

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

Executive Summary

Vermont Law School Land Use Clinic Report
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Questions of Legal Authority, Measures, and Consequences assesses various types of legal risks communities in the Lamprey River Watershed may be concerned about as a result of adopting new flood management regulations and policies. To assess these risks we identified four potential legal challenges related to: (1) municipal liability, (2) enabling authority, (3) the use of climate maps as evidence, and (4) takings.

In general, the risk of municipal liability is low, so long as municipalities follow sound planning principles. Not only is the level of risk low, the federal government *encourages* communities to enact certain types of regulations designed to reduce flood hazards. This encouragement provides states and municipalities an additional layer of assurance with respect to adopting and defending revised or new flood regulations. Under federal floodplain guidelines, states and municipalities are encouraged to establish more stringent regulations above and beyond minimum federal requirements. For example, the Federal Emergency Management Agency (FEMA) advises communities to enact stricter regulations through a program called the Community Rating System.¹ This document, provides a list of additional regulatory and non-regulatory tools communities can use to both help reduce risk of flood hazards and avoid legal quandary.

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

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

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

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

¹ The Community Rating System is a voluntary incentive program which recognizes a community's efforts to go above and beyond the minimum NFIP requirements. Exceeding the minimum standards gives a community discounts on insurance premiums. *See* <http://www.fema.gov/business/nfip/crs.shtm>.

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

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

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

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

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

Recommendations: Regulatory mechanisms should be enacted in a way that preserves some economically viable use of the land. For example, do not create distance requirements for setbacks that cover an entire parcel and thereby prohibit the landowner from being able to build on any part of the property.

Indicate that the purpose of the regulation is to promote hazard mitigation. Make the basis for floodplain regulation clear in the master plan. If necessary, amend your plan to include goals and policies for floodplain management and indicate that the purpose includes the health, safety, and welfare of citizens in the community.

For a full analysis with citations see *New Floodplain Maps for a Coastal New Hampshire Watershed and Questions of Legal Authority, Measures, and Consequences* (2012), available online at:

<http://100yearfloods.org/>