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## COMMENTS

### COUNTY AND MUNICIPAL FLOOD PLAIN ZONING UNDER EXISTING WYOMING LEGISLATION\*

Though Wyoming does not have the dramatic floods associated with the more humid East and Midwest, it is hardly free from floods or the associated damage. For example, Sheridan has experienced some 25 floods since 1883,<sup>1</sup> and Dry Creek in Cheyenne flooded in 1896, 1926, 1929, 1946, and 1955.<sup>2</sup> As a result, a significant effort has been made in Wyoming to control flood damage. A pamphlet published by the U.S. Army Corps of Engineers concerning Wyoming water resource development<sup>3</sup> recites seven completed flood control projects credited with preventing in excess of 15,000,000 dollars in flood damage and two additional projects authorized but deferred. The pamphlet also reports authorization to compile and publish "Flood Plain Information Reports" for five Wyoming streams affecting the cities of Cheyenne and Casper, three of which are completed.<sup>4</sup> The recitation of purpose in these reports serves to introduce the subject of this paper:

[The report] is provided to local officials for their guidance in planning the use and regulation of the flood plain and as public information regarding the flood hazards. Avoidance of flood problems might be accomplished through zoning and subdivision regulations, construction of flood protection works, or a combination of the two approaches.<sup>5</sup>

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1. WATER RESOURCES DEVELOPMENT BY THE UNITED STATES ARMY CORPS OF ENGINEERS IN WYOMING 7 (Jan. 1969). This pamphlet is available from: Flood Plain Management Division, Omaha District, U.S. Army Corps of Engineers, 215 North 17th St., Omaha, Nebr. 68102.

2. 1 UNITED STATES ARMY ENGINEER DISTRICT, OMAHA, FLOOD PLAIN INFORMATION—DRY CREEK, CHEYENNE, WYOMING (Apr. 1969).

3. *Supra* note 1.

4. DRY CREEK, CHEYENNE, WYOMING, *supra* note 2; 1 UNITED STATES ARMY ENGINEER DISTRICT, OMAHA, FLOOD PLAIN INFORMATION—CROW CREEK, CHEYENNE, WYOMING (Apr. 1969); 1 UNITED STATES ARMY ENGINEER DISTRICT, OMAHA, FLOOD PLAIN INFORMATION—GARDEN CREEK, CASPER, WYOMING (Apr. 1969).

5. DRY CREEK, CHEYENNE, WYOMING, *supra* note 2, at i.

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This would seem to be a clear indication by the U.S. Army Corps of Engineers that land use restriction on flood plains is a necessary supplement to the planned and present flood control projects in Wyoming. Yet, the substantial flood control effort in Wyoming is unaccompanied by any significant program of flood plain zoning. On the national level, it is well documented that flood damage cannot be prevented by flood control projects alone;<sup>6</sup> that this lesson is applicable to Wyoming is apparent from the Flood Plain Information Reports. It is the purpose of this paper, following a brief survey of the concept of flood plain zoning, to explore the possibilities of flood plain zoning in Wyoming under existing legislation.

Flood plain zoning is simply a limitation of the use of flood-prone areas (i.e. flood plains) to uses that are not susceptible to substantial flood damage. For example, flood plain zoning might limit the use of a particular flood plain area to parks or parking lots rather than allowing the construction of high cost residential or industrial facilities. Like any other zoning, it is a restriction or regulation of an individual's use of his land and, whether at the municipal, county or state level, is founded on the police power of the state.<sup>7</sup> Accordingly, it is subject to the constitutional restrictions on that power: that it not infringe on the constitutional guarantees of due process or equal protection. Most simply stated, the due process guarantee imposes the requirement that the zoning be reasonable in both purpose and application, while the equal protection guarantee requires that those similarly situated receive similar treatment. Several articles have dealt extensively with those constitutional problems of flood plain zoning and indicate that they are not a substantial impediment to effective flood plain zoning.<sup>8</sup> The problems of equal protection and reasonable application are solved through proper drafting, and the basic constitutionality of purpose is readily

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6. HOUSE COMM. OF PUBLIC WORKS, TASK FORCE ON FEDERAL FLOOD CONTROL POLICY, REPORT ON A UNIFIED NATIONAL PROGRAM FOR MANAGING FLOOD LOSSES, H.R. Doc. No. 465, 89th Cong., 2d Sess. (1966).

7. *American Land Co. v. City of Keene*, 41 F.2d 484 (1st Cir. 1930); 1 ANDERSON, *AMERICAN LAW OF ZONING* § 3.01 (1968).

8. Dunham, *Flood Control Via the Police Power*, 107 U. PA. L. REV. 1098 (1959); Note, *Flood Plain Zoning for Flood Loss Control*, 50 IOWA L. REV. 552 (1965).

established by relating the three objectives of flood plain zoning to the general welfare.<sup>9</sup> A brief look at these objectives will reveal a more explicit rationale for flood plain zoning and how it relates to the general welfare.

One objective of flood plain zoning is to prevent the erection of buildings or structures in the flood channel or floodway which would impede or constrict the flow of flood waters and thereby raise flood levels. Obstructions at one point on a stream which raise the flood level at other points may cause or at least increase damage at those other places. In effect, such channel encroachment is the use of one person's land (where the impeding structure is located) to the detriment of another's land (an upstream point where the flood level is raised), as in the common law nuisance concept. As a result, most flood plain zoning directed at preventing channel encroachment is merely a codification of the nuisance concept as applied particularly to construction in floodways.<sup>10</sup>

The prevention of self-imposed injury is a second objective of flood plain zoning. It assumes that for several reasons individuals will invest in flood plains without a true appreciation for the flood hazard<sup>11</sup> and, as a result, suffer injury far in excess of their expectations. The objective is to prevent such self-imposed injury. This by itself, however, is not sufficient to justify the exercise of the police power in restricting an individual's use of his lands. But, if the flood plain user is unable, rather than unwilling, to protect himself from an unwise investment in flood plain property, the police power may be invoked to protect him. Such inability stems from two primary causes: lack of adequate information as to the true nature of the flood hazard, and misrepresentation of the hazard by ignorant or unscrupulous land developers.<sup>12</sup> It is upon these two deficiencies that this objective is founded.

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9. Dunham, *supra* note 8; Hines, Howe & Montgomery, *Suggestions for a Model Flood Plain Zoning Ordinance*, 5 LAND & WATER L. REV. 321 (1970); Note, *Flood Plain Zoning for Flood Loss Control*, 50 IOWA L. REV. 552 (1965).

10. This concept is explored and developed in Beuchert, *State Regulation of Channel Encroachments*, 4 NATURAL RESOURCES J. 486 (1965); see also Dunham, *supra* note 8, at 1112; Note, *Flood Plain Zoning for Flood Loss Control*, 50 IOWA L. REV. 552, 569 (1965).

11. HOUSE COMM. OF PUBLIC WORKS, *supra* note 6.

12. Dunham, *supra* note 8, at 1113.

A final but most significant objective of restricting the use of flood plains is the reduction of public expenditures. This is effected by flood plain zoning in two ways. First, the demand for public monies for emergency flood relief would be substantially curtailed, and second, the expenditures for building expensive flood control projects to protect development on unprotected flood plains would be reduced. To make clear the rationale behind these objectives, an elementary statement of the economics of flood plain restriction versus flood control is necessary.

As a general proposition, when the use of land is restricted, its commercial value is reduced. If then property, because of a significant flood hazard, is useful for only limited types of activity, it is of less value than if its use were unrestricted. As noted earlier, however, the hazards of potential flooding may go either unnoted or unheeded, and the apparent value of the land is increased. Flood plain zoning forces the recognition of this hazard and in turn depresses the price of the land to its real value, while flood control projects by reducing the risk of flood increase the land value, an increase that generally accrues to private landowners at public expense. Conversely, if the land is extensively developed without flood control works, the equivalent public expense is eventually incurred through emergency flood relief and rehabilitation expenditures or indirectly through federal flood insurance subsidies.<sup>13</sup> In either case, the value of private land is inflated at public expense. That this is a legitimate public policy is not questioned, but it should be explicit, and the costs should be commensurate with the increases in value. Unfortunately, when flood plain development precedes the flood control works and forces their construction without an examination of the alternative of restricting development, hindsight often discloses that the cost of the flood control projects far exceeds what would have been the cost of restricting the use of the land to development less susceptible to flood damage. An objective, then, of flood plain zoning is to prevent the development that forces the expenditure of public funds for flood relief or for construction of flood control projects when they

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13. National Flood Insurance Act, 42 U.S.C. § 4001 (1968).

are not economically justified. And, of course, in the absence of a policy to increase private land values at public expense, flood plain zoning can be used to force the market value in line with its real worth in light of the flood hazard.

Such are the three basic policy objectives—prevention of channel encroachment; prevention of self-imposed harm; and reduction of public expenditures—which underlie the ultimate purpose of reducing flood damage. To what extent and at what level can these policies be implemented in Wyoming?

As has been noted, flood plain zoning is derivative of the police power of the state,<sup>14</sup> a power peculiar to the state which does not inure to lower levels of government in the absence of express delegation. Therefore, implementation of flood plain zoning at the county or municipal level must rest on enabling legislation delegating the appropriate power, while at the state level the power exists and may be exercised, given the appropriate legislative intent. In neither case has the Wyoming legislature expressly addressed the question of flood plain zoning. At the state level, there seems to be no statutory language which could be reasonably construed to allow actual zoning. However, authority to assist counties or cities in planning and developing of local flood plain zoning could probably be implied from the legislation creating and tasking the Department of Economic Planning and Development.<sup>15</sup> At the county and municipal level there is clearly sufficient authority, founded in the general welfare provisions in the general zoning enabling statutes, to allow implementation of flood plain zoning.

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14. *Supra* note 7.

15. The purpose of the Department of Economic Planning and Development (hereinafter referred to as DEPAD) as delineated in the statute creating it, is "the planning for and the development of the physical and economic resources of the state." WYO. STAT. § 9-160.19 (Supp. 1971). More specifically the Executive Director of DEPAD is tasked to "make such investigations and prepare such plans and specifications for development as may be deemed proper in connection with any resource of the state. . . . [and] [e]nter into contracts or agreements with . . . county, city, towns, or other legal subdivisions . . . for the conduct or execution of planning and investigations for the physical and economic development of Wyoming", and finally to "finance or assist the financing of any such projects and plans." WYO. STAT. 9-160.29 (Supp. 1971). Given the initiative, this broad authority seems more than adequate to allow DEPAD to undertake extensive research and planning into flood plain zoning for implementation at the county or municipal level.

The pertinent section of the municipal enabling legislation is taken from the Standard Zoning Act:

For the promotion of health, safety, morals and the general welfare of the community, the governing body of any city or town may regulate or restrict by ordinance . . . the location and use of buildings, structures and land.<sup>16</sup>

The sections in the county enabling legislation are a little different, but have the same essential elements:

In order to promote the public health, safety, morals and general welfare the county board of commissioners . . . is authorized to regulate and to restrict the location and use of buildings and structures and the use, condition of, use or occupancy of lands.<sup>17</sup>

Accepting generally the validity of zoning based on this language,<sup>18</sup> flood plain zoning in particular is justified as relating to the general welfare as previously discussed. Even though several authors have recommended minor changes to expressly provide for flood plain zoning, they have all acknowledged the sufficiency of the type of wording that appears in the Wyoming Statutes.<sup>19</sup> Additionally, they have recognized the virtues of flexibility of the broad authority derivative of the general welfare clause over some more limiting but explicit language. In addition to the quoted statute, the municipal enabling statutes contain another provision which reinforces the conclusion that flood plain zoning would be a legitimate exercise of the power delegated:

All regulations shall be made with reasonable consideration . . . of the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of the land.<sup>20</sup>

This language parallels the basic philosophy of flood plain zoning: to direct the use of flood plains to those uses most suitable to an area characterized by flood hazard.

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16. WYO. STAT. § 15.1-83 (1957).

17. WYO. STAT. § 18-289.1 (Supp. 1971).

18. *George v. Hull*, 65 Wyo. 251, 199 P.2d 832 (1948).

19. *Dunham*, *supra* note 8, at 1120; *Hines, Howe & Montgomery*, *supra* note 9, at 378; Note, *Flood Plain Zoning for Flood Loss Control*, 50 IOWA L. REV. 552, 556 (1965).

20. WYO. STAT. § 15.1-85 (1957).

It is worthy to note that at neither level is zoning regulation or restriction, for whatever purpose, mandatory. The enabling statutes state that the board of county commissioners "shall be and hereby *is authorized*"<sup>21</sup> and "the governing body of any city or town *may regulate and restrict.*"<sup>22</sup> This would apparently preclude any mandamus action to force flood plain zoning, whatever the need. Given, though, the enactment of flood plain zoning, the county enabling legislation expressly provides for its enforcement by mandamus.<sup>23</sup>

A possible shortcoming of the county and municipal enabling legislation is that neither expressly provides for the elimination of existing nonconforming use.<sup>24</sup> This may be derivative of the substantial problems associated with termination of nonconforming uses<sup>25</sup> and also may reflect legislative conservatism toward the use of private property. Whatever the reason, the impact of the failure to provide for termination of nonconforming uses is minimal when considered in light of the objectives of flood plain zoning. As to prevention of self-imposed harm, an abandonment forced by ordinance would seem to impose essentially the same injury as one imposed by flood,<sup>26</sup> so termination would merely accelerate the loss rather than make it contingent upon an eventual flood. Termination seems no more necessary to serve the objective of reduction of public expenditures. First, there would be no savings of construction costs for flood control projects unless the nonconforming development already in place was sufficient to warrant flood protection measures and termination

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21. WYO. STAT. § 18-289.1 (Supp. 1971) (emphasis added).

22. WYO. STAT. § 15.1-83 (1957) (emphasis added).

23. WYO. STAT. § 18-289.7 (Supp. 1971).

24. A nonconforming use is defined by Anderson as "a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance although it does not comply with the use restrictions applicable to the area in which it is situated." 1 ANDERSON, *supra* note 7, at § 6.01.

25. A major problem has been whether a particular termination by amortization is a taking by a governmental entity requiring compensation or a legitimate regulation not requiring compensation. Another is the question of the power of a county or municipality to terminate a non-conforming use in the absence of express authority in the enabling legislation. Termination also presents some philosophical difficulties as pointed out by Anderson. In the absence of compensation, the cost of a public benefit (the integrity of the zone) is privately borne by the non-conforming user who is forced to terminate his use. Anderson suggests that condemnation might be more appropriate. 1 ANDERSON, *supra* note 7, at § 6.70.

26. This is to a degree an overstatement in that an orderly move would allow greater salvage than one forced by impending flood, but the loss in real estate value and abandoned buildings would be similar.



of these nonconforming uses would eliminate that need. If this were the case, sound economics (to say nothing of politics) would dictate their construction rather than a devaluing of the land by zoning to an extent greater than the cost of the required protective works. If the cost of the flood control works were greater than the devaluation, the question is one of trading off current private losses from termination against possible future relief expenditures, an irrational proposition at best. If the public should bear the future loss through relief expenditures, it seems reasonable that it should bear the same loss when precipitated by a termination ordinance. That being the case, termination merely accelerates the public expense rather than avoiding it. Conversely, if the decision is that the loss is to be privately borne, then the nonconforming user should be able to decide whether to terminate his nonconforming use or gamble on the flood—understanding that in event of flood, he will bear the loss.

The real problem with nonconforming use arises in relation to the objective of preventing channel encroachment. It is entirely possible that an existing encroachment could present a serious hazard to other conforming uses. In such a case, an inability to terminate the infringing use constitutes a significant shortcoming of the enabling legislation.<sup>27</sup>

Such is the case at the county level:

A zoning resolution enacted under the provisions of this act shall not prohibit the continuance of the use of any land, building or structure for the purpose for which such land, building or structure is used at the time such resolution takes effect.<sup>28</sup>

Excepting mining, the statute does go on to provide for the eventual possible elimination of nonconforming uses through attrition. It allows the prohibition of additions or alterations to change a nonconforming use and also for the prohibition of reinstatement of a nonconforming use after it has once been discontinued. As to mining, it would seem to be immune from such attrition schemes because it is specifically exempted

27. Though, in light of the private loss-public benefit nature of such a termination, condemnation might be a more appropriate solution. 1 ANDERSON, *supra* note 7, at § 6.70.

28. WYO. STAT. § 18-289.9 (Supp. 1971).

from any zoning ordinances: “[N]o zoning resolution or plan shall prevent any use or occupancy reasonably necessary to the extraction or production of the mineral resources in or under any lands subject thereto.”<sup>29</sup> It is worth noting that the word “production” might be a problem word in this statute. The broader its interpretation, the broader the scope of the exception and the greater the threat to a flood plain zoning plan.

Though municipal legislation fails altogether to mention existing nonconforming uses, several tools for their eventual elimination are probably available by implication. These would include, in addition to those expressed in the county legislation, the prohibition of alteration or addition to continue an existing nonconforming use and the prohibition of rebuilding in the event of substantial destruction of a nonconforming use by fire, flood or other means. The source from which these powers might be implied is the section allowing the governing body to “regulate and restrict the erection, construction, *reconstruction, alteration, repair or use* of buildings, structures or land.”<sup>30</sup> Conceivably, the termination of existing nonconforming uses by amortization<sup>31</sup> could be employed at the municipal level, even in the absence of express enabling legislation.<sup>32</sup> However, considering the absence of both precedent and express authority for this technique in Wyoming, such an ordinance might well be challenged. Even so, given a sound purpose, i.e. removal of a channel encroachment, and a reasonable amortization period, experience in other jurisdictions<sup>33</sup> indicates that it would have a reasonable chance of receiving judicial approval.

Another potential problem, assuming that flood plain zoning were actively pursued on the local level, is that there is apparently a circumferential strip surrounding each municipality which is beyond the zoning jurisdiction of both the county and the city. The county authority is limited to the

29. WYO. STAT. § 18-289.1 (Supp. 1971).

30. WYO. STAT. § 15.1-84 (1957) (emphasis added).

31. Permitting the non-conforming use to continue for a specified time so that the nonconforming user can amortize his investment during the period of permitted nonconformity. 1 ANDERSON, *supra* note 7, at § 6.65.

32. 1 ANDERSON, *supra* note 7, at § 6.03.

33. See generally 1 ANDERSON, *supra* note 7, at §§ 6.64, 6.65.

unincorporated area of the county, which commences one to three miles from the city limits,<sup>34</sup> and the municipal authority apparently is confined to the city. Conceivably this leaves the area in between beyond the jurisdiction of both. The provision for the adoption of a master development plan for cities and towns (including a zoning plan) does address this question by providing: "When a plan involves a territory outside the city or town action shall be taken with the concurrence of the county commissioners."<sup>35</sup> It might be inferred from this that the county commissioners have the power to concur with city zoning in this "no man's land" but are unable to zone it themselves. The problem is, of course, that without extraterritorial zoning power, a city is unable to prevent nonconforming development in adjacent areas obviously destined for annexation. Then, upon annexation, it must deal with the nonconforming uses which should never have been allowed to develop. The statute does give this extraterritorial power but, as noted, only with the concurrence of the county commissioners, and it is likely that the economic and political objectives of a county would differ sufficiently from those of its cities to preclude the necessary cooperation.

An associated problem of jurisdiction, though not peculiar to Wyoming legislation, is one that has been termed "leakage."<sup>36</sup> A landowner in an unincorporated area adjacent to a city, who finds himself subject to a county flood plain zoning provision, might escape that restraint either by being annexed to the city or by sufficient expansion of the city limits to bring him within the surrounding area beyond county jurisdiction. This, of course, presumes that the city does not have the same objectionable zoning regulation. Though these problems may seem to be of little significance, they are areas of potential litigation and point up the need for effective city/county coordination.

Another problem, not between, but common to both city and county flood plain zoning efforts, is the absolute requirement for sound technical information. As noted in the intro-

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34. WYO. STAT. §§ 18-281, -289.1 (1957, Supp. 1971).

35. WYO. STAT. § 15.1-73 (1957).

36. Comment, *State Flood Plain Zoning*, 12 DEPAUL L. REV. 246, 254 (1962).

duction, one of the criteria required for a zoning regulation to be constitutional is that it meet the requirements of due process. Among other things, due process requires that the regulation be reasonably calculated to effect its purpose, and this in turn requires that the zoning regulation be founded on valid technical data.<sup>37</sup> For any city or county considering flood plain zoning this must be a significant concern. In the absence of a sound engineering foundation, the establishment of flood plain zones might be legally arbitrary and subject to challenge on constitutional grounds. Additionally, zones not based on good data may be more restrictive than need be and thus unnecessarily restrict the use of land. Conversely, such zones may underrate the flood hazard and set the scene for disaster by encouraging development in dangerous areas. It is unlikely that many Wyoming cities or counties have the required technical information on hand; however, it may be readily available from federal or state agencies. If not, application for U.S. Army Corps of Engineers' *Flood Plain Information Reports* can be submitted via the Wyoming State Engineer.<sup>38</sup> Basically they are semi-technical documents (in a layman's language), providing a summary of the flood situation, a description of the general conditions of the area studied, a history of past flooding, and a discussion of potential floods. To facilitate the effective use of this data, the appropriate district office of the Corps of Engineers will provide assistance both in the interpretation and application of the data in the reports.<sup>39</sup> In the alternative, or to supplement this source of information, private consulting or engineering firms might be retained to gather and organize the appropriate flood information, though likely at considerable expense. Whatever the source, valid technical data is the foundation of flood plain zoning and permits the enactment of valid flood plain regulation. Like the problems of nonconforming uses and jurisdiction, the requirement for such information is not a major impediment to flood plain zoning but merely an area requiring special attention.

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37. Murphy, *REGULATING FLOOD PLAIN DEVELOPMENT* 50 (University of Chicago Dep't of Geography Research Paper No. 56, 1958).

38. *Supra* note 1, at 12.

39. *DRY CREEK, CHEYENNE, WYOMING*, *supra* note 2, at 23.

Such is the status of flood plain zoning in Wyoming. Though there are several areas deserving of special attention, none are serious enough to preclude a solid flood plain zoning ordinance at either the county or municipal level. The enabling legislation is adequate, if not explicit; the technical and legal information is available; and the need apparent.<sup>40</sup>

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40. Several model flood plain zoning ordinances are available, which would be useful in the preparation of an actual zoning ordinance. See Hines, Howe & Montgomery, *supra* note 9; Note, *Flood Plain Zoning for Flood Loss Control*, 50 IOWA L. REV. 552 (1965). However, the most useful material available, though not previously cited because it is in draft form is a report being prepared by the Water Resources Council. Excerpts from its forward indicate its scope:

This report is the result of a study undertaken by the University of Wisconsin, Center for Resource Policy Studies, in joint cooperation with the Water Resources Council, the Corps of Engineers of the Department of the Army, the Soil Conservation Service of the Department of Agriculture, the Department of Housing and Urban Development, and the Tennessee Valley Authority.

The report explores selected issues in regulation of private and public land uses as a tool of flood plain management. It contains proposed model statutes and ordinances which might be adopted with appropriate modifications by States and local government bodies. The report also contains a commentary on the statutes and ordinances, and it discusses general problems and legal considerations involved in such regulation.

This three volume report is available from: United States Water Resources Council, Suite 800, 2120 L Street, N.W., Washington, D.C. 20037.