

DIVISION OF EMERGENCY MANAGEMENT DIGEST



WILLIAM P. CLEMENTS, JR.
Governor

• JOE E. MILNER
Director

• ROBERT A. LANSFORD
State Coordinator

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This tornado was spotted and captured on film June 8 outside Panhandle in Carson County. No damage reports were made to the Division of Emergency Management . Photo by Mary Esther Smith of Panhandle.

DEM UPDATE

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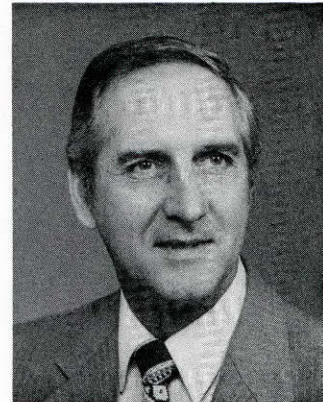
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by Robert A. Lansford
State Coordinator

The federal budget has now been passed and signed into law. At this point we have not been given our allocation for FY '91, nor do we know exactly which programs have been funded or the level of funding. We are somewhat sure that the EMA funds for FY '91 will be about the same as FY '90. We also have information that money for SARA Title III training is again in the budget. As soon as we receive the budget information we will make it known to you.

I had the pleasure recently of attending the dedication ceremony for the new City of San Antonio Emergency Operations Center. City officials, including the mayor, city manager, fire chief, emergency management coordinator, police chief and others turned out for the ribbon cutting for the \$1.7 million facility, which houses the EOC and the fire department administrative offices at 115 Auditorium Circle. The newly renovated facility represents a commitment by the city to have a fully functional and operational EOC. They are to be congratulated and commended for their initiative in this project, which did not include any federal assistance. If you have an opportunity to visit their EOC, I strongly encourage you to do so.

Our 30th annual state conference is rapidly approaching. We expect to mail conference invitation letters and registration information by December 10. If you have not received an invitation letter by the Christmas holidays or shortly thereafter and want to attend the conference, contact the DEM public information office or your Regional Liaison Officer. We want to see you in Austin February 26-28!

Law Could Reduce Disaster Aid For Community Buildings

Provisions of the Stafford Act could reduce the amount of funds available for repair of community buildings in the event of a flood disaster and thus have serious consequences for the community.

When the President determines that a flood or other natural disaster has caused such damage that response to the disaster cannot be delivered adequately by state and local governments, he may, upon a formal request from the governor of the affected state, declare the event a major disaster. Such a declaration can make available several forms of federal disaster assistance, including a 75/25 percent cost-sharing of funding for repair of publicly owned facilities.

Now, however, under provisions of the recently enacted Robert T. Stafford Disaster Relief and Emergency Assistance Act, federal public assistance funding for repair of damage to insurable publicly owned buildings in special flood hazard areas is reduced by the amount of flood insurance proceeds that could have been received, whether the building was insured or not.

Before the new legislation, disaster assistance was available for this category of damage when the

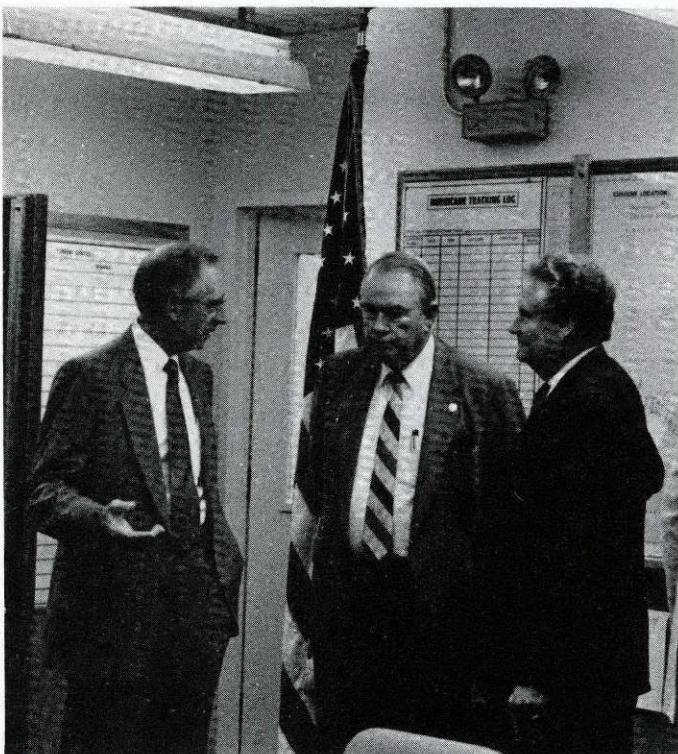
building was not insured, although purchase of flood insurance was a condition of receiving the assistance.

If, for example, the flood damage to an uninsured city hall in a special flood hazard area totals \$500,000, the amount of federal funds available for repair is reduced by \$200,000 -- the maximum amount of flood insurance available. The standard 75/25 percent cost sharing is applied to the remaining \$300,000 in damage.

If the damage totals \$100,000, then there are no public assistance funds available, because the damage could have been fully covered under a flood insurance policy.

From the examples, it is obvious that the additional costs to the community for its officials not to insure can be substantial. Community officials should be aware, however, that the bulk of public assistance funding is for damage to uninsurable structures, such as roads, bridges, levees, and the like. Funding for the repair of damage to these is unaffected by the new law.

Reprinted from "Watermark," National Flood Insurance Program, Federal Emergency Management Agency, Winter 1989-90 issue.



The Honorable Henry Bellmon, Governor of Oklahoma (center) and Glenn Sullivan, Oklahoma Secretary of Natural Resources (right), were among those briefed by DEM State Coordinator Robert Lansford on Texas' response and recovery programs. The Governor and several Oklahoma state agency personnel met with Chief Lansford and DEM staff in September to discuss emergency management. Also accompanying the Governor were Robert Fulton, Governor's Secretary of Social Services; Major General Don Ferrell, Adjutant General and Secretary for Safety and Security; Woody Goins, Director of the Oklahoma Civil Defense Agency; and Clent Dedek, Commissioner of Public Safety.

Hazmit Notes

by Wade Nofziger
DEM Hazard Mitigation Officer

It is said that patience is a virtue. Well, for the Hazard Mitigation Grant Program, it appears that patience is a virtue finally to be rewarded because the money for projects is starting to be allocated. For the three 1989 disasters the City of Murchison (\$5,000) has had its project approved and six others, totaling over \$300,000, have had their applications sent to FEMA's Washington headquarters for approval of their Environmental Considerations Questionnaires. I hope that will be finished soon and the money allocated. When those are funded others will follow. An update on the money which will be used for Texas projects is as follows:

FEMA-823-DR: 9 counties with \$175,000 available. Only three applications were filed, one of which was subsequently withdrawn; the requested funding is for \$70,748, which means FEMA is turning back over \$100,000 to the general fund. The point is, if you don't try, you won't have a chance for funding needed projects.

FEMA-828-DR: 87 counties with \$1,500,000 available. There are many more good projects than funding available, so all the money will be allocated to local governments.

FEMA-836-DR: 9 counties with \$97,500 available. All of this money is also expected to be awarded to local governments.

FEMA-863-DR: 68 counties with an estimated \$887,000 available. This is the 1990 disaster. Several applications have been received and there should be numerous good quality projects in competition for funding. The deadline for submitting completed applications was October 31, 1990.

Mitigation is becoming a more important tool of local government because, as many of you know, it is ultimately less expensive to prevent damage than to repeatedly pay for repairs. Now there is money to help you mitigate damage, but it takes commitment from all of us to make it work. We believe the procedures are becoming more streamlined, so that good projects can be identified, processed and funded expeditiously. Be aware of your options so you can maximize your available financial resources. If you have any questions about mitigation contact me at 512/465-2138.

DEM Personnel

Bob Sandera has joined DEM as Nuclear Resources Planning Officer. Bob, a retired USAF lieutenant colonel, has a bachelor's degree in mechanical engineering and a master's degree in business management. He is a native of Breckenridge, Minnesota.

Texas Tech Announces 3-Day Course

Texas Tech University's Institute for Disaster Research and the Wind Engineering Research Center will present a short course entitled "Engineering for Extreme Winds: 1991" February 6-8, 1991.

This course, offered annually, may be of interest to architects, engineers, building officials and other professionals involved with the design of buildings to

resist extreme winds. Individuals involved with interpretation of wind load standards and codes may also be interested.

For more information contact Birgit Rahman, Division of Continuing Education, Texas Tech University, P.O. Box 4110, Lubbock, TX 79409, phone (806) 742-2352, ext. 244; FAX (806) 742-2318.

Legal Liability Issues

Following is the conclusion of the remarks given by Susan Kantor Bank, Associate General Counsel for Insurance and Litigation, FEMA, at the 29th Annual State Emergency Management Conference.

Feuer v S.C. Coastal Council, et al.
D.S.C. (Beaufort Division)
Civil Action No. D:88-3073-1
October 12, 1989

Same challenge to same statutes as other cases. Also, plaintiff asserts that the legislation violates the contracts clause because it prevents him from enforcing a contract for the sale of his property.

First, court notes that plaintiff's taking claim is **not** mature. Although plaintiff's property is located in the "no construction" zone, the location of that boundary is subject to change. Because plaintiff may petition for a change in the baseline or setback line, the taking issue is not ripe for resolution by this court.

Second, court looks at state interest served by the statutes -- determines "statutory restrictions are substantially related to the important goal of preserving South Carolina's beaches."

Additionally, plaintiff failed to demonstrate an economic injury sufficient to invoke the protection of the taking clause. Same analysis as in previous two cases. No evidence of denial of permission to build or rebuild. And, although plaintiff has apparently been unable to sell his home, that "situation is not the result of any direct restriction on alienability contained in the statutes. Rather, this predicament is the result of a chilling effect on the real estate market caused by enactment of the statutes. Since plaintiff has **not** suffered any adverse consequences as a result of the enforcement of the statutes, the court must decide if he has been deprived of economically viable use of his property."

Court found **NO** taking -- **plaintiff used his property as a temporary vacation residence prior to enactment of the statutes. Statutes do not prevent him from continuing to do so. So, NO deprivation of economically viable use of property. So, NO relief under taking clause.** No process claim -- same analysis as in Esposito -- no relief.

[Re contract claim -- the contracts clause prevents state governments from enacting "any law impairing the obligation of contracts." Court found it was narrowly drafted to protect only those contractual rights existing prior to effective date of the relevant legislation. Here, statutes were effective before the contract for sale of the house. So, court declined to address merits of plaintiff's contract claim.]

[I understand that the South Carolina Coastal Council

is appealing the **Chavous** decision, as well as a state court decision in which the court found the same statute to be a taking. Consequently, in that state court decision, the state was adjudged to pay over \$1 million for the property in question. And I understand that the Coastal Council has been sued by at least 50 additional plaintiffs SO FAR as a result of damage caused by Hugo, with people wanting to rebuild in the dead zone. If these taking rulings start rolling in, I would guess that the law will be changed in the South Carolina legislature.]

This issue is also timely here in Texas. The Court of Appeals of Texas ruled last March in **Arrington v. Mattox**, 767 SW.2d 957 (Tex.App. Austin 1989) that property was **NOT** taken without compensation, where owner was required to remove obstacles to access to ocean beach under the terms of the Open Beaches Act, because the Act involves enforcement of easements previously acquired through prescription, dedication and custom.

What happened here was plaintiff owned a lot and home facing the Gulf in the Bermuda Beach subdivision on West Beach, Galveston Island, Texas. In 1983, Hurricane Alicia struck and moved the vegetation line to a point landward of plaintiffs' property. They then built a wooden bulkhead or retaining wall on the beach in front of their home, placing sand fill on either side, and various improvements on the seaward side, such as pieces of concrete, vegetation, wooden boardwalk and numerous Christmas trees. Plaintiffs admit they couldn't have constructed these improvements on the seaward side of the vegetation line as it existed before the Hurricane.

The Attorney General filed suit on behalf of the public under the Open Beaches Act. He alleged that a public easement and right of use existed on the seaward side of the vegetation line across plaintiffs' property, and that plaintiffs had encroached upon the right of use by placing structures on the easement.

The district court granted the AG's motion for summary judgment, and concluded:

the public has acquired through prescription, dedication and custom a right of use or easement to...that portion of the above-described property...between the line of mean low tide and the natural line of vegetation spreading continuously inland.

continued on next page

The area between these two natural boundaries is the beach as defined at common law and in the Texas Natural Resources Code.

This public right of use or easement migrates and moves landward or seaward with the natural movements of the natural line of vegetation and the line of mean low tide.

The court ordered plaintiffs to remove the items placed on the easement and denied plaintiffs' claims alleging TAKING.

Plaintiffs appealed.

The Texas Court of Appeals affirmed the district court --

HELD: The Open Beaches Act does not empower the AG to take rights of an owner of land, but merely furnishes a means for the public to enforce its existing collective rights.

Plaintiffs cite Nollan to say this is a TAKING --

Court says NO -- in **Nollan**, Calif. Coastal Commission sought to establish an easement, while here, the district court merely enforced an already existing public easement established by custom, prescription or public dedication.

Plaintiffs petitioned for certiorari to the U.S. Supreme Court in December 1989, so that may not be over yet.

Regarding floodplain management restrictions similar to FEMA's, they have been upheld in other cases -- **Responsible Citizens v. City of Asheville**:

In **Asheville**, the North Carolina Supreme Court in 1983 relied on **Texas Landowners** in upholding as constitutional a floodplain ordinance which was more restrictive than FEMA's regulations. The Court ruled that even assuming that the cost of complying with land use regulations is prohibitive and that the fair market value of the property has decreased, these factors are of NO consequence; there was NO TAKING. Also, the judge stated that plaintiffs benefited from the floodplain management ordinance because flood insurance would be available only if the ordinance was adopted.

In another case, challenge was to a floodplain district limiting land to agricultural and recreational uses. The property's value was diminished by 88%. The court ruled NO TAKING.

These cases regarding floodplain restrictions would also be applicable to restrictions placed on construction in areas subject to other types of natural hazards (e.g., erosion-prone areas along the Great Lakes and other coastal areas).

How can a Community protect itself against suits based on a TAKING of Property Without Compensation?

Suggestions on reducing Community vulnerability to such suits:

1. Look at economic impact of the regulation, then try to allow **some reasonable** uses of property.

2. Include among purposes of regulation those public benefits and prevention of harm promoted by the regulation (public safety, public health, avoidance of flood damage and disaster assistance).

3. Regulation should not merely be a pretext for acquiring resources at a lower price.

Given these reasons, courts will **usually** defer to local land use restrictions.

Regarding the bases for liability discussed earlier: How can local governments protect themselves against liability?

Given the uncertain legal atmosphere, there is no sure thing. However, some actions will improve a local government's chances of avoiding liability in building projects that protect against natural hazards:

1. If you have **EMERGENCY OPERATING PLANS**, and you should, **USE THEM**. Make sure they are clearly written and contain well-defined procedures. An emergency plan creates a standard of care and gives you the advantage of knowing precisely what your duties are and are not in a given situation.

2. Avoid municipal actions which may cause or worsen hazards such as operation of a landfill in an area of high ground water or construction of a dike in a floodway. The avoidance of such activities can be facilitated by an inventory of hazards and the mapping of natural hazard areas. Such information then can be reflected in the public facilities plan, the land use plan and community regulations. If community activities are to occur in hazard areas, the community should comply with all applicable federal, state, and local regulations, and it should design and maintain structures consistent with sound geologic, architectural and engineering practices.

3. Prevent private actions which will increase hazards or hazard losses. Landowners have no "right" to create or exacerbate hazards, and you are on much more solid ground by prohibiting such activity. The control of private actions can be accomplished through upgraded zoning subdivision control, building codes or other special codes, and careful evaluation of permit applications. Developers can be made to submit much of the information needed for analysis. Certifications of "safety" and compliance by registered architects, engineers, geologists can also be required. To the extent possible, responsibility for mitigating hazards on private lands should be placed squarely in the laps of those wishing to use such lands.

4. Carefully comply with state and federal statutory requirements and local regulations in plan-

continued on next page

ning, regulation, acquisition, and other activities to avoid due process problems and possible suits.

5. Ensure that all hazard mitigation measures, including permit approvals and denials, are based upon adequate data; also, provide equitable and evenhanded administration and enforcement of hazard regulations to avoid due process and possible **taking** challenges.

6. Encourage private landowners in hazard areas to carry insurance (e.g., flood insurance, earthquake insurance). A landowner compensated by insurance after a loss may be less likely to sue the municipality.

7. Upgrade hazard mitigation plans and measures

as data, mitigation technologies, and mitigation strategies improve. **KEEP THEM CURRENT!**

There are numerous areas of potential liability involved in emergency management and hazard mitigation activities, and given peoples' tendency to want to affix blame when they incur a loss, liability suits are likely to continue. Using these practices that I've mentioned should help to avoid them, however.

Also, when in doubt, seek legal advice from your local attorney. In the field of emergency management, it's very important to ask the questions. Deciding what the question is -- knowing that there IS a question -- that's what's important. Sometimes that's more important than the answer.

Right Way To Write To PPP Changed

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