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## The National Flood Insurance Program: Unattained Purposes, Liability in Contract, and Takings

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# NOTES

## THE NATIONAL FLOOD INSURANCE PROGRAM: UNATTAINED PURPOSES, LIABILITY IN CONTRACT, AND TAKINGS

A flood insurance program is a tool which should be used expertly or not at all. Correctly applied, it could promote wise use of flood plains. Incorrectly applied, it could exacerbate the whole problem of flood losses.<sup>1</sup>

Congress passed the National Flood Insurance Act of 1968<sup>2</sup> which created the National Flood Insurance Program (NFIP) in an effort to avoid or reduce the public's exposure to damages caused by flooding<sup>3</sup> and to discourage development in floodplains.<sup>4</sup> De-

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1. COMMUNICATION FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A REPORT BY THE TASK FORCE ON FEDERAL FLOOD CONTROL POLICY, H.R. Doc. No. 465, 89th Cong., 2d Sess. 17 (1966).

2. 42 U.S.C. §§ 4001-4128 (1988).

3. "Flood" is defined as

(a) A general and temporary condition of partial or complete inundation of normally dry land areas from:

(1) The overflow of inland or tidal waters

(2) The unusual and rapid accumulation or runoff of surface waters from any source

(3) Mudslides (i.e. mudflows) which are proximately caused by flooding as defined in paragraph (a)(2) of this definition and are akin to a river of liquid and flowing mud of the surfaces of normally dry land areas, as when earth is carried by a current of water and deposited along the path of the current.

(4) The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels or suddenly caused by an unusually high water level in a natural body of water, accompanied by a severe storm, or by an unanticipated force of nature, such as flash flood or an abnormal tidal surge, or by some similarly unusual and unforeseeable event which results in flooding as defined in paragraph (a)(1) of this definition.

National Flood Insurance Program, 44 C.F.R. § 59.1 (1992).

4. A floodplain is "any land area susceptible to being inundated by water from any source." *Id.* "Flood insurance is viewed both as a means of helping the individual bear more

spite these noble missions, the NFIP has not accomplished the goal of discouraging development in the floodplain in order to limit private and public damages due to flooding. Certain indicators suggest the NFIP has had the opposite effect of encouraging development.<sup>5</sup> Congress has made efforts over the years to correct the NFIP's problems, most recently during the fall of 1992 and current sessions.<sup>6</sup>

This Note will discuss the NFIP and its developmental history, focusing on some of its recognized problems. It will suggest and discuss solutions and analyze their anticipated effects and viability. This analysis will take place on two legal fronts: contract and takings. First, this Note will discuss whether the NFIP imposes contractual liability on participating communities. Second, it will address takings issues relative to inverse condemnation in light of the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*<sup>7</sup> and the Court's trilogy of takings decisions in 1987,<sup>8</sup> and examines how those cases affect the current NFIP.

## HISTORY

The United States government's first efforts to deter damage due to flooding, beginning in 1927, focused on the physical re-

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easily the risks of flood damage to which his location often exposes him, and, equally, as a means of discouraging unwise occupancy of flood-prone areas." SENATE COMM. ON BANKING AND CURRENCY, 89TH CONG., 2D SESS., INSURANCE AND OTHER PROGRAMS FOR FINANCIAL ASSISTANCE TO FLOOD VICTIMS IX (Comm. Print 1966) [hereinafter SENATE REPORT]; see also 42 U.S.C. § 4001(e)(2) (1988) (declaring guiding development away from flood threats as a congressional purpose of the NFIP).

5. Telephone Interview with David Jansen, Marine Policy Analyst to Senator John Kerry (Oct. 19, 1992). Since the NFIP's implementation, the number of homes in floodplains has increased by 40%. Robert S. Capers, *Great Flood, Still Unfinished, Fills Record Books*, HARTFORD COURANT, Aug. 6, 1993, at A1.

6. In the Fall 1992 session, a bill easily passed the House but a companion bill failed in the Senate. Carl Hulse, *Flood Aid Fund in Trouble*, DALLAS MORNING NEWS, Aug. 24, 1993, at 20A. Representative Doug Bereuter and Senator John Kerry have reintroduced the legislation in 1993 in a renewed effort to revise the NFIP and correct its problems. See H.R. 62, 103d Cong., 1st Sess. (1993); S. 1405, 103d Cong., 1st Sess. (1993).

7. 112 S. Ct. 2886 (1992).

8. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

straint of floodwaters.<sup>9</sup> The government built levees, floodways, reservoirs and other physical structures, all at great expense.<sup>10</sup> These efforts often succeeded only in exacerbating flood damages elsewhere while creating a false sense of security in the protected areas that encouraged building in the floodplain.<sup>11</sup> Development typically outpaced construction of flood protection, further increasing damages.<sup>12</sup> The government's efforts aimed at restraining the floodwaters also destroyed or endangered valuable ecosystems.<sup>13</sup>

President Truman proposed a national flood insurance program first in 1951 and again in 1952, but strong congressional opposition and insurance industry lobbying defeated both proposals.<sup>14</sup> In 1956, Congress adopted President Eisenhower's proposal, the Fed-

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9. Saul J. Singer, *Flooding the Fifth Amendment: The National Flood Insurance Program and the "Takings" Clause*, 17 B.C. ENVTL. AFF. L. REV. 323, 334 (1990).

10. Oliver A. Houck, *Rising Water: The National Flood Insurance Program and Louisiana*, 60 TUL. L. REV. 61, 64-65 (1985).

11. *Id.* at 66.

Efforts at control may, in some cases, in the end produce results worse than they were intended to cure. A levee to confine all floods would be prohibitively costly. A feasible levee can confine floods of limited magnitudes, but every so often a really big one will top it. Once topped, a levee tends to aggravate and prolong inundation beyond what it would have been without the levee.

SENATE REPORT, *supra* note 4, at 22. In response to the 1993 flooding of the Missouri and Mississippi Rivers, the Association of State Flood Plain Managers, a national group representing state officials who deal with flood problems, reported that the flood control measures, such as dikes and dams, increased the severity of the flooding. Diane Dumanoski, *The Answer May Lie in Less Flood Control*, BOSTON GLOBE, July 19, 1993, at 25.

12. SENATE REPORT, *supra* note 4, at 35.

13. Thirty years ago, the Army Corps of Engineers spent \$32 million to straighten Florida's Kissimmee River into a canal in an effort to reduce its flooding tendency, destroying a 75-square-mile ecosystem surrounding the river. The Army now plans to spend \$370 million over the next 15 years to put the kinks back in the river to restore the flood absorbing ecosystem. Steve Kemper, *This Beach Boy Sings a Song Developers Don't Want to Hear*, SMITHSONIAN, Oct. 1992, at 72. Along the Missouri River, prominent for its 1993 flooding, "90 percent of the region drained by the river in 1860 was forest and wetlands, which absorb vast amounts of rain." Keith Schneider, *After Flood, 2 Towns Diverge About the Next One*, N.Y. TIMES, Aug. 7, 1993, at A5. Today, "less than 10 percent is forest or wetland," having been developed for valuable pasture and cropland. *Id.* "It is no accident of nature that Illinois, Iowa and Missouri—the three states where the flood damage [from the 1993 flooding of the Missouri and Mississippi Rivers] has been the worst—have lost from 85 percent to 90 percent of their wetlands." *Id.* For further description of the effects of man's attempts to control flooding, see William K. Stevens, *The High Risks of Denying Rivers Their Flood Plains*, N.Y. TIMES, July 20, 1993, at C1.

14. Singer, *supra* note 9, at 334-35.

eral Flood Insurance Act,<sup>15</sup> but failed to fund its implementation.<sup>16</sup> Congress feared that flood insurance would encourage development in the floodplain and further increase losses.<sup>17</sup> Ironically, the present debacle has proven that fear to be well grounded.<sup>18</sup>

By the 1960's, those in the upper echelons of government had become aware of the government's inability to physically control flooding.<sup>19</sup> Despite spending billions of dollars on the engineering program, flood losses continued to increase.<sup>20</sup> The Department of Housing and Urban Development recommended in 1966 that Congress adopt flood insurance as part of a national program for disaster relief.<sup>21</sup> The proposed flood insurance program would seek to "prevent unwise use of land where flood damages would mount steadily and rapidly" while compensating the victims of flood losses.<sup>22</sup> The Department of Housing and Urban Development intended flood insurance to replace monetary disaster relief in providing funds for flood damages.<sup>23</sup> It has not achieved this goal.<sup>24</sup>

The final legislation proposed by President Johnson became the National Flood Insurance Act of 1968.<sup>25</sup> This Act mandates the adoption and implementation of flood management measures, thereby negating criticisms of the former unsuccessful proposals, while also providing federally subsidized insurance to floodplain residents.<sup>26</sup> The Act requires communities to adopt zoning ordi-

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15. 42 U.S.C. §§ 2401-2421 (1958) (all except § 2414(e) repealed in 1968).

16. SENATE REPORT, *supra* note 4, at v.

17. Houck, *supra* note 10, at 68.

18. Critics have characterized the NFIP as a federal subsidy that actually has contributed to and encouraged building in flood-vulnerable areas. See Christopher B. Daly, *Federal Flood Insurance Seen by Critics As All Wet*, WASH. POST, Feb. 18, 1993, at A3.

19. Houck, *supra* note 10, at 65-66. "The rising trend in total flood damages during the same years that Federal expenditures for flood protection have been rising suggests that flood protection works are not a complete answer to all flood problems." SENATE REPORT, *supra* note 4, at 31-32.

20. Houck, *supra* note 10, at 65-66.

21. SENATE REPORT, *supra* note 4, at 43. HUD made the recommendation pursuant to the Southeast Hurricane Disaster Relief Act of 1965, Pub. L. No. 89-339, 79 Stat. 1301.

22. SENATE REPORT, *supra* note 4, at 2.

23. Houck, *supra* note 10, at 68-69.

24. See *infra* notes 77-92 and accompanying text.

25. Pub. L. No. 90-448, 82 Stat. 572 (codified as amended at 42 U.S.C. §§ 4001-4127 (1988)); see also SENATE REPORT, *supra* note 4, at vii.

26. Singer, *supra* note 9, at 336; see 42 U.S.C. §§ 4011-4012, 4022 (1988).

nances in accordance with criteria designed to minimize the hazard to new construction in the floodplain.<sup>27</sup>

Since its inception, the National Flood Insurance Act has undergone several readjustments attempting to discourage development in floodplains and encourage purchase of individual policies in participating communities. The Flood Disaster Protection Act of 1973<sup>28</sup> provided for federal financial assistance for construction in flood hazard areas contingent upon purchase of flood insurance.<sup>29</sup> By 1979, the United States had spent another \$7 billion on physical flood protection and prevention, and average annual flood losses were estimated to approach over \$3 billion.<sup>30</sup> Burgeoning development of highly exposed coastal barrier islands led to the withdrawal of flood insurance availability for such development.<sup>31</sup> In 1986, President Reagan required that the NFIP be fully self-supporting.<sup>32</sup> Numerous other statutory refinements have sought to create new incentives to encourage the purchase of flood insurance. For example, one statute requires flood insurance before awarding federal construction assistance in a floodplain.<sup>33</sup> The latest attempt at refinement, Senate Bill 2709 proposed by Senator John Kerry in 1992, failed to pass the Senate, although a companion bill in the

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27. 42 U.S.C. §§ 4012, 4022 (1988).

28. Pub. L. No. 93-234, 87 Stat. 975 (codified in scattered sections of 42 U.S.C. §§ 4001-4128 (1988)).

29. As one federal court noted, the Act

sought to significantly enhance the attractiveness of enrollment in the Program through a dual scheme of sanctions against both non-participating communities, as a whole, and against flood-prone designated property located in an area which is eligible for and participating in the Flood Insurance Program, but which is not covered by flood insurance.

*Texas Landowners Rights Ass'n v. Harris*, 453 F. Supp. 1025, 1027 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 311 (D.C. Cir.), *cert. denied*, 444 U.S. 927 (1979). This Act was amended and is now merely a notice requirement for lenders to borrowers whose land may not be eligible for federal disaster relief assistance. *Id.* at 1028 n.8.

30. Houck, *supra* note 10, at 66.

31. 42 U.S.C. § 4028 (1988 & Supp. III 1991) (disallowing new flood insurance for new construction or substantial improvements of structures on any coastal barrier after October 1, 1983 as amended by the Coastal Barrier Resources Act, Pub. L. No. 97-348, § 11, 96 Stat. 1653, 1658-59 (1982)).

32. Interview with Mark Stevens, Public Affairs Office, Federal Emergency Management Agency (Jan. 12, 1994). President Reagan's Federal Insurance Administrator, Jeff S. Bragg, announced this change in policy for the NFIP in 1982. The goal was achieved in 1986. *Id.*

33. 42 U.S.C. § 4012a (1988); see Houck, *supra* note 10, at 70-71.

House did pass.<sup>34</sup> Efforts to refine the NFIP continue as congressmen have resubmitted legislation to reform the NFIP during the 1993 session.<sup>35</sup>

### WHY SUBSIDIZED INSURANCE?

Congress found that numerous factors make it "uneconomic for the private insurance industry alone to make flood insurance available on reasonable terms and conditions."<sup>36</sup> A number of factors combine to make flood insurance economically infeasible for private insurance companies. Flooding tends to be a low frequency hazard resulting in high monetary losses.<sup>37</sup> The low frequency makes accurate risk data extremely difficult to generate.<sup>38</sup> Unlike other types of insurance, flood insurance cannot spread the risk over a large geographic area.<sup>39</sup> Only those at the greatest risk of flooding will purchase insurance, unlike the situation with fire or theft insurance.<sup>40</sup> Consequently, "expected losses arising out of a given group of risks, plus expenses relating to those risks, exceed the premium volume generated by policies written."<sup>41</sup>

Congress determined that "personal hardships and economic distress which have required unforeseen disaster relief measures and have placed an increasing burden on the Nation's resources"<sup>42</sup> could be met better through federally subsidized insurance.<sup>43</sup> The NFIP seeks to generate sufficient premiums to cover its expenses and losses as estimated using actuarial data as to floods and losses

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34. Interview with David Jansen, *supra* note 5.

35. H.R. 62, 103d Cong., 1st Sess. (1993); S. 1405, 103d Cong., 1st Sess. (1993).

36. 42 U.S.C. § 4001(b) (1988).

37. Singer, *supra* note 9, at 333. Generally, three events make up nearly 50% of the NFIP insurance claims paid in a given year. *Id.*

38. *Id.*

39. *Id.* at 332-33.

40. *Id.* at 332. Additionally, the government cannot compel homeowners to buy flood insurance for their protection as it can in the case of automobile insurance that is designed to protect passengers and other third parties, not just the car owner. *Id.* at 328-29; *see also* SENATE REPORT, *supra* note 4, at 47 (recognizing that many do not feel the need for flood insurance until after the flood).

41. Singer, *supra* note 9, at 327. The losses are "expected" because one cannot determine the actual losses which depend on the amount of flooding. *Id.*

42. 42 U.S.C. § 4001(a)(1) (1988).

43. *Id.* § 4001(b)(2).

gathered and analyzed to date.<sup>44</sup> It responds to flood losses by making affordable flood insurance available to individuals and businesses located in floodplains and also by requiring local regulation of development in high hazard areas to reduce future damages.<sup>45</sup> Some believe that national flood insurance equitably spreads the responsibility for taking risks and developing in the floodplain.<sup>46</sup>

### *How the NFIP Works: Community Implementation*

In order for its residents to purchase flood insurance, a community must become a participant in the NFIP.<sup>47</sup> Implementation of the program in a community proceeds in three stages: the Application, the Emergency Program, and the Regular Program.<sup>48</sup> The key components of a community's implementation are the designation of flood-prone zones<sup>49</sup> and the establishment of the Base Flood

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44. *Id.* § 4015(a)-(b).

45. Houck, *supra* note 10, at 64. See, e.g., William Booth, *Pre-Andrew Mistakes Are Being Repeated, Grand Jury Warns*, WASH. POST, Dec. 15, 1992, at A3. The enforcement of adopted ordinances remains a big problem within the program. See *id.* Insuring adequate and proper construction within the floodplain requires reliance on inspection of the construction. *Id.* Hurricane Andrew demonstrates the actual deficiency in relying on such inspections. First, they are inadequately performed, if at all, before a catastrophic event. *Id.* Following the event and reconstruction, the structures face similar threat for the inadequate inspection process again fails to correct deficient construction. *Id.* Future damages, rather than being lessened, are certain to remain the same if not exacerbated.

46. E.g., Clara Germani, *Insurance, U.S. to Pay for Hurricane Cleanup*, CHRISTIAN SCI. MONITOR, Aug. 31, 1992, at 9 (citing Marc H. Rosenberg, Vice-President of the Insurance Information Institute). The NFIP spreads the flood risk more so than disaster relief which generally consists of providing victims with no-interest loans to rebuild. Disaster Relief Act, 42 U.S.C. §§ 5172(a)(1), 5184(a) (1988). Under the NFIP, money in the form of premiums goes back into the system from those who may withdraw it should they suffer flood damage. A catastrophic flood, though, may require even the person living high up in the mountains, as a taxpayer, to absorb some of the loss. Should the losses exceed the amount of money collected in premiums, the NFIP resorts to federal tax dollars. See *infra* notes 97-102 and accompanying text. With the current NFIP, many property owners do not carry the insurance and yet are at great risk. The risk, therefore, can hardly be considered to be spread more evenly when taxpayers living far from a floodplain may have to make up the deficit should a catastrophic flood deplete the NFIP's resources.

47. 44 C.F.R. § 59.22 (1992).

48. See *infra* notes 52-76 and accompanying text.

49. The National Flood Insurance Act authorizes the federal government to identify and publish information on areas of special flood hazards. 42 U.S.C. § 4101(a) (1988). The Special Flood Hazard Areas ("SFHA") define areas within a community that are susceptible to flooding from 100-year floods. FEDERAL EMERGENCY MANAGEMENT AGENCY, MANDATORY



Elevation.<sup>50</sup> However, even if a community fails to complete its application or never participates in the program, its residents still remain eligible for federal disaster relief.<sup>51</sup>

### *The Application Stage*

The Application stage begins with notification from the Federal Emergency Management Agency (FEMA) that all or part of the community lies within a flood-prone area.<sup>52</sup> A community then has one year to complete the Application stage, during which it identifies the flood-prone areas, prepares preliminary maps, and enacts a basic ordinance managing development in the floodplain.<sup>53</sup>

The community must first approve a Flood Hazard Boundary Map prepared by FEMA, giving a general outline of the floodplain.<sup>54</sup> Areas inundated by 100-year floods are designated "Zone A."<sup>55</sup> The community's approval of the Flood Hazard Boundary Map merely indicates its concurrence that the areas designated Zone A present a flood hazard.<sup>56</sup> To protect the Zone A areas, the community must develop a system to issue building permits for structures in Zone A.<sup>57</sup> If the Base Flood Elevation is known, the building permit ordinance must require all new residential struc-

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PURCHASE OF FLOOD INSURANCE GUIDELINES 7 (1989) [hereinafter GUIDELINES]. The Federal Emergency Management Agency considers "statistical analysis of records of river flow, storm tides, and rainfall; information obtained through consultation with the community; floodplain topographic surveys; and hydrologic and hydraulic analyses" in defining the areas. FEDERAL EMERGENCY MANAGEMENT AGENCY, QUESTIONS AND ANSWERS ON THE NATIONAL FLOOD INSURANCE PROGRAM 19 (1987) [hereinafter QUESTIONS]. The SFHA "may be further subdivided into insurance risk rate zones." *Id.*

50. A "base flood," or "100-year flood" is a "flood having a one percent chance of being equalled or exceeded in any given year." 44 C.F.R. § 59.1 (1992). "It is interesting to note that, based on this standard, a homeowner in the floodplain with a traditional 30-year mortgage has a better than one-in-four chance of sustaining a 100-year flood during the term of his or her mortgage." Singer, *supra* note 9, at 331 n.38; see also SENATE REPORT, *supra* note 4, at 3.

51. Houck, *supra* note 10, at 76.

52. See 44 C.F.R. § 59.2(a) (1992).

53. *Id.* § 59.2. Should a community fail to apply within one year, residents will not be able to obtain federal financial assistance, such as a loan or subsidy, for construction within the floodplain. *Id.* §§ 59.1, 59.2(a).

54. Houck, *supra* note 10, at 74.

55. See 44 C.F.R. § 59.1 (1992) (defining "area of special flood hazard").

56. Houck, *supra* note 10, at 74.

57. 44 C.F.R. § 60.3(b) (1992).

tures and substantial improvements to be elevated above the flood level and all new nonresidential structures and substantial improvements either to be elevated or to be floodproofed to that level.<sup>58</sup> If the Base Flood Elevation is not known, a community must use all available information to determine or approximate the Base Flood Elevation,<sup>59</sup> and construction must be "reasonably safe from flooding."<sup>60</sup> In addition, developers must conduct Base Flood Elevation studies for developments exceeding five acres or fifty lots.<sup>61</sup>

### *The Emergency Program Stage*

Once FEMA has approved a community's application, residents become eligible for flood insurance in the Emergency Program.<sup>62</sup> In this program, the participating residents receive less insurance coverage than under the Regular Program and pay a below cost premium designed to encourage involvement in the NFIP.<sup>63</sup> Any federally insured or regulated financial institution is statutorily mandated to require flood insurance before lending funds for construction in the floodplain.<sup>64</sup>

The Emergency Program provides FEMA time to conduct detailed engineering studies of the flood zone.<sup>65</sup> After completion of these studies, communities must adopt stricter ordinances for managing development in the floodplain.<sup>66</sup>

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58. *Id.* § 60.3(c); *see also id.* § 60.2 (setting forth the minimum requirements for compliance with floodplain management criteria).

59. *Id.* § 60.3.

60. *Id.* § 60.3(a)(3).

61. *Id.* § 60.3(b)(3).

62. *See id.* § 59.3(b). A resident can obtain \$35,000 of coverage for a single-family residence and an additional \$10,000 for its contents. Higher coverage is available in Hawaii, Alaska, the U.S. Virgin Islands, and Guam—\$50,000 for a single-family residence. A small business or nonresidential structure can be insured up to \$100,000 with an additional \$100,000 for its contents. *Id.* § 61.6(a).

63. Houck, *supra* note 10, at 75.

64. 42 U.S.C. § 4012a(b) (1988).

65. *See* Houck, *supra* note 10, at 73-74, 76-77.

66. *Id.* at 73-74; *see* 44 C.F.R. § 60.3(c)-(e) (1992).

*The Regular Program Stage*

The community moves into the Regular Program following the completion of its flood insurance rates study. A detailed engineering study is then performed for FEMA by a private contractor.<sup>67</sup> This study is the basis for the Flood Insurance Rate Map (FIRM),<sup>68</sup> which indicates the flood-prone areas and applicable insurance rates within the community and establishes the Base Flood Elevation.<sup>69</sup>

Upon entering the Regular Program, the insurance schedule changes.<sup>70</sup> An additional \$150,000 in coverage for single-family residences, small businesses and nonresidential structures becomes available to policyholders, and contents coverage can be increased by \$50,000 for residences and by \$200,000 for small businesses.<sup>71</sup> An adjustment of insurance premiums accompanies the increase in available coverage.<sup>72</sup> Rate assessments are based on whether structures were existing pre-FIRM or post-FIRM construction.<sup>73</sup> Actuarial rates are assessed on post-FIRM structures because these adhere to the high safety standards required by the Regular Program.<sup>74</sup> Subsidized rates remain for pre-FIRM structures, but only for the amount for which they were insured under the Emergency Program.<sup>75</sup> Those landowners who do not obtain flood insurance through the NFIP can still receive relief through the Disaster Relief Act.<sup>76</sup>

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67. See Houck, *supra* note 10, at 76. The community does not qualify for flood insurance under the regular program until it has adopted a floodplain management ordinance designed to reduce or prevent flood-related damage. See 44 C.F.R. § 59.22(a)(3) (1992). The ordinance must require building above or floodproofing up to the Base Flood Elevation. *Id.* § 60.3(c).

68. Houck, *supra* note 10, at 76.

69. *Id.* at 76-77; see 44 C.F.R. § 64.3(a)(1) (1992).

70. See 44 C.F.R. § 61.6 (1992).

71. *Id.*

72. *Id.* § 59.3.

73. *Id.*

74. See 44 C.F.R. § 59.3 (1992); Houck, *supra* note 10, at 77-78. Note that "accepted actuarial principles" are used to set "risk premium rates." 44 C.F.R. § 59.1 (1992).

75. 44 C.F.R. § 59.3 (1992). Any additional coverage obtained is charged at the risk premium rate. *Id.*

76. Houck, *supra* note 10, at 76.

## THE DISASTER RELIEF ACT: DISINCENTIVE TO NFIP PARTICIPATION

The Disaster Relief Act<sup>77</sup> furnishes federal aid "to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from disasters."<sup>78</sup> Following a disaster, the President of the United States may declare an area either a "major disaster" or an "emergency," thereby releasing either federal services to respond to the emergency or the full spectrum of federal aid to both individuals and local governments.<sup>79</sup> State and local governments may obtain grants and loans to rebuild, restore or replace facilities and to continue governmental functions in the wake of a disaster.<sup>80</sup> Relief agencies may provide federally funded food, temporary shelter, unemployment benefits, and housing repair and reconstruction assistance to individuals.<sup>81</sup> By providing this wealth of federal aid to disaster victims, the Disaster Relief Act creates a loophole that actually discourages participation in the NFIP

The Disaster Relief Act requires local and state government relief applicants seeking reconstruction assistance or "in lieu contributions"<sup>82</sup> for flood-damaged publicly-owned facilities to provide assurance that "insurance will be obtained and maintained to protect against future loss to such property"<sup>83</sup> State and local governments that previously have received aid under the Disaster Relief Act cannot obtain assistance for any subsequent disasters unless all required insurance has been obtained and maintained.<sup>84</sup> The local governments also must take "appropriate action to mitigate [natural] hazards, including safe land-use and construc-

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77. 42 U.S.C. §§ 5121-5202 (1988).

78. *Id.* § 5121(b).

79. *See id.* § 5122(1)-(2); *see also id.* §§ 5174, 5176-5179 (discussing the types of aid the government may provide).

80. *Id.* §§ 5172(a)(1), 5184(a).

81. *See id.* §§ 5174, 5177(a), 5179.

82. Rather than restore damaged facilities, a state or local government can elect to receive "in lieu contributions" in order "to repair, restore, or expand other selected public facilities, to construct new facilities, or to fund hazard mitigation measures to meet a need for governmental services and functions." *Id.* § 5172(c)(1).

83. *Id.* § 5154(a)(1).

84. *Id.* § 5154(b).

tion practices.”<sup>85</sup> The ordinances required by the NFIP should satisfy this requirement.<sup>86</sup> By permitting communities to obtain insurance and adopt safety measures after the first disaster, the Disaster Relief Act allows local and state governments to take “one free bite” from disaster relief funds before instituting measures to limit subsequent losses.<sup>87</sup>

Individuals, however, can obtain multiple, possibly endless, “free bites” from the Disaster Relief Act.<sup>88</sup> No provisions require individuals to obtain flood insurance prior to receiving relief following uninsured disasters.<sup>89</sup> The NFIP and Disaster Relief programs act virtually independently of each other, instead of working together to further mutual goals of preventing and relieving the damages and dangers of flooding.<sup>90</sup> Requiring NFIP participation by communities before the first disaster would benefit the Treasury and provide meaningful inducements for individuals to join the NFIP.<sup>91</sup> The government should use a stick, not just a carrot. The NFIP

was enacted not only because an increasing investment in flood control works was failing to keep America dry (and was indeed rendering some downstream Americans wetter than before), but

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85. *Id.* § 5176.

86. Houck, *supra* note 10, at 131.

87. *Id.*

88. *Id.* at 131-32.

89. *See id.*

90. *Id.* at 132. “The conclusion is inescapable that the federal government has yet to exercise its authority fully, or even to the extent that a private businessman would think prudent and reasonable, to effectuate the NFIP and reduce the disaster losses of individuals, local governments, and its own treasury.” *Id.*

91. The Senate tried in 1974 to prohibit individuals from repeatedly taking advantage of the Disaster Relief Act, but the bill failed despite finding that

[t]he increased Federal costs of providing disaster assistance in recent years, especially to the private sector, has focused attention on the need for more extensive insurance coverage against losses caused by natural hazards. It seems reasonable to expect property owners to purchase basic protection against such losses through any reasonably available insurance.

The bill stipulates that insurance adequate to protect against future loss must be obtained for any disaster-damaged property which has been replaced, restored, repaired, or constructed with Federal disaster funds. Unless such insurance is secured, no applicant for Federal assistance can receive aid for any damage to his property in future major disasters.

S. REP. NO. 778, 93d Cong., 2d Sess. 4 (1974), reprinted in 1974 U.S.C.C.A.N. 3070, 3073.

also because the federal government was being called upon to provide post flood relief for an increasing number of victims. The NFIP intended to minimize these losses and diminish the burden of disaster relief. Sadly, disaster relief shows few signs of abating. Federal relief alone has exceeded one billion dollars for each of the past five years.<sup>92</sup>

The lack of connection between the two programs becomes an even more acute problem considering other facts about the dangers of flooding. Although only seven percent of the United States lies in the floodplain,<sup>93</sup> nine out of ten natural disasters in the United States that prompt presidential declarations of an emergency or major disaster are flood-related.<sup>94</sup> "According to the Federal Interagency Floodplain Management Task Force, floods account for more losses than any other natural disaster and, in most years, the bulk of federal disaster aid goes to flood victims."<sup>95</sup> Congress has found "that annual losses from floods are 'increasing at an alarming rate,' and attribute[d] this increase primarily to acceleration of development and habitation of flood-prone areas."<sup>96</sup> The United States Water Resources Council estimates that flood losses will increase dramatically, rising to more than \$4.3 billion by the turn of the century.<sup>97</sup> Compelling statistical evidence indicates that even inhabitants of flood-prone communities do not adequately appreciate their flood peril.<sup>98</sup> Of the eleven million structures at flood-risk, flood insurance covers only 2.4 million, less than one quarter.<sup>99</sup> Moreover, the National Hurricane Center has warned that the United States "faces more frequent and ferocious hurricanes [in] the next 25 years,"<sup>100</sup> further exacerbating the NFIP's

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92. Houck, *supra* note 10, at 128.

93. *Id.* at 62.

94. Singer, *supra* note 9, at 325.

95. Dumanoski, *supra* note 11, at 25.

96. Singer, *supra* note 9, at 325-26 (quoting 42 U.S.C. § 4002(a) (1982)).

97. Houck, *supra* note 10, at 63 n.4.

98. For instance, about 75% of California residents and businesses in high-risk flood areas do not have insurance. Stephanie O'Neill, *Check the Fine Print on Flood Insurance*, L.A. TIMES, Jan. 31, 1993, at K1.

99. 139 CONG. REC. S10841-02, S10858 (daily ed. Aug. 6, 1993) (statement of Sen. Kerry). Congress anticipated this problem even before it materialized. See SENATE REPORT, *supra* note 4, at 29, 47.

100. Janet L. Fix, *Storm Swells over Floodplain, Insurance a Lifeline to Many*, USA TODAY, Sept. 10, 1992, at 1B.

problems and exposure to insolvency. In the event that the Flood Insurance Fund is depleted, the federal government will advance funds "from appropriations in order to maintain the fund in an operative condition adequate to meet its liabilities."<sup>101</sup> That fact, in connection with the predicted increase in hurricane activity over the next twenty-five years, places the fund in the highly precarious position of potential insolvency and threatens all taxpayers' dollars. As of May 31, 1993, the NFIP, with over \$215 billion in insured properties, was \$18 million in the red.<sup>102</sup> The \$18 million deficit does not include claims from the 1993 flooding of the Missouri and Mississippi Rivers.<sup>103</sup> For 1993, FEMA expects "a deficit of more than \$70 million"<sup>104</sup> and utilization of the \$1 billion line of credit available at the Treasury.<sup>105</sup> A bad hurricane season could aggravate the situation, resulting in \$3.5 to \$4 billion in NFIP claims, an amount that would completely overwhelm the program.<sup>106</sup> The NFIP would then be forced to borrow from the Treasury with no real means of repaying the money.<sup>107</sup> As of 1985, when the NFIP had to become self-supporting, "Congress had forgiven \$1.2 billion in loans that the program had been unable to repay."<sup>108</sup>

Hurricane Andrew, the fierce wind storm of August 1992, should serve as a wake-up call to Congress that the NFIP's problems must be tackled immediately.<sup>109</sup> Andrew caused only \$100 million in

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101. 42 U.S.C. § 4017(b)(3) (1988).

102. 139 CONG. REC. S10841-02, S10858 (daily ed. Aug. 6, 1993) (statement of Sen. Kerry).

103. *Id.*

104. Robert Trigaux, *Flood Insurance Premiums May Rise*, ST. PETERSBURG TIMES, July 22, 1993, at 1A.

105. *Id.*

106. Doug Bereuter, *We Need to Tighten U.S. Flood Insurance*, NEWSDAY, July 20, 1993, at 75.

107. *Id.*

108. Cornelia Dean, *Many Questioning Value of U.S. Flood Insurance*, N.Y. TIMES, July 19, 1993, at B6.

109. Hurricanes present special difficulties for the NFIP and demonstrate the problem of coastal development. As Hurricane Hugo helped demonstrate in 1989, "almost half of federal flood-insurance payments are for repeat claims by 3 percent of policyholders," those living in coastal areas and at greatest risk to the expected increased hurricane activity. Thomas C. Palmer, Jr., *Risky Business*, BOSTON GLOBE, Sept. 13, 1992, at 79. Greater participation in the program must be encouraged before a mere three percent of policyholders break the NFIP's bank. Additionally, "coastal development between 1980 and 1988 alone increased insured value along the Atlantic and Gulf coasts by an estimated 70 percent."

flood damage, well below anticipated flood losses.<sup>110</sup> However, Andrew was a dry storm with a low storm surge that managed to miss major low-lying metropolitan areas such as New Orleans.<sup>111</sup> Moreover, flood damages are much more predictable for a given area so that those who choose to build in these areas should be expected to assume the cost of insuring the risk at subsidized rates without a disaster relief bailout should they choose to ignore the NFIP's benefits.

Flood insurance seems a logical alternative to the continuation of technical attempts to control flood damage. But the NFIP suffers "a major handicap as a 'real-world' option. Flood insurance does not produce the local profits that result from construction of drainage and channelization works. Thus, these projects continue, with the assistance of several agencies, at funding levels that dwarf those of the flood insurance program."<sup>112</sup> Rather than trying to protect the floodplains from flooding, efforts should be concentrated on discouraging building in the floodplain, or at least shifting the risks of that building squarely upon those who choose to do it.

Currently, banks, not state or local governments nor the NFIP, provide the primary enforcement mechanism in the NFIP.<sup>113</sup> Bank lending officers make credit decisions for building projects on the basis of visual impressions from independent inspectors who are chosen for their familiarity with the area, not on the basis of a community's FIRM.<sup>114</sup> Federally insured banks must require that flood insurance be purchased for the amount of the loan or for the maximum coverage available, whichever is less.<sup>115</sup> Cases have shown, however, that banks do not control the grant of variances that essentially render the protections of the NFIP meaningless.<sup>116</sup> Also, unlike mismanagement of funds or neglect of fiduciary du-

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Peter Kerr, *How Big a Disaster Can Insurers Survive?*, N.Y. TIMES, Sept. 13, 1992, § 3, at 12.

110. Fix, *supra* note 100, at 1B.

111. *See id.*

112. Houck, *supra* note 10, at 84-85.

113. *Id.* at 94 n.173.

114. *Id.* at 96.

115. 42 U.S.C. § 4012a(b) (1988).

116. *See United States v. Parish of St. Bernard*, 756 F.2d 1116, 1121 (5th Cir. 1985) (showing the responsibility of local and federal governments for the implementation of the



ties, the banks' directors and officers cannot be held liable for an improperly permitted structure that failed to satisfy NFIP requirements.<sup>117</sup> The United States must still pay on claims that were increased because of a failure to build above or flood-proof up to the Base Flood Elevation.<sup>118</sup>

Further limiting the utility of banks as an enforcement tool is the fact that communities that do not participate in the NFIP remain eligible for federally assisted housing financing because of the Housing and Community Development Act of 1977.<sup>119</sup> Congress caved in to the prominent interests of the development community when it authorized this funding.<sup>120</sup> "Undoubtedly, the incentives to enter the program were weakened, and federally guaranteed money is now behind floodplain development in exactly the fashion noted and criticized by the several federal studies on flood disasters."<sup>121</sup>

The NFIP lacks any firm stick to ensure proper implementation of the program by local authorities. Participating communities may grant variances for building or modifying structures<sup>122</sup> in floodplains: These variances only exacerbate flood damages as the structures built pursuant to the variances continue to qualify for flood insurance.<sup>123</sup> Following increased damages and discovery of the variance problem, FEMA must pay the claims and only then remove the community from the program.<sup>124</sup> As with banks, the United

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program), *cert. denied*, 474 U.S. 1070 (1986); *see also infra* notes 132-69 and accompanying text.

117. Interview with David Jansen, *supra* note 5.

118. *Id.*

119. Pub. L. No. 95-128, 91 Stat. 1111 (codified in scattered sections of 42 U.S.C.); *see also* Houck, *supra* note 10, at 72 n.57.

120. Houck, *supra* note 10, at 72 n.57.

121. *Id.*

122. 44 C.F.R. § 60.6 (1992) (providing for the grant of variances).

123. *Id.*

124. The NFIP first places a community that inadequately enforces floodplain management regulations on probation for as long as one year after the community comes into compliance with the NFIP regulations. *Id.* § 59.24(b). Should the community fail to correct the problem, it can be suspended from the program. *Id.* § 59.24(c). Residents of a community under probation, however, may continue to purchase or renew flood insurance policies. *Id.* § 59.24(b). Thus, although a community may be on probation, the NFIP will still honor the individual policies of residents whose structures do not comply with the intent and letter of the NFIP. Probation does not control the NFIP's exposure to losses such as those sustained in Saint Bernard Parish. *See infra* notes 132-69 and accompanying text (discussing Saint Bernard Parish).

States lacks any ability to recoup its increased insurance claim payments.<sup>125</sup>

The most chronic ill of the NFIP lies in the financial instability of the Flood Insurance Fund.<sup>126</sup> In 1968, Congress, recognizing that the risk takers who build in the floodplains should bear some of that risk, contemplated the use of the NFIP's premium as a means to do just that.<sup>127</sup> Again, the program became more a carrot than a stick. Rather than deterring growth in the floodplain, developers treated the program as a subsidy to encourage development of shorefront property.<sup>128</sup> Likewise, communities have viewed the combination of flood insurance and disaster relief as an entitlement rather than a privilege.<sup>129</sup> The current premium structure still falls far below market rates with a high number of high-risk, pre-FIRM structures paying too little money to cover the risk.<sup>130</sup>

#### ROADBLOCKS TO IMPROVEMENT: CONTRACT LIABILITY AND "TAKINGS" PROBLEMS

Effective solutions to the NFIP's problems involve two basic areas: liability for its inadequately enforced provisions and stricter controls on construction, particularly rebuilding in flood-prone and coastal erosion areas. In order to substantially accomplish the goals of the NFIP, Congress should encourage more participation by individuals and communities and require stricter compliance by lenders and participants. The goal of discouraging development has not been accomplished; instead, the NFIP arguably has attained the opposite effect.<sup>131</sup> While the NFIP should continue to protect owners of existing floodplain structures, measures should be taken to financially inhibit the construction of new buildings on floodplains.

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125. *United States v. Parish of St. Bernard*, 756 F.2d 1116, 1121 (5th Cir. 1985), *cert. denied*, 474 U.S. 1070 (1986). See *infra* notes 131-69 and accompanying text (discussing the lack of a community's contractual liability to the United States government as a participant in the NFIP).

126. See *supra* notes 96-108 and accompanying text.

127. SENATE REPORT, *supra* note 4, at 42-43.

128. Interview with David Jansen, *supra* note 5; see also Daly, *supra* note 18, at A3.

129. Interview with David Jansen, *supra* note 5.

130. *Id.*

131. *Id.*

Court decisions have penalized governments on the one hand for failing to prevent floodplain development, and on the other hand for actively controlling floodplain development. Congress must act in order to resolve this apparent contradiction, and salvage the NFIP. It will not be easy. The NFIP's problems implicate two fundamental areas of the law: contract law and takings law.

*Is There a Contract? United States v. Parish of Saint Bernard*

In the Louisiana case of *United States v. Parish of Saint Bernard*,<sup>132</sup> the United States Court of Appeals for the Fifth Circuit held that the United States could not hold participating communities contractually liable for inadequate enforcement of NFIP regulations.<sup>133</sup> Due to heavy flooding in the Jefferson and St. Bernard parishes in May 1978 and April 1982, the United States paid \$95 million in claims and fees under policies issued pursuant to the parishes' participation in the NFIP.<sup>134</sup> Prompted by the losses from the first flood in May 1978, the United States filed separate suits against Jefferson and St. Bernard parishes with the cases being consolidated in the district court.<sup>135</sup> The United States alleged that the parishes

failed to establish and apply minimum building elevation levels until three years after their deadline; failed to observe and enforce these elevation requirements once enacted; routinely permitted and granted variances, without justification, for construction below [Base Flood Elevation] (in one case, apparently, three feet below [Base Flood Elevation]); and knowingly permitted structures which were falsely certified as elevated to [Base Flood Elevation]. [T]hey further exacerbated flood losses by negligently approving subdivisions in flood-prone areas, utilizing substandard fill, destroying protective levees, and failing to pro-

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132. 756 F.2d 1116 (5th Cir. 1985), *cert. denied*, 474 U.S. 1070 (1986).

133. *Id.* at 1121.

134. Houck, *supra* note 10, at 142-43; *see also* *United States v. Parish of St. Bernard*, No. 83-3557 (5th Cir. Feb. 1, 1984) (LEXIS, Genfed Library, USAPP File) ("*St. Bernard II*"); *United States v. Parish of St. Bernard*, No. 81-1808 (E.D. La. July 8, 1983) (LEXIS, Genfed Library, Dist File) ("*St. Bernard I*").

135. *St. Bernard*, 756 F.2d at 1119; *see also* Houck, *supra* note 10, at 143 n.474.

vide adequate drainage after specific notice from consultants that existing systems were deficient.<sup>136</sup>

The United States originally brought suit for four causes of action: tort, contract, statutory, and public nuisance.<sup>137</sup> Under the tort claim, the Government sued as subrogee of the insured parish residents in potential negligence claims against the parishes.<sup>138</sup> The statutory action sought an implied contract remedy for injunction and damages.<sup>139</sup> The nuisance action sought to abate the increased risk of flood damage that the parishes had created.<sup>140</sup> Most importantly, the United States sought reimbursement for increased payment of claims due to breach of contract and lack of enforcement of the parishes' ordinances adopted pursuant to their participation in the NFIP.<sup>141</sup> The magistrate denied the statutorily implied right of action and the contract claim.<sup>142</sup> He ruled that neither claim clearly existed in the National Flood Insurance Act and did not believe that Congress intended to place ultimate financial responsibility for the Program on local communities.<sup>143</sup> The magistrate validated the actions based on statutory language and the subrogation clauses in the policies and sustained the nuisance claim.<sup>144</sup> The Government's damage claims were reduced to tort, and its injunctive relief to nuisance.<sup>145</sup>

The district court dismissed the nuisance claim for lack of standing due to the fact that no national interest was at stake.<sup>146</sup> It found that subrogation did exist for the tort claim and that a contract existed between the United States and the parishes.<sup>147</sup> However, the court separated the existence of the contract from the

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136. Houck, *supra* note 10, at 143-44.

137. *St. Bernard*, 756 F.2d at 1119.

138. *St. Bernard II*, slip op. at \*1; see also Houck, *supra* note 10, at 144.

139. *St. Bernard*, 756 F.2d at 1119; see also Houck, *supra* note 10, at 144.

140. *St. Bernard II*, slip op. at \*1.

141. *St. Bernard I*, slip op. at \*3.

142. Houck, *supra* note 10, at 144.

143. *Id.* The magistrate believed that the NFIP provided the federal government with a single remedy of specific performance which could be used as an enforcement mechanism. *Id.* at 145.

144. *Id.*

145. *Id.*

146. *St. Bernard I*, slip op. at \*6.

147. *Id.* at \*2-4.

remedy<sup>148</sup> Like the magistrate, the district court also did not believe that Congress intended a remedy as extreme as money damages,<sup>149</sup> but held that the United States could obtain specific performance and force the parishes to act within the constraints of their ordinances.<sup>150</sup>

On appeal to the Fifth Circuit, the United States pursued only monetary damages under the contract, tort and subrogation causes of action, and abandoned the public nuisance claim.<sup>151</sup> Consequently, the Fifth Circuit dismissed the nuisance claim.<sup>152</sup> The circuit court also dismissed any implied right of action under the National Flood Insurance Act and rejected the contract claim, but upheld the subrogation theory.<sup>153</sup>

The Fifth Circuit confronted a tough decision with the parishes facing millions of dollars in damages versus the Government's justifiable expectation of proper and diligent implementation of the ordinances, the failure of which resulted in the damages. Relying on *Pennhurst State Schools v. Halderman*,<sup>154</sup> the majority refused to recognize the existence of a contract by a vote of two to one. In *Pennhurst*, the Supreme Court held that no contract liability existed if a state was unaware of the conditions in the program or was unable to determine the Government's expectations.<sup>155</sup> The

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148. *Id.* at \*2. "We conclude that it was not Congress' intent to permit reimbursement from the parishes under such circumstances. Neither Congress nor the parish governing bodies foresaw that there would be such an extreme remedy for either a negligent or intentional breach of the contract." *Id.* at \*3.

149. *Id.*

150. *Id.*

Congress did not intend that the government should be powerless to compel the parishes and their governing bodies to perform obligations clearly undertaken by them as a condition precedent to the issuing of flood insurance policies to the citizens of the parishes. When local governing bodies voluntarily commit themselves to participation in a federal program, they cannot urge that the Tenth Amendment prohibits the United States from compelling them to satisfy their obligations under the contract.

*Id.*

151. *St. Bernard*, 756 F.2d at 1119.

152. *Id.*

153. *Id.* at 1128.

154. 451 U.S. 1 (1981).

155. *St. Bernard*, 756 F.2d at 1121. "There can, of course, be no knowing acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do

Fifth Circuit ruled that Congress failed to clarify that a community's participation in the NFIP created a contract with potential liability<sup>156</sup> A community, therefore, could not knowingly accept a large risk of liability<sup>157</sup> The court focused not on the parishes' understandings of their performance expectations but on their failure to anticipate their potential liability<sup>158</sup> The majority also seemed troubled by the potentially large damage figure in the complaint of \$95 million.<sup>159</sup>

Judge Williams, writing in dissent, remained truest to contract principles and judicial determination, avoiding the damage figure in his consideration while expressing concern over its consideration by the majority<sup>160</sup> Judge Williams found a definite quid pro quo arrangement in which the United States agreed to provide subsidized insurance to the parishes' residents in exchange for land-use regulations.<sup>161</sup> He found support for finding a contract in the language of *Pennhurst*, the same case that the majority relied on to find no contract. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." <sup>162</sup> According to the dissent, when *Pennhurst* spoke of a party ascertaining the other's expectations, the Court did not mean the expectations of damages or potential liability, but rather the party's expected performance obligations.<sup>163</sup> "Exposure to damages is, classically, the domain of *Hadley v. Baxendale*: the foreseeability of the damages limits exposure[.]" rather than defining it.<sup>164</sup> The dissent concluded that the trial court should determine the extent of the parishes' liability<sup>165</sup>

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so unambiguously " *Id.* (quoting *Pennhurst*, 451 U.S. at 17). It is hard to believe that the parishes could assume that the Government would not expect proper performance under the NFIP so as to meet the goals of the program.

156. *Id.*

157. *Id.*

158. *Id.* at 1127.

159. *Id.* at 1121; see also Houck, *supra* note 10, at 149.

160. *St. Bernard*, 756 F.2d at 1130 (Williams, J., dissenting).

161. *Id.* at 1129.

162. *Id.* (quoting *Pennhurst*, 451 U.S. at 17).

163. *St. Bernard*, 756 F.2d at 1129.

164. Houck, *supra* note 10, at 149-50 (footnote omitted).

165. *St. Bernard*, 756 F.2d at 1130 (Williams, J., dissenting).

The Supreme Court declined to review *Saint Bernard*, denying the NFIP an important stick in implementing its program and accomplishing its goals.<sup>166</sup> The courts have placed squarely on Congress the responsibility to provide explicitly for such liability within the program,<sup>167</sup> a measure that it has yet to pursue. Granted, the political will required for such a measure certainly would exceed that of any exhibited by Congress.<sup>168</sup> To insert such a provision certainly would act as a great discouragement to other communities joining the program, but with no other source of flood protection, notwithstanding any "bites" into the Disaster Relief Act, communities would not have other alternatives. The liability stick becomes even more important when one realizes the inability of FEMA to obtain a staff adequate to oversee the programs of each of the 18,000 participating communities,<sup>169</sup> much less to ensure that each building permit issued by a community meets the NFIP's standards and furthers the goal of preventing property damage in the floodplain.

### "Takings" Defined

Whereas cases concerning contract liability impose a requirement of explicit congressional action, Supreme Court decisions in the areas of eminent domain and inverse condemnation may serve to inhibit if not invalidate those very congressional actions. The Supreme Court's 1987 "trilogy" of decisions<sup>170</sup> and its 1992 decision in *Lucas v. South Carolina Coastal Council*<sup>171</sup> most prominently affect ordinances implemented by communities that have exceeded the requirements of the NFIP and banned development altogether within the floodplain. As will be seen, these cases do not directly impact the NFIP

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166. *United States v. Parish of St. Bernard*, 474 U.S. 1070 (1986) (denying certiorari).

167. *St. Bernard*, 756 F.2d at 1121.

168. Congress consistently lacks the will to balance the federal budget, a measure that no one denies in importance and that figures frequently in any discussion of the United States economy.

169. GUIDELINES, *supra* note 49, at 6.

170. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

171. 112 S. Ct. 2886 (1992).

The key issues in inverse condemnation cases involve the police power, the ability of a government to regulate the use of, or impair rights in, property to prevent detriment to the public interest, and the extent to which a government can use the police power to inhibit individual property rights.<sup>172</sup> When a government goes too far, a court can invalidate an ordinance or its application to a particular property as a taking of property without just compensation, a violation of the Fifth Amendment.<sup>173</sup> The problems in these cases center on where to draw the line between a taking and a justifiable use of the police power and what test or approach to use in drawing that line.<sup>174</sup> One theoretical approach involves actual physical invasion—whether a government has directly confiscated property, transferring its ownership to the government without paying compensation to the owner.<sup>175</sup> Similarly, a court may consider whether property has been physically appropriated for governmental or public use without transferring title.<sup>176</sup> Neither test, however, affects the NFIP because the program does not take land for physical use.<sup>177</sup>

The tort-based theory of nuisance abatement requires less than an actual physical appropriation to find a taking, thereby reducing the burden of a takings claimant.<sup>178</sup> Governments regularly depend on nuisance abatement to uphold health and safety regulations, relying on the Supreme Court's language in *Mugler v. Kansas*:<sup>179</sup> "[A]ll property in this country is held under the implied obligation

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172. "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." *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887); see also *Cooper v. State*, 48 N.Y.S.2d 212, 214-15 (Ct. Cl. 1944) (proper exercise of police power constitutes no taking when prohibiting further damage to water supply by runoff from neighboring barnyard waste).

173. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (emphasis added).

174. See *Singer*, *supra* note 9, at 338.

175. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (holding that any physical appropriation or invasion, no matter how small, constitutes a compensable taking); see also *Singer*, *supra* note 9, at 339.

176. *Singer*, *supra* note 9, at 339.

177. *Id.* at 340.

178. *Id.* at 340-41.

179. 123 U.S. 623 (1887).



that the owner's use of it shall not be injurious to the community"<sup>180</sup> Pursuant to this approach, the issue under the NFIP is whether individuals who do not comply with a participating community's floodplain ordinances have somehow harmed or endangered the general public. Again, as first person type insurance, unlike automobile insurance,<sup>181</sup> the key to the program is to lessen disaster relief costs—costs paid for by the general taxpayer. If a noncompliant property owner's activities lead to increased costs, then some harm may result to the general public as taxpayers. Additionally, any construction that increases the flood danger to other property owners in violation of an ordinance adopted pursuant to the NFIP clearly constitutes a nuisance.

Two other theoretical approaches to determine whether a state's action constitutes a taking involve an ordinance's effect on a property's value. The first involves balancing the economic burden on the landowner due to the regulation against the regulation's benefit to the public.<sup>182</sup> If the benefit does not outweigh the burden, then the regulation constitutes a taking.<sup>183</sup> The other approach involves measuring the regulation's diminution in the property's value or use.<sup>184</sup> Under this approach, a taking consists of depriving a landowner of all or most of his interest in or use of the property.<sup>185</sup> A property owner, however, is not guaranteed the most profitable use of his property though he may expect a reasonable return on his

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180. *Id.* at 665. The concern in nuisance cases involves the innocent landowner who purchased the property before the ordinance was passed with the plans to build in a lawful and inoffensive manner. The regulation suddenly makes that individual a wrongdoer and penalizes him by not allowing him to act on his prior expectations. Drawing the takings line with respect to the nuisance line can be arbitrary. Singer, *supra* note 9, at 342.

181. See *supra* note 40 and accompanying text.

182. "[I]n instances in which a state tribunal reasonably concluded that 'the health, safety, morals or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978); see also Singer, *supra* note 9, at 342.

183. Singer, *supra* note 9, at 342.

184. *Id.* at 343. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492-93 (1987); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

185. Singer, *supra* note 9, at 343. See, e.g., *Keystone*, 480 U.S. at 485 (finding no taking because the regulation did not make plaintiff's venture commercially impracticable); *Pennsylvania Coal*, 260 U.S. at 414 (finding a taking because the regulation destroyed the plaintiff's ability profitably to use the property).

investment.<sup>188</sup> The Supreme Court has scrutinized each of these approaches to takings disputes.

### *The Trilogy Cases*

#### *Keystone Bituminous Coal Association v. DeBenedictis*

The first of the trilogy cases, *Keystone*,<sup>187</sup> focused on the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act.<sup>188</sup> The Act required an owner of mining rights to leave behind fifty percent of the coal to support the land above it should that land have public or private structures built upon it, in order to prevent that land from subsiding or collapsing.<sup>189</sup> The Court applied a two-prong test to determine whether the regulation constituted a taking: (1) whether the statute “ ‘does not substantially advance legitimate state interests,’ ”<sup>190</sup> a police power analysis, or (2) whether the statute “ ‘denies an owner economically viable use of his land,’ ” a diminution in value analysis.<sup>191</sup>

The Act affected only about two percent of the plaintiff's total property, but plaintiff contended that the regulation deprived him of fifty percent of the value of the regulated area.<sup>192</sup> The Supreme Court rejected this argument, taking a holistic approach to the regulation's effect.<sup>193</sup> The Court believed that if it looked at the fifty percent not mined as a whole rather than a small part of a whole, then even setbacks in zoning regulations would result in a taking.<sup>194</sup> The Court looked at the value of what the government had

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186. See *Penn Central*, 438 U.S. at 137.

187. 480 U.S. 470 (1987).

188. See *id.* at 474 (construing PA. STAT. ANN. tit. 52, § 1406.1 *et seq.* (1986)).

189. *Id.* at 476.

190. *Id.* at 485 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

191. *Id.*

192. *Id.* at 498.

193. *Id.* at 498-99.

194. *Id.* at 498. The Court stated:

The 27 million tons of coal do not constitute a separate segment of property for takings law purposes. Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioner's theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line con-

taken versus what the owner retained,<sup>195</sup> but also stressed that when a regulation enjoins a nuisance or public harm, no taking exists.<sup>196</sup>

*Keystone* presented the classic facial challenge to a regulation, wherein the plaintiff asserted that the mere enactment of the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act constituted a taking.<sup>197</sup> Facial challenges are difficult to argue and are rarely successful.<sup>198</sup> "When the Court is convinced that a legislative enactment is intended to protect a defendant against a destructive plaintiff, the Court will grant considerable breadth of discretion to the government, broadly interpret the rationality requirement, and generally uphold governmental regulation."<sup>199</sup>

The NFIP itself survived a facial attack in *Texas Landowners Rights Association v. Harris*.<sup>200</sup> *Keystone* figured prominently in the court's evaluation of whether a participating community's floodplain management regulations may constitute a taking. In *April v. City of Broken Arrow*,<sup>201</sup> a landowner claimed that a city ordinance adopted in compliance with the NFIP<sup>202</sup> completely denied him beneficial use of his property, property that he wished to

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stitutes a taking because the footage represents a distinct segment of property for takings law purposes.

*Id.* Similarly, if the Court adopted the plaintiff's theory, under the NFIP, prohibition of post-FIRM building construction below Base Flood Elevation would be a taking. Singer, *supra* note 9, at 358.

195. *Keystone*, 480 U.S. at 497.

196. *Id.* at 491. The Court noted:

The special status of this type of state action can also be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not "taken" anything when it asserts its power to enjoin the nuisance-like activity.

*Id.* at 491 n.20.

197. *Id.* at 474.

198. The Court in *Keystone* classified facial challenges as a "heavy burden" and an "up-hill battle." *Id.* at 493, 495. Some commentators even claim facial constitutional attacks are "a waste of time and money." Singer, *supra* note 9, at 359 (quoting ARDEN H. RATHKOPF & DAREN A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 7.07, at 7-59 (1986)).

199. Singer, *supra* note 9, at 360.

200. 453 F. Supp. 1025 (D.D.C. 1978) (holding that a community's compliance with the NFIP did not result in a taking without just compensation), *aff'd*, 598 F.2d 311 (D.C. Cir.), *cert. denied*, 444 U.S. 927 (1979); see *infra* note 268 and accompanying text.

201. 775 P.2d 1347 (Okla. 1989).

202. *Id.* at 1352.

develop but which lay within the 100-year floodplain.<sup>203</sup> The ordinance allowed for only "flood tolerant uses," such as a recreation park, nursery, or drive-in theatre.<sup>204</sup> Relying on *Keystone*, the court held that the landowner's "potential use of all property is subordinate to the right of City's reasonable ordinances that are clearly necessary and bear a rational relation to preserving the health, safety, and general welfare of the residents of Broken Arrow."<sup>205</sup> The NFIP and ordinances adopted as part of the program would pass constitutional scrutiny under *Keystone*.<sup>206</sup>

*First English Evangelical Lutheran Church v. County of Los Angeles*

The second case in the trilogy, *First English*,<sup>207</sup> focused on a floodplain regulation in the form of an interim ordinance adopted by Los Angeles County prohibiting the construction or reconstruction of any building in a floodplain.<sup>208</sup> The church claimed that the ordinance denied it all use of its property located within the floodplain.<sup>209</sup> The Supreme Court, however, did not review whether the ordinance constituted a taking entitling the church to compensation.<sup>210</sup> The Court instead focused on whether temporary takings required compensation and remanded the case for determination of the takings issue.<sup>211</sup> The Court did offer guidance to the lower

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203. *Id.* at 1350.

204. *Id.* at 1349 n.5.

205. *Id.* at 1352-53.

206. For a discussion of the effect of *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), on this analysis, see *infra* notes 262-66 and accompanying text.

207. 482 U.S. 304 (1987).

208. *Id.* at 304.

209. *Id.*

210. *Id.* at 312-13.

211. *Id.* at 322. In making its decision, the Supreme Court treated as true the plaintiff's allegation that it had been denied "all use of its property." *Id.* at 321 (emphasis added). On remand, the California Court of Appeal did not find a taking, recognizing the ordinance as a valid exercise of the police power. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893, 906 (Ct. App. 1989), *cert. denied*, 493 U.S. 1056 (1990). Likewise, the church was not denied all use of its property under the holistic approach used in *Keystone*, for eight of its total 21 acres were unaffected by the ordinance. *Id.* at 903. The court also believed that the plaintiff was burdened by, as well as benefited from, the legislation: "First English enjoys the safety benefits accompanying the prohibition of construction on the other properties along the riverbed in return for the 'reciprocal' safety benefits that flow to the other landowners because First English is subject to a similar ban." *Id.* at 905.

court for use in its determination. To prove a taking has occurred, the plaintiff must show by a preponderance that the regulation deprived it of all use of its property—that the only possible use for the land required reconstruction of the previous improvements.<sup>212</sup> In the past, courts have found sufficient value to repeal a takings claim in nondevelopmental uses of floodplain property such as recreational and agricultural uses.<sup>213</sup> The mere deprivation of the most profitable use does not qualify as a taking.<sup>214</sup>

*Nollan v. California Coastal Commission*

The final case in the trilogy, *Nollan*,<sup>215</sup> marked a change in the Supreme Court's consideration of takings. In *Keystone* and *First English*, the Court focused on economic issues. In *Nollan*, the Court adopted a nexus test requiring that when a government agency issues a building permit subject to an affirmative condition, the condition must bear a substantial relationship to the goals the government seeks to attain.<sup>216</sup> The plaintiff in *Nollan* wished to demolish an existing beachfront bungalow and build in its place a larger home.<sup>217</sup> Such construction required a permit from the California Coastal Commission.<sup>218</sup> In return for granting the permit, the Commission required the landowner to allow the public an easement to traverse the landowner's beach.<sup>219</sup> The Commission justified the condition as a way to offset the visual burden of the landowner's proposed home.<sup>220</sup> It maintained that the new home would constitute a psychological as well as a physical barrier which

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212. See *First English*, 482 U.S. at 321.

213. See *Turner v. County of Del Norte*, 101 Cal. Rptr. 93, 95 (Ct. App. 1972) (upholding development ban within floodplain that allowed agricultural and recreational uses); *Turnpike Realty Co. v. Town of Dedham*, 284 N.E.2d 891, 895-96 (Mass. 1972) (upholding regulation because it allowed agricultural and recreational uses), *cert. denied*, 409 U.S. 1108 (1973); *Usdin v. Department of Environmental Protection*, 414 A.2d 280, 290 (N.J. Super. Ct. Law Div. 1980) (upholding ban on all development within the floodplain because it prevented harm to persons), *aff'd*, 430 A.2d 949 (N.J. Super. Ct. App. Div. 1981). The analysis may change after *Lucas*. See *infra* notes 259-65 and accompanying text.

214. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978).

215. 483 U.S. 825 (1987).

216. *Id.* at 837, 841.

217. *Id.* at 828.

218. *Id.*

219. *Id.*

220. *Id.*

would prevent the public from "realizing [that] a stretch of coastline exists nearby" <sup>221</sup>

The Supreme Court held that the condition requiring an easement failed to advance the Commission's justification for the easement.<sup>222</sup> Consequently, "if [the Commission] want[ed] an easement across the Nollans' property, it [had to] pay for it."<sup>223</sup> To enact a particular land-use regulation under the guise of its police powers, a government must show that a prohibited land use furthers the justification given for its enactment.<sup>224</sup>

This trilogy of cases leaves the landowner with two avenues by which to challenge a land-use regulation or its application to his property: (1) the economic impact test when the regulation leaves no viable use,<sup>225</sup> or (2) the public purpose test, wherein a statute fails to further a legitimate governmental purpose or lacks a close nexus between the means and ends.<sup>226</sup> To prevent the finding of a taking, the government must show that the regulation bears a close fit to its purpose or that the landowner retains some viable use of his property.

### *Lucas v. South Carolina Coastal Council*

The Supreme Court's most recent inverse condemnation decision, *Lucas v. South Carolina Coastal Council*,<sup>227</sup> indicates yet another change in the methods of determining takings cases. As seen in *Keystone*, facial challenges to a regulation often fail except in the most egregious situations.<sup>228</sup> "As applied" challenges to a regulation, focusing on the regulation's effect upon the plaintiff's property, have greater success, but each case requires an independent

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221. *Id.*

222. *Id.* at 837.

223. *Id.* at 842.

224. *See id.* at 837.

225. *See* discussion of *Keystone* and *First English*, *supra* notes 187-215 and accompanying text.

226. *Nollan*, 483 U.S. at 837, 841; *see also* *Singer*, *supra* note 9, at 367-68.

227. 112 S. Ct. 2886 (1992).

228. *See* *Mattoon v. City of Norman*, 617 P.2d 1347 (Okla. 1980) (invalidating an ordinance that designated the plaintiff's property a floodway to avoid the expense of adequately maintaining the city's drainage system); *Allingham v. City of Seattle*, 749 P.2d 160, *amended*, 757 P.2d 533 (Wash. 1988) (invalidating an ordinance that required landowners to reserve 50% to 70% of their land for a greenbelt preserve).

analysis of the regulation's effects on the individual property using the various takings tests.<sup>229</sup> Had the plaintiff in *Keystone* owned mining rights that were affected in their entirety by the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act, thus depriving him of fifty percent of his property rather than just one percent,<sup>230</sup> the Court may have come to a different conclusion and found a taking.<sup>231</sup> *Lucas* finds the Supreme Court, in a majority opinion written by Justice Scalia, trying to fashion a more generally applicable test in an effort to move away from the case-by-case determination of "as applied" cases.<sup>232</sup>

The plaintiff in *Lucas* purchased two coastal lots in 1986 for \$975,000.<sup>233</sup> In 1988, the South Carolina legislature passed the South Carolina Beachfront Management Act without a variance provision.<sup>234</sup> The Act prohibits construction of habitable structures between the ocean and a "baseline" that connects "the landward-most 'point[s] of erosion during the past forty years.'"<sup>235</sup> The plaintiff's lots rested entirely within the prohibited area.<sup>236</sup> The Act protects the South Carolina coastline from further development, thus allowing the natural processes of and protection provided by sand dunes to continue without inhibition.<sup>237</sup> The legisla-

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229. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493-95 (1987).

230. Fifty percent of the two percent of the coal that was actually affected equals one percent. *Id.* at 498; see *supra* notes 192-96 and accompanying text.

231. The Court would then have been considering the "whole" rather than "part of the whole." See *supra* notes 193-94 and accompanying text. Interestingly, Justice Scalia has not accepted the part of the whole versus the whole of a part distinction as having precedential value. He believes that the issue remains unsettled despite *Keystone*. See *Lucas*, 112 S. Ct. at 2894 n.7 (Scalia, J.).

232. *Lucas*, 112 S. Ct. at 2888.

233. *Id.* at 2889.

234. *Id.*, see also *id.* at 2907 (Blackmun, J., dissenting). South Carolina added a variance provision in 1990. *Id.* at 2890-91. The NFIP provides for a variance. See *supra* note 66 and accompanying text. Interestingly, The NFIP's variance takes into consideration the landowner's problem in *Lucas*. A variance may be issued for new construction when the new structure is "surrounded by lots with existing structures constructed below base flood level." 44 C.F.R. § 60.6(a)(2) (1992). The lot owner must still satisfy exceptional hardship requirements. *Id.*

235. *Lucas*, 112 S. Ct. at 2889 (alterations in original) (quoting S.C. CODE ANN. § 48-39-280(A)(2) (Law. Co-op. Supp. 1990)).

236. *Id.*

237. *Id.* at 2905. "The Beachfront Management Act includes a finding by the South Carolina General Assembly that the beach/dune system serves the purpose of 'protect[ing] life

ture had determined that development of the dunes increased erosion and caused injury to the general public welfare.<sup>238</sup> The Act, though not allowing any further structural development of the coastline, did allow for other uses and development, such as wooden walkways or golf courses.<sup>239</sup>

The state trial court found for plaintiff, holding that the lots retained no viable use under the construction ban, and awarded compensation.<sup>240</sup> The South Carolina Supreme Court found no taking and reversed the trial court.<sup>241</sup> It held that the South Carolina legislature had acted within its police power to prevent nuisances, relying on precedent to prevent noxious uses.<sup>242</sup>

The United States Supreme Court disagreed with the South Carolina Supreme Court's decision and its reliance on the noxious use cases.<sup>243</sup> Instead, the Court focused on the property owner's

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and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner.' " *Id.* at 2905-06 (Blackmun, J., dissenting) (alteration in original) (quoting S.C. CODE ANN. § 48-39-250(1)(a) (Law. Co-op. Supp. 1990)). In terms of economy, the community of Folly Beach, South Carolina plans to spend \$16 million, 85% of it federal money, to renourish its beach and recreate a 150 foot beach at high tide that was lost to erosion, an expenditure that the Beachfront Management Act seeks to prevent. See Peter Applebome, *Hugo's 3-Year Wake: Lessons of a Hurricane*, N.Y. TIMES, Sept. 18, 1992, at A1.

238. " 'This type of development has jeopardized the stability of the beach/dune system, accelerating erosion, and endangered adjacent property.' " *Lucas*, 112 S. Ct. at 2906 (Blackmun, J., dissenting) (quoting S.C. CODE ANN. § 48-39-250(4) (Law. Co-op. Supp. 1990)).

239. *Id.* at 2908 (Blackmun, J., dissenting). "Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer" and most importantly, exclude others from it. *Id.*

240. *Id.* at 2890.

241. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 896 (S.C. 1991).

242. *Id.* at 900; see also *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (upholding a prohibition against gravel excavation below the water table); *Miller v. Schoene*, 276 U.S. 272 (1928) (finding that a Virginia statute requiring the destruction of the plaintiff's cedar trees in order to protect apple orchards important to the state economy did not constitute a taking); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (holding that an ordinance prohibiting the manufacture of bricks within the city limits of Los Angeles did not constitute a taking); *Mugler v. Kansas*, 123 U.S. 623 (1887) (upholding an ordinance prohibiting the further operation of breweries because the county was declaring itself dry).

243. *Lucas*, 112 S. Ct. at 2897. " 'Harmful or noxious use' analysis was simply the progenitor of our more contemporary statements that 'land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests." ' " *Id.* (quoting *Nollan*, 483 U.S. at 834).



expectations<sup>244</sup> and did not defer to the legislature's findings and purposes.<sup>245</sup> The Court refused to recognize the distinction between preventing harm to the public and providing a public benefit at the expense of the individual.<sup>246</sup> The antagonism to that distinction primarily endangers prior precedent involving floodplain regulation.

Justices Blackmun and Stevens penned strong dissents. Neither found the case ripe for decision because the plaintiff had not filed for and been denied a building permit under the Act.<sup>247</sup> Both dissents found the majority's determination disturbing.<sup>248</sup> Justice Blackmun agreed with the South Carolina Supreme Court's holding that no taking existed and the lower court's deference to the factual determinations of the South Carolina legislature in drafting the Act.<sup>249</sup> He was disturbed by the majority's "willingness to dis-

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244. *Id.* at 2899. "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 2900. Justice Scalia's strong concerns for the landowner are evidenced further by his word choices, such as referring to the Beachfront Management Act as having brought "Lucas's plans to an abrupt end." *Id.* at 2889 (emphasis added).

245. The majority dismissed the legislature's findings when it dismissed the continued use of the harmful or noxious use rationale. *See id.* at 2896-99.

246. *Id.* at 2899.

When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation.

*Id.* at 2898-99 (Blackmun, J., dissenting).

247. *Id.* at 2906 (Blackmun, J., dissenting); *id.* at 2917 (Stevens, J., dissenting).

248. "Clearly, the Court was eager to decide this case. But eagerness, in the absence of proper jurisdiction, must—and in this case should have been—met with restraint." *Id.* at 2909 (Blackmun, J., dissenting). Justice Stevens found the majority acted "[c]avalierly [in] dismissing the doctrine of judicial restraint" and proceeding to decide the issue. *Id.* at 2918 (Stevens, J., dissenting). Justice Souter, in a separate statement would have dismissed the writ of certiorari entirely. *Id.* at 2925 (Souter, J., separate statement). He found the issue of total deprivation of the parcel's value to be an "unreviewable assumption" and thus felt it imprudent to proceed on the merits of the case. *Id.*

249. *Id.* at 2906 (Blackmun, J., dissenting).

pense with precedent"<sup>250</sup> and to shift the burden of proof in such cases from the property owner to the State.<sup>251</sup> The landowner previously had to demonstrate that the ordinance constituted a taking.<sup>252</sup> The Court also required the State to prove its justifications for the Act.<sup>253</sup> Justice Blackmun expressed dismay over this change, particularly in light of having most recently "reaffirmed that claimants have the burden of showing a state law constitutes a taking."<sup>254</sup>

Justice Stevens expressed concern over the Court's attempt to fashion a general rule for takings, particularly in light of the long history of precedent supporting the view that such a rule is not possible in takings situations.<sup>255</sup> He also challenged the general rule's potential for arbitrary decisions.<sup>256</sup> Where one who has lost one hundred percent of use receives full compensation, one who has lost only ninety-five percent does not.<sup>257</sup>

The general rule in *Lucas*, that a total deprivation of viable use constitutes a taking, appears to work favorably with land-use regulations. As long as the regulation allows for some continued use, the government need not pay compensation. This bright-line rule is not helpful, though, in considering prior determinations of viable

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250. *Id.* at 2909.

251. *Id.*

252. *Id.* "[T]his Court always has required plaintiffs challenging the constitutionality of an ordinance to provide 'some factual foundation of record' that contravenes the legislative findings." *Id.* (quoting *O'Gorman & Young, Inc. v. Hartford Fire Ins.*, 282 U.S. 251, 258 (1931)).

253. *Id.*

254. *Id.* (quoting *Keystone*, 480 U.S. at 485). "In this case, apparently, the State now has the burden of showing the regulation is not a taking. The Court offers no justification for its sudden hostility toward state legislators, and I doubt that it could." *Id.*

255. *Id.* at 2918 (Stevens, J., dissenting).

256. *Id.* at 2919.

257. *Id.*

The Beachfront Management Act not only prohibited the building of new dwellings in certain areas, it also prohibited the rebuilding of houses that were "destroyed beyond repair by natural causes or by fire." Thus, if the homes adjacent to Lucas' lot were destroyed by a hurricane one day after the Act took effect, the owners would not be able to rebuild, nor would they be assured recovery. Under the Court's categorical approach, Lucas (who has lost the opportunity to build) recovers, while his neighbors (who have lost *both* the opportunity to build *and* their homes) do not recover. The arbitrariness of such a rule is palpable.

*Id.* (citations omitted).

use, such as agricultural or recreational uses. The Supreme Court in *Lucas* appears to accept only structural improvements as viable uses. Although the majority denies this contention,<sup>258</sup> it fails to describe any other uses that satisfy viable use. Instead, the majority seeks support for its theory in *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>259</sup> a physical invasion case that involved an interference with a landowner's right to exclude others, not his right to realize a viable, nonstructural use. The Court avoided directly addressing what nondevelopmental uses it considers viable. Interestingly, the Court previously spoke on this issue in *Keystone*: "While the Court has almost invariably found that the permanent physical occupation of property constitutes a taking, the Court has repeatedly upheld regulations that destroy or adversely affect real property interests."<sup>260</sup> One may wonder, then, whether the majority in *Lucas* meant to fashion a general rule defining viable use as only developmental use. If not, then one returns to a case-by-case analysis of what uses remain that may be considered viable, thereby defeating the formulation of a general rule.

*Lucas* creates another tension in takings. As a facial challenge, it does not affect the Supreme Court's "as applied" decisions in *First English* and *Nollan*. Its effect on the application of *Keystone*, a facial challenge, is unclear. *Lucas* does not overrule *Keystone*, but the majority makes little use of *Keystone* as support in its analysis. Justice Scalia cites *Keystone* only once in the text of the opinion, using it as authority for a taking when a regulation "denies all economically beneficial or productive use of land."<sup>261</sup> The only other two cites recognizing *Keystone* as precedent occur in footnotes.<sup>262</sup> One might wonder whether the majority's avoidance of *Keystone* is an acknowledgement that *Keystone* weakens the *Lucas* argument or, more importantly, whether it is a disregard for precedent. The Court previously exhibited such disregard when it ignored the nox-

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258. *Id.* at 2895 n.8.

259. 458 U.S. 419, 436 (1982).

260. *Keystone*, 480 U.S. 470, 489 n.18 (citation omitted).

261. *Lucas*, 112 S. Ct. at 2893.

262. *Id.* at 2893 n.6, 2894 n.7.

ious use cases.<sup>263</sup> Justice Stevens identified this concern, calling for “[p]roper respect for our precedents.”<sup>264</sup>

The South Carolina Supreme Court showed respect for precedent. It relied repeatedly on *Keystone*, even stating that the decision to find no taking was “‘straightforward’ because, in the final analysis, Lucas’ position, is the position of the *dissent* in [*Keystone*].”<sup>265</sup> Meanwhile, the United States Supreme Court failed even to contrast why it could find a taking in *Lucas* but not in *Keystone*. Consequently, it is not clear which case controls an analysis of the NFIP. *Lucas* poses the greatest threat to prior challenges to a community’s floodplain ordinances, particularly those that deny all structural improvement in the floodplain.

### *Takings and the NFIP*

The effect of these cases on the NFIP involves three different questions: (1) how they affect the current NFIP, (2) how they would affect the proposed changes in the NFIP, and (3) how they affect specific court determinations of a community’s floodplain regulations.

The trilogy cases have little effect on the current NFIP.<sup>266</sup> The Program does not deny a landowner any use of his property in communities that do not participate. In those communities that do and have enacted building ordinances, the landowner has not been denied the ability to build; he must prove only that the project meets certain structural conditions, i.e., that it is built above or flood-proofed up to Base Flood Elevation. *Lucas* likewise has no effect on the current NFIP because the landowner is not prohibited from building, and he still retains structural use of the property.<sup>267</sup>

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263. See *supra* note 244 and accompanying text.

264. *Lucas*, 112 S. Ct. at 2917 (Stevens, J., dissenting).

265. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 896 (S.C. 1991) (emphasis added), *rev’d*, 112 S. Ct. 2886 (1992).

266. See *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732 (5th Cir. 1988) (holding that neither *First English* nor *Nollan* disturb the court’s validation of the NFIP in *Texas Landowners Rights Ass’n v. Harris*, 453 F. Supp. 1025 (D.D.C. 1978), *aff’d*, 598 F.2d 311 (D.C. Cir.), *cert. denied*, 444 U.S. 927 (1979)).

267. It should be noted that the NFIP sustained a facial attack in *Harris*, 453 F. Supp. 1025. The plaintiff had argued that due to NFIP sanctions against “individual property owners or entire local communities, respectively, for non-participation in the Program, the

Proposed changes in the NFIP would run into problems mainly in the area of a denial of funds to rebuild in erosion risk areas. The denial of disaster relief for flood damage and stronger incentives to purchase flood insurance do not deny the landowner the use of his property. These methods merely require the landowner to bear the full risk of damage should her property be damaged without flood insurance. The cases, particularly *Lucas*, do not prohibit disallowing further development in the floodplain, for the NFIP, even with the proposed changes, merely discourages such development.

Denial of rebuilding permits, particularly in erosion risk areas, appears permissible.<sup>268</sup> Forced relocation of properties may enter the *Lucas* realm and constitute a taking, even with federal assistance for relocation. The landowner would be denied all use of his property in exchange for, more than likely, a less than desirable piece of property.<sup>269</sup> However, the closer the imminent threat of loss of the structure from flood-induced erosion, the less likely it is that the landowner would claim a taking. Either the landowner gives up the property to the government in exchange for relocation, or he gives it up to nature in exchange for nothing.

The greatest takings concern for floodplain ordinances lies in already adopted ordinances that provide only for nonstructural or nonhabitable uses of property in the floodplain. Here, *Lucas* may effectuate the greatest change to floodplain management. A number of cases have been litigated in this area.<sup>270</sup> Courts have found

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value of their land is so drastically diminished that a 'taking' must be found." *Id.* at 1031. "As a matter of policy the [Supreme] Court has been reluctant to find governmental takings where the action challenged is shown to be related to a legitimate public interest." *Id.* at 1032. The *Lucas* Court may agree with the decision but not the reasoning and the reliance on the noxious use cases.

268. See *supra* note 236 and accompanying text.

269. To relocate a house threatened by erosion, such as a waterfront property, one would have to move it behind those properties developed just behind the threatened house.

270. See, e.g., *Turner v. County of Del Norte*, 101 Cal. Rptr. 93 (Ct. App. 1972) (denying a takings claim by a developer who subdivided land before the ordinance providing for only agricultural and recreational uses in the floodplain went into effect); *Turnpike Realty Co. v. Town of Dedham*, 284 N.E.2d 891 (Mass. 1972) (finding no taking though the floodplain ordinance only allowed such uses as for woodland, grassland, agricultural or recreational), *cert. denied*, 409 U.S. 1108 (1973); *Dur-Bar Realty Co. v. City of Utica*, 394 N.Y.S.2d 913 (App. Div. 1977) (denying takings claim when ordinance allowed only agricultural and recreational uses of land in the floodplain), *aff'd*, 380 N.E.2d 328 (1978); *April v. City of Broken Arrow*, 775 P.2d 1347 (Okla. 1989) (denying plaintiff's takings claim that a floodplain ordinance allowing only nonhabitable uses rendered his property worthless). Interestingly, in

no taking, relying often on the noxious use cases<sup>271</sup> and most recently on *Keystone* and *First English*.<sup>272</sup>

The *Lucas* majority's strong indication that only structural use constitutes viable use threatens the continued validity of these ordinances. Consequently, a community's ability to restrict development and subsequent damage in the floodplain, regardless of whether they participate in the NFIP or not, has been greatly hampered. *Lucas* encourages further development in the floodplain and thus increases the government's financial exposure, either through disaster relief or claims paid under the NFIP

### CONCLUSION

Despite the effects of *Lucas*, other measures exist to improve the NFIP and limit the government's and taxpayers' exposure. A first step involves eliminating the inconsistency between the Disaster Relief Act and the NFIP. The one free bite from disaster relief funds for state and local governments and the unlimited bites for individuals should be eliminated.<sup>273</sup> Communities, governments and individuals should be left with only the opportunity to receive aid for flood losses through claim payments. As their only resort for financial assistance in a flood, refusal to participate in the NFIP or to purchase flood insurance policies would be unthinkable. This constitutes a very heavy stick, but it only places the risks of construction alongside the benefits. Alternatively, the one free bite rule could be allowed to continue, but the limit should be extended to individual property owners also. Repair and reconstruction could only occur through the use of disaster relief funds with guaranteed and enforced participation in the NFIP by all. After that, repair and reconstruction would be undertaken through claim payments, or, if having failed to purchase insurance, through state or local tax dollars for governments and private funds for individuals.

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*April v. City of Broken Arrow*, the court ultimately refused to decide the issue because the plaintiff had not exhausted his administrative remedies, unlike in *Lucas* where the plaintiff had not even applied for, much less been denied, a building permit. *April*, 775 P.2d at 1355.

271. See *supra* notes 180, 182 and accompanying text.

272. See, e.g., *April*, 775 P.2d at 1351 n.11, 1352 n.18 (citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)); *id.* at 1353 n.21 (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987)).

273. See *supra* notes 87-91 and accompanying text.

With the removal of all bites or even while allowing just one, enforcement remains critical. As experience has shown, local governments<sup>274</sup> and banks<sup>275</sup> have not taken their responsibilities seriously in ensuring compliance with the NFIP. The threat of liability for such failure tends to be a high motivating force in any situation. Currently, the United States has no avenue to impose legal liability against local governments. In return for the privilege of guaranteeing loans and insuring public and private properties, banks and state or local governments should bear the burden of enforcing the program or bear the consequences of the failure to do so.

The only enforcement mechanism in the NFIP is its ability to suspend localities from the program for failure "to adequately enforce its flood plain management regulations."<sup>276</sup> Such deficiencies often will not come to the attention of FEMA until after a flood has severely damaged a community because of the community's failure properly to participate in the program. One option is for FEMA to employ inspectors, a costly enterprise considering there are approximately 18,000 communities in the program. The task of reviewing all permits would be extremely burdensome. Self-policing by the community itself is a much more effective and efficient procedure, strengthened by the imposition of liability upon the community or the power to refuse claim payments should the community fail to properly operate under the NFIP as the communities did in *Saint Bernard Parish*. This method places pressure upon both the residents of the community and upon its government to enforce the program.

Lastly, storm-related erosion, generally or most evidently a coastal phenomenon, requires additional procedures. For structures lost to such erosion, flood insurance under the NFIP should be denied, thereby discouraging redevelopment of a particular flood threat that involves ongoing transition. For threatened structures, federal assistance should be available under the NFIP for relocation of the structures before storm-related erosion actually

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274. *United States v. Parish of St. Bernard*, 756 F.2d 1116 (5th Cir. 1985), *cert. denied*, 474 U.S. 1070 (1986).

275. Interview with David Jansen, *supra* note 5.

276. National Flood Insurance Program, 44 C.F.R. § 59.24(c) (1992).

destroys the property<sup>277</sup> Little difference exists between paying a claim for a destroyed structure and paying for its relocation before such destruction.

A recent bill<sup>278</sup> that would have implemented some of the changes mentioned above failed to pass in the Senate after running into stiff opposition from the development industry.<sup>279</sup> The bill sought to increase the pressure on regulated banks to make certain that insurance policies are purchased and maintained on homes financed through the banks.<sup>280</sup> Although the bill would only implement minor changes, incrementally increasing the size of the government's stick, it is a start. Greater measures are needed to protect not only the NFIP but also the people and property that the NFIP insures. Otherwise, with greater storms predicted on the horizon, the greatest incentive to amend the program, a catastrophic flood, may soon arrive with disastrous consequences for both taxpayers and the NFIP.<sup>281</sup>

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277. Relocation or buy-out efforts should also be strengthened to prevent continued repeat claims in noncoastal floodplains as well. For instance, Louis Hazelwood of Kempsville, Illinois has collected more than \$250,000 in flood payments over the years, not including his claim for 1993 flooding of the Missouri River. Schneider, *supra* note 13, at A5. He asserts that he has "offered repeatedly to sell the business to the Government for \$125,000," but without success. *Id.*

278. S. 2907, 102d Cong., 2d Sess. (1992).

279. Beth Millemann, *Flood Insurance Only Adds to the Cost of Hurricanes*, ST. PETERSBURG TIMES, Aug. 31, 1992, at 12A.

280. S. 2907, 102d Cong., 2d Sess. §§ 122-125, 141 (1992).

281. The claims following the 1993 flooding of the Missouri and Mississippi Rivers, as of the writing of this Note, have not been fully assessed. FEMA officials have calculated that over 45,000 policyholders live in counties that were declared major disaster areas. Hulse, *supra* note 6, at 20A.