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Apres le Deluge: National Flood Insurance

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Abstract

On August 24, 1992, Hurricane Andrew slammed into the South Florida coast, continued across the peninsula of Florida into the Gulf of Mexico and eventually into Louisiana.

KEYWORDS: flood, insurance, hurricane

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I. INTRODUCTION

On August 24, 1992, Hurricane Andrew slammed into the South Florida coast, continued across the peninsula of Florida into the Gulf of Mexico and eventually into Louisiana.[1] The damage caused by flooding as a result of Andrew that will be covered by the National Flood Insurance Program (NFIP), is expected to be about $50 million in South Florida and $100 million in Louisiana.[2] While traditional homeowner's policies don't cover damage caused by floods, flood insurance available through the NFIP created in 1968 and administered through the Federal Emergency Management Agency (FEMA), covers this risk.[3]

Part II of this paper will examine the background of the NFIP from its inception to the present time. Part III will review proposed changes in the NFIP as a result of perceived problems with the current program. Constitutional "takings" issues concerning the NFIP will be reviewed in part IV.

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1. Beatrice E. Garcia, *Floridians Expected to File $50 Million in Flood Claims*, MIAMI HERALD, Sept. 9, 1992, at C1.
2. *Id.*
3. *Id.*

II. BACKGROUND

> The Congress finds that (1) from time to time flood disasters have created personal hardship and economic distress which have required unforeseen disaster relief measures and have placed an increasing burden on the Nation's resources; (2) despite the installation of preventive and protective works and the adoption of other public programs designed to reduce losses caused by flood damage, these methods have not been sufficient to protect adequately against growing exposure to future flood losses; (3) as a matter of national policy, a reasonable method of sharing the risk of flood losses is through a program of flood insurance which can complement and encourage preventive and protective measures; and (4) if such a program is initiated and carried out gradually, it can be expanded as knowledge is gained and experience is appraised, thus eventually making flood insurance coverage available on reasonable terms and conditions to persons who have need for such protection.[4]

In the United States, nine out of every ten natural disasters are flood related.[5] The United States Water Resources Council expects that losses from floods will rise significantly in the near future and estimates that annual property losses will exceed $4.3 billion by the year 2000.[6] Even though seven percent of the nation's lands are located in lands classified by the United States Army Corps of Engineers as floodplain, the disproportionate population living within the floodplain creates the potential flood problems.[7] The Congress has found that, "annual losses throughout the Nation from floods and mudslides are increasing at an alarming rate, largely as a result of the accelerating development of, and concentration of population in, areas of flood and mudslide hazards."[8]

The National Flood Insurance Program (NFIP)[9] is a federal program created to make subsidized flood insurance available to homeowners and businesses located on the nation's coasts and floodplains. Congress created

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4. 42 U.S.C. § 4001 (1982). Congressional findings and declaration of purpose "(a) Necessity and reasons for flood insurance program."

5. *See* NATIONAL SCIENCE FOUND., A REPORT IN FLOOD HAZARD MITIGATION 1-2 (1980).

6. *Id.*

7. Saul Jay Singer, *Flooding the Fifth Amendment: The National Flood Insurance Program and the "Takings" Clause*, 17 B.C. ENVTL. AFF. L. REV. 323, 325 (1990).

8. 42 U.S.C. § 4002(a)(1).

9. 42 U.S.C.A. §§ 4001-4128 (West 1977 & Supp. 1990).

the insurance program in response to several major storms of the mid-1960's. Those storms cost millions of dollars in direct disaster assistance because many oceanfront homeowners were uninsured. Most private insurers, citing high risk, would not insure against flooding.[10] In August 1968, the National Flood Insurance Act of 1968 was enacted as Title XIII of the Housing and Urban Development Act of 1968.[11]

The availability of subsidized flood insurance under the National Flood Insurance Act of 1968 did not, by itself, provide sufficient incentive to attract extensive local community enrollment in the program.[12] Finding a strong public policy favoring participation in a flood insurance plan of national scope in December 1973, Congress passed the Flood Disaster Protection Act of 1973.[13] The 1973 Act sought to significantly enhance the attractiveness of enrollment in the program through a dual scheme of sanctions against both non-participating communities, as a whole, and against flood prone designated property located in an area which is eligible for and participating in the flood insurance program, but which is not covered by flood insurance. The NFIP was again amended in the Housing and Community Development Act of 1977[14] to remove a prohibition against the extension of financing by federally supervised private lending institutions in flood hazard areas of non-participating communities. The amendment left untouched the direct federal assistance sanction which extend to direct federal grant aid as well as to FHA and VA home mortgages.

In 1982, Congress passed the Coastal Barriers Resource Act[15] withdrawing the availability of flood insurance for undeveloped coastal barriers so designated by the Department of the Interior. A major modifica-

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10. In 42 U.S.C. § 4001(b),

> The Congress also finds that (1) many factors have made it uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions; but (2) a program of flood insurance with large-scale participation of the Federal Government and carried out to the maximum extent practicable by the private insurance industry is feasible and can be initiated.

42 U.S.C. § 4001(b).

11. Pub. L. No. 90-448, Title XIII, 82 Stat. 476.

12. *See* S. REP. NO. 93-583, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S.C.C.A.N. 3217, 3220 (cited in Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025, 1027 (D.D.C. 1978), *aff'd*, 598 F.2d 311 (D.C. Cir.), *cert. denied*, 444 U.S. 927 (1979)).

13. Pub. L. No. 90-448, Title XIII, 87 Stat. 975.

14. Pub. L. No. 95-128, § 703, 91 Stat. 1111 (codified as amended at 42 U.S.C. § 4106(b) (1977)).

15. 16 U.S.C. §§ 3501-3510 (1988).

In 1982, Congress passed the Coastal Barriers Resource Act[15] withdrawing the availability of flood insurance for undeveloped coastal barriers so designated by the Department of the Interior. A major modification of NFIP was created in 1983 with the advent of Write-Your-Own (WYO) Program, in which private sector insurers market flood insurance, with the federal government acting as guarantor and reinsurer. WYO policies are sold through 130,000 insurance agents and brokers.[16] As of July, 1991 there were 167 WYO companies, of which eighty-five were actually writing flood policies.[17] WYO coverage totalled $187,462,218,300 as of July 31, 1991, or 85.4% of the total policy-in-force base.[18]

Congress decreed that in order to protect the nation's investment in property that is situated in a known hazardous area, the community in which that property is located must participate in the program to be eligible for federal assistance, and further, that property located in a participating community must be covered by flood insurance not only to be eligible for direct federal assistance, but also to receive mortgage money from a federally supervised private institution.[19] Section 4012a(a) of the NFIP generally provides that no federal agency shall approve any financial assistance for acquisition or construction purposes in any area that has been identified as a special flood hazard area (SFHA) where the NFIP has been make available. Moreover, section 4012a(b) requires that federal agencies responsible for the regulation of banks, thrifts and other lenders to implement regulations to ensure compliance with the requirement of flood insurance in order to receive federal approval of financial assistance.

To participate in the NFIP, communities in designated flood-prone areas must agree to minimize flooding risks by the adoption and enforcement of floodplain regulatory ordinances.[20] Participating communities have

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15. 16 U.S.C. §§ 3501-3510 (1988).

16. *The Flood Insurance, Mitigation, and Erosion Management Act of 1991, 1991 Hearings on S. 1650 Before the Subcomm. on Housing and Urban Affairs of the Comm. on Banking, Housing and Urban Affairs*, 102d Cong., 1st Sess. 170 (1991) (to revise the National Flood Insurance Program to Provide for Mitigation of Potential Flood Damage and Management of Coastal Erosion, Ensure the Financial Soundness of the Program, and Increase Compliance with Mandatory Purchase Requirement, and for Other Purpose) [hereinafter *Senate Hearings on S. 1650*].

17. *Id.*

18. *Id.*

19. *Texas Landowners Rights Ass'n*, 453 F. Supp. at 1028.

20. 42 U.S.C. § 4001(e) (1982). Section 4001(e) states:

> Land use adjustments by State and local governments; development of proposed future construction; assistance of lending and credit institutions; relation of

regulated floodplain land use in a number of ways including banning construction in the floodway, requiring drainage channels, designating detention areas for flood runoffs, enacting grading, construction and building codes, and prohibiting construction below certain flood levels.[21] Within participating communities, NFIP makes subsidized flood insurance available to homeowners located in floodplains for an average cost of $300 per year if the communities have adopted and enforced floodplain regulatory ordinances.[22]

The program has approximately 2.5 million policies in over 18,000 communities in all fifty states, protecting against floods from rivers, lakes and oceans.[23] However, the Flood Insurance Administration estimates that only twenty-five percent of the properties located in flood-prone areas and are eligible for coverage are taking advantage of the availability of federally subsidized insurance.[24] The area covered by NFIP is estimated at 170,000 square miles of coastal land, a tract larger than Montana.[25] To date, NFIP has paid just five percent of claims for coastal damage, while ninety-five percent has gone for interior floods caused by river flooding.[26]

The NFIP collects about $600 million a year in premiums and pays an average of $300 million per year in claims.[27] Its current reserve is $390 million, although some experts have said a major coastal storm could cost in excess of $4 billion.[28] The current cost of federal subsidized flood

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tion, where practicable, away form locations which are threatened by flood hazards, 3) encourage lending and credit institutions, as a matter of national policy, to assist in furthering the objectives of the flood insurance program, 4) assure that any Federal assistance provided under the program will be related closely to all flood-related programs and activities of the Federal Government, and 5) authorize continuing studies of flood hazards in order to provide for a constant reappraisal of the flood insurance program and its effect on land use requirements.

Id.

21. Singer, *supra* note 7, at 323.
22. *Control Some Growth on Vulnerable Beaches*, USA TODAY, Nov. 21, 1991, at 10A.
23. Christopher B. Daly, *Support Ebbs for Waterfront Building in Storms' Wake, Pressure Mounts for Insurance Plan to Control Development in Flood Plain*, WASH. POST, Nov. 26, 1991, at A3. There are about 400,000 flood policies in Dade, Broward and Collier counties. *See* Dennis Cauthon, *Agency Reacts Quickly to Coordinate Relief*, USA TODAY, Aug. 25, 1992, at A4.
24. Singer, *supra* note 7, at 326.
25. *Soaked by Andrew*, USA TODAY, Aug. 26, 1992, at A8.
26. *Id.*
27. Daly, *supra* note 23, at A3.
28. *Id.*

insurance is approximately $950 per year to coastal homeowners, according to C.M. Schauerte, head of the Federal Insurance Administration.[29] However, without the federal subsidy, the same flood insurance would cost the homeowner close to $7,500 per year on the private market, according to Joyce White of Wilshire National Corp., one of the nation's few private providers of flood insurance.[30]

III. Proposed Changes to the NFIP

The Federal Insurance Administration (FIA), the component of the Federal Emergency Management Agency (FEMA) which administers the NFIP,[31] has undertaken many studies which make it clear that the very worst flood damages are yet to come. Sophisticated simulation techniques have indicated that a serious flood risk exists in the United States, and both the private and public interests have not been adequately notified of the risk. In response to perceived problems with the NFIP, bills were introduced in the House of Representatives[32] and the Senate[33] to revise the NFIP to provide for mitigation of potential flood damages, ensure the financial soundness of the program and increase compliance with the mandatory purchase requirement of flood insurance.[34] House Report 1236, which contained a provision to help protect the taxpayer by prohibiting federally backed flood insurance for new development in eroding portions of the nation's shoreline, passed by an overwhelming vote of 388 to 18.[35] However, the Senate version of the House Report 1236 was strongly opposed by The National Association of Homebuilders and the National Association of Realtors since without the availability of federally subsidized flood insurance, private construction and development along the coastal

29. *Congressional Bills Making Waves*, Chicago Tribune, June 28, 1992, at F1.
30. *Id.*
31. All function vested in the Secretary of Housing and Urban Development pursuant to the provisions of the NFIP were transferred to the Director of the Federal Emergency Management Agency. Reorg. Plan No. 3 of 1978, 43 Fed. Reg. 41943 (1978), *reprinted in* 5 U.S.C. app. at 1372 (1988), *and in* 92 Stat. 3788 (1978).
32. H.R. Rep. No. 1236, 102d Cong., 1st Sess. (1990).
33. S. Rep. No. 1650, 101st Cong., 1st Sess. (1989).
34. *Senate Hearings on S. 1650*, *supra* note 16.
35. Beth Millemann, *U.S. Must Reform our Flood Insurance Program*, Ariz. Rep., Sept. 2, 1992, Editorial.

areas becomes prohibitively expensive.[36] In response to the opposition of Senate Report 1650, Senator John Kerry (D-Mass.) introduced compromise legislation[37] in June of 1992 that would provide more flexibility to the owners of current shore development.[38] Senate Report 2907 kept many of the proposed revisions to the NFIP contained in Senate Report 1650, but modified many controversial proposals concerning erosion management.[39]

Compliance with the requirements of the NFIP is a major concern since only about fifteen percent of properties located a floodplain are currently insured. Under the proposed legislation, banks and other federally regulated lending institutions must ascertain that all properties in flood-prone areas have flood insurance, if such insurance is available.[40] Lenders must periodically review their loan portfolio to ensure compliance with the NFIP and are required to escrow for flood insurance premiums in cases where they already escrow for taxes and other insurance premiums.[41] The proposed legislation provides a civil penalty to the lender of $350 per violation (not to exceed $100,000 a year per lender) if such lender has a pattern of neglecting flood insurance compliance. The legislation also provides for continuing compliance with the NFIP in the event of a sale or transfer of a loan by requiring that lenders notify the purchaser of a mortgage that the property is located in a SFHA prior to executing a mortgage on a property in a SFHA and requires records retention to prove compliance with this rule.[42]

The current maximum flood insurance coverage purchased through the NFIP available for a single family home is $185,000.[43] This amount has not been adjusted since 1978 and consequently has not kept pace with inflation. The proposed changes would raise the amount of flood insurance for single family homes to $250,000.[44]

Another proposed change in the NFIP would create a Community Rating System (CRS) program which would evaluate measures adopted by communities to provide for adequate land use control, to promote flood

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36. *Id.*
37. S. REP. NO. 2907, 101st Cong., 2d Sess. (1990).
38. *Id.*
39. *The National Flood Insurance Reform Act of 1992: Hearings on S. 2907 Before the Subcomm. on Housing and Urban Affairs*, 102d Cong., 2d Sess. (1992) [hereinafter *Senate Hearing on S. 2907*].
40. *Senate Hearings on S. 1650*, 102d Cong., 1st Sess. 238 (1991).
41. *Id.* at 244.
42. *Id.* at 250.
43. 42 U.S.C. § 4013 (1988).
44. *Senate Hearings on S. 1650*, 102d Cong., 1st Sess. 302 (1991).

insurance awareness and to complement adoption of more effective measures for floodplain and coastal erosion management.[45] Incentives in the form of lower premiums rates for flood insurance coverage would be available to property owners in communities that have adopted and enforced the goals of the CRS.[46] Additional adjustments in premium rates would be available in communities where measures relating to the protection of natural and beneficial floodplain functions have been adopted.[47]

Additionally, Senate Report 1650 proposed a national flood mitigation program, funded by a five dollar surcharge on each flood insurance policy, which would make grants to states, communities or people who take steps to reduce the impact of expected floods.[48] To be eligible for these funds, communities would have to engage in flood mitigation activities such as elevation, relocation, flood-proofing and acquisition of properties where flood damage has occurred since December 31, 1977 and where the communities are in full compliance with the requirements of the NFIP.

The most important and controversial proposal of Senate Report 1650 concerns the establishment of a program to reduce coastal erosion. Under the proposed erosion management program, FEMA will identify erosion zones along U.S. coastal and Great Lakes coasts by delineating 10-year, thiryt-year and sixty-year erosion setbacks.[49] The setbacks define the area that is likely to erode in ten, thirty and sixty years, respectively, based on historic average annual rate of erosion for that area.[50] The ten-year erosion setback applies to all buildings, while the thirty-year setback applies to small buildings (one to four family dwelling units), and the sixty-year setback applies to all other buildings.[51]

In the ten-year setback zones, existing buildings are presumed to be "in danger of imminent collapse," and owners can obtain grants to cover the cost of relocation (forty percent of the value of the building) or demolition (forty percent of the value of the building).[52] Relocated buildings would have to be placed landward of the applicable setback to continue receiving flood insurance benefits. For example, if a small home is in the ten-year zone, it must be relocated to at least the thirty-year zone. If a property

45. *Id.* at 261.
46. *Id.*
47. *Id.* at 261-62.
48. *Id.* at 275.
49. *Senate Hearings on S. 1650*, 102d Cong., 1st Sess. 281 (1991).
50. *Id.*
51. *Id.* at 282.
52. *Id.* at 286.

owner who is a flood policy holder chooses to neither relocate nor demolish within two years of notification, such policy holder will be allowed only one more claim of up to forty percent of the building's value on the flood insurance policy after which the policy would be canceled.[53]

In participating communities, no new construction or "substantial improvements" (anything over fifty percent on the seaward side of the thirty-year erosion setback or, if applicable, the sixty-year erosion setback.[54] No new buildings would be permitted seaward of the thirty-year zone, and no large buildings seaward of the sixty-year zone. Moreover, participating communities would also be required to agree that any new small buildings built between the thirty and sixty-year zones would have to be readily movable.[55]

If a community does not choose to participate (participation is voluntary) flood insurance will not be available for new construction or substantial improvement of small buildings seaward of the thirty-year setback zone, or for larger buildings seaward of the sixty-year zone.[56] Owners of buildings in the ten-year setback zone would be allowed only one claim of up to forty percent of the building before the flood insurance policy is canceled. No additional funds would be made available for relocation or demolition. Buildings built before the Flood Insurance Rate Maps were issued for an area within the erosion zones will likely be subject to increase premium rates closer to actuarial until their community joins the management program. No mitigation assistance would be available until a community chooses to participate in the erosion management program.

The opposition to several of the proposals contained in the Erosion Management Program by several powerful groups such as The National Association of Homebuilders and the National Association of Realtors lead Senator Kerry to introduce compromise legislation to address the concerns of these groups.[57] Senate Report 2907 will not require owners to relocate or demolish their homes within two years or face the loss of insurance, communities will not have to adopt erosion management as a requirement for participating in the program, and development of the beachfront areas will be allowed.[58]

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53. *Id.* at 287.
54. *Senate Hearings on S. 1650*, 102d Cong., 1st Sess. 294 (1991).
55. *Id.*
56. *Id.*
57. Millemann, *supra* note 35.
58. *Senate Hearings on S. 2907*, 102d Cong., 2d Sess. 10 (1992).

Another proposal in Senate Report 2907 could potentially help homeowners who suffered damage of fifty percent or greater than the home's market value and live below the flood level set by the federal government. Under the current rules of the NFIP, homeowners cannot rebuild their homes unless they raise the elevation to conform with the federal flood criteria.[59] Several hundred homeowners with homes located in South Florida that were substantially damaged by Hurricane Andrew are currently facing this problem.[60] In many cases, the costs to raise the elevation of a home to conform to the requirements of the NFIP are prohibitive.[61] These costs are not currently covered by existing homeowner or flood policies.[62] However, one of the proposals in Senate Report 2907 would provide Increased Cost of Construction coverage to be included with the flood insurance policy which would allow a policy holder who suffers substantial losses to get benefits to rebuild to the current performance standards of the NFIP which will diminish or eliminate future flood losses.[63]

IV. "TAKINGS" ISSUES AND THE NFIP

The courts have clearly held that the NFIP is constitutional.[64] *Texas Landowners Rights Ass'n v. Harris* held that: 1) the NFIP did not violate sovereign powers of state and local government or the principles of federalism embodied in the Tenth Amendment; 2) the diminution of land values attributable to the unavailability of certain conventional avenues of financial assistance and mortgage money as a result of sanction imposed by statute on states that did not participate in the NFIP do not constitute a "taking" of property without payment of just compensation, and 3) the NFIP was a rational exercise of Congress' powers and was reasonably related to the legitimate national goal of protecting property owners and the United States against flood damage.

The United States Constitution prohibits a taking of private property for public use or the deprivation of property without due process of law without

59. Don Finefrock, *Rule May Doom Saga Bay Homes*, MIAMI HERALD, Sept. 25, 1992, at A16.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Senate Hearings on S. 2907*, 102d Cong., 2d Sess. 16 (1992).
64. *See Texas Landowners Rights Ass'n*, 453 F. Supp. at 1028-33.

just compensation.[65] The Supreme Court, in *Pennsylvania Coal Co. v. Mahon*, stated, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking," thus acknowledging that government regulation could result in a Fifth Amendment taking of property.[66] The purpose of the Fifth Amendment private property rights guarantee is to prevent the government from forcing some people to pay the costs for the public good, when these costs should be borne by the public as a whole.[67] Prior to the Court's decision in *Pennsylvania Coal Co. v. Mahon*, regulation of the use of property through the exercise of the police power would probably not constitute a taking. The Court, in *Mugler v. Kansas*, explained the characteristics distinguishing a taking from a non-taking:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property . . . . The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals or the safety of the public, is not and, consistently with the existence and safety of organized society, cannot be burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury on the community.[68]

The use of this nuisance abatement theory utilized in *Mugler* to uphold regulations against taking challenges is often criticized because of the false underlying assumption the private homeowner is responsible for the public nuisance and must therefore be financially responsible.[69] In the context of the NFIP, a homeowner constructing a home in a floodplain before a community opted to participate in the NFIP would be unreasonably transformed into a wrongdoer, and absorb serious financial loss simply because the community enacted floodplain regulation.[70] By utilizing the

65. U.S. CONST. amends. V, XIV.
66. 260 U.S. 393, 415 (1922).
67. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978).
68. 123 U.S. 623, 668-89 (1887).
69. Singer, *supra* note 7, at 342.
70. *Id.*

nuisance abatement theory in this manner, innocent parties would be harmed by these arbitrary results.[71]

Regulatory takings cases based on facial challenges to a statute or regulation have been determined by applying a two-prong test to analyze whether: 1) the regulation substantially advances a legitimate state interest; and 2) does the regulation deny all economically viable uses of the property.[72] In *Agins*, the City of Tiburon limited the development of the plaintiff's five-acre lot to a maximum of five single-family homes through density restrictions. In considering whether the ordinance limiting development prevented the best use of the land or extinguished a fundamental attribute of ownership, the Court held that the general plan advanced the legitimate state interest of protecting against the ills of urbanization.[73] The ordinance did not impose a burden solely on one landowner since it affected development generally; and therefore, the public did not benefit at the expense of a few. In addition, the ordinance did not prevent the best use of land or extinguish a fundamental attribute of ownership.[74]

The test in *Agins* was modified in *Nollan v. California Coastal Commission*. The Court formulated the "substantial relationship" test which states that the government's power to forbid particular land uses to facilitate advancement of some legitimate police power purpose is contingent upon the government's ability to demonstrate the prohibited land use furthers the same purpose which the government had advanced as justification.[75]

In *Nollan*, the Coastal Commission required property owners to dedicate a public easement to provide beach access as a condition to receiving a permit for an addition to their home.[76] The easement requirement was to further the state interest in preserving the public's view of the ocean. The construction of homes and development of the coastal constitutes a "psychological barrier" severely restricting the public's ingress to and egress from the beach.[77] The Court ruled that the state cannot escape compensation by the indirect imposition of a requirement when direct imposition of the requirement would require just compensation.[78]

71. *Id.*
72. Agins v. City of Tiburon, 447 U.S. 255, 261 (1980).
73. *Id.*
74. *Id.* at 262.
75. 483 U.S. 825, 837 (1987).
76. *Id.* at 828.
77. *Id.* at 828-29.
78. *Id.* at 831.

The most common theory used in regulatory takings challenges focuses on the following factors: 1) The character of the governmental action, e.g., a land-use restriction that allegedly protects the health and safety of the greater public; 2) whether there is interference with reasonable investment-backed expectations; and 3) the severity of the economic impact.[79]

In *Penn Central*, the owner entered into a lease agreement with a property development company to construct an office building above the terminal. Because Penn Central Terminal was designated as a landmark by New York City's Landmark Preservation Commission, the planning commission denied the developer permission to build due to the detrimental effect on the terminal's historic character.[80] After examining the character of the action and the nature of the interference with the rights in the parcel as a whole, the Court stated the diminution in the value of the property alone, even by as much as eighty-seven percent did not constitute a taking.[81]

In determining Penn Central's investment-backed expectations, the Court concluded that the owner's primary expectation of operating a transportation terminal was preserved since a reasonable return could still be made.[82] Penn Central was not singled out because the law was broadly aimed at many historical landmarks for the benefit of many and the government was not appropriating private property for its own use, therefore, there was no taking.[83]

The problem with using this approach in regulatory taking challenges is that it does not provide a model that FEMA or other regulators can rely on to determine precisely where diminution of value has sufficiently occurred to warrant finding a taking.[84] The circumstances under which the government can prohibit all economically beneficial or productive use of property without being required to provide the property owner with just compensation,[85] has been changed by a recent ruling by the Supreme

79. *See Penn Cent. Transp. Co.*, 438 U.S. at 104.
80. *Id.* at 118-19.
81. *Id.* at 130-31.
82. *Id.* at 136.
83. *Id.* at 134-35.
84. *See Penn Cent. Transp. Co.*, 438 U.S. at 124 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)). "[T]his Court has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government." *Id.*
85. Gregory R. McClintock & Edward P. Manning, *An Update on Regulatory Takings*, LITIGATION 1992, at 723 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5139, 1992).

Court.[86]

In *Lucas*, the petitioner purchased two undeveloped lots for $975,000 with the intention of building single family homes.[87] At the time of purchase, there were no legal restrictions prohibiting construction of homes. However, two years later, the South Carolina Legislature passed the Beachfront Management Act which effectively barred any construction on the two parcels. The trial court found that the properties had been "taken" by operation of the Act and awarded "just compensation" of approximately $1.2 million.[88] The South Carolina Supreme Court reversed, concluding that based on "uncontested . . . findings," the statute was enacted to prevent the infliction of harm on the public and this could be done without the payment of compensation.[89]

Prior to the *Lucas* decision, states have relied on the ability of state legislatures, cities and counties to make legislative findings that certain activities were nuisances subject to abatement without just compensation.[90] The Court stated that in many prior opinions there was the suggestion that "harmful or noxious uses" of property may be prohibited or limited by government regulation without requiring compensation to the owner.[91] However, the Court pointed out that "prevention of harmful use" was only a justification to allow any regulatory diminution in value without compensation and the noxious-use logic does not allow courts to "distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation."[92] The Court was clear that the legislature could not rely on the noxious-use argument to justify a departure from the rule that total regulatory takings must be compensated.[93] The Court concluded that in order to use nuisance law to preclude all economically beneficial use of land without compensation to the owner, an "inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[94] Although there are no Fifth Amendment problems under NFIP as currently constituted, depending on the

86. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).
87. *Id.* at 2889.
88. *Id.* at 2890.
89. *Id.*
90. Michael M. Berger, *Recent Takings and Eminent Domain Cases*, c750 ALI-ABA 75 (1992).
91. *Lucas*, 112 S. Ct. at 2890; *see also* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-35 (1987); *Penn Cent. Transp. Co.*, 438 U.S. at 125.
92. *Lucas*, 112 S. Ct. at 2898-99.
93. *Id.* at 2899.
94. *Id.*

scope of new amendments, Fifth Amendment concerns may come to the forefront.

V. Conclusion

The National Flood Insurance Program has become increasingly controversial. It has become a rallying point for environmental groups, such as the National Wildlife Federation, which has asserted that the NFIP does not adequately protect public safety, taxpayers, and the environment. On the other side, the National Board of Realtors has argued that certain proposals to amend the NFIP, particularly relating to coastal erosion zones, potentially raise Fifth Amendment concerns.

We should not forget that the reason for the passage of the NFIP was to protect a significant part of the population from economic disaster and to encourage flood mitigation. At the least, reforms are needed to ensure a higher rate of compliance by property owners and lenders and steps should be taken to shore up the NFIP's fiscal safety and soundness. In the wake of Hurricane Andrew the urgency of these reforms is clear.

FLORIDA'S PATH OF DESTRUCTION—HURRICANE ANDREW (Historic Publications, Aug. 1992).