

Land Use Law Update: Is the Tide Turning Toward Municipal Liability for Failure to Adapt to Climate Change?

By Sarah J. Adams-Schoen

Local governments are often referred to as “on the front line” of climate change adaptation. This characterization makes sense given that “[l]and use patterns are determined, infrastructure is designed and provided, and many other development issues are decided at the local level, where natural hazards are experienced and losses are suffered most directly.”¹



Furthermore, local governments have an array of tools in their toolbox that can help adapt their communities to climate change-related conditions including building codes; land use, zoning, and subdivision regulations; comprehensive, capital improvement, transportation, floodplain management, storm-water management, and open space plans; facilities needs studies; population growth and future development studies; and economic development plans. Municipal regulation of the form and placement of building stock in particular offers an opportunity to create more resilient infrastructure and patterns of development; whereas, failure to proactively plan for rising seas, higher storm surges and more frequent and intense storms will result in further investment in infrastructure and patterns of development that, at best, fail to adapt to hazards, and, at worst, exacerbate hazards.²

The current state of the law, however, creates uncertainty about whether municipalities have a duty to mitigate foreseeable climate related hazards. The International Panel on Climate Change’s most recent projections suggest that failure to promptly and aggressively mitigate and adapt to climate change will significantly diminish the ability of coastal communities to moderate harms like flooding and foreclose some opportunities to do so in the future.³ Given the clear role for local governments in adaptation planning and implementation, some question whether local governments will soon face liability for failure to plan for and implement hazard mitigation measures.⁴ Because the consequences of destructive storms are foreseeable and at least in part attributable to failures in the legal system, Professor Maxine Burkett argues that local governments could face tort liability for failure to adapt to climate change.⁵

So far, in the United States, plaintiffs’ claims against local governments have not extended to negligent failure to adapt to climate change. Rather, typical claims have involved plaintiffs injured by flooding alleging that the municipalities’ negligent design, construction, or operation of flood control structures caused the plaintiffs’ injuries.⁶ Liability in these cases has tended to hinge on whether the municipality’s conduct was statutorily immune,⁷ and, if it was not, whether the plaintiffs proffered sufficient proof of negligence and causation.⁸ In at least one instance, plaintiffs injured by flooding brought an action against a county government claiming that the county’s negligent regulation of development *on an adjacent property* caused plaintiffs’ damages.⁹ The court in this case held that the county owed no duty to homeowners to ensure that development of an adjoining subdivision would not create a risk of flooding the homeowners’ property.

The Fifth Circuit ultimately rejected tort theories of liability in the Katrina litigation as violative of governmental immunity under the Flood Control Act and discretionary-function exception to the Federal Tort Claims Act.¹⁰ But, in the U.S. Court of Federal Claims case *St. Bernard Parish Government v. United States*, the court essentially expanded Takings Clause liability to encompass governmental negligence that exacerbates weather-related damage to property.¹¹ Relying in large part on the U.S. Supreme Court’s 2012 decision in *Arkansas Game & Fish Commission*,¹² the court ruled in *St. Bernard Parish* that the U.S. Army Corps of Engineers’ failure to properly maintain the Mississippi River–Gulf Outlet (“MR-GO”), a seventy-six mile long navigational channel constructed, expanded and operated by the Corps, resulted in a taking of private property without just compensation in violation of the Takings Clause because it exacerbated flood damage from Hurricane Katrina and several subsequent storms, and, although only temporarily, wrongfully deprived landowners of the use of their property. Because *St. Bernard Parish* involved affirmative governmental actions (i.e., negligent expansion and maintenance of the navigational channel), the case leaves open the question of whether a government entity could be liable for failing to prepare for sea level rise, storm surges and other climate-related risks.¹³

Notwithstanding the lack of clarity in the law, some municipalities have proactively begun to plan for and implement hazard mitigation measures. Steps

that coastal municipalities can and are taking include: (1) reviewing waterfront development plans and related regulations to assess whether development and rebuilding is being allowed or even encouraged in areas that are currently vulnerable or will become vulnerable within the lifespan of the development, and whether the development is increasing the vulnerability of adjacent areas; (2) amending structure elevation requirements to reduce the vulnerability of the structure throughout its entire useful life, not just for the next five, ten or twenty years; (3) assessing zoning and building codes to determine whether they impose requirements on the construction of elevated structures that increase local flood risk by, for example, increasing the impermeable surface areas; and (4) educating constituents on scientific projections regarding future flood and other related risks so that they can make prudent building and buying decisions. Because we can anticipate the addition of substantial new building stock and infrastructure over the next few decades,¹⁴ local governments that regulate the placement and, in some respects, design aspects of building stock have an opportunity—if not a duty—to avoid locking in infrastructure that increases flood and other related risks.

Endnotes

1. Patricia Salkin, *Sustainability at the Edge: The Opportunity and Responsibility of Local Governments to Most Effectively Plan for Natural Disaster Mitigation*, 38 ENVTL L.R. 10158, 10159 (2008).
2. See REID EWING ET AL., GROWING COOLER: EVIDENCE ON URBAN DEVELOPMENT AND CLIMATE CHANGE 8 (2008) (reporting that U.S. population is expected to grow to 420 million by 2050, resulting in projected construction between 2007 and 2050 of 89 million new or replaced homes and 190 billion square feet of new offices, institutions, stores, and other nonresidential buildings); see also Salkin, *supra* note 1, at 10162-69; John R. Nolon, *Disaster Mitigation Through Land Use Strategies*, 23 PACE ENVTL. L. REV. 959, 976-77 (2006).
3. See INTERNATIONAL PANEL ON CLIMATE CHANGE (IPCC), CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY: SUMMARY FOR POLICYMAKERS 23 (2014), available at http://ipcc-wg2.gov/AR5/images/uploads/WG2AR5_SPM_FINAL.pdf (table depicting projection that even highly adapted North American communities will face medium to high risks under scenarios of global mean temperature increases at 2°C and 4°C above preindustrial levels); see also Sarah J. Adams-Schoen, *Sink or Swim: In Search of a Model for Coastal City Climate Resilience*, 40 COLUMBIA J. ENVTL. L. 433 (2015) (concluding that “failure to promptly and aggressively mitigate climate change will likely significantly diminish the ability of coastal communities to moderate harms like flooding and foreclose opportunities to do so in the future” and citing sources (footnotes omitted)).
4. See, e.g., Maxine Burkett, *Duty and Breach in an Era of Uncertainty: Local Government Liability for Failure to Adapt to Climate Change*, 20 GEO. MASON L. REV. 775, 780-81 (2013).
5. *Id.*

6. See, e.g., *Vermef v. City of Boulder City*, 80 P.3d 445, 445 (Nev. 2003), *abrogated by* *ASAP Storage, Inc. v. City of Sparks*, 173 P.3d 734 (Nev. 2007); *Walter Legge Co. v. City of Peekskill*, 619 N.Y.S.2d 771, 771-72 (N.Y. App. Div. 1994).
7. See, e.g., *Vermef*, 80 P.3d at 553 (ruling on appeal of summary judgment that city was not entitled to immunity for damages occurring during flood under statute immunizing government entities from liability arising out of emergency management activities where damage was due to pre-emergency installation of the drainage channel), *abrogated by* *ASAP Storage*, 80 P.3d at 744-45 (ruling that statute immunizing government from liability relating to emergency management activities creates immunity for emergency responses and emergency preparation activities); see also *In re Katrina Canal Breaches Consol. Litig.*, 577 F. Supp. 2d 802, 807 (E.D. La. 2008) (ruling that genuine issues of material fact existed as to whether damage from flooding was caused by governmental negligence in design, construction, maintenance, and operation of a navigational channel, including resulting destruction of flood-mitigating wetlands, as opposed to negligence with regard to federal flood control project, which would be subject to statutory governmental immunity); *In re Katrina Canal Breaches Consol. Litig.*, 696 F.3d 436 (5th Cir. 2012) (holding that the government was immunized against claims for flooding damage).
8. *Walter Legge Co.*, 210 A.D.2d at 317 (affirming order granting judgment as matter of law for city where there was insufficient proof of causation and negligence in action against city for damage to property allegedly caused by flooding when natural waterway used as part of municipal drainage system overflowed).
9. See *Cootey v. Sun Inv., Inc.*, 718 P.2d 1086, 1088-89 (Haw. 1986).
10. 696 F.3d at 444 (immunity under FCA extends to claims stemming from levee breaches caused by dredging of canal); *id.* at 449-52 (discretionary function exception to FTCA extends to remaining claims).
11. No. 05-1119L, 2015 WL 2058969 (Fed. Cl. May 1, 2015).
12. 133 S. Ct. 511, 515 (2012).
13. See generally Christopher Serkin, *Passive Takings: The State’s Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345 (2014); John Echeverria, *Ruling in MR-GO Takings Lawsuit*, TAKINGS LITIGATION: A BLOG ABOUT TAKINGS LAW, May 2, 2015, <http://takingslitigation.com/2015/05/02/ruling-in-mr-go-takings-lawsuit/> (“the decision would appear to convert the Federal Tort Claims Act and its carefully crafted governmental immunities into a dead letter, at least in the flooding context”).
14. See EWING ET AL., *supra* note 2, at 8.

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