Flood Disaster Protection Act

by William Eugene Nichols, C.R.E.

A few weeks ago a friend said to me, with some degree of indignation, that this Flood Disaster Protection Act had slipped up on us. That's quite an accurate assessment of the majority response and reaction in the real estate industry and among the general public. But it needn't and shouldn't have been so. This legislation has been around for ***six years!***

What happened in 1973? This six-year-old Act was fitted out with a brand new set of very sharp teeth. In examining the enactment in its entirety with special emphasis on the legislation's new masticating capabilities, let me first establish three predicates to bear in mind in considering the details of the current law.

The Flood Disaster Protection Act of 1973 ***is a law***. It's an accomplished fact; it is in force right now. It's almost certain that as the owners of real estate or the practitioners in the real estate business you will be confronted with the provisions of this law shortly, if some haven't already directly or indirectly been impacted. There are many who have already been affected by this law and just don't know it. Those in this uninformed category are very late in accomplishing the things they must do under the dictates of this law to serve their own best interest.

Secondly, it is obvious that the application and administration of this law are the province of the lawyer and the courts when those inevitable and numerous instances of legal interpretation, advice, and litigation arise. Therefore, a part and parcel of the second predicate is a declaration that I am not a lawyer and disclaim any presumption of such ability.

Rather, my point of view is that of a real estate counselor. Individuals who have been invited to join the American Society of Real Estate Counselors (ASREC) number only 400+ persons across North America. They are becoming well-known outside of the real estate field for their extensive backgrounds and expertise and are entitled to use the Society's professional designation C.R.E. (Counselor of Real Estate).

The basic function of the counselor is to take a given consideration or problem assignment—assuming that such an assignment is within his or her particular

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professional capability—analyze and evaluate it, and reduce the subject to a set of basic facts (as I will do here) that are clearly understandable by either the non-professional or professional client, and upon which that client can establish a reasoned and informed decision. Ethical canons circumscribing the practice of the members of ASREC provide that the counselor can have no contingent beneficial interest in the outcome of any matter upon which he renders counsel or arising from the action or inaction of the client in response to the counselor's report, opinion, or advice.

This third predicate should be understood as a context for my remarks pertaining to land use legislation and regulation. The aim is not to "sell" a point of view. The only purpose is to explain and evaluate the existing situation.

In addressing the title of this Act, it is well to note that it is somewhat deceptively named. The term "flood disaster" calls up visions of large-scale catastrophes, and it does so quite properly. But this law also addresses itself to a real estate unit as small as a single mobile home.

At the 1973 conference on this subject, Commissioner Armstrong remarked that he didn't like the words "land use controls" or "regulation." He stated a preference for such words as "land resource management." But the fact is that the statutes being examined are laws which will substantially control and/or regulate the use of land, as soon as enforcement starts. For some land owners that point in time is measurable in terms of a few months. For many others, the effect has already set in but they just are not aware of the substantial implications. The process of finding out—either through personal experience, word of mouth, or observation—will also begin in the next few weeks or months. Since a major purpose of my remarks is to warn and inform, the text will be liberally punctuated with the terms "land use," "control," and "regulation," the same words that pervade the various items of documentation relating to the Flood Disaster Protection Act of 1973, including the Act itself. Through these observations, I hope to increase understanding of these statutes and enable them to become viable land resource management tools.

LAND USE CONTROLS

Make no mistake about it! The Flood Disaster Protection Act of 1973 *is* a land use control and regulatory statute whose effective date was March 2, 1974. To some who are greatly impacted, it may prove to be the most stringent of all the land use laws extant, or that may be enacted in the future. Virtually all who own unimproved, improved, or partially improved land designated by the Federal Insurance Administration as a flood-prone area are going to suffer a negative economic effect. The only question is one of form and extent.

There is very little general knowledge currently in the industry or the public mind as to the details of this statute, and little preparation is being made so far to accommodate it. Time for preparation has already passed. The inception date was July 1, 1975. There are probably many for whom the "stop-watch" is already running, whether they are involved personally or in a professional position with a company that has problems created by the Act's provisions.

Details of implementation, compliance, and enforcement can become quite complicated and comprehensive. Perhaps a pragmatic analysis of what the Act

provides and some of its more prominent characteristics will assist in implementing a rational response.

If you own real property, plus personal property thereon—either improved, partially improved, or unimproved and identified as flood-prone by the Federal Insurance Administration (FIA)—it is mandatory that you comply with the provisions of the Act by July 1, 1975 or twelve months after the date of actual designation, whichever is later. You must also apply for participation in the National Flood Insurance Program and buy flood insurance on any building or mobile home, and any personal property which may be affected by federally-related financial assistance. The insurance must be purchased for a period of time covering the anticipated economic or useful life of the improvements on the land and in an amount at least equal to the replacement or project cost, less the cost of the land, or to the maximum limit of coverage available for the particular type of property involved, as described in the 1968 legislation. However, if the "federally-related" financial assistance provided is in the form of a loan or a loan guaranty, the amount of flood insurance required need not exceed the outstanding principal balance of the loan and need not be required beyond the maturity date of the loan. Failure to comply with these requirements will result in a status of non-compliance, the sanction for which (under this law) is to sever the land owner from *any* formal source of borrowed capital to acquire, improve, or renovate any improvement on the land.

FORMAL SOURCES DEFINED

Borrowers and lenders should note that "formal sources" of borrowed money are defined as lending institutions affiliated with or directly or indirectly regulated by any of the following: commercial banks that are members of the Federal Deposit Insurance Corporation; members of the Federal Home Loan Bank System or the Federal Savings and Loan System; the Farmer's Home Administration; the Veterans Administration; the FHA; the Federal National Mortgage Association; the Federal Home Loan Mortgage Corporation; the Federal Reserve System; the Comptroller of the Currency; the Securities and Exchange Commission; the Federal Savings and Loan Insurance Corporation; the National Credit Union Administration; any insurance company; any REIT; and so on.

Most of the lending systems have been instructed by their federal regulating agency as to what they must do to comply with this law. What this amounts to is that—absent compliance—the only money that can be risked in such an area is the property owner's or that which can be borrowed from an unrelated source willing to accept risk. Any loan outstanding on a designated property cannot be renewed, extended, or changed if compliance is not complete. All residential brokers and lenders should be aware that numerous residential properties designated as flood-prone are not yet in compliance, hence are ineligible for new mortgages.

Every residential lender, residential broker, and appraiser must know the locus of any designated flood-prone area or areas within the scope of their business operations, including existing homes. After learning whether their community is participating in the flood insurance program, Realtors should obtain copies of the flood insurance policy, if available, to present to the lender when a new

mortgage is part of the sales transaction. Title insurance companies should also be informed of the law's requirements and a copy of the flood insurance policy must now be one of the exhibits included in the closing process if the house is in a designated and eligible flood insurance area. If the community fails to participate in the program and a new mortgage is essential to the sale transaction, financing and closing will be virtually impossible. This requirement is effective now and there are thousands of affected houses throughout the country, many of them ineligible for insurance. The public must understand the implications and Realtors must be prepared to respond with professional assistance. The withdrawal of almost every source of mortgage capital—absent compliance—is the sanction that forces mandatory compliance with this law. It is the "teeth" that were left out of the 1968 Act. For those who are affected, these "teeth" took a firm hold on March 2, 1974.

FLOOD INSURANCE EVOLUTION

It is pertinent to know that individuals actually cannot, separately and alone, comply with the Act. Such compliance has to be undertaken by a community-wide effort, the practical aspects of which are treated elsewhere in this report. Background information on the source of this legislation is helpful in understanding its application and purpose.

Since 1936 the federal government has spent approximately $9 billion on flood protection works across the country. Notwithstanding this enormous expenditure, flood losses have continued to increase annually as a result of population growth and development of the land, including a not inconsequential amount lying in flood plains of flood-prone areas.

Prior to the enactment of the National Flood Insurance Act of 1968, the only relief available to victims of property destruction caused by floods were special disaster loans and grants. These funds were federal tax monies dispensed to both the innocent and negligent victims, without distinction. Such destruction was financed by the tax-paying public. The thrust of the current law is to transfer the cost and risk liability for the land development to those responsible, and to remove that liability from taxpayers who do not create risk situations.

In spite of a lack of awareness of the law's provisions, federally-subsidized flood insurance is not a novel subject, with one exception. The exception is that compliance with the 1973 Act is mandatory, which—absent compliance—imposes the sharp sanctions mentioned above.

The Federal Flood Insurance Act was passed by the Congress in 1956. However, funds weren't appropriated for its administration because the Act did not include mitigation measures to reduce the incidence of flood damage.

There were efforts to revive flood insurance legislation in 1962, 1963, and 1965. A feasibility study authorized within the Southeastern Hurricane Disaster Relief Act of 1965 was completed and sent to the Congress in August, 1966. That report indicated that the flood damage hazard in the United States was continuing to rise as increasing numbers of people moved to coastal and river locations to live and work.

As a part of the Housing and Urban Development Act of 1968, the Congress passed the National Flood Insurance Act of 1968. This, in brief, provided

federally-subsidized flood insurance through private companies in designated areas in a trade-off for the adoption by the insured of land use control measures, removing the risk of flood damage to a specific property. But there were no provisions for sanctions in the Act. In other words, there was nothing to induce compliance and, in general, there was little. It became clear to the Congress that without mandating provisions no real accomplishment in restricting the use of flood-prone lands could be expected from that legislation. The 1973 Act is actually an amendment of the 1968 Act to include such a mandate. Put another way, if you're involved, particularly in developing unimproved land, the federal government requires you, at your cost, to improve the land to a condition which will reduce government expense to only one chance in a hundred (annually) of having to pay a flood loss claim. Land owner-developers are now required to buy insurance; to be insurable they must comply with federal standards and pay each year's premium in full in advance, or be faced with the alternative of supplying all capital needs from cash on hand and accepting losses that may occur from the forces of nature.

Administration of the Act is by the U.S. Department of Housing and Urban Development. Authority vested in the Secretary of HUD has been delegated to the administrator of the FIA.

FLOOD INSURANCE COVERAGE

The program provides coverage for all types of buildings, whether public or private, profit or non-profit, religious, residential, industrial, commercial, or agricultural in nature. Contents are also insurable, independently of whether the structure in which they are located is insured, but they are generally insurable only while within the enclosed structure described in the policy. Note that dams, roads and bridges, water and sewer lines, and underground structures cannot be insured; if any of these are a necessary part of a development plan, successful completion may be effectively inhibited.

There are between 9,000 and 14,000 such flood-prone communities throughout the United States involved in this program. The identification notice for flood-prone areas is made by letter from HUD to the local official noted in the Federal Register; instructions are then forwarded detailing the moves necessary to install the program in the designated area. The communities thus identified which may be an entire state, corporate municipality, county, town, township, or any body that has extraterritorial jurisdiction, must make application to the Federal Insurance Administration on behalf of all of the property owners who are involved in such a designated area.

It is only necessary for the community to make a written commitment to adopt ordinances or building codes applicable to the designated area which comply with the FIA criteria. Upon the basis of this and the execution of the application form, they are designated as eligible for the sale of flood insurance. Usually, policies are available within a working week after eligibility is declared. Later, the FIA dispatches technicians to make detailed studies of the designated area, establish the actual bench marks delineating the area, and adopt criteria for the use of impacted land; thereafter, the development of

such land must comply with dictated criteria or the eligibility designation can be suspended or withdrawn, and sanctions imposed. The detailed study may take from nine months to two years.

There are no requirements for retroactive flood-proofing of existing buildings, nor construction of flood works. All land use criteria specified will pertain to new (future) land development and improvement, and construction of buildings or substantial improvement (as defined) of any existing structure.

HUNDRED-YEAR FLOOD

The key criteria which has thus far been adopted is the so-called "hundred-year flood," the standard for identifying the extent of special flood hazard areas and the base elevation below which all lands are subject to controls.

The term "hundred-year flood" has been used freely by many without an understanding of its meaning. It represents the flood level that, on the average, will have a one percent chance of being equalled or exceeded in any given year, and can also be referred to as the minimum safety flood. This standard has been adopted to achieve uniformity throughout the country as an estimate of the degree of risk without creating regional discrimination. A standard of probability was also required as a means of estimating potential annual damages for given locations and types of properties to determine actuarial rates for new construction as required by the 1968 legislation.

In ascertaining the areas subject to inundation by the hundred-year flood standard, historical data is considered. However, it is not possible to establish flood safety elevations based on historical storms alone. To use only historical water data without applying such factors as topography, wind velocity, levees, and so forth, would be sufficiently indiscriminate as to require designation of the last flood as the only level to protect against. Complete hydrological as well as historical data doesn't guarantee that a particular flood will occur each hundred years, and doesn't diminish the desirability of attempting to use the total available data to determine the likelihood of flood losses at particular elevations and particular communities during a storm of specific intensity.

In a statement on the hundred-year flood standard the FIA implies that such an occurrence is actually an "intermediate flood," and is a compromise between minor floods and what the Corps of Engineers terms a "standard project flood" which is the greatest flood thought likely to ever occur in a given area. Actually, in many cases the hundred-year flood is already far below the largest flood of record in a given area. For example, hurricanes Camille and Agnes and the 1973 floods on the Mississippi all involved floodings substantially in excess of the hundred-year flood.

IMPACTS OF HUNDRED-YEAR STANDARD

Thus, the rationale for the establishment of the bench mark. What does or can that mean to the land or improved property lying within the designated flood area? As a practical consideration, the law provides that any new structure built upon such land must have its first floor at or above the elevation of the projected hundred-year bench mark. The first floor of a building can be construed as the basement, if the building has a basement. If there is more than

one sub-structure, the lowest one is considered. That one application of criteria should certainly conjure visions as to the limitations on future development of lands so designated. The guiding information supplied by FIA shows many suggestions by which buildings can be built at elevations below the hundred-year bench mark and be sufficiently flood-proof to qualify for insurance without modification to the land itself.

But consider the practicalities involved. Say, for example, that a manufacturing or warehouse facility is in a known constructed flood hazard area; the building is in complete compliance with the specifications necessary to qualify for flood insurance; a flood occurs and the building is partially inundated, but it is not damaged because it was built to withstand such a flood; the contents are also safe, but the access facilities to the plant are below the hundred-year bench mark elevation. What are the economic consequences? If the facility is used in a manufacturing process which is a twenty-four hour procedure, a shutdown for one shift could be exceedingly disruptive and expensive. The same is true for refrigerated warehouses loaded with perishables.

Consider yet another probability: a typical combination office-warehouse building. Most individuals are aware that an important consideration in such a building is the door height for the loading and unloading of trucks or rail cars. As a matter of necessity, one has the choice of building such a structure in compliance with the specifications established to protect the building from any loss in the event of a flood (and bearing such added cost of construction), while at the same time accepting the risk of surrounding inundation and a complete shutdown of the facility. Possible damage to uninsurable items such as the roadway system, parking areas, or rail siding remains an unknown risk. So, it seems rational that to avoid such risk exposures, including the interruption of business and consequential loss of income, the building and all access facilities would have to be built at or above the hundred-year bench mark. The added cost impact of such a decision will be a function of distance below said bench mark and it obviously implies creating structures and facilities above flood-prone elevations. The attending cost could very easily exceed the value of the land.

As an introductory statement it was alleged that those owning land designated as flood-prone or land which becomes so designated will be financially affected, the only question being the nature or degree of the effect. It is easy to appreciate that once the land use criteria is established by the FIA, *some* of the land which lies below the hundred-year bench mark will have had its utility value for development completely diminished. Even under favorable circumstances the owners or purchasers of such land will be obliged to spend varying amounts of capital to put the land into a condition of utility. Such expenditures are capitalized into reduced market values of the land. The greater the necessary expenditure, the nearer an owner draws to that ultimate point where the money value of his land for higher use is wiped out.

LAND USERS GUIDELINES

With this conclusion in mind, and remembering repeated reference to land use controls (which a community composed of private property owners must agree to adopt to become eligible for flood insurance) and the consequence of failing

to comply, all users of land should consider the pertinent criteria that have already been formulated and included in the FIA application form.

1) When the administrator has not defined the special flood hazard areas within a community, the minimum standards (which must be adopted) call for the community to:

   a) Require building permits for all proposed construction or other improvements in the community.

   b) Review all building permit applications for new construction or substantial improvements to determine whether proposed building sites will be reasonably safe from flooding.

   c) Review subdivision proposals and other proposed new developments to assure that (1) all such proposals are consistent with the need to minimize flood damage, (2) all public utilities and facilities, such as sewer, gas, electrical, and water systems are located, ***elevated,*** and constructed to minimize or eliminate flood damage, and (3) adequate drainage is provided to reduce exposure to flood.

   d) Require that new or replacement water supply systems and/or sanitary sewage systems be designed to minimize or eliminate infiltration of flood waters into the systems and discharges from the systems into flood waters, and that on-site waste disposal systems be located to avoid their impairment or their contamination of other items during flooding.

2) When the administrator has made full identification of all criteria, the community must minimally do the following:

   a) Meet the requirements outlined above.

   b) Require new construction or substantial improvements of residential structures to have the lowest floor (including the basement) elevated to or above the level of the hundred-year flood bench mark.

   c) Require new construction or substantial improvement of nonresidential structures to be constructed in compliance with the same elevation.

   d) Designate a floodway for passage of the water of the hundred-year flood. The selection of the floodway shall be based on the principle that the area chosen for the floodway must be designed to carry the waters of the hundred-year flood without increasing the water surface elevation of that flood more than one foot at any point.

(This last criteria is one of the regulations that communities agree to apply to new developments in designated areas when it makes application to the FIA for eligibility to enter the program. This one alone will create compliance problems in riverine areas, impacting millions of acres of land.)

e) Provide that existing nonconforming uses in the floodway shall not be expanded but may be modified, altered, or repaired to incorporate flood-proofing measures, provided such measures do not raise the level of the hundred-year flood.

f) Prohibit fill or encroachments within the designated floodway that would impair its ability to carry and discharge the waters resulting from the hundred-year flood, except where the effect on flood heights is fully offset by stream improvements.

3) When the administrator ***has*** identified the flood plain area having special flood hazards, but has produced ***neither*** water surface elevation data nor data sufficient to identify the floodway or coastal high-hazard area, the minimum land use and control measures adopted by the community for the flood plain must, in part:

a) Take into account flood plain management programs, if any, already in effect in neighboring areas.

b) Provide that within the flood plain area having special flood hazards, the laws and ordinances concerning land use and control and other measures designed to reduce flood losses shall take precedence over any conflicting laws, ordinances, or codes.

Thus, one of the effects of this law will be to cause some of the unimproved lands to remain as flood plains, perhaps in perpetuity. Such lands can be developed for attractive open space and recreational uses such as bike trails, hiking trails, bridle paths, picnic grounds, and so forth. Some impacted lands might retain economic value and market appeal to municipalities for uses in the public sphere areas.

COVERAGE FOR OTHER EXPOSURES

There are also hazards other than flooding which the Act addresses. It requires management procedures, meaning development restrictions and regulations, for land areas subject to mudslides, erosion by wave action, and land subsidence. All of those exposures may be added to the sum of what has previously been outlined. The requirements for protection against these hazards are basically the same as for flooding, hence there will be no added redundancy; but, it is important to know these exposures by definition.

Documents detailing the Act define a mudslide as a general and temporary movement down a slope of a mass of rock or soil, artificial fill, or a combination of these materials, caused or precipitated by the accumulation of water on or under the ground. A mudslide or mudslide-prone area means one characterized by unstable slopes and land surfaces, whose history, geology, soil and bedrock structure, and climate indicate a potential for mudslides. For those having interest in the coastal areas, the following is particularly meaningful: a coastal high-hazard area means that portion of a coastal flood plain (having special flood hazards) that is subject to high velocity waters, including hurricane wave wash and tidal surges.

This section of the Act further provides that no land below the level of the hundred-year flood in a coastal high hazard area may be developed unless the new construction or substantial improvement, 1) is located ***landward*** of the reach of the mean high tide, 2) is elevated on adequately-anchored piles or columns to a lowest floor level at or above the hundred-year flood level and securely anchored to such piles or columns, 3) has no basement, with a space below the lowest floor free of obstructions so that the impact of abnormally-high tides or wind-driven water is minimized.

If an affected property owner or group feels that the criteria established by the Secretary of the Department of Housing and Urban Development are incorrect, the law provides a well-defined appellate procedure. However, during the appeal period the Secretary's findings stand, and the affected parties remain eligible for subsidized flood insurance provided that their area has been identified as eligible for the sale of flood insurance and maintains its standing.

RECAP OF FLOOD LAW PROVISIONS

In summation, it's the stated purpose of this law (as contained in the language of the 1968 Act) to:

1) Encourage state and local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood damage, and minimize damage caused by flood losses.

2) Guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards.

But, for those with homes, businesses, or other improved real property in a designated flood-prone area, the program proffers flood insurance at a reasonable rate which would otherwise be unattainable (or if attainable at all, only at a prohibitive cost).

The quote from the 1968 Act simply means that all prominent characteristics of this law, in combination, function to diminish or remove the developable utility of certain designated land areas. This is, of course, especially and particularly true of unimproved or partially improved land.

The 1973 Act effectively succeeds the 1968 Act which denied disaster relief to persons who could have purchased flood insurance for a year or more and did not do so. The effective date of that provision was December 31, 1974. As a sequel, admittedly a confusing one, the Disaster Relief Act of 1974 has been "hooked onto" the Flood Disaster Protection Law (a direct result of hurricane Agnes).

This law, on one hand, clearly acknowledges the exclusion contained in Title II of the 1973 Act which restored the availability of disaster relief to eligible flood insurance recipients. Further, the law provides (effective March 2, 1974) that if the FIA administrator has identified the areas having special flood hazards in a community in which the sale of flood insurance has been made available under the 1968 Act, buildings and contents not covered for the full insurable value or the maximum amount of insurance available (whichever is the lesser) are not eligible for federal financial assistance. Financial assistance

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The Disaster Relief Act also says (for all project applications approved after June 30, 1975) that if the FIA administrator has identified an area as having special flood hazards, but the community is not participating in the flood insurance program under the National Flood Insurance Act of 1968, restorative work for flood-damaged buildings is ineligible for federal assistance.

It seems clear that the 1968 Act took away disaster benefits for individuals who should have had flood insurance and did not; the 1973 Act restored the availability of disaster relief under conditions which would be clearly stated in the disaster acts; and the Disaster Act of 1974 has taken disaster relief away again if communities failed to sign up for flood insurance under the 1973 Act.

Prior caution was extended against the exclusive visions of large-scale disaster as distinct from the reality of reducing loss impacts on the individual. Therefore, the urgency, immediacy, and the personal subjectivity of this particular law (indeed three laws) should be thoughtfully regarded by all concerned with real estate. It should also be remembered that although insurance coverage and compliance with FIA criteria is important to large land owners, it is equally essential for the single mobile home owner. Finally, it should be noted that no new contract for flood insurance can be entered into after June 30, 1977.