



**Violations and Variances**

**IAFSM Conference**

**March 8, 2022**

# Common Violations

- Development without a permit
- Community did not require state floodway permit
- Constructed differently from approved plans
- Foundation built in wrong location
- Floodway incorrectly located on the site plan
- Foundation elevation not spot checked
- Foundation openings covered or omitted
- Substantial Damage/Sub. Improvement not enforced
- Homes built on floodway fill, no final LOMR issued under a CLOMR without a final LOMR
- Walkout basement added, bringing building into the floodplain

# Development Definition

Any man-made change to real estate including, but not necessarily limited to:

1. demolition, construction, reconstruction, repair, placement of a building, or any structural alteration to a building;
2. substantial improvement of an existing building;
3. installation of a manufactured home on a site, preparing a site for a manufactured home, or installing a travel trailer on a site for more than one hundred eighty (180) days per year;
4. installation of utilities, construction of roads, bridges, culverts or similar projects;

# Development Definition (Cont.)

5. redevelopment of a site, clearing of land as an adjunct of construction
6. construction or erection of levees, dams, walls, or fences;
7. drilling, mining, filling, dredging, grading, excavating, paving, or other alterations of the ground surface;
8. storage of materials including the placement of gas and liquid storage tanks, and channel modifications or any other activity that might change the direction, height, or velocity of flood or surface waters.

“Development” does not include resurfacing of pavement when there is no increase in elevation; or gardening, plowing, and similar practices that do not involve filing, grading, or construction of levees.

# When Does Enforcement Begin?

- ✓ When you first become aware of the violation
- ✓ When you drive by the violation

Preferably not

- ✓ When the state NFIP Coordinator comes to town
- ✓ When FEMA is notified of a violation through a LOMC request, such as LOMR-F application for a house on fill in the floodway

# Beginning Steps for Enforcement

1. Create a file with:
  - Owner's name and mailing address
  - Occupant's name, if different
  - Copies of the floodplain mapping, historical aerial images, post-flood damage estimates with photos, and historic permit records.
2. Visit the property and take numerous photos from public right-of-way. Be prepared to speak to the property owner and bring copies of the floodplain maps to share with the owner and permit application forms. Take digital photos and save the files with the metadata (date and time taken), in the event you go to court.
3. If violation is actively under construction, be prepared to issue a stop work order. See who in community has power to do this. Check with your attorney. New model floodplain development ordinance language includes this option.

# Owner's Address

Don't assume occupant is the owner

- Tax Bills - County/Township Assessor and County GIS
- Trusts go to County Recorder – Look at deeds or mortgage to get attorney's contact information
- Corporations and LLC, use Secretary of State website:  
<https://apps.ilsos.gov/corporatellc/>

# Use of Aerial Photos

Be careful of violating 4<sup>th</sup> amendment rights - unreasonable search.

Now your community's thoughts on aerial images: In May 2014, Will County's Judicial Committee restricted staff from using aerial photography for **initiating** zoning enforcement.

A historic aerials could be inadmissible in court without witness verification.

# Taking Photos - 4<sup>th</sup> Amendment Violations

**Can you raise your camera above your head to go over a privacy fence?**

NO – Nor can you bring a taller person with you to take the photos or go into the neighbor's 2<sup>nd</sup> story bedroom.



**Can you fly a drone over the backyard?**

Michigan Appeals Court in 2021 says no.



# Next Steps for Enforcement

4. Issue a “allegation” letter via certified mail using your ordinance
  - Clearly explain the violation you believe has occurred, citing the location of the floodplain regulation in the code or ordinance number and the section of the code/ordinance that is in violation
  - Request a meeting with the property owner
  - Outline timeline for a required response - DEADLINE

# Next Steps for Enforcement (Cont.)

5. Meet with the property owner and come up a plan to resolve, often begin with submitting documentation for a building permit. Follow up the meeting with a letter and the plan in writing (2<sup>nd</sup> letter). This letter can now be the violation notice. Include nature of violation, cite your regulations with specific sections, deadlines for progress (30 days), the penalties for ignoring the letter, and appeal options.
6. Contact the state NFIP Coordinator and FEMA for help as needed.
7. Send any follow up letters with additional deadlines and steps like the matter will be turned over to the Village Attorney, failure to comply can lead to a fine of not less than fifty dollars (\$50) or more than seven hundred fifty (\$750) for each offense
8. Go to court if necessary.

Talk with your attorney for any statute of limitations and to review the violation letter.

Know who in your community can issue citations; such as a police officer, building official, etc.

# Due Process

Alleged violators must be given “due process”. That is a reasonable opportunity to correct a situation.

Communities should send a minimum of two written notices before proceeding on to more harsh actions such as fines or litigation.

Failing to inform violator of the right to an appeal may be considered as taking away from their right to “due process”.

Is there any easy way out?

Your boss or governing board may want you to issue a variance to make the problem go away.

While this tempting... be careful

# Variance

A variance is a granting of permission to deviate from the requirements of a regulation.

The variance is issued by a governing body such as the City Council, County Board, or Village Board.

Variances will set a precedent, meaning other similar requests should also be granted.

A variance is not the solution to a violation.

**VARIANCES SHOULD BE RARE**

# Conditions for Granting a Variance

- **The applicant has provided sufficient evidence to justify the variance.**
- The situation is **unique**, will not create a condition where numerous other variances will need to be granted undermining your code.
- **Must relate to the property not the owner.**
- **Cannot be issued in the floodway if there will be an increase in the base flood elevation**
- Cannot be issued in the Zone A (i.e., no floodway) without an analysis of the effect.
- The variance is to a locally higher regulatory standard and not a minimum criteria for the NFIP.

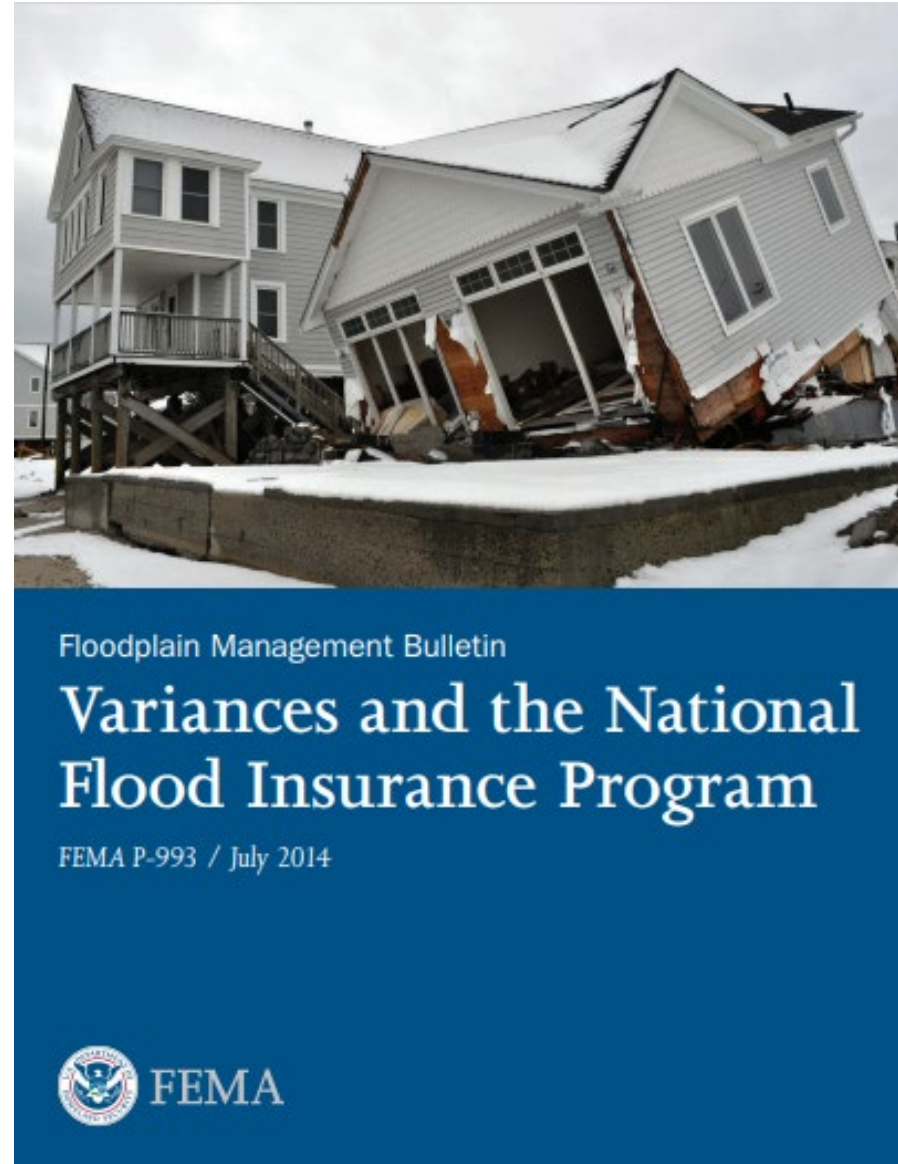
# How is a Floodplain Variance Different than a Zoning variance

The safety and flood risk of the property owners and first responders may be affected.

The cost of flood insurance could be greatly increased.

Future owners are typically unaware of the variance. (Record mandatory letter informing flood insurance will increase as a result)

FEMA  
Guidance is  
Available





# What the Ordinance Says the Applicant Must Demonstrate

1. The development activity **cannot be located outside the floodplain.**
2. A determination that failure to grant the variance would result in exceptional hardship by rendering the lot undevelopable.
3. The variance granted **is the minimum necessary**, considering the flood hazard, to afford relief.
4. There will be **no additional threat to public health**, public safety, destruction of beneficial stream uses and functions including, aquatic habitat, causation of **fraud on or victimization of the public**, conflict with existing local laws or ordinances, or creation of a nuisance.

# What the Ordinance says the Applicant Must Demonstrate (continued)

5. There will be **no additional public expense for flood protection, rescue or relief operations**, policing, lost environmental stream uses and functions, repairs to streambeds and banks, or repairs to roads, utilities, or other public facilities.
6. The **circumstances of the property are unique** and do not establish a pattern inconsistent with the intent of the NFIP.
7. **Good and sufficient cause has been shown** that the unique characteristics of the size, configuration, or topography of the site renders the requirements of this ordinance inappropriate.
8. **All other state and federal permits have been obtained.**

# Valid Reasons

- “Unnecessary hardships”
- Loss of all beneficial or productive use
- Deprivation of reasonable return on property
- Property valueless without variance\*
- Inability to develop property in compliance with the regulations
- Reasonable use cannot be made consistent with regulations

\* NE IL Floodway Appropriate Use Rules will not allow for a new buildings in the floodway.

# What paperwork is needed?

A written request from the applicant showing good and sufficient cause.

A report ,“Findings of Fact”, should be prepared and presented by community staff to the governing board for each requested variance. The findings of fact must address all issues, both the requirements where a variance is not recommended and the specifics for ant recommended variance or optionse.

The board/council must issue a formal ruling at a public meeting.

# Notification to Applicant Required in Your Ordinance

Community shall notify an applicant in writing that a variance that would lessen the degree of protection to a building will:

1. Result in increased premium rates for flood insurance up to twenty-five dollars (\$25) per one hundred dollars (\$100) of insurance coverage.
2. Increase the risk to life and property.
3. **Require that the applicant proceed with knowledge of these risks and that the applicant acknowledge in writing the assumption of the risk and liability.**

# Notification to Applicant Required in Your Ordinance

- A community shall notify the applicant in writing that the issuance of the variance to construct a structure below the BFE will result in increased flood insurance premium rates and that construction below the BFE increases risks to life and property.
- This notification shall be maintained with a record of all variance actions.

# Example

The local freeboard has been increased from 1 to 2 feet. A home built only 10 years ago, that was compliant with the 1-foot freeboard, had a fire causing substantial damage. They have requested not to be required to raise the house the additional foot as the foundation was not damaged.

## **Considerations – Good and Sufficient cause:**

Why was the freeboard increased? Would this variance undermine the reason for the increase? Are there a draft floodplain maps coming with a higher BFE? Was it just to get CRS credit? Are the floodplain maps dated and studies used old rainfall statistics? How much will flood insurance differ?

## **If allowed, could some compliance be required?**

- Findings must explain that only a 1-foot variance is being granted.
- Any replacement of machinery and equipment could be required to be elevated to the 2-foot freeboard.

# Example

Homeowner is proposing a first-floor bedroom addition that is not a substantial improvement for their 90-year-old mother. The addition needs to be 3 feet higher to meet the 1 ft freeboard. She doesn't want to add stairs though and can't fit a ramp into the home.

The owner has asked for a variance to build the addition 2 feet below the BFE.

## **Considerations:**

- The request is not based on the property or some unique factor. Instead, it is related to the owner and personal hardship.
- Flood insurance would be increase.
- Do you have cumulative substantial improvement/damage criteria? How close will they be to the 50%? Discuss future improvements requiring them to mitigate entire home. Should they just elevate existing home as well?



# Example – Temporary Permit

During the summer months a shoreline restaurant would like to have kayak rentals and needs a small shed in the floodway to operate the rental business. The kayaks will be stored offsite nightly.

## **Considerations:**

- Will the state permit as a minor non-obstructive use?
- Could you issue a temporary permit from May 15 to October 15
- Require flood openings and that the shed be secured
- Is electricity needed? Can that safely be done?
- Place a condition on the permit that shed be removed within 24 hours notice if flooding is forecasted (easier for rivers with prediction gages and slower rise)
- Annual permit required with 24-hr contact phone numbers

# Example

Community requires 1 ft freeboard and compensatory storage for fill in the flood fringe at a 1.5 to 1 ratio. A new garage is proposed that is larger than the 500 sq. ft. allowed for an accessory structure to be wet floodproofed.

Homeowners wants a 3-car garage but if elevated on fill they can't meet the compensatory storage requirement.

The owner has asked for a 0.5 ft freeboard and no compensatory storage for the fill.

## **Considerations:**

- Situation does not appear to be unique.
- Is a lower freeboard acceptable? Could flood resistant materials be required?
- If you allow no compensatory storage is that likely to be challenged by others?
- Is 600 sq. ft. enough? Should be community look at updating ordinance to allow for a 600 sq. ft. garage?
- Is there an off-site comp storage site available?

# More Examples

## COMP STORAGE

- Comp storage required for an elevated septic field replacement

## CUMMULATIVE SUBSTANTIAL IMPROVEMENT

- You could exempt improvements for floodproofing/reducing flood risk
- Removal of asbestos
- Changing lead pipes, removing lead paint

# Questions?

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