Country Envtl. Servs. v. Town of Bethlehem, 150 N.H. 606, 615 (1984)). The New Hampshire Department of Environmental Services (DES) adopted regulations governing sludge management. Under the heading "Applicability," the regulations provided that: "Nothing in these rules shall be construed to modify or lessen the powers conferred upon local authorities by health and land use enabling statutes, provided however that in all instances the requirements of these rules shall be considered as minimum." *N.H. Admin. Rules, Env-Ws* §§ 803.01, 803.02, 806.08, and 806.11; *N. Country Envtl. Servs.* 150 N.H at 615.
[201] *Derry*, 157 N.H. at 449.
[202] *Id*. at 451.
[203] *Id*. at 450.
[204] *Id*.

compliance with a more stringent state or federal regulation would not supersede the town's requirement that an applicant obtain a special use permit.[205]

Even though the federal government provides a set of minimum floodplain management criteria under 44 CFR §§ 60.1-60.8 (2009), the state and municipalities may create more stringent regulations. In fact, FEMA encourages communities to enact stricter regulations through the Community Rating System.[206] There are several instances where courts have allowed municipal regulations to exceed FEMA standards. For example, courts have allowed municipalities to regulate activities consistent with the 500-year flood rather than the 100-year flood, to prohibit residences in floodplains and to establish more stringent floodway standards, such as preventing activities that would cause substantial increase in flood heights.[207]

4.5 Conclusion

There are many sources of legal authority that may enable municipalities in New Hampshire to design and implement regulatory controls based on current and predicted environmental conditions. Courts frequently find that towns are acting within their enabling authority. Unless a statute specifically describes the limits of the authority and the municipality exceeds their limits, the regulations will be upheld.

It is important that a municipality identify and clearly state which state enabling authority its ordinance falls under. A municipal ordinance lacking clear reference to, or outside the scope of, the proper enabling legislation could have its ordinance struck down.

[205] Motorsports Holdings, LLC v. Town of Tamworth, 160 N.H. 95, 110-11 (N.H. 2010).
[206] The Community Rating System is a voluntary incentive program which recognizes a community's efforts to go above and beyond the minimum NFIP requirements. Exceeding the minimum standards gives a community discounts on insurance premiums. *See* http://www.fema.gov/business/nfip/crs.shtm.
[207] Jon A. Kusler, *Common Legal Questions About Floodplain Regulations in the Courts 2003*. Update, available at http://www.floods.org/NoAdverseImpact/FLOODPLAIN_REG_IN_COURTS_050604.pdf.

5. Legal Standards

What legal standard of scientific and technical reliability must planners and other officials meet in order to support regulatory measures that are based on current and future—as opposed to past—environmental conditions?

5.1 Introduction

Climate science may be challenged in court and during administrative hearings as being unreliable. For certain types of legal proceedings there are strict rules for the admissibility of scientific evidence. For example, a court might ask if the science has been subject to peer review or if the science is generally accepted within the relevant scientific community. The municipalities within the Lamprey River Watershed may rely in part on new climate maps to justify the enactment of new regulations. Given the susceptibility of climate data in court, it is important to know whether climate data could be questioned if an ordinance based on climate data is challenged. As explained below, scientific evidence is generally not needed to justify the enactment of ordinances. The type of evidence a court looks at will depend on the cause of action or manner in which a municipality's ordinance is being challenged.[208] This section will introduce the various substantive claims a citizen could bring against a municipality to vacate an ordinance and the evidence a court will likely consider for each of these claims.

Substantively, a citizen could claim the ordinance violates the federal or state constitution. Not all laws are created equal; there is a hierarchy among laws that generally goes as follows: (1) the United States Constitution as applied to the states through the Fourteenth Amendment, (2) federal statutes, (3) the state's constitution, (4) the state statutes, and (5) a municipal ordinance. A municipal ordinance is at the bottom of the totem pole, so to speak, and must comply with all

[208] Any aggrieved citizen may bring the challenge. "Aggrieved" is a term of art that means that the ordinance in question has an impact on that particular person.

of the legal authority from above. Section I will address:[209] (1) a substantive due process claim, (2) an equal protection claim, and (3) a charge that the ordinance exceeds the enabling authority.[210] If a citizen brought either a substantive due process claim or an equal protection claim, they would be alleging that the ordinance violates either the state or federal constitutions. If a citizen brought a charge that the ordinance exceeds the enabling authority, they would be alleging it is a violation of state law.

Constitutional challenges include many similar elements. Under either a substantive due process claim or an equal protection claim, a court will review the legitimacy of governmental acts. Courts use a hierarchy of three different tests depending on the constitutional right involved: (1) strict scrutiny, (2) middle-tier scrutiny, and (3) rational basis review. Rational basis review can be thought of as a default standard of review; it is the lowest level of constitutional scrutiny. With rational basis review the court essentially asks whether the ordinance is legitimate or rational. In other words, did the municipality have some good reason for enacting the ordinance?

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[209] A citizen could also allege that the ordinance results in an unconstitutional taking of their property. This claim is addressed in Section 6.

[210] As an initial matter, all challenges to a municipal ordinance would qualify as questions of law, and a court will review a question of law *de novo*. McKenzie v. Town of Eaton Zoning Bd., 917 A.2d 193, 197 (N.H. 2007) (citing Taylor v. Town of Plaistow, 872 A.2d 796 (N.H. 2005). What this means is that a reviewing court need not give any deference to another adjudicatory body's decision. For example, an appellate court, when reviewing a trial court's decision regarding a question of law, need not accept any of the trial court's conclusions and will review the matter as if it was initially brought before them. This means that the reviewing court can come to any conclusion that is supported by the record before it. In addition, when reviewing a trial court's decision, the higher court can address constitutional issues not raised at the trial court level. Cmty. Res. for Justice, Inc. v. City of Manchester, 917 A.2d 707, 714 (N.H. 2007). If a challenger brings any of these claims, the challenge would likely be brought initially before a New Hampshire superior court. As a general rule, a challenger must exhaust their administrative remedies prior to appealing to the courts. *McNamara v. Hersh*, 945 A.2d 18, 20 (N.H. 2008). For example, if a citizen where to apply for a variance under a zoning ordinance, they must first appeal an unfavorable decision to the local body that is designated to hear such an appeal, *e.g.*, the Zoning Board of Adjustment. However, the New Hampshire Supreme Court has held that there are exemptions from this general rule. In *McNamara*, the Court states that "[j]udicial treatment may be particularly suitable when the constitutionality or validity of an ordinance is in question or when the agency at issue lacks the authority to act." *Id.* (citing Metzger v. Town of Brentwood, 343 A.2d 24, 26 (N.H. 1975). Therefore, a challenger would file a claim in the superior court in order to challenge the constitutionality or validity of the floodplain ordinance.

With intermediate scrutiny, the standard is a bit higher. Middle-tier scrutiny requires a substantial reason based on an important governmental interest. In contrast, strict scrutiny is the highest level of review. A law examined under this standard will often be invalidated if there is a less restrictive alternative to achieve the government's goal. It is likely that a court will look at specific scientific data only under a strict scrutiny analysis. Under a strict scrutiny analysis, a court may look at scientific evidence to determine whether the government could achieve its goals in a less burdensome way.

Under a substantive due process challenge, the court will use the rational basis test. Under an equal protection challenge, the court will use the intermediate scrutiny test. If a citizen claims the ordinance exceeds the enabling authority, there is no constitutional right involved and the legal standard is one of statutory interpretation.

5.2 Substantive Due Process: The Rational Basis Test

One avenue for challenging a town's zoning ordinance is to argue that the ordinance violates the Due Process Clause under either the state or federal constitution. In general, for a municipal zoning ordinance to be valid or legitimate, its purpose must promote the general public health, safety, or welfare. "A substantive due process challenge questions the fundamental fairness of an ordinance 'both generally and in the relationship of the particular ordinance to particular property under particular conditions existing at the time of litigation.'"[211] The challenger has the burden to prove the regulation is not rationally related to that purpose. A challenger may argue either that the ordinance is facially invalid (that is, there is no constitutionally permissible application of the ordinance) or the ordinance is invalid as applied (that is, the ordinance is applied to the plaintiff). However, challenging a municipality's floodplain ordinance using either of these arguments would likely fail. The Supreme Court of New Hampshire stated that, "[i]n determining whether an ordinance is a

[211] Dow v. Town of Effingham, 803 A.2d 1059, 1063 (2002) (citing Caspersen v. Town of Lyme, 661 A.2d 759, 763 (1995)).

proper exercise of the town's police power, and thus able to withstand [either a facial or as-applied] substantive due process challenge under the State Constitution, we apply the rational basis test."[212]

Rational basis review is highly deferential to the challenged legislation and the decision maker. According to the New Hampshire Supreme Court, in the context of a zoning ordinance "[t]his inquiry employs the lowest level of constitutional scrutiny, and asks whether the ordinance constitutes a restriction on property rights that is rationally related to the municipality's legitimate goals."[213] In *Boulders*, the court clarified the appropriate inquiry under the rational basis test, stating that "the rational basis test . . . requires that legislation be only rationally related to a legitimate government interest . . . . [It further] contains no inquiry into whether legislation unduly restricts individuals rights, and . . . a least-restrictive-means analysis is not part of this test."[214] Under rational basis review, a court will start with the presumption that "the challenged ordinance is valid."[215] The party challenging the legislation then has the burden of proof.[216]

The *Boulders* case is a particularly useful illustration of the wide latitude afforded towns under rational basis review. In *Boulders*, the town passed a wetlands zoning ordinance that was more restrictive (requiring 100-, 150-, and 200-foot setbacks, depending on soil type) than the minimum setbacks required by the state.[217] At trial, "all of the experts agreed that a less restrictive setback of 75 feet would protect the wetlands in all circumstances."[218] Based on this testimony, the trial court concluded that "'by setting the setback requirements at a distance more severe than any of the experts testified was necessary,' the town's ordinance was arbitrary and

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[212] Boulders v. Town of Strafford, 903 A.2d 1021, 1025 (N.H. 2006) (citing Dow v. Town of Effingham, 803 A.2d 1059 (N.H. 2002)).
[213] *Boulders*, 903 A.2d at 1025 (citing Taylor v. Town of Plaistow, 872 A.2d 769, 769 (N.H. 1996)).
[214] *Boulders*, 903 A.2d at 1029.
[215] Cmty. Res. for Justice, Inc. v. City of Manchester, 917 A.2d 707, 716 (N.H. 2007) (citing Verizon New England v. City of Rochester, 855 A.2d 497 (N.H. 2004)).
[216] *Boulders*, 903 A.2d at 1028 (citing LeClair v. LeClair, 624 A.2d 1350, 1356 (N.H. 1990)).
[217] *Boulders*, 903 A.2d at 1026.
[218] *Id.*

unreasonable."[219] However, the New Hampshire Supreme Court reversed, holding that the ordinance satisfied the deferential rational basis standard. The court stated that the trial court erred by "inappropriately appl[ying] an element of . . . strict scrutiny."[220] The Court said that, "'[w]e will not second-guess the town's choice of means to accomplish its legitimate goals, so long as the means chosen is rationally related to those goals.'"[221] The court specifically criticized the counsel for petitioner's questioning of an expert witness to try to deduce what the proper setback requirement should be: "[t]he problem with this line of questioning is that the ordinances are not required to produce a 'proper' or 'appropriate setback', but rather one that is rationally related to the ends of protecting the wetlands."[222] *Boulders* is illustrative of the degree of discretion extended to municipalities in land use ordinances.

The Supreme Court of New Hampshire, in the 2007 *Community Resources* case, further clarified the limited role of a court in reviewing a zoning ordinance. The court noted that the reviewing courts will not independently examine the factual basis for the ordinance, but "[r]ather, [the court will inquire] only as to whether the legislature could reasonably conceive to be true the facts upon which it is based."[223] As a result, the proffered interests for enacting an ordinance need not be the city's actual interests in adopting the ordinance nor need they be based upon facts.[224]

In *Community Resources*, a private organization that operates halfway houses alleged that the city's ban on correctional facilities violated its substantive due process rights.[225] The court noted that the city articulated several legitimate policy

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[219] *Id.*
[220] Prohibiting the use of a least restrictive means argument is favorable to the municipalities. For example, this prohibition would bar a challenger from arguing that the town could have enacted a floodplain ordinance that achieved the same degree of protection but was less intrusive/restrictive on property owners. *Id*.
[221] *Boulders*, 903 A.2d at 1026–27 (quoting *Caspersen*, 661 A.2d at 764)).
[222] *Id* at 1027.
[223] *Id.* (citing Winnisquam Regional School District v. Levine, 880 A.2d 369 (N.H. 2006) (internal quotation marks omitted)).
[224] *Community Resources*, 917 A.2d at 717.
[225] *Id.* at 716.

concerns that the ordinance conceivably could serve, such as "[c]oncerns that the prisoners to be housed at a residential transition facility would either pose some threat to the surrounding community, engage in recidivism, exacerbate the City's perceived burden in accommodating a disproportionate share of social services or affect surrounding property values."[226] In upholding the ordinance, the court noted that "the City could reasonably conclude these facts to be true, and thus that the ordinance serves or could conceivably serve legitimate governmental interests."[227] The court's analysis in *Community Resources* demonstrates the deference a court must give to a government body acting in a legislative capacity to protect residents from physical harm as well as potential property damage.

As the *Boulders* and *Community Resources* cases suggest, the role of a reviewing court is very limited, and towns enacting zoning ordinances are given much deference. Under the reasoning in *Boulders*, provided the enabling legislation permits the municipalities to act, the court will not submit the factual basis for adopting of an ordinance to searching review. Moreover, the court states that there are "many reasons besides scientific data that a town could posit to justify its zoning ordinances."[228] The court further emphasized the broad discretion given to towns when enacting zoning ordinances by noting that "'any fair reason [that] could be assigned for bringing legislation within [the town's] purview' might be sufficient to save it."[229] For example, the court has held that "aesthetic[230], safety, and planning concerns" are legitimate reasons for an ordinance enacted under the police power.[231] The court has also upheld an ordinance that created a buffer zone for the purposes of avoiding unsightliness, containing noise, and promoting safety concerns.[232] Moreover, in the context of a growth control ordinance, the court has

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[226] *Id*. at 717.
[227] *Id*.
[228] *Boulders*, 903 A.2d at 1030.
[229] *Id.* (citing Sundeen v. Rogers, 141 A.142, 144 (N. H. 1928)).
[230] Moreover, the court in *Asselin* held that "municipalities may validly exercise zoning power *solely* to advance aesthetic values, because the preservation or enhancement of the visual environment may promote the general welfare." *Asselin*, 628 A.2d at 371–72.
[231] *Taylor*, 872 A.2d at 773–74.
[232] *Quirk*, 663 A.2d at 1332.

held that scientific and statistical data "cannot function as the sole guide" in examining the reasonableness of the ordinance and are only "one kind of evidence."[233]

Under these standards a substantive challenge under the Due Process Clause (either facial or as applied) to a municipality's floodplain ordinance would likely fail. As the above analysis suggests, a challenger faces a high hurdle when bringing a substantive due process challenge because the reviewing court's inquiry is limited to asking: (1) whether the municipalities have a legitimate interested in protecting their residents from the hazards of flooding, and (2) whether the ordinance chosen is rationally related to this legitimate interest.[234] In addition, the challenger has the burden of proof. For a facial challenge to succeed, the plaintiff would need to prove that the floodplain ordinance bears no rational relationship to protecting the people in any possible application—a very high hurdle. It is not likely that a challenger could meet this burden. An ordinance restricting development in a project floodplain plainly bears, at the minimum, a rational relationship to protecting residents from the hazards of flood damage. The preceding discussion suggests that the court will not scrutinize the underlying basis for the ordinance chosen by the municipality. An as-applied challenge would be fact-specific and its outcome more difficult to predict. However, the deferential nature of rational basis review suggests that such a claim would likely fail.

A due process challenge to a municipal ordinance based on the NH maps is likely to stress the fact that the ordinance factors in projected future flood levels attributed to climate change. This should only be a cursory concern, as the Supreme Court of New Hampshire has opined that it will not "independently examine the factual basis

[233] Rancourt v. Town of Barnstead, 523 A.2d 55, 59 (N.H. 1986).
[234] *But see Boulders*, 903 A.2d at 1026 (citing *Taylor*, 872 A.2d at 769) (stating that a "rational relation to the town's objective does not make the objective legitimate," rather, "the goal must itself be legitimate, and additionally the means employed by the town must be rationally related to that end").

for the ordinance."[235] What is important for purposes of a substantive due process challenge is "whether the legislature could reasonably conceive to be true the facts upon which it is based."[236] Therefore, the crux of the municipalities' efforts should be aimed at clearly defining their legitimate interest in promulgating such an ordinance and illustrating how these ordinances reasonably relate to that legitimate interest.

5.3 Equal Protection: Intermediate Scrutiny

Although rarely successful, a municipality may face an equal protection challenge to an ordinance under the federal or New Hampshire constitutions**.** An equal protection challenge is "[a]n assertion that the government impermissibly established classifications and, therefore, treated similarly situated individuals in a different manner."[237] In accordance with the New Hampshire Constitution, courts will begin an equal protection analysis by determining the appropriate standard of review by examining the purpose and scope of the classification and the rights affected.[238] Under this initial step, courts have reasoned that by adopting zoning ordinances, municipalities incidentally restrict the right to use and enjoy land. Pursuant to this reasoning, the New Hampshire Supreme Court has ruled that ordinances affect "important substantive rights".[239]

The New Hampshire Supreme Court has ruled that because zoning ordinances effect "important substantive rights," intermediate scrutiny applies to equal protection challenges to ordinances. The Court recently changed its intermediate scrutiny test in order to follow the federal standard of review.[240] In order to meet the current

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[235] *Community Resources*, 917 A.2d at 717 (citing *Appeal of Salem Regional Medical Center*, 590 A.2d 602, 607 (N.H. 1991)).
[236] *Id.* (citing Winnisquam Regional School District v. Levine, 880 A.2d 369, 371 (N.H. 2006) (internal quotation marks omitted)).
[237] Dow v. Town of Effingham, 803 A.2d 1059, 1063 (N.H. 2002).
[238] *In re* Concord Teachers (N.H. Ret. Sys.), 969 A.2d 403, 411 (N.H. 2009).
[239] *Cmty. Res. for Justice, Inc., v. City of Manchester*, 917 A.2d 718 (N.H. 2007).
[240] The overruled intermediate scrutiny test required that legislation be "reasonable, not arbitrary, *and* must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Cmty. Res. for Justice, Inc.*, 917 A.2d at 721.

intermediate scrutiny test, "[t]he challenged legislation [must] be substantially related to an important government objective."[241] The *Community Resources* can only recently clarify the standard governing equal protection claims under the N.H. Constitution, courts have yet to analyze an equal protection challenge to an ordinance under this test.

Despite the lack of case law interpreting this new standard, cases prior to the *Community Resources* decision shed light on how a court would likely rule on an equal protection challenge to an ordinance. *Asselin v. Town of Conway* provides a good example of how a court might determine whether an ordinance is related to a government objective in an equal protection challenge.[242] *Asselin* involved an equal protection challenge by a restaurant owner who wanted to use a readerboard, a sign with letters on a track so they can be easily changed.[243] The application for a readerboard was denied under an ordinance that limited the use of readerboards to theaters and businesses featuring live entertainment.[244] The court held that the ordinance violated the equal protection clause because the ordinance was not substantially related to the town's goals.[245]The court reasoned that readerboards used by restaurants did not impact aesthetics and traffic any more than readerboards used by theaters and business featuring live entertainment.[246] Furthermore, the court reasoned that there was no need for the distinction because the restaurant had the same unique advertising needs as the theaters and businesses featuring live entertainment.[247]

Once the court has determined that the classification made by an ordinance necessitates review under intermediate scrutiny, the burden to demonstrate that

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[241] *Cmty. Res. for Justice, Inc.* 917 A.2d at 721 (citing United States v. Virginia, 518 U.S. 515, 533 (1996)).
[242] Asselin v. Town of Conway, 607 A.2d 132, 133 (N.H. 1992).
[243] *Id*.
[244] *Id*.
[245] *Id.* at 134.
[246] *Id*.
[247] *Id*.

the challenged ordinance passes scrutiny rests with the municipality.[248] The municipality cannot meet this burden by relying on "[j]ustifications that are hypothesized or invented *post hoc* in response to litigation, nor upon overbroad generalizations."[249] The *Community Resources* case illustrates the character of the burden that a town must carry in an equal protection challenge. The City of Manchester was required to prove that an ordinance distinguishing halfway houses from other similar facilities served an important government interest and that banning the halfway houses was substantially related to furthering that interest.[250] However, the court held that the city failed to satisfy its burden to demonstrate that the ordinance served the important government interests of protecting the community from recidivism and lowered property values. The court reasoned that the city failed to carry its burden because it did not provide any factual evidence, only "mere speculation."[251] Accordingly, the court affirmed by saying "[t]he [c]ity's reliance upon . . . hypothesized and overly generalized justifications is insufficient to meet the demanding intermediate scrutiny standard."[252]

Although courts apply a higher standard for equal protection than for substantive due process, equal protection challenges are rarely successful. A party may bring an equal protection challenge when a town denies a land use request and the aggrieved party feels that similarly situated individuals have already been approved and, thus, have been treated differently. To defend against this type of challenge, municipalities must be sure only to adopt ordinances that have a substantial relation to an important government objective. *Community Resources* suggests that a municipality can justifiably adopt an ordinance to protect the community from a certain harm. This will fulfill the "important government objective" requirement.

[248] *Cmty. Res. for Justice Inc.,* 917 A.2d at 721.
[249] *Id.*
[250] *Cmty. Res. for Justice Inc.*, 949 A.2d 681, 684 (N.H. 2008).
[251] *Id.* at 684–85.
[252] *Id. at 685.*

5.4 Conclusion

When adopting an ordinance in accordance with the UNH climate maps, the regional officials should consider that parties may challenge the ordinance based on the claims discussed above. In summary:

- If a party challenges the ordinance claiming a violation of **substantive due process**, the court will decide whether the town's actions are rationally related to a legitimate interest. When looking at substantive due process claims, the New Hampshire Supreme Court stated that there are "many reasons besides scientific data that a town could posit to justify its zoning ordinances."[253]

Pursuant to an **equal protection** challenge, the court will determine whether the town's classification was "substantially related to an important government objective." When looking at an equal protection challenge, the New Hampshire Supreme Court said, "reliance upon … hypothesized and overly generalized justifications is insufficient to meet the demanding intermediate scrutiny standard…"

[253] *Boulder*, 903 A.2d at 1030.

6. Takings

What is the potential regulatory takings exposure of New Hampshire communities if they impose regulatory controls that are designed at least in part to address anticipated future environmental conditions?

6.1 Introduction

In order to address anticipated future flooding events, affected municipalities may wish to enact a variety of regulations and ordinances restricting development in flood-prone areas. The resulting restriction of property rights, however, presents the potential for litigation concerning regulatory "takings." The Takings Clause, found in the Fifth Amendment to the Federal Constitution, reads ". . . nor shall private property be taken for public use, without just compensation."[254] In other words, the government may not acquire or "take" property without compensating the owner. This section explores municipalities' potential exposure to such claims. Section 6.2 gives a background on takings. Section 6.3 is a national survey of takings cases related to floodplain regulation. Section 6.4 discusses how the New Hampshire takings doctrine departs from the federal doctrine. Section 6.5 suggests how a municipality might avoid takings claims when enacting regulations that minimize development in the floodplain.

6.2 Background on Takings Law

Generally, a municipality can be subject to takings claims either when a regulation deprives a landowner of all economically viable uses of their land (under the *Lucas* test) or when the regulation goes "too far" and infringes on private property rights (under the *Penn Central* test).

[254] U.S. CONST. amend. V.

In *Lucas v. South Carolina Coastal Council,* the Supreme Court of the United States held that regulations that deny the property owner all "economically viable use of his land" require compensation.[255]

Under *Penn Central Transportation Co. v. New York City*,[256] takings claims are evaluated based on: (1) the character of the government action, (2) the regulation's economic effect on the landowner, and (3) the regulation's interference with the landowner's reasonable investment-backed expectations.[257] Thus, *Penn Central* is a case-specific, fact-based inquiry that tends to favor regulation over compensation.

The *Lucas* case also articulated an absolute defense against takings litigation. In its modern application, the *Lucas* exception exempts government regulation from compensatory takings liability, regardless of the extent of the burden imposed by the regulation, as long as the regulation does nothing more than prohibit a land use that was never initially part of the owner's property rights.

In *Lucas*, the Court recognized that the government can prohibit property uses that constitute a common law nuisance, even if it eliminates all economic value of the property. The Court reasoned that no person possesses a property right to use his or her land in a way that harms others in the community. A government regulation will not be deemed a takings if it does "no more than duplicate the result that could have been achieved in the courts . . . under the State's law of private nuisance or by the State under its complementary power to abate nuisances that affect the public generally."[258]

[255] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[256] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[257] *Id*. at 124.
[258] *Lucas*, 505 U.S. at 1029.

The Supreme Court in *Lucas* remanded the case to the Supreme Court of South Carolina to determine whether any background principles prohibited the use of the land the plaintiff intended "in the circumstances in which the property is presently found."[259] Upon remand, the state was unable to persuade the Supreme Court of South Carolina that any "common law basis exist[ed] by which it could restrain Lucas's desired use of his land; nor has [the court's] research uncovered any such common law principle."[260] Therefore, the court found a compensable taking had occurred.

The significance of the *Lucas* case for the present inquiry is that, under the *Lucas* rule, a floodplain regulation adopted by a municipality will not constitute a compensable taking as long as it merely articulates a prohibition that already exists under common law. The Court explained that background principles inquiry into nuisance law should involve:

> analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so). So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.[261]

[259] *Id.* at 1031 (citations omitted).
[260] Lucas v. S.C. Coastal Council, 424 S.E.2d 484, 486 (1992).
[261] *Lucas*, 505 U.S. at 1030–31.

6.3 National Survey of Floodplain Regulation Takings Cases

6.3.1 Cases in Which Courts Reject Takings Claims

6.3.1.1 Cases That Refer to Lucas' *Background Principles*

To date, courts have been presented with little opportunity to apply the *Lucas* principles to floodplain regulations. Those that have discussed the issue have recognized that development in a floodplain can constitute a nuisance. For example, in *Commonwealth v. Blair*, the city sued owners of waterfront property, claiming they had violated the Watershed Protection Act (the "Act") by altering their beach and lawn. The property owners asserted the Act and regulations were an unconstitutional taking.[262] The Act prohibited "alteration[s]" within 200 feet of the bank of a "surface water" in designated "watersheds," and defined alterations to include "excavating, filling or grading" or "changing of run-off characteristics."[263] Exemptions were provided for single-family dwellings on pre-existing lots, provided, however, that "[w]herever possible there shall be no alterations within the area regulated."[264] In addition, the Act exempted extensions to structures lawfully existing in 1992, so long as they do not substantially change or enlarge the structure or "degrade the quality of the water in the watershed."[265] The Act also allowed variances to be issued.[266]

The Massachusetts Superior Court found the regulatory takings claim was not ripe for review because the Blairs failed to apply for a variance.[267] However, the lower court had reasoned:

> [t]he rights of a property owner to utilize lakefront property come with significant limitations when the regulatory concern is

[262] Commonwealth v. Blair, 805 N.E.2d 1011 (Mass. App. Ct. 2004).
[263] *Id*. at 1013 (quoting Watershed Protection Act, MASS. GEN. LAWS ch. 92, § 107A(a) and § 104 (YEAR) (repealed 2003)).
[264] Watershed Protection Act, MASS. GEN. LAWS ch. 92, § 107A(h) (YEAR) (repealed 2003).
[265] *Blair*, 805 N.E.2d at 1013 (quoting Watershed Protection Act, MASS. GEN. LAWS ch. 92 §107A(c) (YEAR) (repealed 2003)).
[266] Watershed Protection Act, MASS. GEN. LAWS ch. 92, § 108 (YEAR) (repealed 2003).
[267] *Blair*, 805 N.E.2d at 1015.

> for the health and welfare of society. Conduct affecting a public resource, such as public water supplies, that could be actionable at common law . . . under a public nuisance theory, may be aptly regulated, or at minimum, be regulated with a decreased risk of having the regulation adjudicated an unconstitutional taking . . . .[268]

The Massachusetts Superior Court, therefore, recognized that regulation of a nuisance activity will, at the least, be weighed against a taking claim.

Similarly, in *Lyons v. Town of Wayne*, the plaintiffs alleged that flooding affecting their property was caused by stormwater runoff that originated on municipal property or was channeled onto plaintiffs' property by structures the municipality erected, such as a paved road, raised berm, or drainage ditch.[269] The court explained, "individually, an instance of flooding is a trespass, but it is also a nuisance if it is repeated or of long duration," supporting the theory that floodplain development violates a background principle of nuisance law.[270]

In *Mansoldo v. State*, the New Jersey Supreme Court reversed a lower court decision finding that denial of permits for residential construction in a mapped floodway constituted a taking.[271] The court remanded the case to the trial court to determine whether the background principles of nuisance and property law precluded Mansoldo's claim that he had suffered a taking.[272] The court found that Mansoldo's "ambiguous" statements that he no longer disputed determinations "that a structure would pose a threat to other properties during a flood"[273] did not represent a concession that his actions were a nuisance, in light of his testimony that he "gave

[268] Commonwealth v. Blair, No. CIV.A 98-2758-G, 2000 WL 875903, at *2, *9 (Mass. App. Ct. June 6, 2000).
[269] Lyons v. Wayne, 888 A.2d 426, 427-428 (N.J. 2005).
[270] *Id.* at 433.
[271] Mansoldo v. State, 898 A.2d 1018, 1025 (N.J. 2006).
[272] *Id*.
[273] *Id*.

up fighting the findings of the DEP and the administrative law judge."[274] Given that the administrative proceedings involved the question of whether Mansoldo was entitled to a hardship waiver, not whether his property development would constitute a common law nuisance, the court reasoned that his statements did not bar his takings claim.[275] The court cited the Supreme Court's decision in *Lingle*[276] to emphasize that the state's policy interests have no consideration in a takings analysis, which should only consider whether the regulation denies "all economically beneficial or productive use of [the] land."[277]

In a less clear use of background principles, the court in *Disch v. Borough of Watchung* upheld the trial court's determination that plaintiffs were entitled to injunctive relief when stormwater discharge that would have naturally flowed from south to north was intercepted by a road.[278] The court's reasoning cited the *Lyons* court stance on flooding as a nuisance.[279]

Filling wetlands has also been found to be a nuisance. Although it presents a slightly different issue, such cases may be relevant. For example, in *Palazzolo v. State*, regulations that precluded use of fill on wetlands to facilitate development did not deprive the landowner of all economic use of the entire parcel so as to support a

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[274] *Id*.
[275] *Id*.
[276] Lingle v. Chevron, 544 U.S. 528 (2005).
[277] *Mansoldo,* 898 A.2d at 1024 (2006).
[278] Disch v. Borough of Watchung, A-5379-04T3, *5, 2007 WL 2460198 (N.J. Super. Ct. App. Div. Aug. 31, 2007).
[279] *Id*. *See also* Posey v. Bordentown Sewerage Auth., 793 A.2d 607, 609 (N.J. 2002) ("[A] public entity may be liable for a dangerous condition on private property that is proximately caused by the public entity's activities on public property, in this case, directing storm-drainage water onto private property."); Gould & Eberhardt, Inc. v. Newark, 78 A.2d 77, 78 (N.J. 1951) ("[A] municipality does not have the right to collect surface water and discharge it upon private property in greater quantity and with greater force than would occur from natural flow, so as to cause substantial injury."); Sheppard v. Township of Frankford, 617 A.2d 666, 668 (N.J. Super. Ct. App. Div. 1992) (noting that injunctive relief was appropriate because unreasonable discharge of stormwaters by township onto plaintiffs' property created a continuing nuisance).

Lucas takings claim.[280] The court further found that filling in the wetland would result in "significant and predictable negative effects," thus demonstrating a public nuisance and banning a taking claim.[281]

Cases prior to *Lucas* also support the principle of nuisance as a defense to takings. In *Consolidated Rock Products Company v. City of Los Angeles*, the court held that regulations that prevented the extraction of sand and gravel in a floodplain did not result in a taking, even if this was the only economic use for the land.[282] The court reasoned that the activity would have had nuisance impacts on the sufferers of respiratory ailments nearby.[283] Furthermore, the Supreme Court of Missouri previously supported this idea, ruling that when "the failure of subdivision developers to construct [a drainage] ditch affected drainage over entire area and endangered health and welfare of an unlimited area and created a constant danger of flooding, conduct and omissions of subdivision developers constituted a public nuisance."[284]

The Florida Supreme Court upheld a setback line, partially established to prevent future flood and erosion damage from hurricanes, against a taking claim by a landowner who was forbidden by the ordinance from building on his oceanfront land.[285] The court asserted "a 'taking' cannot be said to have occurred if it was not feasible to build a residence in the place forbidden by the ordinance."[286] In doing so it suggested that, in this case, construction might not be feasible because the landowner failed to explain "the topography of the beach in that area and the history of storms, the pattern of erosion of that beach area, or how or whether the building would affect the bluffs or any natural vegetation."[287]

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[280] Palazzolo v. State, WM 88-0297, 2005 WL 1645974 (R.I. Super. Ct. July 5, 2005).
[281] *Id.* at *5.
[282] Consol. Rock Prod. Co. v. City of Los Angeles, 370 P.2d 342 (Cal. 1962), appeal dismissed, 371 U.S. 36 (1962).
[283] *Id.* at 345.
[284] Metro. St. Louis Sewer Dist. v. Zykan, 495 S.W.2d 643 (Mo. 1973).
[285] Town of Indialantic v. McNulty, 400 So. 2d 1227, 1233 (Fla. Dist. Ct. App. 1981).
[286] *Id*.
[287] *Id*. at 1230.

6.3.1.2 Cases that Did Not Cite to Lucas' *Background Principles and Did Not Find a Taking*

The few cases in which courts find floodplain regulations to amount to a taking typically involve denials of all economic use.[288] However, many regulations that come close to this standard survive judicial review, especially performance-orientated regulations, such as the No Adverse Impact (NAI) standard. For example, the North Carolina Supreme Court ruled that an ordinance that required new construction and substantial improvements on property in a flood hazard district be built to prevent or minimize flood damage was not a taking given the degree the municipality interfered with the property.[289]

In Ohio, an affected landowner filed suit when a municipality enacted an ordinance that redefined the floodplain five to six feet higher than its true level and then refused to issue building permits within the area.[290] The federal Department of Housing and Urban Development (HUD) had hired a consulting firm to survey and define the floodplain along the Cuyahoga River.[291] The village council had previously approved the plaintiff's plan to develop a parcel of land that the consulting firm now found to lay in a floodplain.[292] The village enacted regulations restricting the plaintiff's development plans, refusing to issue building permits and denying the use of public streets for construction activities.[293] The court rejected the plaintiff's

[288] *See infra* discussion in subsection 6.2.2.
[289] Responsible Citizens in Opposition to Floodplain Ordinance v. Asheville, 308 N.C. 255, 302 S.E.2d 204 (1983). *See also* Krahl v. Nine Mile Creek Watershed Dist., 283 N.W.2d 538, 543 (Minn. 1979) (holding floodplain regulations that denied filling 20 percent of property for building placement not a taking because other reasonable uses existed, like driving ranges or recreation use).
[290] Terrace Knolls, Inc. v. Dalton, Dalton, Little & Newport, Inc., 571 F. Supp. 1086 (N.D. Ohio 1983) (*aff'd,* 751 F.2d 387 (6th Cir. 1984)).
[291] *Id*. at 1088.
[292] *Id.* at 1089.
[293] *Id.*

taking claim, ruling there was not a deprivation of all economic use, as the complaint alleged only an interference with the plaintiff's right to develop the land.[294]

Whether a case is determined to be "ripe" for adjudication is another legal issue that can block a taking claim. In particular, the existence of special-use permits or variances that have not been sought by a landowner often prevent the landowner's taking claim from being "ripe".[295] For example, in 2006, amendments to Houston's floodplain ordinance that relied upon new floodway maps resulted in several takings lawsuits that ended with decisions on ripeness. The amended ordinance expressly prohibited any variances except in certain circumstances involving bridges and facilities necessary to protect the health, safety, and welfare of the general public.[296] A Texas appeals court recently ruled that a taking claim based on these amendments was not ripe because the plaintiff never submitted a permit application or variance request to the city,[297] and the plaintiff had no plans for the property when the city passed amendments to its ordinance imposing more stringent restrictions on development in floodways.[298] Despite the holding on ripeness, in footnotes in its opinion the court discussed the merits of the taking claim, stating:

> [the plaintiff] also asserted that it is automatically entitled to compensation because the amendment deprived it of the right to build on its property and thereby took one of the 'sticks in its bundle of property rights.' We disagree. Even if a regulation interferes with a property-owner's use of property and thus intrudes upon property

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[294] *Id*. at 1093.

[295] *See, e.g.,* Bonge v. Madison, 253 Neb. 903, 907, 573 N.W.2d 448, 451 (1998) (finding a floodplain regulatory taking suit not ripe when plaintiff failed to apply for a variance) ("Generally, to attain a final decision in regulatory takings cases, there must be at least (1) a rejection of a development plan and (2) a denial of a variance where the statute or bylaw at issue provides for such exceptions.").

[296] HOUS., TEX., ORDINANCE 2006-894 (Aug. 30, 2006). The revised ordinance provided, "[n]o permit shall hereinafter be issued for a development proposed in a floodway if that development provides for . . . [n]ew construction, additions to existing structures, or substantial improvement of any structure within the floodway." Houston v. Student Aid Found. Enters., 14-09-00236-CV, 2010 WL 2681706 at *1 (Tex. App. July 8, 2010) (quoting amendments to the Houston ordinance).

[297] Student Aid Found. Enters., 2010 WL 2681706, at *5.

[298] *Id.*

> rights, a regulation constitutes a taking only when the regulation deprives the owner of all economically beneficial or productive use of the property.[299]

The amendments to Houston's floodplain ordinance also produced a line of cases involving challenges to the revised ordinance. Most of these cases were held to be ripe because the plaintiffs alleged a specific plan for improvement or a sale was thwarted by the 2006 amendments.[300] However, none of these cases addressed the merits of a taking claim. There has been one related takings case, *City of Houston v. HS Tejas, Limited.* In this case, the court ruled that a taking claim was not ripe because the plaintiff did "not allege any specific improvement or sale that was impacted or impeded by the 2006 amendment."[301]

Courts sometimes refuse to find a taking even when a municipality denies a variance to allow floodplain development, as demonstrated by several Massachusetts cases. In *S. Kemble Fischer Realty Trust v. Board of Appeals of Concord*, the city refused to allow land filling in a floodplain based on an ordinance that barred issuance of a permit unless it were "proven . . . as being in fact not subject to flooding . . . and that the use . . . will not be detrimental to the public health, safety or welfare."[302] The court ruled that a denial of the permit did not effect a taking, reasoning that "it is by no means clear from the record that the plaintiff could not use that portion of its land in the floodplain zone for some purpose which did not require filling, for

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[299] *Id.* at *7 n. 3.
[300] *See* City of Houston v. Mack, No. 01-09-00427-CV, --- S.W.3d ----, 2009 WL 5064710, at *5-6 (Tex.App.-Houston [1st Dist .] Dec. 22, 2009, no pet. h.) (plaintiffs alleged they intended to sell property for development and had entered into listing agreement); City of Houston v. Norcini, No. 01-09-00426-CV, --- S.W.3d ----, 2009 WL 3931681, at *4-5 (Tex.App.-Houston [1st Dist.] Nov. 19, 2009, pet. denied) (plaintiff intended to sell lots to a builder); City of Houston v. Noonan, No. 01-08-01030-CV, 2009 WL 1424608, at *1 (Tex.App.-Houston [1st Dist.] May 21, 2009, no pet.) (mem.op.) (plaintiff intended to build a residence); City of Houston v. O'Fiel, NCE M W,00242-CV, 2009 WL 214350, at *2 (Tex.App.-Houston [1st Dist.] Jan. 29, 2009, pet. denied) (mem.op.) (plaintiff's intended use was residential construction).
[301] City of Houston v. HS Tejas, Ltd., 305 S.W.3d 178, 305 S.W.3d 172, 2009 WL 3401066, at *4-5 (Tex. App.-Houston [1st Dist.] 2009, no pet.).
[302] S. Kemble Fischer Realty Trust v. Bd. of Appeals, 9 Mass. App. Ct. 477, 481, 402 N.E.2d 100, 103 (Mass. App. Ct. 1980).

example to enhance that portion of its land which is outside the floodplain . . . [T]he land owner in this case is substantially restricted but 'such restrictions must be balanced against the potential harm to the community.'"[303]

In *Gove v. Zoning Board of Appeal*, the town zoned Special Flood Hazard Areas to require a variance before construction of new residential buildings.[304] The court found that the refusal to issue a permit for a single-family home did not constitute a taking. The court focused on the significant need for protection in the erosion-prone area where houses were "falling into the sea."[305] The property was on the coast in an area that had experienced major flooding and became exposed to the open ocean waves due to a barrier beach just opposite the site. The court reasoned that the property retained significant value and therefore the taking claim failed, noting that the plaintiff "cannot prove a total taking by proving only that one potential use of her property—i.e., as the site of a house—is prohibited. *Lucas* requires that the challenged regulation 'denies *all* economically beneficial use' of land."[306]

In a similar case, *Wilkerson v. City of Pauls Valley*, the city enacted an ordinance prohibiting new construction or placement of structures in the "floodway" area.[307] The city denied a variance to the plaintiff, who wished to erect a mobile home park in a floodplain. The court upheld the denial of the variance, finding no taking because "a valid enactment of a floodplain ordinance is not *per se* a taking [because] acts done in the proper exercise of the police power which merely impair the use (or value) of property do not constitute a 'taking.'" [308]

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[303] *Id*. at 482, 402 N.E.2d 103 (quoting Tpk. Realty Co. v. City of Dedham, 362 Mass. at 235, 284 N.E.2d at 900) (where the court upheld zoning regulations essentially limiting the floodplain to open space uses despite testimony that the land was worth $431,000 before regulations and $53,000 after regulation).
[304] Gove v. Zoning Bd. of Appeal, 444 Mass. 754, 831 N.E.2d 865, 868 (2005).
[305] *Id*. at 756, 831 N.E. 2d 868.
[306] *Id.* at 763-64, 831 N.E.2d 872-73 (citations omitted).
[307] Wilkerson v. City of Pauls Valley, 24 P.3d 872, 874 (Okla. Civ. App. 2001).
[308] *Id.* at 876 (citing April v. City of Broken Arrow, 775 P.2d 1347, 1351 (Okla. 1989).

In *Leonard v. Town of Brimfield,* the plaintiff applied to the zoning board of appeals for a special permit to build on her land within a floodplain zone.[309] The board issued a special permit that limited construction on land at or above the 370-foot elevation mark, effectively limiting construction to six of the plaintiff's sixteen acres.[310] The court found no taking of the property, explaining that, despite plaintiff's arguments, she had constructive notice of the zoning map, which was available for viewing at the building inspector's office.[311] The court further reasoned:

> even if we ignore the fact that the zoning restriction was in place prior to the plaintiff's purchase of the property, the evidence was insufficient to show that the economic impact was severe. The plaintiff's economic loss argument is based on her inability to build houses on approximately ten acres of her sixteen-acre parcel. This has not frustrated her purpose to build her own home on the parcel, which she has done. There is no dispute that the complete sixteen acres is suitable for agricultural, horticultural, and recreational purposes. The land was used for agricultural purposes prior to her purchase and can continue to be used as such.[312]

Most significantly, the court pointed to the *Lucas* notion of background principles, stating: "because she purchased the property subject to the restrictions on building in a floodplain, she may not complain about the loss of a right she never acquired."[313]

Setback regulations generally do not constitute a taking. A case from Montana, *McElwain v. County of Flathead*, demonstrates the general success of setback regulations. There, the state supreme court held that a 100-foot setback between a septic tank drain field and a floodplain was not a taking.[314] Though the regulation reduced the property value from $75, 000 to $25,000, the court reasoned that the

[309] Leonard v. Town of Brimfield, 423 Mass. 152, 153, 666 N.E.2d 1300, 1302 (1996).
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] *Id.*
[314] McElwain v. County of Flathead, 811 P.2d 1267 (Mont. 1991).

owner remained able to use the property for the purposes originally intended, to build a home, though not as close to the river.[315]

In a related case, the New Jersey Superior Court also upheld state regulations against a taking claim.[316] In this case, the regulations prohibited the construction of structures for occupancy by humans or livestock, the storage of materials or equipment, and depositing of any solid waste in floodways. The court reasoned that the purposes of the regulations—"to minimize losses and damages to public and private property caused by land uses which, at times of flood, increase flood heights and/or velocities . . . and to . . . preserve[e] and enhance[e] the environment of the floodplain"[317]—are consistent with the restrictions and a reasonable means of attaining these goals.[318] Thus, the court concluded, "it is not unreasonable under these circumstances, to limit plaintiffs to the natural use of their own land."[319] The same court also sustained an ordinance against a taking claim when the ordinance changed the minimum lot size from three to ten acres on a tract where a third of the land was a floodplain.[320]

The Connecticut Supreme Court upheld against a takings claim the denial of a permit to build a market within an encroachment line along the bank of a river that would seriously impair the capacities of the channel and result in increased upstream water stages in time of flood.[321] The court reasoned this denial was justifiable and did not necessarily mean that no structure allowing for economic

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[315] *Id*. at 130-131.
[316] Usdin v. State. Dept. of Envtl. Prot., 173 N.J. Super. 311, 316, 414 A.2d 280, 282 (N.J. Super. Ct. Law Div. 1980) (*aff'd,* 179 N.J. Super. 113, 430 A.2d 949 (N.J. Super. Ct. App. Div. 1981))(citing N.J. ADMIN. CODE § 7:13-1.4).
[317] *Id*. at 414.
[318] *Id*.
[319] *Id*.
[320] Kirby v. Twp. Comm'r, 341 N.J. Super. 276, 281, 775 A.2d 209, 213 (N.J. Super. Ct. App. Div. 2000).
[321] Vartelas v. Water Res. Comm'n, 146 Conn. 650, 656, 153 A.2d 822, 825 (Conn. 1959).

utilization of the property would be allowed, so that plaintiff was not deprived of "reasonable and proper use of the property."[322]

The Washington Supreme Court upheld a lower court decision rejecting a taking claim based on the denial of a permit to construct homes in a floodway along the Cedar River, under a regulation prohibiting construction for human habitation within a floodway.[323] In finding a rational relationship between the necessity of the regulation and the objective of the flood control zone regulation, the court noted the "danger to persons living on a floodway" and that the "structures built in a floodway could endanger life and property."[324] The court also reasoned that the regulations only prohibited the building of structures for human habitation, so that the restrictions did not prevent the appellant from making a profitable use of its property.[325]

California courts have denied takings claims arising from floodplain regulations several times. In 1972, the California Court of Appeals held that a floodplain zoning ordinance prohibiting specified types of buildings in an area subject to flooding and limiting use of the land to parks, recreation, and agriculture did not constitute a taking.[326] In *First English v. County of Los Angeles,* the California Court of Appeals, on remand from the United States Supreme Court, held that an interim ordinance that prohibited any construction in a flood-prone area following a devastating flood did not effect a taking.[327] While the interim ordinance was in effect, the city initiated studies to develop a permanent flood protection area according to mapping and evaluation of flood data.[328] Even though half of the landowner's property was affected, the court emphasized the purpose of the ordinance as "the preservation of

[322] *Id.* at 658, 826.
[323] Maple Leaf Investors, Inc. v. Dept. of Ecology, 565 P.2d 1162 (Wash. 1977).
[324] *Id*. at 733.
[325] *Id*. at 734.
[326] Turner v. City of Del Norte, 24 Cal. App. 3d 311 (1972).
[327] First English v. County of Los Angeles, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (Cal. Ct. App. 1989).
[328] *Id*. at 1368.

life," which it explained "must rank at the top."[329] The court reasoned that the balance of the public benefits far exceed the private costs on the individual property owner.[330]

In 1999, the New York Court of Appeals held that an ordinance that changed the zoning of the plaintiff's property from residential to recreational use, done partially for flood control purposes, did not constitute a taking.[331] The court highlighted that "this shift in the zoning districts was in response to years of study and documentation regarding the recurrent flooding problems and concerns,"[332] and reasoned that the fact that less restrictive options were available to the board was an irrelevant fact.[333]

The Michigan Court of Appeals held that a decline in fair market value of a home rebuilt by homeowners after a flood, as a result of flood-resistant building code requirements imposed by defendants, did not constitute a *de facto* taking, and that no temporary regulatory taking occurred when the town delayed responses and decisions requiring owners to comply with the new building code requirements.[334] The court rejected the argument that plaintiffs were denied all economically beneficial use because complying with building code requirements resulted in a negative equity, explaining that "even with a negative equity, plaintiffs are still able to use their property as a residence."[335] The court also analyzed the regulations according to *Penn Central* and determined that plaintiffs were both benefited and burdened like other similarly situated property owners in the flood-prone areas.[336] The court also reasoned that because plaintiff's homes "are situated in a floodplain that experiences frequent flooding, plaintiffs could have no reasonable expectation

[329] *Id.* at 1370.
[330] *Id.*
[331] Bonnie Briar Syndicate. v. City of Mamaroneck, 94 N.Y.2d 96, 721 N.E.2d 971, (N.Y. 1999).
[332] *Id*. at 108.
[333] *Id*.
[334] Cummins v. Robinson Twp., 283 Mich. App. 677, 770 N.W.2d 421 (Mich. Ct. App. 2009).
[335] *Id*. at 710.
[336] *Id*. at 708-09.

that their property would not periodically experience flood damage necessitating costly repairs."[337]

6.3.2 Cases in Which Courts Find Regulatory Takings

Courts have occasionally found that floodplain regulations constitute a taking, primarily when the regulation deprives the property of all economically viable use. For example, in *Annicelli v. Town of South Kingston*, the court held that denial of a permit to build a single family dwelling on a barrier beach required compensation, as it deprived the owner of all "reasonable or beneficial use" of the property.[338] In that case, amendments to the town's zoning ordinance designated various segments of the town's shoreline as "High Flood Danger" districts (HFD).[339] Although the court recognized the ecological significance of barrier beaches, the court reasoned, "the police power may properly regulate the use of property only where uncontrolled use would be harmful to the public," and suggested that the power of eminent domain represented a more appropriate exercise of power in this situation.[340] Similarly, in *Sherman v. Wayne*, the court found a taking when forty to sixty percent of an undeveloped property had no economically viable use when the city applied a residential zoning ordinance to a parcel that contained an old armory, because the trial court found the application of residential zoning to this parcel reduced the market value of the property to zero.[341]

In a 1963 decision, *Morris County Land*, the New Jersey Supreme Court found that a wetland conservancy district that preserved the natural state of the land, primarily for floodwater detention, but permitted no economic uses, demonstrated a taking.[342] However, the New Jersey Supreme Court more recently noted, in 1991, "the vitality

[337] *Id*. at 721.
[338] Annicelli v. Town of South Kingston, 463 A.2d 133, 139 (R.I. 1983).
[339] *Id.* at 145.
[340] *Id*. at 140-141.
[341] Sherman v. Wayne, 266 S.W.3d 34, 44 (Tex. App. 2008).
[342] Morris County Land Imp. v. Parsippany-Troy Hills Twp., 40 N.J. 539 (1963).

of *Morris County Land* has declined with the emerging priority accorded to the ecological integrity of the environment."[343] Finally, in an older case, a court upheld a taking claim based on an amendment to the master plan placing land in a ponding area in a flood protection zone.[344] In light of the trend of recent cases, however, these distant cases hold little threat of influence.

6.3.3 Pending Cases

Two decisions that were pending at the time this research was conducted also may present a relevant situation. The first case concerns a Texas city that hired an engineering firm to conduct a study to complete a more detailed assessment and documentation of stormwater drainage within the city.[345] This study revealed that prior elevation data on maps contained errors.[346] FEMA revised its prior Flood Insurance Studies and Digital Flood Insurance Rate Maps to reflect this information, which placed additional property in the floodplain.[347] The plaintiff's land now falls in the floodplain, and the plaintiff has sued the city for refusing to grant her a Certificate of Occupancy, which resulted in the cancellation of the $600,000 sale the plaintiff had under contract.[348]

In Texas, another potentially pertinent case waits on the docket. In 2004, a plaintiff filed an inverse condemnation claim against San Antonio, complaining the city had placed a flood control dam across a non-exclusive overlapping easement the two parties owned, causing a physical invasion of plaintiff's property. Plaintiff further contended that "[t]he City constructed the dam across the Easement [inflow wall] as part of a water diversion/detention facility designed to restrain the floodwaters of Leon Creek. As a result, substantial portions of the Plaintiffs land will be placed

[343] Gardner v. N.J. Pinelands Comm'n, 125 N.J. 193, 214, 593 A.2d 251, 261 (N.J. 1991) (finding that regulations that limited use of the property to farmland did not effect a taking).
[344] Hager v. Louisville & Jefferson County Planning & Zoning Comm'n, 261 S.W.2d 619 (Ky. Ct. App. 1953).
[345] Strother v. Rockwell, No. 05-10-01348-CV, 2011 WL 734351, at *4 (Tex.App.-Dallas).
[346] *Id*.
[347] *Id.* at *5.
[348] *Id*. at *18.

within the area of the 100-year floodplain and will be inundated during the regulatory [100 year] rainfall event."[349] On appeal, the plaintiff now argues it was damaged by the project's detention system, which "prevents its property from being permitted for development" and, thus, the city is unreasonably interfering with Kopplow's right to develop its property.[350] Therefore, the plaintiff now claims a regulatory taking, while the city argues this claim cannot be brought before the appellate court, as the plaintiff failed to bring it before the trial court.[351] If the court hears the regulatory taking claim, the outcome may prove relevant. When these decisions are rendered their outcomes should be reviewed for their relevance to this regulatory takings risk assessment.

6.4 Takings Law in New Hampshire

> *No part of a man's property shall be taken from him, or applied to public uses, without his consent.* - Part I, Article 12 of the New Hampshire Constitution[352]

The law of takings in New Hampshire generally follows federal law. The New Hampshire Supreme Court has noted that "the New Hampshire Constitution makes explicit what is implicit in the Fifth Amendment to the Federal Constitution."[353] Nonetheless, the New Hampshire Supreme Court determines the legality of regulations based on state law and uses federal precedent only as a means of comparison and to determine whether the Fifth Amendment to the Federal Constitution would provide any additional protection.[354] Thus, any taking claim should be examined under both the federal and New Hampshire constitutions in

[349] Kopplow Dev. v. City of San Antonio, No. 04-09-00403-CV, 2011 WL 2669703 at *2 (Tex.).
[350] *Id*. at *5.
[351] *Id*.
[352] N.H. CONST. pt. I, art. 12.
[353] Burrows v. City of Keene, 121 N.H. 590, 596 (N.H. 1981).
[354] *See* State v. Ball, 124 N.H. 226, 232 (N.H. 1983); *cf.* U.S. CONST. AMEND. V. ("[N]or shall private property be taken for public use, without just compensation.").

order to determine whether a challenged regulation constitutes a compensable taking.

Similar to the federal analysis, the first step for a New Hampshire takings analysis is to determine whether the regulation affects a property right. If the regulation articulates a prohibition that already exists at common law, such as state nuisance law, the regulation merely prohibits a land use that was never initially part of the owner's property rights and, therefore, will not result in a taking.[355]

If the regulation does affect a property right, the court will first look at whether the regulation creates a *per se* regulatory taking by denying a landowner all viable economic use of the property. If the court determines a *per se* taking has not occurred, the court will then look at whether a partial taking has occurred, under a *Penn Central* type analysis.

6.4.1 Effect on Property Rights

The New Hampshire Supreme Court defines property as "refer[ing] to a person's right to 'possess, use, enjoy and dispose of a thing and is not limited to the thing itself."'[356] Property rights are often referred to as a bundle of sticks. Possession, ownership, or an easement, are different types of sticks contributing to property rights. A landowner may have one or all of the possible property rights. However, the right to interfere with a neighbor's land is not a property right. This is a restriction from the law of nuisance. As discussed previously, under *Lucas*, compensation is not required if the property interests affected were not part of the landowner's title to begin with.[357] If it can be established that the floodplain regulation merely prohibits a nuisance activity, the regulation should withstand a taking claim.

[355] *Lucas*, 505 U.S. at 1029.
[356] *Burrows*, 121 N.H. at 597 (quoting Metzger v. Town of Brentwood, 117 N.H. 497, 502 (N.H. 1977)).
[357] *Lucas*, 505 U.S. at 1027.

6.4.1.1 Background Principles of Nuisance

According to the New Hampshire Supreme Court, "[a] private nuisance exists when an activity substantially and unreasonably interferes with the use and enjoyment of another's property."[358] By contrast, a public nuisance "is behavior which unreasonably interferes with the health, safety, peace, comfort or convenience of the general community."[359]In order for an action to be considered a nuisance, however, "the interference complained of [must be] substantial."[360] In addition, the interference with a recognized property interest must be unreasonable.[361] The test for determining whether an activity constitutes an unreasonable interference, and therefore constitutes a nuisance, is whether "the utility [of the activity] to the public is outweighed by the gravity of the harm that results.'"[362] In New Hampshire, "it is the plaintiffs' burden to prove the existence of a nuisance by a preponderance of the evidence."[363]

New Hampshire decisions describing flood-related activities as nuisances go back to 1858. In *Coe v. Lake Winnepisiogee Lake Cotton and Woolen Mfg. Co.*, the plaintiff sought injunctive relief to abate his neighbor's excavation and widening of river channels in order to facilitate a mill operation.[364] The activities caused the plaintiff's

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[358] Dunlop v. Daigle, 122 N.H. 295, 298 (N.H. 1982) (citing Heston v. Ousler, 119 N.H. 58, 60 (N.H. 1979); *see also* Robie v. Lillis, 112 N.H. 492, 495 (N.H. 1972)).
[359] *Robie*, 112 N.H. at 495 (citing 6-A AMERICAN LAW OF PROPERTY, at 68; RESTATEMENT (SECOND) OF TORTS, s. 821B(2)(a). *See also* Urie v. Franconia Paper Co., 107 N.H. 131, 218 A.2d 360 (N.H. 1966); McKinney v. Riley, 105 N.H. 249, 197 A.2d 218 (N.H. 1964); White v. Suncook Mills, 91 N.H. 92, 13 A.2d 729 (N.H. 1940)).
[360] *Robie*, 112 N.H. at 495 (citing RESTATEMENT (SECOND) OF TORTS, Comment at 6); *See also* Proulx v. Keene, 102 N.H. 427, 423 (N.H. 1960).
[361] *Robie*, 112 N.H. at 495 (citing, RESTATEMENT (SECOND) OF TORTS, s. 822); *see also* Dunlop, 122 N.H. at 298 (citing *Robie*, 112 N.H. at 495-96 for the proposition that "to constitute a nuisance, the defendant's activity must cause harm that exceeds 'the customary interferences a land user suffers in an organized society' and be an 'appreciable and tangible interference with a property interest.'").
[362] *Robie*, 112 N.H. at 496 (quoting 6-A AMERICAN LAW OF PROPERTY, at 66); *see also* Cook v. Sullivan, 149 N.H. 774, 829 (N.H. 2003) (citing Treisman v. Kamen, 126 N.H. 372, 375 (N.H. 1985)).
[363] *Cook*, 149 N.H. at 781 (citing Dunlop, 122 N.H. at 298).
[364] Coe v. Winnepisiogee Lake Cotton & Woolen Mfg. Co., 37 N.H. 254 (1858).

property to flood, and his fences, pasture, and timber were damaged.[365] In *Coe,* the New Hampshire Supreme Court stated "injury *to* a watercourse, or *by means of* a watercourse, is a species of tort denominated a nuisance."[366]

In *Smith v. Town of Wolfeboro*, the plaintiff appealed a determination by the town planning and zoning board that lots in his development should be restricted and subject to an ordinance amendment.[367] While the court found the contested zoning amendment was applied to the plaintiff's property in error, the court went on to define the power of the town planning and zoning department to regulate for the general health, welfare, and safety of the municipality. The court stated that the applicable portion of the zoning regulations authorized "the board to deny subdivision approval for lots that pose[d] an 'exceptional danger to health.'"[368] The court also stated that the regulation was rationally related to a legitimate government interest and that it "deprive[d] landowners of no reasonable uses of their land."[369] The court went on to say that "such a regulation would not exceed tort and property law restrictions even if it were applied to deprive an owner of all economically viable use of his or her land."[370] The *Smith* court indicated that the landowner never possessed a property right to undertake the activity the plaintiff claimed was taken by virtue of the regulation and, therefore, the government regulation would not constitute a compensable taking.

In *Cook v. Sullivan,* defendants added fill dirt and re-graded their property, which was located in jurisdictional wetlands.[371] This action effectively forced the water to move to a neighbor's land. The water damaged the neighbor's property, interfering with the customary use of their property.[372] The court ruled that the defendant's activity constituted a nuisance and that the plaintiff was entitled to injunctive relief.

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[365] *Id.* at 255.
[366] *Id.* at 256.
[367] Smith v. Town of Wolfeboro, 136 N.H. 337, 339–340 (N.H. 1992).
[368] *Id.* at 345.
[369] *Id*. at 345.
[370] *Id*. (citing *Lucas*, 505 U.S. at 1029–1030).
[371] Cook v. Sullivan, 149 N.H. 774 (N.H. 2003).
[372] *Id*. at 776.

In order to meet its burden to prove that a nuisance existed, the plaintiff introduced witness testimony to attest to the standing water on the property; expert testimony that the defendant's activity in fact interfered with jurisdictional wetlands, altering the elevation of the defendant's land as well as the flow of subsurface water; and discredited the defense's expert witness, who admitted that his examination prior to construction was primarily visual and inadequate.[373] As a result of the standing water, the plaintiffs were forced to move their dog pens and were precluded from stacking wood on their property, using their clothesline, and using their backyard for recreational activities. Also, the plaintiffs could no longer mow their backyard or store anything on the floor of their garage, and their home was permeated by a musty smell that prevented them from using it during months when the windows were closed. The trial court found this evidence sufficient to determine the defendant's activities were a nuisance in fact.

In *Cook*, the appellate court applied the traditional balancing test (unreasonable interference versus utility of activity) to determine whether injunctive relief, as ordered by the trial court, was appropriate.[374] The court determined that because the defendants could not maintain the activity on their property without the unreasonable interference with the plaintiff's property rights, injunctive relief was appropriate. Here, enjoining the nuisance activity is the judicial equivalent to the legislature restricting development through regulation.

6.4.1.2 The Challenge of Proving a Future Nuisance

One challenge in defeating a regulatory takings claim based on background principles of nuisance law is proving that a future use will constitute a nuisance. A floodplain regulation may be based on prospective precipitation events and prospective land use, while future development in the floodplain may, or may not, create a nuisance.

[373] *Id*. at 781.
[374] *Id.* at 782.

In *Coe*, the court observed that, "the thing complained of cannot be abated until it actually becomes a nuisance; so that if one sees another commencing any work which probably will, when completed, be a nuisance, it cannot be abated while in an inoffensive state; but the persons whose rights are thus in jeopardy may seek protection in a court of equity."[375]

In other words, it may be difficult to prove that future development will pose the necessary "clear and imminent" harm. [376] For example, *New Hampshire Donuts* involved a disputed lease agreement for which injunctive relief was sought. When determining the suitability of injunctive relief, the court noted that "[i]njunctive relief is one of 'the peculiar and extraordinary powers of equity', normally to be exercised only when warranted by `imminent danger of great and irreparable damage.'"[377]

The bias against providing injunctive relief for theoretical, future injury is well founded in New Hampshire jurisprudence. For example, in an 1887 case, *Mayor of the City of Manchester v. Smyth*, the court stated: "The equity jurisdiction of the court undoubtedly includes, in proper cases, the restraining by injunction of the erection and maintenance of nuisances, public and private. To warrant the application of this restraining power, the danger of irreparable mischief or injury must be imminent and clearly made to appear."[378] Also adding, the *Smyth* court stated: "The act sought to be restrained must be one which, if performed or executed, will inevitably bring

[375] Coe v. Winnepisiogee Lake Cotton & Woolen Mfg. Co., 37 N.H. 254 (N.H. 1858).
Id. (citing Gardner v. Trustees of Newburgh, 2 Johns. Ch. 162 (N.Y. Ch. 1816) (proposing that "the foundation of [a court of equity's] jurisdiction is the necessity of a preventive remedy when great and immediate mischief, or material injury, would arise to the comfort and useful enjoyment of property.")).
[376] New Hampshire Donuts, Inc. v. Skipitaris, 129 N.H. 774, 779 (N.H. 1987) (citing Johnson v. Shaw, 101 N.H. 182, 188 (N.H. 1957) (quoting Wason v. Sanborn, 45 N.H. 169, 171 (N.H. 1862))).
[377] *Shaw*, 101 N.H. at 188-89 (quoting Dana v. Craddock, 66 N.H. 593, 595 (N.H. 1891)).
[378] Mayor of Manchester v. Smyth, 64 N.H. 380, 380 (N.H. 1887) (citing Wason, 45 N. H. at 169; Perkins v. Foye, 60 N. H. 496 (N.H. 1881)).

on the danger threatened by it. It must be a nuisance in fact, and not one created solely by statutory enactment or municipal ordinance."[379]

Although *Lucas* takes a broad step away from the traditional ad hoc taking analysis relied upon to determine whether a regulation constituted a compensable taking, there is still a factual inquiry necessary to determine the applicability of the nuisance defense.[380] However, if the court deems an activity to be a nuisance and a regulation restricts that activity, the regulation merely prohibits a land use that was never initially part of the owner's property rights and, therefore, is unlikely to be a taking.

On the other hand, if it is not a nuisance and the landowner has a property right affected by the regulation, he may consider bringing a taking claim.

6.4.1.3 A Per Se *Regulatory Taking*

The question, then, is: when does a land use regulation become so burdensome that it crosses the threshold into a compensable taking of property by the government? Neither New Hampshire courts nor federal courts have established a bright line to delineate when a regulation becomes a taking. As mentioned in Section 6.2, if the regulation restricts "all economically beneficial or productive use of land" there is a *per se* taking or complete taking. [381] This is equally true under the New Hampshire Constitution: "Arbitrary or unreasonable restrictions which substantially deprive the owner of the 'economically viable use of his land' in order to benefit the public in some way constitute a taking within the meaning of our New Hampshire

[379] *Shaw*, 101 N.H. at 380.
[380] *Lucas*, 505 U.S. at 1015 (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (quoting Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)) ("In 70–odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "'set formula'" for determining how far is too far, preferring to "engag[e] in . . . essentially ad hoc, factual inquiries.").
[381] *Id*. at 1015.

Constitution requiring the payment of just compensation." [382] Even without a complete taking, compensation may be warranted for a partial taking.

6.4.2 New Hampshire's Partial Takings Balancing Test

To determine whether a partial taking has occurred, New Hampshire courts have adopted a simplified version of the *Penn Central* balancing approach mentioned in Section 6.2.

In *Penn Central Transportation Co. v. City of New York*, the United States Supreme Court applied an analytical framework that balanced three attributes of a disputed regulation:

1) the economic impact on the property owner;
2) the degree of interference with the owner's reasonable investment-backed expectation; and
3) the character of the occupation.[383]

How these factors interact is essentially a factual determination; however, any one factor could prove controlling over the other two and, thereby, sway the outcome of the analysis. Likewise, New Hampshire courts have said it is a factual determination; "[t]he question of whether a taking has occurred when the police power is exercised must be resolved under the circumstances of each case."[384]

6.4.2.1 Economic Impact on the Property Owner

[382] *Burrows*, 121 N.H. at 598 ("The owner need not be deprived of all valuable use of his property. If the denial of use is substantial and is especially onerous, a taking occurs.") (citing Sundell v. Town of New London, 119 N.H. 839, 845 (N.H. 1979); Metzger v. Town of Brentwood, 117 N.H. 497, 503(N.H.) ("It is a matter of degree.") (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)); *see also* Huard v. Town of Pelham, 159 N.H. 567, 574 (N.H. 2009)).
[383] *Penn Central*, 438 U.S. at 124.
[384] *Burrows*, 121 N.H. at 598; *cf.* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (explaining that compensable takings liability depends largely on particular circumstances).

While there are several methods to measure the degree to which a government regulation diminishes a property's economically viable use, New Hampshire courts use a "before and after" comparison. [385] Typically this test attempts to determine the market value immediately before and immediately after the regulation is imposed on the property. This is similar to most federal courts who apply a "with or without" test, looking at the value of the property with or without regulation. For most properties a comparable-sales approach is implemented to assess fair market value of the property. For income producing properties, however, a market-capitalization approach may be used, or the methods may be combined. It should be noted that the "with or without" approach has an inherent weakness for determining the true value lost from imposing a regulation, because this approach reflects a loss of value to a property due to the regulation rather than a reflection of the value had the regulation never been enacted.[386] Therefore, a court needs to rely on a high value loss threshold when applying the "with or without" approach, due to the method's inherent exaggeration of the economic impact of a regulation on an individual property.[387]

In *Quirk v. Town of New Boston*, the plaintiff sued the town for imposing a buffer zone around his parcel that limited the development of a campground. The court found that the limitation on development was insufficient to constitute a compensatory taking based on the diminution of the value of the parcel in its entirety. The court ruled that the rights and uses that are impacted by the regulation cannot be segmented in order to find a higher impact on a particular portion of an owner's bundle of property rights. A landowner cannot "establish a 'taking' simply

[385] Quirk v. Town of New Boston, 140 N.H. 124, 130-32 (N.H. 1995).
[386] *Penn Central*, 438 U.S. at 139-40 (stating: "Typical zoning restrictions may, it is true, so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties.").
[387] *See* Agins v. City of Tiburon, 447 U.S. 255, 10 ELR 20361 (1980) (no taking with an 85% reduction in value); Village of Euclid v. Ambler Realty Co., 272 U.S. 36 (1926) (no taking with a 75% reduction in value); Ha-dacheck v. Sebastian, 239 US. 394 (1915) (no taking with a 92.5% diminution in value)).

by showing that they have been denied the ability to exploit a property interest that they previously believed was available for development."[388] "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."[389]

New Hampshire courts have also demonstrated a high tolerance for economic loss before they will find a regulatory taking. In *Claridge v. New Hampshire Wetlands Board*, the plaintiffs challenged the denial of a fill permit that was necessary to build a residence on their property,[390] which was located in a jurisdictional wetlands. The plaintiff's permit had been denied because the construction would have caused irreparable damage to a natural resource. The court found the property to be worth in excess of $50,000. The court also found that "[t]he property is not generally conducive for swimming, hunting, fishing, boating, farming or timber production."[391] Essentially the court found that the parcel was not suitable for most uses if it could not be filled and developed. Nevertheless, even without the fill permit, the property was not deemed valueless because the owners retained the ability to "clear a portion of the property to enable the location of a travel trailer or tent for seasonal use" or "the property could be sold to abutters or utilized for limited seasonal use."[392] Accordingly, the court did not find a taking.

The New Hampshire Supreme Court also found the "before and after" rule in *Burrows v. City of Keene*.[393] In *Burrows*, the plaintiff purchased 124 acres of undeveloped woodland for the purpose of developing a subdivision. The city proposed that Burrows consult with the conservation commission to determine if it might buy the land and conserve it as open space. The city conservation commission offered the plaintiff $27,900, which was much less than the purchase price of $45,000 or the city tax appraisal of $41,000. When the plaintiff refused to sell at the

[388] *Id.* at 131 (quoting *Penn Central*, 438 U.S. at 130).
[389] *Quirk*, 140 N.H. at 131 (quoting Andrus v. Allard, 444 U.S. 51, 65-66 (1979)); *see also Penn Central*, 438 U.S. at 130-31.
[390] Claridge v. Wetlands Bd., 125 N.H. 745 (N.H. 1984).
[391] *Id*. at 747.
[392] *Id.* at 747-48.
[393] Burrows v. City of Keene, 121 N.H. 590 (N.H. 1981).

offer price, the city amended its zoning to include the land in a conservation zone, thereby precluding the proposed development. The New Hampshire Supreme Court found the regulation effectively "prohibit[ed] all normal private development" and held that the zoning amendment constituted a taking, entitling the plaintiff to compensation equal to the diminution of value (i.e., fair market value based on the highest and best use of the property).[394] Although this case is an apparent departure from the high diminution threshold usually required by courts to find a taking, the court here emphasized the onerous character of the regulation and the plaintiff's investment-backed expectation to use the land for development.

A second approach federal courts have used to determine value diminution is based on assessing a landowner's reasonable rate of return once the regulation in implemented. This method is typically applied in takings decisions that involve an existing use or where the owner maintains a substantial investment-backed expectation in a projected use. In *Penn Central*, a New York City law prohibited the future use of the airspace above the Grand Central Terminal while still allowing the plaintiff's use of "the remainder of the parcel in a gainful fashion."[395] Since the regulation allowed for the existing use of the property, this provided the owners with a reasonable rate of return on the property, and, therefore, no taking was found.[396]

New Hampshire courts have also indirectly applied the rate-of-return approach to determining diminution of value in cases that involve regulating income and investment properties. In *Burrows*, the court recognized that the plaintiff's land was purchased for development purposes and the value should, therefore, be assessed based on that use. The court held that the open space value the City of Keene offered the plaintiff as compensation was insufficient to provide a return on investment and,

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[394] *Id.* at 600-01.
[395] *Penn Central*, 438 U.S. at 135.
[396] *Id*. at 136; *see also* Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 855 (Cal. 1997) (rent control law); Cienega Gardens v. United States, 331 F.3d 1319, 1342-43 (Fed. Cir. 2003) (96% reduction in rate of return suggests a taking).

therefore, the land use restrictions the city imposed constituted a taking.[397] In a companion case, *Sibson v. State*, a wetland development restriction prevented developers from filling two lots they purchased for the purpose of building homes. The court found the plaintiffs had recovered their initial investment and realized some profit from the original land purchase, and, therefore, the land had not been rendered useless by the regulation.[398]

To a lesser extent, the courts have also weighed a plaintiff's ability to recoup the original cost-basis under the disputed regulation in order to determine whether a taking has occurred.[399] This valuation method is often inextricably tied to the rate-of-return analysis. For parcels that have significantly appreciated over time, this factor will likely weigh in favor of the state and a finding that no taking has occurred.

In practice, the federal courts have not adjusted the cost-basis for inflation.[400] This approach has influenced decisions in New Hampshire as well. The concept is inherent in the court's decision in *Burrows*. The City of Keene only offered one half the value of the property as compensation for condemnation.[401] The court found a taking and found the compensation to be insufficient. The cost-basis recovery determination was also applied in *Sibson*, where the court found the initial investment was recovered and balanced this with other factors to determine that no taking had occurred.[402]

In conclusion, the New Hampshire courts are most likely to apply a "with-or-without" test to assess the economic impact a regulation has on a landowner. However, especially in the case of investment or income generating properties,

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[397] *See Burrows*, 121 N.H. at 601.
[398] Sibson v. State, 115 N.H. 124, 127 (1975).
[399] *See, e.g.*, Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 905 (Fed. Cir. 1986) ("[i]n determining . . . economic impact, the owner's opportunity to recoup its investment . . . cannot be ignored"); Walcek v. United States, 303 F.3d 1349 (Fed Cir. 2002); Putnam County National Bank v. City of New York, 829 N.Y.S.2d 661 (App. Div. 2007).
[400] *See* Walcek v. United States, 303 F.3d 1349 (Fed Cir. 2002).
[401] *Burrows*, 121 N.H. at 594.
[402] *Sibson*, 115 N.H. at 127.

courts may employ a "reasonable rate of return" or "cost-basis" type analysis, based on the particular factual circumstances of each case. Therefore, while the particular diminution of value measure that the court may use is difficult to predict, it will likely be tied to the factual attributes of the property in question and the regulatory circumstances behind the government action.

6.4.2.2 Investment Backed Expectations

> *"The purpose of consideration of plaintiffs' investment-backed expectations is to limit recoveries to property owners who can demonstrate that 'they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.'"*[403]

The second prong of the *Penn Central* test is an inquiry into whether the owner had reasonable investment-backed expectations at the time they purchased the property that now falls under the regulation.[404]

New Hampshire courts often look at an owner's initial intended use in order to determine whether a regulation interferes with a legitimate investment-backed expectation. In *Burrows v City of Keene*, the New Hampshire Supreme Court put a significant emphasis on the original intention of the plaintiff to develop his property and, thus, found that a zoning ordinance prohibiting that use constituted a taking.[405] It is worth noting, however, that the court emphasized the "total" diminution of value that resulted from the town designating the property as a conservation zone and the onerous character of the town's regulation, which was motivated by its desire to acquire the plaintiff's property at a discounted price.

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[403] Cienega Gardens v. United States, 331 F.3d 1319, 1345-46 (Fed. Cir. 2003) (quoting Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994)).
[404] *Penn Central*, 438 U.S. at 124,Ruckelshaus v. Monsanto Co., 467 U.S. 986, 987 (1984) ("A factor for consideration in determining whether a governmental action short of acquisition or destruction of property has gone beyond proper "regulation" and effects a "taking" is whether the action interferes with reasonable investment-backed expectations.").
[405] *See* Burrows v. City of Keene, 121 N.H. 590 (1981).

Finding that a buyer intended a particular use that is later prohibited, however, does not necessarily establish a taking. As mentioned before, the court in *Sibson v. State* found that land that was purchased for development purposes could be restricted in use without a regulatory taking. In that case, the court found the regulation did not interfere with the current use of the property and that, in spite of the regulation, the property owner had achieved a sufficient rate of return and had recouped his initial cost basis. Most importantly, the regulation prevented an irreparable harm to the public by prohibiting development in wetlands.[406]

More recently, in *Huard v. Town of Pelham*, a property owner brought a taking claim challenging the expiration of a use variance.[407] The decision prevented the owner from using the property for an automobile transmission repair business.[408] The court found that the plaintiff had "purchased his property for both residential and business purposes, and he acknowledges that his ability to live in the house is unaffected by whether or not the property has a use variance."[409] The denial of a zoning variance did not sufficiently devalue the plaintiff's property, and the regulation did not prevent the use of the property as a residence or, potentially, a different type of business.[410] Accordingly, the court did not find a taking.

Once a court has determined a landowner has an initial expectation to use the property for a purpose that is prohibited by the regulation, it will ordinarily inquire into whether the expectation is objectively reasonable. The United States Supreme Court has adopted a three-part test to determine whether an expectation is reasonable and whether the regulation was foreseeable at the time of the acquisition of the property.[411] Under this test, individuals who operate or claim

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[406] *See* Sibson v. State, 115 N.H. 124, 127 (1975); *Burrows*, 121 N.H. at 129-30.
[407] Huard v. Town of Pelham, 159 N.H. 567 (2009).
[408] *Id*.
[409] *Id*. at 575.
[410] *Id.*
[411] *See* Appolo Fuels, Inc. v. U.S., 54 Fed. Cl. 717, 1349 (2002) (for the test: (1) whether the plaintiff operated in a "highly regulated industry"; (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property; and (3) whether the plaintiff could have "reasonably anticipated" the possibility of such

property rights in a "heavily regulated field" typically have a difficult time establishing they have an objectively reasonable expectation the state will not enact new regulations that will affect their property.[412]

New Hampshire has previously regulated land abutting the Lamprey River. N.H. Rev. Stat. § 483:15 identifies the Lamprey River as a "Protected River" with varying levels of statutory regulation depending on the location at issue. This legislation intends that the "scenic beauty and recreational potential of such rivers … be restored and maintained [and] that riparian interests shall be respected."[413] While the statute does not regulate development per se, the intent is to impose restrictions on the areas abutting or affecting the watershed in general. This legislation could influence the court's decision regarding whether there was a reasonable investment-backed expectation regarding certain types of development in the Lamprey River watershed.[414]

Courts have also looked to whether the particular circumstance, that a regulation addresses, was known by the owner at the time of acquisition. When the state enacts a regulatory measure to correct a problem that was unforeseen at the time of acquisition, an owner will have a much stronger argument that the regulation interferes with a reasonable investment-backed expectation.[415] However, a

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regulation in light of the "regulatory environment" at the time of purchase (citing *Commonwealth Edison Co. v. U.S.,* 271 F.3d 1327 (Fed.Cir.2001), to illustrate the "three factors relevant to the determination of a party's reasonable expectations.")).

[412] *See* Fed. Hous. Admin. v. Darlington, Inc., 358 U.S. 84, 91 (1958) ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."); *see also Concrete Pipe*, 508 U.S. at 645 (quoting *Darlington*); Rith Energy, Inc. v. United States, 270 F.3d 1347, 1350 (Fed. Cir. 2001).

[413] N.H. REV. STAT. 483:2.

[414] *See, e.g.*, Claridge v. Wetlands Bd., 125 N.H. 745, 751 (1984) (establishing that "a person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights.").

[415] *Cf*. *Appolo Fuels*, 381 F.3d at 1349 (explaining that the Plaintiff was aware that surface mining was a potentially environmentally hazardous activity).

regulation may still be considered foreseeable, even if it was not in existence at the time of acquisition.[416]

In *Claridge*, the property owner's intended use was not restricted at the time of purchasing the property; however, the owner was on notice to some degree that it needed to obtain approval from the town's conservation commission to fill the wetland intended for development.[417] The court found the plaintiffs had constructive notice their land was subject to state wetlands statutes that were enacted prior to the purchase of the property. Although development of the property was not actually restricted at the time of purchase, the regulated condition of wetlands development, and the subsequent permitting restrictions, were known to the landowners at the time of purchase.[418] The court found no compensable taking had occurred when the town review board restricted the development on the plaintiffs' property, noting there was a reduced investment-backed expectation when the owners purchased the property knowing they would need to obtain approval from the conservation commission in order to develop the property.[419]

Finally, a court may determine whether the claimant could have reasonably anticipated government action in light of the contemporary regulatory environment.[420] Again, as in *Claridge*, the New Hampshire courts will look to the regulatory scheme currently in place to determine whether a use that is restricted interferes with any reasonable investment-backed expectations. In *Claridge*, the court found that, in light of the existing regulatory environment surrounding wetlands development, the denial of the owner's wetlands fill permit did not interfere with any reasonable investment-backed expectation.[421]

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[416] *See Ruckelshaus*, 467 U.S. at 1007 (stating that one must accept regulatory burdens as part of doing business).
[417] *Claridge*, 125 N.H. at 752.
[418] *Id.*
[419] *Id*.
[420] *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) ("the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations."*).*
[421] *See Claridge*, 125 N.H. at 752-53.

6.4.2.3 Character of the Regulation

This final prong of the *Penn Central* test initially focuses on the extent a regulatory taking approximated the physical taking that is envisioned in the Takings Clause of the Fifth Amendment.[422] Since the *Penn Central* decision was rendered, courts have universally interpreted the character factor much more broadly, defining the character of a government action in many different ways, and evaluating whether the regulation, as enacted, is a valid exercise of its police power.

Historically, courts found regulatory takings if the challenged government action failed to substantially advance a legitimate government interest.[423] However, *Lingle* abolished this determination as either part of the character factor or as a stand-alone requirement necessary to establish a Fifth Amendment taking. Instead, the *Lingle* Court relegated this determination to due process challenges of a state action.[424]

Alternatively, courts have balanced the public interest served by the regulation against the private burden on an affected landowner, in order to evaluate the character of the state action.[425] This definition of character is essentially a determination of whether a government action constitutes a taking based on whether the burden on a private property interest should be carried by the landowner or the public at large.[426] This analysis is analogous to the decision in *Lucas* that recognizes inherent property use restrictions at common law.

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[422] *See Penn Central*, 138 U.S. at 124 (citing United States v. Causby, 328 U.S. 256 (1946); *see also* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005) (stressing that the regulation must be the functional equivalent to a physical invasion such that it destroys the property owners right to exclude).
[423] *See* Agins v. City of Tiberon, 447 U.S. 225 (1980).
[424] Lingle v. Chevron U.S.A. Inc., 544 U.S. at 545-49.
[425] *See*, *e.g.,* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488, 492 (1987) (recognizing that property law restricts use of property that is to the detriment of the public at large or individual property interest (citing *Mugler,* 123 U.S. at 665) and that determining the legitimacy of state action "necessarily requires a weighing of private and public interests." (citing *Agins*, 447 U.S. at 260-261)).
[426] *See Keystone* 480 U.S. at 492; *Agins* 447 U.S. at 260-261.

New Hampshire courts have articulated this approach in their characterization of government action. In *Claridge*, the court noted that the town's denial of a permit to fill and develop the plaintiffs' property, which was located in jurisdictional wetlands, created a "burden which these plaintiffs must shoulder [that] is more direct and more acute than that of the public at large."[427] Nonetheless, in this pre-*Lucas* decision, the court did not find a taking because the denial of the permit directly supported the state's pre-existing policy of protecting fragile and limited resources, such as wetlands, from development. Here the interest of the public at large outweighed the private property interests of the plaintiffs. Had the decision come down at a later date, it would have been interesting to see whether the New Hampshire court could have simplified its analysis by invoking *Lucas* and ruling that the prohibited activity constituted a public nuisance.

Federal courts have also characterized government action by determining whether it is undertaken to provide a public benefit or prevent a public or private harm. The courts first identified this definition of character in *Mulger v. Kansas*, noting that private property rights do not allow for a landowner to use his property in such a way that it is injurious to the community.[428] In *Mugler*, the claimant was prohibited from using his land as a brewery in violation of an amendment to the Kansas Constitution. When asked to determine the legitimacy of the amendment, the United States Supreme Court said that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."[429] Some variation of this character determination has appeared in most federal regulatory takings decisions, including *Lucas*, that examine the character of the government action. This is the approach

[427] Claridge v. Wetlands Bd., 125 N.H. 745, 752 (1984); *see also* Sibson v. State, 115 N.H. 124, 129 (1975).
[428] Mugler v. Kansas 123 U.S. 623, 665 (1887); *see also Keystone*, 480 U.S. 470 (1987).
[429] *Mugler*, 123 U.S. at 668; *see also Penn Central*, 438 U.S. at 144 (1978) (Rehnquist, J. dissenting).

most often articulated in New Hampshire jurisprudence and is also a close relative to the *Lucas* approach.

One important distinction courts have articulated stresses the public value of regulations that prevent public harm relative to those that confer a public benefit. An exercise of the state's police power that protects public health, welfare, and safety is unlikely to be found to constitute a compensable taking.[430] In *Lucas*, the court commented that "'harm preventing' and 'benefit conferring' regulation is often in the eye of the beholder."[431] Although at times challenging to determine, the distinction is important and courts are much more likely to hold that a "harm preventing" regulation does not constitute a compensable taking.

This sentiment is clearly evidenced in New Hampshire court decisions. The most striking example is when the New Hampshire Supreme Court in *Burrows* found a restriction on development to be benefit conferring but not harm preventing. The New Hampshire Supreme Court found that, although the regulation in question provided a public benefit by establishing conserved open space, this was insufficient to justify a regulation that prohibited all private development of the parcel. The court found that the character of the regulation was an onerous burden on the plaintiff's land and was an underhanded attempt to acquire the land without paying just compensation.[432]

It is a simple comparison to look to the regulation in *Claridge*, to see how New Hampshire courts place a significant importance on the character of the regulation. In *Claridge*, the town imposed a regulation on landowners attempting to fill a portion of their property that lay within a jurisdictional wetland. Due to the "dangers associated with filling wetlands" and the scarcity of the natural resource, the court found that to deny a permit to fill the plaintiffs' property would be

[430] *See*, *e.g.*, Rose Acre Farms, Inc. v. U.S., 373 F.3d 1177, 1281 (Fed. Cir. 2004).
[431] *Lucas*, 505 U.S. at 1024-25 (referencing *Claridge*, 125 N.H. at 752).
[432] *Burrows*, 121 N.H. at 600-01. *See also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

preventing an irrevocable public harm.[433] The court ruled that a compensable taking had not occurred because, among other things, the character of the state action was to prevent public harm.[434]

6.4.3 Conclusion

While both New Hampshire and U.S. Supreme Court jurisprudence provides some helpful guidance for municipalities looking to amend their zoning regulations to mitigate damage during floods, there are still numerous case-by-case circumstances that will instruct the courts whether a compensable regulatory taking has occurred.

First, it must be determined whether a landowner has a vested property right to use his property in a way that is precluded by the challenged zoning regulation. There are many variable factors in this analysis, such as what is the alleged property right and how is it restricted, which can only be evaluated after a factually intensive inquiry. Furthermore, whether the regulated property use constitutes a nuisance and, therefore, can be regulated without proceeding through the *Penn Central* test, is a matter of New Hampshire nuisance and property law. Determining whether a *Lucas* defense would shield a New Hampshire municipality from takings liability requires an analysis of the specific activity and the nature of the specific regulation. If the zoning regulation affects a *per se* taking, it is possible municipalities can argue against a taking claim if they can prove that development in a floodplain is a nuisance in fact and the amended zoning merely articulates a background principle of New Hampshire property law.

If the regulation does not affect a *per se* taking of property rights, both the federal and state courts will apply analogous balancing tests to determine whether a zoning amendment will result in a partial regulatory taking. Federal courts will apply the test articulated in *Penn Central*. New Hampshire Courts will likely balance the economic harm to the property owner (including harm to investment backed

[433] *See Claridge* 125 N.H. at 752.
[434] *Id*. at 753. S*ee also* Sibson v. State, 115 N.H. 124 (1975).

expectations) against the nature of the regulation. Often times the New Hampshire courts will draw a distinction between whether the regulation is enacted to protect the public or benefit the public. If the zoning regulation is a legitimate attempt to protect the health, welfare, and safety of the public, it is likely that New Hampshire courts will find it to be constitutional and not a compensable taking under the New Hampshire Constitution, even if the diminution of economically viable activity is severe. Precedent suggests that the Federal Constitution provides little if any takings protection over the New Hampshire Constitution. Therefore, municipal floodplain regulation takings exposure is a roughly similar analysis under both jurisdictions.

6.5 Suggestions on How to Avoid the Risk of Takings

There are several ways a municipality may minimize the risk of a taking claim when enacting regulations that restrict development in the floodplain. The regulations referenced below are more thoroughly explained in Section 3.

As explained in the prior takings analyses section, a municipality can be subject to takings claims when a regulation deprives a landowner of all economically viable uses of his land or when the regulation goes too far and infringes on private property rights. Thus, any of the following regulatory mechanisms should be enacted in a way that preserves economically viable uses of the regulated property and indicates that the purpose is to promote hazard mitigation as the basis for the government action. Municipalities should also make the basis for floodplain regulation clear in the master plan. A municipality should amend the plan to include its goals and policies for floodplain management and indicate that the prevailing purpose of subsequent regulations is hazard mitigation for the health, safety, and welfare of its citizens.

6.5.1 No Adverse Impact (NAI) As a Performance Standard

A municipality might consider using the principle of No Adverse Impact (NAI) as a standard when creating floodplain regulations to avoid takings claims. NAI is the principle that the action of one property owner may not adversely impact the flooding risk for other property owners. This principle is reminiscent of nuisance law, which prohibits property owners from taking actions on their property that substantially interferes with other property owners' rights to the enjoyable use of their land. Under *Lucas*, nuisance law and other background property law principles prevent takings claims when such activities would not be permitted, even without the regulation. A municipality might also use NAI to prevent harm to a body of water held in public trust.

Moreover, to prevent a takings claim under the *Penn Central* balancing test, the regulation should indicate that its purpose is hazard mitigation. When the character of the government action is based on protecting the health, safety, and welfare of citizens, it is much less likely to be struck down in court than if the regulation is based on environmental or aesthetic concerns.

6.5.2 Overlay Districts

When a municipality creates an overlay district, or enacts a regulation that requires the rezoning of a property in the floodplain, it should ensure that the rezoning is done in a way that maintains the economic viability of the property. For instance, a municipality might consider rezoning properties in the floodplain from residential to agricultural, to help ensure that the development prohibition will not deny a property owner of all economic use of the property.

Overlay districts that prohibit impervious surfaces in the floodplain prevent harm to neighboring property owners and the water body. Similar to the discussion above on NAI, such regulations are supported by nuisance and other background principles of property law. However, the regulation should also indicate that hazard

mitigation is the primary purpose, rather than aesthetics or environmental concerns, to avoid takings claims.

6.5.3 Setback and Freeboard Requirements

When a municipality enacts a regulation that requires new development to be set back a certain distance or above a certain height from the water body, the requirements should be sufficient to provide necessary protection yet leave some economically viable use of the land. A municipality should not create distance requirements that cover an entire parcel and, thereby, prohibit the landowner from being able to build on any part of the land. Moreover, the municipality should indicate that the requirements are based on hazard mitigation and protection of the development to promote the beneficial nature of the government action.

6.5.4 Transferable Development Rights (TDR)

Transferable Development Rights (TDR) programs have been enacted to avoid takings claims when a municipality desires to restrict development in certain areas.[435] TDR programs, however, are not always found to be sufficient to preserve the private property rights of landowners. To avoid creating a regulation that falls under the latter category, municipalities should ensure that TDR programs are designed in a way that grant landowners a substantial benefit to counter the restrictions the regulation imposes.

When enacting a TDR program, a municipality should establish definitive sending and receiving zones and ensure that there are a wide variety of available receiving areas.[436] The TDR program should minimize any adverse effects on a landowner's

[435] TDRs harness private market forces to protect sensitive open space by transferring some or all of the development that would otherwise have occurred in environmentally sensitive areas to locations that are more suitable for development, such as city and town centers or vacant and underutilized properties.
[436] Under TDR schemes, development rights are "transferred" from one district (the "sending district") to another (the "receiving district"), thereby, shifting development

right to exclude or right to devise real property and be designed in a way that sufficiently mitigates any economic impact on the landowners (i.e., their investment backed expectations). Also, the TDR program should be designed to meet a clear public purpose, such as hazard mitigation, and be compatible or included in the comprehensive plan. Finally, the municipality should be certain that there is sufficient municipal infrastructure for increased development in receiving areas.

6.5.5 Non-Conforming Uses

While the NFIP does not cover non-conforming uses, municipalities can alter their regulations to clearly state that post-disaster rebuilds must be brought to code. Existing structures in the floodplain can be addressed as a non-conforming use in local regulations. Non-conforming use language typically prohibits alterations or reconstruction of existing structures. A municipality might, however, choose to allow landowners to update structures in the floodplain to meet certain safety and floodplain specific requirements. Any modifications must arise naturally from the grandfathered use.

In general, no property owner has a vested right to maintain a non-conforming structure that imperils the safety of the community. A non-conforming use regulation, therefore, should clearly indicate that its purpose is hazard mitigation and to prevent negative impact on other property owners.

6.5.6 Regulate Early

The earlier a municipality regulates, the more likely it can avoid infringing on investment-backed expectations of property owners and be subject to takings claims. Regulations should focus on addressing flood hazards at the siting stage of development instead of the construction stage. A municipality might also use data to

densities within the community to achieve both open space and economic goals without changing their overall development potential.

substantiate regulations and, thereby, help prevent owners from claiming their significant investment-backed expectations are reasonable.

6.5.7 Variances

Local zoning regulations set forth most of the requirements an applicant must fulfill to develop in the floodplain. An applicant seeking a variance from the requirements established by the municipality may apply to a zoning board of adjustment. A variance provides relief from the application of an ordinance when, due to "special conditions" of the property, compliance would result in an "unnecessary hardship" to the applicant.[437]

FEMA requires stricter variance standards than the standards set by New Hampshire law. Therefore, municipalities participating in the National Flood Insurance Program must adopt stricter variance standards for properties located within the FEMA floodplain boundaries as defined in the FEMA regulations. Additional areas delineated by the municipality, however, are only subject to the variance standards described in New Hampshire law.

6.5.8 Defenses

In addition to the preventative strategies mentioned above, municipalities may have both procedural and substantive defenses available. Procedurally, a municipality may challenge a taking claim as not being ripe or exceeding a statute of limitations or argue that a landowner does not have standing. Substantively, a municipality may elicit the public trust doctrine or demonstrate how the landowner will be benefited by the regulation. These are just a few examples of the defenses available.

It is important to note that the recommendations in this section are generally intended to guide municipalities as they weigh regulatory options during the planning process. *For example, once a takings claim has been initiated there will be*

[437] The elements for a variance are described under New Hampshire law RSA 674:33, I(b).

more arguments and defenses available. These recommendations are not a substitute for *legal advice.*

6.5.9 Resources

- http://www.nh.gov/oep/resourcelibrary/referencelibrary/n/nonconforminguses/index.htm
- *Fischer v. Building Code Review Board*, 154 N.H. 585, 588 (2006), stating there is no such thing as an inherent or vested right to imperil the health safety of the community.
- *Killington, Limited. v. State*, 164 Vt. 253 (1995), which explores the *Williamson County Barrier* in Vermont.
- *New London Land Use Association. v. New London ZBA,* 130 N.H. 510 (1988), stating that non-conforming uses can exist so long as there is no negative impact on neighbors and the change arises naturally from the grandfathered use.
- *Smith v. Town of Wolfeboro*, 136 N.H. 337 (1992), stating New Hampshire has interpreted *Lucas* to uphold municipal ordinances that protect the public from nuisances. No one can be grandfathered from a regulation that is exclusively designed to prevent public harm and prevent the violation of rights of others.