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# EXISTING LEGISLATION AND PROPOSED MODEL FLOOD PLAIN ORDINANCE FOR NEW MEXICO MUNICIPALITIES\*

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Mounting cost of flood control projects is forcing both local government and the federal government to look to other means for protection from flood damage. To date in New Mexico alone, flood control projects constructed under the supervision of the U.S. Army Corps of Engineers for the protection of local governments have cost \$56,317,000.<sup>1</sup> Of this amount, \$15,275,000 came from the local governments, with the remainder from the federal government.

There is growing evidence that the federal government, at least, is becoming unhappy with the existing situation. In 1966, Executive Order 11296<sup>2</sup> was issued. It requires, in part, that the flood hazard be evaluated by all executive agencies administering programs supported by federal grants, loans or mortgage insurance. The objectives are to lessen the risk of flood losses by encouraging a broad effort to "preclude the uneconomic, hazardous, or unnecessary use of flood plains."

By limiting federal assistance in areas exposed to flooding, the federal government is encouraging the local governments to do one of three things: institute flood control projects (at great cost to the local governments); effectively control construction and land use in the flood plain area to preserve natural waterways and, thereby, both lessen the danger of floods and the amount of damage when flooding does in fact occur; or decide not to occupy the particular flood plain at all. The purpose of this article is to investigate and evaluate means of effectuating the second alternative, that is: local regulation of the flood plain in New Mexico.

In the material that follows, certain existing state enabling legislation that impliedly grants to local governments power to regulate land use and development in the flood plain is, first, briefly explored. Next, a general municipal ordinance for regulating the flood plain

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1. U.S. Army Corps of Engineers, *Water Resources Development in New Mexico* (1969).

2. Exec. Order No. 11,296, 3 C.F.R. § 427 (Rev. 1969).

is proposed and the various sections of the ordinance explained. Then, certain amendments to existing enabling legislation are suggested so as to give local governments express, rather than implied, power to regulate flood plains. Finally, the desirability of new enabling legislation is discussed.

## I

### REVIEW OF EXISTING ENABLING LEGISLATION

Although there are currently at least six legislative enactments in force in New Mexico that pertain directly to flood control,<sup>3</sup> they do not, with one possible exception,<sup>4</sup> provide authority for regulating private land use and development in the flood plain. In fact, there appears to be no existing enabling legislation that expressly grants to any state agency, municipality, county, or special district, express power to regulate private land use and development so as to prevent or control damage caused by flooding. Therefore, if such power exists, it must be implied from existing constitutional or legislative grants.

It is doubtful that a power to regulate land use and development in the flood plain can be implied from either a constitutional or legislative grant to any state agency or special district.<sup>5</sup> However, such authority can be clearly implied with respect to municipalities and counties, as a result of the zoning powers granted them.<sup>6</sup>

A municipality or county is a zoning authority for the purpose of promoting health, safety, morals or the general welfare. Regulations and restrictions of the county or municipal zoning authority are to be in accordance with a specific plan and designed, among other things, to secure safety from fire, panic, and other dangers. A zoning authority may divide territory under its jurisdiction into such dis-

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3. These enactments are contained in the following sections of the New Mexico Statutes Annotated: Municipal Flood Control, §§ 14-42-1 to -5 (Repl. 1968); County Flood Control, §§ 15-50-1 to -17 (Repl. 1968); Soil and Water Conservation Districts, §§ 45-5-19 to -64 (Repl. 1966); Conservancy Districts, §§ 75-28-1 to -67, 75-29-1 to -15, 75-30-1 to -53, 75-31-1 to -24 (Repl. 1968); Arroyo Flood Control Act, §§ 75-36-1 to -103 (Repl. 1968); and Las Cruces Arroyo Flood Control Act, §§ 75-38-1 to -103 (Repl. 1968) (This Act, although not repealed, is essentially moot because the voters failed to approve the necessary bond issue.).

4. According to N.M. Stat. Ann. § 75-28-4 (Repl. 1968), a conservancy district has power "to make improvements, to remove, and to regulate and prescribe the location of improvements upon land." Although this language must be read in the context of the entire Conservancy Act, it arguably provides authority for a conservancy district to regulate private land use and development in the flood plain. There is no indication, however, that any conservancy district has attempted such regulation—if in fact it may do so.

5. *Id.* (With the possible exception of conservancy districts).

6. N.M. Stat. Ann. §§ 14-20-1 to -24 (Repl. 1968).

tricts as are necessary to carry out the purpose of the zoning statutes. A zoning authority may regulate: (1) the locations and use of buildings, structures, and land for trade, industry, residence, or other purposes; and (2) the erection, construction, reconstruction, alteration, repair, or use of buildings, structures or land in each district. Regulations may vary from district to district, but must be consistent for any class or kind of buildings within a particular district.<sup>7</sup>

Zoning ordinances are enforced by the zoning authority having jurisdiction as municipal ordinances are enforced. In addition, the zoning authority may institute any appropriate action or proceedings to prevent, abate, or restrain the violation.<sup>8</sup> Counties having zoning authority may enact ordinances to carry out that authority, the same as a municipality, with the same penalties for violation, except where such enactment would be inconsistent with statutory or constitutional limitations placed on counties.<sup>9</sup> Unfortunately, such limitations appear to exist with regard to a number of counties in New Mexico. Counties are classified in the following fashion:<sup>10</sup>

<u>Classification</u>	<u>Assessed Valuation</u>	<u>Population</u>
Class "A"	More than \$75,000,000	100,000 or more
Class "B"	More than \$75,000,000	Less than 100,000
Class "C"	More than \$45,000,000	Less than 100,000
First Class	More than \$14,000,000	_____
Second Class	\$8,250,000-\$14,000,000	_____
Third Class	\$6,500,000-\$8,250,000	_____
Fourth Class	\$4,750,000-\$6,500,000	_____
Fifth Class	Less than \$4,750,000	_____

Any county which covers an area of not more than 144 square miles is a class "H" county.<sup>11</sup> Class "H" and class "A" counties have the same power to enact ordinances as do municipalities, except that class "A" counties do not have powers that are inconsistent with statutory or constitutional limitations placed on counties.<sup>12</sup> It would seem that such limitations would also apply to class "H" counties; however, the statutory provisions<sup>13</sup> granting ordinance-making power to class "H" counties does not so state. But under the Municipal Code<sup>14</sup> both class "H" and class "A" counties appear to have a zon-

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7. N.M. Stat. Ann. §§ 14-20-1, -2 (Repl. 1968).  
 8. N.M. Stat. Ann. §§ 14-20-8, -21 (Repl. 1968).  
 9. N.M. Stat. Ann. § 14-20-11 (Repl. 1968).  
 10. N.M. Stat. Ann. § 15-43-1 (Repl. 1968).  
 11. N.M. Stat. Ann. § 15-43-3.1 (Repl. 1968).  
 12. N.M. Stat. Ann. §§ 15-36-13, -26 (Repl. 1968).  
 13. N.M. Stat. Ann. § 15-36-13 (Repl. 1968).  
 14. N.M. Stat. Ann. §§ 14-1-1 to 14-59-2 (Repl. 1968).

ing power comparable to that of incorporated municipalities. At the present time, Los Alamos County is the only class "H" county, and Bernalillo County is the only class "A" county.<sup>15</sup>

Although class "B" counties may enact ordinances, the purposes for which they may do so are severely limited. They are granted the same powers to enact ordinances that are granted to municipalities:

*Provided that the enactment of ordinances shall be limited to the following purposes:*

- A. Prescribing safety regulations and speed limits for county roads;
- B. Prescribing legal dump sites and sites for refuse disposal and providing penalties for dumping of refuse at sites other than those prescribed by the ordinance; and
- C. Providing for county park and recreation commissions, and prescribing their powers and duties.<sup>16</sup>

Since these purposes do not include zoning and since counties may not enact zoning ordinances where such ordinances would be "inconsistent with statutory or constitutional limitations placed on counties"<sup>17</sup> class "B" counties apparently do not have the power to use ordinances to carry out their zoning authority. The following counties are now classified as class "B" counties: Chavez, Dona Ana, Eddy, Grant, Lea, and San Juan.<sup>18</sup>

Statutory provisions relating to zoning may be summarized as follows. Municipalities have the power to enact and to enforce zoning ordinances. So, too, do class "H" and class "A" counties. Class "C" counties and counties of the first, second, third, fourth, and fifth classes, in the absence of any express provisions as to the ordinance-making powers, apparently are given the power to make and enforce zoning ordinances by virtue of N.M. Stat. Ann. §14-20-11 (Repl. 1968). This power, however, is denied to class "B" counties.<sup>19</sup> The purposes for which zoning restrictions and regulations can be enacted do not expressly include regulation of land use and development in the flood plain to control and minimize flood damage. However, the general zoning powers granted to zoning authorities to promote "health, safety, . . . or the general welfare"<sup>20</sup> and to "secure from . . . panic and other dangers"<sup>21</sup> clearly imply

15. According to the 1969-70 classification of counties provided by the Local Government Division, New Mexico Department of Finance and Administration.

16. N.M. Stat. Ann. § 15-36-35 (Repl. 1968).

17. N.M. Stat. Ann. § 14-20-11 (Repl. 1968).

18. *Supra* note 15.

19. This result seems inevitably to follow when N.M. Stat. Ann. §§ 14-20-11 and 15-36-35 (Repl. 1968) are read in conjunction.

20. N.M. Stat. Ann. § 14-20-1 (Repl. 1968).

21. N.M. Stat. Ann. § 14-20-3 (Repl. 1968).

such a power. Several municipalities in New Mexico have acted on the assumption that they have such power and have enacted zoning ordinances which in some degree regulate land use and construction in the flood plain for the purpose of minimizing and controlling to some extent damage caused by flooding. Albuquerque, for example, has had such an ordinance since 1953.

Based on the foregoing analysis of statutory authority, a model municipal ordinance for regulating land use and development in the flood plain has been developed. This is not to say that certain counties in New Mexico could not adopt this or a similar ordinance. Rather, emphasis has been placed on a municipal ordinance for the following reasons: (1) Under existing enabling legislation, only municipalities and counties appear to have the authority to enact and enforce flood plain regulation; (2) Even though all counties are "zoning authorities," there is considerable doubt that class "B" counties can enact ordinances to enforce their zoning authority; and (3) Because municipalities have extraterritorial zoning power,<sup>22</sup> a model municipal ordinance, if widely adopted, would cover almost all of the centers of urban population in the state. Since major development—and hence, maximum flood damage—tends to occur in urban areas, under existing enabling legislation a municipal ordinance thus has been chosen as the best means of regulating land use and development in the flood plain.

## II

### PROPOSED MODEL FLOOD PLAIN ORDINANCE

Section 1. The purposes of this ordinance are to secure safety from flood; to prevent loss of life; to prevent property damage and loss and all other related dangers; to promote health and general welfare by regulating and restricting areas in the floodways and flood plains of watercourses shown on the master drainage plan to be subject to periodic flooding; and to preserve the location, character and extent of natural drainage courses. The master drainage plan, dated \_\_\_\_\_, as it may be amended from time to time, is incorporated into this ordinance and made a part hereof by reference.

Section 2. DEFINITIONS—As used in this ordinance, unless the context otherwise requires:

- (1) A \_\_\_\_\_ year flood shall mean a flood having an average fre-

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22. The extraterritorial zoning power of a municipality extends three or five miles beyond its boundaries, depending on whether its population is less or greater than 25,000. See N.M. Stat. Ann. §§ 14-18-5, 14-19-5, and 14-20-2 (Repl. 1968).

quency of occurrence in the order of once in — years, although the flood may occur in any year;

(2) Channel shall mean the geographical area within the natural or artificial banks of a watercourse required to convey continuously or intermittently flowing water;

(3) Commission shall mean the agency designated to administer this ordinance and \_\_\_\_\_ shall act as the enforcement officer for the commission;

(4) Commission floodway shall mean the floodway required to pass the — year flood, the limits of which have been designated and established by order of the commission; and which is delineated on the master drainage plan and described in the minutes of the commission;

(5) Flood shall mean an overflow of water onto lands, not normally covered by water, that are used or usable by man. Floods have two essential characteristics: the inundation of land is temporary; and the land is adjacent to and inundated by overflow from a watercourse, or lake or other body of standing water;

(6) Floodway shall mean the channel of any watercourse and those portions of the flood plain adjoining the channel which are reasonably required to carry and discharge flood water;

(7) Flood plain shall mean the relatively flat area or low lands adjoining the channel of a watercourse or a body of standing water, which has been or may be covered by floodwater and is so designated on the master drainage plan;

(8) Locate shall mean construct, place, insert or excavate;

(9) Natural obstruction shall mean any rock, tree, gravel, or analogous natural matter that is an obstruction and has been located within a floodway by a nonhuman cause;

(10) Obstruction shall mean artificial obstructions, such as any dam, wall, wharf, embankment, levee, dike, pile, abutment, excavation, channel rectification, bridge, conduit, culvert, building, wire, fence, rock, gravel, refuse, fill, or other analogous structure or matter in, along, across, or projecting into any floodway which may impede, retard, change the direction of the flow of water, or increase the flooding height, either in itself or by catching or collecting debris carried by such water, or that is placed where the natural flow of the water would carry the same downstream to the damage or detriment of either life or property;

(11) Owner shall mean any person who has dominion over, control of, or title to an obstruction;

(12) Selected floodway shall mean that portion of a commission floodway as shown on the master drainage plan, encroachment on

which would unduly increase flood heights and endanger life and property. The limits of the selected floodway shall be those limits where the extent of permitted encroachment would not raise the estimated level of the \_\_\_\_\_ year flood in excess of one foot, as computed in water surface profiles;

(13) Watercourse shall mean any stream, arroyo, or drainway having a channel that serves to give direction to a flow of water.

### Section 3.

(1) The commission shall initiate a comprehensive program for the delineation of commission floodways and selected floodways for watercourses in its jurisdiction. It shall make a study relating to the acquiring of flood data, and have authority to enter into arrangements with the United States Geological Survey and the United States Army Corps of Engineers and any other local, State or Federal agency for such acquisition.

(2) When sufficient data have been acquired to reasonably locate the floodways of a \_\_\_\_\_ year flood, the commission shall establish, by order, after a public hearing, a master drainage plan which shall delineate the lines and limits of the commission and selected floodways. The commission shall have the power to alter such lines at any later time, by order, after a public hearing if a reevaluation of the then available flood data warrants it. Notice of any such hearing or order of the commission establishing or altering any such commission floodway or portion thereof shall be given at least fifteen days prior to the date of the hearing, within its respective jurisdiction, by mailing notice thereof to the owners, as shown by the records of the county assessor, of lots or land within the area proposed to be changed by a commission order, and by publishing such notice once each week for two consecutive weeks in a legal newspaper published or of general circulation in the area involved, the last publication of which shall be not less than ten days prior to the date set for the hearing or the effective date of such order. Prior to publication of the notice, copies of the master drainage plan shall be available for inspection by any citizen in the office of the commission. A certified copy of the approved master drainage plan shall be kept available for public inspection in the office of \_\_\_\_\_.

Section 4. Any obstruction in any commission floodway not exempt under section 5 of this ordinance is hereby declared to be a public nuisance unless a permit has been obtained for such obstruction from the commission.



### Section 5.

(1) It shall be unlawful (a) for a person to locate any obstruction within an established commission floodway, or (b) for any owner to permit any obstruction to remain within an established commission floodway without a permit from the commission. This ordinance shall not affect any obstruction unless such obstruction is located in the floodway after the effective date of this ordinance and after the commission has enforced a commission floodway; Provided, that no person shall make nor shall any owner allow alterations of any obstruction within an established commission floodway whether such obstruction is located in the commission floodway before or after the effective date of this ordinance except upon express written approval of the commission. Maintenance of an obstruction shall not be construed to be an alteration.

(2) An owner of land may channelize, confine, relocate, or alter floodways traversing or bordering such land with the purpose of minimizing flooding, ponding, or erosion, and to permit the filling and grading of adjacent land so that it may be placed in higher use; Provided, that all such changes are based on sound engineering design and a permit or permits are secured as required by section 6 of this ordinance. As a condition of permitting a floodway to be channelized, confined, relocated, or altered, the commission may require that the channelized, confined, relocated, or altered floodway be dedicated to the public use.

### Section 6.

(1) The commission shall have the power to issue permits for the location or alteration of obstructions which would otherwise violate section 5 of this ordinance. The application for the permit shall contain such information as the commission shall require, including complete maps, plans, profiles, and specifications of the obstruction and watercourse.

(2) In passing upon such application, the commission shall consider:

- (a) the danger to life and property by water which may be backed up or diverted by such obstruction;
- (b) the danger that the obstruction will be swept downstream to the injury of others;
- (c) the availability of alternate locations;
- (d) the construction or alteration of the obstruction in such a manner as to lessen the danger;
- (e) the permanence of the obstruction;

- (f) the anticipated development in the foreseeable future of the area which may be affected by the obstruction; and
- (g) such other factors as are in harmony with the purpose of this ordinance.

(3) Examples of uses that may be permitted in selected floodways are:

- (a) cultivation and harvesting of crops according to recognized soil conservation practices;
- (b) pasture, grazing land, outdoor plant nursery, orchard, and harvesting of any wild crops;
- (c) wildlife sanctuary, woodland preserves, arboretums;
- (d) outlet installations for sewage treatment plants, sealed public water supply wells;
- (e) recreational uses such as: parks, day camps, picnic groves, golf courses, hunting, fishing, tennis clubs, and boating clubs, provided no principal building is located in the selected floodway; and
- (f) commercial uses such as: parking lots, railroads, streets, utility lines, storage yards for equipment and material not subject to major damage or displacement by flood, provided such use is accessory to a use permitted in an adjoining area.

(4) Uses permitted for lands lying outside selected floodways but within commission floodways shall be the same as those permitted for lands lying immediately adjacent to the commission floodways, but shall be subject to the following regulations:

- (a) Buildings or structures may be located and existing buildings or structures may be altered, provided the first floors of said buildings or structures are placed above the elevation of the \_\_\_\_ year flood.
- (b) Foundations of all structures shall be designed and constructed to withstand flood conditions at the proposed construction site.
- (c) Basements, lower floors, or appurtenances located below the elevation of the \_\_\_\_ year flood shall be designed and constructed to prevent passage of water into the building or structure and withstand flood conditions, including hydrostatic pressures of elevated water-tables and the momentum of flood flows. Materials for construction shall be of the type not deteriorated appreciably by water. Windows, doorways, and other openings into the building or structure that are located below the elevation of the \_\_\_\_ year flood shall be designed and constructed incorporating adequate floodproofing.
- (d) All electrical equipment, circuits, and installed electric appliances shall be located so as not to be subject to flooding or shall be

floodproofed to prevent damage resulting from inundation by the \_\_\_\_ year flood.

(e) Sanitary and storm sewer drains shall be equipped with valves capable of being closed, manually or automatically, to prevent backup of sewage and storm waters into the building or structure. Gravity draining of basements may be eliminated by mechanical devices.

(f) Chemical storage, explosive, buoyant and flammable liquid storage shall be located above the \_\_\_\_ year flood level or shall be adequately floodproofed to prevent flotation of tanks or other appreciable damage or escape into the floodwaters of toxic materials.

(g) Land may be filled provided such fill extends 15 feet beyond the limits of any building, or structure erected thereon.

Section 7. The commission may make a part of such permit any conditions it may deem advisable to implement the purposes of this ordinance. For the permit to remain in force, any obstruction must be maintained so as to comply with the conditions and specifications of the permit.

Section 8. Permits for obstructions to be located in the commission floodway must be specifically approved or denied within a reasonable time by the commission; permits for obstructions in the commission floodways shall be conclusively deemed to have been granted \_\_\_\_ days after the receipt of such application by the commission or after such time as the commission shall by rule specify, unless the commission notifies the applicant that the permit is denied.

Section 9. Every application for a permit shall be accompanied by a non-refundable application fee of \_\_\_\_\_ dollars.

Section 10. The powers and duties of the commission relative to obstructions in a commission floodway shall include the following:

(1) Where a natural obstruction to a floodway established under subsection (2) of section 3 of this ordinance has been created by fallen trees, silt, debris, and like matter, the commission may, in its discretion, remove the natural obstruction, in which case the cost of removal shall be borne by the commission;

(2) Where, after investigation, notice and hearing, an order has been issued to the owner of an obstruction not exempt under the provisions of section 5 of this ordinance for its removal or repair, and the order is not complied with within such reasonable time as may be prescribed by the commission, or if the owner cannot be found or determined, the commission may make or cause such removal or repairs to be made. The reasonable cost of the removal or

repairs shall constitute a lien against the obstruction removed or repaired and against the lot or parcel of land from which it was removed or on which it was repaired. The lien shall be foreclosed in the manner provided in sections 14-35-1 through 14-35-5 New Mexico Statutes Annotated, 1953 compilation.

Section 11. The commission, its agents, surveyors, or other employees may make reasonable entry upon any lands and waters within the commission's jurisdiction for the purpose of making any investigation, survey, removal, or repair contemplated by this ordinance. An investigation of any natural or artificial obstruction shall be made by the commission either on its own initiative, or the written request of any three titleholders of land abutting the watercourse involved.

Section 12. This ordinance shall not extend to any obstruction in the floodway of a watercourse where the drainage area above the same, either within or without the jurisdiction, is less than — acres in extent, unless a particular watercourse is expressly declared to be within the coverage of this ordinance by order of the commission and is so designated on the master drainage plan.

Section 13. The commission may issue such orders as are necessary to implement the provisions of this ordinance. If an order is issued to the owner of an obstruction not exempt under the provisions of section 5 of this ordinance for its removal or repair, such order shall not become effective less than ten days after a hearing is held relating to such order. In addition to any requirement imposed by subsection (2) of section 3 of this ordinance, where any order is issued which affects with particularity the land adjacent to any watercourse, notice of the contents of such order and of any required hearing shall be mailed by the commission to the titleholder of such land not less than ten days before the effective date of such order, or, if there is a required hearing, to the titleholder of such land and to the owner of the obstruction not less than ten days before the date of such hearing; Provided, that such notice need not be given to the owner of the obstruction for an order issued pursuant to subdivision (2) of section 10 of this ordinance if the owner cannot be found or determined. All orders issued by the commission shall be on file at the offices of the commission. Any person aggrieved by any order of the commission issued under this ordinance may appeal from such order to the district court. Such appeal must be taken within thirty days after the order has been entered in the record of the clerk of

the commission. In the event such an appeal is taken, enforcement of such order shall be stayed pending the outcome of such appeal. Service of notice of the appeal shall be made upon the executive secretary of the commission.

Section 14. The city treasurer is hereby directed to create and establish the Floodway Obstruction Removal Fund and to credit to such fund for the removal of natural obstructions as provided in subdivision (1) of section 7 of this ordinance, such money as shall be specifically appropriated or reappropriated by the city commission. Funds collected under section 9 of this ordinance shall be included in this section.

Section 15. Any person found guilty of violating any of the provisions of this ordinance shall be punished by a fine not to exceed \$300.00 or imprisonment not to exceed 90 days, or by both such fine and imprisonment in the discretion of the court. The commission, in addition to other remedies, may institute any appropriate action or proceeding to prevent, abate or restrain the violation. Each day's continuance of a violation shall be deemed a separate and distinct offense.

Section 16.

(1) The grant or denial of a permit shall not have any effect on any remedy of any person at law or in equity; Provided, that where it is shown that there is a wrongful failure to comply with this ordinance, there shall be a rebuttable presumption that the obstruction was the proximate cause of the flooding of the land of any person bringing suit.

(2) The granting of approval of any structure or use shall not constitute a representation, guarantee, or warranty of any kind or nature by \_\_\_\_\_ or by any political subdivision, or by an officer or employee of any of them, of the practicability or safety of any structure or use proposed and shall create no liability upon or cause of action against the commission, a member of the commission, or its employees or agents.

Section 17. The use of any one of the remedies or powers given to the commission in this ordinance shall not constitute a bar to the exercise of any other remedy or power given by this ordinance.

Section 18. The provisions of this ordinance are severable, and if any provision, sentence, clause, section, or part thereof is held illegal,

invalid or unconstitutional, or inapplicable to any person or circumstance, the illegality, invalidity, unconstitutionality, or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of this ordinance or their application to other persons or circumstances. It is hereby declared to be the intent of the \_\_\_\_\_ that this ordinance would have been adopted if such illegal, invalid or unconstitutional provision, sentence, clause, section or part had not been included therein, and if the person or circumstances to which the ordinance or any part thereof is inapplicable had been specifically exempted therefrom.

### III

#### COMMENTS ON PROPOSED ORDINANCE

The model for the proposed ordinance was Nebraska's Flood Plain Regulation Act of 1967. However, changes have been made where applicable to have the proposed ordinance conform to New Mexico law and procedure.

This proposed ordinance's effectiveness is based on the local government controlling construction and land use within certain designated areas shown on a master drainage plan. The most general way a local government can control an individual's use of his land is via the police power. The state has the authority to adopt such regulations as are needed to secure generally the comfort, health, welfare, etc., of the state. This general language is used to state the purpose of the ordinance in Section 1. One must remember, however, that the state may not use its police power to protect a person from the "consequences of his own acts."<sup>23</sup> Rather, individual freedom should be curtailed in order to protect man from being victimized; that is, from situations in which a rational choice is not made, and in order to protect the community against financial burdens. Section 1 should be read with this distinction in mind.

The existence of a master drainage plan is the key to the entire ordinance. This ordinance will not apply to any property unless it is designated as being subject to floodway regulation on the master drainage plan. An analogy to this is drawn from §14-20-4 of N.M. Stat. Ann. (Repl. 1968) which provides that zoning ordinances are not effective unless the boundaries of zoning districts are determined in advance. The same situation would exist with regard to the master drainage plan.

Section 2 provides a fairly complete list of definitions. The definition of "watercourse" is intentionally very general. The standard

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23. Durham, *Flood Control via the Police Power*, 107 U. Pa. L. Rev. 1098 (1959).

definition of watercourse states that it has well-defined banks, but this was omitted from this definition because New Mexico has many alluvial fans and playas that do not have "well-defined banks" and yet should be regulated.

There are three different floodways defined. The first, "commission floodway," has its limits specifically set by the Commission on the basis of flood data. These limits must be delineated on the master drainage plan before the Commission has the power to exercise the other sections of the ordinance. A flood of specified year frequency (e.g., 100-year) will be selected and used as the standard for the commission floodway. The year frequency to be used may vary with each particular municipality, depending on such factors as availability of flood data, means of enforcement, etc., and perhaps to a considerable extent, economic considerations. Designating a flood in terms of year frequency does not mean that a flood of such magnitude will occur only once in so many specified years. What it does mean is that an analysis of the available hydrologic data indicates that the chances a flood of such magnitude will occur in any particular year are in the ratio of one to the specified year frequency. The chances in each year are the same, no matter whether the last preceding flood of this magnitude occurred last year, or many years ago. Thus, for example, if a 100-year frequency flood is chosen, the odds of a flood of that size occurring in any particular year are one in one hundred.

The definition for "floodway" is intentionally left quite broad. The reason is to avoid undue restraints on the power of the commission through use of a too narrowly restrictive definition.

The "selected floodway" is a technical definition. It is actually an area designation within the commission floodway. The distinction between the selected floodway in particular and the commission floodway in general is one that is used in later sections of the ordinance, i.e., Sections 6(3) and 6(4). These sections deal with permitted uses within the respective areas. The selected floodway is severely restricted in use to activities which would in no way obstruct the passage of a defined volume of water.

Before anything may be done with regard to this ordinance, the Commission must be established. How this is done will depend on the desires of the respective municipalities. They may set up a new separate body, or they may simply place it under an already existing agency. At any rate, the Commission will probably consist of a group of individuals who would meet only on specified or infrequent occasions. Because of the necessity of immediate action in some instances, one person should be designated as the enforcement officer

for the Commission. Either the municipality or the Commission itself can appoint this member.

Any doubt as to whether a watercourse may be artificial (e.g., a canal) or natural should be dispelled by the words "natural or artificial banks" in the Section 2(2) definition of "channel."<sup>24</sup>

For simplicity and clarity, the definition of "obstruction" provides that it ". . . shall mean artificial obstructions . . ."; and the phrase "natural obstruction" is then used to differentiate where needed. This definition of obstruction is necessary because the act is aimed mainly at artificial obstructions, and by specifying that the word obstruction means "artificial obstruction," any ambiguity that could arise is eliminated. One distinction between natural and artificial obstruction appears in Section 10, where subsection 1 gives the Commission power to remove any natural obstruction at public expense, while subsection 2 gives the Commission the power to remove or repair an artificial obstruction at the owner's expense. Section 11 further facilitates this by giving the Commission the power to make reasonable entry upon lands within its jurisdiction for the purposes set forth in Section 10. Section 11 allows the Commission to use its own initiative, but goes on to make it mandatory that the Commission investigate if three titleholders of land abutting the watercourse make a written request to the Commission.

The definition of "obstruction" is to be construed as all-inclusive for artificial obstructions. This definition will affect the situation that occurs where the current has cut away part of the owner's bank and he has placed a structure in the watercourse to restore the bank to its original position. Under present law this is generally permitted, even if it shifts the current so as to erode a neighbor's bank, as long as the original bank would have had the same effect. The definition used is intended to regulate this type of structure to accord with the purpose of the ordinance.

It should be noted that excavations are included in the definition of obstruction, if they change the direction of the flow of water. This was included, since an excavation could have the same practical effect as a structure that is an obstruction in the more usual sense.

Also included in the obstruction definition are structures that can be carried downstream by a flood. Storage tanks, for example, which are within the commission floodway, are within the definition of obstruction and hence within the meaning of the ordinance because a flood could carry them downstream. They are particularly

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24. Such a definition of "channel" will avoid the litigated issue in *Ranney v. Saint Louis & S.F.R.R.*, 137 Mo. App. 537, 119 S.W. 484 (1909), where it was held that a statute requiring lateral ditches to be dug wherever there was a watercourse does not refer only to natural streams but includes artificial ditches and canals.



dangerous since they can be swept downstream to catch in bridges and restrict the capacity of the floodway at a most crucial point.

Section 3 gives the general procedure for establishing the master drainage plan. This procedure follows the general pattern established by §14-20-4 of N.M. Stat. Ann. (Repl. 1968) for the adoption of a zoning ordinance. The acquiring of flood data from the U.S. Geological Survey and U.S. Army Corps of Engineers is merely a suggestion as to where the flood data may be obtained. Certainly every conceivable reliable source of information should be utilized in determining the necessary information.

Section 4 makes an obstruction, not exempt under Section 5, a public nuisance unless a permit has been obtained from the Commission. The general rule is that the legislature may classify as a nuisance anything which is detrimental to the health, morals, peace or welfare of the citizens of the state.<sup>25</sup>

While the legislature may enlarge the common law idea of what is a nuisance, it may not classify something a nuisance which is in fact not a nuisance. But whenever a thing is of such a nature that it may become a nuisance, it may be regulated or prohibited by the legislature. The courts have generally upheld statutes declaring that obstruction of a floodway is a public nuisance.<sup>26</sup> Obstructions of the floodway will often damage large segments of the community since the flooding is usually not limited to one area. Also, the entire community would have to bear the cost of these damages, either directly or indirectly, involving lost services, restoration of utilities, and clean-up.

Section 5 specifies what is unlawful under the ordinance, and Section 15 provides for criminal prosecution or an injunction for a violation of this section. A distinction is made between locating an

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25. *Lawton v. Steele*, 152 U.S. 133, 136 (1894). The police power:

. . . is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by. . . . Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. . . . To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive on individuals.

26. *Moore v. Chicago, B.&Q. Ry.*, 75 Iowa 263, 39 N.W. 390 (1888); *Powell v. City of Rochester*, 93 Misc. 227, 157 N.Y. Supp. 109 (Sup. Ct. 1915).

obstruction (in that it extends to "any person") and allowing an obstruction to remain (which extends only to the "owner" of the obstruction). The reason for the distinction is that "owner" (as defined) is probably the broadest term which could properly be used where a criminal penalty is imposed for allowing an obstruction to remain on the land, a rather passive type of crime. It basically imposes a duty on the owner to inspect his land and obtain a permit for any artificial obstruction located thereon, as long as he has control over the obstruction. It relieves any person from liability if he owns the land but has no control over the obstruction itself, since Section 2(11) defines "owner" as a person who has dominion over, control of, or title to an obstruction. Section 10(2) takes care of the situation where some other person, unknown to the owner of the land, has abandoned an obstruction on the land within the floodway. Under Section 10(2), the Commission may remove the obstruction and place a lien against the land for the reasonable cost of the removal. On the other hand, it is unlawful under Section 5 for any person to locate an obstruction within an established commission floodway. This clearly requires a positive act, and would not excuse anyone claiming, for example, to be the agent of the actual owner of the obstruction, who may be outside the state. It also covers the person who abandons the obstruction on the land.

This ordinance will not be retroactive. The difficulties in making it retroactive are immediately apparent for, in some cases, the entire downtown area of a city may be within the commission floodway. But while not being retroactive, Section 5(1) does prevent any alterations of an obstruction without the Commission's written approval. A distinction is made between maintenance and an alteration. While no express figure is given in the ordinance, a ratio of 30% of the total value of the obstruction would probably be construed as an alteration and not maintenance. But the figure could be different, depending on the municipality.

Section 5(2) allows an owner to obtain a permit from the Commission to increase the efficiency of such floodways as may cross their land, and in so doing, to decrease the size of such floodways. In return for being allowed to narrow the floodway, the owner is required to: (1) improve the floodway to allow the more rapid passage of water through a smaller space; and he may be required to (2) dedicate it to the public use. Dedication has the advantage to the landowner of his not having to maintain the improvement or pay property taxes on the land that is dedicated to the public use. The municipality also receives an advantage in knowing that the im-

provement will be there permanently. The municipality can then, on this basis, make plans further down the watercourse. This dedication is analogous to dedication of certain land within a subdivision for the public use as streets, as required by N.M. Stat. Ann. §14-19-10 (Repl. 1968).

Section 6 gives some of the guidelines which the Commission shall consider before passing on such permits. These guidelines, of course, would be correlated with the purpose of the ordinance as set forth in Section 1. Thus, for example, "the danger to life and property" would cover not only the nature of the surrounding area but also the nature of the obstruction itself; an embankment would be in a stronger position to obtain a permit than a factory building of the same size and shape. The "availability of alternate locations" would bear not only in factory requirements of large amounts of water for its productive activity, but also on whether the surrounding area of the proposed location is urban or agricultural. The "construction . . . in such a way as to lessen the danger" might not only refer to putting the structure on piles but also, if it were rectangular in shape, to locating the length parallel to the flow of the water, or to requiring that the design emphasize vertical rather than horizontal construction. Section 6(3) gives examples of permitted uses in the selected floodway. Because the selected floodway area is essential to allow the passage of floodwaters, no building will be permitted within its limits. The permitted uses should be limited to activities which require no structures and which may be moved to higher elevations when flooding danger occurs. Section 6(4) covers uses permitted for lands outside the selected floodway but within the commission floodway. One limitation requires that zoning restrictions on land adjacent to the commission floodway must be followed. While structures are permitted in this area, they are subject to certain structural limitations dealing with flood proofing.

Section 7 empowers the Commission to mold the permit to fit any type of situation. It also gives the Commission the power to revoke permits where the permit is not followed or the obstruction is not maintained.

Section 8 gives the Commission a "reasonable time" to either approve or deny a permit; but this reasonable time has an outside limitation of some period which will be adopted by each separate municipality as it sees fit. The Commission may set up a shorter time period in its own rules than the municipality adopts, but in any case the shorter period will always be the effective one.

Section 11 requires the Commission to investigate any natural or artificial obstruction on the "written request of any three titleholders of land abutting the watercourse involved." By using "titleholder" here instead of occupiers of the land, long-term lessees and other renters are restricted from forcing the Commission to investigate. This procedure is considered preferable, rather than having lessees make changes which the titleholder of the land may not know about or may not have approved of in the past. However, the municipality may substitute occupiers of the land or lessees of certain duration, if it so desires, in lieu of the "titleholder" provision.

Section 12 limits the scope of the ordinance to exclude certain drainage areas of small extent. Again, it is up to the municipality to determine what it feels it can regulate. This limitation is put in to exclude the great number of small watercourses which present no serious flood problem and which the municipality's storm drains can adequately handle. Presumably, this would lessen the administrative burden on the Commission and keep it within manageable proportions.

Section 13 has general provisions relating to notice, hearings, orders, rules, and appeals. Orders and rules are required to be filed with the Commission, thus tying in with the recording of floodway encroachment lines as provided in Section 3.

Section 14 provides for a fund to be set up in which the money collected from the permits shall be included. Money from the permits must be placed in the fund, and the fund may be increased as the municipality sees fit.

Section 15 sets forth the penalties for violating any provision of the ordinance.

Section 16 makes clear that the granting of a permit is a requirement independent of other remedies either at law or in equity. Thus, the granting of a permit would not affect, for example, any requirement to conform with a local flood plain zoning regulation. However, as an inducement to obtain the required permit, if there is a wrongful failure to comply with the ordinance and at some later time a person's land is flooded, there is a rebuttable presumption that the obstruction is the proximate cause of the flooding; this shifts the burden of proof on a point with which the plaintiff might otherwise have substantial difficulty.

Section 17 is intended to make clear that the use of one remedy under the ordinance does not act as a bar to any other remedy (i.e., criminal prosecution, injunctive relief, or the power to order removal under Section 10).

Section 18 is a standard severability clause.

## IV

## SUGGESTED AMENDMENTS TO EXISTING ENABLING LEGISLATION

As has been noted earlier, the power of municipalities and of some counties to regulate land use and development in the flood plain can be implied from existing enabling legislation. Normally, however, in the interest of avoiding confusion and possible litigation, it is desirable where possible to have powers of local governments expressly stated. With this end in mind, therefore, amendments conferring certain express powers to control and regulate the flood plain should be incorporated in present statutes dealing with the planning and zoning authority of municipalities and counties. Where appropriate, suggested amendments are shown in capital letters within the body of existing provisions.

Municipal planning is covered by N.M. Stat. Ann. §§14-18-1 through -12 (Repl. 1968). Section 14-18-9, dealing with purposes of a municipal master plan, should be amended at least minimally along the following lines:

14-18-9. Master plan—Purposes.—A. The planning commission shall prepare and adopt a master plan for the physical development of the municipality and the area within the planning and platting jurisdiction of the municipality which in the planning commission's judgment bears a relationship to the planning of the municipality. The planning commission may amend, extend or add to the plan or carry any part or subject matter into greater detail. In preparing the master plan, the planning commission shall make careful and comprehensive surveys and studies of existing conditions and probable future growth of the municipality and its environs. The plan shall be made with the general purpose of guiding and accomplishing a co-ordinated, adjusted and harmonious development of the municipality which will, in accordance with existing and future needs, best promote health, safety, morals, order, convenience, prosperity or the general welfare as well as efficiency and economy in the process of development. **THE PLAN SHALL BE DESIGNED, WHERE POSSIBLE, TO PROMOTE SAFETY FROM FIRE, FLOOD WATERS, AND OTHER DANGERS.**

B. Among other things, the master plan with accompanying maps, plats and charts, descriptive and explanatory matter, and recommendations of the planning commission for the physical development of the municipality, and for its planning jurisdiction, may include:

- (1) the general location, character and extent of streets, bridges, viaducts and parkways, parks and playgrounds, **FLOODWAYS,**

waterways and waterfront development, airports and other ways, grounds, places and spaces;

County planning is dealt with in N.M. Stat. Ann. §§15-58-1 through -3. Section 15-58-2, covering the powers and duties of a county planning commission, reads in part as follows:

15-58-2. Powers and duties of commission.—A. A county planning commission shall have such powers as are necessary and proper to carry out and promote county planning. Such planning shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the county which will, in accordance with existing and future needs, best promote health, safety, morals, order, convenience, prosperity or the general welfare as well as efficiency and economy in the process of development.

This wording is so broad and all inclusive that it may be construed to mean very little. It is suggested that appropriate wording be added at the end of this provision so as to clearly indicate that it is within the power of a county planning commission to prepare plans that will promote safety from fire, flood waters, and other dangers.

County and municipal zoning powers are treated jointly in N.M. Stat. Ann. §§14-20-1 through -12. Section 14-20-1, which delineates the zoning authority of counties and municipalities, should be amended in a manner at least somewhat analogous to the following:

14-20-1. Zoning—Authority of county or municipality.—A. For the purpose of promoting health, safety, morals or the general welfare, a county or municipality is a zoning authority and may regulate and restrict within its jurisdiction the:

- (1) height, number of stories and size of buildings and other structures;
- (2) percentage of a lot that may be occupied;
- (3) size of yards, courts and other open space;
- (4) density of population; and
- (5) location and use of buildings, structures and land for trade, industry, residence or other purposes.

**B. A ZONING AUTHORITY MAY ALSO ESTABLISH, REGULATE, RESTRICT, AND LIMIT THE LOCATION AND USE OF BUILDINGS, STRUCTURES AND LAND WITHIN A FLOODWAY, AS SUCH FLOODWAY HAS BEEN DESIGNATED ON AN APPROVED DRAINAGE PLAN, IN ORDER TO LESSEN OR AVOID THE HAZARDS**

TO PERSONS AND DAMAGE TO PROPERTY RESULTING FROM THE ACCUMULATION OF STORM OR FLOOD WATERS; PROVIDED THAT THE POWER HEREIN CONFERRED SHALL NOT BE EXERCISED SO AS TO DEPRIVE THE OWNER OF ANY EXISTING PROPERTY OF ITS USE OR MAINTENANCE FOR THE PURPOSE TO WHICH IT WAS LAWFULLY DEVOTED ON THE EFFECTIVE DATE OF ANY REGULATION, RESTRICTION OR LIMITATION, BUT PROVISIONS MAY BE MADE FOR THE GRADUAL ELIMINATION OF USES, BUILDINGS, AND STRUCTURES, INCLUDING PROVISIONS FOR THE ELIMINATION OF SUCH USES WHEN THE EXISTING USES TO WHICH THEY ARE DEVOTED ARE DISCONTINUED, AND FOR THE ELIMINATION OF SUCH BUILDINGS AND STRUCTURES WHEN THEY ARE DESTROYED OR DAMAGED IN MAJOR PART.

What is now part B of this section would then be redesignated part C.

The following amendment should be made to N.M. Stat. Ann. §14-20-3:

14-20-3. Zoning—Conformance to comprehensive plan.—A. The regulations and restrictions of the county or municipal zoning authority are to be in accordance with a comprehensive plan and be designed to:

- (1) lessen congestion in the streets and public ways;
- (2) secure safety from fire, FLOOD WATERS, panic and other dangers;
- (3) promote health and the general welfare;
- (4) provide adequate light and air;
- (5) prevent the overcrowding of land;
- (6) avoid undue concentration of population;
- (7) facilitate adequate provision for transportation, water, sewerage, schools, parks and other public requirements; and
- (8) control and abate the unsightly use of buildings or land.

Finally, if counties are given the power to regulate land use and development in the flood plain, it would seem desirable that all counties—especially those having sizeable urban populations—be able to exercise the power. Therefore, the power of class “B” counties to enact ordinances should be expanded by the repeal of the following parts of § 15-36-35 that are shown with dashes through the words:

15-36-35. Class B counties—Power to enact ordinances.—Class

B counties are granted the same powers to enact ordinances that are granted to municipalities except for those powers that are inconsistent with statutory or constitutional limitations placed on counties, and Provided that the enactment of ordinances shall be limited to the following purposes:

- A. prescribing safety regulations and speed limits for county roads;
- B. prescribing legal dump sites and sites for refuse disposal and providing penalties for dumping refuse at sites other than those prescribed by the ordinance; and
- C. providing for county park and recreation commissions, and prescribing their powers and duties.

## V

### THOUGHTS FOR THE FUTURE

It has been suggested that for flood plain regulation to be effective in more than merely isolated incidence, it is imperative that some form of regional agency be available to provide the planning, coordination, and data necessary to allow local governing bodies or regulatory agencies to implement meaningful regulation of this type. Most often, such help has been best provided at the state level.<sup>27</sup> At the present time, there are two state agencies in New Mexico that could, with a minimum of new enabling legislation, be empowered to provide the necessary coordination, planning, and hydrographic data. They are (1) the State Engineer, and (2) the State Planning Office.

By N.M. Stat. Ann. § 75-2-1 (1968), the State Engineer is responsible for "general supervision of the waters of the state and of the measurement, appropriation, [and] distribution thereof." He also controls the manner in which municipalities and counties may construct and maintain dikes, embankments, dams, ditches, structures, or excavations in any public stream (see N.M. Stat. Ann. §§ 14-24-4 and 15-50-4 (Repl. 1968)). It is evident from these provisions that the State Engineer, if adequately funded for this purpose, is empowered to collect and provide the hydrographic data necessary for reasonable and effective flood plain regulation.

The State Planning Act, N.M. Stat. Ann. §§ 4-20-1 through 4-20-7 (Repl. 1966), was enacted by N.M. Laws 1959, ch. 255. According to §4-20-2, the State Planning Office:

[s]hall function as the governor's staff agency in planning for the

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27. See generally F. Murphy, *Regulating Flood Plain Development*, University of Chicago Dep't of Geography Research Paper No. 56 (1958).



long-range, comprehensive, balanced development of the state's natural, economic and human resources and public facilities, the financial requirements and methods of financing of public facilities and public works and other planning matters, and to prepare, recommend and keep up to date programs for the co-ordination, guidance and use of agencies administering funds and statutes useful in the development, exploitation, and conservation of such resources.

Section 4-20-3 requires the State Planning Office to "work toward the preparation of comprehensive state-wide resource development plans relating development potential and needs of various resources to population, industry, agricultural and recreational growth and development, and indicating benefits to be derived from water development, including but not limited to irrigation, flood control, domestic and industrial water requirements and recreation."

Water is a vital resource in New Mexico. It seems clear that flood plain regulation and flood control works in conjunction are the best means the state has for effectively controlling and using this important resource. The State Planning Act now requires the State Planning Office, subject to the governor's direction, to (1) function as an advisory, consultative, and coordinating agency to other agencies of the state; and (2) cooperate with and provide planning assistance and advice to county, municipal and other local governments, instrumentalities or planning agencies (see 4-20-3). Thus, under its existing enabling legislation, the State Planning Office can serve to coordinate activities and provide data necessary for local regulation of the flood plain.