



# Legal Issues and No Adverse Impact Workshop

On Behalf Of:

**Texas Water Development Board**  
**Texas Floodplain Management Association**  
**Lower Colorado River Authority**  
**Texas Colorado River Floodplain Coalition**

Edward A. Thomas, Esq.

**Baker**

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# **Land Use Regulations Are Local Within A State and Federal Context**

**The Views Expressed Are Those of the Author  
and Do not Necessarily Reflect Approval Of  
Any Organization.**

- **This is Not Legal Advice – It is a Lecture on  
General Principles of Law.**

**For Legal Advice see a Lawyer Licensed in Your  
Jurisdiction.**

# Agenda

- **Part I: Property Rights And Floodplain Management**
  - **Introduction**
  - **Where We Are**
  - **Property Rights and Floodplain Management**
  - **Legal Roots of Floodplain Management**
  - **Flood Insurance, Community Rating System**
  - **No Adverse Impact Floodplain Management**
- **Part II:**
  - **Impediments to Proper Floodplain Management:**
  - **A) Externality**
  - **B) “The Taking Issue”**

# Agenda

- **Short BREAK !!!**
- **Part III:**
  - **Useful Tools Based On Case Law**
- **Part IV:**
  - **Property Rights And The Constitution In Exile**
- **Part V:**
  - **Avoiding A Taking: Discussion**
- **Part VI:**
  - **Rapanos Wetland Decision Call For Coordination Among Water Resource Managers**

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**Baker** **Agenda**

- **Part VII:**
  - **Liability For Failed Dams and Levees**
  
- **Part VIII:**
  - **How Efforts To Regulate Are Often Challenged: The Playbook**
  
- **Part IX:**
  - **Summary Comments**
  - **Talking Points**
  - **Questions & Comments**

## **To Set the Stage For Our Discussion on Land Use-Sustainability-Liability and Water Resources**

- **Lets Discuss Some Basics of Law**
- **In the Law-Especially Criminal Law Attorneys Often Seeks to Identify Someone Else to Take the Blame**
- **Often Called SODDI-Some Other Dude Did It**
- **On the TV show “The Practice” it Was Called “Plan B”**
- **The SODDI for Increased Flood Damages is Often...**

# Mother Nature



# Trends in Flood Damages

- **Flood Losses and Reported Flood Heights Are Increasing**
- **Demographic Trends Indicate Great Future Challenges**
- **More Challenges From Sea Level Rise**
- **Even More Challenges Likely From Climate Change**



# Does Nature Cause Disasters?

- **Some Folks Say: Global Warming Sea Level Rise- Causes Harm: Mother Nature is at Fault**
- **Are Natural Disasters “Natural”?**
- **Dr. Gilbert White Stated The Facts:**
  - **“Floods are Acts of Nature; But Flood Losses Are Largely Acts of Man”**
- **Excellent Lecture by Dr. Roger Pielke Jr. at Natural Hazards Conference:**

**Cause of increased Flood Loss Is Changes in Density and Cost/Type of Buildings in Hazardous Areas**

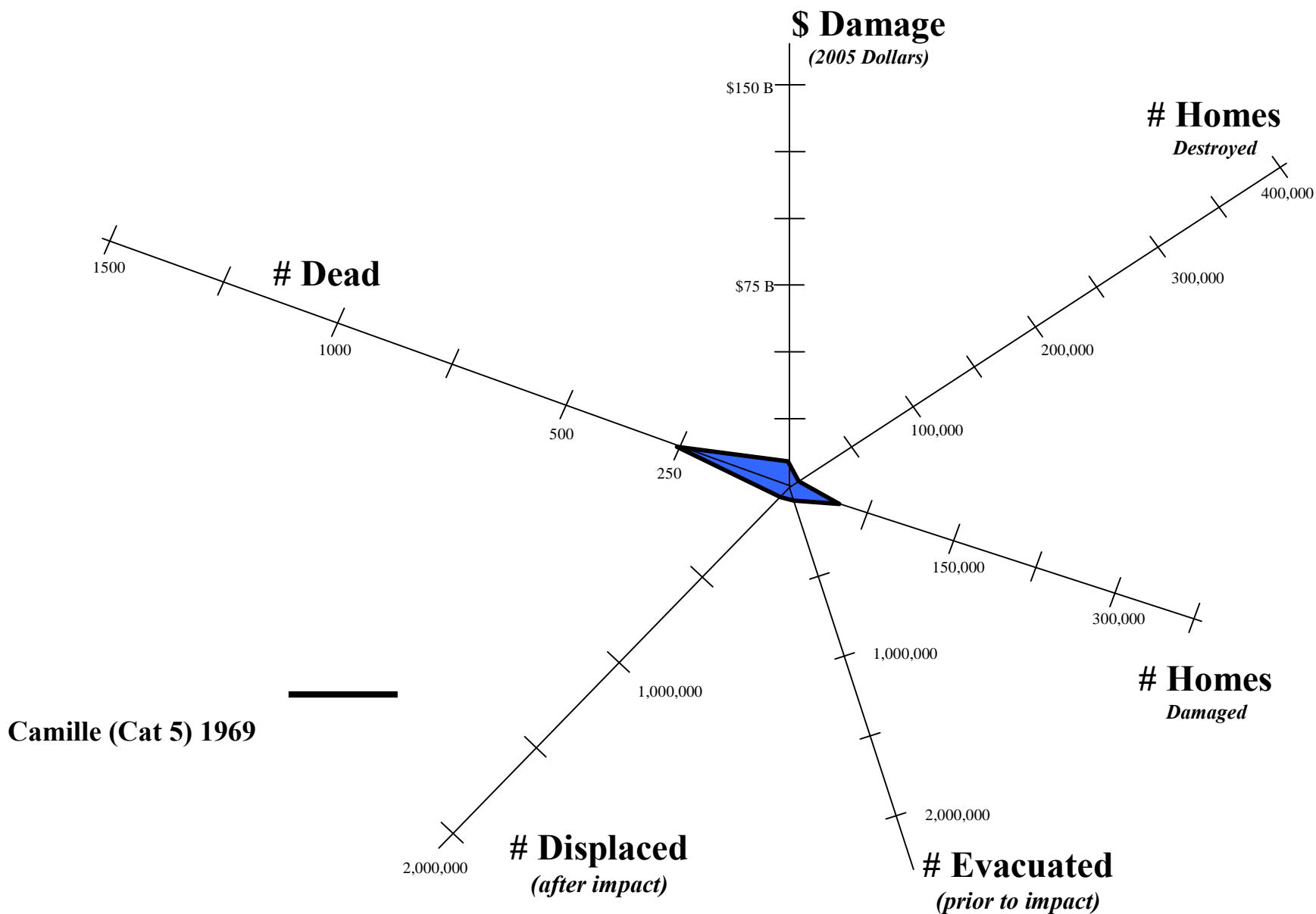
# Introduction

- **Among of the Most Clear Lessons of The Horrific Aftermath of Hurricane Katrina:**
  - **There Is No Possibility of A Sustainable Economy Without Safe Housing and Safe Locations for Business and Industry to Occupy**
  - **We Need Housing for Employees to Have Businesses and Industry – to Have an Economy**

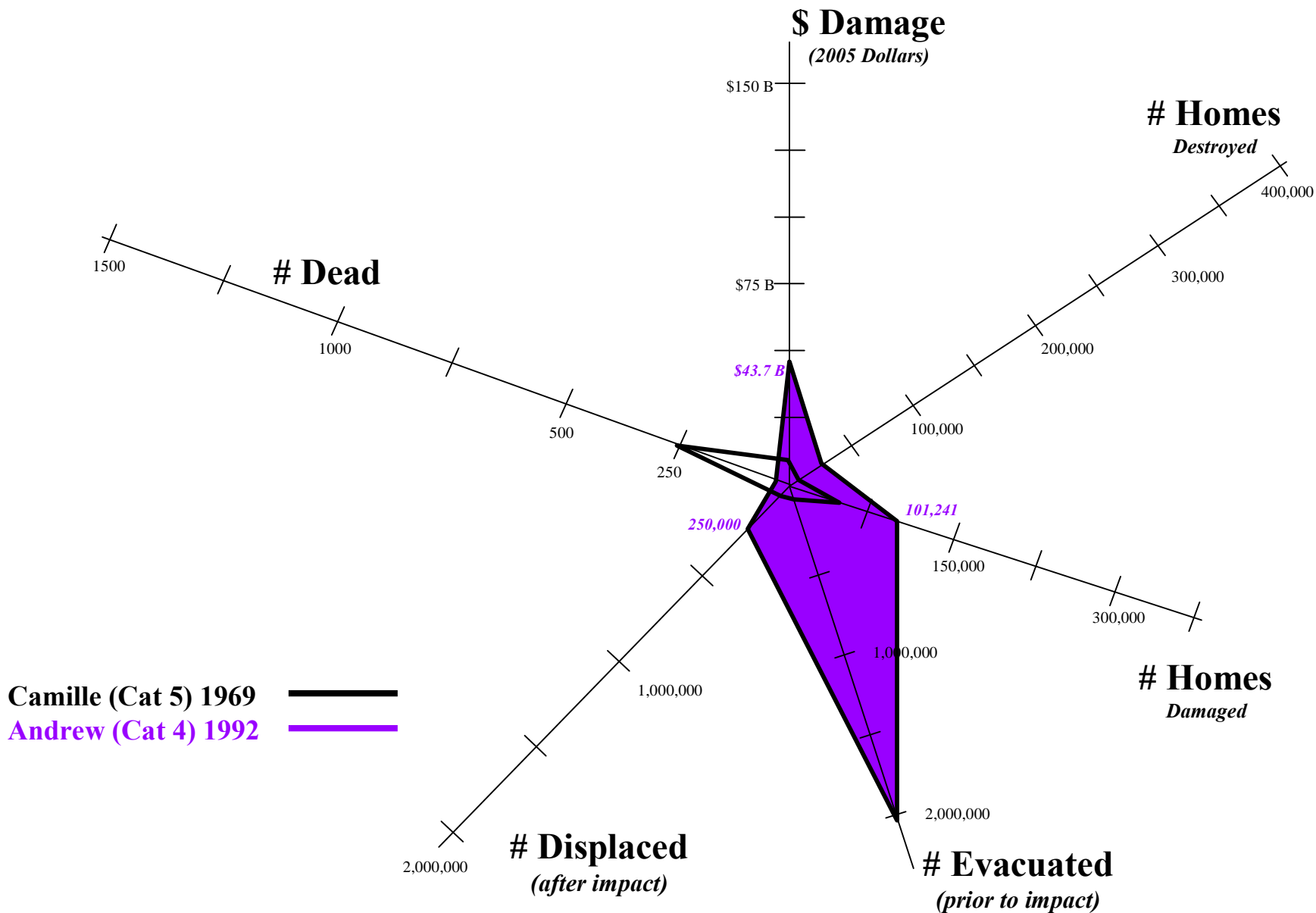
# **Must Sustainability Or “Smart-Growth” Have A Foundation in Hazard Mitigation?**

- **The Spring 2007 Edition of The Urban Lawyer Contains an Article Which Summarizes the Views of 16 of the Leading Gurus of the “Smart Growth” Movement**
- **A Total of 135 Separate Principles**
- **None Refer to Hazards Specifically**
- **A Very Few Refer to Protecting Natural Resources**
- **Gabor Zovanyi is the Author; Article is The Role of Smart Growth Legislation in Advancing the Tenets of Smart Growth**

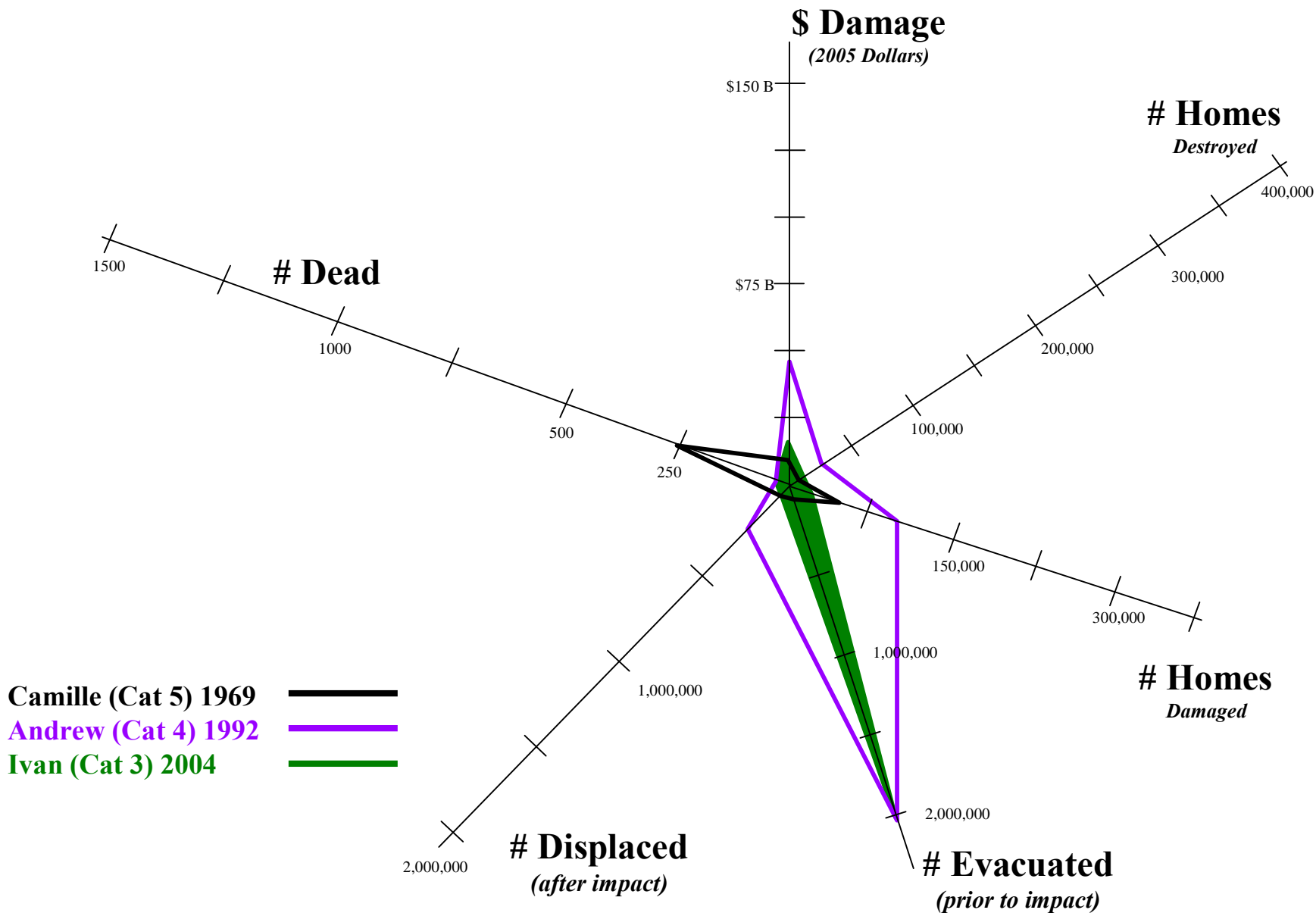
# Hurricane Camille



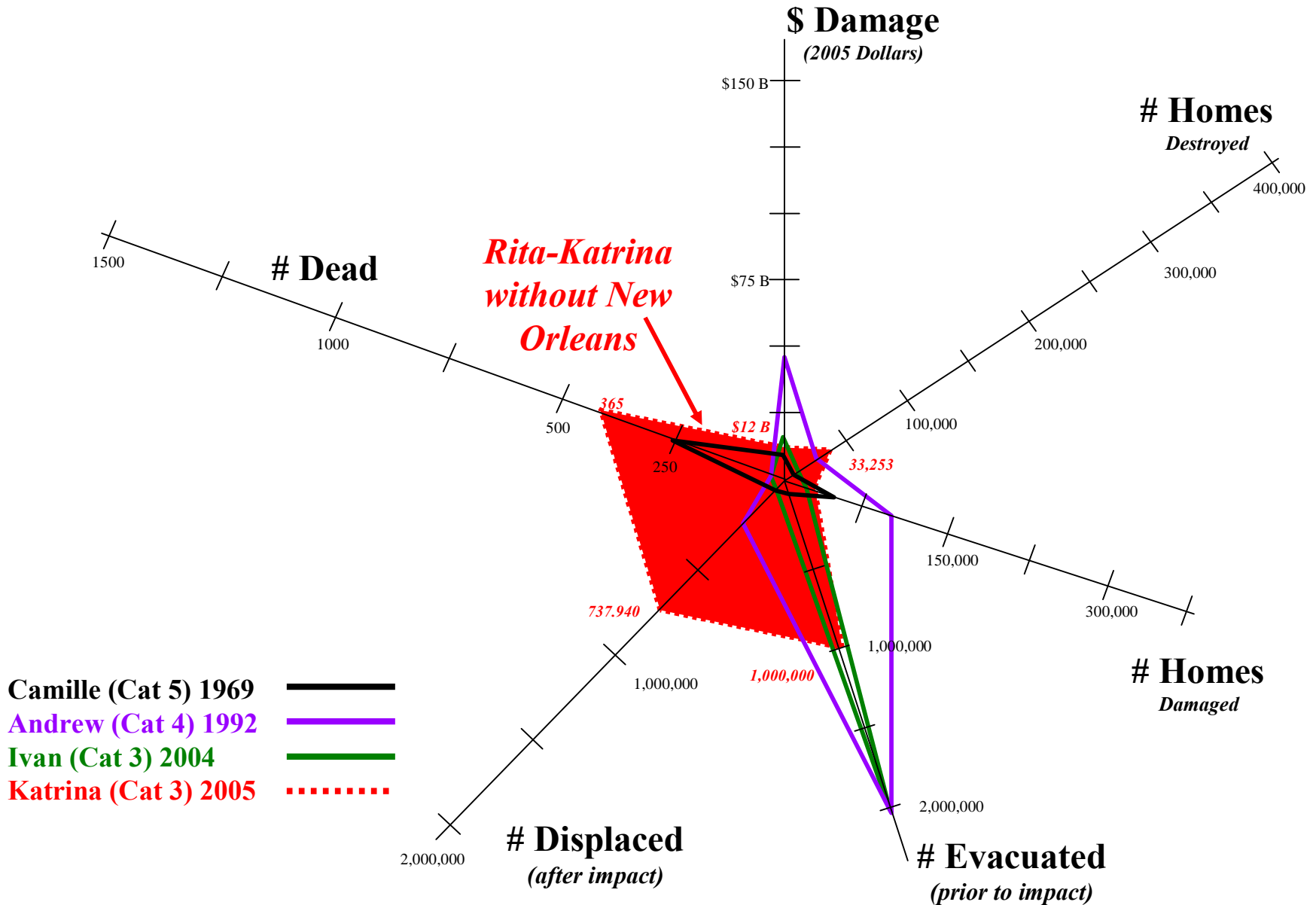
# Camille and Andrew



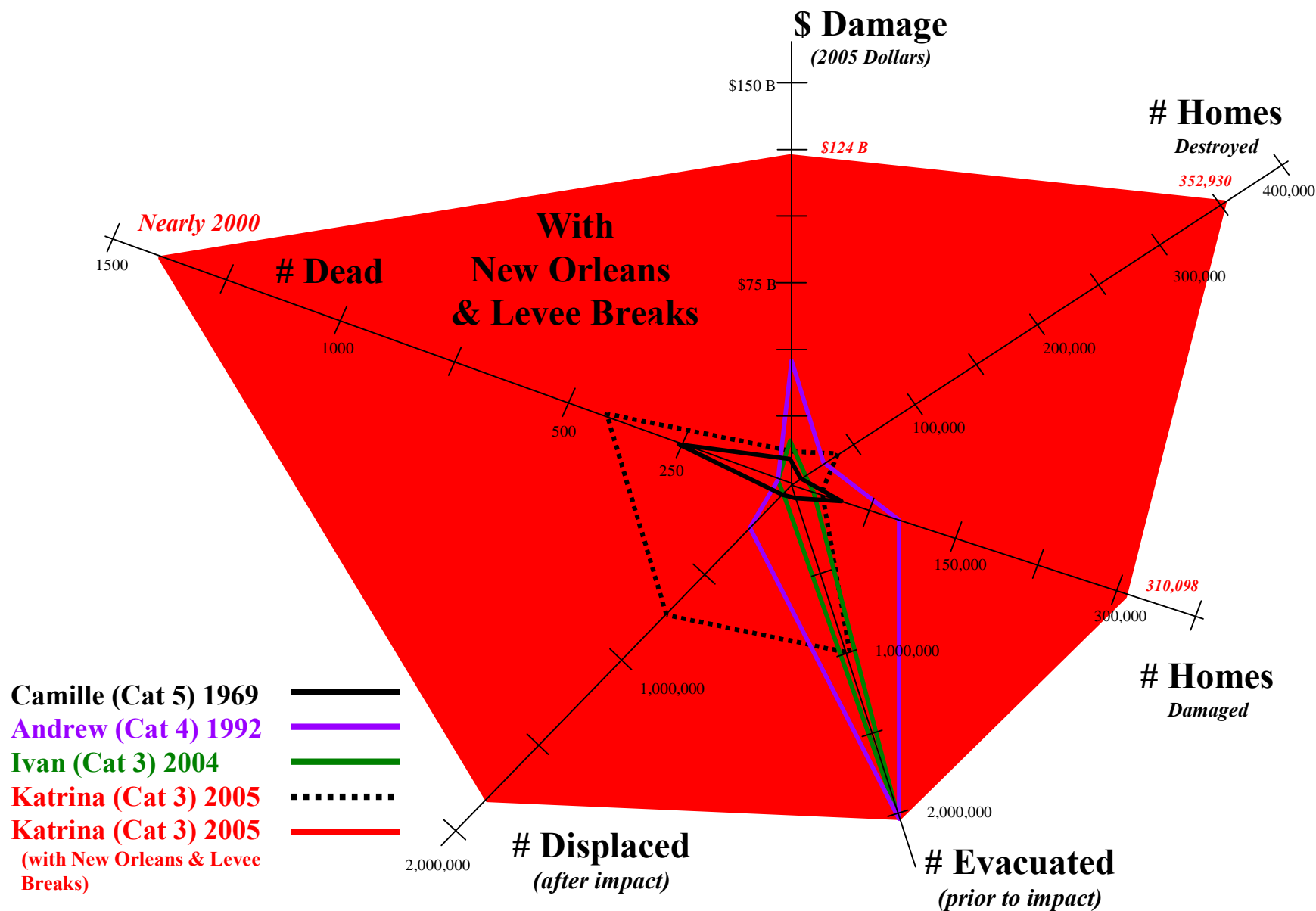
# Camille, Andrew and Ivan



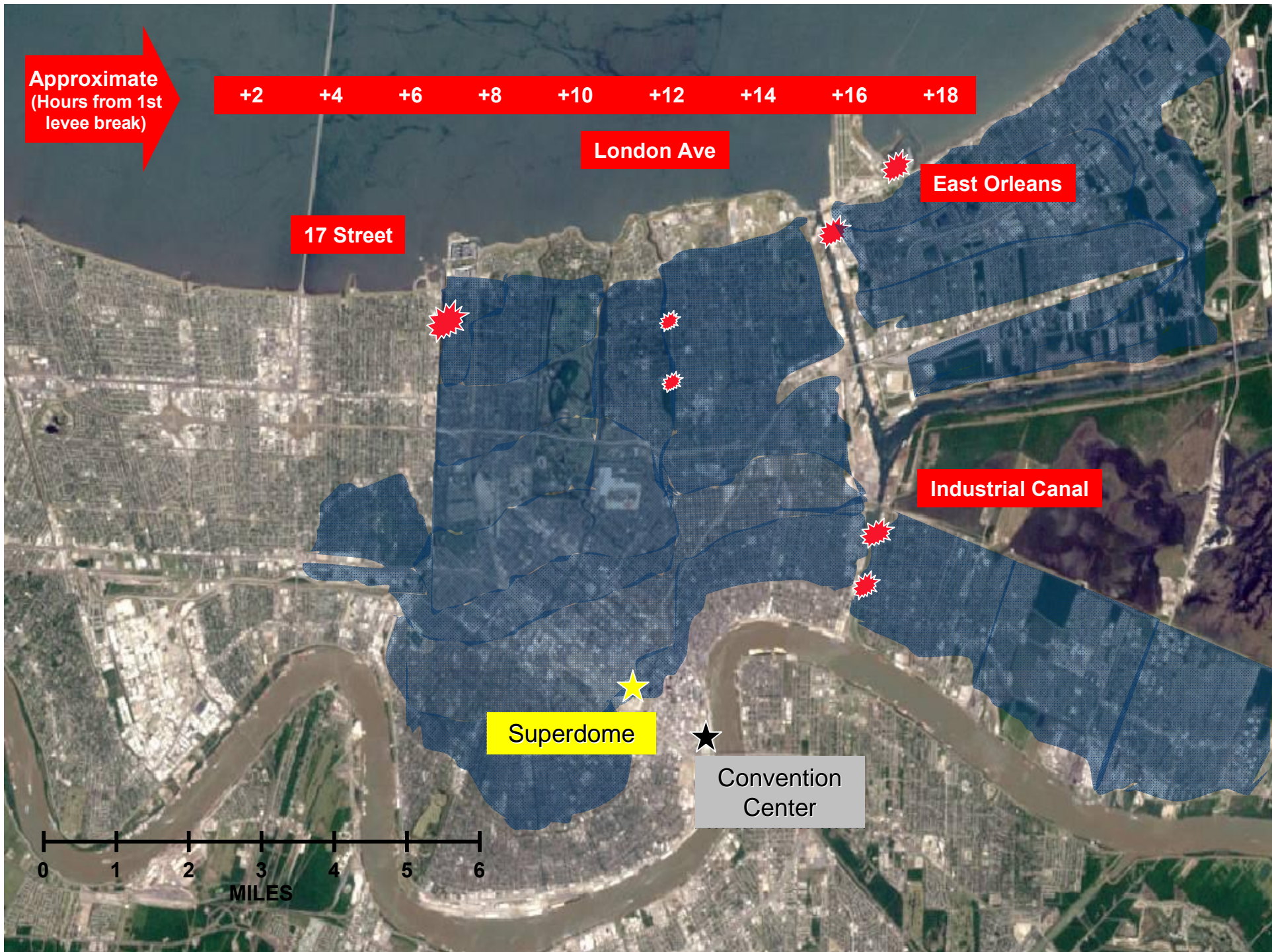
# Katrina & Rita w/o New Orleans



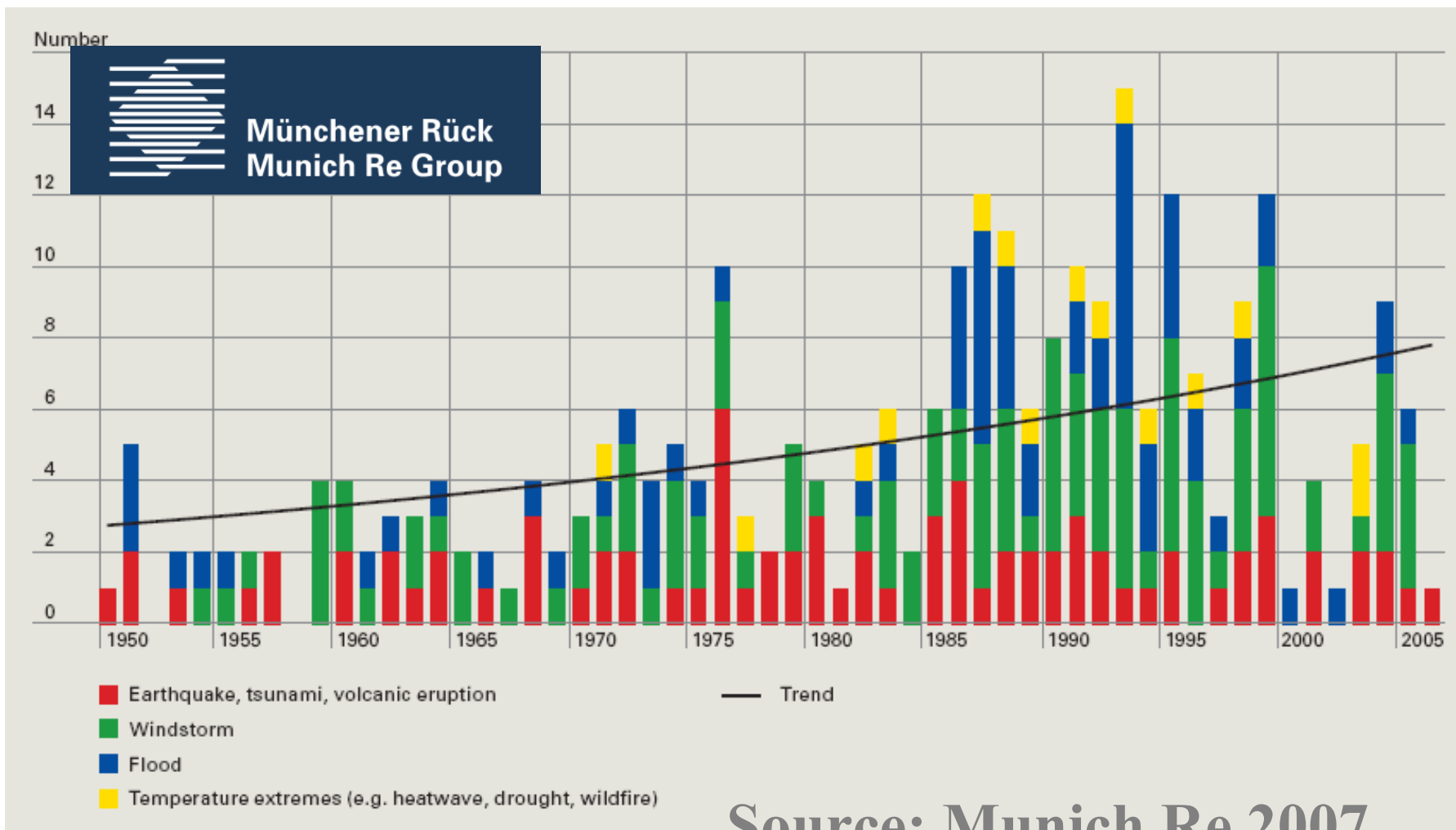
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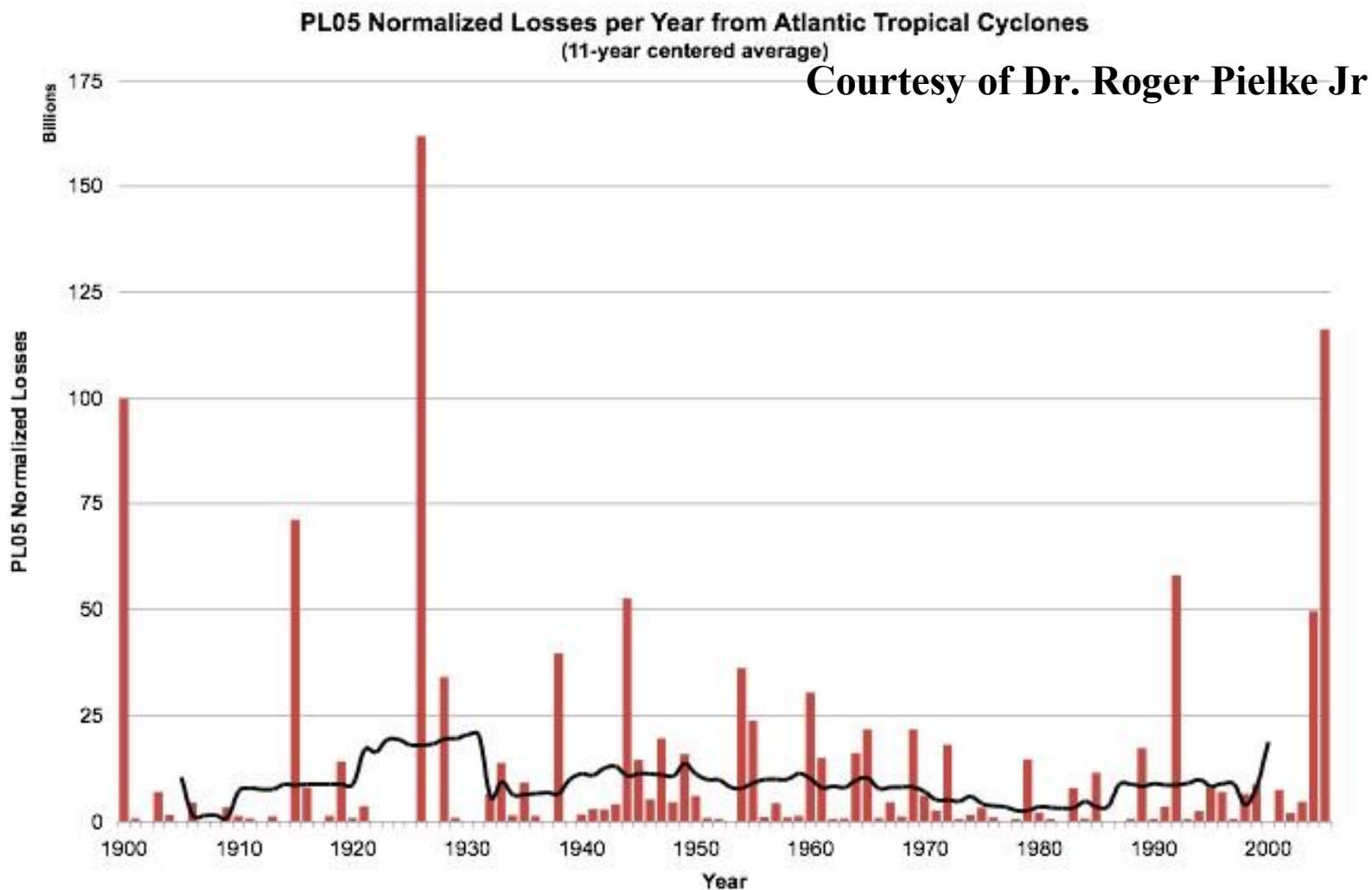
# Flood and Wind Disasters Have Been Increasing Most



Source: Munich Re 2007

Courtesy of Dr. Roger Pielke Jr.

# US Damage If Every Hurricane Season Occurred in 2005



# USA: Coastal Development

Miami Beach 2006

Miami Beach 1926



Wendler Collection



Joel Gratz © 2006

# Flood Risk = P (Probability of flood) X Consequences)

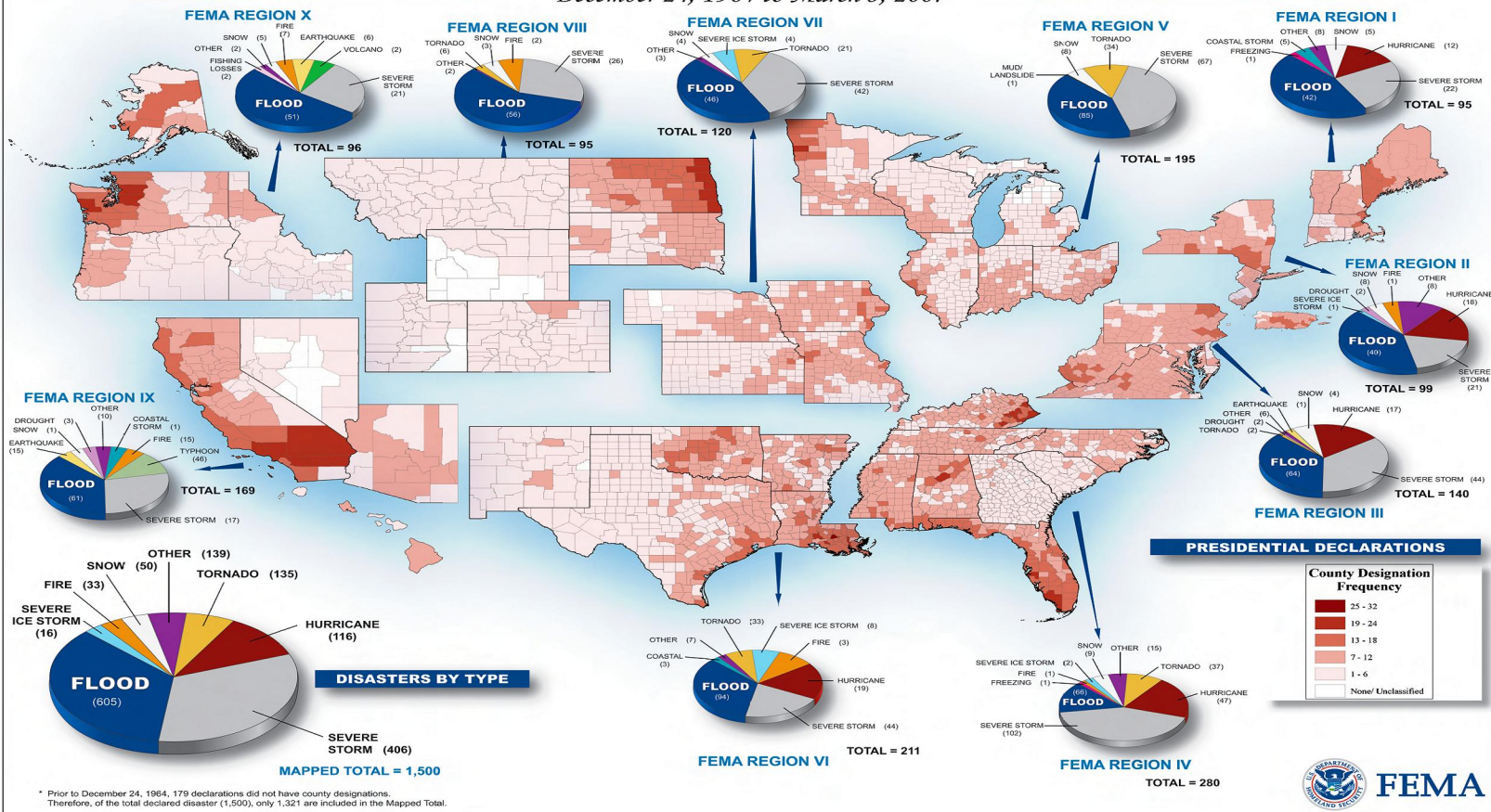


Courtesy of Pete Rabbon USACE

# However, Things Are Not So Bad In Texas, Yet!

## PRESIDENTIAL DISASTER DECLARATIONS

December 24, 1964 to March 3, 2007



\* Prior to December 24, 1964, 179 declarations did not have county designations. Therefore, of the total declared disaster (1,500), only 1,321 are included in the Mapped Total.

# Please Understand

- **Even if we perfectly implement current standards, damages and flood heights will continue to increase.**

**Remember, we have done a number of positive things, both non-structural and structural, but...  
We'll discuss why that is...**

# Central Message

**Even If We Perfectly Implement  
Current Standards,  
Damages Will Increase.**

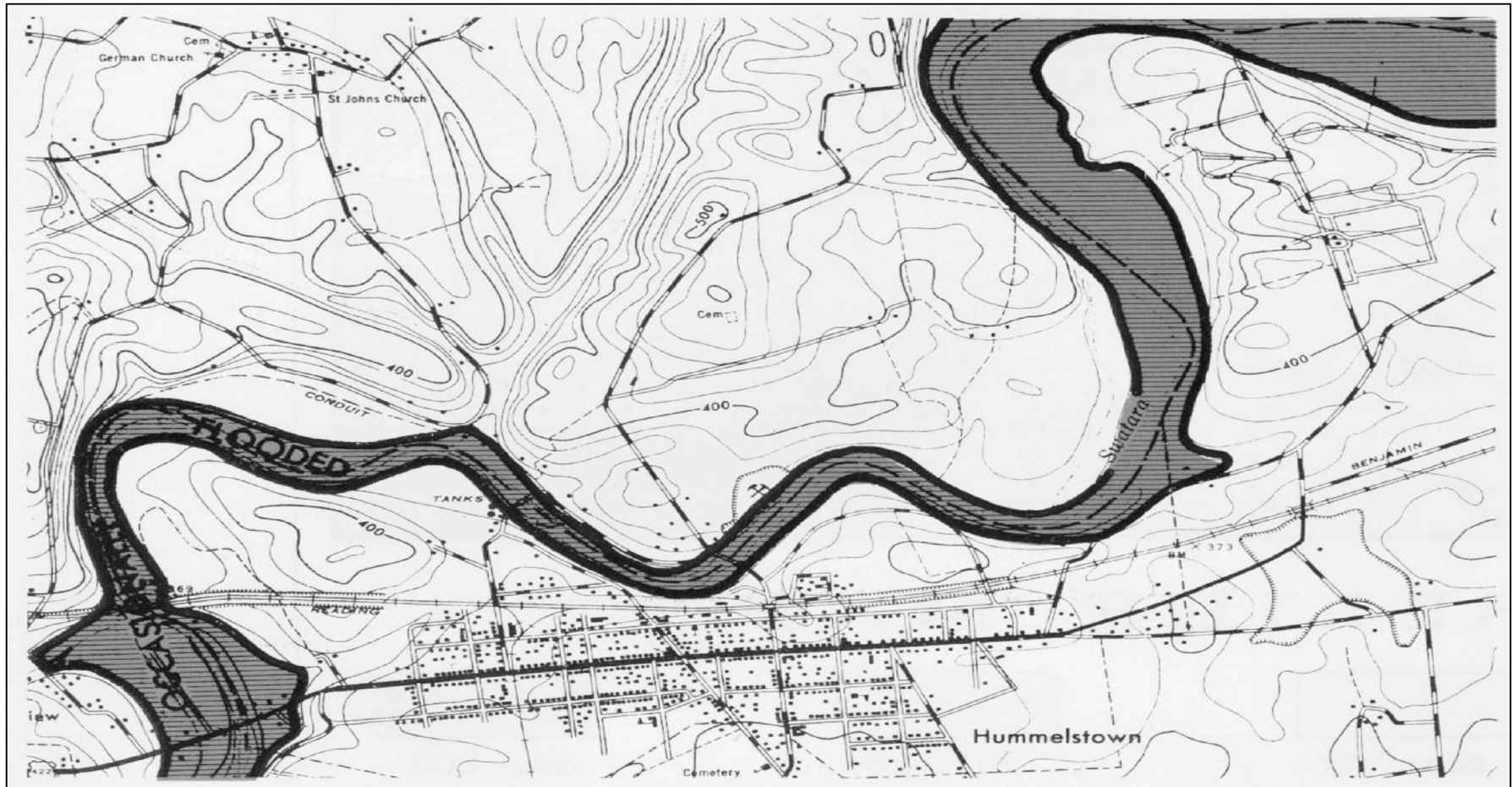
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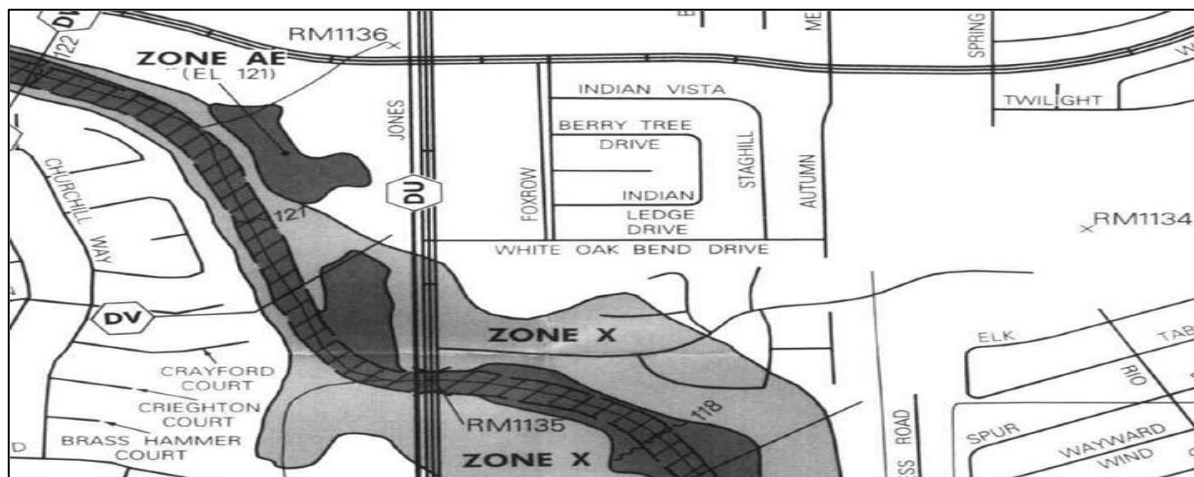
# Where is the Floodplain?



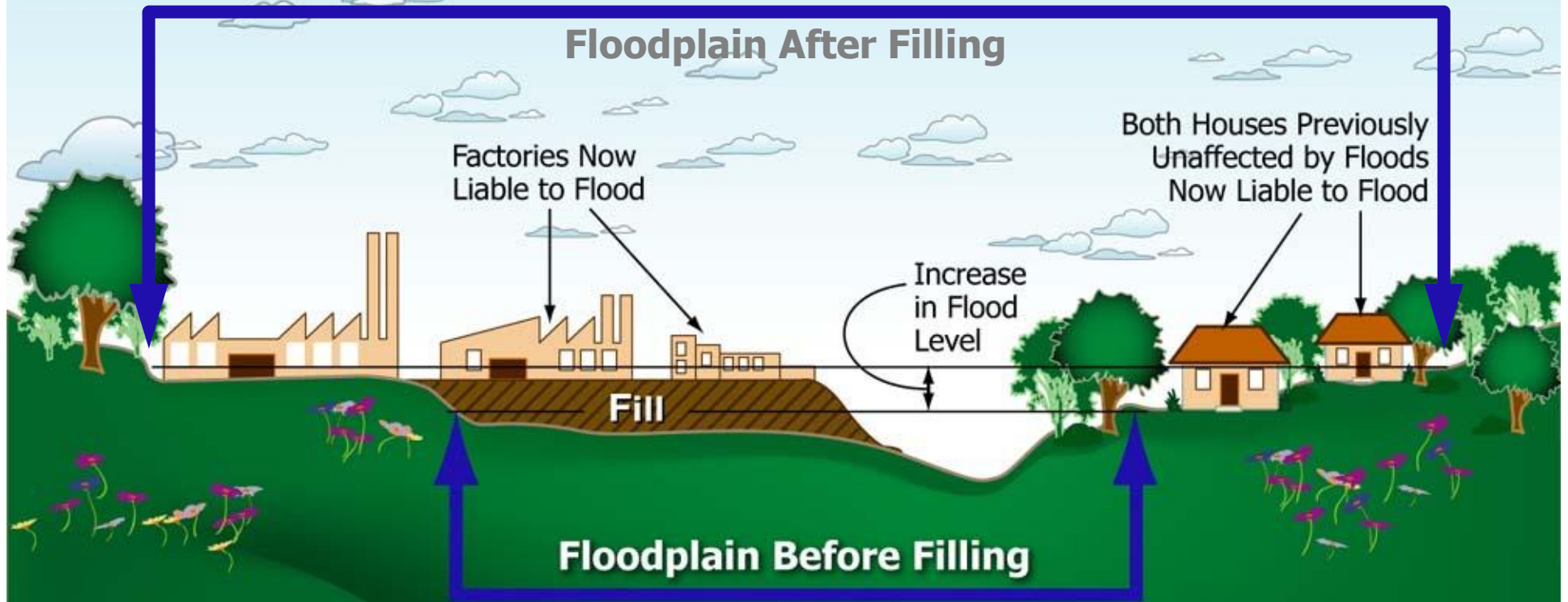
# Where is the Floodplain?



# Where is the Floodplain?



# Today's Floodplain Is Not Necessarily Tomorrow's Floodplain



**If large areas of the floodplain are filled, then there will be an increase in the land area needed to store flood waters.  
This means your home or business may be impacted.**

# With Full Build Out Flood Heights May Increase Dramatically

- **No Adverse Impact:**
  - **A New Direction in Floodplain Management Policy**
  - **Larry Larson PE, CFM and Doug Plasencia PE, CFM**
  - **Published in Natural Hazards Review Nov. 2001, IAAN 1527-6988**

## What is A Watershed?

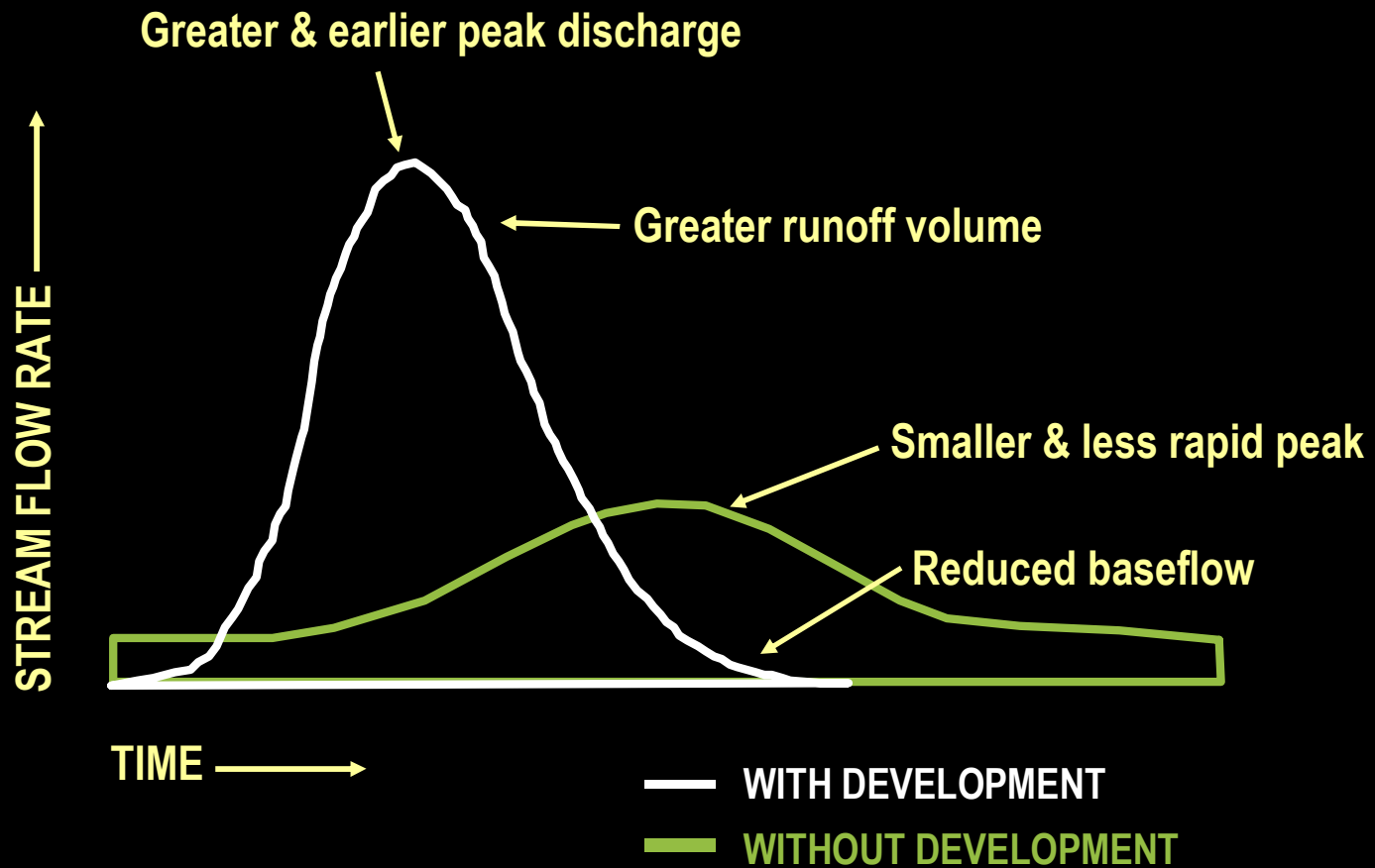
A watershed is an area of land that drains into a lake or river. As rainwater and melting snow run downhill, they carry sediment and other materials into our streams, lakes, and groundwater. The image below is a watershed illustration.



Watersheds provide water for drinking, irrigation, and streams. Many people also enjoy the lakes and streams for their beauty -- and for boating, fishing, and swimming. Healthy watersheds also provide food and shelter for wildlife.

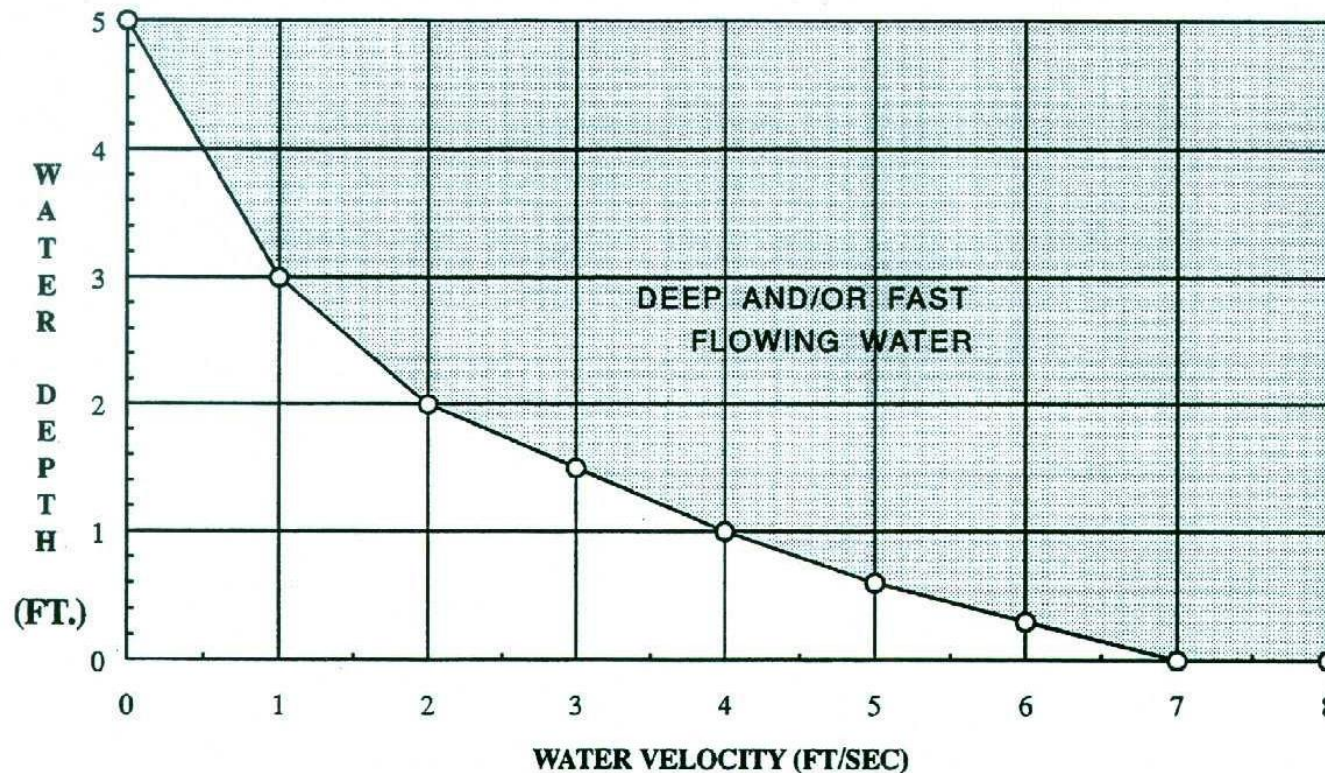
# Stormwater

## Impacts of Development on Streams



# Deeper and Higher Water Results?

## Serious Public Safety Issues



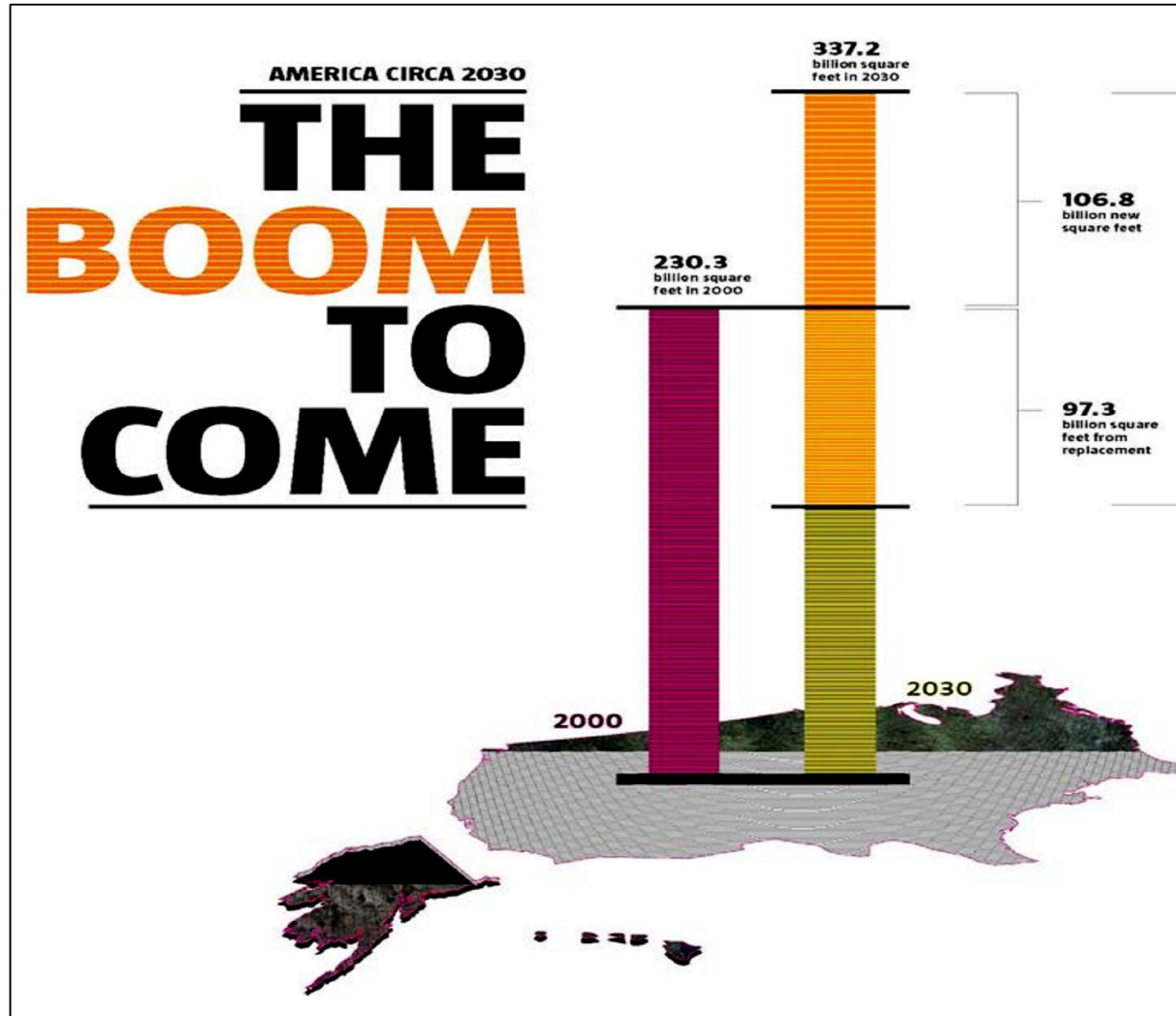


## Demographic Trends: The Future

- **As We Move Into the Next Generation Things Will Be Much More Challenging For Floodplain and Stormwater Managers**
- **Dr. Arthur “Chris” Nelson, FAICP**
- **Leadership in a New Era**
- **“More than half of the built environment of the United States we will see in 2025 did not exist in 2000”**

Journal of the American Planning Association,  
Vol. 72, No. 4, Autumn 2006.

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As printed in [www.architectmagazine.com](http://www.architectmagazine.com)

# USA Today

## April 29, 2008

- **Chris Nelson Tells APA Convention That:**
- **In the Next One Hundred Years the US Population Will Grow To:**
  
- **Any Guesses?**
- **Does 100 Years Have Any Special Meaning To Us?**

# Texas Population Projections From Texas Water Board

- **TEXAS STATE TOTAL Population:**
- **1990: 16 M;**
- **2000: 20 M;**
- **2050: 39.6 M**
- **County By-County Projections Available at:**
- **<http://www.twdb.state.tx.us/data/popwaterdemand/2002%20Projections/countypopulation.htm>**

# A Solution

- **Go Beyond NFIP Minimum Standards**
  - **No Adverse Impact-CRS Type:**
    - **Development Decision-making**
    - **Planning**
    - **Emergency Preparedness**

# Question One

- **Why are Flood Heights Increasing?**
  - A) Bad Luck;**
  - B) Urbanization, Loss Of Natural Valley Storage, Increasing Impermeable Surfaces in the Watershed;**
  - C) Global Cooling**
  - D) All Of The Above**

# Why Go Beyond the Current Minimum Standards?

**Flood damages are rapidly increasing unnecessarily!**

**Current approaches deal primarily with how to build in a floodplain vs. how to minimize future damages**

## No Adverse Impact Floodplain Management

- What is No “Adverse Impact Floodplain Management”?
- ASFPM Defines it as *“...an Approach that ensures the action of any property owner, public or private, does not adversely impact the property and rights of others”*



# No Adverse Impact Explained

NAI is a concept/policy/strategy that broadens one's focus from the built environment to include how changes to the built environment potentially impact other properties.

NAI broadens property rights by protecting the property rights of those that would be adversely impacted by the actions of others.



## Future Concept

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

## No Adverse Impact Roles

- **State, Regional & Local Government Working With the Private Sector Is the Key**
  - **Develop and adopt NAI community-based plans**
  - **Adopt NAI strategies**
  - **Educate citizens on the “Good Neighbor Policy”**



## **How To Follow the No Adverse Impact Principle?**

- **Identify ALL the Impacts of a Proposed Development**
- **Determine ALL the Properties Which Will be Impacted**
- **Notify Potentially Affected Persons of the Impact of Any Proposed Development**

## **How To Follow the No Adverse Impact Principle?**

- **Design or Re-Design the Project to Avoid Adverse Impacts**
- **Require Appropriate Mitigation Measures Acceptable to the Community and the Affected Members of the Community**

## **What is the Result of Following the No Adverse Impact Principle?**

- **With NAI, the Persons Who May be Victimized By Improper Development Are Made Aware and Can Have their Concerns Voiced to Community Officials.**
- **Really Turns the Usual Development Process Around!**

## What Is The Result Of Following The No Adverse Impact Principle?

- **PROTECTION OF THE PROPERTY RIGHTS OF ALL**
- **Legally Speaking, Prevention of Harm is Treated Quite Differently Than Making the Community a Better Place.**
- **Prevention of Harm to the Public Is Accorded Enormous Deference by the Courts**

# **No Adverse Impact Floodplain & Stormwater Regulation**

- **Consistent with the Concept of Sustainable Development**
- **Provides a Pragmatic Standard for Regulation**
- **Complements Good Wetland and Stormwater Regulation**
- **Makes Sense on a Local and Regional Basis**
- **May be Rewarded by FEMA's Community Rating System, Especially Under the New CRS Manual**



# No Adverse Impact Floodplain Management

- **New Concept?**
- ***“Sic utere tuo ut alienum non laedas”***
- **Detailed Legal Paper by Jon Kusler and Ed Thomas available at: [www.floods.org](http://www.floods.org)**
- **More Information in ASFPM**
- ***A Toolkit on Common Sense Floodplain Management* at: [www.floods.org](http://www.floods.org)**

- **NO ADVERSE IMPACT AND THE COURTS: PROTECTING THE PROPERTY RIGHTS OF ALL**
- **Prepared for the Association of State Floodplain Managers**
- **By: Jon A. Kusler, Esq. and Edward A. Thomas, Esq.**
- **Special Edition Minnesota Association of Flood Plain Managers, November 2007**



## Question For The Group

- **Anyone Ever Hear Of Mohandas K. Gandhi?**

**He Was:**

- A) One Of The Great Moralists of The Twentieth Century.**
- B) A British Trained Attorney-At-Law.**
- C) A Tremendous Influence On The Philosophy Which Guided Dr. Martin Luther King.**
- D) All Of The Above.**

## According To Gandhi's Writings

- ***“Sic Utere Tuo Ut Alienum Non Laedas”*** That Is, In English: **Use Your Property So You Do Not Harm Others Is:**
  - **“A Grand Doctrine Of Life And The Basis Of (Loving Relationships) Between Neighbors”**
  - **The Concept Of Using Property So It Does Not Harm Others Is Important To Discussion Of Dam And Levee Liability And Design**
  - **This Concept Will Also Help Us Understand How To Proceed In The Future, As We Shall See**

# Great State Case On Equitable Relief

- ***Wells v. Young*, 2000 ML 2338, 2000 Mont. Dist. Lexis 2526 (2000)**
- **Irrigation Water Seeps Across Fields Into Home, Causes Damage**
- **Montana State Law Bars Recovery of Damage**
- **Equitable Relief-Stop All Irrigation Until You Show Court Problem Seepage Fixed**

## Who Else Likes Sic Utere...?

- Texas Supreme Court
- See, e.g., *Ike Miller et al. v. Henry Letzerich et al.*, Supreme Court of Texas, *121 Tex. 248; 49S.W.2d 404 (1932)*
- “The present regulation is for the prevention of damage ... amounts merely to an application of the maxim *sic utere tuo ut alienum non laedas.*”

## Indiana Supreme Court Used *Sic Utere* as a Basis to Expand Groundwater Rights Doctrine in 1982

- “...the use or non-use intended to be made of the water, and other circumstances have come to be regarded as more or less influential in this class of cases and **have justly led to an extension of the maxim, “*Sic utere tuo ut alienum non laedas*” to the rights of landowners over subterranean waters, and to some abridgment of their supposed power to injure their neighbors without benefiting themselves.**”

*See, Wiggins et al. v. Brazil Coal et al., Court of Appeals of Indiana, First District, 440 N.E.2d 495; 1982 Ind. App. LEXIS 1397, September 30, 1982*

## **Texas Courts Have Not Reached Such A Result for Groundwater Protection (YET!)**

- **SIPRIANO et al. v. GREAT SPRING WATERS OF AMERICA, INC., SUPREME COURT OF TEXAS, 1 S.W.3d 75, 42 Tex. Sup. J. 629 (1999)**
- **Court Says Leave It To Legislature**
- **Very Powerful Concurrence By Two Justices Which Suggests The Court Might Change Its Mind If the Legislature Does Not Act**



# Part II

## The Impediments To Proper Floodplain Management

- A. Externality

# The Problem of Externality

- **When One Group Pays Maintenance or Replacement of Something Yet Different Person or Group Uses That Same Something, We Often Have Problems**
- **Classic Example Is a Park Bench**
- **Disaster Assistance Is Another Classic Example of Externality**
- **Who Pays For Disaster Assistance?**
- **Who Benefits?**

# Who Pays For Disaster Assistance?

- **Costs of flooding are usually largely borne by:**
  - a) **The Federal and Sometimes the State Taxpayer Through IRS Casualty Losses, SBA Loans, Disaster CDBG Funds, and the Whole Panoply of Federal and Private Disaster Relief Described in the Ed Thomas and Sarah Bowen Publication "Patchwork Quilt (Located at:  
[http://www.floods.org/PDF/Post\\_Disaster\\_Reconstruction\\_Patchwork\\_Quilt\\_ET.pdf](http://www.floods.org/PDF/Post_Disaster_Reconstruction_Patchwork_Quilt_ET.pdf) )**
  - b) **By Disaster Victims Themselves**

# Cui Bono? (Who Benefits?)

- **At Least the Short Term Benefits of Unwise or Improper Floodplain Development Flow to:**
  - a) **Developers (profit on sale and occupancy)**
  - b) **Local Governments (Real Estate and Sales Taxes-Jobs etc.)**
  - c) **State Government (Some Sales Tax-Jobs etc.)**
  - d) **Mortgage Companies (Profits On Loans etc.)**
  - e) **The Occupants of Floodplains Who May Benefit From a Lovely Place To Stay For a While, Anyway**

# Why Should Government Do Something About This?

- **Fundamental Duty**
- **Protect The Present**
- **Preserve A Community's Future**

# Why Else Should Government Do Something About This?

- In a Word:

**Liability**

# How Can You Best Avoid These Friendly Lawyer Folks?



# Floods and Litigation

- **When Someone Is Allegedly Damaged by the Actions of Others Who Pays?**
  
- **This is a Fundamental Question of Law.**



# Three Ways to Support Reconstruction Following Disaster Damage

1. **Self Help: Loans, Savings, Charity, Neighbors**
2. **Insurance Disaster Relief: A Combination of Social Insurance and Self Help**
3. **Litigation**

**The preferred alternative is...**

**To have NO DAMAGE**

**Due to Land Use and Hazard Mitigation**

# Grounds For Suit

- **Standard of Care for Professionals Is Increasingly High As Professionals Develop Increasingly Sophisticated Design Methods**
- **Previously Accepted Defenses Such As the Common Enemy Doctrine for Flood Fighting is Increasingly Replaced By “Rule of Reasonable Person”**
- **The “Reasonable Person” is Expected To Be Something Like An Expert When We Are Discussing Something Like Land Use**

# **Proof of Causation of Harm Is Easier Now Than In Past Times**

- **Forensic Hydrologists**
- **Forensic Hydraulic Engineers**

# Web Cast on Professional Liability

- **Next Web-Cast Later in 2009?**
- **Sponsored by American Council of Engineering Companies (ACEC)**
- **Presented by Dr. Jon Kusler, Esq. and Edward A. Thomas, Esq.**

## Flooded Homes May Cost City Millions City Held Liable – Damages Still To Be Determined



Photo: Lincoln Star Journal

## From California January 2008

- **Lawsuit seeks \$1 billion in Marin flood damage** The plaintiffs – 265 individuals and businesses – are each seeking \$4.25 million in damages
- **Lawyers representing the victims could collect more than \$66 million in fees**

# Lawsuit seeks \$1 billion for Marin flood damage

## Government agencies blamed for failing to prevent disaster

By Tad Whitaker  
*IJ reporter*

Victims of last winter's devastating flood in Marin are seeking more than \$1 billion in damages from a laundry list of government agencies that they say share blame for the destruction.

The plaintiffs — 265 individuals and businesses — are each seeking \$4 million in damages and another \$250,000 in legal fees, according to lawyer Herb Rowland, who is defending San Anselmo. Lawyers representing the victims could collect more than \$66 million in fees.

The scope of the lawsuit, first filed last fall, and the cost to fight it have rankled some officials who believe the flood — which began on Dec. 31, 2005 — was the result of unique circumstances. The storm damaged about 1,200

### LAWSUIT

The suit resulted from the Dec. 31, 2005, flood that damaged about 1,200 homes and 200 businesses in Marin.

### PLAINTIFFS

A total of 265 residents and businesses.

### DEFENDANTS

Those being sued include: San Anselmo, Mill Valley, Ross, Fairfax, Corte Madera, Larkspur, Marin County, the Marin Municipal Water District, the state of California, the Ross Valley Sanitary District, Tamalpais Union High School District and the Marin County Flood Control and Water Conservation District.

homes and 200 businesses.

Lawrence Mann, one of the attorneys representing the

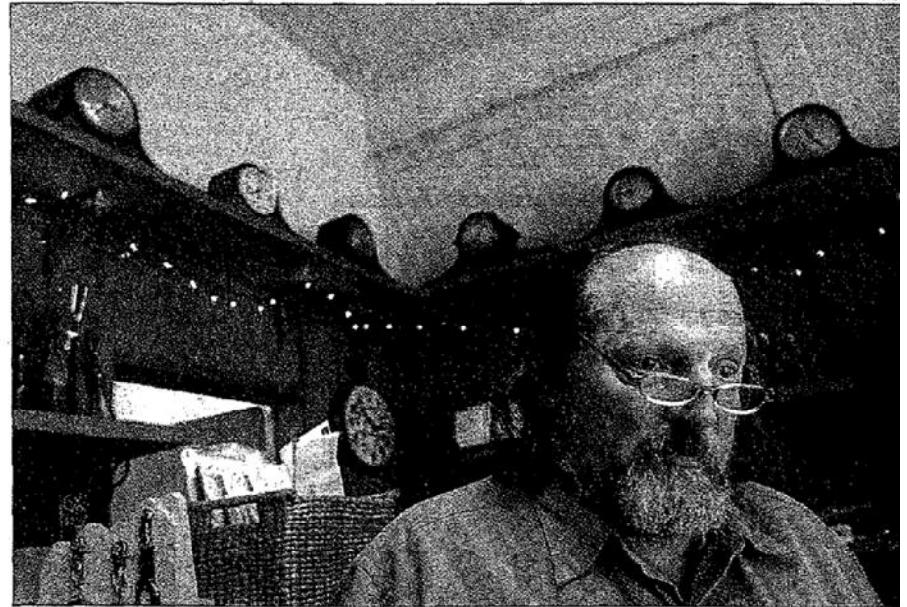
plaintiffs, said the goal is to win the maximum allowed by each entity's insurance policy so the settlement does not affect municipal budgets. Officials have estimated that total damage exceeded \$110 million, although Mann puts it above \$300 million. He said some of his clients have expressed interest in directing at least a portion of the proceeds toward flood solutions.

"Most people would like to see some of the money used to prevent flooding," he said.

Supervisor Hal Brown, whose district covers much of the flooded area, laughed when asked about people donating settlement money toward flood repairs.

"That to me isn't human nature," he said. "I think there are more positive directions to go in."

See Lawsuit, page A7



*IJ photo/Alan*

**SUES:** Drew McEachern of San Anselmo, owner of Antique Timepieces, is among those merchants joining a class-action lawsuit against numerous public agencies over the flood on Dec. 31, 2005. McEachern said "it's negligence" that the agencies didn't do enough to prevent a recurrence of the 1982 flood that also damaged his property.

# **City Of Half Moon Bay, California**

## **November, 2007**

- **City Liable for Nearly \$37,000,000 Under the Federal and State Takings Clauses, as Well as the Common Law Doctrines of Nuisance and Trespass, for Constructing a Storm Water Drainage System Which Flooded Someone**



# Fernley, Nevada

- **“Class-action lawsuit updated in Fernley flood case”**
- **“The lawsuit names the Truckee-Carson Irrigation District, Lyon County, the city of Fernley, and companies that built and sold homes in the area flooded when a storm-swollen irrigation canal ruptured” Nevada Appeal, 1/26/08**

# Texas Lawsuit Dismissed on Procedural Grounds

- Homeowners Find Out That They Are in Floodplain
- Then They Get Flooded
- Sue Municipality and Local Officials
- Court Says They Should Have Sued Within Two Years of Learning of the Problem
- Suit Barred By Statute of Limitations
- *Campbell v. Hays County*, TX Court of Civil Appeals, 2003 Tex. App. LEXIS 8501, 2003

# Katrina Legal Situation

- Katrina Lawsuits
- 500,000 Plaintiffs
- \$278 Billion in Damages Requested
- **Approximately 1,000 Plaintiffs Attorneys Involved- Learning About Levees, Floods, and Liability**
- A Copy of an Article on This Topic Appeared in the National Wetlands Newsletter and is available at:  
[www.floods.org/PDF/ET\\_Katrina\\_Insurance\\_082907.pdf](http://www.floods.org/PDF/ET_Katrina_Insurance_082907.pdf)
- For The First Time In Many Years, Lenders Will Lose Considerable Money on Mortgages in A Disaster Area

## Part II

# The Impediments To Proper Floodplain Management

- **B. Concerns About A “Taking”**

# The Constitution of the United States

- **Fifth Amendment to the Constitution: “... *nor shall private property be taken for public use without just compensation.*”**
- **Was this Some Theoretical Thought, or Passing Fancy?**
- **Which Part of this Directly Mentions Regulation?**
- ***Pennsylvania Coal Company vs. Mahon 260 US 293 (1922). But See, Keystone Coal 480 US 470, 1987.***

# CONSTITUTION OF THE STATE OF TEXAS 1876

## ARTICLE I. BILL OF RIGHTS

- *Tex. Const. Art. I, § 17 (2009)*
- No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.

# Texas Constitution Seems To Offer Broad Protection of Property Rights

- “The Texas Constitution prohibits three distinct types of “takings” without adequate compensation:
  - (1) taking,
  - (2) damaging, and
  - (3) destroying property.” *See, City of Dallas v. Jennings, 142 S.W.3d 310, 313 n.2 (Tex. 2004).*

# Increase in Cases Involving Land Use

- There Has Been a Huge Increase in Taking Issue Cases, and Related Controversies Involving Development.
- Thousands of Cases Reviewed by Jon Kusler, Me and Others.
- Common thread? Courts Have Modified Common Law to Require an **Increased Standard of Care** as the State of the Art of Hazard Management Has Improved.



# Taking Lawsuit Results

- **Regulations Clearly Based on Hazard Prevention and Fairly applied To All: Successfully Held to be a Taking – Almost None!**
- **Many, Many Cases where Communities and Landowners Held Liable for Harming Others**

# The Texas Courts Seem To Agree With This Trend

- “It is clear that in exercising the police power, the government agency is acting as an arbiter of disputes among groups and individuals for the purpose of resolving conflicts among competing interests. This is the role in which government acts when it adopts zoning ordinances, enacts health measures, adopts building codes, abates nuisances, or adopts a host of other regulations. **When government, in its roles as neutral arbiter, adopts measures for the protection of the public health, safety, morals or welfare, and such regulations result in economic loss to a citizen, a rule shielding the agency from liability for such loss can be persuasively defended, since the threat of liability in such cases could well have the effect of deterring the adoption of measures necessary for the attainment of proper police power objectives, with the result that only completely safe, and probably ineffective, regulatory measures would be adopted.**”
- *See, San Antonio River Authority v. Garrett Bros.*, 528 S.W.2d 266 (Tex., 1975)

# Examples of Situations Where Governments and Landowners May Be Held Liable

- Construction of a Road Causes Damage
- Stormwater System Increases Flows *See, [City of Keller v. Wilson, 86 S.W.3d 693, 702-06](#)* (Tex. App. - Fort Worth 2002, no pet.)
- Development Blocks Watercourse
- Bridge Without Adequate Opening
- Grading Land Increases Runoff- Flood Control Structure Causes Damage
- Filling Wetland Causes Damage
- Issuing Permits for Development Which Causes Harm to a Third Party *See, [Kite v. City of Westworth Village, 853 S.W.2d 200, 201](#)* (Tex. App. - Fort Worth 1993, writ denied) (holding the city liable for flooding caused by platting of a subdivision).

**More Texas Examples From Excellent Article by: Dawn Norman in St. Mary's Law Journal "RECENT DEVELOPMENT: THE METES AND BOUNDS OF GOVERNMENTAL IMMUNITY AND POLITICAL SUBDIVISIONS: LIMITING TORT LIABILITY FOR MUNICIPAL UTILITY DISTRICTS IN TEXAS", 40 St. Mary's L. J. 581 (2008)**

- [Tarrant Reg. Water Dist. v. Gragg, 47 Tex. Sup. Ct. J. 707, 2004 WL 1439646, at 8](#) (Tex. June 25, 2004) (holding that construction of a dam caused District to be liable for occasional downstream flooding that it knew was substantially certain to occur as a result);
- [City of Keller v. Wilson, 86 S.W.3d 693, 702-06](#) (Tex. App. - Fort Worth 2002, no pet.) (holding the city's approval of the drainage plan sufficient to impose liability for the resulting flood of a downstream subdivision);
- [Harris County Flood Control Dist. v. Adam, 56 S.W.3d 665, 668-69](#) (Tex. App. - Houston [14th Dist.] 2001, pet. dismissed w.o.j.) (holding that an allegation that District's design of a freeway caused flooding was sufficient to allow the case to proceed);
- [Kite v. City of Westworth Village, 853 S.W.2d 200, 201](#) (Tex. App. - Fort Worth 1993, writ denied) (holding the city liable for flooding caused by platting of a subdivision). “

## **Texas Statute and Case Mentions Water Trespass**

- **Unlawful to divert the Surface Waters of the State in such a Way as to Cause Harm**
- **See, Wilson v. Hagins, 116 Tex. 538, (1927)**

# Snapshots of Texas Law

- **“Plaintiffs in error are not authorized, under the law, to construct dams, embankments, channels and ditches to impound surface water on their own land and thereby divert it on to the lands of their neighbors to their detriment and damage.” See, *Ike Miller et al. v. Henry Letzerich et al.*, Supreme Court of Texas, 121 Tex. 248; 49 S.W.2d 404 (1932)**
- **“If the State knows that a specific act is causing identifiable harm or that the specific property damage is substantially certain to result from an authorized governmental action, a takings claim may lie even if there was no desire to damage the property.” See, *City of Dallas v. Jennings*, 142 S.W.3d 310, 313 (Tex. 2004).**

# Legal Issues: Professional Liability For Construction in Hazardous Areas

**Excellent Paper By Jon Kusler, PhD, Esq.  
Is Now Available**

- [www.floods.org](http://www.floods.org)
- [www.floods.org/PDF/ASFPM\\_Professional\\_Liability\\_Construction.pdf](http://www.floods.org/PDF/ASFPM_Professional_Liability_Construction.pdf)
- **Prepared For The Association Of State Floodplain Managers Foundation**

**Ed Thomas and Jon Kusler Did a Web-Cast on this Topic  
in March 2008**

**Next Web-Cast TBD**

## **New Trend In The Law**

- **Increasingly States Are Allowing Lawsuits Against Communities for Alleged Goofs in Permitting Construction OR in Conducting Inspections**
- **Excellent Paper By Attorney Jon Kusler PhD For The Association of State Floodplain Managers Foundation Available On Line at [www.floods.org](http://www.floods.org)**



## Recent Legal Research by Ed Thomas

- **Many Cases Where Communities Try to Prevent Building in a Hazardous Area**
- **Refuse the Requested Permit Based on Nebulous Environmental or Aesthetic Concerns**
- **And They Lose**
- **If they Clearly Related Permit Refusal to Harm Prevention-Very Likely a Different Result**

# An Illustration of the Trend in the Law Towards Recovery by Injured Parties

- **Background: For Over Thirty Years Lenders and the Companies who Make Read FEMA Flood Insurance Maps Have Escaped Liability When They Read A Map Incorrectly; the Plaintiff Does Not Purchase Flood Insurance and Then Gets Flooded**
- ***Then: Paul v. Landsafe Flood Determination, Inc.*, No. 07-60652 (5th Cir. Dec. 5, 2008)**
- **Plaintiff Allowed To Sue to Recover From Flood Determination Allegedly in Error**
- **The Court Noted that a Flood Zone Determination Was the Kind of Professional Opinion for Which it is Foreseeable that Justifiable and Detrimental Reliance by a Reasonable Person Would Be Induced.**
- **Would a Court Think that a Levee Certification Is a Similar Professional Opinion?**

# **In These Examples Of Community Legal Liability For Permitting Or Undertaking Activity**

Is There A Theme?

**YOU BET!!!**

What is that Theme?

## The Theme

- They did not do **No Adverse Impact Planning!!!**
- They Did Not **Identify the Impacts** of the Development Activity
- They Did Not **Notify** the Soon- to- Be Afflicted Members of the Community
- They Did Not **Re-Design or Re-Consider** the Project
- They Did Not Require Appropriate and Necessary **Mitigation** Measures

# **Landowner Does Not Have All Rights Under The Law**

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

# **Public Entities Do Not Have The Right To Do Just Anything Either!**

- **No Right to Use Public Office To Wage Vendettas**
- **No Right To Abuse the Public**
- **No Right To Use Regulation To Steal From a Landowner**

# Can Government Adopt Higher Standards Than FEMA Minimums?

- FEMA Regulations Encourage Adoption of Higher Standards-”... **any floodplain** management regulations adopted by a State or a community which are **more restrictive** than (the FEMA Regulations) **are encouraged** and shall take precedence.” 44CFR section 60.1(d). (emphasis added)

# **Might Texas Governments Wish To Consider Even Higher Standards?**

- **Consider:**
  - A) Uncertainties in Flood Elevations**
  - B) Plasencia- Larson Paper On Flood Height Increases Due To Future Watershed Development**
  - C) Consequences If Water Control Facility, or Other Critical Facility Is Overtopped**
  - D) Height of Freeboard**
  - E) 50% Chance That 1% Flood Will be Exceeded Within 70 Years-Bulletin 17 B**



# **Governmental Rights and Duties to Manage Development**

- **Does Government Have a Right to Regulate to Prevent Harm?**
  
- **Does Government Have an Affirmative Duty to Regulate to Prevent Harm?**

# Recent Major Federal Court Cases

- **San Remo Hotel v. City and County of San Francisco, *U.S. Supreme Court No. 04-340 decided June 20, 2005***
- **Kelo v. New London, *US Supreme Court, No.04-108, Decided June 23, 2005.***

Baker

# Susette Kelo



# Susette Kelo's House



# Extremely Important US Supreme Court Case on Takings

- **Lingle v. Chevron, *US Supreme Court No. 04-163 Decided May 23, 2005***

# Here Is The Gas Station In Lingle



# In Lingle, The Supreme Court States How To Determine If There Is A Taking I

- **Physical Intrusion *See, Loretto v. Teleprompter Manhattan 458 US 419 (1982);***

**Loretto Apartment  
Building:  
Physical Intrusion**

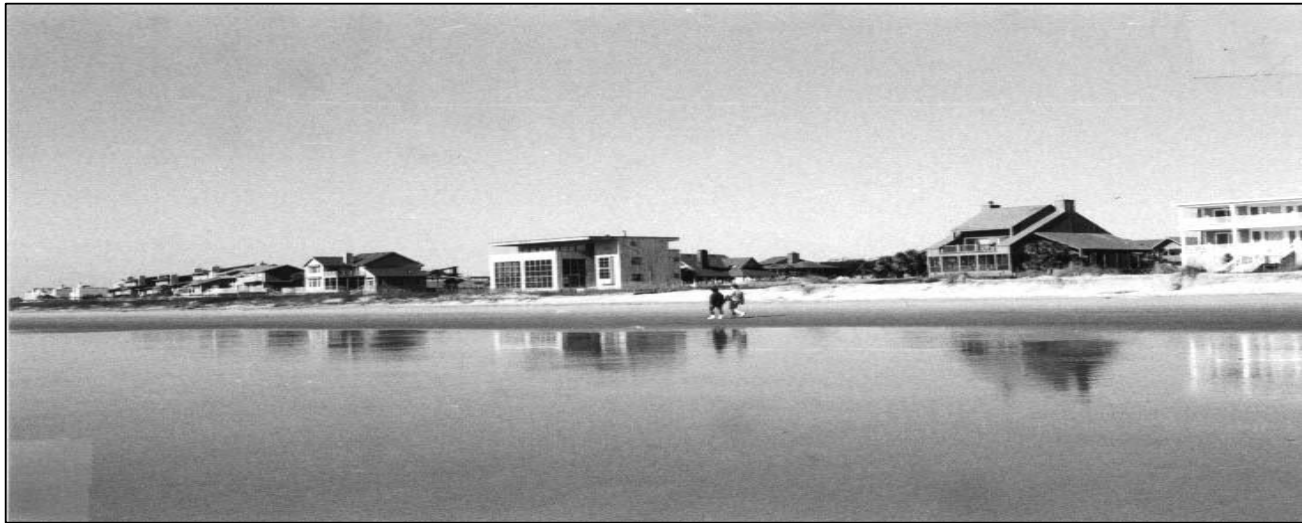




# In Lingle, The Supreme Court States How To Determine If There Is A Taking II

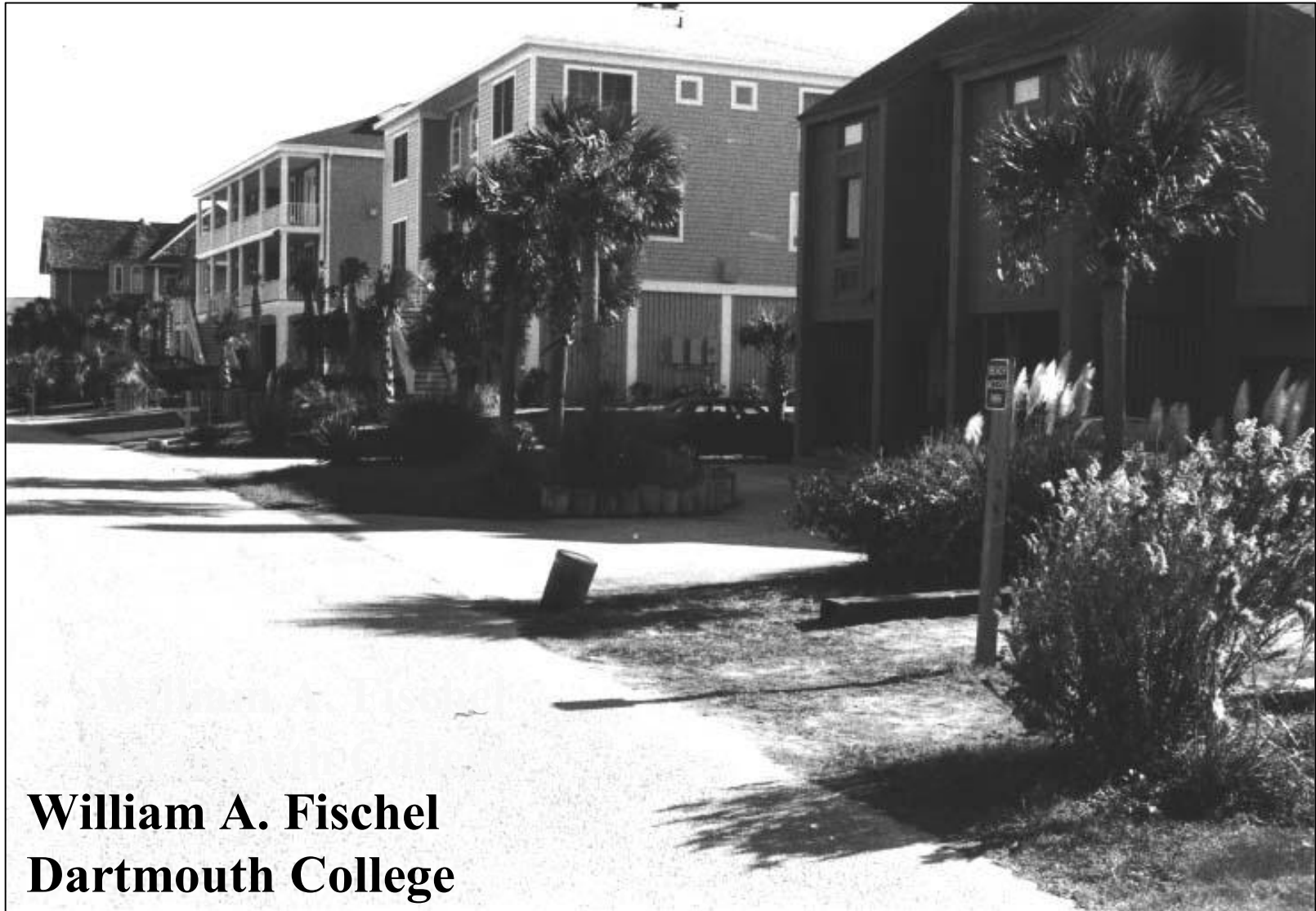
- **Total, or Near Total Regulatory Taking.** *See, Lucas v. South Carolina Coastal Council 505 US 1003 (1992);*

# Lucas Sites Pre-Development



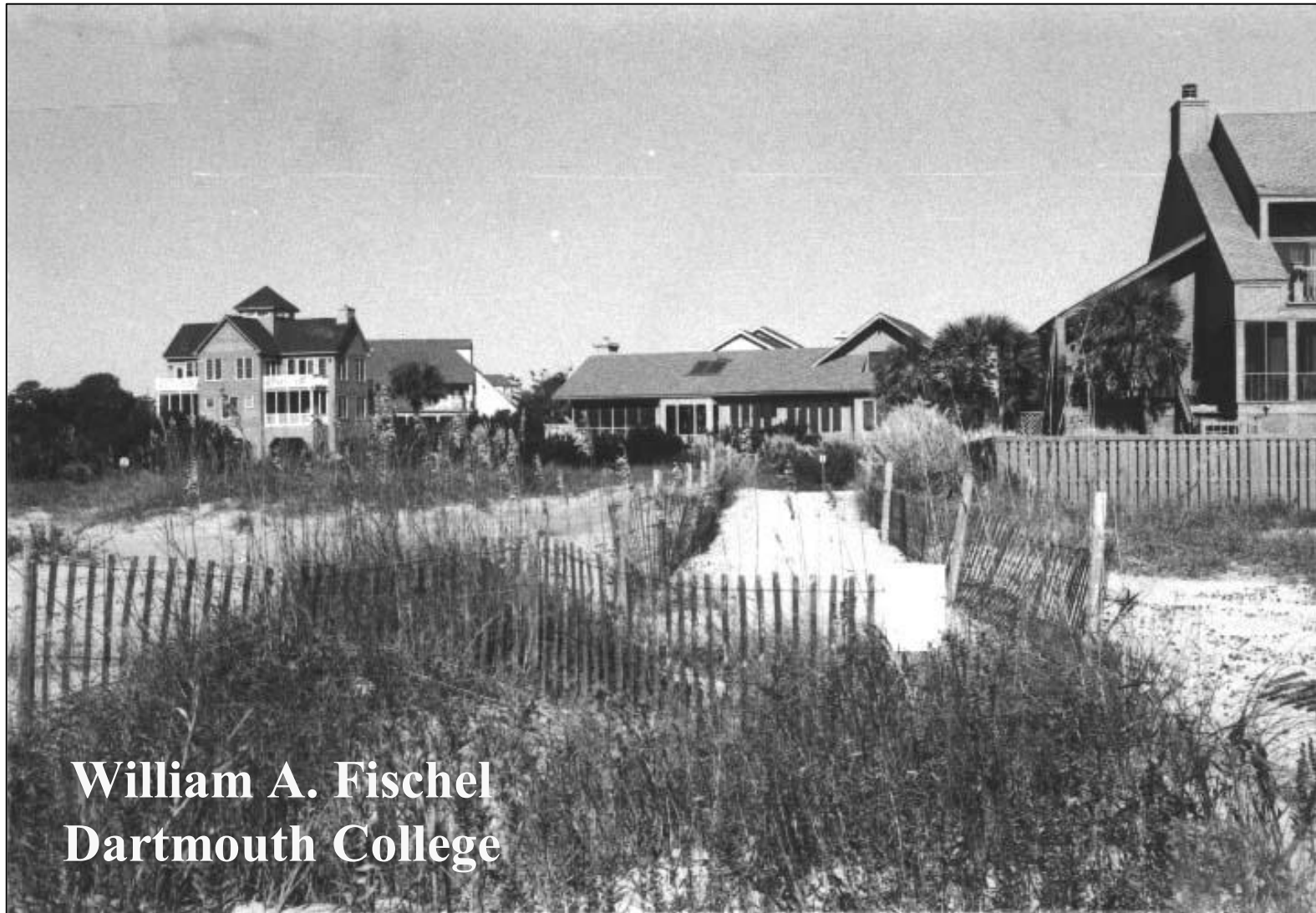
**William A. Fischel**  
**Dartmouth College**

# Lucas From Street



**William A. Fischel**  
**Dartmouth College**

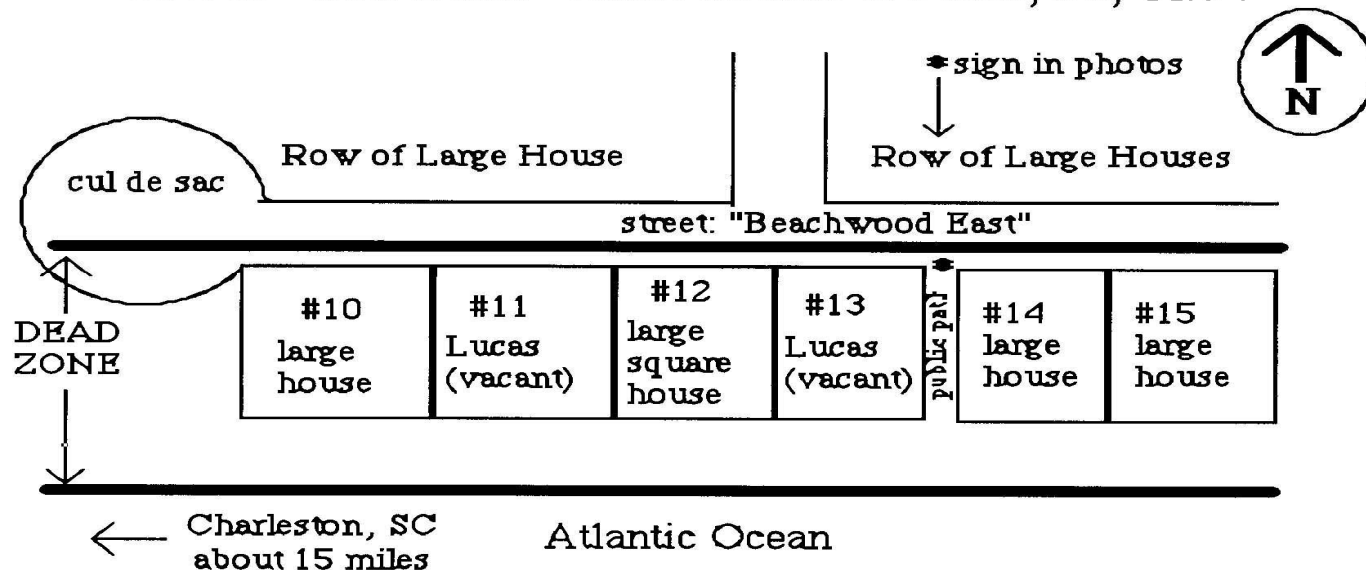
# Lucas Area



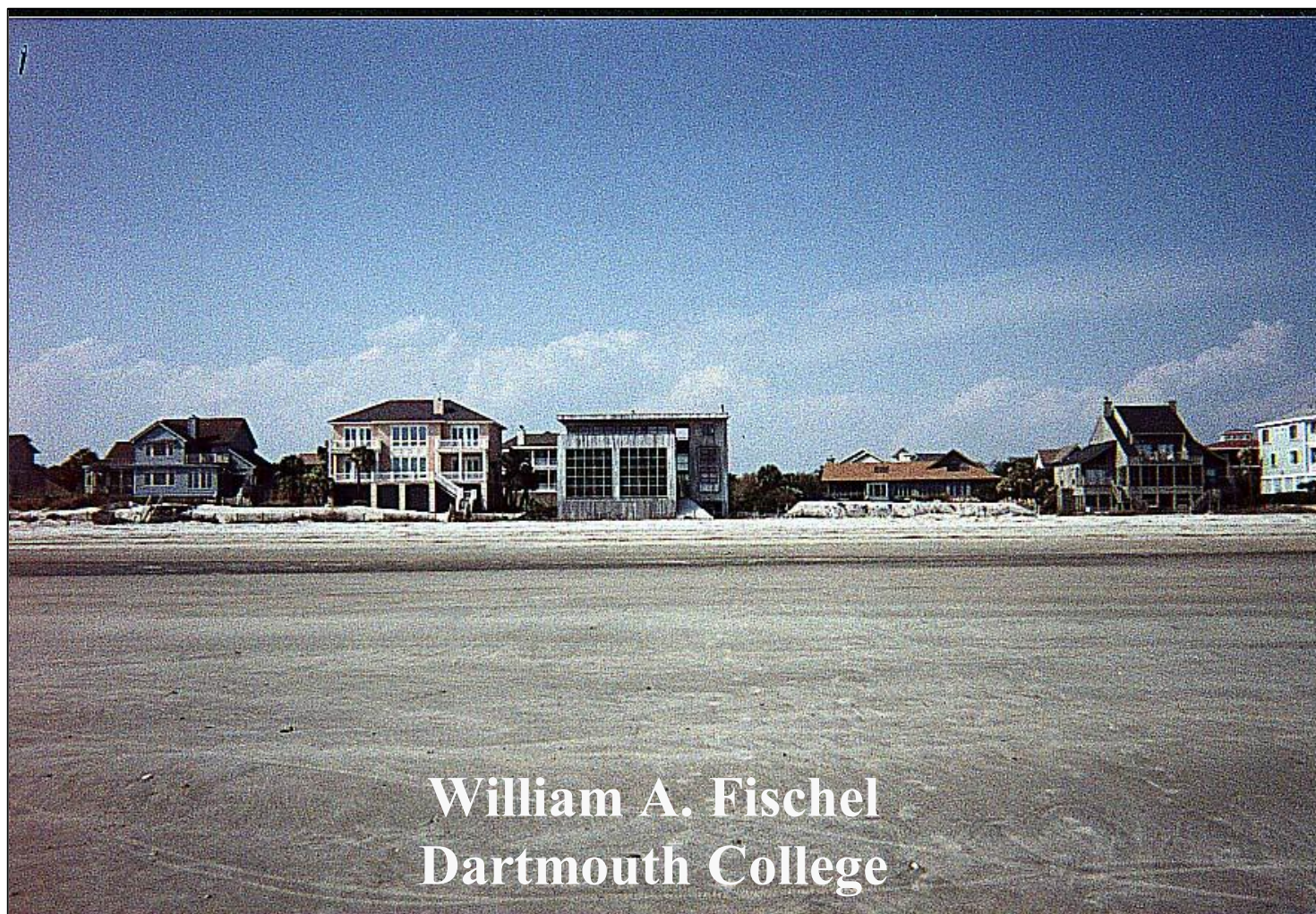
**William A. Fischel**  
**Dartmouth College**

# Lucas Extinguishing Legitimate Investment Backed Expectations

Part of "Wild Dunes" resort on Isles of Palms, SC, 11/94



# Lucas Post Development of One Lot; Now Both Lots



William A. Fischel  
Dartmouth College

# In Lingle, The Supreme Court States How To Determine If There Is A Taking III

- A “**Penn Central Taking.**” *See, Penn Central v. City of New York 438 US 104 (1978);*

# Grand Central Station, New York



Photo Used With Permission of R. Murphy; "*GNU Free Documentation License*".



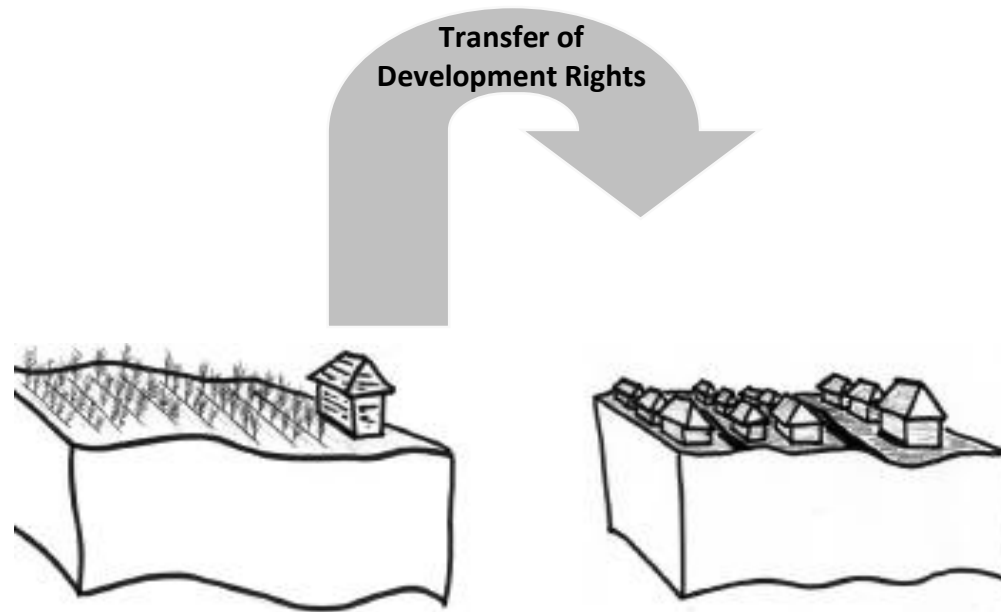
# Grand Central Station, New York



# Grand Central, With New Design



# Transfer Of Development Rights



## Preservation Zone

Area of identified important natural, cultural, or farmland. Generally the area is zoned with low development density potential (1 unit per 5 acres, for example).

## Transfer Zone

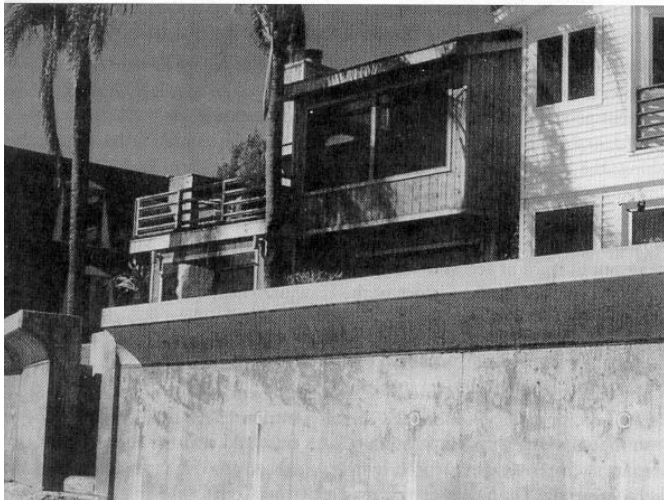
Identified growth area. Developer can increase the allowable density through purchasing development rights from a property owner located in the preservation zone.

# In Lingle, The Supreme Court States How to Determine If There Is a Taking IV

- **A land use exaction which has little or no relationship to the “property.”** In Summary: little or no relationship between the exaction and the articulated government interest. *(Nollan; and Dolan)*

Baker

# Nollan House From Road



Baker

# Nollan House From Beach



Baker

# Dolan From Street



Baker

# Dolan Floodplain and Bike Path





# Court Also Says What Test It Will Not Use

- **The Court States That it Will No Longer use the First Part of the Two Part Test in *Agins v. City of Tiburon*. 447 US 255 (1980: “whether the regulation substantially advances a legitimate state interest ...”**
- **This Test Had Been Used For Years By Courts To Second Guess Legislative Actions**

# **In Lingle, The Supreme Court States How To Determine If There Is A Taking**

- **The Court went on to say that the Tests articulated all aim to identify regulatory actions that are functionally equivalent to a direct appropriation of or ouster from private property**

# In Lingle, The Supreme Court States How To Determine If There Is A Taking

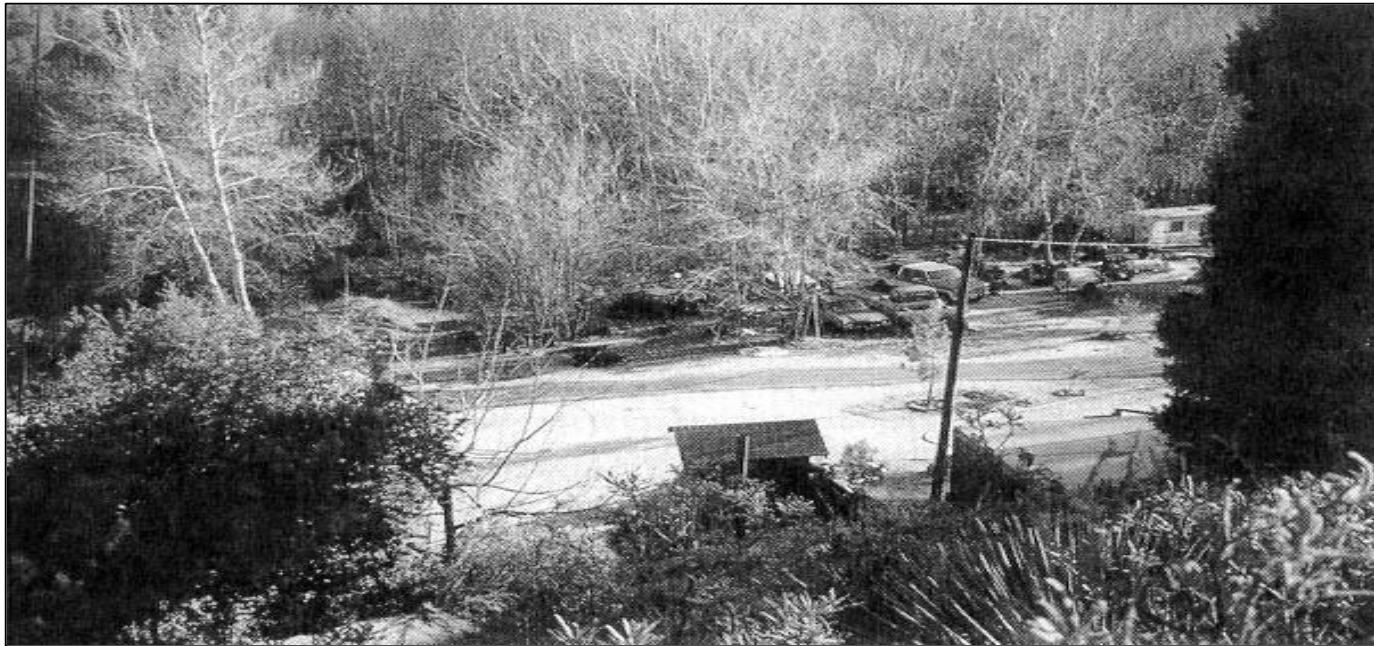
- In Addition, in His Concurring Opinion, Justice Kennedy Indicates that the decision left open the possibility of litigating a regulation which was "so arbitrary or irrational as to violate due process."

- **Legal Issues In Our Floodplain**
  - **Some Land Use Tools**

## **How About A Moratorium While Regulations Are Developed?**

- **Can A Moratorium for a Period of Time be a “Taking”**
- **Technically, Yes Sort Of, Maybe Sometimes**

# Lutherglen



# **Tahoe Sierra Preservation Council vs. Tahoe Regional Planning Agency**

- **Moratoria While Regulations Developed  
Lasted 32 Months OK**
- **US Supreme Court 2002**



# Courts Reasoning in Sierra Tahoe

“... with a temporary development ban, there is less risk that **individual landowners will be singled out to bear a special burden** that should be shared by the public as a whole”

“...focus on “the **parcel as a whole**” Properties Were Still Being Bought and Sold

“It may be true that a **moratorium lasting more than one year should be viewed with special skepticism**, but the District Court found that the **instant delay was not unreasonable.**”



## Recent State Moratorium Case

- ***Wild Rice River Estates, Inc. v. City of Fargo***  
705 N.W.2d. 850 (2005)
- City had a 21 Month moratorium on development while FEMA mapped the floodplain/floodway of an area which had recently flooded
- Court said OK, City had reasons to stop development while it determined what floodplain management measures were needed
- ***But, Very Different Result in Biggers v. City of Bainbridge Island, in Washington State, 169 P.3d 14, 2007***

# Courts Acceptance of Regulations Based on Local Conditions

- *In Re Woodford Packers Inc.*, 175 VT 60, 830 A. 2d 100 (2003)
- Court gave the State considerable latitude in selecting a methodology for the designation of floodways much broader than the FEMA minimum standard, based on **fluvial erosion**

# Courts Acceptance of Regulations Based on Local Conditions

- ***Gove v. Zoning Board of Appeals*, 444 Mass.754 (2005) Massachusetts Supreme Judicial Court, decided July 26, 2005**

# How About Setbacks?

- This Is An Area About Which Our Friends In The Property Rights Movement Are Quite Active
- Questions for Us to Ask:
  - Why Is There A Set-Back?
  - Parcel As A Whole Rule-Still Reasonable
  - Investment Backed Value
- *See, e.g., City of Coeur d'Alene v. Simpson*  
Pacific Legal Foundation Brief

## Great State Case on Setbacks

- ***McElwain v. County of Flathead*, 248 Mont. 231, (1991)**
- **Setback of 100' from Floodplain for Septic System**
- **Court Says Regulations Presumed To Be Valid**
- **Plaintiff Has Remaining Uses Though 1/3 Devaluation**
- **Very Powerful Dissent – Why 100 feet?**
- **Why not Thirty Feet or a Mile?**

## Another Idaho Case on Setbacks

- *City of Coeur D'Alene v. Simpson, 142 Idaho 839; 136 P.3d 310 (2006)*
- All Construction Within 40 Feet of Shoreline Forbidden
- Plaintiff Builds a Fence
- Community Says Remove Fence
- Is There A “Taking”?
- What is The Parcel “As a Whole” to Be Considered By the Court
- Current Status as Divided Into Two Separate Parcels?
- Previous Recorded Ownership
- Very Powerful Dissent

## Can Government Adopt Higher Standards Than FEMA Minimums?

- FEMA Regulations Encourage Adoption of Higher Standards-”... **any floodplain** management regulations adopted by a State or a community which are **more restrictive** than (the FEMA Regulations) **are encouraged** and shall take precedence.” 44 CFR section 60.1(d). (emphasis added)

## Section III Summary

- **No Adverse Impact Hazards Management Is:**
  - A) Legal**
  - B) Proper**
  - C) Practical**



# Hazard Based Regulation And The Constitution

- Hazard Based Regulation Generally Sustained Against Constitutional Challenges
- Goal of Protecting the Public Accorded **ENORMOUS DEFERENCE** by the Courts

## So, That Means Everything is OK?

- **Yes, But We Do Need To Talk About Two Other Major Areas Related to the Law that Impact on Floodplain Management and No Adverse Impact Hazards Planning:**
- ***“The Constitution in Exile Movement”*** and
- ***“The Property Rights Movement.”***

- **Property Rights; and**
- **The Constitution In Exile**

## The Constitution in Exile

- **Richard Epstein, a Professor of Law at the University of Chicago is the Intellectual Force Behind a Movement that Feels that Many US Supreme Court Cases in the Twentieth Century were Wrongfully Decided**
- **Examples of Federal Laws Which they Feel are Unconstitutional: Social Security; Minimum Wage Laws; EPA; OSHA**

# The Constitution in Exile

- The Cato Institute Indicates that **Compensation is Not Due When:**

*“... regulation prohibits wrongful uses, no compensation is required.”*

*“When the government acts to Secure Rights-when it stops someone from polluting his neighbor ... it is acting under its police power ... because the use prohibited ... was wrong to begin with.”*

## Class Exercise!

- Do Reasonable, Fairly Applied Hazard Based Regulations Decrease The **VALUE** of A Property?
- Not The Price, The **VALUE**.

**Hint: The Problem Of The Purloined Purse.**

## The Purloined Purse Defense

- **Fifth Amendment to the Constitution of the United States: “... *nor shall private property be taken for public use without just compensation.*”**

- ***“The taking clause was never intended to compensate property owners for property rights they never had.” – Massachusetts Supreme Judicial Court***

*Gove v. Zoning Board of Appeals*

**444 Mass.754 (2005) Massachusetts Supreme Judicial Court,  
decided July 26, 2005**



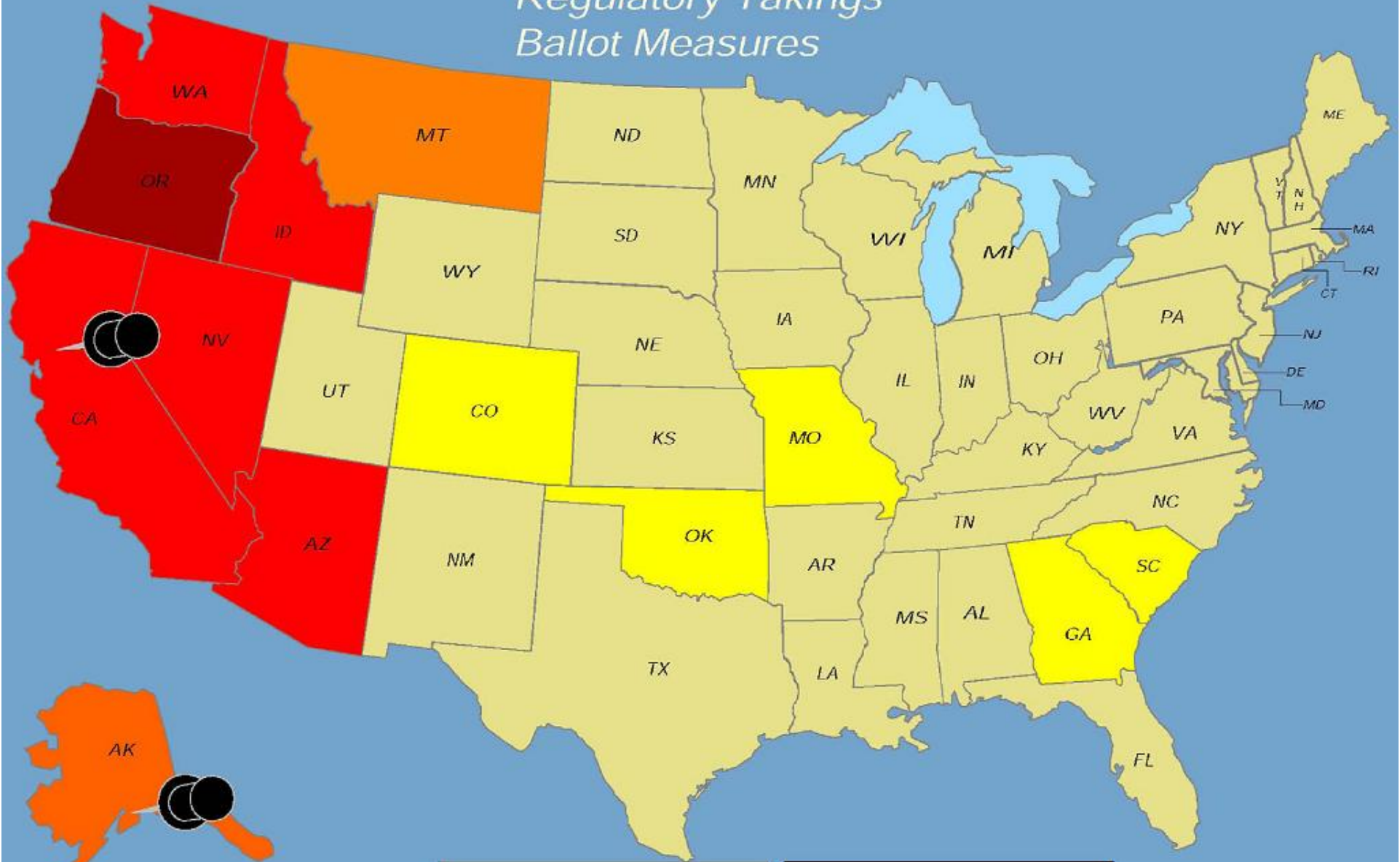
## The Property Rights Movement

- **“The Property Rights Movement May Well be the Most Significant Land Use and Environmental Movement in the United States in Recent Decades.” (Professor Harvey Jacobs-University of Wisconsin).**
- **Twenty-Eight States Have Enacted Property Rights Legislation (1991–2006).**

# Land Use And Property Rights In America

- **Oregon Measure 37 Adopted November 2, 2004. Requires State and Local Governments”... must pay owners, or forego enforcement, when certain land use restrictions reduce property value.”**
- **Harris Act in Florida (1995). No Claims Paid to Date, Many Claims Made.**
- **We Must Acknowledge the Very Real Emotional Appeal of Land and Property Rights to the Public.**

# Regulatory Takings Ballot Measures



Ballot Measure Approved

Ballot Measure Pending

Ballot Measure Qualified

Ballot Proposal Fail to Qualify

## 1995 State of Texas:

### Private Real Property Rights Preservation Act

- The Act specifically **excludes** actions to fulfill a federal or state mandated obligation; certain rules regarding water safety, hunting, and fishing; specific provisions of the Texas Natural Resources Code; and **actions to regulate construction in a floodplain area** or to prevent subsidence.
- This Act defines a taking as a reduction of 25% in the value of property "in whole or in part or temporarily or permanently."

- **Avoiding a Taking: Discussion**

# In Deciding Whether Regulations “Take”, Courts Examine

- Impact of regulations on private property owners
- Parcel as a Whole
- The nature of the government actions



# Avoiding A Taking

- Avoid Interfering with the Owner's Right to **Exclude Others**. (Loretto)
- Avoid Denial of All Economic Use. (Lucas)
- In Highly Regulated Areas Consider **Transferable Development Rights** or Similar Residual Right so the Land Has Appropriate Value. (Penn Central)
- **Clearly Relate Regulation to Preventing a Hazard**. See, Different results in Gove cited previously and *Annicelli v. Town of South Kingston*, 463 A.d 133 (1983); and *Lopes v. Peabody*.
- Establish a Fair Variance Procedure

# **No Adverse Impact Hazard Regulation Is A Winning Concept**

- **So How Do We Proceed?**
- **Planning**
- **Partnerships**
- **Planning**
- **Multi-Use Mapping and Engineering**
- **Planning**
- **Fair Regulation to Prevent Harm**



## Part VI

- **A Call To Work Together With Other Interested Parties**

### Rapanos

- **Especially Important In The Arid West**
- **Articles On This In FMA Newsletter, ASFPM Newsletter, National Wetlands Newsletter, etc.**

# Courts Give Floodplain Managers An Opportunity To Partner

- ***Rapanos et ux., et al. v. United States*, U.S. (2006) Nos. 04-1034 and 04-1384, 2006 WL 1667087 (U.S.)**
- **Involving the geographic extent of the area that the federal government may regulate as “wetlands” under the Clean Water Act of 1972**
- **Courts Want a Link Between the Wetland Regulated and Waters of the United States**
- **One Link is Through Floodplain Management**
- **Further Information-ASFPM News and Views of August 2006; National Wetlands Newsletter of September–October 2006**

## Partnerships With Other Hazard Managers

- **DHS/FEMA is Continuing Its Efforts to Modernize Flood insurance Maps**
- **As Part of that Effort there is a Cooperating Technical Partners Program.**
- **Think of Other Hazard Managers With Whom to Partner on NAI, **Possibly** Through the FEMA CTP Program!**
- **Other Partners: EPA Wetlands, Watershed, USGS, Others?**

- **Legal Challenges When Dams And Levees Fail To Protect**

## **Legal Challenges When Dams And Levees Do Not Protect.**

- **When Someone Is Damaged by the Actions of Others Who Pays?**
- **This is a Fundamental Question of Law**

## Legal Challenges When Dams And Levees Do Not Protect.

- **Early English Common Law: Person Who Causes Harm Absolutely Responsible For Damage. “...if I lift my stick in self defense...and there is a man injured...” (Justice Brian, 1466)**
- **Later a Legal Standard of Negligence Was Developed**
- **Negligence is Based on a Breach of a Duty of Care Owed to Another**

## **English Law Treated Dams and Levees Differently**

- **Negligence Need Not Be Proved= “Strict Liability”**
- **Roman Maxim: “Sic Utere Tuo Ut Alienum Non Laedas” a/k/a No Adverse Impact**
- **Rylands v. Fletcher (1868)**
- **Dams/Levees: “Non-Natural Use of Land”**
- **Sometimes Called Ultra-Hazardous or Abnormal**

## Most United States Courts Have Adopted Strict Liability For Dams and Levees

- **Strict Liability For Dam/Levee Failure Adopted by Most Courts and Recently Partially Adopted in One More State**
- **State of California Recently Held Liable for Levee Failure in Amount of About 464 Million Dollars.** *PATERNO v. STATE, C040553, (Cal.App.4th 2003).*



# Texas and California Law on Liability for Failed Levees Quite Complicated

- **California and Texas Courts Have Used A Negligence Standard for Dams/Levees** *See, Suitliff v. Sweetwater, 182 Cal. 34 (1920)*
- **But for in California Water Displaced By a Road-Strict Liability** *See, Youngman v. DOT 2006 Cal. App. Unpub. Lexis 4104*
- **California Courts Have Been Concerned As to Whether or not the Property Flooded in the Past** *See, Youngman id.*

# Strict Liability

- **Strict Liability is Not “Absolute Liability.”**
- **Four Defenses:**
  - a) **Vis Major or Act of God;**
  - b) **Plaintiff’s Own Fault ; or**
  - c) **Unforeseeable Act of Third Party**
  - d) **Statutory or Sovereign Immunity**

**No Need For Plaintiff to Show Negligence.**

- **That a Water Control Structure Was Designed Perfectly-Or Maintained Impeccably Not Good Defense**

# Why Are Levees Treated Differently By The Law?

- **“ There are only two kinds of levees, those which have failed and those which will fail in the future.”**

**Quote Attributed to William H. Hall, the State of California's Pioneering State Engineer as well as Mark Twain and Many Others.**

# Paper On This Topic From ASFPM

## LIABILITY FOR WATER CONTROL STRUCTURE FAILURE DUE TO FLOODING



- Special Edition for the
- Floodplain Managers Annual Meeting
- September 7, 2006
- Edward A. Thomas, Esq.
- Michael Baker, Inc.
- “Challenge Us”
- [www.floods.org](http://www.floods.org)

# **American Council of Engineering Companies (ACEC) Web- Cast On Dam & Levee Liability**

- **Latest Held October 31, 2007**
- **Next One Sometime in 2009?**
- **Floodplain Management Associations Which Promote the Class Get The Same Rate As ACEC Members**
- **Hint, Hint**

# Why Are Both Dams And Levees Treated Differently By The Law?

- **Possibility of Serious Loss of Life and Property**  
Duty of Care When Life and Limb are At Stake is the Highest  
Possible: Dean Thayer of Harvard 1916
- **Roman Maxim of Law: Use Your Property So as You Do not Harm Others.**
- **Somewhat Back to the Beginnings of Common Law**

# Special Sovereign Immunity For The United States

- **“No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place....”** [United States Code](#)  
TITLE 33 — NAVIGATION AND NAVIGABLE WATERS  
CHAPTER 15 — FLOOD CONTROL  
[33 U.S.C. § 702c](#).
- **Courts Have Found That This Phrase Applies to Flood Control But Not to Other Efforts Such as Navigation** [\(See, e.g. GRACI v. UNITED STATES, 456 F.2d 20 \(5th Cir. 1971\)\)](#).
- **Litigation Pending to Test Constitutional Limits of this Immunity**

# Lawsuits Are Being Filed Following Hurricane Katrina

- **Defendants:**

- A) Corps of Engineers;
- B) Local Levee Boards;
- C) Oil and Gas Companies;
- D) State Government, Public Officials (As Individuals); Construction Companies, Architects or Design Firms and Maintenance Entities.

- **Total Claims Are Over 278 Billion Dollars; 500,000 Plaintiffs**

- A) loss of life;
- B) injury;
- C) insurable risks: commercial losses, property damage, business interruption, jobs lost, repair costs, disability claims; and
- D) virtually every type action allowed by our legal system.



# How Can The Federal Government Be Liable?

Numerous Legal Arguments Including:

A) Violation of Constitutional Protections:

- 1) Fifth Amendment "Taking",
- 2) Violation of Due Process,
- 3) Violation of Equal Protection of Law;

B) 42 USC Section 1983 Claims against Individuals (and Corporations);

C) "malfeasance, misfeasance and nonfeasance" in ensuring the competent design, construction, inspection, maintenance and operation of an entire navigable waterway system." [From Insurance Journal, June 6, 2005.](#)

D) 33 USC 702 (c) does not apply to Navigation and other non-flood Control Projects.

## Idaho, Texas and California Law on Liability for Failed Levees Somewhat Similar

- **Idaho, California and Texas Courts Have Used A Negligence Standard for Dams/Levees** *See, Suitliff v. Sweetwater*, 182 Cal. 34 (1920)
- **But, in California, For Water Displaced By a Road-Strict Liability** *See, Youngman v. DOT* 2006 Cal. App. Unpub. Lexis 4104
- **California Courts Have Been Concerned As to Whether or not the Property Flooded in the Past** *See, Youngman id.*
- **Might That Legal Analysis Evolve?**

# California Law Changes

## 1986 Sacramento River Flood

- 1 levee rupture**
- + 50,000 people evacuated**
- + 9,000 families left homeless**
- + 29 counties declared**
- + \$532 million in damages**
- + almost 2 decades of litigation**

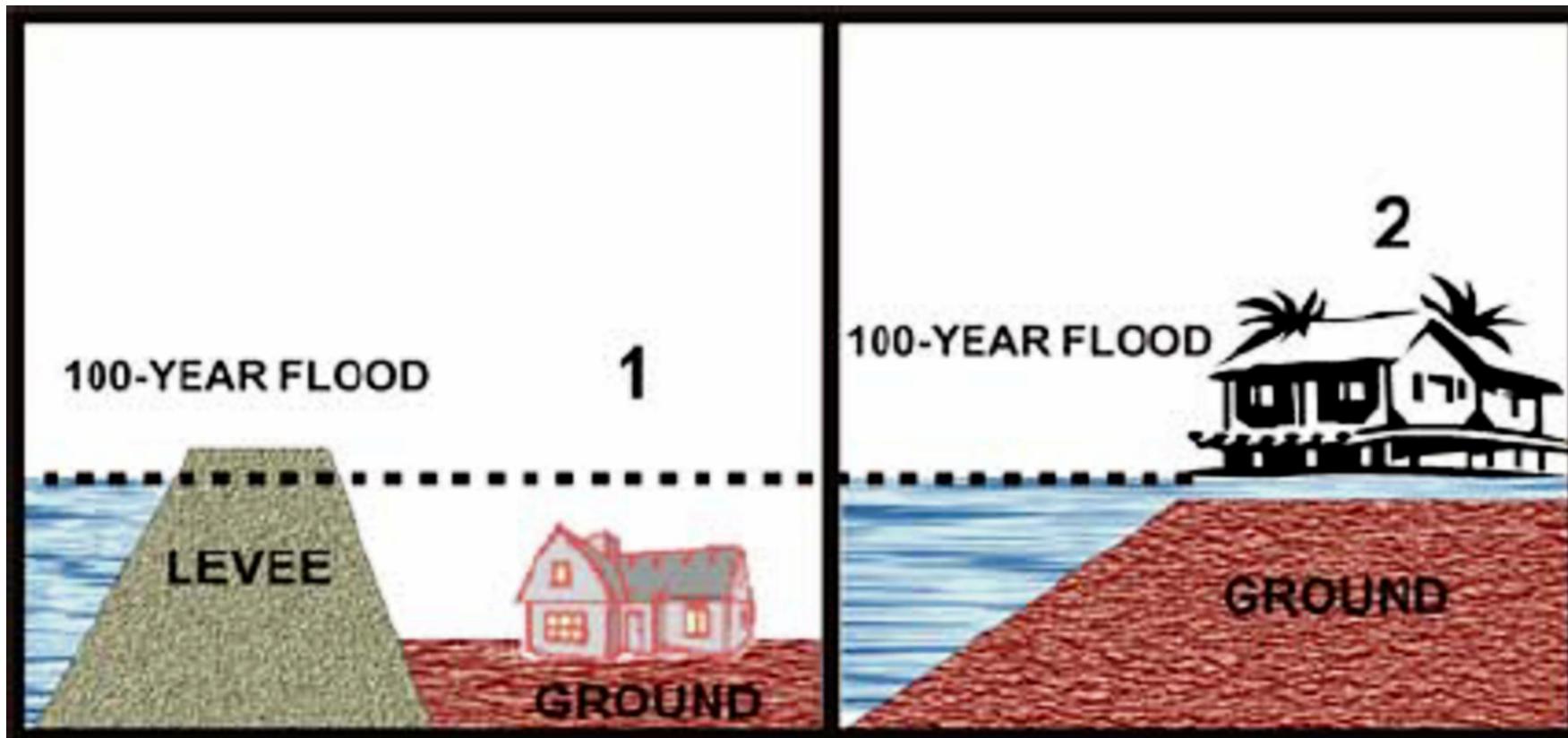


Photographer: Geoff Fricker

= Paterno, A landmark court decision in 2003

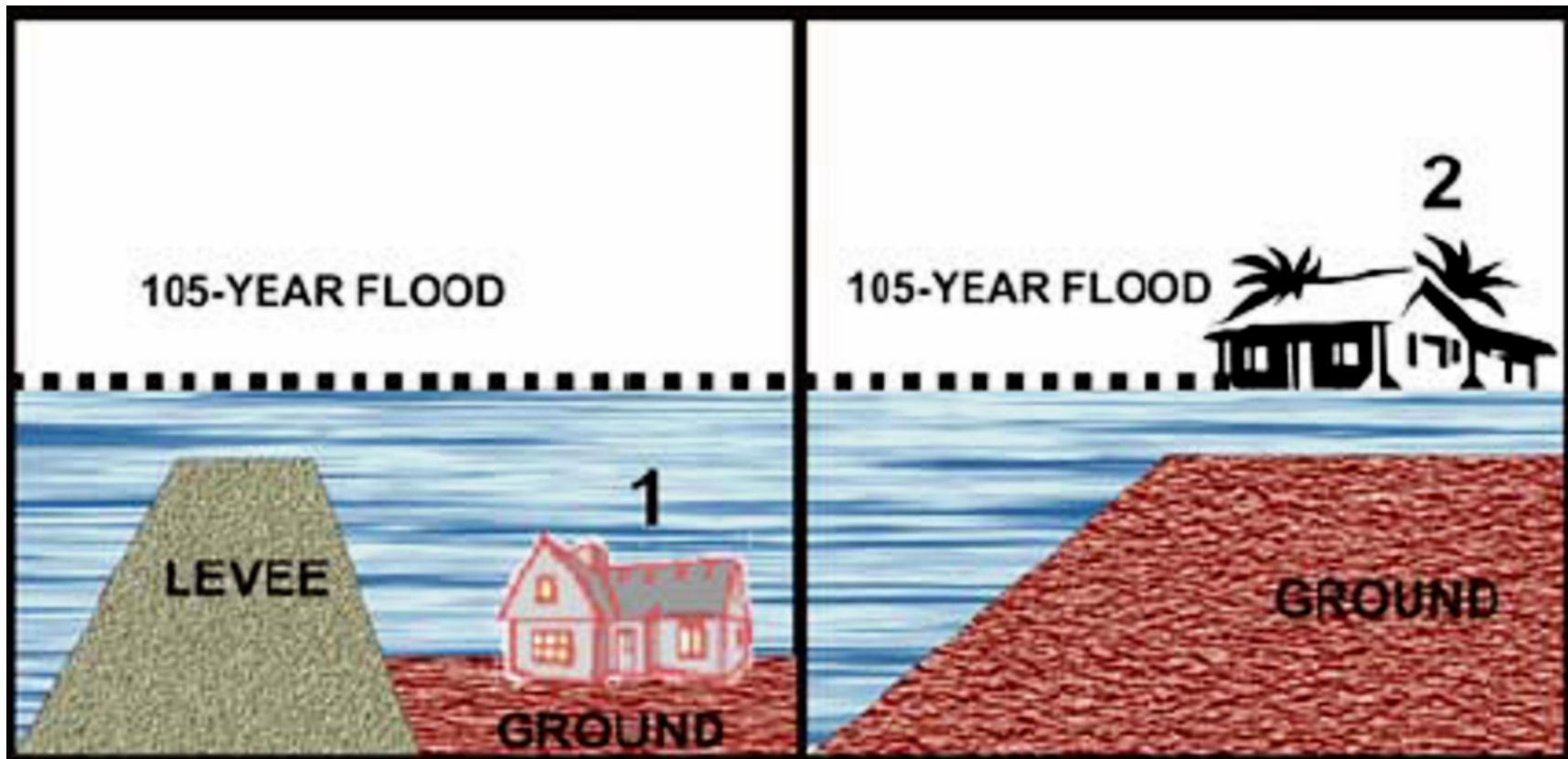
Damages \$464 Million

# California Courts Ask Did The Property Flood?



Images from: Interagency Levee Policy Review Committee, *The National Levee Challenge: Levees and the FEMA Map Modernization Initiative*, September 2006.

# Is The Nature Of The Flooding The Same?



Images from: Interagency Levee Policy Review Committee, *The National Levee Challenge: Levees and the FEMA Map Modernization Initiative*, September 2006.

# Public Safety First Legally-Morally-Ethically

- The first Fundamental Canon of the American Society of Civil Engineer's (ASCE) Code of Ethics states that:

**“Engineers shall hold paramount the safety, health, and welfare of the public....”**

**“This canon must be the guiding principle for rebuilding the hurricane protection system in New Orleans.**

**And it must be applied with equal rigor to every aspect of an engineer’s work – in New Orleans, in America, and throughout the world.”**

# Question

**Question: When You Are Uncertain How To Design A Facility Whose Failure Could Result In Catastrophic Loss, Do You Advise a Client To?**

- **A) Hope For The Best; Plan for the Worst?**
- **B) Use A 50% Confidence Interval To Calculate Flood Elevations Used To Design A Levee?**
- **C) Assume That Changing Watershed Conditions Will Not Increase Downstream Flood Heights?**
- **D) Meet FEMA Minimum Standards Only?**

# First Part Of The Solution: Do It Right

- **Conservative Calculations And Design**
- **Consider Upstream Conditions**
- **Consider Consequences Of Failure**



# **Additional Part Of The Solution**

**Encourage Communities To Go Beyond NFIP Minimum Standards To A No Adverse Impact Approach:  
Flood Insurance Community Rating Credits=Lower Flood Insurance Rates:**

**NAI Based Development Decision-making**

**NAI Based Planning**

**NAI Based Emergency Preparedness**

## **When All Upstream Communities Are Not Following NAI Principles:**

- **Does A Design Professional Need To Conduct A Future Conditions Hydrological Analysis To Determine Proper Freeboard?**
- **Need A Design Professional Calculate Possible Effects Of Sea Level Rise and Land Subsidence?**
- **Should the Design Professional Update Outdated Hydrology And Hydraulics?**
- **What Will A Court Say Later?**

# Professional Liability Considerations

- **Excellent Paper By Jon Kusler PhD, Esq.  
Available at [www.floods.org](http://www.floods.org).**
- **Prepared For The Association Of State  
Floodplain Managers Foundation.**
- **It Is Available at: [www.floods.org](http://www.floods.org)**

# **Levees:**

## **Where Are We Headed As A Nation?**

**FEMA Initiatives-Policy and Guidance**

**California Bond Issues and White Papers**

**Louisiana Initiatives Such As Levee School**

**Legislation Both Federal and State**

**Mega Pending Litigation**

- **How Efforts To Regulate Are Attacked**
- **The Playbook**

# The Playbook – How Can Government Efforts to Regulate Be Attacked? I

- Bluster and Threats; and

# How Can Government Efforts To Regulate Be Attacked? II

- Allegation that the Regulator has Deprived a Developer of a Constitutional Right “Under the Color of Law”. (*42 USC Section 1983/1988*);
- **This is Not Theory-Very Real In Oklahoma (Canadian County) and States Like Montana**

# How Can Government Efforts To Regulate Be Attacked? III

- **“Class of One” Allegations of Discriminatory Treatment Based on Personal Animus, or Other Inappropriate Factors; and**

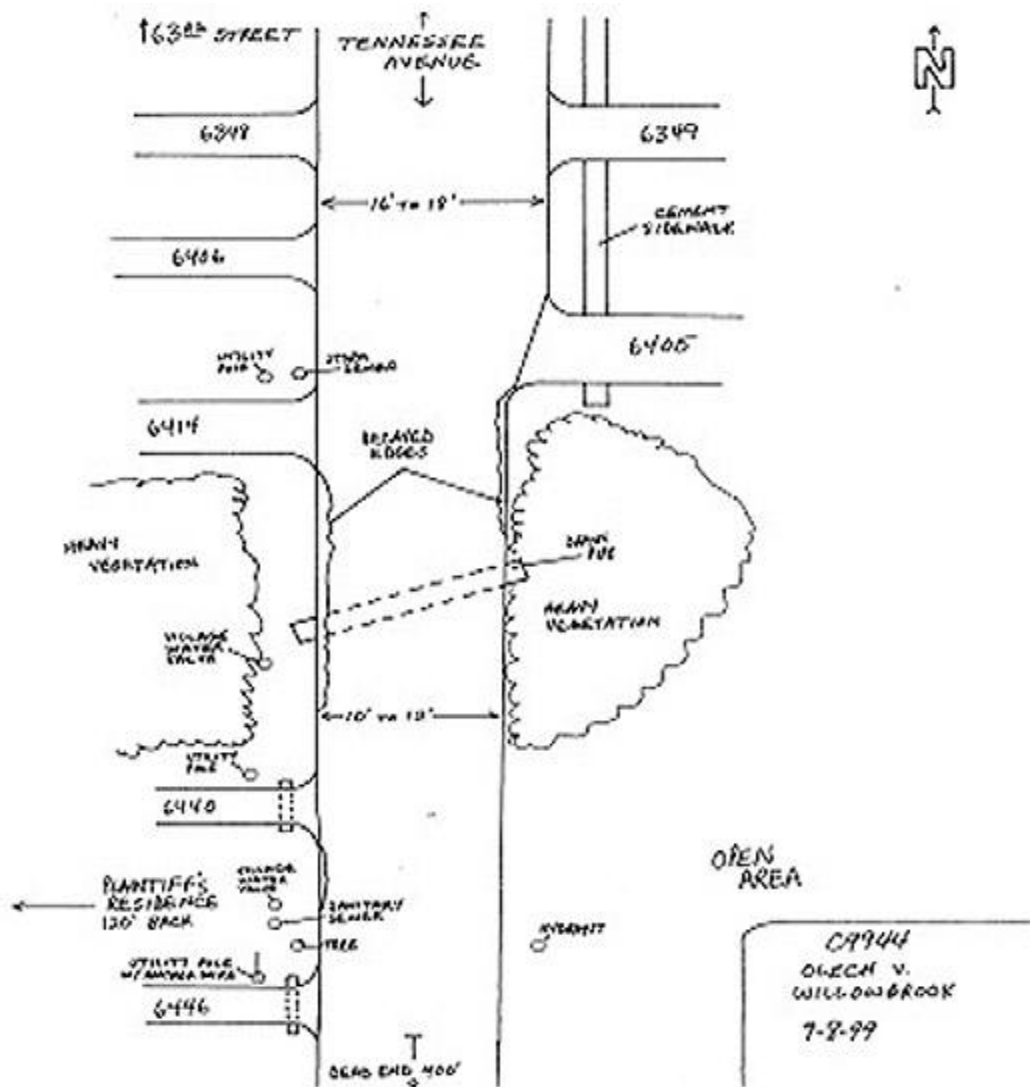


Baker

# Mrs. Olech



# The Olech's Property



# **Public Entities Do Not Have The Right To Do Just Anything Either!**

- **No Right to Use Public Office To Wage Vendettas**
- **No Right To Abuse the Public**
- **No Right To Use Regulation To Steal From a Landowner**

# How Can Government Efforts To Regulate Be Attacked? IV–VI

- Procedural Due Process – No Hearing; and
- Substantive Due Process – Shocks the Conscience; and
- State Law Violations-Open Meetings-  
Statutory Compliance: See, e.g. *UNION COUNTY et al. v. CGP, INC. et al.*, SUPREME COURT OF GEORGIA, 277 Ga. 349; 589 S.E.2d 240, 2003
- *Other?*

# Part IX Closing Comments

- **Summary Comments**
- **Talking Points**
- **Your Questions And Comments**

## Implementing NAI in the Real World

- **Comprehensive Watershed Future Conditions Water Resources Mapping Looking At Water Supply-Water Quality-Stormwater Management And Flooding.**
- **Interim Measure**
  - **Require A Demonstration That All Development Does Not Change The Hydrograph For The 1-10-50-100-500 Year BOTH Flood And Storm**
- **If Time Permitted We Would Have Some Engineers Discuss Exactly How To do These Steps: LID**

# Harm Prevention And The Law

- **Is NAI a Silver Bullet?**
- **Use of NAI Will Significantly Reduce the Probability of a Loss in Court!**
- **Even Better Odds if there is A Good, Fair Variance Procedure + Flexibility in the Regulation + Community Applies the Principle to their Own Activities.**

# Floodplain and Wetland Regulators!

- **Should Be Both Fair and Confident!**
- **Should Be Assertive Protecting Both the Public and the Landowner!**
- **Should Consider Partnering With Other Regulators**
- **Should Be There To Help Make Community Development and Housing Decisions**
- **Should Develop Messages Specialized To Various Interest Groups**



# Fair Regulators Have The Law On Their Side!

- They Do Not Need to be a Punching Bag!
- They Should Be Ready With NAI Tools, Fairly Applied!
- Everyone Should Remember There are **Serious Sanctions** Available for Frivolous Lawsuits!

# Take Away Messages For Today

## Prevention

- **We Throw Money At Problems After They Occur**
- **You Can Pay A Little Now Or Lots Later**
- **The Legal System Is Ready To Help You Pay Later**

## Take Away Message

- **Responsible For A Levee? Realize That:**
  - A) Levees Can Fail Or Be Overtopped;**
  - B) Uninsured Victims Will Likely Sue;**
  - C) Flood Insurance For All Affected By Levee Failure Helps Everyone.**

# What Do Folks Protected By A Levee Need?

- **Clear Communication of Risk/Consequences**
- **Orderly Steps to Buy Down Risk- Especially an Effective System of Warning and Evacuation**
- **An Efficient System of Indemnification**

# Uniting Water Resources and Land Use

- **“Demonstrating Program Effectiveness Is Your Only Defense Against Unnecessary Regulation”**
  
- **“Demonstrating Program Effectiveness May Well Be Also Your Best Defense Against Unwarranted, Costly, and Disruptive Litigation”**

# Take Away Message

- **Responsible For Community Development?**
  - **Many Areas Can Flood**
  - **Uninsured Victims Will Likely Sue-If They Can Find Someone to Blame**
  - **Fair Harm Prevention Regulation Helps Everyone**

# Message For All Involved In Community Development

- **The Fundamental Rules of Development Articulated, By Federal Law, Envision Housing and Development Which Is:**
  - **Decent**
  - **Safe**
  - **Sanitary**
  - **Affordable**

# Flooded Development Fails That Vision!

- **Housing And Development Which Flood Are:**
  - **Indecent**
  - **Unsafe**
  - **Unsanitary**
  - **Unaffordable- by the Flood Victims, By Their Community, By The State, and By Our Nation.**





# Legal Issues and No Adverse Impact Workshop

**Texas Water Development Board**

**Texas Floodplain Management Association**

**Lower Colorado River Authority**

**Texas Colorado River Floodplain Coalition**

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**April 14, 2009**

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