

**APPLICANT' RESPONSE TO CITY ATTORNEY MEMORANDUM MS 59 AND
PROPOSED ADDITIONAL CRITERIA.**

TO: City Council members

FROM: David Stebbins, project # 51076

SUBJECT: 1. The Stebbins residence- legal response to the City Attorney Memorandum concerning whether additional findings are required in order to deny appeal of the above project and uphold unanimous Planning Commission vote, and *alternatively*;

2. Supplemental criteria confirming Planning Commission findings

OVERVIEW

On March 1, 2007, the Planning commission unanimously approved a Coastal Development Permit, Site Development Permit and Mitigated Negative Declaration for my house. The vote was 6-0, all 17 required findings were made. This decision has been appealed. The appeal was continued in order to determine whether additional findings or criteria need to be included. The City Attorney has provided a memorandum that says yes. I disagree as matter of law.

I have attached a copy of a responsive memorandum of Law from Evelyn F. Heidelberg, a respected land use Attorney with Procopio, Cory, Hargreaves & Savitch (attachment #3). A copy of the City Attorney Memorandum is attached thereto. *I urge the reader to review each memorandum in detail as my comments are intended as a brief summary.*

**THE FINDINGS MADE BY THE PLANNING COMMISSION ON 3/1/07 WERE
SUFFICIENT PURSUANT TO THE LAND DEVELOPMENT CODE AND NEED NOT
BE SUPPLEMENTED.**

The City Attorney suggests that the land development code incorporates 44cfr60.6(a) by reference. The analysis violates a fundamental principal of statutory construction because there is another section of the land development code that specifically outlines the necessary findings needed for a deviation. A special statute dealing with a subject *always* controls over the more general.

The city attorney correctly states that reference to council Policy 600-14 was removed into the land development code, but then goes on to suggest that council policy 600-14 "trumps" the land development code. As suggested by Council Policy No. 000-01, Council Policy should not be a required part of a land development decision without being incorporated specifically by reference. Previously, when the council has wanted its policy incorporated into the LDC it has done so (see Heidelberg memorandum); it did not do so in this case.

The City Attorney argument-that a general statement in a section defining applicable regulations which says "all other applicable requirements and regulations of FEMA apply" is incorporated by reference into another entirely different section that specifically identifies standards for granting deviations from those very same regulations-defies logic, principals of statutory construction, and constitutional rights to due process. Such an interpretation is void for vagueness and incorrect as a matter of law.

According to the memorandum, I am required to make additional findings on top of the those already ratified by the Planning commission. Apart from the illegality and unfairness of this last minute legal requirement as it relates to my project (I have spent three years and \$50,000 in city fees to get this far), I believe the City Attorney's rationale has terrible policy implications. This interpretation could be used as a trick by any opponent of any project in an effort to create wide spread uncertainty and confusion as each homeowner or builder tries to figure out which voluminous federal regulation, state regulation or council policy is or is not incorporated into the building code.

The city Attorney memorandum also contradicts the practice and understanding of Development services staff in these matters. One must remember that FEMA and NFIP do not administer flood plain regulations. That authority is exclusively local and the Land Development code has already incorporated those portions of NFIP and FEMA guidelines deemed appropriate. When so incorporated the rules are specific and clear; one does not need to look elsewhere for authority or interpretation. It is unwise from a policy and practical standpoint to do so

Therefore, I request that the city council decide that the findings made by the planning commission on 3/1/07 were the only required findings. These findings are correct and all inclusive pursuant to the Land Development Code. I request that the appeal be denied. However, if the Council elects to follow the recommendations of the City Attorney, I submit the following background and proposed additional findings/criteria which I believe can easily be made;

IN THE ALTERNATIVE:**THE ADDITIONAL CRITERIA SUGGESTED BY THE CITY ATTORNEY AS APPLICABLE TO THE STEBBINS RESIDENCE SUPPORT THE PLANNING COMMISSIONS FINDINGS.****GUIDELINES**

It is important to note that the term findings in this context may not be appropriate. NFIP in their training manual used the word "guidelines" The NFIP manual also seems to indicate a primary concern of insurance underwriting *not* public safety. They exist to weed out inappropriate projects, not to prevent Deviations. " NFIP regulations do not address appeals...Follow the procedures used in your zoning ordinance as these are usually prescribed by state law."..... " Because variances may expose insurable property to higher flood risk, NFIP regulations set guidelines for granting them." NFIP ordinance administration unit 7, page 7-50.

These "guidelines" also appear in 44cfr60.6(a) and are mirrored in council policy 600-14. They are however just guidelines not findings. This means that while we can use the word findings or criteria, it is more likely that these are mere considerations to guide you as decision makers when confirming the existing findings rather than rules in and of themselves.

HARDSHIP

The word hardship does not appear in the LDC as it applies to this project. Regardless, the property in question is a unique property with significant hardships. The existing structure is dilapidated and already in violation of fema regulations because the lowest floor is two feet below Base flood elevation. To do nothing would doom the occupants and the entire neighborhood to an ongoing and unprotected risk of flood damage.

The new design eliminates this risk to the extent it exists.

If no deviation is allowed, the first floor of any alternate design would be 3'10" above grade. The garage ceiling would be 7 feet above grade. The resulting finished structure would be almost a perfect cube or rectangle. As opposed to a friendly 7' long roof line at 30 feet, any other design would have a long roof line at 30' for almost the entire envelope. Aside from the esthetics; this structure would not be approved due to the bulk and scale constraints of the building code and the ob precise plan. In effect, there is no alternative design absent a deviation.

It is undisputed by city staff, applicant's experts and the appellant that the source of any flooding

is the inadequate city storm drain system. Since the City is responsible for the potential flooding (*see council policy 800-4*), it would be an extreme hardship to refuse to allow the applicant to correct the problem ..especially since applicant is willing to us his own funds and is asking nothing in return.

I have agreed to sign an indemnity for the city. If this parcel were just one foot outside the flood zone or if the city corrected the storm drain system, I could build a much larger *habitable* space below grade without any deviation. Therefore, this design is a compromise on the part of the applicant effectively reduces his property value. The situation was created through no fault of my own, yet the indemnity averts potential city financial or legal liabilities.

The entire *block* is dilapidated. Parking is currently done illegally in the setbacks by all the occupants of the block. Since there is no alternative design available given the constraints of the building code, the entire block would be subject to the same hardship as the applicant and this very valuable area of the city would continue to be an eyesore.

This parcel is a subset of a subset of a subset; it exists in the only zip code in the county that applies an far of .70 to a zoning designation of rm2-4. It will have a marvelous view of the ocean which makes this type of underground parking feasible (economically). It is a tiny parcel which limits the opportunity for parking and articulation and step backs. It is in the coastal zone. It has height restrictions.

BALANCING

The above facts, the source of the flood zone and limited development alternatives justify the conclusion that a failure to find a hardship and allow the owner to develop his parcel effectively deprives the applicant of a reasonable use of his property.

A hardship finding is a balancing act according to FEMA regulations. It is not a fixed quantity and does not occur in a vacuum. In this instance, one must balance the hardship with the purpose of the regulation. The regulation has only one purpose; public safety. City Staff, my engineers, my architects and the planning commission after two hearings found the concept to be safe. Not even the appellant has provided any evidence that would suggest this design will be unsafe. NFIP training manuals suggest that when granting a hardship deviation the owner should be encouraged to place all habitable space above the BFE and minimize "non-conforming areas" *as has been done in this case*. Clearly, the applicant has done everything possible to eliminate any safety issues.

Generally NFIP manuals and FEMA regulations focus on habitable space instead of parking because habitable areas are their primary concern. The only the rationale stated in the regulations for generally disfavoring below grade parking in residences (as opposed to commercial properties and mixed use properties where it is allowed), is that FEMA does not want residents

hiding in their basements thinking they are safe in a hurricane. *This rationale does not apply to Southern California where storms of hurricane magnitude simply do not occur and have not been confirmed in recorded history.*

The rationale concerning underground parking certainly does not apply to the applicant's house where any occupant, even in the severest event, would simply remain above ground in the *flood proofed* habitable space. Therefore, the rationale for of the regulation in this narrow instance is practically irrelevant and the balancing heavily favors the applicant

CONCLUSION

A finding of exceptional hardship can be made. The technical need is great, the alternatives are practically useless and any danger to the public is non-existent. The algebra that is the "balancing of the purpose of the ordinance with the hardship of the applicant" convincingly favors the applicant.

The house design has been well vetted by city staff, city engineering and the Planning Commission has made every finding needed for this deviation under the regulations. Further, The parcel is so unique that the odds of further similar development will be limited to this block. This very uniqueness and the lack of viable development alternatives for this parcel justifies a hardship finding. Council policy 800-14 is not meant to be a straight jacket.

After balancing the hardships of the applicant with the purpose of the regulations, considering the opportunity to make the block safer and more desirable along with the lack of alternatives to the project and the inapplicability of the some of the rationale behind the regulations pertaining to underground parking in a flood zone as they apply in this case, it is clear that this is precisely the type of project that meets the criteria for a deviation. Therefore, failure to grant the applicant's request would result in an undue hardship

* NOTE I HAVE ATTACHED ADDITIONAL CRITERIA (ATTACHMENT #1)
I HAVE ALSO ATTACHED A COPY OF THE FINDINGS OF THE PLANNING COMMISSION MADE ON 3/1/07 (ATTACHMENT#2)

*TOGETHER THESE ARE ALL OF THE FINDINGS THAT NEED TO BE MADE PURSUANT TO THE CITY ATTORNEY'S MEMORANDUM.

*PLEASE NOTE THAT ADDITIONAL CRITERIA #3 IS SUBSTANTIALLY THE SAME FINDING AS PLANNING COMMISSION SENSITIVE LANDS FINDING #2

*PLEASE NOTE THAT ADDITIONAL CRITERIA #4 IS SUBSTANTIALLY THE SAME AS PLANING COMMISSION SUPPLEMENTAL FINDING SENSITIVE LANDS DEVIATION FROM FEMA REGULATIONS #1&2.

** NOTE THAT ANY ONE OF THE HARDSHIP CRITERIA BELOW (NOS. 2A - E), WILL IS SUFFICIENT TO SHOW A HARDSHIP.

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ATTACHMENT

#1

ADDITIONAL
CRITERIA

ATTACHMENT#1ADDITIONAL DEVIATION CRITERIA PURSUANT TO COUNCIL POLICY 600-14
AND 44CFR 60.6(A)

After due consideration of the following four criteria, and balancing the hardship of the applicant with the purpose of the deviation guidelines, the City Council upon showing of good cause hereby Confirms the 17 Findings made by the Planning Commission March 1, 2007 on project 51076, Coastal Development Permit # 147134, site development permit #. 389939 which attached hereto as attachment #2.

1. Good and sufficient cause exists to grant deviation;

Good and sufficient cause exists because there are no alternative designs that are more appropriate. Pursuant to NFIP Ordinance administration unit 7-50, guidelines for deviations exist "to screen out situations in which alternatives to variances are most appropriate". Here there are none. (Finding 2A below is hereby incorporated by reference). The flood area involved is a minor one with low velocity floods. The property is a small unique lot and meets all the physical criteria for a Deviation from FEMA regulations. The new design is Safe and will replace an existing unsafe structure where all habitable areas are below the base flood elevation. All other necessary findings have been made and the project and its deviation has been well vetted by the City Engineer, staff and the Planning Commission.(see Planning Commission resolution unanimously approved March 1, 2007 - attachment #2).

2. Failure to grant a deviation would result in exceptional hardship to the applicant:

A. The subject property is a legally developable lot that is significantly substandard by both the current minimum area requirement and dimensional criteria of the land development code for parcels within the RM2-4 zone. The minimum lot area on which RM2-4 regulations are predicated is 6000 square-feet. Likewise, the minimum lot width is 50 feet and the minimum depth is 90 feet. By comparison, the Stebbins property is only 2500 square feet in total area with a lot width of 25 feet. Based on the limitations due to the substandard lot size there are few, if any design alternatives which would allow for a reasonable use of the property. Any alternative design without a deviation would require that the lowest habitable floor be 3'10" above grade. The top of the garage would be over 7 feet and would reduce the habitable space by the size of the garage. The resulting offset would create significant design problems. The resulting elevation would be a large rectangular cube.

Therefore, alternative designs of comparable or even lesser size would not provide the articulation, offsetting planes and architectural interests recommended in the Ocean Beach Precise Plan and the land development code and could not be approved. This creates an exceptional hardship.

B. Exceptional hardship exists because the existing structure should be considered in noncompliance with FEMA standards and the City of San Diego Land Development Code because the first floor is currently two feet below the Base Flood Elevation. To the extent that a flood risk exists, this property in its present state is potentially dangerous to its occupants. Whereas, in the proposed design the entire habitable floor is flood proofed above the base flood elevation per FEMA guidelines. Therefore, allowing a deviation for flood proofed below grade parking is less of a nonconforming condition than maintaining an obsolete structure where all habitable area is 2 feet below the base flood elevation.

C. Exceptional hardship exists because the existing structure is dilapidated as is the rest of the block. The flood risks are relatively minor because the entire block property is encircled by a flood zone x (no special building rules apply for this type of zone and properties are generally not at risk from flood). This zone is not subject to tidal or river flooding.

The characteristics of the Flood Zone A applicable to this property is theoretical flooding of low velocity and shallow depth with long warning times. The lot is small and substandard and meets all the physical criteria stated in the FEMA guidelines for deviation. The record indicates that this flood zone is created by a deficiency of the city storm drain system in a theoretical 100 year storm; it would be an unjust and exceptional hardship to deny the property owner the opportunity to build a safer structure.

D. The purpose of the regulation regarding underground parking in residential structures is public safety. Specifically, hurricane prone communities floods combine with hurricane force winds capable of removing structures from foundations; the concern is that homeowners will "shelter in place" and think the basement is safe. This is the rationale for discouraging below grade parking in residential buildings. This rationale does not apply in San Diego where hurricanes do not form and have not been confirmed in recorded history. Accordingly, even in a 100 year flood event, there would be no tendency to shelter in the basement. In this limited instance, the rationale for the regulation is very weak or does not apply. Therefore, when balancing the purpose of the regulation with the hardship of the applicant, the unique characteristics of the land (as described above and elsewhere on the record), the cause of the potential flooding and the characteristics thereof, heavily favor of the applicant.

E. When balanced against the purpose of the ordinance and the lack of risk to the public, a hardship finding is justified in the peculiar circumstances of the appellant's land. Furthermore, a denial of this deviation would constitute a hardship on the property owner because it would limit or eliminate his ability to develop and improve this dilapidated and unsafe property in a reasonable manner with a new structure that conforms to the extent possible with the land development code and at a bulk and scale consistent with the Ocean Beach Precise Plan. All habitable space is one foot above BFE pursuant to guidelines. The below grade parking area is flood proofed and will significantly reduce and probably eliminate any risk of flood damage, enhance the surrounding community and provide much needed off street parking on a substandard lot.

3. Granting the deviation does not result in increased flood heights, additional threats to public safety, extraordinary public expense, create nuisances, cause fraud on or victimization of the public, or conflict with existing laws or ordinances.

The proposed development including the flood proofed basement garage is taking place in the 100 year flood plain and not within the flood way. The site is currently developed and the new construction will occupy substantially the same footprint as the old structure. The permit as conditioned shall require the owner to flood proof all structures subject to inundation. The owner shall bear all costs of flood proofing, and there will be no expense to the city. The owner will record a covenant not to occupy the basement so there will be public record and notice to any future owner that the basement area is for parking only.

The city Engineer has determined that the deviation to allow the structure to be built under the BFE rather than 2'0" as required by the land development code will not cause an increase in flood height. The elevation requirement is for the protection of structures and its contents. Lessening the requirement does not result in additional threats to public safety, extra-ordinary public expense, or create a public nuisance.

4. The variance is the minimum necessary, considering the flood hazard, to afford relief.

The proposed development is taking place in Flood Zone A. The Land Development Code requires the lowest floor including basement to be elevated 2 feet above base flood elevation. FEMA requires the lowest floor to be elevated one foot above BFE. The project requests a deviation for a below grade parking and storage area which will be dry flood proofed one foot above BFE in accordance with FEMA technical bulletin 3-93. This requires a deviation.

The deviation is necessary because the lot is substandard and in order to build a modest structure (1750 sq. ft.), the parking area must be located below ground so that it may be excluded from the FAR; this area will be only for parking, storage and access to the house. No habitable area will be below BFE. All other aspects of this house comply precisely with all other applicable provisions of the land development code.

Potential flooding in this area is not from the river or from the ocean. Any flooding is theoretical and would possibly occur in a 100 year event due to the inadequacy of the storm drain system. Hydrology indicated this flooding would be slow, low velocity and with long warning times. Nevertheless, all habitable portions of the property will be protected one foot above BFE and the non habitable portions below will be dry flood proofed.

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ATTACHMENT #2

Planning Commission Findings

PLANNING COMMISSION
RESOLUTION NO. PC-XXXX
COASTAL DEVELOPMENT PERMIT NO. 147134
SITE DEVELOPMENT PERMIT NO. 389939
STEBBINS RESIDENCE [MMRP]

WHEREAS, DAVID STEBBINS, Owner/Permittee, filed an application with the City of San Diego for a permit to demolish an existing one-story duplex, and construct a new, three-story single family residence above basement garage (as described in and by reference to the approved Exhibits "A" and corresponding conditions of approval for the associated Permits No. 147134 and 389939), on portions of a 0.057-acre site;

WHEREAS, the project site is located at 5166 West Point Loma Boulevard in the RM 2-4 Zone, Coastal Overlay Zone (appealable-area), Coastal Height Limit Overlay Zone, First Public Roadway, Beach Parking Impact Overlay Zone, Airport Approach Overlay Zone, Airport Environs Overlay Zone, and the 100-year Flood-plain Overlay Zone, within the Ocean Beach Precise Plan and Local Coastal Program Land Use Plan;

WHEREAS, the project site is legally described as Lot 14, Block 90 of Ocean Bay Beach Map No. 1189;

WHEREAS, on February 8, 2007, the Planning Commission of the City of San Diego considered Coastal Development Permit No. 147134, and Site Development Permit No. 389939, pursuant to the Land Development Code of the City of San Diego; NOW, THEREFORE,

BE IT RESOLVED by the Planning Commission of the City of San Diego as follows:

That the Planning Commission adopts the following written Findings, dated February 8, 2007.

FINDINGS:

Coastal Development Permit - Section 126.0708

1. The proposed coastal development will not encroach upon any existing physical access way that is legally used by the public or any proposed public accessway identified in a Local Coastal Program land use plan; and the proposed coastal development will enhance and protect public views to and along the ocean and other scenic coastal areas as specified in the Local Coastal Program land use plan.

All development would occur on private property, and would be within the 30-foot coastal height limit. Additionally, the proposed project will not encroach upon any adjacent existing physical access way used by the public nor will it adversely affect any proposed physical public accessway identified in the Local Coastal Program Land Use Plan. The subject property is not located within or near any designated public view corridors. Accordingly, the proposed project will not impact any public views to or along the ocean or other scenic coastal areas as specified in the Local Coastal Program land use plan.

2. The proposed coastal development will not adversely affect environmentally sensitive lands.

The project requires a Site Development Permit due to the presence of Environmentally Sensitive Lands. The project proposes the demolition of an existing one-story, duplex and the construction of a new three-story above basement single family residence. The City of San Diego conducted a complete environmental review of this site. A Mitigated Negative Declaration has been prepared for this project in accordance with State of California Environmental Quality Act (CEQA) guidelines, which preclude impact to these resources and Mitigation Monitoring and Reporting Program (MMRP) would be implemented to reduce potential historical resources (archaeology) impacts to a level below significance. Mitigation for archaeology was required as the project is located in an area with a high potential for subsurface archaeological resources. The project site is a relatively flat contains an existing structure, which is located approximately 8 feet above mean sea level (AMSL). The project site is not located within or adjacent to the Multi-Habitat Planning Area (MHPA) of the City's Multiple Species Conservation Program. The project site is located within an existing urbanized area. The proposed project was found to not have a significant effect on the environment. Therefore, the proposed coastal development will not adversely affect environmentally sensitive lands.

3. The proposed coastal development is in conformity with the certified Local Coastal Program land use plan and complies with all regulations of the certified Implementation Program.

City staff has reviewed the proposed project for conformity with the Local Coastal Program and has determined it is consistent with the recommended land use, design guidelines, and development standards in effect for this site per the adopted Ocean Beach Precise Plan and Local Coastal Program Land Use Plan which identifies the site for multi-family residential use at 15-25 dwelling units per acre, the project as proposed would be constructed at 17 dwelling units per acre.

The proposed development is to demolish an existing one-story, duplex and construct a new three-story above basement garage. The new structure will be constructed within the 100 Year Floodplain (*Special Flood Hazard Area*), and has a Base Flood Elevation of 9.6 feet mean sea level. The restrictions on development within the floodplain require that the lowest floor, including basement to be elevated at least 2 feet above the base flood elevation in accordance with San Diego Municipal Code (SDMC) section §143.0146(C)(6), while the Federal Emergency Management Agency (FEMA) requires that the finished floor elevation be at one or more feet above the base flood elevation (BFE). This project is requesting a Site Development Permit to allow a deviation to permit development of the residential structure, to be at 7.1 feet below the Base Flood Elevation.

Staff supports the proposed deviation due to the development limitations of the site and the flood-proofing conditions that would be applied to the permit to construct the lower level below the Base Flood Elevation. The deviation request will not increase the overall structure height, mass, and setbacks.

The proposed development is located in an area designated as being between the first public road and the Pacific Ocean, therefore views to the ocean shall be preserved. A visual corridor of not less than the side yard setbacks will be preserved to protect views toward Dog Beach and the San Diego River. In addition, this area is not designated as a view corridor or as a scenic resource. Public views to the ocean from this location will be maintained and potential public views from the first public roadway will not be impacted altered by the development. Accordingly, the proposed project will not impact any public views to or along the ocean or other scenic coastal areas. The project meets the intent of the guidelines for the Coastal Overlay and Coastal Height Limitation Overlay zones, and the Ocean Beach Precise Plan and Local Coastal Program Addendum. Therefore, the proposed coastal development would conform with the certified Local Coastal Program land use plan and, with an approved deviation, comply with all regulations of the certified Implementation Program.

4. For every Coastal Development Permit issued for any coastal development between the nearest public road and the sea or the shoreline of any body of water located within the Coastal Overlay Zone the coastal development is in conformity with the public access and public recreation policies of Chapter 3 of the California Coastal Act.

The proposed development is to demolish an existing one-story, duplex and construct a new three-story above basement garage. The subject property is designated as being between the first public road and the Pacific Ocean within the Coastal Overlay Zone.

The proposed project site backs up to and is adjacent to the Ocean Beach Park, designated in the Local Coastal Program as a public park and recreational area. Public access to the park area is available at the end of Voltaire Street and West Point Loma Boulevard. All development would occur on private property; therefore, the proposed project will not encroach upon the existing physical access way used by the public. Adequate off-street parking spaces will be provided on-site, thereby, eliminating any impacts to public parking. The proposed coastal development will conform to the public access and public recreation policies of Chapter 3 of the California Coastal Act.

Site Development Permit - Section 126.0504(a)

I. The proposed development will not adversely affect the applicable land use plan;

The proposed development is to demolish an existing one-story, duplex and construct a new three-story above basement garage. The project is within the 100-year floodplain, and is therefore within the Environmentally Sensitive Lands, requiring a Site Development Permit for the deviation to the Special Flood Hazard Area, per the City's Environmentally Sensitive Lands Regulations (SDMC Section 143.0110 Table 143-01A). The project is located in the appealable Coastal Overlay Zone requiring a Coastal Development Permit. The proposed development is located between the shoreline and the first public roadway; therefore views to the ocean shall be preserved. This project is located in the RM-2-4 Zone. The RM-2-4 Zone permits a maximum density of 1 dwelling unit for each 1,750 square feet of lot area. The project is in conformance with the underlying zoning, and conforms to the required floor area ratio, parking and setbacks. The proposed development will adhere to the required yard area setbacks pursuant to the Land Development Code. A Deed Restriction is a condition of approval to preserve a visual corridor

of not less than the side yard setbacks, in accordance with the requirements of San Diego Municipal Code Section 132.0403(b). The building will be under the maximum 30-foot Coastal Height Limit allowed by the zone.

The proposed project meets the intent, purpose, and goals of the underlying zone, and the Ocean Beach Precise Plan and Local Coastal Program Addendum. Therefore, the proposed development will not adversely affect the applicable land use plan.

2. The proposed development will not be detrimental to the public health, safety, and welfare;

The proposed development is to demolish an existing one-story, duplex and construct a new 1,749 square-foot, three-story single-family dwelling unit above an 819 square-foot basement garage resulting in a 2,565 square-foot structure, hardscape, landscape on a 2,500 square-foot site. The present units to be demolished may contain asbestos and lead-based paint and it could potentially pose a risk to human health and public safety. All demolition activities must be conducted in accordance with the San Diego County Air Pollution Control District (SDAPCD) and the California Code of Regulations Title 8 and 17 regarding the handling and disposal of asbestos-containing materials and lead-based paints. Therefore, special procedures during demolition shall be followed. As a condition of the permit, Notice is to be provided to the Air Pollution Control District prior to demolition. Failure to meet these requirements would result in the issuance of a Notice of Violation.

The permit as conditioned, shall floodproof all structures subject to inundation. The floodproofed structures must be constructed to meet the requirements of the Federal Insurance Administration's Technical Bulletin 3-93. The permit conditions added, to flood-proof the basement garage to the required height above grade, have been determined necessary to avoid potentially adverse impacts upon the health, safety and general welfare of persons residing in the area. All site drainage from the proposed development would be directed away from the adjacent properties into existing public drainage system located on West Point Loma Boulevard via a sump pump and sidewalk underlain.

Based on the above, human health and public safety impacts due to the demolition of the existing structure on site would be below a level of significant, and a Notice to the SDAPCD is required and would be added as a permit condition. Therefore, the proposed development will not be detrimental to the public health, safety and welfare.

3. The proposed development will comply with the regulations of the Land Development Code;

The proposed development includes the demolition of an existing single-level, 1,250 square-foot duplex residence and construction of a new 1749 square-foot three-level single dwelling unit with a subterranean parking garage. The project area is mapped within the 100 Year Floodplain (*Special Flood Hazard Area*), and has a Base Flood Elevation of 9.6 feet mean sea level. The restrictions on development within the floodplain require that the lowest floor, including basement to be elevated at least 2 feet above the base flood elevation in accordance with San Diego Municipal Code (SDMC) section §143.0146(C)(6), while the Federal Emergency

Management Agency (FEMA) requires that the finished floor elevation be at one or more feet above the base flood elevation (BFE), which would effectively render the ground floor uninhabitable for most properties in this area. In addition, the lot is sub-standard in that it is only 2,500 square feet in area where the minimum lot size allowed by the zone is 6,000 square feet. Additionally, the RM-2-4 zone requires that 25 percent of FAR be utilized for parking, unless the parking is provided underground. Therefore, the project is requesting a deviation to allow development of the residential structure, to be at 7.1 feet below the Base Flood Elevation. All structures subject to inundation shall be flood-proofed, and must be constructed to meet the requirements of the Federal Insurance Administration's Technical Bulletin 3-93.

An approved Site Development Permit would allow the deviation and would be consistent with the Land Development Code. Thus, the proposed project meets the intent, purpose, and goals of the underlying zone, and the Ocean Beach Precise Plan and Local Coastal Program Addendum, and complies to the maximum extent feasible with the regulations of the Land Development Code. Therefore, the proposed development will not adversely affect the applicable land use plan.

Supplemental Findings, Environmentally Sensitive Lands(b)

1. The site is physically suitable for the design and siting of the proposed development and the development will result in minimum disturbance to environmentally sensitive lands;

The project site is immediately south of the San Diego River mouth outfall at the Pacific Ocean and located within the 100 year floodplain and is therefore considered environmentally sensitive land, requiring a Site Development Permit for the deviation to the Special Flood Hazard Area. However, the previous site grading and construction of the existing duplex have completely disturbed the site. The property is relatively flat and does not include any sensitive topographical or biological resources. The site is neither within nor adjacent to Multi-Habitat Planning Area (MHPA) lands. A Mitigated Negative Declaration dated November 2, 2006, has been prepared for this project in accordance with State CEQA guidelines, and a Mitigation, Monitoring and Reporting Program is required for Archaeological Resources to reduce any potential impacts to below a level of significance.

A geotechnical analysis was prepared to address the liquefaction issue. This report concluded that the site is considered suitable for the proposed development provided the conditions in the Geotechnical Investigation Report are implemented. Therefore, the site is physically suitable for the design and siting of the proposed development and the development will result in minimum disturbance to environmentally sensitive lands.

2. The proposed development will minimize the alteration of land forms and will not result in undue risk from geologic and erosional forces, flood hazards, or fire hazards;

The proposed project will be sited on a 2,500 square-foot, developed lot. The majority of the site is relatively flat at 8 feet above MSL across an approximately 25 foot x 100 foot lot. The proposed development surrounded by existing residential development, within a seismically active region of California; and therefore, the potential exists for geologic hazards, such as

earthquakes and ground failure. Proper engineering design of the new structures would minimize potential for geologic impacts from regional hazards.

On site grading would occur for excavation of the building foundation and basement. The subterranean garage, which would have a depth of 6 feet below existing grades, would be at least two feet below the high groundwater table. However, the subject site is no greater danger from flooding than the adjacent, already developed sites and the proposed design mitigates potential flood related damage to the principal residential structure by raising the required living space floor area above the flood line per FEMA requirements, and flood-proof all structures subject to inundation in accordance with Technical Bulletin 3-93 of the Federal Insurance Administration. Therefore, the proposed development will not result in undue risk from geologic and erosional forces, flood hazards, or fire hazards.

3. The proposed development will be sited and designed to prevent adverse impacts on any adjacent environmentally sensitive lands;

The project site is within the 100 year floodplain and is therefore considered environmentally sensitive land. However, the previous site grading and construction of the existing duplex have completely disturbed the site. The property is relatively flat with an elevation of 8 feet above mean sea level and does not include any sensitive topographical or biological resources. The site is neither within nor adjacent to Multi-Habitat Planning Area (MHPA) lands. A Mitigated Negative Declaration dated November 2, 2006, has been prepared for this project in accordance with State CEQA guidelines, and a Mitigation, Monitoring and Reporting Program is required for Archaeological Resources to reduce any potential impacts to below a level of significance. Thus, with the implementation of the conditions in the Geotechnical Investigation the proposed project should not adversely affect environmentally sensitive lands.

4. The proposed development will be consistent with the City of San Diego's Multiple species Conservation Program (MSCP) and subarea plan;

The project proposes the demolition of the existing duplex and construction of a three-level single dwelling unit with a subterranean parking garage. The project site is south of, but not adjacent to, the Multiple Species Conservation Program (MSCP), Multiple Habitat Planning Area (MHPA) of the San Diego River floodway. Therefore, the project does not need to show consistency with Multiple Species Conservation Program Subarea Plan.

5. The proposed development will not contribute to the erosion of public beaches or adversely impact local shoreline sand supply; and

The subject property is located approximately 450 feet away from the edge of the public beach, and is separated from the shoreline by a city parking lot. All site drainage from the proposed development would be directed away from the adjacent properties into existing public drainage system located on West Point Loma Boulevard via a sump pump and sidewalk underlain. Therefore, the proposed development will not contribute to the erosion of public beaches or adversely impact local shoreline sand supply.

6. The nature and extent of mitigation required as a condition of the permit is reasonably related to, and calculated to alleviate, negative impacts created by the proposed development.

The project proposes the demolition of the existing duplex and construction of a three-level single dwelling unit with a subterranean parking garage. An environmental analysis was performed and Mitigated Negative Declaration (MND) No. 51076 was prepared, which would mitigate potentially significant archaeological resource impacts to below a level of significance. The MND also discusses the location of the project being within the 100-year floodplain of the San Diego River according to the Federal Emergency Management Agency (FEMA) map. The permit and MMRP prepared for this project include conditions, environmental mitigation measures, and exhibits of approval relevant to achieving compliance with the applicable regulations of the Municipal Code in effect for this project. These conditions have been determined necessary to avoid potentially adverse impacts upon the health, safety and general welfare of persons residing or working in the area. These conditions include requirements pertaining to landscape standards, noise, lighting restrictions, public view, public right of way improvements, flood-proofing the structure and raising the habitable space above flood line, which provides evidence that the impact is not significant or is otherwise mitigated to below a level of significance. Therefore, the nature and extent of mitigation required as a condition of the permit is reasonably related to, and calculated to alleviate, negative impacts created by the proposed development.

Supplemental Findings, Environmentally Sensitive Lands Deviations(c)

1. There are no feasible measures that can further minimize the potential adverse affects on environmentally sensitive lands; and

The project area is mapped within the 100-year floodplain and the restrictions on development within the floodplain require that the first floor be 2 feet above the base flood elevation. The sub-standard lot of 2,500 square feet is less than 42% of the minimum area required for a legal lot in the RM-2-4 zone. These conditions and the fact that 25 percent of the 0.70 floor area ratio (FAR) allowed by the zone is required to be used for parking, unless the parking is provided underground, led the applicant to provide an underground garage that will be flood proofed according to the requirements of the Federal Emergency Management Agency (FEMA) in order to avoid having part of the ground floor level devoted to parking, which, in turn, would have drastically reduced habitable space. The project proposal includes a modest increase in square footage from 1,250 to 1,749 and to allow for development to be below the base flood elevation. Raising the finished floor elevation two feet above the BFE will not change the situation with regard to any adverse effects. The property is protected by a levee from floods that may come from the San Diego River. Any flooding would be of a low velocity and shallow and more likely from run off from the hill above Ocean Beach than from the river or the ocean.

Building the structure below the BFE or two-feet above, will not have implications to environmentally sensitive lands, therefore there are no feasible measures that can further minimize the potential adverse affects on environmentally sensitive lands.

2. The proposed deviation is the minimum necessary to afford relief from special circumstances or conditions of the land, not of the applicant's making

The proposed development is taking place within the 100 Year Floodplain (*Special Flood Hazard Area*), and the proposed new development is not in conformance with SDMC section §143.0146(C)(6) which requires a development within a *Special Flood Hazard Area* to have the lowest floor, including basement, elevated at least 2 feet above the base flood elevation. The Federal Emergency Management Agency (FEMA) requires that the finished floor elevation be at one or more feet above the base flood elevation (BFE). This project is requesting a deviation to allow development of the residential structure, to be at 7.1 feet below the Base Flood Elevation. The subterranean garage, which would have a depth of 6 feet below existing grades, would be at least two feet below the high groundwater table. However, all structures subject to inundation shall be flood-proofed and meet the requirements of the Federal Insurance Administration's Technical Bulletin 3-93. The proposed basement parking area is the minimum necessary to exclude the parking from the FAR, to allow for a reasonably sized residence on this sub-standard lot. In addition, the applicant states that there is hydrological evidence that flooding if any that may occur in a 100 years flood event would be minor and easily handled by the proposed flood proofing. The property is protected by a levee from floods that may come from the San Diego River. Flooding in this area would be due to lack of capacity of the storm water system. Flooding in a 100 year event in this area is very low velocity (ponding only) does not come from the river or the beach as is commonly believed but from run off from the streets on the hill above ocean beach. Additionally, there is evidence that recent and significant storm water repairs in this area should significantly reduce the already low risk. The proposed BFE will not have an adverse effect on environmentally sensitive lands and provide the minimum necessary to afford relief from special circumstances or conditions of the land.

Supplemental Findings, Environmentally Sensitive Lands Deviation from Federal Emergency Management Agency Regulations(d)

1. The City engineer has determined that the proposed development, within any designated floodway will not result in an increase flood levels during the base flood discharge;

The proposed development including the flood-proofed basement garage is taking place within the 100 Year Floodplain and not within the Floodway. Therefore, this finding is not applicable to the subject project.

2. The City engineer has determined that the deviation would not result in additional threats to the public safety, extraordinary public expense, or create a public nuisance.

The proposed development is to demolish an existing one-story, duplex and construct a new 1,749 square-foot, three-story single-family dwelling unit above an 819 square-foot basement garage. The permit as conditioned, shall flood-proof all structures subject to inundation. The owner shall bear all costs of flood-proofing, and there will be no expense to the city.

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The City Engineer has determined that the deviation to allow the structure to be built under the BFE rather than 2'-0" above as required by the Land Development Code will not cause an increase in the flood height. The elevation requirement of the Land Development Code is for the protection of the structures and its contents. Lessening that requirement does not result in additional threats to public safety, extraordinary public expense, or create a public nuisance.

BE IT FURTHER RESOLVED that, based on the findings hereinbefore adopted by the Planning Commission, Coastal Development Permit No. 147134 and Site Development Permit No. 389939 are hereby GRANTED by the Planning Commission to the referenced Owner/Permittee, in the form, exhibits, terms and conditions as set forth in Permit No. 147134/389939, a copy of which is attached hereto and made a part hereof.

LAILA ISKANDAR
Development Project Manager
Development Services

Adopted on: February 8, 2007

Job Order No. 42-3454

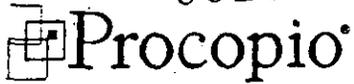
cc: Legislative Recorder, Planning Department

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ATTACHMENT #3

Applicant Memo of Law

001061



Procopio, Cory, Hargreaves & Savitch LLP

Evelyn F. Heidelberg

Direct Dial: (619) 525-3804

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Personal Fax: (619) 398-0134

August 14, 2007

BY HAND

Honorable Members of the City Council
City of San Diego
City Administration Building
202 "C" Street
San Diego, CA 92101-3862

Re: Appeal of Planning Commission's Decision to Approve Site Development Permit
and Coastal Development Permit for the Stebbins Residence -- Project No. 51076
(September 4, 2007)

Dear City Council Members:

On behalf of our client, appellee Mr. David Stebbins, we submit a response to the City Attorney's Memorandum MS 59, dated June 13, 2007 ("City Attorney's Memo"), in which the City Attorney asserts that certain findings required by the Federal Emergency Management Agency ("FEMA") need to be made in order to approve a Site Development Permit ("SDP") for the referenced project ("Project"). (A copy of the City Attorney's Memo is attached for your reference as Exh. A.) As set forth below, the City Attorney's opinion is incorrect as a matter of law.

Executive Summary

Among the 17 findings made by the Planning Commission to support issuance of an SDP and a Coastal Development Permit are four required specifically to support a deviation for the Project from the Land Development Code's Supplemental Requirements for Special Flood Hazard Areas. The project requires a deviation from a Supplemental Requirement that the first floor of a structure have the lowest floor (including basements) elevated at least two feet above the base flood elevation. Due to an extremely small lot and restrictive FAR requirements, the only feasible design that meets the zoning requirements necessitates placing a water-proofed garage below-grade.

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The City Attorney has taken the position that the Land Development Code "on its fact [sic] incorporates by reference the [additional] requirements of 44 CFR Section 60.6(a)" and that as a consequence two additional findings need to be made to support the deviation. But nowhere in the Land Development Code ("LDC") are such requirements expressly incorporated by reference. The City Attorney's argument is based on an interpretation of the LDC that violates a fundamental principle of statutory construction. The City Attorney argues that a provision in one section of the LDC specifying development regulations for special flood hazard areas (in which it is stated that "The following development regulations and all other applicable requirements and regulations of FEMA apply" [SDMC § 143.0145(d)]) carries over and is somehow incorporated into an entirely different section of the LDC which specifies supplemental findings that must be made for a deviation from those development regulations. SDMC §§ 143.0150(a)&(b) (requiring that findings required by SDMC §§ 126.0504(c)&(d) be made). The City Attorney's argument violates the "settled rule of statutory construction that a special statute dealing with a particular subject controls and takes priority over a general statute." *Pinewood Investors v. City of Oxnard*, 133 Cal. App. 3d 1030, 1041 (1982). As applied to the facts here, this principle means that if City Council in adopting provisions requiring that specific findings be made to support deviations from flood regulations had intended to incorporate FEMA regulations, it would have said so in the LDC provisions governing deviations not in the LDC provisions governing the regulations from which deviations may be necessary.

The City Attorney's argument is also premised on the incorrect assertion that Council Policy 600-14, which calls for the two additional findings to be made, somehow "trumps" the LDC regulations. Such a position is at odds with the stated purpose of the LDC, the Council's Policy No. 000-01, and fundamental principles of due process.

Regulatory Background

The Project site is considered "environmentally sensitive" solely because it is located within the 100-year flood plain.¹ The Planning Commission's findings acknowledge that any flooding in this area would be due to lack of capacity of the storm water system. "Flooding in a 100 year event in this area is very low velocity (ponding only) [and] does not come from the [San Diego] [R]iver or the beach as is commonly believed but from runoff from the streets on the hill above [O]cean [B]each. Additionally, there is evidence that recent and significant storm water repairs in this area should significantly reduce the already low risk." (Planning Commission Resolution, at page 14).

The Project required an SDP solely because one of the Supplemental Regulations for Special Flood Hazard Areas requires that a structure have the lowest floor (including basements)

¹ As set forth in the staff report to Council dated May 16, 2007, "[t]he site does not include any sensitive topographical or biological resources and is neither within or adjacent to Multi-Habitat Planning Area (MPHA) lands." Report No. 07-091, at page 4.

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elevated at least two feet above the base flood elevation. San Diego Municipal Code ("SDMC") § 143.0146(c)(6). The Project requires a deviation from that requirement because water-proofed parking is partially below grade, with the living space above. This design was necessary because the lot is very small (only 2,500 square feet), and the applicable zoning (RM-2-4) allows a Floor Area Ratio ("FAR") of only 0.7 and requires that 25 percent of the permitted FAR be used for parking unless parking is provided underground. If part of the first floor (i.e., above two feet above base flood elevation) had to be devoted to parking, the habitable space of the unit would be very small. These regulatory constraints probably explain why the existing modest and dilapidated structures along this block, built in the mid-1950s, have not been redeveloped. As it is, with the water-proofed parking below-grade, the Project is still quite small by contemporary standards, consisting of livable space of only 1,749 square feet plus the 816 square foot garage.

Pursuant to the LDC, a deviation from Section 143.0146(c)(6) requires that findings be made pursuant to Section 126.0504(c) and (d). (See SDMC § 143.0150(a) & (b).) Such findings are in addition to the findings required for all SDPs, for SDPs for projects located on Environmentally Sensitive Lands and for Coastal Development Permits ("CDPs") pursuant to Sections 126.050(a), 126.050(b) and 126.0708, respectively. To satisfy these various authorities, seventeen (17) findings need to be made, and the Planning Commission has made each of these required findings, and each finding is supported by substantial evidence.

The City Attorney's Position Is Incorrect As a Matter of Law in Arguing that the FEMA Standards for Deviations Are Incorporated Into the Land Development Code and that in Making the Required Findings, the FEMA Standards Must Be Addressed

The City Attorney's Memo does not dispute that the referenced 17 findings must be made.² Rather, the City Attorney's Memo asserts that "the LDC on its fact [sic] incorporates by reference the requirements of 44 CFR Section 60.6(a)." City Attorney's Memo, at page 6. The City Attorney is incorrect: the Land Development Code does not, on its face, incorporate by reference the referenced FEMA standards, which identify certain procedures for communities to follow when granting a variance.

At issue is an obscure provision appearing not in the main body of FEMA regulations, but rather in one of several voluminous appendices to the National Flood Insurance Program regulations. 44 CFR Section 60.6.(a) is found in Appendix E, a copy of which is attached as Exh. B. Specifically, the import of the City Attorney's Memo is that in addition to the 17 detailed findings made by the Planning Commission, the Planning Commission was obligated also to make one "showing" and one "determination": that the variance was approved upon a showing of good and sufficient cause, and that failure to grant the deviation would result in

² The City Attorney's Memo addresses only the 14 findings that must be made for an SDP, and does not address the three additional findings that must be made for a CDP pursuant to Section 126.0708.

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exceptional hardship to the applicant. See 44 CFR § 60.6(a)(3)(i)&(ii), at Exh. B, page E-23.³ The Planning Commission's 17 findings themselves demonstrate that there was "good and sufficient cause" for granting the deviation, although those precise words do not appear per se in the 17 findings. Sufficient evidence to support a determination that failure to grant the deviation would result in exceptional hardship is before you in consideration of this appeal, but it is Mr. Stebbins' contention that the City Attorney's position that the Planning Commission's findings are insufficient is incorrect as a matter of law.

To support its position, the City Attorney's Office cites Section 143.0145(d). Section 143.0145 sets forth "Development Regulations for Special Flood Hazard Areas," which sets forth the technical requirements applicable to developments proposed for special flood hazard areas as mapped by FEMA. Subsection (d), on which the City Attorney relies, states "[t]he following development regulations **and all other applicable requirements and regulations of FEMA**, apply to all development proposing to encroach into a Special Flood Hazard Area, including both the floodway and flood fringe areas or that does not qualify for an exemption pursuant to Section 143.0110(c) . . ." (emphasis added).

But an entirely separate section of the LDC, Section 143.0150, provides for standards for granting deviations from Environmentally Sensitive Lands Regulations: as referenced above, Sections 143.0150(a) and (b) set forth required findings that the Planning Commission must make for deviations from the Environmentally Sensitive Land regulations generally, and from the Supplemental Regulations for Special Flood Areas in Section 143.0146, respectively. Neither Sections 143.0150(a) or (b) reference FEMA standards in any manner, let alone "on their fac[e]."

The City Attorney's argument – that the general statement in a section defining applicable regulations that "all other applicable requirements and regulations of FEMA apply" is incorporated by reference into an entirely different section that specifically identifies standards for granting deviations from those regulations particular FEMA regulations – defies logic, principles of statutory construction, and constitutional rights to due process. As a matter of logic and interpretation of regulations, "[i]t is a settled rule of statutory construction that a special statute dealing with a particular subject controls and takes priority over a general statute." *Pinewood Investors v. City of Oxnard*, 133 Cal. App. 3d 1030, 1041 (1982). Applied to the regulations at issue, this principle means that the provision in the general regulation (stating that "all other applicable requirements and regulations of FEMA apply" (Section 143.0110(c)) does not carry over or apply to the specific regulations establishing the criteria and findings for deviations from the Supplemental Regulations for Special Flood Areas in Section 143.0150(b). Moreover, the section setting forth the findings that must be made pursuant to Section 143.0150(b) is denominated "Supplemental Findings – Environmentally Sensitive Lands

³ All of the other standards of 44 CFR § 60.6(a) are met by the 17 findings made by the Planning Commission.

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Deviation from Federal Emergency Management Agency Regulations.” SDMC § 126.0504(d). If City Council had intended to incorporate the specific FEMA standards for granting variances appearing at 44 CFR § 60.6(a), surely it would have so specified in Section 126.0504(d).

In addition, the City Attorney’s argument – that “all other applicable requirements and regulations of FEMA apply” in Section 143.0110(c) means that in determining whether deviations may be granted pursuant to Sections 126.0504(d) and 143.0150(b) – would not pass constitutional muster because it is void for vagueness. *See, e.g.*, D.J. Curtin, Jr. and C.T. Talbert, Curtin’s California Land Use and Planning Law (24th ed. 2004), at 45 (“A land use ordinance, including a zoning ordinance, cannot be so vague or uncertain that a person of common intelligence and understanding must guess as to its meaning.”). What are the “other applicable requirements and regulations of FEMA”? FEMA’s regulations are voluminous and it is not at all clear to the regulated public which of FEMA’s regulations are applicable. Surely the regulated public cannot be expected to comb through not only the main FEMA regulations, but all of the various appendices to the National Flood Insurance Program and guess as to which of those regulations may be “applicable.”

The City Attorney’s Office Is Incorrect in Asserting that Council Policy 600-14 “Trumps” the Land Development Code Requirements

In addition to incorrectly asserting that “the LDC on its fact [sic] incorporates by reference the requirements of 44 CFR Section 60.6(a)[,]” the City Attorney argues that Council Policy 600-14, which incorporates the two provisions that the City Attorney claims are absent from the Planning Commission’s findings (a showing of good and sufficient cause for the deviation and a determination that failure to grant the variance would result in sufficient hardship to the applicant) applies to add substantive requirements to the Planning Commission’s necessary findings in issuing deviations from FEMA Regulations pursuant to Section 126.0507(d). Here, too, the City Attorney’s Memo is wrong.

The City Attorney correctly notes that “[a]fter the Land Development Code [LDC] was streamlined and amended in January 2000, reference to Council Policy 600-14 was removed from the Municipal Code.” City Attorney’s Memo, at page 5. Yet the City Attorney asserts that despite the removal of all references to Policy 600-14, it nevertheless applies to the Planning Commission’s approval of deviations pursuant to Sections 126.0504(d) and 143.0150(b). But by contrast, many provisions of the LDC reference Council Resolutions that are applicable to proposed development projects. *See, e.g.*, Editor’s Note following SDMC § 111.1006.⁴ Even

⁴ The Editor’s Note following SDMC Section 111.0106 states as follows:

- The Land Development Manual includes:
- Coastal Bluffs and Beaches Guidelines
- Biology Guidelines
- Historical Resources Guidelines
- Submittal Requirements for Deviations within the Coastal Overlay Zone

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though Council Policies, such as Policy 600-14, are adopted by resolution, neither Sections 126.0504(d) nor 143.0150(b) reference any of the Resolutions by which Policy 600-14 was adopted or amended. Accordingly, there is nothing in the LDC to suggest that anything outside the LDC applies to regulate the findings that need to be made to support a deviation from the Supplemental Regulations for Special Flood Areas pursuant to Sections 143.0150(b) and 126.0504(d).

The City Attorney's position flies in the face of the stated purposes of the LDC, as well as the regulated public's right to know what regulations apply to their proposed projects. Specifically, the "Purpose of the Land Development Code" is as follows: "The Land Development Code sets forth the procedures used in the application of land use regulations, the types of review, of development, and the regulations that apply to the use and development of land in the City of San Diego. The intent of these procedures and regulations is to facilitate fair and effective decision-making and to encourage public participation." SDMC § 111.0102. "Fair" decision-making cannot be accomplished if the applicable rules are not specified for the benefit of the regulated public. Because by its terms the LDC sets forth the procedures, types of review and applicable regulations, if the Council intended the two FEMA criteria to apply to deviations from the Supplemental Regulations for Special Flood Areas, it presumably would have included such criteria in the LDC. Here, however, as stated above, there is nothing in the LDC to suggest that anything outside the LDC applies to regulate the findings that need to be made to support a deviation from the Supplemental Regulations for Special Flood Areas pursuant to Sections 143.0150(b) and 126.0504(d).

Moreover, the Council's Policy on its Policies (Policy No. 000-01) states "Regulatory policies established by the City Council usually are adopted by ordinance and included in the Municipal Code. However, other policies also are established which by their nature do not require adoption by ordinance." (A copy of Policy No. 000-01 is attached as Exh. C.) It is submitted that the interests of fundamental fairness and due process require that all Council policies imposing land development regulations be adopted by ordinance, or, in the words of Policy No. 000-01 and consistent with the stated purpose of the LDC, that by their nature, policies regulating the use of land be adopted by ordinance as part of the LDC, or at minimum be

See RR-292248 for the Coastal Bluffs and Beaches Guidelines of the Land Development Code; RR-292249 for the Biology Guidelines of the Land Development Code; RR-292250 for the Historical Resources Guidelines of the Land Development Code; RR-292251 for the Submittal Requirements for Deviations within the Coastal Overlay Zone of the Land Development Code.

Thus, the Land Development Code incorporates by reference those applicable regulations and guidelines that do not appear in the Land Development Code but which have been adopted by Council by resolution.

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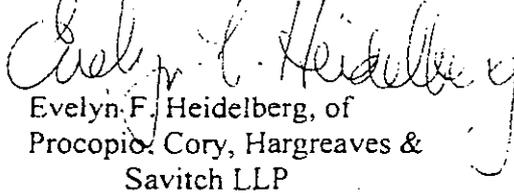


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incorporated in the LDC by specific reference to the resolutions by which such policies were adopted by Council.

For all of the above-stated reasons, we submit that the City Attorney's Memo is incorrect as a matter of law and that the Council may, consistent with the LDC and all other applicable regulations, reject the appeal and affirm the findings and decisions of the Planning Commission.

Very truly yours,


Evelyn F. Heidelberg, of
Procopio, Cory, Hargreaves &
Savitch LLP

EFH/hal

cc: Hon. Mayor Jerry Sanders
Mr. Jim Waring
Michael Aguirre, Esq.

Exhibit A

EXHIBIT A

001071

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: June 13, 2007
TO: Honorable Mayor and City Councilmembers
FROM: City Attorney
SUBJECT: In Relation to the Appeal of the Planning Commission's Decision to Approve the Issuance of a Site Development Permit for the Stebbins Residence, Project No. 51076

INTRODUCTION

On March 1, 2007, the Planning Commission approved a Coastal Development Permit [CDP] and Site Development Permit [SDP], certified the Mitigated Negative Declaration [MND] and adopted a Mitigation Monitoring and Reporting Program [MMRP] for the Stebbins Residence—a project involving the demolition of an existing single-story duplex and the construction of a 1,749 square-foot three-story single-family residence on a 2,500 square-foot lot. A Site Development Permit is needed because the project includes a request to deviate from the applicable *Environmentally Sensitive Lands (ESL) Regulations* to allow a portion of the new structure to be located below the base flood elevation for below grade parking (subterranean two-car garage with storage area). The property is located within a 100 year floodplain and is within a Special Flood Hazard Area [SFHA]. See San Diego Municipal Code [SDMC] sections 143.0110 Table 143-01A, 126.0504(a)(b)(c) & (d) and 143.0150(a) & (b); Staff Report to Planning Commission, Report No. PC-07-010 (January 30, 2007).

On or about March 14, 2007, the determination of the Planning Commission was appealed to City Council. A hearing is currently scheduled for June 19, 2007, at which time the City Council will be asked to decide whether to grant or deny the appeal. Pursuant to San Diego Municipal Code section 112.0508(c), grounds for appeal of this Process Four Decision may include:

1. *Factual Error.* The statements or evidence relied upon by the decision maker when approving, conditionally approving, or denying a permit, map, or other matter were inaccurate;
2. *New Information.* New information is available to the applicant or the interested person that was not available through that person's reasonable efforts or due diligence at the time of the decision;

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3. *Findings Not Supported.* The decision maker's stated findings to approve, conditionally approve, or deny the permit, map, or other matter are not supported by the information provided to the decision maker;
4. *Conflicts.* The decision to approve, conditionally approve, or deny the permit, map, or other matter is in conflict with a land use plan, a City Council policy, or the Municipal Code; or
5. *Citywide Significance.* The matter being appealed is of citywide significance.

On appeal of the Mitigated Negative Declaration, the City Council, per Section 112.0520(d), shall, by majority vote:

1. Deny the appeal, uphold the environmental determination and adopt the CEQA findings of the previous decision-maker, where appropriate; or
2. Grant the appeal and make a superceding environmental determination or CEQA findings; or
3. Grant the appeal, set aside the environmental determination, and remand the matter to the previous decision-maker, in accordance with section 112.0520(f), to reconsider the environmental determination that incorporates any direction or instruction the City Council deems appropriate.

One of the issues on appeal is whether the Federal Emergency Management Administration [FEMA] Regulations, Section 60.6(a) of Title 44 of the Code of Regulations [44 CFR Section 60.6(a)] (and as expressly referenced in Council Policy 600-14), apply to this project; and if so, whether these standards have been complied with. *See Report To City Council, May 16, 2007, Report No. 07-091.* In determining whether to approve the Site Development Permit for this project, the Planning Commission did not make the findings of 44 CFR Section 60.6(a), which are identified in Council Policy 600.14.¹

¹ Although normally the Development Services Department [DSD] makes a written recommendation to City Council on appeal, DSD is not required to do so in every case. Section 112.0401(b) only requires a written recommendation where feasible. Given the nature of this appeal and the determinations to be made based upon the applicability of federal standards to these particular facts (e.g. exceptional hardship), it may not be feasible for DSD to make a written recommendation at this time.

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QUESTION PRESENTED

Do the findings of 44 CFR Section 69.6(a) (as incorporated into Council Policy 600-14) need to be made in order to approve an SDP for this project?

SHORT ANSWER

Yes. The findings of 44 CFR Section 69.6(a) (as incorporated into Council Policy 600-14) need to be made in order to approve an SDP for this project.

LEGAL ANALYSIS

Under FEMA's National Flood Insurance Program [NFIP], the City of San Diego qualifies for the sale of federally-subsidized flood insurance if the City adopts and enforces its floodplain management requirements that meet or exceed the minimum NFIP standards and requirements. See 44 CFR Section 59.2(b) and Part 60. The City's floodplain management requirements must, at a minimum, be designed to reduce or avoid future flood, mudslide (i.e., mudflow) or flood-related erosion damages and must include effective enforcement provisions. See FEMA's *Floodplain Management Requirements A Study Guide and Desk Reference for Local Officials*, Page 5-4.

FEMA Regulations [44 CFR Section 60.6(a)] expressly identify the procedures for communities to follow when granting a variance, or in this case a deviation:

1. Variances shall not be issued by a community within any designated regulatory floodway if any increase in flood levels during the base flood discharge would result;
2. Variances may be issued by a community for new construction and substantial improvements to be erected on a lot of one-half acre or less in size contiguous to and surrounded by lots with existing structures constructed below the base flood level, in conformance with the procedures of paragraphs (a)(3), (4), (5) and (6) of this section;
3. Variances shall only be issued by a community upon
 - i. a showing of good and sufficient cause,
 - ii. a determination that failure to grant the variance would result in exceptional hardship to the applicant, and
 - iii. a determination that the granting of a variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, create nuisances, cause fraud on or

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victimization of the public, or conflict with existing local laws or ordinances;

4. Variances shall only be issued upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief;
5. A community shall notify the applicant in writing over the signature of a community official that
 - i. the issuance of a variance to construct a structure below the base flood level will result in increased premium rates for flood insurance up to amounts as high as \$25 for \$100 of insurance coverage and
 - ii. such construction below the base flood level increases risks to life and property. Such notification shall be maintained with a record of all variance actions as required in paragraph (a)(6) of this section; and
6. A community shall (i) maintain a record of all variance actions, including justification for their issuance, and (ii) report such variances issued in its annual or biennial report submitted to the Administrator.

FEMA interprets these requirements to mean that, "[a] review board hearing a variance request must not only follow procedures given in the NFIP criteria, it must consider the NFIP criteria in making its decision." *See FEMA's Floodplain Management Requirements A Study Guide and Desk Reference for Local Officials*, Page 7-45. In interpreting its own standards, FEMA has provided guidance to assist communities in determining whether the applicant for a project has demonstrated good and sufficient cause and hardship to justify a deviation:

Good and sufficient cause. The applicant must show good and sufficient cause for a variance. Remember, the variance must pertain to the land, not its owners or residents. Here are some common complaints about floodplain rules that are NOT good and sufficient cause for a variance:

- The value of the property will drop somewhat.
- It will be inconvenient for the property owner.
- The owner doesn't have enough money to comply.
- The property will look different from others in the neighborhood.
- The owner started building without a permit and now it will cost a lot to bring the building into compliance.

Hardship. The concept of unnecessary hardship is the cornerstone of all variance standards. Strict adherence to this concept across the country has limited the granting of variances.

The applicant has the burden of providing unnecessary hardship. Reasons for granting the variance must be substantial; the proof must be compelling. The claimed hardship must be exceptional, unusual and peculiar to the property involved. Financial hardship, inconvenience, aesthetic considerations, physical handicaps, personal preferences or the disapproval of one's neighbors do not qualify as exceptional hardships.

The local board must weigh the applicant's plea of hardship against the purpose of the ordinance. Given a request for a variance from floodplain elevation requirements, the board must decide whether the hardship the applicant claims outweighs the long-term risk to the owners and occupants of the building would face, as well as the community's need for strictly enforced regulations that protect its citizens from flood danger and damage.

When considering variances to flood protection ordinances, local boards continually face the difficult task of frequently having to deny requests from applicants whose personal circumstances evoke compassion, but whose hardships are simply not sufficient to justify deviation from community-wide flood damage prevention requirements.

See FEMA's Floodplain Management Requirements A Study Guide and Desk Reference for Local Officials, Pages 7-45 and 7-46.²

Historically, the City of San Diego's approved floodplain management requirements were a combination of the City Municipal Code provisions, found at Sections 62.0423, 91.8901 and 101.0462, and Council Policy 600-14. Both Section 62.0423 and 91.8901 incorporated by reference Council Policy 600-14. After the Land Development Code [LDC] was streamlined and amended in January 2000, reference to Council Policy 600-14 was removed from the Municipal Code. Council Policy 600-14, both before and after the January 2000 LDC amendments,

² The requirement for demonstrating good cause and exceptional hardship before granting a deviation dates to 1976. The federal regulatory history of 44 CFR Part 60 is found in the Federal Register at 40 Fed. Reg. 13419, 13420 (March 26, 1975) and 41 Fed. Reg. 46961, 46962, 46966 and 46979 (October 26, 1976). "The proposed regulations did not intend to set absolute criteria for granting of a variance, since it is the community which, after appropriate review, approves or disapproves a request. Rather, the regulations support FIA's authority to review the grounds on which variances were granted and to take action (including action to suspend) where a pattern of variance issuances indicates an absence of unusual hardship or just and sufficient cause. For example, in the instance of a community issuing a variance for a structure to be erected on a lot exceeding one-half acre, the final rule reflects FIA's position that the degree of technical justification required increases greatly and that extreme and undue hardship must be shown." 41 Fed. Reg. at 46966.

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identified the criteria for granting a variance consistent with FEMA Regulations 44 CFR Section 60.6(a). Although Council Policy 600-14 is no longer incorporated by reference into the LDC, this Policy still remains in effect and, thus, City Council is subject to its terms. The last time Council Policy 600-14 was amended was in December 2000. In addition, Section 143.0145(d) of the LDC makes clear that "...all other applicable requirements and regulations of FEMA apply to all development proposing to encroach into a Special Flood Hazard Area, including both the floodway and flood fringe areas..." Therefore, the LDC on its fact incorporates by reference the requirements of 44 CFR Section 60.6(a).

Because a Special Flood Hazard Area is considered an environmentally sensitive lands (ESL) area, a Site Development Permit is necessary per SDMC section 126.0504(a) and (b). The normal findings for a Site Development Permit for projects on ESLs are:

1. The proposed development will not adversely affect the applicable land use plan;
2. The proposed development will not be detrimental to the public health, safety, and welfare;
3. The proposed development will comply with the applicable regulations of the Land Development Code;
4. The site is physically suitable for the design and siting of the proposed development and the development will result in minimum disturbance to environmentally sensitive lands;
5. The proposed development will minimize the alteration of natural land forms and will not result in undue risk from geologic and erosional forces, flood hazards, or fire hazards;
6. The proposed development will be sited and designed to prevent adverse impacts on any adjacent environmentally sensitive lands;
7. The proposed development will be consistent with the City of San Diego's Multiple Species Conservation Program (MSCP) Subarea Plan;
8. The proposed development will not contribute to the erosion of public beaches or adversely impact local shoreline sand supply; and
9. The nature and extent of mitigation required as a condition of the permit is reasonably related to, and calculated to alleviate, negative impacts created by the proposed development.

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In addition to the above findings for a Site Development Permit, any deviation from the Environmentally Sensitive Land Regulations where the project is within a Special Flood Hazard Area also requires the following supplemental findings be made, pursuant to SDMC section 143.0150(a) & (b), 126.0504(c) & (d):

1. There are no feasible measures that can further minimize the potential adverse effects on environmentally sensitive lands;
2. The proposed deviation is the minimum necessary to afford relief from special circumstances or conditions of the land, not of the applicant's making;
3. The City Engineer has determined that the proposed development, within any designated floodway will not result in an increase in flood levels during the base flood discharge; and,
4. The City Engineer has determined that the deviation would not result in additional threats to public safety, extraordinary public expense, or create a public nuisance.

Therefore, in order to grant the deviation for this project under the Land Development Code, all 13 findings, as identified above, must be made, as supported by substantial evidence in the record. One of the express requirements is that "the proposed development will comply with the applicable regulations of the Land Development Code." In as much as the LDC incorporates by reference the FEMA standards, it is clear that FEMA standards will also apply to this project. This would include the provisions of 44 CFR Section 60.6(a). Council Policy 600-14 further demonstrates the need to ensure Section 60.6(a) is complied with before a deviation is granted since it expressly identifies this FEMA regulatory criteria.

CONCLUSION

Among the many issues the City Council must consider in determining whether to grant or deny the appeal, the City Council must also decide whether substantial evidence in the record supports the findings for granting a Site Development Permit, which includes the findings of 44 CFR Section 60.6(a) of the FEMA Regulations (as incorporated by reference into the Land Development Code and as expressly referenced in Council Policy 600-14).

MICHAEL J. AGUIRRE, City Attorney

By

Shirley R. Edwards
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SRE:pev
MS-2007-7

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Exhibit B

EXHIBIT B

APPENDIX E: NFIP REGULATIONS

This Appendix contains the text of the Code of Federal Regulations (CFR) for the National Flood Insurance Program: 44 CFR Parts 59, 60, 65, and 70.

TITLE 44--EMERGENCY MANAGEMENT AND ASSISTANCE

CHAPTER I--FEDERAL EMERGENCY MANAGEMENT AGENCY, DEPARTMENT OF HOMELAND SECURITY

PART 59--GENERAL PROVISIONS - Table of Contents

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- 59.21 Purpose of subpart.
 - 59.22 Prerequisites for the sale of flood insurance.
 - 59.23 Priorities for the sale of flood insurance under the regular program.
 - 59.24 Suspension of community eligibility.
- Authority: 42 U.S.C. 4001 et seq.; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127 of Mar. 31, 1979, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

Subpart A--General

§ 59.1 Definitions.

As used in this subchapter--

"Act" means the statutes authorizing the National Flood Insurance Program that are incorporated in 42 U.S.C. 4001-4128.

"Actuarial rates"--see "risk premium rates".

"Administrator" means the Federal Insurance Administrator.

"Agency" means the Federal Emergency Management Agency, Washington DC.

"Alluvial fan flooding" means flooding occurring on the surface of an alluvial fan or similar landform which originates at the apex and is characterized by high-velocity flows; active processes of erosion, sediment transport, and deposition; and unpredictable flow paths. "Apex" means a point on an alluvial fan or similar landform below which the flow path of the major stream that formed the fan becomes unpredictable and alluvial fan flooding can occur.

"Applicant" means a community which indicates a desire to participate in the Program.

"Appurtenant structure" means a structure which is on the same parcel of property as the principal structure to be insured and the use of which is incidental to the use of the principal structure.

"Area of future-conditions flood hazard" means the land area that would be inundated by the 1-percent-annual-chance (100-year) flood based on future-conditions hydrology.

"Area of shallow flooding" means a designated AO, AH, AR/AO, AR/AH, or VO zone on a community's Flood Insurance Rate Map (FIRM) with a 1 percent or greater annual chance of flooding to an average depth of 1 to 3 feet where a clearly defined channel does not exist, where the path of flooding is unpredictable, and where velocity flow may be evident. Such flooding is characterized by ponding or sheet flow.

"Area of special flood-related erosion hazard" is the land within a community which is most likely to be subject to severe flood-related erosion losses. The area may be designated as Zone E on the Flood Hazard Boundary Map (FHBM). After the detailed evaluation of the special flood-related erosion hazard area in preparation for publication of the FIRM, Zone E may be further refined.

"Area of special flood hazard" is the land in the flood plain within a community subject to a 1 percent or greater chance of flooding in any given year. The area may be designated as Zone A on the FHBM. After detailed ratemaking has been completed in preparation for publication of the flood insurance rate map, Zone A usually is refined into Zones A, AO, AH, AI-30, AE, A99, AR, AR/AI-30, AR/AE, AR/AO, AR/AH, AR/A, VO, or VI-30, VE, or V. For purposes of these regulations, the term "special flood hazard area" is synonymous in meaning with the phrase "area of special flood hazard".

"Area of special mudslide (i.e., mudflow) hazard" is the land within a community most likely to be subject to severe mudslides (i.e., mudflows). The area may be designated as Zone M on the FHBM. After the detailed evaluation of the special mudslide (i.e., mudflow) hazard area in preparation for publication of the FIRM, Zone M may be further refined.

"Base flood" means the flood having a one percent chance of being equalled or exceeded in any given year.

"Basement" means any area of the building having its floor subgrade (below ground level) on all sides.

"Breakaway wall" means a wall that is not part of the structural support of the building and is intended through its design and construction to collapse under specific lateral loading forces, without causing damage to the elevated portion of the building or supporting foundation system.

"Building" - see structure.

"Chargeable rates" mean the rates established by the Administrator pursuant to section 1308 of the Act for first layer limits of flood insurance on existing structures.

"Chief Executive Officer of the community (CEO)" means the official of the community who is charged with the authority to implement and administer laws, ordinances and regulations for that community.

"Coastal high hazard area" means an area of special flood hazard extending from offshore to the inland limit of a primary frontal dune along an open coast and any other area subject to high velocity wave action from storms or seismic sources.

"Community" means any State or area or political subdivision thereof, or any Indian tribe or authorized tribal organization, or Alaska

Native village or authorized native organization, which has authority to adopt and enforce flood plain management regulations for the areas within its jurisdiction.

"Contents coverage" is the insurance on personal property within an enclosed structure, including the cost of debris removal, and the reasonable cost of removal of contents to minimize damage. Personal property may be household goods usual or incidental to residential occupancy, or merchandise, furniture, fixtures, machinery, equipment and supplies usual to other than residential occupancies.

"Criteria" means the comprehensive criteria for land management and use for flood-prone areas developed under 42 U.S.C. 4102 for the purposes set forth in part 60 of this subchapter.

"Critical feature" means an integral and readily identifiable part of a flood protection system, without which the flood protection provided by the entire system would be compromised.

"Curvilinear Line" means the border on either a FHBM or FIRM that delineates the special flood, mudslide (i.e., mudflow) and/or flood-related erosion hazard areas and consists of a curved or contour line that follows the topography.

"Deductible" means the fixed amount or percentage of any loss covered by insurance which is borne by the insured prior to the insurer's liability.

"Developed area" means an area of a community that is:

(a) A primarily urbanized, built-up area that is a minimum of 20 contiguous acres, has basic urban infrastructure, including roads, utilities, communications, and public facilities, to sustain industrial, residential, and commercial activities, and

(1) Within which 75 percent or more of the parcels, tracts, or lots contain commercial, industrial, or residential structures or uses; or

(2) Is a single parcel, tract, or lot in which 75 percent of the area contains existing commercial or industrial structures or uses; or

(3) Is a subdivision developed at a density of at least two residential structures per acre within which 75 percent or more of the lots contain existing residential structures at the time the designation is adopted.

(b) Undeveloped parcels, tracts, or lots, the combination of which is less than 20 acres and

contiguous on at least 3 sides to areas meeting the criteria of paragraph (a) at the time the designation is adopted.

(c) A subdivision that is a minimum of 20 contiguous acres that has obtained all necessary government approvals, provided that the actual "start of construction" of structures has occurred on at least 10 percent of the lots or remaining lots of a subdivision or 10 percent of the maximum building coverage or remaining building coverage allowed for a single lot subdivision at the time the designation is adopted and construction of structures is underway. Residential subdivisions must meet the density criteria in paragraph (a)(3).

"Development" means any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials.

"Director" means the Director of the Federal Emergency Management Agency.

"Eligible community or participating community" means a community for which the Administrator has authorized the sale of flood insurance under the National Flood Insurance Program.

"Elevated building" means, for insurance purposes, a nonbasement building which has its lowest elevated floor raised above ground level by foundation walls, shear walls, posts, piers, pilings, or columns.

"Emergency Flood Insurance Program or emergency program" means the Program as implemented on an emergency basis in accordance with section 1336 of the Act. It is intended as a program to provide a first layer amount of insurance on all insurable structures before the effective date of the initial FIRM.

"Erosion" means the process of the gradual wearing away of land masses. This peril is not per se covered under the Program.

"Exception" means a waiver from the provisions of part 60 of this subchapter directed to a community which relieves it from the requirements of a rule, regulation, order or other determination made or issued pursuant to the Act.

"Existing construction" means for the purposes of determining rates, structures for which the "start of construction" commenced before the effective date of the FIRM or before January 1, 1975, for FIRMs effective before that date.

"Existing construction" may also be referred to as "existing structures."

"Existing manufactured home park or subdivision" means a manufactured home park or subdivision for which the construction of facilities for servicing the lots on which the manufactured homes are to be affixed (including, at a minimum, the installation of utilities, the construction of streets, and either final site grading or the pouring of concrete pads) is completed before the effective date of the floodplain management regulations adopted by a community.

"Existing structures" - see existing construction.

"Expansion to an existing manufactured home park or subdivision" means the preparation of additional sites by the construction of facilities for servicing the lots on which the manufacturing homes are to be affixed (including the installation of utilities, the construction of streets, and either final site grading or the pouring of concrete pads).

"Federal agency" means any department, agency, corporation, or other entity or instrumentality of the executive branch of the Federal Government, and includes the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation.

"Federal instrumentality responsible for the supervision, approval, regulation, or insuring of banks, savings and loan associations, or similar institutions" means the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Federal Home Loan Bank Board, the Federal Savings and Loan Insurance Corporation, and the National Credit Union Administration.

"Financial assistance" means any form of loan, grant, guaranty, insurance, payment, rebate, subsidy, disaster assistance loan or grant, or any other form of direct or indirect Federal assistance, other than general or special revenue sharing or formula grants made to States.

"Financial assistance for acquisition or construction purposes" means any form of financial assistance which is intended in whole or in part for the acquisition, construction, reconstruction, repair, or improvement of any publicly or privately owned building or mobile home, and for any machinery, equipment, fixtures, and furnishings contained or to be contained therein, and shall include the purchase or subsidization of mortgages or mortgage loans but shall exclude assistance pursuant to the Disaster Relief Act of 1974 other than assistance under such Act in connection with a flood. It includes only financial assistance insurable under the Standard Flood Insurance Policy.

"First-layer coverage" is the maximum amount of structural and contents insurance coverage available under the Emergency Program.

"Flood" or "Flooding" means:

(a) A general and temporary condition of partial or complete inundation of normally dry land areas from:

- (1) The overflow of inland or tidal waters.
- (2) The unusual and rapid accumulation or runoff of surface waters from any source.
- (3) Mudslides (i.e., mudflows) which are proximately caused by flooding as defined in paragraph (a)(2) of this definition and are akin to a river of liquid and flowing mud on the surfaces of normally dry land areas, as when earth is carried by a current of water and deposited along the path of the current.

(b) The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels or suddenly caused by an unusually high water level in a natural body of water, accompanied by a severe storm, or by an unanticipated force of nature, such as flash flood or an abnormal tidal surge, or by some similarly unusual and unforeseeable event which results in flooding as defined in paragraph (a)(1) of this definition.

"Flood elevation determination" means a determination by the Administrator of the water surface elevations of the base flood, that is, the flood level that has a one percent or greater chance of occurrence in any given year.

"Flood elevation study" means an examination, evaluation and determination of flood hazards and, if appropriate, corresponding water surface elevations, or an examination, evaluation and determination of mudslide (i.e., mudflow) and/or flood-related erosion hazards.

"Flood Hazard Boundary Map (FHBM)" means an official map of a community, issued by the Administrator, where the boundaries of the flood, mudslide (i.e., mudflow) related erosion areas having special hazards have been designated as Zones A, M, and/or E.

"Flood insurance" means the insurance coverage provided under the Program.

"Flood Insurance Rate Map (FIRM)" means an official map of a community, on which the Administrator has delineated both the special hazard areas and the risk premium zones applicable to the community.

"Flood Insurance Study" - see flood elevation study.

"Flood plain or flood-prone area" means any land

area susceptible to being inundated by water from any source (see definition of "flooding").

"Flood plain management" means the operation of an overall program of corrective and preventive measures for reducing flood damage, including but not limited to emergency-preparedness plans, flood control works and flood plain management regulations.

"Flood plain management regulations" means zoning ordinances, subdivision regulations, building codes, health regulations, special purpose ordinances (such as a flood plain ordinance, grading ordinance and erosion control ordinance) and other applications of police power. The term describes such state or local regulations, in any combination thereof, which provide standards for the purpose of flood damage prevention and reduction.

"Flood protection system" means those physical structural works for which funds have been authorized, appropriated, and expended and which have been constructed specifically to modify flooding in order to reduce the extent of the area within a community subject to a "special flood hazard" and the extent of the depths of associated flooding. Such a system typically includes hurricane tidal barriers, dams, reservoirs, levees or dikes. These specialized flood modifying works are those constructed in conformance with sound engineering standards.

"Flood proofing" means any combination of structural and non-structural additions, changes, or adjustments to structures which reduce or eliminate flood damage to real estate or improved real property, water and sanitary facilities, structures and their contents.

"Flood-related erosion" means the collapse or subsidence of land along the shore of a lake or other body of water as a result of undermining caused by waves or currents of water exceeding anticipated cyclical levels or suddenly caused by an unusually high water level in a natural body of water, accompanied by a severe storm, or by an unanticipated force of nature, such as a flash flood or an abnormal tidal surge, or by some similarly unusual and unforeseeable event which results in flooding.

"Flood-related erosion area or flood-related erosion prone area" means a land area adjoining the shore of a lake or other body of water, which due to the composition of the shoreline or bank and high water levels or wind-driven currents, is likely to suffer flood-related erosion damage.

"Flood-related erosion area management" means the operation of an overall program of corrective and

preventive measures for reducing flood-related erosion damage, including but not limited to emergency preparedness plans, flood-related erosion control works, and flood plain management regulations.

"Floodway" - see regulatory floodway.

"Floodway encroachment lines" mean the lines marking the limits of floodways on Federal, State and local flood plain maps.

"Freeboard" means a factor of safety usually expressed in feet above a flood level for purposes of flood plain management. "Freeboard" tends to compensate for the many unknown factors that could contribute to flood heights greater than the height calculated for a selected size flood and floodway conditions, such as wave action, bridge openings, and the hydrological effect of urbanization of the watershed.

"Functionally dependent use" means a use which cannot perform its intended purpose unless it is located or carried out in close proximity to water. The term includes only docking facilities, port facilities that are necessary for the loading and unloading of cargo or passengers, and ship building and ship repair facilities, but does not include long-term storage or related manufacturing facilities.

"Future-conditions flood hazard area, or future-conditions floodplain"--see Area of future-conditions flood hazard.

"Future-conditions hydrology" means the flood discharges associated with projected land-use conditions based on a community's zoning maps and/or comprehensive land-use plans and without consideration of projected future construction of flood detention structures or projected future hydraulic modifications within a stream or other waterway, such as bridge and culvert construction, fill, and excavation.

"General Counsel" means the General Counsel of the Federal Emergency Management Agency.

"Highest adjacent grade" means the highest natural elevation of the ground surface prior to construction next to the proposed walls of a structure.

"Historic Structure" means any structure that is:

(a) Listed individually in the National Register of Historic Places (a listing maintained by the Department of Interior) or preliminarily determined by the Secretary of the Interior as meeting the requirements for individual listing on the National Register;

(b) Certified or preliminarily determined by the Secretary of the Interior as contributing to the

historical significance of a registered historic district or a district preliminarily determined by the Secretary to qualify as a registered historic district;

(c) Individually listed on a state inventory of historic places in states with historic preservation programs which have been approved by the Secretary of the Interior; or

(d) Individually listed on a local inventory of historic places in communities with historic preservation programs that have been certified either:

(1) By an approved state program as determined by the Secretary of the Interior or

(2) Directly by the Secretary of the Interior in states without approved programs.

"Independent scientific body" means a non-Federal technical or scientific organization involved in the study of land use planning, flood plain management, hydrology, geology, geography, or any other related field of study concerned with flooding.

"Insurance adjustment organization" means any organization or person engaged in the business of adjusting loss claims arising under the Standard Flood Insurance Policy.

"Insurance company or insurer" means any person or organization authorized to engage in the insurance business under the laws of any State.

"Levee" means a man-made structure, usually an earthen embankment, designed and constructed in accordance with sound engineering practices to contain, control, or divert the flow of water so as to provide protection from temporary flooding.

"Levee System" means a flood protection system which consists of a levee, or levees, and associated structures, such as closure and drainage devices, which are constructed and operated in accordance with sound engineering practices.

"Lowest Floor" means the lowest floor of the lowest enclosed area (including basement). An unfinished or flood resistant enclosure, usable solely for parking of vehicles, building access or storage in an area other than a basement area is not considered a building's lowest floor; provided, that such enclosure is not built so as to render the structure in violation of the applicable non-elevation design requirements of Sec. 60.3.

"Mangrove stand" means an assemblage of mangrove trees which are mostly low trees noted for a copious development of interlacing adventitious roots above the ground and which contain one or more of the following species: Black mangrove (*Avicennia Nitida*); red mangrove (*Rhizophora Mangle*); white

mangrove (*Languncularia Racemosa*); and buttonwood (*Conocarpus Erecta*).

"Manufactured home" means a structure, transportable in one or more sections, which is built on a permanent chassis and is designed for use with or without a permanent foundation when attached to the required utilities. The term "manufactured home" does not include a "recreational vehicle".

"Manufactured home park or subdivision" means a parcel (or contiguous parcels) of land divided into two or more manufactured home lots for rent or sale.

"Map" means the Flood Hazard Boundary Map (FHBM) or the Flood Insurance Rate Map (FIRM) for a community issued by the Agency.

"Mean sea level" means, for purposes of the National Flood Insurance Program, the National Geodetic Vertical Datum (NGVD) of 1929 or other datum, to which base flood elevations shown on a community's Flood Insurance Rate Map are referenced.

"Mudslide (i.e., mudflow) describes a condition where there is a river, flow or inundation of liquid mud down a hillside usually as a result of a dual condition of loss of brush cover, and the subsequent accumulation of water on the ground preceded by a period of unusually heavy or sustained rain. A mudslide (i.e., mudflow) may occur as a distinct phenomenon while a landslide is in progress, and will be recognized as such by the Administrator only if the mudflow, and not the landslide, is the proximate cause of damage that occurs.

"Mudslide (i.e., mudflow) area management" means the operation of an overall program of corrective and preventive measures for reducing mudslide (i.e., mudflow) damage, including but not limited to emergency preparedness plans, mudslide control works, and flood plain management regulations.

"Mudslide (i.e., mudflow) prone area" means an area with land surfaces and slopes of unconsolidated material where the history, geology and climate indicate a potential for mudflow.

"New construction" means, for the purposes of determining insurance rates, structures for which the "start of construction" commenced on or after the effective date of an initial FIRM or after December 31, 1974, whichever is later, and includes any subsequent improvements to such structures. For floodplain management purposes, new construction means structures for which the start of construction commenced on or after the effective date of a floodplain management regulation adopted by a community and includes any subsequent improvements to such structures.

"New manufactured home park or subdivision" means a manufactured home park or subdivision for which the construction of facilities for servicing the lots on which the manufactured homes are to be affixed (including at a minimum, the installation of utilities, the construction of streets, and either final site grading or the pouring of concrete pads) is completed on or after the effective date of floodplain management regulations adopted by a community.

"100-year flood" - see base flood.

"Participating community", also known as an eligible community, means a community in which the Administrator has authorized the sale of flood insurance.

"Person" includes any individual or group of individuals, corporation, partnership, association, or any other entity, including State and local governments and agencies.

"Policy" means the Standard Flood Insurance Policy.

"Premium" means the total premium payable by the insured for the coverage or coverages provided under the policy. The calculation of the premium may be based upon either chargeable rates or risk premium rates, or a combination of both.

"Primary frontal dune" means a continuous or nearly continuous mound or ridge of sand with relatively steep seaward and landward slopes immediately landward and adjacent to the beach and subject to erosion and overtopping from high tides and waves during major coastal storms. The inland limit of the primary frontal dune occurs at the point where there is a distinct change from a relatively steep slope to a relatively mild slope.

"Principally above ground" means that at least 51 percent of the actual cash value of the structure, less land value, is above ground.

"Program" means the National Flood Insurance Program authorized by 42 U.S.C. 4001 through 4128.

"Program deficiency" means a defect in a community's flood plain management regulations or administrative procedures that impairs effective implementation of those flood plain management regulations or of the standards in Sec. 60.3, 60.4, 60.5, or 60.6.

"Project cost" means the total financial cost of a flood protection system (including design, land acquisition, construction, fees, overhead, and profits), unless the Federal Insurance Administrator determines a given "cost" not to be a part of such project cost.

"Recreational vehicle" means a vehicle which is:

(a) Built on a single chassis;

(b) 400 square feet or less when measured at the

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largest horizontal projection;

(c) Designed to be self-propelled or permanently towable by a light duty truck; and

(d) Designed primarily not for use as a permanent dwelling but as temporary living quarters for recreational, camping, travel, or seasonal use.

"Reference feature" is the receding edge of a bluff or eroding frontal dune, or if such a feature is not present, the normal high-water line or the seaward line of permanent vegetation if a high-water line cannot be identified.

"Regular Program" means the Program authorized by the Act under which risk premium rates are required for the first half of available coverage (also known as "first layer" coverage) for all new construction and substantial improvements started on or after the effective date of the FIRM, or after December 31, 1974, for FIRM's effective on or before that date. All buildings, the construction of which started before the effective date of the FIRM, or before January 1, 1975, for FIRMs effective before that date, are eligible for first layer coverage at either subsidized rates or risk premium rates, whichever are lower. Regardless of date of construction, risk premium rates are always required for the second layer coverage and such coverage is offered only after the Administrator has completed a risk study for the community.

"Regulatory floodway" means the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than a designated height.

"Remedy a violation" means to bring the structure or other development into compliance with State or local flood plain management regulations, or, if this is not possible, to reduce the impacts of its noncompliance. Ways that impacts may be reduced include protecting the structure or other affected development from flood damages, implementing the enforcement provisions of the ordinance or otherwise deterring future similar violations, or reducing Federal financial exposure with regard to the structure or other development.

"Risk premium rates" mean those rates established by the Administrator pursuant to individual community studies and investigations which are undertaken to provide flood insurance in accordance with section 1307 of the Act and the accepted actuarial principles.

"Risk premium rates" include provisions for operating costs and allowances.

"Riverine" means relating to, formed by, or

resembling a river (including tributaries), stream, brook, etc.

"Sand dunes" mean naturally occurring accumulations of sand in ridges or mounds landward of the beach.

"Scientifically incorrect". The methodology(ies) and/or assumptions which have been utilized are inappropriate for the physical processes being evaluated or are otherwise erroneous.

"Second layer coverage" means an additional limit of coverage equal to the amounts made available under the Emergency Program, and made available under the Regular Program.

"Servicing company" means a corporation, partnership, association, or any other organized entity which contracts with the Federal Insurance Administration to service insurance policies under the National Flood Insurance Program for a particular area.

"Sheet flow area"- see area of shallow flooding.

"60-year setback" means a distance equal to 60 times the average annual long term recession rate at a site, measured from the reference feature.

"Special flood hazard area"-- see "area of special flood hazard".

"Special hazard area" means an area having special flood, mudslide (i.e., mudflow), or flood-related erosion hazards, and shown on an FHBM or FIRM as Zone A, AO, A1-30, AE, AR, AR/A1-30, AR/AE, AR/AO, AR/AH, AR/A, A99, AH, VO, V1-30, VE, V, M, or E.

"Standard Flood Insurance Policy" means the flood insurance policy issued by the Federal Insurance Administrator, or an insurer pursuant to an arrangement with the Administrator pursuant to Federal statutes and regulations.

"Start of Construction" (for other than new construction or substantial improvements under the Coastal Barrier Resources Act (Pub. L. 97348)), includes substantial improvement, and means the date the building permit was issued, provided the actual start of construction, repair, reconstruction, rehabilitation, addition placement, or other improvement was within 180 days of the permit date. The actual start means either the first placement of permanent construction of a structure on a site, such as the pouring of slab or footings, the installation of piles, the construction of columns, or any work beyond the stage of excavation; or the placement of a manufactured home on a foundation. Permanent construction does not include land preparation, such as clearing, grading and filling;

nor does it include the installation of streets and/or walkways; nor does it include excavation for a basement, footings, piers, or foundations or the erection of temporary forms; nor does it include the installation on the property of accessory buildings, such as garages or sheds not occupied as dwelling units or not part of the main structure. For a substantial improvement, the actual start of construction means the first alteration of any wall, ceiling, floor, or other structural part of a building, whether or not that alteration affects the external dimensions of the building.

"State" means any State, the District of Columbia, the territories and possessions of the United States, the Commonwealth of Puerto Rico, and the Trust Territory of the Pacific Islands.

State coordinating agency means the agency of the state government, or other office designated by the Governor of the state or by state statute at the request of the Administrator to assist in the implementation of the National Flood Insurance Program in that state.

"Storm cellar" means a space below grade used to accommodate occupants of the structure and emergency supplies as a means of temporary shelter against severe tornado or similar wind storm activity.

"Structure" means, for floodplain management purposes, a walled and roofed building, including a gas or liquid storage tank, that is principally above ground, as well as a manufactured home. Structure, for insurance purposes, means:

(1) A building with two or more outside rigid walls and a fully secured roof, that is affixed to a permanent site;

(2) A manufactured home ("a manufactured home," also known as a mobile home, is a structure: built on a permanent chassis, transported to its site in one or more sections, and affixed to a permanent foundation); or

(3) A travel trailer without wheels, built on a chassis and affixed to a permanent foundation, that is regulated under the community's floodplain management and building ordinances or laws.

For the latter purpose, "structure" does not mean a recreational vehicle or a park trailer or other similar vehicle, except as described in paragraph (3) of this definition, or a gas or liquid storage tank.

"Subsidized rates" mean the rates established by the Administrator involving in the aggregate a subsidization by the Federal Government.

"Substantial damage" means damage of any origin sustained by a structure whereby the cost of restoring the structure to its before damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred.

"Substantial improvement" means any reconstruction, rehabilitation, addition, or other improvement of a structure, the cost of which equals or exceeds 50 percent of the market value of the structure before the "start of construction" of the improvement. This term includes structures which have incurred "substantial damage", regardless of the actual repair work performed. The term does not, however, include either:

(1) Any project for improvement of a structure to correct existing violations of state or local health, sanitary, or safety code specifications which have been identified by the local code enforcement official and which are the minimum necessary to assure safe living conditions or

(2) Any alteration of a "historic structure", provided that the alteration will not preclude the structure's continued designation as a "historic structure".

"30-year setback" means a distance equal to 30 times the average annual long term recession rate at a site, measured from the reference feature.

"Technically incorrect". The methodology(ies) utilized has been erroneously applied due to mathematical or measurement error, changed physical conditions, or insufficient quantity or quality of input data.

"V Zone" - see "coastal high hazard area."

"Variance" means a grant of relief by a community from the terms of a flood plain management regulation.

"Violation" means the failure of a structure or other development to be fully compliant with the community's flood plain management regulations. A structure or other development without the elevation certificate, other certifications, or other evidence of compliance required in Sec. 60.3(b)(5), (c)(4), (c)(10), (d)(3), (e)(2), (e)(4), or (e)(5) is presumed to be in violation until such time as that documentation is provided.

"Water surface elevation" means the height, in relation to the National Geodetic Vertical Datum (NGVD) of 1929, (or other datum, where

specified) of floods of various magnitudes and frequencies in the flood plains of coastal or riverine areas.

"Zone of imminent collapse" means an area subject to erosion adjacent to the shoreline of an ocean, bay, or lake and within a distance equal to 10 feet plus 5 times the average annual long-term erosion rate for the site, measured from the reference feature.

[41 FR 46968, Oct. 26, 1976]

Editorial Note: For Federal Register citations affecting Sec. 59.1, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO access.

§ 59.2 Description of program.

(a) The National Flood Insurance Act of 1968 was enacted by title XIII of the Housing and Urban Development Act of 1968 (Pub. L. 90448, August 1, 1968) to provide previously unavailable flood insurance protection to property owners in flood-prone areas. Mudslide (as defined in Sec. 59.1) protection was added to the Program by the Housing and Urban Development Act of 1969 (Pub. L. 91-152, December 24, 1969). Flood-related erosion (as defined in Sec. 59.1) protection was added to the Program by the Flood Disaster Protection Act of 1973 (Pub. L. 93-234, December 31, 1973). The Flood Disaster Protection Act of 1973 requires the purchase of flood insurance on and after March 2, 1974, as a condition of receiving any form of Federal or federally-related financial assistance for acquisition or construction purposes with respect to insurable buildings and mobile homes within an identified special flood, mudslide (i.e., mudflow), or flood-related erosion hazard area that is located within any community participating in the Program. The Act also requires that on and after July 1, 1975, or one year after a community has been formally notified by the Administrator of its identification as community containing one or more special flood, mudslide (i.e., mudflow), or flood-related erosion hazard areas, no such Federal financial assistance, shall be provided within such an area unless the community in which the area is located is then participating in the Program, subject to certain exceptions. See FIA published Guidelines at Sec. 59.4(c).

(b) To qualify for the sale of federally-subsidized flood insurance a community must adopt and submit to the Administrator as part of its application, flood plain management regulations, satisfying at a minimum the criteria set forth at part 60 of this subchapter, designed to reduce or avoid future flood, mudslide (i.e., mudflow) or flood-related erosion damages. These regulations must include effective enforcement provisions.

(c) Minimum requirements for adequate flood plain management regulations are set forth in Sec. 60.3 for flood-prone areas, in Sec. 60.4 for mudslide (i.e., mudflow) areas and in Sec. 60.5 for flood-related erosion areas. Those applicable requirements and standards are based on the amount of technical information available to the community.

[41 FR 46968, Oct. 26, 1976, as amended at 43 FR 7140, Feb. 17, 1978. Redesignated at 44 FR 31177, May 31, 1979, and amended at 48 FR 44552, Sept. 29, 1983; 49 FR 4751, Feb. 8, 1984]

§ 59.3 Emergency program.

The 1968 Act required a risk study to be undertaken for each community before it could become eligible for the sale of flood insurance. Since this requirement resulted in a delay in providing insurance, the Congress, in section 408 of the Housing and Urban Development Act of 1969 (Pub. L. 91-152, December 24, 1969), established an Emergency Flood Insurance Program as a new section 1336 of the National Flood Insurance Act (42 U.S.C. 4056) to permit the early sale of insurance in flood-prone communities. The emergency program does not affect the requirement that a community must adopt adequate flood plain management regulations pursuant to part 60 of this subchapter but permits insurance to be sold before a study is conducted to determine risk premium rates for the community. The program still requires upon the effective date of a FIRM the charging of risk premium rates for all new construction and substantial improvements and for higher limits of coverage for existing structures.

[43 FR 7140, Feb. 17, 1978. Redesignated at 44 FR 31177, May 31, 1979, and amended at 48 FR 44543, Sept. 29, 1983]

§ 59.4 References.

(a) The following are statutory references for the National Flood Insurance Program, under which these regulations are issued:

(1) National Flood Insurance Act of 1968 (title XIII of the Housing and Urban Development Act of 1968), Pub. L. 90-448, approved August 1, 1968, 42 U.S.C. 4001 et seq.

(2) Housing and Urban Development Act of 1969 (Pub. L. 91-152, approved December 24, 1969).

(3) Flood Disaster Protection Act of 1973 (87 Stat. 980), Public Law 93-234, approved December 31, 1973.

(4) Section 816 of the Housing and Community Development Act of 1974 (87 Stat. 975), Public Law 93-383, approved August 22, 1974.

(5) Public Law 5-128 (effective October 12, 1977).

(6) The above statutes are included in 42 U.S.C. 4001 et seq.

(b) The following are references relevant to the National Flood Insurance Program:

(1) Executive Order 11988 (Floodplain Management, dated May 24, 1977 (42 FR 26951, May 25, 1977)).

(2) The Flood Control Act of 1960 (Pub. L. 86645).

(3) Title II, section 314 of title III and section 406 of title IV of the Disaster Relief Act of 1974 (Pub. L. 93-288).

(4) Coastal Zone Management Act (Pub. L. 92583), as amended Public Law 94-370.

(5) Water Resources Planning Act (Pub. L. 8990), as amended Public Law 94-112 (October 16, 1975).

(6) Title I, National Environmental Policy Act (Pub. L. 91-190).

(7) Land and Water Conservation Fund Act (Pub. L. 89-578), and subsequent amendments thereto.

(8) Water Resources Council, Principals and Standards for Planning, Water and Related Land Resources (38 FR 24778-24869, September 10, 1973).

(9) Executive Order 11593 (Protection and Enhancement of the Cultural Environment), dated May 13, 1971 (36 FR 8921, May 15, 1971).

(10) 89th Cong., 2nd Session, H.D. 465.

(11) Required land use element for comprehensive planning assistance under section 701 of the Housing Act of 1954, as amended by the Housing and Community Development Act of 1974 (24 CFR 600.72).

(12) Executive Order 11990 (Protection of Wetlands, dated May 24, 1977 (42 FR 26951, May 25, 1977)).

(13) Water Resources Council (Guidance for Floodplain Management) (42 FR 52590, September 30, 1977).

(14) Unified National Program for Floodplain Management of the United States Water Resources Council, July 1976.

(c) The following reference guidelines represent the views of the Federal Insurance Administration with respect to the mandatory purchase of flood insurance under section 102 of the Flood Disaster Protection Act of 1973: Mandatory Purchase of Flood Insurance Guidelines (54 FR 29666-29695, July 13, 1989).

[41 FR 46968, Oct. 26, 1976, as amended at 43 FR 7140, Feb. 17, 1978. Redesignated at 44 FR 31177, May 31, 1979, and amended at 57 FR 19540, May 7, 1992]

§ 59.2 Description of program.

(a) The National Flood Insurance Act of 1968 was enacted by title XIII of the Housing and Urban Development Act of 1968 (Pub. L. 90-448, August 1, 1968) to provide previously unavailable flood insurance protection to property owners in flood-prone areas. Mudslide (as defined in Sec. 59.1) protection was added to the Program by the Housing and Urban Development Act of 1969 (Pub. L. 91-152, December 24, 1969). Flood-related erosion (as defined in Sec. 59.1) protection was added to the Program by the Flood Disaster Protection Act of 1973 (Pub. L. 93-234, December 31, 1973). The Flood Disaster Protection Act of 1973 requires the purchase of flood insurance on and after March 2, 1974, as a condition of receiving any form of Federal or federally-related financial assistance for acquisition or construction purposes with respect to insurable buildings and mobile homes within an identified special flood, mudslide (i.e., mudflow), or flood-related erosion hazard area that is located within any community participating in the Program. The Act also requires that on and after July 1, 1975, or one year after a community has been formally notified by the Administrator of its identification as community containing one or more special flood, mudslide (i.e., mudflow), or flood-related erosion hazard areas, no such Federal financial assistance, shall be provided within such an area unless the community in which the area is located is then participating in the Program, subject to certain exceptions. See FIA published Guidelines at Sec. 59.4(c).

(b) To qualify for the sale of federally-subsidized flood insurance a community must adopt and submit

to the Administrator as part of its application, flood plain management regulations, satisfying at a minimum the criteria set forth at part 60 of this subchapter, designed to reduce or avoid future flood, mudslide (i.e., mudflow) or flood-related erosion damages. These regulations must include effective enforcement provisions.

(c) Minimum requirements for adequate flood plain management regulations are set forth in Sec. 60.3 for flood-prone areas, in Sec. 60.4 for mudslide (i.e., mudflow) areas and in Sec. 60.5 for flood-related erosion areas. Those applicable requirements and standards are based on the amount of technical information available to the community.

[41 FR 46968, Oct. 26, 1976, as amended at 43 FR 7140, Feb. 17, 1978. Redesignated at 44 FR 31177, May 31, 1979, and amended at 48 FR 44552, Sept. 29, 1983; 49 FR 4751, Feb. 8, 1984]

§ 59.4 References.

(a) The following are statutory references for the National Flood Insurance Program, under which these regulations are issued:

(1) National Flood Insurance Act of 1968 (title XIII of the Housing and Urban Development Act of 1968), Pub. L. 90-448, approved August 1, 1968, 42 U.S.C. 4001 et seq.

(2) Housing and Urban Development Act of 1969 (Pub. L. 91-152, approved December 24, 1969).

(3) Flood Disaster Protection Act of 1973 (87 Stat. 980), Public Law 93-234, approved December 31, 1973.

(4) Section 816 of the Housing and Community Development Act of 1974 (87 Stat. 975), Public Law 93-383, approved August 22, 1974.

(5) Public Law 5-128 (effective October 12, 1977).

(6) The above statutes are included in 42 U.S.C. 4001 et seq.

(b) The following are references relevant to the National Flood Insurance Program:

(1) Executive Order 11988 (Floodplain Management, dated May 24, 1977 (42 FR 26951, May 25, 1977)).

(2) The Flood Control Act of 1960 (Pub. L. 86645).

(3) Title II, section 314 of title III and section 406 of title IV of the Disaster Relief Act of 1974 (Pub. L. 93-288).

(4) Coastal Zone Management Act (Pub. L. 92583), as amended Public Law 94-370.

(5) Water Resources Planning Act (Pub. L. 8990), as amended Public Law 94-112 (October 16, 1975).

(6) Title I, National Environmental Policy Act (Pub. L. 91-190).

(7) Land and Water Conservation Fund Act (Pub. L. 89-578), and subsequent amendments thereto.

(8) Water Resources Council, Principals and Standards for Planning, Water and Related Land Resources (38 FR 24778-24869, September 10, 1973).

(9) Executive Order 11593 (Protection and Enhancement of the Cultural Environment), dated May 13, 1971 (36 FR 8921, May 15, 1971).

(10) 89th Cong., 2nd Session, H.D. 465.

(11) Required land use element for comprehensive planning assistance under section 701 of the Housing and Community Development Act of 1974 (24 CFR 600.72).

(12) Executive Order 11990 (Protection of Wetlands, dated May 24, 1977 (42 FR 26951, May 25, 1977)).

(13) Water Resources Council (Guidance for Floodplain Management) (42 FR 52590, September 30, 1977).

(14) Unified National Program for Floodplain Management of the United States Water Resources Council, July 1976.

(c) The following reference guidelines represent the views of the Federal Insurance Administration with respect to the mandatory purchase of flood insurance under section 102 of the Flood Disaster Protection Act of 1973: Mandatory Purchase of Flood Insurance Guidelines (54 FR 29666-29695, July 13, 1989). [41 FR 46968, Oct. 26, 1976, as amended at 43 FR 7140, Feb. 17, 1978. Redesignated at 44 FR 31177, May 31, 1979, and amended at 57 FR 19540, May 7, 1992]

Subpart B—Eligibility Requirements §

59.21 Purpose of subpart.

This subpart lists actions that must be taken by a community to become eligible and to remain eligible for the Program.

[41 FR 46968, Oct. 26, 1976. Redesignated at 44 FR 31177, May 31, 1979]

§ 59.22 Prerequisites for the sale of flood insurance.

(a) To qualify for flood insurance availability a community shall apply for the entire area within its jurisdiction, and shall submit:

(1) Copies of legislative and executive actions indicating a local need for flood insurance and an explicit desire to participate in the National Flood Insurance Program;

(2) Citations to State and local statutes and ordinances authorizing actions regulating land use and copies of the local laws and regulations cited;

(3) A copy of the flood plain management regulations the community has adopted to meet the requirements of Sec. 60.3, 60.4 and/or Sec. 60.5 of this subchapter. This submission shall include copies of any zoning, building, and subdivision regulations, health codes, special purpose ordinances (such as a flood plain ordinance, grading ordinance, or flood-related erosion control ordinance), and any other corrective and preventive measures enacted to reduce or prevent flood, mudslide (i.e., mudflow) or flood-related erosion damage;

(4) A list of the incorporated communities within the applicant's boundaries;

(5) Estimates relating to the community as a whole and to the flood, mudslide (i.e., mudflow) and flood-related erosion prone areas concerning:

(i) Population;

(ii) Number of one to four family residences;

(iii) Number of small businesses; and

(iv) Number of all other structures.

(6) Address of a local repository, such as a municipal building, where the Flood Hazard Boundary Maps (FHBM's) and Flood Insurance Rate Maps (FIRM's) will be made available for public inspection;

(7) A summary of any State or Federal activities with respect to flood plain, mudslide (i.e., mudflow) or flood-related erosion area management within the community, such as federally-funded flood control projects and State-administered flood plain management regulations;

(8) A commitment to recognize and duly evaluate flood, mudslide (i.e., mudflow) and/or flood-related erosion hazards in all official actions in the areas having special flood, mudslide (i.e., mudflow) and/or flood-related erosion hazards and to take such other official action reasonably necessary to carry out the objectives of the program; and

(9) A commitment to:

(i) Assist the Administrator at his/her request, in his/her delineation of the limits of the areas having special flood, mudslide

(i.e., mudflow) or flood-related erosion hazards;

(ii) Provide such information concerning present uses and occupancy of the flood plain, mudslide (i.e., mudflow) or flood-related erosion areas as the Administrator may request;

(iii) Maintain for public inspection and furnish upon request, for the determination of applicable flood insurance risk premium rates within all areas having special flood hazards identified on a FHBM or FIRM, any certificates of floodproofing, and information on the elevation (in relation to mean sea level) of the level of the lowest floor (including basement) of all new or substantially improved structures, and include whether or not such structures contain a basement, and if the structure has been floodproofed, the elevation (in relation to mean sea level) to which the structure was floodproofed;

(iv) Cooperate with Federal, State, and local agencies and private firms which undertake to study, survey, map, and identify flood plain, mudslide (i.e., mudflow) or flood-related erosion areas, and cooperate with neighboring communities with respect to the management of adjoining flood plain, mud slide (i.e., mudflow) and/or flood-related erosion areas in order to prevent aggravation of existing hazards;

(v) Upon occurrence, notify the Administrator in writing whenever the boundaries of the community have been modified by annexation or the community has otherwise assumed or no longer has authority to adopt and enforce flood

plain management regulations for a particular area. In order that all FHBM's and FIRM's accurately represent the community's boundaries, include within such notification a copy of a map of the community suitable for reproduction, clearly delineating the new corporate limits or new area for which the community has assumed or relinquished flood plain management regulatory authority.

(b) An applicant shall legislatively:

(1) Appoint or designate the agency or official with the responsibility, authority, and means to implement the commitments made in paragraph

(a) of this section, and

(2) Designate the official responsible to submit a report to the Administrator concerning the community participation in the Program, including, but not limited to the development and implementation of flood plain management regulations. This report shall be submitted annually or biennially as determined by the Administrator.

(c) The documents required by paragraph (a) of this section and evidence of the actions required by paragraph (b) of this section shall be submitted to the

Federal Emergency Management Agency,
Washington DC 20472.

[41 FR 46968, Oct. 26, 1976. Redesignated at 44 FR 31177, May 31, 1979 and amended at 48 FR 29318, June 24, 1983; 48 FR 44543 and 44552, Sept. 29, 1983; 49 FR 4751, Feb. 8, 1984; 49 FR 33656, Aug. 24, 1984; 50 FR 36023, Sept. 4, 1985]

§ 59.23 Priorities for the sale of flood insurance under the regular program.

Flood-prone, mudslide (i.e., mudflow) and flood-related erosion prone communities are placed on a register of areas eligible for ratemaking studies and then selected from this register for ratemaking studies on the basis of the following considerations--

- (a) Recommendations of State officials;
- (b) Location of community and urgency of need for flood insurance;
- (c) Population of community and intensity of existing or proposed development of the flood plain, the mud slide (i.e., mudflow) and the flood-related erosion area;
- (d) Availability of information on the community with respect to its flood, mudslide (i.e., mudflow) and flood-related erosion characteristics and previous losses;
- (e) Extent of State and local progress in flood plain, mudslide (i.e., mudflow) area and flood-related erosion area management, including adoption of flood plain management regulations consistent with related ongoing programs in the area.

[41 FR 46968, Oct. 26, 1976. Redesignated at 44 FR 31177, May 31, 1979]

§ 59.24 Suspension of community eligibility.

(a) A community eligible for the sale of flood insurance shall be subject to suspension from the Program for failing to submit copies of adequate flood plain management regulations meeting the minimum requirements of paragraphs (b), (c), (d), (e) or (f) of Sec. 60.3 or paragraph (b) of Sec. 60.4 or Sec. 60.5, within six months from the date the Administrator provides the data upon which the flood plain regulations for the applicable paragraph shall be based. Where there has not been any submission by the community, the Administrator shall notify the community that 90 days remain in the six month period in order to submit adequate flood plain management regulations. Where there has been an inadequate submission, the Administrator shall notify

the community of the specific deficiencies in its submitted flood plain management regulations and inform the community of the amount of time remaining within the six month period. If, subsequently, copies of adequate flood plain management regulations are not received by the Administrator, no later than 30 days before the expiration of the original six month period the Administrator shall provide written notice to the community and to the state and assure publication in the Federal Register under part 64 of this subchapter of the community's loss of eligibility for the sale of flood insurance, such suspension to become effective upon the expiration of the six month period. Should the community remedy the defect and the Administrator receive copies of adequate flood plain management regulations within the notice period, the suspension notice shall be rescinded by the Administrator. If the Administrator receives notice from the State that it has enacted adequate flood plain management regulations for the community within the notice period, the

suspension notice shall be rescinded by the Administrator. The community's eligibility shall remain terminated after suspension until copies of adequate flood plain management regulations have been received and approved by the Administrator.

(b) A community eligible for the sale of flood insurance which fails to adequately enforce flood plain management regulations meeting the minimum requirements set forth in Sec. 60.3,

60.4 and/or 60.5 shall be subject to probation. Probation shall represent formal notification to the community that the Administrator regards the community's flood plain management program as not compliant with NFIP criteria. Prior to imposing probation, the Administrator

(1) shall inform the community upon 90 days prior written notice of the impending probation and of the specific program deficiencies and violations relative to the failure to enforce,

(2) shall, at least 60 days before probation is to begin, issue a press release to local media explaining the reasons for and the effects of probation, and

(3) shall, at least 90 days before probation is to begin, advise all policyholders in the community of the impending probation and the additional premium that will be charged, as provided in this paragraph, on policies sold or renewed during the period of probation. During this 90-day period the community shall have the opportunity to avoid probation by demonstrating compliance with Program

requirements, or by correcting Program deficiencies and remedying all violations to the maximum extent possible. If, at the end of the 90-day period, the Administrator determines that the community has failed to do so, the probation shall go into effect. Probation may be continued for up to one year after the community corrects all Program deficiencies and remedies all violations to the maximum extent possible. Flood insurance may be sold or renewed in the community while it is on probation. Where a policy covers property located in a community placed on probation on or after October 1, 1986, but prior to October 1, 1992, an additional premium of \$25.00 shall be charged on each such policy newly issued or renewed during the one-year period beginning on the date the community is placed on probation and during any successive one-year periods that begin prior to October 1, 1992. Where a community's probation begins on or after October 1, 1992, the additional premium described in the preceding sentence shall be \$50.00, which shall also be charged during any successive one-year periods during which the community remains on probation for any part thereof. This \$50.00 additional premium shall further be charged during any successive one-year periods that begin on or after October 1, 1992, where the preceding one-year probation period began prior to October 1, 1992.

(c) A community eligible for the sale of flood insurance which fails to adequately enforce its flood plain management regulations meeting the minimum requirements set forth in Sec. 60.3,

60.4 and/or 60.5 and does not correct its Program deficiencies and remedy all violations to the maximum extent possible in accordance with compliance deadlines established during a period of probation shall be subject to suspension of its Program eligibility. Under such circumstances, the Administrator shall grant the community 30 days in which to show cause why it should not be suspended. The Administrator may conduct a hearing, written or oral, before commencing suspensive action. If a community is to be suspended, the Administrator shall inform it upon 30 days prior written notice and upon publication in the Federal Register under part 64 of this subchapter of its loss of eligibility for the sale of flood insurance. In the event of impending suspension, the Administrator shall issue a press release to the local media explaining the reasons and effects of the suspension. The community's eligibility shall only be reinstated by the Administrator upon his

receipt of a local legislative or executive measure reaffirming the community's formal intent to adequately enforce the flood plain management requirements of this subpart, together with evidence of action taken by the community to correct Program deficiencies and remedy to the maximum extent possible those violations which caused the suspension. In certain cases, the Administrator, in order to evaluate the community's performance under the terms of its submission, may withhold reinstatement for a period not to exceed one year from the date of his receipt of the satisfactory submission or place the community on probation as provided for in paragraph (b) of this section.

(d) A community eligible for the sale of flood insurance which repeals its flood plain management regulations, allows its regulations to lapse, or amends its regulations so that they no longer meet the minimum requirements set forth in Sec. 60.3, 60.4 and/or 60.5 shall be suspended from the Program. If a community is to be suspended, the Administrator shall inform it upon 30 days prior written notice and upon publication in the Federal Register under part 64 of this subchapter of its loss of eligibility for the sale of flood insurance. The community eligibility shall remain terminated after suspension until copies of adequate flood plain management regulations have been received and approved by the Administrator.

(e) A community eligible for the sale of flood insurance may withdraw from the Program by submitting to the Administrator a copy of a legislative action that explicitly states its desire to withdraw from the National Flood Insurance Program. Upon receipt of a certified copy of a final legislative action, the Administrator shall withdraw the community from the Program and publish in the Federal Register underpart 64 of this subchapter its loss of eligibility for the sale of flood insurance. A community that has withdrawn from the Program may be reinstated if it submits the application materials specified in Sec. 59.22(a).

(f) If during a period of ineligibility under paragraphs (a), (d), or (e) of this section, a community has permitted actions to take place that have aggravated existing flood plain, mudslide (i.e., mudflow) and/or flood related erosion hazards, the Administrator may withhold reinstatement until the community submits evidence that it has taken action to remedy to the maximum extent possible the increased hazards. The Administrator may also place the reinstated community on probation as provided for in paragraph

(b) of this section.

(g) The Administrator shall promptly notify the servicing company and any insurers issuing flood insurance pursuant to an arrangement with the Administrator of those communities whose eligibility has been suspended or which have withdrawn from the program. Flood insurance shall not be sold or renewed in those communities. Policies sold or renewed within a community during a period of ineligibility are deemed to be voidable by the Administrator whether or not the parties to sale or renewal had actual notice of the ineligibility.

[41 FR 46968, Oct. 26, 1976. Redesignated at 44 FR 31177, May 31, 1979, and amended at 48 FR 44543 and 44552, Sept. 29, 1983; 49 FR 4751, Feb. 8, 1984; 50 FR 36023, Sept. 4, 1985; 57 FR 19540, May 7, 1992; 59 FR 53598, Oct. 25, 1994; 62 FR 55715, Oct. 27, 1997]

PART 60--CRITERIA FOR LAND MANAGEMENT AND USE

Subpart A--Requirements for Flood Plain Management Regulations

Sec.

60.1 Purpose of subpart.

60.2 Minimum compliance with flood plain management criteria.

60.3 Flood plain management criteria for flood-prone areas.

60.4 Flood plain management criteria for mudslide (i.e., mudflow)-prone areas.

60.5 Flood plain management criteria for flood-related erosion-prone areas.

60.6 Variances and exceptions.

60.7 Revisions of criteria for flood plain management regulations.

60.8 Definitions.

Subpart B--Requirements for State Flood Plain Management Regulations

Sec.

60.11 Purpose of this subpart.

60.12 Flood plain management criteria for State-owned properties in special hazard areas.

60.13 Noncompliance.

Subpart C--Additional Considerations in Managing Flood-Prone, Mudslide (i.e., Mudflow)-Prone, and Flood-Related Erosion-Prone Areas

Sec.

60.21 Purpose of this subpart.

60.22 Planning considerations for flood-prone areas.

60.23 Planning considerations for mudslide (i.e., mudflow)-prone areas.

60.24 Planning considerations for flood-related erosion-prone areas.

60.25 Designation, duties, and responsibilities of State Coordinating Agencies.

60.26 Local coordination.

Authority: 42 U.S.C. 4001 et seq.; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127 of Mar. 31, 1979, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

Source: 41 FR 46975, Oct. 26, 1976, unless otherwise noted. Redesignated at 44 FR 31177, May 31, 1979.

§ 60.1 Purpose of subpart.

(a) The Act provides that flood insurance shall not be sold or renewed under the program within a community, unless the community has adopted adequate flood plain management regulations consistent with Federal criteria. Responsibility for establishing such criteria is delegated to the Administrator.

(b) This subpart sets forth the criteria developed in accordance with the Act by which the Administrator will determine the adequacy of a community's flood plain management regulations. These regulations must be legally-enforceable, applied uniformly throughout the community to all privately and publicly owned land within flood-prone, mudslide (i.e., mudflow) or flood-related erosion areas, and the community must provide that the regulations take precedence over any less restrictive conflicting local laws, ordinances or codes. Except as otherwise provided in Sec. 60.6, the adequacy of such regulations shall be determined on the basis of the standards set forth in Sec. 60.3 for flood-prone areas, Sec. 60.4 for mudslide areas and Sec. 60.5 for flood-related erosion areas.

(c) Nothing in this subpart shall be construed as modifying or replacing the general requirement that all eligible communities must take into account flood, mudslide (i.e., mudflow) and flood-related erosion hazards, to the extent that they are known, in all official actions relating to land management and use.

(d) The criteria set forth in this subpart are minimum standards for the adoption of flood plain management regulations by flood-prone, mudslide (i.e., mudflow)-prone and flood-related erosion-prone communities. Any community may exceed the minimum criteria under this part by adopting more comprehensive flood plain management regulations utilizing the standards such as contained in subpart C of this part. In some instances, community officials may have access to information or knowledge of conditions that require, particularly for human safety, higher standards than the minimum criteria set forth in subpart A of this part. Therefore, any flood plain management regulations adopted by a State or a community which are more restrictive than the criteria set forth in this part are encouraged and shall take precedence.

[41 FR 46975, Oct. 26, 1976. Redesignated at 44 FR 31177, May 31, 1979, as amended at 48 FR 44552, Sept. 29, 1983; 49 FR 4751, Feb. 8, 1984]

§ 60.2 Minimum compliance with flood plain management criteria.

(a) A flood-prone community applying for flood insurance eligibility shall meet the standards of Sec.60.3(a) in order to become eligible if a FHBM has not been issued for the community at the time of application. Thereafter, the community will be given a period of six months from the date the Administrator provides the data set forth in Sec.60.3(b), (c), (d), (e) or (f), in which to meet the requirements of the applicable paragraph. If a community has received a FHBM, but has not yet applied for Program eligibility, the community shall apply for eligibility directly under the standards set forth in Sec.60.3(b). Thereafter, the community will be given a period of six months from the date the Administrator provides the data set forth in Sec.60.3(c), (d), (e) or (f) in which to meet the requirements of the applicable paragraph.

(b) A mudslide (i.e., mudflow)-prone community applying for flood insurance eligibility shall meet the standards of Sec. 60.4(a) to become eligible. Thereafter, the community will be given a period of six months from the date the mudslide (i.e., mudflow) areas having special mudslide hazards are delineated in which to meet the requirements of Sec. 60.4(b).

(c) A flood-related erosion-prone community applying for flood insurance eligibility shall meet the standards of Sec. 60.5(a) to become eligible. Thereafter, the community will be given a period of

six months from the date the flood-related erosion areas having special erosion hazards are delineated in which to meet the requirements of Sec. 60.5(b).

(d) Communities identified in part 65 of this subchapter as containing more than one type of hazard (e.g., any combination of special flood, mudslide (i.e., mudflow), and flood-related erosion hazard areas) shall adopt flood plain management regulations for each type of hazard consistent with the requirements of Sec. Sec. 60.3, 60.4 and 60.5.

(e) Local flood plain management regulations may be submitted to the State Coordinating Agency designated pursuant to Sec. 60.25 for its advice and concurrence. The submission to the State shall clearly describe proposed enforcement procedures.

(f) The community official responsible for submitting annual or biennial reports to the Administrator pursuant to Sec. 59.22(b)(2) of this subchapter shall also submit copies of each annual or biennial report to any State Coordinating Agency.

(g) A community shall assure that its comprehensive plan is consistent with the flood plain management objectives of this part.

(h) The community shall adopt and enforce flood plain management regulations based on data provided by the Administrator. Without prior approval of the Administrator, the community shall not adopt and enforce flood plain management regulations based upon modified data reflecting natural or man-made physical changes.

[41 FR 46975, Oct. 26, 1976. Redesignated at 44 FR 31177, May 31, 1979, as amended at 48 FR 29318, June 24, 1983; 48 FR 44552, Sept. 29, 1983; 49 FR 4751, Feb. 8, 1984; 50 FR 36024, Sept. 4, 1985; 59 FR 53598, Oct. 25, 1994; 62 FR 55716, Oct. 27, 1997]

§ 60.3 Flood plain management criteria for flood-prone areas.

The Administrator will provide the data upon which flood plain management regulations shall be based. If the Administrator has not provided sufficient data to furnish a basis for these regulations in a particular community, the community shall obtain, review and reasonably utilize data available from other Federal, State or other sources pending receipt of data from the Administrator. However, when special flood hazard area designations and water surface elevations have been furnished by the Administrator, they shall apply. The symbols defining such special flood hazard designations are set forth in Sec. 64.3 of this subchapter. In all cases the minimum requirements

governing the adequacy of the flood plain management regulations for flood-prone areas adopted by a particular community depend on the amount of technical data formally provided to the community by the Administrator. Minimum standards for communities are as follows:

(a) When the Administrator has not defined the special flood hazard areas within a community, has not provided water surface elevation data, and has not provided sufficient data to identify the floodway or coastal high hazard area, but the community has indicated the presence of such hazards by submitting an application to participate in the Program, the community shall:

(1) Require permits for all proposed construction or other development in the community, including the placement of manufactured homes, so that it may determine whether such construction or other development is proposed within flood-prone areas;

(2) Review proposed development to assure that all necessary permits have been received from those governmental agencies from which approval is required by Federal or State law, including section 404 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1334;

(3) Review all permit applications to determine whether proposed building sites will be reasonably safe from flooding. If a proposed building site is in a flood-prone area, all new construction and substantial improvements shall

(i) be designed (or modified) and adequately anchored to prevent flotation, collapse, or lateral movement of the structure resulting from hydrodynamic and hydrostatic loads, including the effects of buoyancy, (ii) be constructed with materials resistant to flood damage, (iii) be constructed by methods and practices that minimize flood damages, and (iv) be constructed with electrical, heating, ventilation, plumbing, and air conditioning equipment and other service facilities that are designed and/or located so as to prevent water from entering or accumulating within the components during conditions of flooding.

(4) Review subdivision proposals and other proposed new development, including manufactured home parks or subdivisions, to determine whether such proposals will be reasonably safe from flooding. If a subdivision proposal or other proposed new development is in a flood-prone area, any such proposals shall be reviewed to assure that (i) all such proposals are consistent with the need to minimize flood damage within the flood-prone area, (ii) all

public utilities and facilities, such as sewer, gas, electrical, and water systems are located and constructed to minimize or eliminate flood damage, and (iii) adequate drainage is provided to reduce exposure to flood hazards;

(5) Require within flood-prone areas new and replacement water supply systems to be designed to minimize or eliminate infiltration of flood waters into the systems; and

(6) Require within flood-prone areas (i) new and replacement sanitary sewage systems to be designed to minimize or eliminate infiltration of flood waters into the systems and discharges from the systems into flood waters and (ii) onsite waste disposal systems to be located to avoid impairment to them or contamination from them during flooding.

(b) When the Administrator has designated areas of special flood hazards (A zones) by the publication of a community's FHBM or FIRM, but has neither produced water surface elevation data nor identified a floodway or coastal high hazard area, the community shall:

(1) Require permits for all proposed construction and other developments including the placement of manufactured homes, within Zone A on the community's FHBM or FIRM;

(2) Require the application of the standards in paragraphs (a) (2),

(3), (4), (5) and (6) of this section to development within Zone A on the community's FHBM or FIRM;

(3) Require that all new subdivision proposals and other proposed developments (including proposals for manufactured home parks and subdivisions) greater than 50 lots or 5 acres, whichever is the lesser, include within such proposals base flood elevation data; (4) Obtain, review and reasonably utilize any base flood elevation and floodway data available from a Federal, State, or other source, including data developed pursuant to paragraph (b)(3) of this section, as criteria for requiring that new construction, substantial improvements, or other development in Zone A on the community's FHBM or FIRM meet the standards in paragraphs (c)(2), (c)(3), (c)(5), (c)(6), (c)(12), (c)(14), (d)(2) and (d)(3) of this section;

(5) Where base flood elevation data are utilized, within Zone A on the community's FHBM or FIRM:

- (i) Obtain the elevation (in relation to mean sea level) of the lowest floor (including basement) of all new and substantially improved structures, and
- (ii) Obtain, if the structure has been floodproofed in accordance with paragraph (c)(3)(ii) of this section, the elevation (in relation to mean sea level) to which the structure was floodproofed, and
- (iii) Maintain a record of all such information with the official designated by the community under Sec. 59.22 (a)(9)(iii);
- (6) Notify, in riverine situations, adjacent communities and the State Coordinating Office prior to any alteration or relocation of a watercourse, and submit copies of such notifications to the Administrator;
- (7) Assure that the flood carrying capacity within the altered or relocated portion of any watercourse is maintained;
- (8) Require that all manufactured homes to be placed within Zone A on a community's FHBM or FIRM shall be installed using methods and practices which minimize flood damage. For the purposes of this requirement, manufactured homes must be elevated and anchored to resist flotation, collapse, or lateral movement. Methods of anchoring may include, but are not to be limited to, use of over-the-top or frame ties to ground anchors. This requirement is in addition to applicable State and local anchoring requirements for resisting wind forces.
- (c) When the Administrator has provided a notice of final flood elevations for one or more special flood hazard areas on the community's FIRM and, if appropriate, has designated other special flood hazard areas without base flood elevations on the community's FIRM, but has not identified a regulatory floodway or coastal high hazard area, the community shall:
 - (1) Require the standards of paragraph (b) of this section within all A1-30 zones, AE zones, A zones, AH zones, and AO zones, on the community's FIRM;
 - (2) Require that all new construction and substantial improvements of residential structures within Zones A1-30, AE and AH zones on the community's FIRM have the lowest floor (including basement) elevated to or above the base flood level, unless the community is granted an exception by the Administrator for the allowance of basements in accordance with Sec. 60.6 (b) or (c);
 - (3) Require that all new construction and substantial improvements of non-residential structures within Zones A1-30, AE and AH zones on the community's firm (i) have the lowest floor (including basement)

elevated to or above the base flood level or, (ii) together with attendant utility and sanitary facilities, be designed so that below the base flood level the structure is watertight with walls substantially impermeable to the passage of water and with structural components having the capability of resisting hydrostatic and hydrodynamic loads and effects of buoyancy;

(4) Provide that where a non-residential structure is intended to be made watertight below the base flood level, (i) a registered professional engineer or architect shall develop and/or review structural design, specifications, and plans for the construction, and shall certify that the design and methods of construction are in accordance with accepted standards of practice for meeting the applicable provisions of paragraph (c)(3)(ii) or (c)(8)(ii) of this section, and (ii) a record of such certificates which includes the specific elevation (in relation to mean sea level) to which such structures are floodproofed shall be maintained with the official designated by the community under Sec. 59.22(a)(9)(iii);

(5) Require, for all new construction and substantial improvements, that fully enclosed areas below the lowest floor that are usable solely for parking of vehicles, building access or storage in an area other than a basement and which are subject to flooding shall be designed to automatically equalize hydrostatic flood forces on exterior walls by allowing for the entry and exit of floodwaters. Designs for meeting this requirement must either be certified by a registered professional engineer or architect or meet or exceed the following minimum criteria: A minimum of two openings having a total net area of not less than one square inch for every square foot of enclosed area subject to flooding shall be provided. The bottom of all openings shall be no higher than one foot above grade. Openings may be equipped with screens, louvers, valves, or other coverings or devices provided that they permit the automatic entry and exit of floodwaters.

(6) Require that manufactured homes that are placed or substantially improved within Zones A1-30, AH, and AE on the community's FIRM on sites

- (i) Outside of a manufactured home park or subdivision,
- (ii) In a new manufactured home park or subdivision,
- (iii) In an expansion to an existing manufactured home park or subdivision, or
- (iv) In an existing manufactured home park or subdivision on which a manufactured home has incurred "substantial damage" as the result of a

flood, be elevated on a permanent foundation such that the lowest floor of the manufactured home is elevated to or above the base flood elevation and be securely anchored to an adequately anchored foundation system to resist floatation collapse and lateral movement.

(7) Require within any AO zone on the community's FIRM that all new construction and substantial improvements of residential structures have the lowest floor (including basement) elevated above the highest adjacent grade at least as high as the depth number specified in feet on the community's FIRM (at least two feet if no depth number is specified);

(8) Require within any AO zone on the community's FIRM that all new construction and substantial improvements of nonresidential structures

(i) have the lowest floor (including basement) elevated above the highest adjacent grade at least as high as the depth number specified in feet on the community's FIRM (at least two feet if no depth number is specified), or

(ii) together with attendant utility and sanitary facilities be completely floodproofed to that level to meet the floodproofing standard specified in Sec. 60.3(c)(3)(ii);

(9) Require within any A99 zones on a community's FIRM the standards of paragraphs (a)(1) through (a)(4)(i) and (b)(5) through (b)(9) of this section;

(10) Require until a regulatory floodway is designated, that no new construction, substantial improvements, or other development (including fill) shall be permitted within Zones A1-30 and AE on the community's FIRM, unless it is demonstrated that the cumulative effect of the proposed development, when combined with all other existing and anticipated development, will not increase the water surface elevation of the base flood more than one foot at any point within the community.

(11) Require within Zones AH and AO, adequate drainage paths around structures on slopes, to guide

floodwaters around and away from proposed structures.

(12) Require that manufactured homes to be placed or substantially improved on sites in an existing manufactured home park or subdivision within Zones A-1-30, AH, and AE on the community's FIRM that are not subject to the provisions of paragraph (c)(6) of this section be elevated so that either

(i) The lowest floor of the manufactured home is at or above the base flood elevation, or

(ii) The manufactured home chassis is supported by reinforced piers or other foundation elements of at least equivalent strength that are no less than 36 inches in height above grade and be securely anchored to an adequately anchored foundation system to resist floatation, collapse, and lateral movement.

(13) Notwithstanding any other provisions of Sec. 60.3, a community may approve certain development in Zones A1-30, AE, and AH, on the community's FIRM which increase the water surface elevation of the base flood by more than one foot, provided that the community first applies for a conditional FIRM revision, fulfills the requirements for such a revision as established under the provisions of Sec. 65.12, and receives the approval of the Administrator.

(14) Require that recreational vehicles placed on sites within Zones A1-30, AH, and AE on the community's FIRM either

(i) Be on the site for fewer than 180 consecutive days,

(ii) Be fully licensed and ready for highway use, or

(iii) Meet the permit requirements of paragraph (b)(1) of this section and the elevation and anchoring requirements for "manufactured homes" in paragraph (c)(6) of this section.

A recreational vehicle is ready for highway use if it is on its wheels or jacking system, is attached to the site only by quick disconnect type utilities and security devices, and has no permanently attached additions.

(d) When the Administrator has provided a notice of final base flood elevations within Zones A1-30 and/or AE on the community's FIRM and, if appropriate, has designated AO zones, AH zones, A99 zones, and A zones on the community's FIRM, and has provided data from which the community shall designate its regulatory floodway, the community shall:

- (1) Meet the requirements of paragraphs (c) (1) through (14) of this section;
- (2) Select and adopt a regulatory floodway based on the principle that the area chosen for the regulatory floodway must be designed to carry the waters of the base flood, without increasing the water surface elevation of that flood more than one foot at any point;
- (3) Prohibit encroachments, including fill, new construction, substantial improvements, and other development within the adopted regulatory floodway unless it has been demonstrated through hydrologic and hydraulic analyses performed in accordance with standard engineering practice that the proposed encroachment would not result in any increase in flood levels within the community during the occurrence of the base flood discharge;
- (4) Notwithstanding any other provisions of Sec. 60.3, a community may permit encroachments within the adopted regulatory floodway that would result in an increase in base flood elevations, provided that the community first applies for a conditional FIRM and floodway revision, fulfills the requirements for such revisions as established under the provisions of Sec. 65.12, and receives the approval of the Administrator.

(e) When the Administrator has provided a notice of final base flood elevations within Zones A1-30 and/or AE on the community's FIRM and, if appropriate, has designated AH zones, AO zones, A99 zones, and A zones on the community's FIRM, and has identified on the community's FIRM coastal high hazard areas by designating Zones V1-30, VE, and/or V, the community shall:

- (1) Meet the requirements of paragraphs (c)(1) through (14) of this section;
- (2) Within Zones V1-30, VE, and V on a community's FIRM, (i) obtain the elevation (in relation to mean sea level) of the bottom of the lowest structural member of the lowest floor (excluding pilings and columns) of all new and substantially improved structures, and whether or not such structures contain a basement, and (ii) maintain a record of all such information with the official designated by the community under Sec.

59.22(a)(9)(iii);

(3) Provide that all new construction within Zones V1-30, VE, and V on the community's FIRM is located landward of the reach of mean high tide;

(4) Provide that all new construction and substantial improvements in Zones V1-30 and VE, and also Zone V if base flood elevation data is available, on the community's FIRM, are elevated on pilings and columns so that

(i) the bottom of the lowest horizontal structural member of the lowest floor (excluding the pilings or columns) is elevated to or above the base flood level; and

(ii) the pile or column foundation and structure attached thereto is anchored to resist flotation, collapse and lateral movement due to the effects of wind and water loads acting simultaneously on all building components. Water loading values used shall be those associated with the base flood. Wind loading values used shall be those required by applicable State or local building standards. A registered professional engineer or architect shall develop or review the structural design, specifications and plans for the construction, and shall certify that the design and methods of construction to be used are in accordance with accepted standards of practice for meeting the provisions of paragraphs (e)(4)

(i) and (ii) of this section.

(5) Provide that all new construction and substantial improvements within Zones V1-30, VE, and V on the community's FIRM have the space below the lowest floor either free of obstruction or constructed with non-supporting breakaway walls, open wood lattice-work, or insect screening intended to collapse under wind and water loads without causing collapse, displacement, or other structural damage to the elevated portion of the building or supporting foundation system. For the purposes of this section, a breakaway wall shall have a design safe loading resistance of not less than 10 and no more than 20 pounds per square foot. Use of breakaway walls which exceed a design safe loading resistance of 20 pounds per square foot (either by design or when so required by local or State codes) may be permitted only if a registered professional engineer or architect certifies that the designs proposed meet the following conditions:

(i) Breakaway wall collapse shall result from a water load less than that which would occur during the base flood; and,

(ii) The elevated portion of the building and supporting foundation system shall not be subject to

collapse, displacement, or other structural damage due to the effects of wind and water loads acting simultaneously on all building components (structural and non-structural). Water loading values used shall be those associated with the base flood. Wind loading values used shall be those required by applicable State or local building standards. Such enclosed space shall be useable solely for parking of vehicles, building access, or storage.

(6) Prohibit the use of fill for structural support of buildings within Zones V1-30, VE, and V on the community's FIRM;

(7) Prohibit man-made alteration of sand dunes and mangrove stands within Zones V1-30, VE, and V on the community's FIRM which would increase potential flood damage.

(8) Require that manufactured homes placed or substantially improved within Zones V1-30, V, and VE on the community's FIRM on sites

(i) Outside of a manufactured home park or subdivision,

(ii) In a new manufactured home park or subdivision,

(iii) In an expansion to an existing manufactured home park or subdivision, or

(iv) In an existing manufactured home park or subdivision on which a manufactured home has incurred "substantial damage" as the result of a flood, meet the standards of paragraphs (e)(2) through (7) of this section and that manufactured homes placed or substantially improved on other sites in an existing manufactured home park or subdivision within Zones V1-30, V, and VE on the community's FIRM meet the requirements of paragraph (c)(12) of this section.

(9) Require that recreational vehicles placed on sites within Zones V1-30, V, and VE on the community's FIRM either

(i) Be on the site for fewer than 180 consecutive days,

(ii) Be fully licensed and ready for highway use, or

(iii) Meet the requirements in paragraphs (b)(1) and (e) (2) through (7) of this section.

A recreational vehicle is ready for highway use if it is on its wheels or jacking system, is attached to the site only by quick disconnect type utilities and security devices, and has no permanently attached additions.

(f) When the Administrator has provided a notice of final base flood elevations within Zones A1-30 or AE on the community's FIRM, and, if appropriate, has designated AH zones, AO zones, A99 zones, and A zones on the community's FIRM, and has identified flood protection restoration areas by designating

Zones AR, AR/A1-30, AR/AE, AR/AH, AR/AO, or AR/A, the community shall:

(1) Meet the requirements of paragraphs (c)(1) through (14) and (d)(1) through (4) of this section.

(2) Adopt the official map or legal description of those areas within Zones AR, AR/A1-30, AR/AE, AR/AH, AR/A, or AR/AO that are designated developed areas as defined in Sec.59.1 in accordance with the eligibility procedures under Sec.65.14.

(3) For all new construction of structures in areas within Zone AR that are designated as developed areas and in other areas within Zone AR where the AR flood depth is 5 feet or less:

(i) Determine the lower of either the AR base flood elevation or the elevation that is 3 feet above highest adjacent grade; and

(ii) Using this elevation, require the standards of paragraphs (c)(1) through (14) of this section.

(4) For all new construction of structures in those areas within Zone AR that are not designated as developed areas where the AR flood depth is greater than 5 feet:

(i) Determine the AR base flood elevation; and

(ii) Using that elevation require the standards of paragraphs (c)(1) through (14) of this section.

(5) For all new construction of structures in areas within Zone AR/A1-30, AR/AE, AR/AH, AR/AO, and AR/A:

(i) Determine the applicable elevation for Zone AR from paragraphs (a)(3) and (4) of this section;

(ii) Determine the base flood elevation or flood depth for the underlying A1-30, AE, AH, AO and A Zone; and (iii) Using the higher elevation from paragraphs (a)(5)(i) and (ii) of this section require the standards of paragraphs (c)(1) through (14) of this section.

(6) For all substantial improvements to existing construction within Zones AR/A1-30, AR/AE, AR/AH, AR/AO, and AR/A:

(i) Determine the A1-30 or AE, AH, AO, or A Zone base flood elevation; and

(ii) Using this elevation apply the requirements of paragraphs (c)(1) through (14) of this section.

(7) Notify the permit applicant that the area has been designated as an AR, AR/A1-30, AR/AE, AR/AH, AR/AO, or AR/A Zone and whether the structure will be elevated or protected to or above the AR base flood elevation.

[41 FR 46975, Oct. 26, 1976]

Editorial Note: For Federal Register citations affecting Sec. 60.3, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 60.4 Flood plain management criteria for mudslide (i.e., mudflow)-prone areas.

The Administrator will provide the data upon which flood plain management regulations shall be based. If the Administrator has not provided sufficient data to furnish a basis for these regulations in a particular community, the community shall obtain, review, and reasonably utilize data available from other Federal, State or other sources pending receipt of data from the Administrator. However, when special mudslide (i.e., mudflow) hazard area designations have been furnished by the Administrator, they shall apply. The symbols defining such special mudslide (i.e., mudflow) hazard designations are set forth in Sec. 64.3 of this subchapter. In all cases, the minimum requirements for mudslide (i.e., mudflow)-prone areas adopted by a particular community depend on the amount of technical data provided to the community by the Administrator. Minimum standards for communities are as follows:

(a) When the Administrator has not yet identified any area within the community as an area having special mudslide (i.e., mudflow) hazards, but the community has indicated the presence of such hazards by submitting an application to participate in the Program, the community shall

(1) Require permits for all proposed construction or other development in the community so that it may determine whether development is proposed within mudslide (i.e., mudflow)-prone areas;

(2) Require review of each permit application to determine whether the proposed site and improvements will be reasonably safe from mudslides (i.e., mudflows). Factors to be considered in making such a determination should include but not be limited to (i) the type and quality of soils, (ii) any evidence of ground water or surface water problems, (iii) the depth and quality of any fill, (iv) the overall slope of the site, and (v) the weight that any proposed structure will impose on the slope;

(3) Require, if a proposed site and improvements are in a location that may have mudslide (i.e., mudflow) hazards, that

(i) a site investigation and further review be made by persons qualified in geology and soils engineering, (ii) the proposed grading, excavations, new construction, and substantial improvements are adequately designed and protected against mudslide (i.e., mudflow) damages, (iii) the proposed grading, excavations, new construction and substantial improvements do not aggravate the existing hazard

by creating either on-site or off-site disturbances, and (iv) drainage, planting, watering, and maintenance be such as not to endanger slope stability.

(b) When the Administrator has delineated Zone M on the community's FIRM, the community shall:

(1) Meet the requirements of paragraph (a) of this section; and

(2) Adopt and enforce a grading ordinance or regulation in accordance with data supplied by the Administrator which (i) regulates the location of foundation systems and utility systems of new construction and substantial improvements, (ii) regulates the location, drainage and maintenance of all excavations, cuts and fills and planted slopes, (iii) provides special requirements for protective measures including but not necessarily limited to retaining walls, buttress fills, sub-drains, diverter terraces, benchings, etc., and (iv) requires engineering drawings and specifications to be submitted for all corrective measures, accompanied by supporting soils engineering and geology reports. Guidance may be obtained from the provisions of the 1973 edition and any subsequent edition of the Uniform Building Code, sections 7001 through 7006, and 7008 through 7015. The Uniform Building Code is published by the International Conference of Building Officials, 50 South Los Robles, Pasadena, California 91101.

[41 FR 46975, Oct. 26, 1976. Redesignated at 44 FR 31177, May 31, 1979, as amended at 48 FR 44552, Sept. 29, 1983; 49 FR 4751, Feb. 8, 1984]

§ 60.5 Flood plain management criteria for flood-related erosion-prone areas.

The Administrator will provide the data upon which flood plain management regulations for flood-related erosion-prone areas shall be based. If the Administrator has not provided sufficient data to furnish a basis for these regulations in a particular community, the community shall obtain, review, and reasonably utilize data available from other Federal, State or other sources, pending receipt of data from the Administrator. However, when special flood-related erosion hazard area designations have been furnished by the Administrator they shall apply. The symbols defining such special flood-related erosion hazard designations are set forth in Sec. 64.3 of this subchapter. In all cases the minimum requirements governing the adequacy of the flood plain management regulations for flood-related erosion-prone areas adopted by a particular community depend on the amount of technical data provided to

the community by the Administrator. Minimum standards for communities are as follows:

(a) When the Administrator has not yet identified any area within the community as having special flood-related erosion hazards, but the community has indicated the presence of such hazards by submitting an application to participate in the Program, the community shall

(1) Require the issuance of a permit for all proposed construction, or other development in the area of flood-related erosion hazard, as it is known to the community;

(2) Require review of each permit application to determine whether the proposed site alterations and improvements will be reasonably safe from flood-related erosion and will not cause flood-related erosion hazards or otherwise aggravate the existing flood-related erosion hazard; and

(3) If a proposed improvement is found to be in the path of flood-related erosion or to increase the erosion hazard, require the improvement to be relocated or adequate protective measures to be taken which will not aggravate the existing erosion hazard.

(b) When the Administrator has delineated Zone E on the community's FIRM, the community shall

(1) Meet the requirements of paragraph (a) of this section; and

(2) Require a setback for all new development from the ocean, lake, bay, riverfront or other body of water, to create a safety buffer consisting of a natural vegetative or contour strip. This buffer will be designated by the Administrator according to the flood-related erosion hazard and erosion rate, in conjunction with the anticipated "useful life" of structures, and depending upon the geologic, hydrologic, topographic and climatic characteristics of the community's land. The buffer may be used for suitable open space purposes, such as for agricultural, forestry, outdoor recreation and wildlife habitat areas, and for other activities using temporary and portable structures only.

[41 FR 46975, Oct. 26, 1976. Redesignated at 44 FR 31177, May 31, 1979, as amended at 48 FR 44552, Sept. 29, 1983; 49 FR 4751, Feb. 8, 1984]

§ 60.6 Variances and exceptions.

(a) The Administrator does not set forth absolute criteria for granting variances from the criteria set forth in Sec. 60.3, 60.4, and 60.5. The issuance of a variance is for flood plain management purposes only. Insurance premium rates are determined by

statute according to actuarial risk and will not be modified by the granting of a variance. The community, after examining the applicant's hardships, shall approve or disapprove a request. While the granting of variances generally is limited to a lot size less than one-half acre (as set forth in paragraph (a)(2) of this section), deviations from that limitation may occur. However, as the lot size increases beyond one-half acre, the technical justification required for issuing a variance increases. The Administrator may review a community's findings justifying the granting of variances, and if that review indicates a pattern inconsistent with the objectives of sound flood plain management, the Administrator may take appropriate action under Sec. 59.24(b) of this subchapter. Variances may be issued for the repair or rehabilitation of historic structures upon a determination that the proposed repair or rehabilitation will not preclude the structure's continued designation as a historic structure and the variance is the minimum necessary to preserve the historic character and design of the structure. Procedures for the granting of variances by a community are as follows:

(1) Variances shall not be issued by a community within any designated regulatory floodway if any increase in flood levels during the base flood discharge would result;

(2) Variances may be issued by a community for new construction and substantial improvements to be erected on a lot of one-half acre or less in size contiguous to and surrounded by lots with existing structures constructed below the base flood level, in conformance with the procedures of paragraphs (a) (3), (4), (5) and (6) of this section;

(3) Variances shall only be issued by a community upon (i) a showing of good and sufficient cause, (ii) a determination that failure to grant the variance would result in exceptional hardship to the applicant, and (iii) a determination that the granting of a variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, create nuisances, cause fraud on or victimization of the public, or conflict with existing local laws or ordinances;

(4) Variances shall only be issued upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief;

(5) A community shall notify the applicant in writing over the signature of a community official that (i) the issuance of a variance to construct a structure below the base flood level will result in increased premium rates for flood insurance up to amounts as high as \$25 for \$100 of insurance coverage and (ii) such construction below the base flood level increases risks to life and property. Such notification shall be maintained with a record of all variance actions as required in paragraph (a)(6) of this section; and

(6) A community shall (i) maintain a record of all variance actions, including justification for their issuance, and (ii) report such variances issued in its annual or biennial report submitted to the Administrator.

(7) Variances may be issued by a community for new construction and substantial improvements and for other development necessary for the conduct of a functionally dependent use provided that (i) the criteria of paragraphs (a)(1) through (a)(4) of this section are met, and (ii) the structure or other development is protected by methods that minimize flood damages during the base flood and create no additional threats to public safety.

(b)(1) The requirement that each flood-prone, mudslide (i.e., mudflow)-prone, and flood-related erosion prone community must adopt and submit adequate flood plain management regulations as a condition of initial and continued flood insurance eligibility is statutory and cannot be waived, and such regulations shall be adopted by a community within the time periods specified in Sec. 60.3, 60.4 or Sec. 60.5. However, certain exceptions from the standards contained in this subpart may be permitted where the Administrator recognizes that, because of extraordinary circumstances, local conditions may render the application of certain standards the cause for severe hardship and gross inequity for a particular community. Consequently, a community proposing the adoption of flood plain management regulations which vary from the standards set forth in Sec. 60.3, 60.4, or Sec. 60.5, shall explain in writing to the Administrator the nature and extent of and the reasons for the exception request and shall include sufficient supporting economic, environmental, topographic, hydrologic, and other scientific and technical data, and data with respect to the impact on public safety and the environment.

(2) The Administrator shall prepare a Special Environmental Clearance to determine whether the proposal for an exception under paragraph (b)(1) of this section will have significant impact on the human

environment. The decision whether an Environmental Impact Statement or other environmental document will be prepared, will be made in accordance with the procedures set out in 44 CFR part 10. Ninety or more days may be required for an environmental quality clearance if the proposed exception will have significant impact on the human environment thereby requiring an EIS.

(c) A community may propose flood plain management measures which adopt standards for floodproofed residential basements below the base flood level in zones A1-30, AH, AO, and AE which are not subject to tidal flooding. Notwithstanding the requirements of paragraph

(b) of this section the Administrator may approve the proposal provided that:

(1) The community has demonstrated that areas of special flood hazard in which basements will be permitted are subject to shallow and low velocity flooding and that there is adequate flood warning time to ensure that all residents are notified of impending floods. For the purposes of this paragraph flood characteristics must include:

(i) Flood depths that are five feet or less for developable lots that are contiguous to land above the base flood level and three feet or less for other lots;

(ii) Flood velocities that are five feet per second or less; and (iii) Flood warning times that are 12 hours or greater. Flood warning times of two hours or greater may be approved if the community demonstrates that it has a flood warning system and emergency plan in operation that is adequate to ensure safe evacuation of flood plain residents.

(2) The community has adopted flood plain management measures that require that new construction and substantial improvements of residential structures with basements in zones A1-30, AH, AO, and AE shall:

(i) Be designed and built so that any basement area, together with attendant utilities and sanitary facilities below the floodproofed design level, is watertight with walls that are impermeable to the passage of water without human intervention. Basement walls shall be built with the capacity to resist hydrostatic and hydrodynamic loads and the effects of buoyancy resulting from flooding to the floodproofed design level, and shall be designed so that minimal damage will occur from floods that exceed that level. The floodproofed design level shall be an elevation one foot above the level of the base flood where the difference between the base flood and the 500-year flood is three feet or less and two feet above the level

of the base flood where the difference is greater than three feet.

(ii) Have the top of the floor of any basement area no lower than five feet below the elevation of the base flood;

(iii) Have the area surrounding the structure on all sides filled to or above the elevation of the base flood. Fill must be compacted with slopes protected by vegetative cover;

(iv) Have a registered professional engineer or architect develop or review the building's structural design, specifications, and plans, including consideration of the depth, velocity, and duration of flooding and type and permeability of soils at the building site, and certify that the basement design and methods of construction proposed are in accordance with accepted standards of practice for meeting the provisions of this paragraph;

(v) Be inspected by the building inspector or other authorized representative of the community to verify that the structure is built according to its design and those provisions of this section which are verifiable.

[41 FR 46975, Oct. 26, 1976. Redesignated at 44 FR 31177, May 31, 1979, as amended at 48 FR 44543 and 44552, Sept. 29, 1983; 49 FR 4751, Feb. 8, 1984; 50 FR 36025, Sept. 4, 1985; 51 FR 30308, Aug. 25, 1986; 54 FR 33550, Aug. 15, 1989]

§ 60.7 Revisions of criteria for flood plain management regulations.

From time to time part 60 may be revised as experience is acquired under the Program and new information becomes available. Communities will be given six months from the effective date of any new regulation to revise their flood plain management regulations to comply with any such changes.

§ 60.8 Definitions.

The definitions set forth in part 59 of this subchapter are applicable to this part.

Subpart B--Requirements for State Flood Plain Management Regulations

§ 60.11 Purpose of this subpart.

(a) A State is considered a "community" pursuant to Sec. 59.1 of this subchapter; and, accordingly, the Act provides that flood insurance shall not be sold or renewed under the Program unless a community has adopted adequate flood plain management regulations consistent with criteria established by the Administrator.

(b) This subpart sets forth the flood plain management criteria required for State-owned properties located within special hazard areas identified by the Administrator. A State shall satisfy such criteria as a condition to the purchase of a Standard Flood Insurance Policy for a State-owned structure or its contents, or as a condition to the approval by the Administrator, pursuant to part 75 of this subchapter, of its plan of self-insurance.

[41 FR 46975, Oct. 26, 1976. Redesignated at 44 FR 31177, May 31, 1979, as amended at 48 FR 44552, Sept. 29, 1983; 49 FR 4751, Feb. 8, 1984]

§ 60.12 Flood plain management criteria for State-owned properties in special hazard areas.

(a) The State shall comply with the minimum flood plain management criteria set forth in Sec. Sec. 60.3, 60.4, and 60.5. A State either shall:

(1) Comply with the flood plain management requirements of all local communities participating in the program in which State-owned properties are located; or (2) Establish and enforce flood plain management regulations which, at a minimum, satisfy the criteria set forth in Sec. 60.3, 60.4, and 60.5.

(b) The procedures by which a state government adopts and administers flood plain management regulations satisfying the criteria set forth in Sec. 60.3, 60.4 and 60.5 may vary from the procedures by which local governments satisfy the criteria.

(c) If any State-owned property is located in a non-participating local community, then the State shall comply with the requirements of paragraph (a)(2) of this section for the property.

§ Sec. 60.13 Noncompliance.

If a State fails to submit adequate flood plain management regulations applicable to State-owned properties pursuant to Sec. 60.12 within six months of the effective date of this regulation, or fails to adequately enforce such regulations, the State shall be subject to suspensive action pursuant to Sec. 59.24. Where the State fails to adequately enforce its flood plain management regulations, the Administrator shall conduct a hearing before initiating such suspensive action.

[41 FR 46975, Oct. 26, 1976. Redesignated at 44 FR 31177, May 31, 1979, as amended at 48 FR 44552, Sept. 29, 1983; 49 FR 4751, Feb. 8, 1984]

Subpart C—Additional Considerations in Managing Flood-Prone, Mudslide (i.e., Mudflow)-Prone and Flood-Related Erosion-Prone Areas

§ 60.21 Purpose of this subpart.

The purpose of this subpart is to encourage the formation and adoption of overall comprehensive management plans for flood-prone, mudslide (i.e., mudflow)-prone and flood-related erosion-prone areas. While adoption by a community of the standards in this subpart is not mandatory, the community shall completely evaluate these standards.

§ 60.22 Planning considerations for flood-prone areas.

(a) The flood plain management regulations adopted by a community for flood-prone areas should:

(1) Permit only that development of flood-prone areas which (i) is appropriate in light of the probability of flood damage and the need to reduce flood losses, (ii) is an acceptable social and economic use of the land in relation to the hazards involved, and (iii) does not increase the danger to human life;

(2) Prohibit nonessential or improper installation of public utilities and public facilities in flood-prone areas.

(b) In formulating community development goals after the occurrence of a flood disaster, each community shall consider—

(1) Preservation of the flood-prone areas for open space purposes;

(2) Relocation of occupants away from flood-prone areas;

(3) Acquisition of land or land development rights for public purposes consistent with a policy of minimization of future property losses;

(4) Acquisition of frequently flood-damaged structures;

(c) In formulating community development goals and in adopting flood plain management regulations, each community shall consider at least the following factors—

(1) Human safety;

(2) Diversion of development to areas safe from flooding in light of the need to reduce flood damages and in light of the need to prevent environmentally incompatible flood plain use;

(3) Full disclosure to all prospective and interested parties (including but not limited to purchasers and renters) that

(i) certain structures are located within flood-prone areas,

(ii) variances have been granted for certain structures located within flood-prone areas, and

(iii) premium rates applied to new structures built at elevations below the base flood substantially increase as the elevation decreases;

(4) Adverse effects of flood plain development on existing development;

(5) Encouragement of floodproofing to reduce flood damage;

(6) Flood warning and emergency preparedness plans;

(7) Provision for alternative vehicular access and escape routes when normal routes are blocked or destroyed by flooding;

(8) Establishment of minimum floodproofing and access requirements for schools, hospitals, nursing homes, orphanages, penal institutions, fire stations, police stations, communications centers, water and sewage pumping stations, and other public or quasi-public facilities already located in the flood-prone area, to enable them to withstand flood damage, and to facilitate emergency operations;

(9) Improvement of local drainage to control increased runoff that might increase the danger of flooding to other properties;

(10) Coordination of plans with neighboring community's flood plain management programs;

(11) The requirement that all new construction and substantial improvements in areas subject to subsidence be elevated above the base flood level equal to expected subsidence for at least a ten year period;

(12) For riverine areas, requiring subdividers to furnish delineations for floodways before approving a subdivision;

(13) Prohibition of any alteration or relocation of a watercourse, except as part of an overall drainage basin plan. In the event of an overall drainage basin plan, provide that the flood carrying capacity within the altered or relocated portion of the watercourse is maintained;

(14) Requirement of setbacks for new construction within Zones V1-30, VE, and V on a community's FIRM;

(15) Requirement of additional elevation above the base flood level for all new construction and substantial improvements within Zones A1-30, AE, V1-30, and VE on the community's FIRM to protect against such occurrences as wave wash and floating

debris, to provide an added margin of safety against floods having a magnitude greater than the base flood, or to compensate for future urban development;

(16) Requirement of consistency between state, regional and local comprehensive plans and flood plain management programs;

(17) Requirement of pilings or columns rather than fill, for the elevation of structures within flood-prone areas, in order to maintain the storage capacity of the flood plain and to minimize the potential for negative impacts to sensitive ecological areas;

(18) Prohibition, within any floodway or coastal high hazard area, of plants or facilities in which hazardous substances are manufactured.

(19) Requirement that a plan for evacuating residents of all manufactured home parks or subdivisions located within flood prone areas be developed and filed with and approved by appropriate community emergency management authorities. [41 FR 46975, Oct. 26, 1976. Redesignated at 44 FR 31177, May 31, 1979, as amended at 50 FR 36025, Sept. 4, 1985; 54 FR 40284, Sept. 29, 1989]

§ 60.23 Planning considerations for mud slide (i.e., mudflow)-prone areas.

The planning process for communities identified under part 65 of this subchapter as containing Zone M, or which indicate in their applications for flood insurance pursuant to Sec. 59.22 of this subchapter that they have mudslide (i.e., mudflow) areas, should include—

(a) The existence and extent of the hazard;

(b) The potential effects of inappropriate hillside development, including

(1) Loss of life and personal injuries, and

(2) Public and private property losses, costs, liabilities, and exposures resulting from potential mudslide (i.e., mudflow) hazards;

(c) The means of avoiding the hazard including the (1) availability of land which is not mudslide (i.e., mudflow)-prone and the feasibility of developing such land instead of further encroaching upon mudslide (i.e., mudflow) areas, (2) possibility of public acquisition of land, easements, and development rights to assure the proper development of hillsides, and

(3) advisability of preserving mudslide (i.e., mudflow) areas as open space;

(d) The means of adjusting to the hazard, including the (1) establishment by ordinance of site exploration, investigation, design, grading, construction, filing,

compacting, foundation, sewerage, drainage, subdrainage, planting, inspection and maintenance standards and requirements that promote proper land use, and

(2) provision for proper drainage and subdrainage on public property and the location of public utilities and service facilities, such as sewer, water, gas and electrical systems and streets in a manner designed to minimize exposure to mudslide (i.e., mudflow) hazards and prevent their aggravation;

(e) Coordination of land use, sewer, and drainage regulations and ordinances with fire prevention, flood plain, mudslide (i.e., mudflow), soil, land, and water regulation in neighboring communities;

(f) Planning subdivisions and other developments in such a manner as to avoid exposure to mudslide (i.e., mudflow) hazards and the control of public facility and utility extension to discourage inappropriate development;

(g) Public facility location and design requirements with higher site stability and access standards for schools, hospitals, nursing homes, orphanages, correctional and other residential institutions, fire and police stations, communication centers, electric power transformers and substations, water and sewer pumping stations and any other public or quasi-public institutions located in the mudslide (i.e., mudflow) area to enable them to withstand mudslide (i.e., mudflow) damage and to facilitate emergency operations; and

(h) Provision for emergencies, including:

(1) Warning, evacuation, abatement, and access procedures in the event of mudslide (i.e., mudflow),

(2) Enactment of public measures and initiation of private procedures to limit danger and damage from continued or future mudslides (i.e., mudflow),

(3) Fire prevention procedures in the event of the rupture of gas or electrical distribution systems by mudslides,

(4) Provisions to avoid contamination of water conduits or deterioration of slope stability by the rupture of such systems,

(5) Similar provisions for sewers which in the event of rupture pose both health and site stability hazards and

(6) Provisions for alternative vehicular access and escape routes when normal routes are blocked or destroyed by mudslides (i.e., mudflow);

(i) The means for assuring consistency between state, areawide, and local comprehensive plans with the plans developed for mudslide (i.e., mudflow)-prone areas;

(j) Deterring the nonessential installation of public utilities and public facilities in mudslide (i.e., mudflow)-prone areas.

§ 60.24 Planning considerations for flood-related erosion-prone areas.

The planning process for communities identified under part 65 of this subchapter as containing Zone E or which indicate in their applications for flood insurance coverage pursuant to Sec.

59.22 of this subchapter that they have flood-related erosion areas should include--

- (a) The importance of directing future developments to areas not exposed to flood-related erosion;
- (b) The possibility of reserving flood-related erosion-prone areas for open space purposes;
- (c) The coordination of all planning for the flood-related erosion-prone areas with planning at the State and Regional levels, and with planning at the level of neighboring communities;
- (d) Preventive action in E zones, including setbacks, shore protection works, relocating structures in the path of flood-related erosion, and community acquisition of flood-related erosion-prone properties for public purposes;
- (e) Consistency of plans for flood-related erosion-prone areas with comprehensive plans at the state, regional and local levels.

§ 60.25 Designation, duties, and responsibilities of State Coordinating Agencies.

- (a) States are encouraged to demonstrate a commitment to the minimum flood plain management criteria set forth in Sec. Sec. 60.3, 60.4, and 60.5 as evidenced by the designation of an agency of State government to be responsible for coordinating the Program aspects of flood plain management in the State.
- (b) State participation in furthering the objectives of this part shall include maintaining capability to perform the appropriate duties and responsibilities as follows:
 - (1) Enact, whenever necessary, legislation enabling counties and municipalities to regulate development within flood-prone areas;
 - (2) Encourage and assist communities in qualifying for participation in the Program;
 - (3) Guide and assist county and municipal public bodies and agencies in developing, implementing, and maintaining local flood plain management regulations;
 - (4) Provide local governments and the general public

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with Program information on the coordination of local activities with Federal and State requirements for managing flood-prone areas;

- (5) Assist communities in disseminating information on minimum elevation requirements for development within flood-prone areas;
- (6) Assist in the delineation of riverine and coastal flood-prone areas, whenever possible, and provide all relevant technical information to the Administrator;
- (7) Recommend priorities for Federal flood plain management activities in relation to the needs of county and municipal localities within the State;
- (8) Provide notification to the Administrator in the event of apparent irreconcilable differences between a community's local flood plain management program and the minimum requirements of the Program;
- (9) Establish minimum State flood plain management regulatory standards consistent with those established in this part and in conformance with other Federal and State environmental and water pollution standards for the prevention of pollution during periods of flooding;
- (10) Assure coordination and consistency of flood plain management activities with other State, areawide, and local planning and enforcement agencies;
- (11) Assist in the identification and implementation of flood hazard mitigation recommendations which are consistent with the minimum flood plain management criteria for the Program;
- (12) Participate in flood plain management training opportunities and other flood hazard preparedness programs whenever practicable.
- (c) Other duties and responsibilities, which may be deemed appropriate by the State and which are to be officially designated as being conducted in the capacity of the State Coordinating Agency for the Program, may be carried out with prior notification of the Administrator.
- (d) For States which have demonstrated a commitment to and experience in application of the minimum flood plain management criteria set forth in Sec. 60.3, 60.4, and 60.5 as evidenced by the establishment and implementation of programs which substantially encompass the activities described in paragraphs (a), (b), and (c) of this section, the Administrator shall take the foregoing into account when:
 - (1) Considering State recommendations prior to implementing Program activities affecting State communities;
 - (2) Considering State approval or certifications of

local flood plain management regulations as meeting the requirements of this part.
[51 FR 30309, Aug. 25, 1986]

§ 60.26 Local coordination.

- (a) Local flood plain, mudslide (i.e., mudflow) and flood-related erosion area management, forecasting, emergency preparedness, and damage abatement programs should be coordinated with relevant Federal, State, and regional programs;
- (b) A community adopting flood plain management regulations pursuant to these criteria should coordinate with the appropriate State agency to promote public acceptance and use of effective flood plain, mudslide, (i.e., mudflow) and flood-related erosion regulations;
- (c) A community should notify adjacent communities prior to substantial commercial developments and large subdivisions to be undertaken in areas having special flood, mudslide (i.e., mudflow) and/or flood-related erosion hazards.

PART 65—IDENTIFICATION AND MAPPING OF SPECIAL HAZARD AREAS-

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Authority: 42 U.S.C. 4001 et seq.; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127 of Mar. 31, 1979, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 65.1 Purpose of part.

42 U.S.C. 4104 authorizes the Director to identify and publish information with respect to all areas within the United States having special flood, mudslide (i.e., mudflow) and flood-related erosion hazards. The purpose of this part is to outline the steps a community needs to take in order to assist the Agency's effort in providing up-to-date identification and publication, in the form of the maps described in part 64, on special flood, mudslide (i.e., mudflow) and flood-related erosion hazards.

[48 FR 28278, June 21, 1983]

§ 65.2 Definitions.

(a) Except as otherwise provided in this part, the definitions set forth in part 59 of this subchapter are applicable to this part.

(b) For the purpose of this part, a certification by a registered professional engineer or other party does not constitute a warranty or guarantee of performance, expressed or implied. Certification of data is a statement that the data is accurate to the best of the certifier's knowledge. Certification of analyses is a statement that the analyses have been performed correctly and in accordance with sound engineering practices. Certification of structural works is a statement that the works are designed in accordance with sound engineering practices to provide protection from the base flood. Certification of "as built" conditions is a statement that the structure(s) has been built according to the plans being certified, is in place, and is fully functioning.

(c) For the purposes of this part, "reasonably safe from flooding" means base flood waters will not inundate the land or damage structures to be removed from the SFHA and that any subsurface waters related to the base flood will not damage existing or proposed buildings.

[51 FR 30313, Aug. 25, 1986, as amended at 66 FR 22442, May 4, 2001]

§ 65.3 Requirement to submit new technical data.

A community's base flood elevations may increase or decrease resulting from physical changes affecting flooding conditions. As soon as practicable, but not later than six months after the date such information

becomes available, a community shall notify the Administrator of the changes by submitting technical or scientific data in accordance with this part. Such a submission is necessary so that upon confirmation of those physical changes affecting flooding conditions, risk premium rates and flood plain management requirements will be based upon current data.

[51 FR 30313, Aug. 25, 1986]

§ 65.4 Right to submit new technical data.

(a) A community has a right to request changes to any of the information shown on an effective map that does not impact flood plain or floodway delineations or base flood elevations, such as community boundary changes, labeling, or planimetric details. Such a submission shall include appropriate supporting documentation in accordance with this part and may be submitted at any time.

(b) All requests for changes to effective maps, other than those initiated by FEMA, must be made in writing by the Chief Executive Officer of the community (CEO) or an official designated by the CEO. Should the CEO refuse to submit such a request on behalf of another party, FEMA will agree to review it only if written evidence is provided indicating the CEO or designee has been requested to do so. (c) Requests for changes to effective Flood Insurance Rate Maps (FIRMs) and Flood Boundary and Floodway Maps (FBFMs) are subject to the cost recovery procedures described in 44 CFR part 72. As indicated in part 72, revisions requested to correct mapping errors or errors in the Flood Insurance Study analysis are not to be subject to the cost-recovery procedures.

[51 FR 30313, Aug. 25, 1986, as amended at 57 FR 29038, June 30, 1992; 61 FR 46331, Aug. 30, 1996; 62 FR 5736, Feb. 6, 1997]

Editorial Note: For references to FR pages showing lists of eligible communities, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 65.5 Revision to special hazard area boundaries with no change to base flood elevation determinations.

(a) Data requirements for topographic changes. In many areas of special flood hazard (excluding V zones and floodways) it may be feasible to elevate areas with engineered earthen fill above the base flood elevation. Scientific and technical information to support a request to gain exclusion from an area of

special flood hazard of a structure or parcel of land that has been elevated by the placement of engineered earthen fill will include the following:

(1) A copy of the recorded deed indicating the legal description of the property and the official recordation information (deed book volume and page number) and bearing the seal of the appropriate recordation official (e.g., County Clerk or Recorder of Deeds).

(2) If the property is recorded on a plat map, a copy of the recorded plat indicating both the location of the property and the official recordation information (plat book volume and page number) and bearing the seal of the appropriate recordation official. If the property is not recorded on a plat map, FEMA requires copies of the tax map or other suitable maps to help in locating the property accurately.

(3) A topographic map or other information indicating existing ground elevations and the date of fill. FEMA's determination to exclude a legally defined parcel of land or a structure from the area of special flood hazard will be based upon a comparison of the base flood elevations to the lowest ground elevation of the parcel or the lowest adjacent grade to the structure. If the lowest ground elevation of the entire legally defined parcel of land or the lowest adjacent grade to the structure are at or above the elevations of the base flood, FEMA will exclude the parcel and/or structure from the area of special flood hazard.

(4) Written assurance by the participating community that they have complied with the appropriate minimum floodplain management requirements under Sec. 60.3. This includes the requirements that:

(i) Existing residential structures built in the SFHA have their lowest floor elevated to or above the base flood;

(ii) The participating community has determined that the land and any existing or proposed structures to be removed from the SFHA are "reasonably safe from flooding", and that they have on file, available upon request by FEMA, all supporting analyses and documentation used to make that determination;

(iii) The participating community has issued permits for all existing and proposed construction or other development; and

(iv) All necessary permits have been received from those governmental agencies where approval is required by Federal, State, or local law.

(5) If the community cannot assure that it has complied with the appropriate minimum floodplain management requirements under Sec. 60.3, of this

chapter, the map revision request will be deferred until the community remedies all violations to the maximum extent possible through coordination with FEMA. Once the remedies are in place, and the community assures that the land and structures are "reasonably safe from flooding," we will process a revision to the SFHA using the criteria set forth in Sec. 65.5(a). The community must maintain on file, and make available upon request by FEMA, all supporting analyses and documentation used in determining that the land or structures are "reasonably safe from flooding."

(6) Data to substantiate the base flood elevation. If we complete a Flood Insurance Study (FIS), we will use those data to substantiate the base flood elevation. Otherwise, the community may submit data provided by an authoritative source, such as the U.S. Army Corps of Engineers, U.S. Geological Survey, Natural Resources Conservation Service, State and local water resource departments, or technical data prepared and certified by a registered professional engineer. If base flood elevations have not previously been established, we may also request hydrologic and hydraulic calculations.

(7) A revision of floodplain delineations based on fill must demonstrate that any such fill does not result in a floodway encroachment.

(b) New topographic data. A community may also follow the procedures described in paragraphs (a)(1) through (6) of this section to request a map revision when no physical changes have occurred in the area of special flood hazard, when no fill has been placed, and when the natural ground elevations are at or above the elevations of the base flood, where new topographic maps are more detailed or more accurate than the current map.

(c) Certification requirements. A registered professional engineer or licensed land surveyor must certify the items required in paragraphs (a)(3) and (6) and (b) of this section. Such certifications are subject to the provisions under Sec. 65.2.

(d) Submission procedures. Submit all requests to the appropriate address serving the community's geographic area or to the FEMA Headquarters Office in Washington, DC.

[66 FR 22442, May 4, 2001]

§ 65.6 Revision of base flood elevation determinations.

(a) General conditions and data requirements.

(1) The supporting data must include all the information FEMA needs to review and evaluate the

request. This may involve the requestor's performing new hydrologic and hydraulic analysis and delineation of new flood plain boundaries and floodways, as necessary.

(2) To avoid discontinuities between the revised and unrevised flood data, the necessary hydrologic and hydraulic analyses submitted by the map revision requestor must be extensive enough to ensure that a logical transition can be shown between the revised flood elevations, flood plain boundaries, and floodways and those developed previously for areas not affected by the revision. Unless it is demonstrated that it would not be appropriate, the revised and unrevised base flood elevations must match within one-half foot where such transitions occur.

(3) Revisions cannot be made based on the effects of proposed projects or future conditions. Section 65.8 of this subchapter contains provisions for obtaining conditional approval of proposed projects that may effect map changes when they are completed.

(4) The datum and date of releveling of benchmarks, if any, to which the elevations are referenced must be indicated.

(5) Maps will not be revised when discharges change as a result of the use of an alternative methodology or data for computing flood discharges unless the change is statistically significant as measured by a confidence limits analysis of the new discharge estimates.

(6) Any computer program used to perform hydrologic or hydraulic analyses in support of a flood insurance map revision must meet all of the following criteria:

(i) It must have been reviewed and accepted by a governmental agency responsible for the implementation of programs for flood control and/or the regulation of flood plain lands. For computer programs adopted by non-Federal agencies, certification by a responsible agency official must be provided which states that the program has been reviewed, tested, and accepted by that agency for purposes of design of flood control structures or flood plain land use regulation.

(ii) It must be well-documented including source codes and user's manuals.

(iii) It must be available to FEMA and all present and future parties impacted by flood insurance mapping developed or amended through the use of the program. For programs not generally available from a Federal agency, the source code and user's manuals must be sent to FEMA free of charge, with fully-documented permission from the owner that FEMA

may release the code and user's manuals to such impacted parties.

(7) A revised hydrologic analysis for flooding sources with established base flood elevations must include evaluation of the same recurrence interval(s) studied in the effective FIS, such as the 10-, 50-, 100-, and 500-year flood discharges.

(8) A revised hydraulic analysis for a flooding source with established base flood elevations must include evaluation of the same recurrence interval(s) studied in the effective FIS, such as the 10-, 50-, 100-, and 500-year flood elevations, and of the floodway. Unless the basis of the request is the use of an alternative hydraulic methodology or the requestor can demonstrate that the data of the original hydraulic computer model is unavailable or its use is inappropriate, the analysis shall be made using the same hydraulic computer model used to develop the base flood elevations shown on the effective Flood Insurance Rate Map and updated to show present conditions in the flood plain. Copies of the input and output data from the original and revised hydraulic analyses shall be submitted.

(9) A hydrologic or hydraulic analysis for a flooding source without established base flood elevations may be performed for only the 100-year flood.

(10) A revision of flood plain delineations based on topographic Changes must demonstrate that any topographic changes have not resulted in a floodway encroachment.

(11) Delineations of flood plain boundaries for a flooding source with established base flood elevations must provide both the 100- and 500-year flood plain boundaries. For flooding sources without established base flood elevations, only 100-year flood plain boundaries need be submitted. These boundaries should be shown on a topographic map of suitable scale and contour interval.

(12) If a community or other party seeks recognition from FEMA, on its FHBM or FIRM, that an altered or relocated portion of a watercourse provides protection from, or mitigates potential hazards of, the base flood, the Administrator may request specific documentation from the community certifying that, and describing how, the provisions of Sec. 60.3(b)(7) of this subchapter will be met for the particular watercourse involved. This documentation, which may be in the form of a written statement from the Community Chief Executive Officer, an ordinance, or other legislative action, shall describe the nature of the maintenance activities to be performed, the frequency with which they will be performed, and the

title of the local community official who will be responsible for assuring that the maintenance activities are accomplished.

(13) Notwithstanding any other provisions of Sec. 65.6, a community may submit, in lieu of the documentation specified in Sec. 65.6(a)(12), certification by a registered professional engineer that the project has been designed to retain its flood carrying capacity without periodic maintenance.

(14) The participating community must provide written assurance that they have complied with the appropriate minimum floodplain management requirements under Sec. 60.3 of this chapter. This includes the requirements that:

(i) Existing residential structures built in the SFHA have their lowest floor elevated to or above the base flood;

(ii) The participating community has determined that the land and any existing or proposed structures to be removed from the SFHA are "reasonably safe from flooding," and that they have on file, available upon request by FEMA, all supporting analyses and documentation used to make that determination;

(iii) The participating community has issued permits for all existing and proposed construction or other development; and

(iv) All necessary permits have been received from those governmental agencies where approval is required by Federal, State, or local law.

(15) If the community cannot assure that it has complied with the appropriate minimum floodplain management requirements under Sec. 60.3, of this chapter the map revision request will be deferred until the community remedies all violations to the maximum extent possible through coordination with FEMA. Once the remedies are in place, and the community assures that the land and structures are "reasonably safe from flooding," we will process a revision to the SFHA using the criteria set forth under Sec. 65.6. The community must maintain on file, and make available upon request by FEMA, all supporting analyses and documentation used in determining that the land or structures are "reasonably safe from flooding."

(b) Data requirements for correcting map errors. To correct errors in the original flood analysis, technical data submissions shall include the following:

(1) Data identifying mathematical errors.

(2) Data identifying measurement errors and providing correct measurements.

(c) Data requirements for changed physical conditions. Revisions based on the effects of physical

changes that have occurred in the flood plain shall include:

- (1) Changes affecting hydrologic conditions. The following data must be submitted:
 - (i) General description of the changes (e.g., dam, diversion channel, or detention basin).
 - (ii) Construction plans for as-built conditions, if applicable.
 - (iii) New hydrologic analysis accounting for the effects of the changes.
 - (iv) New hydraulic analysis and profiles using the new flood discharge values resulting from the hydrologic analysis.
 - (v) Revised delineations of the flood plain boundaries and floodway.
- (2) Changes affecting hydraulic conditions. The following data shall be submitted:
 - (i) General description of the changes (e.g., channelization or new bridge, culvert, or levee).
 - (ii) Construction plans for as-built conditions.
 - (iii) New hydraulic analysis and flood elevation profiles accounting for the effects of the changes and using the original flood discharge values upon which the original map is based.
 - (iv) Revised delineations of the flood plain boundaries and floodway.
- (3) Changes involving topographic conditions. The following data shall be submitted:
 - (i) General description of the changes (e.g., grading or filling).
 - (ii) New topographic information, such as spot elevations, cross sections grading plans, or contour maps.
 - (iii) Revised delineations of the flood plain boundaries and, if necessary, floodway.
- (d) Data requirements for incorporating improved data. Requests for revisions based on the use of improved hydrologic, hydraulic, or topographic data shall include the following data:
 - (1) Data that are believed to be better than those used in the original analysis (such as additional years of stream gage data).
 - (2) Documentation of the source of the data.
 - (3) Explanation as to why the use of the new data will improve the results of the original analysis.
 - (4) Revised hydrologic analysis where hydrologic data are being incorporated.
 - (5) Revised hydraulic analysis and flood elevation profiles where new hydrologic or hydraulic data are being incorporated.
 - (6) Revised delineations of the flood plain boundaries and floodway where new hydrologic, hydraulic, or

topographic data are being incorporated.

(e) Data requirements for incorporating improved methods. Requests for revisions based on the use of improved hydrologic or hydraulic methodology shall include the following data:

- (1) New hydrologic analysis when an alternative hydrologic methodology is being proposed.
- (2) New hydraulic analysis and flood elevation profiles when an alternative hydrologic or hydraulic methodology is being proposed.

(3) Explanation as to why the alternative methodologies are superior to the original methodologies.

(4) Revised delineations of the flood plain boundaries and floodway based on the new analysis(es).

(f) Certification requirements. All analysis and data submitted by the requester shall be certified by a registered professional engineer or licensed land surveyor, as appropriate, subject to the definition of "certification" given at Sec. 65.2 of this subchapter.

(g) Submission procedures. All requests shall be submitted to the FEMA Regional Office servicing the community's geographic area or to the FEMA Headquarters Office in Washington, DC, and shall be accompanied by the appropriate payment, in accordance with 44 CFR part 72.

[51 FR 30314, Aug. 25, 1986, as amended at 53 FR 16279, May 6, 1988; 54 FR 33550, Aug. 15, 1989; 61 FR 46331, Aug. 30, 1996; 62 FR 5736, Feb. 6, 1997; 66 FR 22442, May 4, 2001]

§ 65.7 Floodway revisions.

(a) General. Floodway data is developed as part of FEMA Flood Insurance Studies and is utilized by communities to select and adopt floodways as part of the flood plain management program required by Sec. 60.3 of this subchapter. When it has been determined by a community that no practicable alternatives exist to revising the boundaries of its previously adopted floodway, the procedures below shall be followed.

(b) Data requirements when base flood elevation changes are requested. When a floodway revision is requested in association with a change to base flood elevations, the data requirements of Sec. 65.6 shall also be applicable. In addition, the following documentation shall be submitted:

- (1) Copy of a public notice distributed by the community stating the community's intent to revise the floodway or a statement by the community that it has notified all affected property owners and affected adjacent jurisdictions.

(2) Copy of a letter notifying the appropriate State agency of the floodway revision when the State has jurisdiction over the floodway or its adoption by communities participating in the NFIP.

(3) Documentation of the approval of the revised floodway by the appropriate State agency (for communities where the State has jurisdiction over the floodway or its adoption by communities participating in the NFIP).

(4) Engineering analysis for the revised floodway, as described below:

(i) The floodway analysis must be performed using the hydraulic computer model used to determine the proposed base flood elevations.

(ii) The floodway limits must be set so that neither the effective base flood elevations nor the proposed base flood elevations if less than the effective base flood elevations, are increased by more than the amount specified under Sec. 60.3 (d)(2). Copies of the input and output data from the original and modified computer models must be submitted.

(5) Delineation of the revised floodway on the same topographic map used for the delineation of the revised flood boundaries.

(c) Data requirements for changes not associated with base flood elevation changes. The following data shall be submitted:

(1) Items described in paragraphs (b) (1) through (3) of this section must be submitted.

(2) Engineering analysis for the revised floodway, as described below:

(i) The original hydraulic computer model used to develop the established base flood elevations must be modified to include all encroachments that have occurred in the flood plain since the existing floodway was developed. If the original hydraulic computer model is not available, an alternate hydraulic computer model may be used provided the alternate model has been calibrated so as to reproduce the original water surface profile of the original hydraulic computer model. The alternate model must be then modified to include all encroachments that have occurred since the existing floodway was developed.

(ii) The floodway analysis must be performed with the modified computer model using the desired floodway limits.

(iii) The floodway limits must be set so that combined effects of the past encroachments and the new floodway limits do not increase the effective base flood elevations by more than the amount specified in Sec. 60.3(d)(2). Copies of the input and

output data from the original and modified computer models must be submitted.

(3) Delineation of the revised floodway on a copy of the effective NFIP map and a suitable topographic map.

(d) Certification requirements. All analyses submitted shall be certified by a registered professional engineer. All topographic data shall be certified by a registered professional engineer or licensed land surveyor. Certifications are subject to the definition given at Sec. 65.2 of this subchapter.

(e) Submission procedures. All requests that involve changes to floodways shall be submitted to the appropriate FEMA Regional Office servicing the community's geographic area.

[51 FR 30315, Aug. 25, 1986]

§ 65.8 Review of proposed projects.

A community, or an individual through the community, may request FEMA's comments on whether a proposed project, if built as proposed, would justify a map revision. FEMA's comments will be issued in the form of a letter, termed a Conditional Letter of Map Revision, in accordance with 44 CFR part 72. The data required to support such requests are the same as those required for final revisions under Sec. Sec. 65.5, 65.6, and 65.7, except as-built certification is not required. All such requests shall be submitted to the FEMA Headquarters Office in Washington, DC, and shall be accompanied by the appropriate payment, in accordance with 44 CFR part 72. [62 FR 5736, Feb. 6, 1997]

§ 65.9 Review and response by the Administrator.

If any questions or problems arise during review, FEMA will consult the Chief Executive Officer of the community (CEO), the community official designated by the CEO, and/or the requester for resolution. Upon receipt of a revision request, the Administrator shall mail an acknowledgment of receipt of such request to the CEO. Within 90 days of receiving the request with all necessary information, the Administrator shall notify the CEO of one or more of the following:

(a) The effective map(s) shall not be modified;

(b) The base flood elevations on the effective FIRM shall be modified and new base flood elevations shall be established under the provisions of part 67 of this subchapter;

(c) The changes requested are approved and the map(s) amended by Letter of Map Revision (LOMR);

(d) The changes requested are approved and a revised map(s) will be printed and distributed;

(e) The changes requested are not of such a significant nature as to warrant a reissuance or revision of the flood insurance study or maps and will be deferred until such time as a significant change occurs;

(f) An additional 90 days is required to evaluate the scientific or technical data submitted; or

(g) Additional data are required to support the revision request.

(h) The required payment has not been submitted in accordance with 44 CFR part 72, no review will be conducted and no determination will be issued until payment is received.

[51 FR 30315, Aug. 25, 1986; 61 FR 46331, Aug. 30, 1996, as amended at 62 FR 5736, Feb. 6, 1997]

§ 65.10 Mapping of areas protected by levee systems.

(a) General. For purposes of the NFIP, FEMA will only recognize in its flood hazard and risk mapping effort those levee systems that meet, and continue to meet, minimum design, operation, and maintenance standards that are consistent with the level of protection sought through the comprehensive flood plain management criteria established by Sec. 60.3 of this subchapter. Accordingly, this section describes the types of information FEMA needs to recognize, on NFIP maps, that a levee system provides protection from the base flood. This information must be supplied to FEMA by the community or other party seeking recognition of such a levee system at the time a flood risk study or restudy is conducted, when a map revision under the provisions of part 65 of this subchapter is sought based on a levee system, and upon request by the Administrator during the review of previously recognized structures. The FEMA review will be for the sole purpose of establishing appropriate risk zone determinations for NFIP maps and shall not constitute a determination by FEMA as to how a structure or system will perform in a flood event.

(b) Design criteria. For levees to be recognized by FEMA, evidence that adequate design and operation and maintenance systems are in place to provide reasonable assurance that protection from the base flood exists must be provided. The following requirements must be met:

(1) Freeboard. (i) Riverine levees must provide a minimum freeboard of three feet above the water-surface level of the base flood. An additional one foot above the minimum is required within 100 feet in either side of structures (such as bridges) riverward of the levee or wherever the flow is constricted. An additional one-half foot above the minimum at the upstream end of the levee, tapering to not less than the minimum at the downstream end of the levee, is also required.

(ii) Occasionally, exceptions to the minimum riverine freeboard requirement described in paragraph (b)(1)(i) of this section, may be approved. Appropriate engineering analyses demonstrating adequate protection with a lesser freeboard must be submitted to support a request for such an exception. The material presented must evaluate the uncertainty in the estimated base flood elevation profile and include, but not necessarily be limited to an assessment of statistical confidence limits of the 100-year discharge; changes in stage-discharge relationships; and the sources, potential, and magnitude of debris, sediment, and ice accumulation. It must be also shown that the levee will remain structurally stable during the base flood when such additional loading considerations are imposed. Under no circumstances will freeboard of less than two feet be accepted.

(iii) For coastal levees, the freeboard must be established at one foot above the height of the one percent wave or the maximum wave runup (whichever is greater) associated with the 100-year stillwater surge elevation at the site.

(iv) Occasionally, exceptions to the minimum coastal levee freeboard requirement described in paragraph (b)(1)(iii) of this section, may be approved. Appropriate engineering analyses demonstrating adequate protection with a lesser freeboard must be submitted to support a request for such an exception. The material presented must evaluate the uncertainty in the estimated base flood loading conditions. Particular emphasis must be placed on the effects of wave attack and overtopping on the stability of the levee. Under no circumstances, however, will a freeboard of less than two feet above the 100-year stillwater surge elevation be accepted.

(2) Closures. All openings must be provided with closure devices that are structural parts of the system during operation and design according to sound engineering practice.

(3) Embankment protection. Engineering analyses must be submitted that demonstrate that no

appreciable erosion of the levee embankment can be expected during the base flood, as a result of either currents or waves, and that anticipated erosion will not result in failure of the levee embankment or foundation directly or indirectly through reduction of the seepage path and subsequent instability. The factors to be addressed in such analyses include, but are not limited to: Expected flow velocities (especially in constricted areas); expected wind and wave action; ice loading; impact of debris; slope protection techniques; duration of flooding at various stages and velocities; embankment and foundation materials; levee alignment, bends, and transitions; and levee side slopes.

(4) Embankment and foundation stability. Engineering analyses that evaluate levee embankment stability must be submitted. The analyses provided shall evaluate expected seepage during loading conditions associated with the base flood and shall demonstrate that seepage into or through the levee foundation and embankment will not jeopardize embankment or foundation stability. An alternative analysis demonstrating that the levee is designed and constructed for stability against loading conditions for Case IV as defined in the U.S. Army Corps of Engineers (COE) manual, "Design and Construction of Levees" (EM 1110-2-1913, Chapter 6, Section II), may be used. The factors that shall be addressed in the analyses include: Depth of flooding, duration of flooding, embankment geometry and length of seepage path at critical locations, embankment and foundation materials, embankment compaction, penetrations, other design factors affecting seepage (such as drainage layers), and other design factors affecting embankment and foundation stability (such as berms).

(5) Settlement. Engineering analyses must be submitted that assess the potential and magnitude of future losses of freeboard as a result of levee settlement and demonstrate that freeboard will be maintained within the minimum standards set forth in paragraph (b)(1) of this section. This analysis must address embankment loads, compressibility of embankment soils, compressibility of foundation soils, age of the levee system, and construction compaction methods. In addition, detailed settlement analysis using procedures such as those described in the COE manual, "Soil Mechanics Design--Settlement Analysis" (EM 1100-2-1904) must be submitted.

(6) Interior drainage. An analysis must be submitted that identifies the source(s) of such flooding, the

extent of the flooded area, and, if the average depth is greater than one foot, the water-surface elevation(s) of the base flood. This analysis must be based on the joint probability of interior and exterior flooding and the capacity of facilities (such as drainage lines and pumps) for evacuating interior floodwaters.

(7) Other design criteria. In unique situations, such as those where the levee system has relatively high vulnerability, FEMA may require that other design criteria and analyses be submitted to show that the levees provide adequate protection. In such situations, sound engineering practice will be the standard on which FEMA will base its determinations. FEMA will also provide the rationale for requiring this additional information.

(c) Operation plans and criteria. For a levee system to be recognized, the operational criteria must be as described below. All closure devices or mechanical systems for internal drainage, whether manual or automatic, must be operated in accordance with an officially adopted operation manual, a copy of which must be provided to FEMA by the operator when levee or drainage system recognition is being sought or when the manual for a previously recognized system is revised in any manner. All operations must be under the jurisdiction of a Federal or State agency, an agency created by Federal or State law, or an agency of a community participating in the NFIP.

(1) Closures. Operation plans for closures must include the following:

(i) Documentation of the flood warning system, under the jurisdiction of Federal, State, or community officials, that will be used to trigger emergency operation activities and demonstration that sufficient flood warning time exists for the completed operation of all closure structures, including necessary sealing, before floodwaters reach the base of the closure.

(ii) A formal plan of operation including specific actions and assignments of responsibility by individual name or title.

(iii) Provisions for periodic operation, at not less than one-year intervals, of the closure structure for testing and training purposes.

(2) Interior drainage systems. Interior drainage systems associated with levee systems usually include storage areas, gravity outlets, pumping stations, or a combination thereof. These drainage systems will be recognized by FEMA on NFIP maps for flood protection purposes only if the following minimum criteria are included in the operation plan:

(i) Documentation of the flood warning system, under the jurisdiction of Federal, State, or community

officials, that will be used to trigger emergency operation activities and demonstration that sufficient flood warning time exists to permit activation of mechanized portions of the drainage system.

(ii) A formal plan of operation including specific actions and assignments of responsibility by individual name or title.

(iii) Provision for manual backup for the activation of automatic systems.

(iv) Provisions for periodic inspection of interior drainage systems and periodic operation of any mechanized portions for testing and training purposes. No more than one year shall elapse between either the inspections or the operations.

(3) Other operation plans and criteria. Other operating plans and criteria may be required by FEMA to ensure that adequate protection is provided in specific situations. In such cases, sound emergency management practice will be the standard upon which FEMA determinations will be based.

(d) Maintenance plans and criteria. For levee systems to be recognized as providing protection from the base flood, the maintenance criteria must be as described herein. Levee systems must be maintained in accordance with an officially adopted maintenance plan, and a copy of this plan must be provided to FEMA by the owner of the levee system when recognition is being sought or when the plan for a previously recognized system is revised in any manner. All maintenance activities must be under the jurisdiction of a Federal or State agency, an agency created by Federal or State law, or an agency of a community participating in the NFIP that must assume ultimate responsibility for maintenance. This plan must document the formal procedure that ensures that the stability, height, and overall integrity of the levee and its associated structures and systems are maintained. At a minimum, maintenance plans shall specify the maintenance activities to be performed, the frequency of their performance, and the person by name or title responsible for their performance.

(e) Certification requirements. Data submitted to support that a given levee system complies with the structural requirements set forth in paragraphs (b)(1) through (7) of this section must be certified by a registered professional engineer. Also, certified as-built plans of the levee must be submitted. Certifications are subject to the definition given at Sec. 65.2 of this subchapter. In lieu of these structural requirements, a Federal agency with responsibility for levee design may certify that the levee has been

adequately designed and constructed to provide protection against the base flood.

[51 FR 30316, Aug. 25, 1986]

§ 65.11 Evaluation of sand dunes in mapping coastal flood hazard areas.

(a) General conditions. For purposes of the NFIP, FEMA will consider storm-induced dune erosion potential in its determination of coastal flood hazards and risk mapping efforts. The criterion to be used in the evaluation of dune erosion will apply to primary frontal dunes as defined in Sec. 59.1, but does not apply to artificially designed and constructed dunes that are not well-established with long-standing vegetative cover, such as the placement of sand materials in a dune-like formation.

(b) Evaluation criterion. Primary frontal dunes will not be considered as effective barriers to base flood storm surges and associated wave action where the cross-sectional area of the primary frontal dune, as measured perpendicular to the shoreline and above the 100-year stillwater flood elevation and seaward of the dune crest, is equal to, or less than, 540 square feet.

(c) Exceptions. Exceptions to the evaluation criterion may be granted where it can be demonstrated through authoritative historical documentation that the primary frontal dunes at a specific site withstood previous base flood storm surges and associated wave action.

[53 FR 16279, May 6, 1988]

§ 65.12 Revision of flood insurance rate maps to reflect base flood elevations caused by proposed encroachments.

(a) When a community proposes to permit encroachments upon the flood plain when a regulatory floodway has not been adopted or to permit encroachments upon an adopted regulatory floodway which will cause base flood elevation increases in excess of those permitted under paragraphs (c)(10) or (d)(3) of Sec. 60.3 of this subchapter, the community shall apply to the Administrator for conditional approval of such action prior to permitting the encroachments to occur and shall submit the following as part of its application:

(1) A request for conditional approval of map change and the appropriate initial fee as specified by Sec. 72.3 of this subchapter or a request for exemption from fees as specified by Sec. 72.5 of this subchapter, whichever is appropriate;

(2) An evaluation of alternatives which would not

result in a base flood elevation increase above that permitted under paragraphs (c)(10) or (d)(3) of Sec. 60.3 of this subchapter demonstrating why these alternatives are not feasible;

(3) Documentation of individual legal notice to all impacted property owners within and outside of the community, explaining the impact of the proposed action on their property.

(4) Concurrence of the Chief Executive Officer of any other communities impacted by the proposed actions;

(5) Certification that no structures are located in areas which would be impacted by the increased base flood elevation;

(6) A request for revision of base flood elevation determination according to the provisions of Sec. 65.6 of this part;

(7) A request for floodway revision in accordance with the provisions of Sec. 65.7 of this part;

(b) Upon receipt of the Administrator's conditional approval of map change and prior to approving the proposed encroachments, a community shall provide evidence to the Administrator of the adoption of flood plain management ordinances incorporating the increased base flood elevations and/or revised floodway reflecting the post-project condition.

(c) Upon completion of the proposed encroachments, a community shall provide as-built certifications in accordance with the provisions of Sec. 65.3 of this part. The Administrator will initiate a final map revision upon receipt of such certifications in accordance with part 67 of this subchapter.

[53 FR 16279, May 6, 1988]

§ 65.13 Mapping and map revisions for areas subject to alluvial fan flooding.

This section describes the procedures to be followed and the types of information FEMA needs to recognize on a NFIP map that a structural flood control measure provides protection from the base flood in an area subject to alluvial fan flooding. This information must be supplied to FEMA by the community or other party seeking recognition of such a flood control measure at the time a flood risk study or restudy is conducted, when a map revision under the provisions of part 65 of this subchapter is sought, and upon request by the Administrator during the review of previously recognized flood control measures. The FEMA review will be for the sole purpose of establishing appropriate risk zone determinations for NFIP maps and shall not constitute a determination by FEMA as to how the

flood control measure will perform in a flood event.

(a) The applicable provisions of Sec. 65.2, 65.3, 65.4, 65.6, 65.8 and 65.10 shall also apply to FIRM revisions involving alluvial fan flooding.

(b) The provisions of Sec. 65.5 regarding map revisions based on fill and the provisions of part 70 of this chapter shall not apply to FIRM revisions involving alluvial fan flooding. In general, elevations of a parcel of land or a structure by fill or other means, will not serve as a basis for removing areas subject to alluvial fan flooding from an area of special food hazards.

(c) FEMA will credit on NFIP maps only major structural flood control measures whose design and construction are supported by sound engineering analyses which demonstrate that the measures will effectively eliminate alluvial fan flood hazards from the area protected by such measures. The provided analyses must include, but are not necessarily limited to, the following:

(1) Engineering analyses that quantify the discharges and volumes of water, debris, and sediment movement associated with the flood that has a one-percent probability of being exceeded in any year at the apex under current watershed conditions and under potential adverse conditions (e.g., deforestation of the watershed by fire). The potential for debris flow and sediment movement must be assessed using an engineering method acceptable to FEMA. The assessment should consider the characteristics and availability of sediment in the drainage basin above the apex and on the alluvial fan.

(2) Engineering analyses showing that the measures will accommodate the estimated peak discharges and volumes of water, debris, and sediment, as determined in accordance with paragraph (c)(1) of this section, and will withstand the associated hydrodynamic and hydrostatic forces.

(3) Engineering analyses showing that the measures have been designed to withstand the potential erosion and scour associated with estimated discharges.

(4) Engineering analyses or evidence showing that the measures will provide protection from hazards associated with the possible relocation of flow paths from other parts of the fan.

(5) Engineering analyses that assess the effect of the project on flood hazards, including depth and velocity of floodwaters and scour and sediment deposition, on other areas of the fan.

(6) Engineering analyses demonstrating that flooding from sources other than the fan apex, including local runoff, is either insignificant or has been accounted for in the design.

(d) Coordination. FEMA will recognize measures that are adequately designed and constructed, provided that: evidence is submitted to show that the impact of the measures on flood hazards in all areas of the fan (including those not protected by the flood control measures), and the design and maintenance requirements of the measures, were reviewed and approved by the impacted communities, and also by State and local agencies that have jurisdiction over flood control activities.

(e) Operation and maintenance plans and criteria. The requirements for operation and maintenance of flood control measures on areas subject to alluvial fan flooding shall be those specified under Sec. 65.10, paragraphs (c) and (d), when applicable.

(f) Certification requirements. Data submitted to support that a given flood control measure complies with the requirements set forth in paragraphs (c) (1) through (6) of this section must be certified by a registered professional engineer. Also, certified as-built plans of the flood control measures must be submitted. Certifications are subject to the definition given at Sec. 65.2.

(Approved by the Office of Management and Budget under control number 3067-0147)

[54 FR 33551, Aug. 15, 1989]

§ 65.14 Remapping of areas for which local flood protection systems no longer provide base flood protection.

(a) General. (1) This section describes the procedures to follow and the types of information FEMA requires to designate flood control restoration zones. A community may be eligible to apply for this zone designation if the Administrator determines that it is engaged in the process of restoring a flood protection system that was:

- (i) Constructed using Federal funds;
- (ii) Recognized as providing base flood protection on the community's effective FIRM; and
- (iii) Decertified by a Federal agency responsible for flood protection design or construction.

(2) Where the Administrator determines that a community is in the process of restoring its flood protection system to provide base flood protection, a FIRM will be prepared that designates the temporary flood hazard areas as a flood control restoration zone (Zone AR). Existing special flood hazard areas

shown on the community's effective FIRM that are further inundated by Zone AR flooding shall be designated as a "dual" flood insurance rate zone. Zone AR/AE or AR/AH with Zone AR base flood elevations, and AE or AH with base flood elevations and Zone AR/AO with Zone AR base flood elevations and Zone AO with flood depths, or Zone AR/A with Zone AR base flood elevations and Zone A without base flood elevations.

(b) Limitations. A community may have a flood control restoration zone designation only once while restoring a flood protection system.

This limitation does not preclude future flood control restoration zone designations should a fully restored, certified, and accredited system become decertified for a second or subsequent time.

(1) A community that receives Federal funds for the purpose of designing or constructing, or both, the restoration project must complete restoration or meet the requirements of 44 CFR

61.12 within a specified period, not to exceed a maximum of 10 years from the date of submittal of the community's application for designation of a flood control restoration zone.

(2) A community that does not receive Federal funds for the purpose of constructing the restoration project must complete restoration within a specified period, not to exceed a maximum of 5 years from the date of submittal of the community's application for designation of a flood control restoration zone. Such a community is not eligible for the provisions of Sec. 61.12. The designated restoration period may not be extended beyond the maximum allowable under this limitation.

(c) Exclusions. The provisions of these regulations do not apply in a coastal high hazard area as defined in 44 CFR 59.1, including areas that would be subject to coastal high hazards as a result of the decertification of a flood protection system shown on the community's effective FIRM as providing base flood protection.

(d) Effective date for risk premium rates. The effective date for any risk premium rates established for Zone AR shall be the effective date of the revised FIRM showing Zone AR designations.

(e) Application and submittal requirements for designation of a flood control restoration zone. A community must submit a written request to the Administrator, signed by the community's Chief Executive Officer, for a floodplain designation as a flood control restoration zone. The request must include a legislative action by the community

requesting the designation. The Administrator will not initiate any action to designate flood control restoration zones without receipt of the formal request from the community that complies with all requirements of this section. The Administrator reserves the right to request additional information from the community to support or further document the community's formal request for designation of a flood control restoration zone, if deemed necessary.

(1) At a minimum, the request from a community that receives Federal funds for the purpose of designing, constructing, or both, the restoration project must include:

(i) A statement whether, to the best of the knowledge of the community's Chief Executive Officer, the flood protection system is currently the subject matter of litigation before any Federal, State or local court or administrative agency, and if so, the purpose of that litigation;

(ii) A statement whether the community has previously requested a determination with respect to the same subject matter from the Administrator, and if so, a statement that details the disposition of such previous request;

(iii) A statement from the community and certification by a Federal agency responsible for flood protection design or construction that the existing flood control system shown on the effective FIRM was originally built using Federal funds, that it no longer provides base flood protection, but that it continues to provide protection from the flood having at least a 3percent chance of occurrence during any given year;

(iv) An official map of the community or legal description, with supporting documentation, that the community will adopt as part of its flood plain management measures, which designates developed areas as defined in Sec.59.1 and as further defined in Sec.60.3(f).

(v) A restoration plan to return the system to a level of base flood protection. At a minimum, this plan must:

(A) List all important project elements, such as acquisition of permits, approvals, and contracts and construction schedules of planned features;

(B) Identify anticipated start and completion dates for each element, as well as significant milestones and dates;

(C) Identify the date on which "as built" drawings and certification for the completed restoration project will be submitted. This date must provide for a restoration period not to exceed the maximum

allowable restoration period for the flood protection system, or;

(D) Identify the date on which the community will submit a request for a finding of adequate progress that meets all requirements of Sec.61.12. This date may not exceed the maximum allowable restoration period for the flood protection system;

(vi) A statement identifying the local project sponsor responsible for restoration of the flood protection system;

(vii) A copy of a study, performed by a Federal agency responsible for flood protection design or construction in consultation with the local project sponsor, which demonstrates a Federal interest in restoration of the system and which deems that the flood protection system is restorable to a level of base flood protection.

(viii) A joint statement from the Federal agency responsible for flood protection design or construction involved in restoration of the flood protection system and the local project sponsor certifying that the design and construction of the flood control system involves Federal funds, and that the restoration of the flood protection system will provide base flood protection;

(2) At a minimum, the request from a community that receives no Federal funds for the purpose of constructing the restoration project must:

(i) Meet the requirements of Sec.65.14(e)(1)(i) through (iv);

(ii) Include a restoration plan to return the system to a level of base flood protection. At a minimum, this plan must:

(A) List all important project elements, such as acquisition of permits, approvals, and contracts and construction schedules of planned features;

(B) Identify anticipated start and completion dates for each element, as well as significant milestones and dates; and

(C) Identify the date on which "as built" drawings and certification for the completed restoration project will be submitted. This date must provide for a restoration period not to exceed the maximum allowable restoration period for the flood protection system;

(iii) Include a statement identifying the local agency responsible for restoration of the flood protection system;

(iv) Include a copy of a study, certified by registered Professional Engineer, that demonstrates that the flood protection system is restorable to provide protection from the base flood;

(v) Include a statement from the local agency responsible for restoration of the flood protection system certifying that the restored flood protection system will meet the applicable requirements of Part 65; and

(vi) Include a statement from the local agency responsible for restoration of the flood protection system that identifies the source of funds for the purpose of constructing the restoration project and a percentage of the total funds contributed by each source. The statement must demonstrate, at a minimum, that 100 percent of the total financial project cost of the completed flood protection system has been appropriated.

(f) Review and response by the Administrator. The review and response by the Administrator shall be in accordance with procedures specified in Sec. 65.9.

(g) Requirements for maintaining designation of a flood control restoration zone. During the restoration period, the community and the cost-sharing Federal agency, if any, must certify annually to the FEMA Regional Office having jurisdiction that the restoration will be completed in accordance with the restoration plan within the time period specified by the plan. In addition, the community and the cost-sharing Federal agency, if any, will update the restoration plan and will identify any permitting or construction problems that will delay the project completion from the restoration plan previously submitted to the Administrator. The FEMA Regional Office having jurisdiction will make an annual assessment and recommendation to the Administrator as to the viability of the restoration plan and will conduct periodic on-site inspections of the flood protection system under restoration.

(h) Procedures for removing flood control restoration zone designation due to adequate progress or complete restoration of the flood protection system. At any time during the restoration period:

(1) A community that receives Federal funds for the purpose of designing, constructing, or both, the restoration project shall provide written evidence of certification from a Federal agency having flood protection design or construction responsibility that the necessary improvements have been completed and that the system has been restored to provide protection from the base flood, or submit a request for a finding of adequate progress that meets all requirements of Sec.61.12. If the Administrator determines that adequate progress has been made, FEMA will revise the zone designation from a flood control restoration zone designation to Zone A99.

(2) After the improvements have been completed, certified by a Federal agency as providing base flood protection, and reviewed by FEMA, FEMA will revise the FIRM to reflect the completed flood control system.

(3) A community that receives no Federal funds for the purpose of constructing the restoration project must provide written evidence that the restored flood protection system meets the requirements of Part 65. A community that receives no Federal funds for the purpose of constructing the restoration project is not eligible for a finding of adequate progress under Sec.61.12.

(4) After the improvements have been completed and reviewed by FEMA, FEMA will revise the FIRM to reflect the completed flood protection system.

(i) Procedures for removing flood control restoration zone designation due to noncompliance with the restoration schedule or as a result of a finding that satisfactory progress is not being made to complete the restoration. At any time during the restoration period, should the Administrator determine that the restoration will not be completed in accordance with the time frame specified in the restoration plan, or that satisfactory progress is not being made to restore the flood protection system to provide complete flood protection in accordance with the restoration plan, the Administrator shall notify the community and the responsible Federal agency, in writing, of the determination, the reasons for that determination, and that the FIRM will be revised to remove the flood control restoration zone designation. Within thirty (30) days of such notice, the community may submit written information that provides assurance that the restoration will be completed in accordance with the time frame specified in the restoration plan, or that satisfactory progress is being made to restore complete protection in accordance with the restoration plan, or that, with reasonable certainty, the restoration will be completed within the maximum allowable restoration period. On the basis of this information the Administrator may suspend the decision to revise the FIRM to remove the flood control restoration zone designation. If the community does not submit any information, or if, based on a review of the information submitted, there is sufficient cause to find that the restoration will not be completed as provided for in the restoration plan, the Administrator shall revise the FIRM, in accordance with 44 CFR Part 67, and shall remove the flood control restoration zone designations and shall redesignate those areas as Zone A1-30, AE, AH,

AO, or A.

[62 FR 55717, Oct. 27, 1997]

§ 65.15 List of communities submitting new technical data.

This section provides a cumulative list of communities where modifications of the base flood elevation determinations have been made because of submission of new scientific or technical data. Due to the need for expediting the modifications, the revised map is already in effect and the appeal period commences on or about the effective date of the modified map. An interim rule, followed by a final rule, will list the revised map effective date, local repository and the name and address of the Chief Executive Officer of the community. The map(s) is (are) effective for both flood plain management and insurance purposes.

[51 FR 30317, Aug. 25, 1986. Redesignated at 53 FR 16279, May 6, 1988, and further redesignated at 54 FR 33551, Aug. 15, 1989. Redesignated at 59 FR 53599, Oct. 25, 1994]

Editorial Note: For references to FR pages showing lists of eligible communities, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 65.16 Standard Flood Hazard Determination Form and Instructions.

(a) Section 528 of the National Flood Insurance Reform Act of 1994 (42 U.S.C. 1365(a)) directs FEMA to develop a standard form for determining, in the case of a loan secured by improved real estate or a mobile home, whether the building or mobile home is located in an area identified by the Director as an area having special flood hazards and in which flood insurance under this title is available. The purpose of the form is to determine whether a building or mobile home is located within an identified Special Flood Hazard Area (SFHA), whether flood insurance is required, and whether federal flood insurance is available. Use of this form will ensure that required flood insurance coverage is purchased for structures located in an SFHA, and will assist federal entities for lending regulation in assuring compliance with these purchase requirements.

(b) The form is available by written request to Federal Emergency Management Agency, PO Box 2012, Jessup, MD 20794; ask for the Standard Flood Hazard Determination form. It is also available by fax-on-demand; call (202) 646-3362, form #23103. Finally, the form is available through the Internet at

<http://www.fema.gov/nfip/mpurfi.htm>.

[63 FR 27857, May 21, 1998]

§ 65.17 Review of determinations.

This section describes the procedures that shall be followed and the types of information required by FEMA to review a determination of whether a building or manufactured home is located within an identified Special Flood Hazard Area (SFHA).

(a) General conditions. The borrower and lender of a loan secured by improved real estate or a manufactured home may jointly request that FEMA review a determination that the building or manufactured home is located in an identified SFHA. Such a request must be submitted within 45 days of the lender's notification to the borrower that the building or manufactured home is in the SFHA and that flood insurance is required. Such a request must be submitted jointly by the lender and the borrower and shall include the required fee and technical information related to the building or manufactured home. Elevation data will not be considered under the procedures described in this section.

(b) Data and other requirements. Items required for FEMA's review of a determination shall include the following:

- (1) Payment of the required fee by check or money order, in U.S. funds, payable to the National Flood Insurance Program;
- (2) A request for FEMA's review of the determination, signed by both the borrower and the lender;
- (3) A copy of the lender's notification to the borrower that the building or manufactured home is in an SFHA and that flood insurance is required (the request for review of the determination must be postmarked within 45 days of borrower notification);
- (4) A completed Standard Flood Hazard Determination Form for the building or manufactured home, together with a legible hard copy of all technical data used in making the determination; and
- (5) A copy of the effective NFIP map (Flood Hazard Boundary Map (FHBM) or Flood Insurance Rate Map (FIRM)) panel for the community in which the building or manufactured home is located, with the building or manufactured home location indicated. Portions of the map panel may be submitted but shall include the area of the building or manufactured home in question together with the map panel title block, including effective date, bar scale, and north arrow.

(c) Review and response by FEMA. Within 45 days after receipt of a request to review a determination, FEMA will notify the applicants in writing of one of the following:

- (1) Request submitted more than 45 days after borrower notification; no review will be performed and all materials are being returned;
 - (2) Insufficient information was received to review the determination; therefore, the determination stands until a complete submittal is received; or
 - (3) The results of FEMA's review of the determination, which shall include the following:
 - (i) The name of the NFIP community in which the building or manufactured home is located;
 - (ii) The property address or other identification of the building or manufactured home to which the determination applies;
 - (iii) The NFIP map panel number and effective date upon which the determination is based;
 - (iv) A statement indicating whether the building or manufactured home is within the Special Flood Hazard Area;
 - (v) The time frame during which the determination is effective.
- [60 FR 62218, Dec. 5, 1995]

PART 70—PROCEDURE FOR MAP CORRECTION

Mapping Deficiencies Unrelated to Community - Wide Elevation Determinations

Sec.

- 70.1 Purpose of part.
 70.2 Definitions.
 70.3 Right to submit technical information.
 70.4 Review by the Director.
 70.5 Letter of Map Amendment.
 70.6 Distribution of Letter of Map Amendment.
 70.7 Notice of Letter of Map Amendment.
 70.8 Premium refund after Letter of Map Amendment.
 70.9 Review of proposed projects.
- Authority: 42 U.S.C. 4001 et seq.; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127 of Mar. 31, 1979, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 70.1 Purpose of part.

The purpose of this part is to provide an administrative procedure whereby the Administrator will review the scientific or technical submissions of an owner or lessee of property who believes his property has been inadvertently included in

designated A, AO, A130, AE, AH, A99, AR, AR/A1-30, AR/AE, AR/AO, AR/AH, AR/A, VO, V1-30, VE, and V Zones, as a result of the transposition of the curvilinear line to either street or to other readily identifiable features. The necessity for this part is due in part to the technical difficulty of accurately delineating the curvilinear line on either an FHBM or FIRM. These procedures shall not apply when there has been any alteration of topography since the effective date of the first NFIP map (i.e., FHBM or FIRM) showing the property within an area of special flood hazard. Appeals in such circumstances are subject to the provisions of part 65 of this subchapter. [62 FR 55718, Oct. 27, 1997]

§ 70.2 Definitions.

The definitions set forth in part 59 of this subchapter are applicable to this part.

[41 FR 46991, Oct. 26, 1976. Redesignated at 44 FR 31177, May 31, 1979]

§ 70.3 Right to submit technical information.

(a) Any owner or lessee of property (applicant) who believes his property has been inadvertently included in a designated A, AO, A1-30, AE, AH, A99, AR, AR/A1-30, AR/AE, AR/AO, AR/AH, AR/A, VO, V1-30, VE, and V Zones on a FHBM or a FIRM, may submit scientific or technical information to the Administrator for the Administrator's review.

(b) Scientific and technical information for the purpose of this part may include, but is not limited to the following:

(1) An actual copy of the recorded plat map bearing the seal of the appropriate recordation official (e.g. County Clerk, or Recorder of Deeds) indicating the official recordation and proper citation (Deed or Plat Book Volume and Page Numbers), or an equivalent identification where annotation of the deed or plat book is not the practice.

(2) A topographical map showing (i) ground elevation contours in relation to the National Geodetic Vertical Datum (NVD) of 1929, (ii) the total area of the property in question, (iii) the location of the structure or structures located on the property in question, (iv) the elevation of the lowest adjacent grade to a structure or structures and (v) an indication of the curvilinear line which represents the area subject to inundation by a base flood. The curvilinear line should be based upon information provided by any appropriate authoritative source, such as a Federal Agency, the appropriate state agency (e.g.

Department of Water Resources), a County Water Control District, a County or City Engineer, a Federal Emergency Management Agency Flood Insurance Study, or a determination by a Registered Professional Engineer

(3) A copy of the FHBM or FIRM indicating the location of the property in question;

(4) A certification by a Registered Professional Engineer or Licensed Land Surveyor that the lowest grade adjacent to the structure is above the base flood elevation.

[41 FR 46991, Oct. 26, 1976. Redesignated at 44 FR 31177, May 31, 1979, as amended at 48 FR 44544 and 44553, Sept. 29, 1983; 49 FR 4751, Feb. 8, 1984; 50 FR 36028, Sept. 4, 1985; 51 FR 30317, Aug. 25, 1986; 53 FR 16280, May 6, 1988; 59 FR 53601, Oct. 25, 1994; 62 FR 55719, Oct. 27, 1997]

§ 70.4 Review by the Director.

The Director, after reviewing the scientific or technical information submitted under the provisions of Sec. 70.3, shall notify the applicant in writing of his/her determination within 60 days after we receive the applicant's scientific or technical information that we have compared either the ground elevations of an entire legally defined parcel of land or the elevation of the lowest adjacent grade to a structure with the elevation of the base flood and that:

(a) The property is within a designated A, A0, A1-30, AE, AH, A99, AR, AR/A1-30, AR/AE, AR/AO, AR/AH, AR/A, V0, V1-30, VE, or V Zone, and will state the basis of such determination; or

(b) The property should not be within a designated A, A0, A1-30, AE, AH, A99, AR, AR/A1-30, AR/AE, AR/AO, AR/AH, AR/A, V0, V1-30, VE, or V Zone and that we will modify the FHBM or FIRM accordingly; or

(c) The property is not within a designated A, A0, A1-30, AE, AH, A99, AR, AR/A1-30, AR/AE, AR/AO, AR/AH, AR/A, V0, V1-30, VE, or V Zone as shown on the FHBM or FIRM and no modification of the FHBM or FIRM is necessary; or (d) We need an additional 60 days to make a determination.

[66 FR 33900, June 26, 2001]

§ 70.5 Letter of Map Amendment.

Upon determining from available scientific or technical information that a FHBM or a FIRM requires modification under the provisions of Sec. 70.4(b), the Administrator shall issue a Letter of Map Amendment which shall state:

(a) The name of the Community to which the map to be amended was issued;

(b) The number of the map;

(c) The identification of the property to be excluded from a designated A, A0, A1-30, AE, AH, A99, AR, AR/A1-30, AR/AE, AR/AO, AR/AH, AR/A, V0, V1-30, VE, or V Zone.

[41 FR 46991, Oct. 26, 1976. Redesignated at 44 FR 31177, May 31, 1979, as amended at 48 FR 44553, Sept. 29, 1983; 49 FR 4751, Feb. 8, 1984; 50 FR 36028, Sept. 4, 1985; 59 FR 53601, Oct. 25, 1994; 62 FR 55719, Oct. 27, 1997]

§ 70.6 Distribution of Letter of Map Amendment.

(a) A copy of the Letter of Map Amendment shall be sent to the applicant who submitted scientific or technical data to the Administrator.

(b) A copy of the Letter of Map Amendment shall be sent to the local map repository with instructions that it be attached to the map which the Letter of Map Amendment is amending.

(c) A copy of the Letter of Map Amendment shall be sent to the map repository in the state with instructions that it be attached to the map which it is amending.

(d) A copy of the Letter of Map Amendment will be sent to any community or governmental unit that requests such Letter of Map Amendment.

(e) [Reserved]

(f) A copy of the Letter of Map Amendment will be maintained by the Agency in its community case file.

[41 FR 46991, Oct. 26, 1976. Redesignated at 44 FR 31177, May 31, 1979, as amended at 48 FR 44544 and 44553, Sept. 29, 1983; 49 FR 4751, Feb. 8, 1984]

§ 70.7 Notice of Letter of Map Amendment.

(a) The Administrator, shall not publish a notice in the Federal Register that the FIRM for a particular community has been amended by letter determination pursuant to this part unless such amendment includes alteration or change of base flood elevations established pursuant to part 67. Where no change of base flood elevations has occurred, the Letter of Map Amendment provided under Sec. 70.5 and 70.6 serves to inform the parties affected.

(b) [Reserved] Editorial Note: For a list of communities issued under this section and not carried in the CFR see the List of CFR Sections Affected, which appears in the Finding Aids Section of the printed volume and on GPO Access.

§ 70.8 Premium refund after Letter of Map Amendment.

A Standard Flood Insurance Policyholder whose property has become the subject of a Letter of Map Amendment under this part may cancel the policy within the current policy year and receive a premium refund under the conditions set forth in Sec. 62.5 of this subchapter. [41 FR 46991, Oct. 26, 1976. Redesignated at 44 FR 31177, May 31, 1979]

§ 70.9 Review of proposed projects.

An individual who proposes to build one or more structures on a portion of property that may be included inadvertently in a Special Flood Hazard Area (SFHA) may request FEMA's comments on whether the proposed structure(s), if built as

proposed, will be in the SFHA. FEMA's comments will be issued in the form of a letter, termed a Conditional Letter of Map Amendment. The data required to support such requests are the same as those required for final Letters of Map Amendment in accordance with Sec. 70.3, except as-built certification is not required and the requests shall be accompanied by the appropriate payment, in accordance with 44 CFR part 72. All such requests for CLOMAs shall be submitted to the FEMA Regional Office servicing the community's geographic area or to the FEMA Headquarters Office in Washington, DC.

[62 FR 5736, Feb. 6, 1997]

001127

Exhibit C

EXHIBIT C

001129

CITY OF SAN DIEGO, CALIFORNIA
COUNCIL POLICY

CURRENT

SUBJECT: COUNCIL POLICY MANUAL
POLICY NO.: 000-01
EFFECTIVE DATE: January 8, 1990

BACKGROUND:

The City Council of The City of San Diego is charged with the responsibility of establishing municipal policies to guide the various functions of the City and, where necessary, to establish procedures by which functions are performed. Regulatory policies established by the City Council usually are adopted by ordinance and included in the Municipal Code. However, other policies also are established which by their nature do not require adoption by ordinance. These policy statements adopted by resolution of the City Council need to be consolidated in a reference document for easy access.

PURPOSE:

It is the purpose of this policy to:

1. clearly state and compile policies of the City Council not covered by ordinance;
2. provide for the distribution of these policies to all concerned; and
3. establish procedures for the preparation, distribution and maintenance of Council policies and the "Council Policy Manual."

POLICY:

1. There is hereby established a "Council Policy Manual" which shall contain all City policy statements adopted by resolution of the City Council.
2. Generally, policy statements in this "Council Policy Manual" will include only such municipal matters for which the responsibility of decision is placed in the City Council by virtue of the City Charter, the Municipal Code, or specific ordinances and resolutions.
3. All policy statements of the City Council shall be prepared in writing and approved by resolution. Once approved, statements of policy will be reproduced, distributed, and included in the "Council Policy Manual" accompanied by the resolution number and date of adoption.
4. Each policy statements shall include: a) a brief background description of the problem, b) the purpose of the policy, c) the policy statements, d) other criteria or procedural sections as required, and e) cross reference notations as to appropriate provisions in the City Charter, Municipal Code, Administrative Regulations, etc.
5. The City Clerk shall be responsible for the preparation, continuing maintenance and distribution of the "Council Policy Manual," and additions or deletions thereto.
6. Copies of the "Council Policy Manual" shall be distributed to each non-managerial department head and to the City Manager and to such of their representatives as they may direct.
7. Copies of the "Council Policy Manual" shall be available to the general public at a cost established by the City Clerk.
8. Council Committees shall annually review the Policy Manual "Table of Contents" to determine which, if any, policies need review.

CITY OF SAN DIEGO, CALIFORNIA
COUNCIL POLICY

CURRENT

9. Each policy shall be assigned to a "responsible department" and it shall be the responsibility of departments so designated to 1) periodically review their assigned policies, 2) offer appropriate revisions as necessary, and 3) enter upon any subsequent revisions the cross reference notations mentioned in Item 4 above.

PROCEDURE:

1. The City Council or any standing committee or member thereof, the City Manager, non-managerial department heads, and City Boards and Commissions may originate draft policy proposals for formal consideration by the City Council.
2. The City Clerk shall be responsible for the assignment of tentative and final policy numbers and titles to a proposed policy draft. For these purposes, he shall be consulted prior to the preparation by the originating department of the draft policy.

Prior to preparing the draft policy, the originating department will obtain a copy of the current policy from the City Clerk.

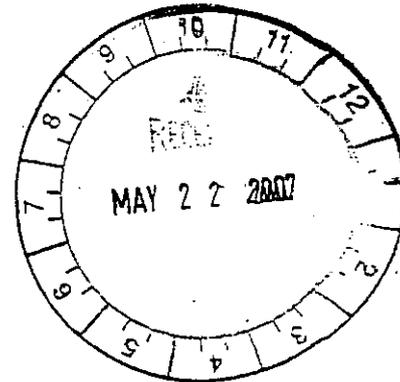
3. Drafts of proposed Council policies and amendments to existing policies shall be processed in accordance with the provisions of the Permanent Rules of the Council. Such drafts shall be referred to the appropriate Council Committee for discussion, analysis and preliminary action.
4. Upon approval by the appropriate Council committee, the draft policy shall be delivered to the City Attorney for preparation of a resolution of adoption. Such resolution shall be prepared and processed in accordance with Rule 28 of the Permanent Rules of the Council. A strike-out version of the draft policy shall be prepared and forwarded with the resolution.
5. Proposed policies will then be presented for Council consideration. If Council approves a policy and directs revisions, the originating department will make the changes and forward a final draft and strike-out version to the City Attorney before publication by the City Clerk.
6. After official adoption by the City Council, the City Clerk shall be responsible for duplication of the statement of policy and distribution.
7. As required, the City Clerk shall update the Table of Contents and Cross Reference in the "Council Policy Manual."
8. Each July the four Council Committees shall review an updated table of contents to determine which, if any, policies they wish to review.

HISTORY:

Adopted by Resolution R-169938 03/15/1962
 Amended by Resolution R-191955 10/26/1967
 Amended by Resolution R-211429 08/29/1974
 Amended by Resolution R-252047 06/16/1980
 Amended by Resolution R-274932 01/08/1990

001131

Office of
The City Attorney
City of San Diego



DATE: May 22, 2007
TO: Honorable Mayor and City Council
FROM: City Attorney
SUBJECT: Today's City Council Agenda Item No. 334 – Appeal of Planning Commission Decision Involving the Stebbins Residence – Request for Two-Week Continuance.

On today's City Council Agenda for this afternoon is a scheduled appeal hearing of the Planning Commission's decision in approving an application for a Coastal Development Permit (CDP) and a Site Development Permit (SDP) for the demolition of an existing one-story duplex, and the construction of a new three-story single family residence, and to allow for deviation from the regulations for Special Flood Hazard Areas, to permit development of the residential structure at 7.1 feet below the Base Flood Elevation where two (2) feet above the Base Flood Elevation is required.

As recently as last Friday, officials of the Federal Emergency Management Agency (FEMA) were offering conflicting positions relative to FEMA's view and requirements on this construction proposal which includes a below-surface parking structure. Yesterday, representatives of FEMA appeared to tentatively resolve their differing viewpoints; consequently we are undertaking additional legal research and analysis which will be of benefit to the City on this matter. The appellants have raised eighteen (18) appeal issues identified in the staff report prepared by the Development Services Department; some of them are related to FEMA concerns.

We respectfully request a two-week continuance of this appeal hearing, to the City Council meeting of June 5, 2007. This will allow the City Attorney's Office time to identify and clarify the FEMA-related issues, and prepare a legal memorandum for your information and consideration which will be distributed during the week prior to the June 5 appeal hearing. This will allow the City Council the opportunity to consider all of the legal issues associated with this appeal hearing.

MICHAEL J. AGUIRRE, City Attorney

By: Marianne Greene
Marianne Greene, Deputy City Attorney

cc: Elizabeth Maland, City Clerk
Bob Manis, Dev. Serv. Dept.

001132

THE STEBBINS RESIDENCE PROJECT 51076

APPLICANT RESPONSE TO APPEAL

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PROJECT OVERVIEW5166 W. POINT LOMA BLVD.
(OCEAN BEACH)

PROJECT: Demolition of existing dilapidated 1250 square foot duplex and construction of a single-family, three-story home plus underground garage (1,749 square foot house plus garage).

ISSUE: Appeal by a neighbor (in a condo across the street) apparently concerned about his potential loss of his view toward the ocean, but raising a number of spurious points based on misinterpretations of the facts and the law.

CITY ENTITLEMENTS BEING APPEALED: Planning Commission approved, by a 6-0 vote on March 1, 2007, the following entitlements and environmental documentation:

- Coastal Development Permit
- Site Development Permit (to allow deviation *only* from the Special Flood Hazard Area regulations; project is in conformance with all other applicable requirements [underlying zoning, floor area ratio ("FAR"), height limit, parking, setbacks, etc.]
- Mitigated Negative Declaration

DEVELOPMENT CONSTRAINTS IMPOSED BY LAND USE REGULATIONS:

- Lot is very small: only 2,500 square feet (0.057-acre), but the minimum lot size under the applicable zoning is 6,000 square feet.
- Applicable zoning (RM-2-4) provides for FAR of only .7, and requires that 25% of the permitted FAR be used for parking unless parking is provided underground.
- Project is located within 100-year floodplain and restrictions require that the first floor be 2 (two) feet above the base flood elevation, which would render the first floor uninhabitable for most properties in the area. If part of the first floor had to be devoted to parking, the habitable space of the unit would be very small (according to staff report to Planning Commission).
- These constraints may explain why the existing modest and dilapidated structures in the area, built in the mid-1950s, have not been redeveloped.
- Project's architect came up with an innovative solution: put water-proofed parking in subterranean area and home above.
- Staff supported the deviation from the Special Flood Hazard Area regulations (discussed below) in part because of the "development limitations" of the site.

HISTORY OF PROJECT'S PROCESSING BY CITY:

- City staff initially was concerned re bulk and scale, but project was redesigned to address those concerns. Staff and Planning Commission found that:
 - As redesigned, new home will preserve the character of the area's small-scale residential development.
 - Revised project is consistent with the Ocean Beach Precise Plan.
 - Redesigned project is consistent with the Ocean Beach Action Plan goals for redevelopment and owner-occupied housing.
 - Project would not impact coastal access, physical or visual (no public view corridors identified by either the Precise Plan or the Action Plan). Nevertheless, the project provides a three-foot view corridor on the east and west sides of the property through a deed restriction to preserve views toward Dog Beach and the San Diego River.

OB planning board voted 4-4 on project. OB land use sub-committee voted 5-0 in favor. Neither body had any concerns about underground parking.

ENVIRONMENTAL ISSUES:

- Property is considered "environmentally sensitive" solely because it is located within 100-year flood plain and is therefore considered a "special flood hazard area." Because this is not an environmental issue per se, it is discussed in the following section.
- Mitigation monitoring is required by the Mitigated Negative Declaration for possible archeological resources that might be encountered during construction.
- Coastal Commission staff review raised no significant issues.

FLOOD PLAIN ISSUES

- Property is located in 100-year floodplain and the Base Flood Elevation ("BFE") is 9.6 feet mean sea level.
 - Planning Commission's findings acknowledge that any flooding in this area would be due to lack of capacity of the storm water system. "Flooding in a 100 year event in this area is very low velocity (ponding only) [and] does not come from the [San Diego] [R]iver or the beach as is commonly believed but from runoff from the streets on the hill above Ocean Beach. Additionally, there is evidence that recent and significant

storm water repairs in this area should significantly reduce the already low risk." (Planning Commission Resolution, at page 14)

- The restrictions on development in the floodplain require that the lowest floor, including basement, be elevated at least two feet above the base flood elevation (per SDMC § 143.0146(C)(6)), and the Federal Emergency Management Agency ("FEMA") requires that the finished floor elevation be at one or more feet above the BFE.
- The project requires, and the Planning Commission approved 6-0 on staff's recommendation, a deviation from these requirements to allow development to be at 7.1 feet below the BFE. Importantly, however, the living area of the property (i.e., above the garage) will be at 10.6, or one foot above BFE (vs. current structure, in which living area is below BFE).
- Although the garage would be six (6) feet below existing grade, the structure has been designed and flood-proofed to mitigate potential flood-related damage to the principal residential structure by raising the required living space floor area above the flood line consistent with FEMA requirements.
- As conditioned by the Planning Commission, the project is fully consistent with FEMA requirements.
 - All structures subject to inundation are required to be flood proofed.
 - Flood proofed structures must be constructed to meet the requirements of the Federal Insurance Administration's Technical Bulletin 3-93.
 - FEMA has confirmed, in an e-mail to City staff, that the proposed project – as approved with conditions by the Planning Commission – is fully consistent not only with FEMA's regulations, but also with the City's flood plain management ordinance and variance procedures (see attachment 18).
- The City Engineer has determined that the deviation will not result in any additional threats to the public safety or any additional public expense, and will not create a public nuisance. In other words, construction of this house will not result in any change or alteration to the flood potential to any surrounding structure.

This deviation has been well vetted and approved by staff and Planning Commission in two hearings

SELECTED QUOTES FROM
PLANNING COMMISSION HEARINGS

"I think this is going to be a catalyst for a lot of change and I think that's actually a good thing."- Commissioner Griswold, 2/8/07

"I have no issue with the bulk and scale or other issues. I think you have done a very good job."- Commissioner Naslund, 2/8/07

"I believe the concern for our building is not the skyline, that's irrelevant."-Appellant Watson, 2/8/07

"He has done an exemplary job (with) height, width, bulk and scale massing. I think the project looks fine."-Commissioner Naslund, 2/8/07

"We have to recognize that he could have built something much more shear....but in fact he has backed away deferring to the large neighborhood going from one to three stories, this is a design decision and this is what we are looking for..."- Commissioner Naslund, 2/8/07

"I have no problem with it, it is a great project!"- Commissioner Griswold, 2/8/07

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“ I feel strongly that we should not be up here saying you have obeyed all the rules and furthermore the community plan says you would do these things and then say we don't agree with it?”-Commissioner Naslund 2/18/07

(On flood plan issues).. “That is irrelevant to the community, if a person wants to do something on their property that is their risk..-Appellant Watson, 3/1/07

“I was born and raised in San Diego, I have worked and lived in the O.B./Penninsula area continuously since 1988. I currently live and work in Ocean Beach. I live at the property now, and this will be my home..”-Applicant Stebbins

“A gentrification argument in my mind does not apply..”-
Commissioner Naslund 3/1/07

“..it does all the things the precise plan talks about and further they (the owner) have made a lot of changes to address even the bulk and scale..”- Commissioner Naslund, 3/1/07

“I think its inappropriate to establish a set of rules and then do not grant somebody their rights if they follow them...”-
Commissioner Naslund, 3/1/07

“..this owner has come forward and as mentioned has played by the rules...followed the exact specifics of the precise plans..”-
Commissioner Ontai, 3/1/07

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“We take issue with the statement (by appellant) that the project is inconsistent with what’s anticipated by the community plan. The plan contains policies to renovate properties that are substandard and dilapidated and this represents one of many on that whole side of the block. The development is consistent with the small scale development in the general neighborhood and when we look at the general neighborhood we are looking at the area that includes the noticed area not just one side of the block. There are two and three story structures immediately across from this one. Also, the block to the immediate east appears to have transitioned from a smaller scale to mostly two and three story structures as well... So, this is the last area remaining (this one side of the block) where there is nothing but one story structures. We think that the project is appropriate in terms of bulk and scale. They are adding only 500sq. Feet to the project, going from 1250 to 1750. And we think that they have done an excellent job of breaking down what bulk and scale there was with the original proposal” -Tony Kempton Senior Planner, 3/1/07

“I am at a good comfort level with what I have heard today of the technical side of it,,”-Commissioner Ontai, 3/1/07

“I feel the methods and means that we heard today would be a good start in regards to future developments..”-Commissioner Ontai, 3/1/07

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"..merely by building a basement is not going to result in damage to other structures in the area. Again, the basement is going to be flood proofed, there are going to be some sump pumps and in fact this building may react more favorable than other properties in the area."-Building Director, 3/1/07

"I am familiar with the waterproofing techniques that you are utilizing and I think they are indeed sufficient.... we have used those on projects ourselves and I think they work fine."-
Commissioner Naslund, 3/1/07

"..if the applicant were to remove the (underground) parking and stay within the envelope requirements what you would end up with is a perfect box, because he would have to make up that lost space, and I think you (the appellant) would be very dissatisfied with a perfect box.

What he has done here is create some angles and setbacks and deviations in the elevations that make the building more attractive and I think this is really what you want to see in your community"-Commissioner Onati, 3/1/07

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RESPONSE TO APPELLANTS APPEAL OF STEBBINS RESIDENCE

OVERVIEW

This appeal is troubling to refute; not because it is true but because it is inconsistent, lacking in facts and contradictory. Conclusions are drawn with no basis in fact. Many codes cited are incomplete, out of context, out of date and in one case never adopted. Appellant's arguments serve only to confuse the issue and create as much uncertainty as possible. Appellant has focused on the below grade parking issue even though Appellant has admitted twice in public testimony that it is irrelevant. Appellant has conveniently forgotten to mention that his large 3 story condo complex has a very nice view which might be affected by this project.

Each of the following rebuttals are absolutely accurate and based on facts which are proven, agreed on by staff, well vetted by staff and Planning Commission and which accurately reflect the letter and intent of the appropriate codes or regulations.

I ask the reader to remember that this is in reality a simple project. Please do not become lost in the numerous smoke screens propounded by Appellant which I must address as the Applicant, but which have little or no relevance. This is a modest single family home with one deviation. As has been stated by others, I have followed all of the rules in every respect.

COMMENT ON FEMA GUIDELINES

When the Applicant or the Appellant is talking about FEMA guidelines or technical bulletins it is important to note that FEMA does not make regulations that bind the City. Rather, any regulations cited are guidelines for state and local officials to make their own local rules. The City of San Diego has incorporated many of these guidelines for flood management into the building code. The City code is at least and in some cases more stringent than FEMA recommendations. Ultimately, FEMA only requires that the city follows its own procedures. This has been done to the letter in the case of the deviation granted on this project.

1. PROJECT DOES NOT CONFLICT WITH COUNCIL POLICY 600-14B

A. Appellant quotes only the first sentence of the policy and fails to cite or include the other 4 pages of that council policy in his analysis (Attachment 17). The policy document goes on to enumerate the conditions under which a deviation is granted. Each finding for the project or deviation under this policy has been made by staff and the Planning commission. This document and various other city codes and FEMA guidelines have clear deviation procedures that outline the conditions for a deviation; all of those have been followed. (see staff findings in staff report).

B. Appellant Watson himself has stated on the record that "the flood issue is absolutely

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irrelevant" (planning commission testimony 2/8/07). He does not care about the underground parking and has adopted this new position only after being unanimously defeated.

C. Throughout his appeal appellant refers to this little flood zone as a "flood plain of the San Diego River"- it is not. This zone is a flood zone A. Zone A means that there is a 1 in 100 chance in any given year that a flood would occur and reach the base flood elevation.

This particular Zone is manmade as city records show. This area has a very low risk of flooding. Flood waters, if any would come from the overwhelming of the storm drain system, not from the Ocean or The River as is commonly believed. Flooding would be slow, shallow and of short duration. These are all characteristics enumerated in the fema guidelines governing deviations. The flood possibility is statistical only; This area has not flooded to the base flood elevation in recorded history.

(**A flood *plain* would imply alluvial flooding and this area does not include this characteristic; it is surrounded on all sides by Flood Zone X. Flood Zone X means that there is a 1 in 500 chance in any given year that the area will flood. This Zone X would act as a barrier. It encircles and prevents any other flood waters from affecting the project. Currently there are no federal, state or local building guidelines that apply to a zone x in this context).

2. APPELLANT'S ARGUMENT REGARDING PRIOR REJECTION OF PROJECT IS IRRELEVANT.

The project was not rejected. It was sent back to applicant for redesign. This is a normal part of any process. In addition, the project was redesigned in a major way after intense research and consultation with city staff. New information was obtained that had not been presented with the first project draft. Again this is rather normal. Appellants's use of applicant's correspondence is out of context. Specifically, city staff and Applicant were not focused at the time of the Iskandar letter of the FEMA deviation regs.

In addition, applicant worked closely with staff and significantly scaled back the bulk and scale of the building and added articulation in accordance with city guidelines and the OBPP. Appellant therefore, is citing a letter that is out of date and irrelevant as to the current design.

3. APPELLANT MISSTATES FEMA GUIDELINES;

A. The words "strictly prohibits" do not appear in any regulation. These words were uttered by a junior fema employee (Blackburn) who has not spoken to city staff has not viewed any aspect of the project and whose only source of info was a few sentence inquiry from appellant.

Michael Hornick is Blackburn's superior at Fema (DHS). He was provided all regulations and schematics and proposed findings concerning the project. After reviewing the project and discussing the project with the city engineer, Mr. Hornick stated that "I am confident that city staff is pursuing the correct course of action with regard to your own variance procedures." (Email 4/12/07-See attachment18).

44 CFR 60.3 states "The administrator does not set forth absolute criteria for granting

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variances..” Also, “A community may propose flood plain management measures which adopt standards for flood proofed residential basements.”(60.6(b)(2)©). (See attachment 19 for full text.)

B. Fema recognizes that all flood zones are not created equal and has provided flexibility to the community. These regulations set forth specific criteria and characteristics that a project must have to meet the deviation requirements. This project meets each of these requirements*;

1. The lot is less than ½ acre
2. The potential flooding is of low velocity, long warning times and short duration
3. Flood velocities are 5 feet per second or less
4. Flood depths are less than 5 feet.
5. As stated above all of the other findings have been met.(see staff findings and owner’s supplemental info in this packet).
6. The flood proofing measures have been well vetted to the city engineer and Planning commission in two separate hearings.

(*this is a summary please read 44cfr60.6 in its entirety)

The fema guidelines are clear; deviations are allowed. Otherwise why would Appellants spend so much time in his next section trying to show the deviation is unjustified?

Appellant argues that the city could be expelled from the NFIP program. Again, this is out of context. Since deviations are allowed there is no violation of any of the gridlines and there are no consequences. Appellant likes to use words like “violation” when no violation exists.

4. THE PROJECT IS IN CONFORMANCE WITH THE OCEAN BEACH PRECISE PLAN;

A. Appellant states that residence violates precise plan. He asserts that a 1750 sq. foot residence can be built without parking below grade. This is incorrect. SDMC S. 11.0234(b)(6) states that “Gross floor area includes on or above grade parking” Therefore, any parking area must be deducted from allowable square footage. It is a matter of public record. Staff agrees.

Appellant completely MISSTATES the law. His conclusion that staff and applicant mislead the public is disingenuous. If Applicant could build an above ground garage and not lose any habitable square feet, he would do so. Appellant’s argument is pure fabrication. Even if Applicant could devote ground floor to parking the result would be an unarticulated block style building that *would* be inconsistent with the community plan.

B. The Appellant is incorrect about the visual impacts. All 3 foot public view corridors are preserved. The building is stepped back from one to two to three stories. No public views would be blocked from elevated areas because there are no elevated public views. In fact, Appellant fails to point out that he lives in a 3 story monolithic block condo complex across the street with a magnificent *private* view.(Interestingly, Appellant’s building probably could not be built today because of setbacks and inadequate flood proofing) With 4 foot setbacks, Appellant’s building blocks the sunlight from several properties behind his. The Stebbins residence is 95 feet away from the nearest structure (other than the neighbors on the project side of the street- all of whom favor the project.

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"The Community plan contains policies to renovate properties that are substandard and dilapidated. And this represents one of many on that whole block. The development is consistent with small scale development in the general neighborhood and when we look at the neighborhood we are looking at the area that includes the noticed area not just one side of the block. There are two and three story structures immediately across from this one. Also, the block to the immediate east appears to have been transitioned from mostly smaller scale to mostly two and three story structures as well... we think that the project is appropriate in terms of bulk and scale, they are only adding approximately five hundred square feet to the project going from 1250 to 1750 and we think they have done an excellent job of breaking down what bulk and scale there was with the original proposal." Tony Kempton, senior planner Planning commission gearing 2/8/07 *** (Appellants complains about visual impact and quotes Mr. Kempton in regards to a previous design. The project was redesigned and resubmitted in 2005).

6. APPELLANT'S AFFORDABLE HOUSING ARGUMENT IS IRRELEVANT AS THIS IS ONE STRUCTURE LESS THAN 3 UNITS AND THEREFORE EXEMPT

Still, Ocean Beach area rents are well above the median. No "affordable" housing presently exists on this block please see staff report.

7. GEOTECHNICAL REPORT IS NOT NEW INFORMATION;

Appellant calls the geotechnical report new information, even though he correctly cites the date of the report as 8/5/05. This information was in fact considered as part of the MND and considered insignificant. Updated answers were provided to city staff in the normal course of business and are part of the record.

B. Applicant is willing to go on record as agreeing to correct any minor problems associated with dewatering. Applicant's contractor believes dewatering may not be necessary depending on the time of year and other factors.

Please remember all of the neighbors on Applicant's side of the street that could potentially be affected have provided letters of support (Attachments 21 a-f). According to the report, damage if any, is speculative and would be minor...even appellant does not dispute this. Nevertheless, Appellant leaps to the unsupportable conclusion that this is cause for denial.

8. APPELLANT'S STATEMENTS THAT FEMA VARIANCE IS UNWARRANTED IS CONTRADICTORY;

Appellant contradicts himself when he states that a fema variance is unwarranted. Earlier, Appellant stated (incorrectly) that underground parking was "strictly prohibited" Now, Appellant goes to great lengths to say the deviation is unsupported. There cannot be a deviation procedure for a prohibited act. Furthermore, as quoted above, appellant stated that the underground parking was "irrelevant". Appellant again misstates the ob precise plan and the building code. And claims that above ground parking would not diminish the total allowable space.

The building code is explicit for this property; all parking areas (in this case-2 spaces) must be deducted from floor area ratio calculations (SDMC S. 11.0234(b)(6)). Appellant's claim that city staff and applicant have made false claims or that staff does not understand or has misrepresented the building code and should interpret it differently is spurious and false. Appellant again quotes statements from staff that apply to a prior design which are again irrelevant.

B. Appellants claims that the hardship standard has not been met; This erroneous conclusion is based this on Appellant's claim that a 1750 sq foot house can in fact be built with above ground parking, we know this to be false. Without a deviation for the parking applicant would need to build a 1250 square foot house which would make no sense and as one commissioner pointed out create a block style unarticulated structure which I am quite certain appellant would like even less.

In addition, it is economically unfeasible to tear down a 1250 sq. foot residential structure on the beach only to replace it with another. Even though this is to be my home, the finished product given the costs of construction must justify the expenditure. This is a prime site and the only justifiable way to build and therefore improve the neighborhood is to go up. Appellant cites no facts to support his conclusion that there is no hardship-he merely concludes. Appellant does not provide any suggestions about any other viable design.

C. Appellant cites possible (60)(a)(3ii) "nuisances"..... nuisances are permanent characteristics that might be created after the project is completed not during construction. No one..including the appellant has provided supporting facts citing a nuisance after the project is completed. All of applicants comments about public safety are conclusory and do not provide facts or proof. This is yet another set of "red herrings."

D. Appellant's comments about flood insurance are irrelevant because that is a private matter. However, I have obtained a quote based on preliminary designs of \$3000 per year and that is expected to decline to about \$8-900 once the flood proofing schematics and final engineering certification are done. I pay \$750 per year at this time.

9. DEVIATION IS THE MINIMUM NECESSARY;

Appellant claims that this deviation is not the minimum necessary; appellant does not cite any viable alternatives and those he does cite are based on appellant misrepresenting the building code as stated above. He again falsely states that I can build a 1750 Sq. Foot house with above ground parking. *(If true I would be happy to redesign).*

The house as designed has exactly 1750 sq. feet of living space. This is a moderate house by any measure. It only adds 500 sq. Feet to the existing structure. *no living space will exist below grade.*

10. APPELLANT MISSTATES FLOOD DEPTH CRITERIA;

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A. Appellant claims that flood depth would be too great (fema guidelines, (44cfr 60.3) suggest no more than 3 foot maximum flood depth for a deviation). Appellant has his math wrong. Here, the base flood elevation is 9.6 feet. The grade at the property is 7.8 feet .. therefore, the mean flood depth in a 100 year flood is 1.8 feet...well below the suggested 3 foot guideline. It is a simple matter of math. The Base flood elevation was established by the FIRM and city records. Engineering staff has concluded that there is no danger to any surrounding property due to the flood proofing.

B. Appellant suggests that there might be tidal flooding yet presents no evidence. Staff has stated that there is no tidal flooding. The site is flat and staff has concluded that there will be no adverse affect on the flood zone. Fema flood maps show that this flood zone is surrounded on all sides by a flood zone x (500year flood) Therefore, Appellant's comments are misleading and have no basis in fact. Of course coastal commission has reviewed the project and is not requiring wave runup studies because there is no tidal flooding.

11. THERE IS NO EVIDENCE OF ANY POTENTIAL ENVIRONMENTAL DAMAGE;

Dewatering is a common construction technique and does not create any environmental issues. Appellant implies some environmental damage to neighboring properties in the flood zone but does not cite any evidence of any potential environmental damage and makes only vague generalized complaints. Appellant again calls this a flood plain; it is not. There is a big difference; a man made flood zone is not a natural resource. Staff has stated that there are no environmental impacts to the flood zone.

This site is already developed and is not a natural resource. There are no environmentally sensitive lands for it to affect. And Appellant does not cite any potential damage of any significance. Appellant's conclusions are overly general and amount to no more than non-expert opinion about dire consequences which are unsupported by any factual proof.

12. RETAINING WALLS ARE NOT NEEDED;

Appellant suggests the driveway be classified as a shoreline protective device...There is no authority for this statement especially as it applies to this project which separated from the shoreline by a massive(several acres) parking lot and a flood zone X.

The sides of a driveway over 100 yards away from the beach and separated from the beach by a 3 story structure and a parking lot cannot be a shoreline protection device. Coastal Commission has evaluated the driveway walls and found no issues. This is yet another spurious argument.

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13. THERE IS NO EVIDENCE THAT PROJECT IS IN ANY WAY DETRIMENTAL TO PUBLIC HEALTH;

A. Appellant argues that the project would be detrimental to public health...but does not state how...Appellant provides no specifics other than some out of context fema regs. Appellant again refuses to cite the deviation regulations so his arguments are merit less. Appellant calls everything a violation when we are dealing with a deviation.. Rebuttal to such conclusory argument is unnecessary.

B. Appellant inaccurately quotes neighbor and project supporter Byron Meadows who stated "some water entered my house 2 feet and wet my carpet"(please replay the tape) Appellant says the water was 2-3 feet deep and that Byron lost everything. This is again untrue. (This was during the 82-83 El Nino season). Even if it were true, flood proofing measures would increase safety not decrease safety; That same flood would have caused no damage.

C. Appellant provided a nice picture of this same event in 82-83 which actually proves the point the flooding was at grade only and may have lapped at the end structures on the block....this flood level is 1.8 below bfe, 2.8 below my flood proofing measures and this was the second worst storm in OB history. The worst storm occurred 2 years ago and the streets and parking lot did not even flood possibly due to recent storm drain work..this would of course be the predicted result.

It would take far worse storms to even come close to overwhelming my flood proofing measures. Appellant once again fails to show how my house can be a detriment to public safety. Ironically the building where Appellant lives would suffer far greater damage than my house since it is at grade and not flood proofed in the least.

14. THE SITE IS SUITABLE;

A. Appellant again suggests that an alternative to the current building would be above grade parking but again does not understand the floor area ratio limitations. The city is not required to propose alternatives to the homeowner. The site is already developed and the footprint does not really change..there is no impact to environmentally sensitive lands so the site is suitable..

B. Appellant states that the deviation is based on fema technical bulletin 3-93 and that this is misleading because the document generally covers non-residential structures. Nothing in this document is restrictive, it is merely a technical opinion. To suggest that this somehow limits what one can do with a residence is a tortured and cynical piece of reasoning that barely justifies rebuttal.

Still, that bulletin is merely a flood proofing guideline and it was cited for technical reasons. Actually the laws of physics do not differentiate between residences and business. Moreover, The city engineer will have to sign off on the final constructions documents and applicants design must be certified reasonable safe from flooding by an engineer. This is another red herring argument.

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C. Appellant states that the public was misled because the full title of the fema 3-93 bulletin was not cited..this is disingenuous nitpicking as the document is freely available on the internet. Even so, it is the Appellant who is misleading the public as he refuses to acknowledge that deviations for underground parking are allowed.

15. NEW INFORMATION IS NOT NEW;

Appellant stapled a sheet labeled "new information" to his appeal. It states that cd coastal overlay prohibits my proposal; THIS IS FALSE -THE SECTION APPELLANT REFERS TO WAS NEVER ADOPTED The section cited (Appendix B of the OBPP) is a mockup of an overlay zone was never and has no legal effect....If one tries to follow the cut and paste gibberish in this argument it implies that any structure built after 1980 would be illegal. There is no regulation prohibiting the building of a house on my lot. Appellant's suggestion would be that no house of any kind could be built. Essentially, Appellant neglects to apply the permissive exceptions and augmentations and revisions in any part of any code he has cited. Appellant simply refuses to attach or cite any sections that do not favor his position. Any honest review of the current coastal regulations shows this to be another tortured and out of sync analysis of the code.

21. PROJECT HAS NO CITY WIDE SIGNIFICANCE;

Appellant suggests there is city wide significance to my project. This is not true. First, Ocean Beach is the only zip code in the county that has such a restrictive F.A.R. (.70) coupled with this zoning(rm2-4). Add to that the small lot, flood criteria and the view potential needed to make a project like this economically feasible and the likelihood of this deviation occurring again on any other block in the county is tiny-if not impossible. This block is a subset of a subset of a subset.

Appellant has raised fear of "mass" development yet does not provide any facts which support this conclusion. Even so, the zoning, F.A.R. and community plan changes that would be necessary to significantly change the character of this neighborhood are not even on anyone's drawing board. Currently, everyone on the block parks illegally in their setback. If anything Applicants house will create less density and legal parking on his lot for the first time in 40 years.

22. THERE ARE NO DEFICIENCIES IN THE MND;

Appellant claims an there is an "omission" to potential (minor) damages to adjacent residences and that this is significant. This report has been in the record for almost two years. Furthermore, every adjacent property owner has stated in writing that they approve of the project. The applicant claims that if 6 more owners build on the block this could create a walling off effect. Appellant provides no evidence of how this would come about other than vague statements.

The statements and desires of any other owners regarding the future development of their respective properties though sincere are speculative. Of course, any project going forward would be required to observe the 3 foot public visual corridors between properties even though this area is not designated for public views. There would be no "walling off effect" as the street is open to

the park and the area of beach on each side and because the street in front is very wide and there will be absolutely no effect on the public view and there is no elevated public view nearby. Therefore, there could be no walling off effect.

B. Appellant has presented NO evidence of a cumulative impact. Appellant has presented no evidence that 6 houses built on this same block would have ANY impact. "In the absence of specific factual foundation in the record, dire predictions by nonexperts regarding the consequences of a project do not constitute substantial evidence". (Bankers Hill v. City of San Diego) 2006 Cal. APP.Lexis 684.

CONCLUSION

There are no "violations" of fema regulations in this project. The proposed deviation meets all of the criteria set out by the city and fema. The project has been vetted by over 400 hours of staff time and two planing commission hearing's it was enthusiastically approved. Appellant likes to call each and every aspect of the project a "violation" but provides no proof or specific evidence. Appellant MISSTATES or misinterprets the building regulations. Appellant quotes laws that were not adopted. Appellant acknowledges that a deviation procedure exists and then flip-flops and disagrees with that again and calls everything a violation. Appellants arguments are contradictory and circular.

This Appeal is disturbing. The Appellants technique of manipulating the data and the facts to serve his own agenda is a waste of the Council's time. Appellant has presented not one new or different piece of information that would justify his appeal. Furthermore, Appellant lives across the street in a condo complex on the third floor and enjoys a very nice ocean view. This is a fact of significance. Ironically Appellant's view will not be significantly impaired As the first floor of Applicant's house is 95 feet away. Neither Appellant had the courtesy to show up to the planning board hearings though one Appellant has waged a misleading email campaign. When Appellant lost in front of the planning commission Appellant ran to the planning board without notifying Appellant in an attempt to get support for an appeal; they failed

There is no great public controversy over this project; in fact there is just as much, if not more support for it. There is unanimous support from all the property owners on the block. Most importantly the applicant has followed the rules. The appellant does not. There are no violations of the code or any of fema regulation. Everything including the deviation has been done by the book. The project as reviewed by the planning commission enjoys their unanimous support and the support of city staff.

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SUPPLEMENTAL INFORMATION AND TALKING POINTS FROM APPLICANT
5166 W. POINT LOMA BLVD, STEBBINS RESIDENCE

As requested I have provided you with technical information regarding the flood proofing of the below grade parking area for my home. Please consider the following:

THE DESIGN IS SAFE

1. ALL HABITABLE SPACE WILL BE ABOVE FLOOD ELEVATION PER FEMA REGULATIONS. THE ONLY AREA BELOW BFE WILL BE THE PARKING AREA AND THIS WILL BE DRY FLOOD PROOFED. THE DEVIATION REQUESTED IS FOR UNDERGROUND PARKING ONLY. THE REST OF THE PROJECT AND ALL HABITABLE AREAS FOLLOW THE BUILDING CODE PRECISELY.
2. CONSEQUENTLY, ALL HABITABLE AREAS OF MY HOUSE WILL BE 2.5 FEET ABOVE CURRENT GRADE. ALL OTHER PROPERTIES IN THIS ZONE ARE INCLUDING MINE ARE CONSTRUCTED AT A MAXIMUM ONE FOOT ABOVE GRADE (1.5 FEET BELOW FLOOD) OR AT GRADE. IRONICALLY, THIS MEANS MY HOUSE WILL BE THE ZONE'S SAFEST AND THE ONLY PROPERTY IN COMPLIANCE WITH FEMA GUIDLINES.
3. THIS FLOOD ZONE IS A MINOR FLOOD ZONE. PLEASE DO NOT BE DISTRACTED BY THE PROXIMITY TO THE BEACH. THE OCEAN HAS NOTHING TO DO WITH THE FLOOD ZONE DESIGNATION. THE SITE IS 450 FEET AWAY FROM THE SAND AND ANOTHER 100 YARDS TO THE WATER. THERE IS NO CURRENT DOCUMENTED RISK FROM COASTAL FLOODING. IT IS SEPARATED FROM THE SAN DIEGO RIVER BY A ZONE X.
4. THIS FLOOD ZONE EXISTS ONLY BECAUSE THE CITY STORM DRAIN SYSTEM IS POTENTIALLY INADEQUATE. THERE IS NO DISPUTE ABOUT THIS FACT. FLOODING (IF ANY) IN A 100 YEAR EVENT WOULD BE SLOW, SHALLOW AND LOW VELOCITY-EASILY HANDLED BY MY ENGINEERING. A FLOOD OF THIS TYPE HAS NOT OCCURRED IN THIS ZONE IN RECORDED HISTORY.
5. DUE TO RECENT STORM DRAIN WORK THE ABOVE MAY NO LONGER BE A POTENTIAL PROBLEM ALTHOUGH THIS HAS NOT BEEN STUDIED.
6. SINCE THE PROBLEM (THE FLOOD ZONE) WAS CREATED BY THE CITY THIS DEVIATION IS FAIR TO THE APPLICANT AND COSTS THE CITY NOTHING.

7. THIS AREA IS BLIGHTED-EVEN THOSE LUKEWARM ABOUT THE PROJECT HAVE AGREED ON THIS POINT. OB PLANNING BOARD DID NOT OBJECT TO THE UNDERGROUND ASPECT OF THIS PROJECT.

8. COMMERCIAL UNDERGROUND PARKING IS UBIQUITOUS EVEN IN SOUTHERN CALIFORNIA AND NO DEVIATION IS REQUIRED. THE CONVENTION CENTER PARKING IS BELOW SEA LEVEL.

THE PROJECT IS A BIT UNUSUAL BUT THE TECHNOLOGY IS PROVEN

1. THE SITE IS A SMALL LOT WITH AN FAR OF .70; THE PENINSULA PLANNING DISTRICT IS THE ONLY AREA IN SAN DIEGO COUNTY WITH A SMALL F.A.R. FOR THIS ZONING. ALL OTHER RM2-4 PROPERTIES IN THE COUNTY HAVE LARGER F.A.R. THE SAME IS ESPECIALLY TRUE IN PACIFIC BEACH AND MOST ANALOGOUS AREAS UP THE SOUTHERN CALIFORNIA COAST.

2. OWNERS IN THESE OTHER AREAS HAVE THE ABILITY TO BUILD ABOVE GRADE PARKING. I DO NOT. THIS IS WHY THE COMMISSION HAS NOT YET SEEN A PROJECT OF THIS TYPE. MY SITE IS IN THE ZONE A WHICH FURTHER EXPLAINS WHY IT HAS NOT BEEN DONE. ESSENTIALLY MY LOT IS A SUBSET OF A SUBSET OF A SUBSET.

3. EVEN IF THE F.A.R WAS MAGICALLY INCREASED; THIS PROJECT WITH AN ABOVE GROUND GARAGE WOULD PRESENT SIGNIFICANT BUILD AND SCALE ISSUES. UNDERGROUND PARKING ALLOWS A MORE ELEGANT ARTICULATED DESIGN FOR THE NEIGHBORHOOD.

4. IT IS MORE EXPENSIVE TO BUILD AN UNDERGROUND BASEMENT, ESPECIALLY IN SAND AND A NARROW SETBACK/LOT LINE. THEREFORE ONLY PROPERTIES WITH VIEW POTENTIAL WOULD BE ECONOMICALLY VIABLE. THIS FURTHER EXPLAINS THE LACK OF SIMILAR PROJECTS TO DATE.

5. FEMA REGULATIONS ARE TAILORED ALMOST SPECIFICALLY FOR MY LOT; THE REGULATIONS THAT ALLOW THE DEVIATION SPECIFY A LOT OF LESS THAN ½ ACRE IN A DEVELOPED AREA BEING THE ONLY CANDIDATE FOR THIS DEVIATION. MY LOT QUALIFIES. THE FLOOD ZONE SHOULD BE SHALLOW, LOW VELOCITY WITH LONG WARNING TIMES; MY LOT QUALIFIES -IF THERE WAS EVER A GOOD CANDIDATE FOR UNDERGROUND PARKING, MY PROJECT IS IT!

6. SAN DIEGO IS A DRY CLIMATE. THE FLOOD PROOFING MEASURES I PROPOSE ARE UBIQUITOUS IN OTHER AREAS OF THE COUNTY. THEY MAY BE UNFAMILIAR TO US BECAUSE WE ENJOY A PRETTY MILD CLIMATE. NEVERTHELESS THE DRY PROOFING OF BASEMENTS AND FLOOD BARRIER TECHNOLOGY IS VENERABLE. SOME OF THE PRINCIPLES ARE CENTURIES OLD.

CONCLUSION

Sometimes the more one focuses on a problem the larger it seems. I am requesting a deviation for underground parking only. All other aspects of this project precisely meet the code. Residential underground parking is not common because of the factors I have outlined above. Please keep in mind that many areas of San Diego flood each year. Many of these areas are not in designated flood zones. Yet, my area has not flooded. Still, I have provided a flood proof solution that should will make my property safer than every property in the area and most properties in any San Diego Coastal Zone. I am doing this at my expense even though the problem was created by poor storm drain management.

I am the first in Ocean Beach to do this in a residential zone. This is done all the time in commercial zones without a deviation required. Being first does not mean it's a bad idea...It just means I am first. Nevertheless, due to the economics of the beach and the very few properties with characteristics like mine, this will not be a major development trend and will result in no more than a handful of similar projects.

Respectfully Submitted,



David Stebbins, ESQ.

001153

JAMES SCOTT FLEMING, AIA
STONEBROOK STUDIO, INC ARCHITECTURE AND PLANNING

FEBRUARY 17, 2007

Laila Iskandar
Project Manager
City of San Diego development Services
222 1st Ave
San Diego, CA 92101

Re: Stebbins Residence
CDP
Floodproofing

Dear Ms. Iskandar:

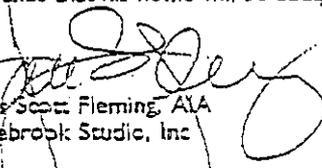
We have reviewed the flood proofing criteria for the basement parking garage as requested by the members of the Planning Commission on February 8, 2007. Along with additional information Mr. Stebbins has put together, we have prepared additional exhibits showing the proposed flood proofing details and gate structures in schematic form.

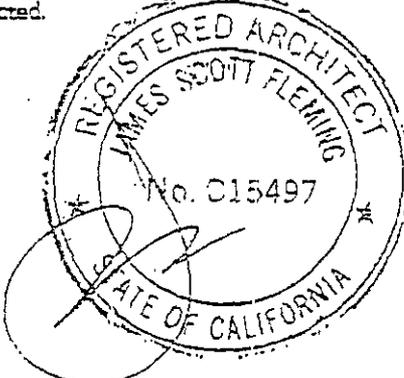
As indicated in the exhibits, The basement walls will be constructed of 12" concrete walls and a min. 18" thick concrete slab floor. The walls and floor will be structurally designed to resist any future hydrostatic as well as buoyancy forces generated by possible flood water that may accumulate at the site. The resistant forces will be engineered per FEMA technical bulletin 93, and NFIP (National Flood Insurance Program) recommendations, as well as taking into consideration any impact forces generated by floating debris. The basement walls and retaining walls at the sloping driveway, as well as the slab below will be entirely waterproofed/floodproofed utilizing a "Tremco" water proofing system so that no moisture/water may penetrate into the basement. The Waterproofing will be protected from damage by backfill protection material, and a water drainage grid system will be utilized on the sidewalls and underslab to direct any built up moisture to a sump system that will direct water out and away from the structure. The structure will be completely floodproofed to one foot above the 9.6 flood level elevation.

As the exhibits show, a "FLOODWALL" or "FLOODGATE" protection system will be utilized at the entry to the parking garage driveway to prohibit any floodwater from entering the basement. As the enclosed literature shows, these systems have been utilized in numerous locations and types of installations throughout the country in flood prone areas, and we have confidence that this system will be more than adequate to provide protection to Mr. Stebbins' residence in the rare occurrence it may be needed.

Utilities (electrical etc.) will be protected by placing the main panels and services above the 9.6 flood level. Sewer discharge pipes will be equipped with backflow prevention devices.

Our office will be providing design and engineering for the project, along with the assistance of Mr. de Beradinis, our structural engineering consultant, Christain Wheeler Engineering, geotechnical consultant, and Sunshine Supply Corporation, our waterproofing consultant to assure that both the structure and floodproofing will be providing Mr. Stebbins with assurance that his home will be adequately protected.


James Scott Fleming, AIA
Stonebrook Studio, Inc



2240 SHELTER ISLAND DRIVE, SUITE 209 SAN DIEGO, CALIFORNIA 92106.
(619)523-0962 (619)224-8290

001154

CHRISTIAN WHEELER
ENGINEERING

February 19, 2007

David Stebbins
4948 Voltaire Street, Suite 1A
San Diego, California 92107

CWE 20403 14.3

**SUBJECT: REVIEW OF SCHEMATIC FLOOD PROOFING DESIGN, PROPOSED
SINGLE-FAMILY RESIDENCE, 5166 WEST POINT LOMA
BOULEVARD, SAN DIEGO, CALIFORNIA**

- REFERENCES:** 1) Report of Preliminary Geotechnical Investigation, Proposed Single-Family Residence, 5166 West Point Loma Boulevard, California, prepared by Christian Wheeler Engineering, CWE Report No. 2040314.1, dated June 14, 2004.
- 2) Response to 2nd Geotechnical Review of Documents, Proposed Single-Family Residence, 5166 West Point Loma Boulevard, San Diego, California, prepared by Christian Wheeler Engineering, CWE Report No. 2040314.2, dated August 5, 2005.
- 3) Schematic Flood Proofing Design (Dry Flood Proofing), Basement Garage, Stebbins Residence, prepared by James Scott Fleming, AIA, dated February 14, 2007.
- 4) User's Guide to Technical Bulletins, Including Key Word/Subject Index, Technical Bulletin Guide-01, prepared by Federal Emergency Management Agency, FLA-TB-0, dated May 2001.

Dear Mr. Stebbins:

In accordance with the request of Mr. James Scott Fleming, AIA, of Stonebrook Studio, Inc., we have prepared this letter to provide geotechnical comment on the above referenced flood proofing design for the subject residence. Based on our review of the referenced flood proofing schematic and the facts that, as presented on page 5 of the City Staff Report No. PC-07-010 for the meeting of the Planning Commission, Agenda of February 8, 2007, the proposed flood proofing of the structure will need to satisfy the requirements presented in FEMA's Technical Bulletin 3-93 and that a registered civil engineer or architect will need to certify that the requirements put forth in Technical Bulletin 3-93 have been met prior to occupancy of the residence, it is our professional opinion that the proposed flood proofing concept can be successfully incorporated into the construction of the proposed single-family residence.

001155

February 19, 2007

Page No. 2

If you have any questions regarding this letter, please do not hesitate to contact this office. Christian Wheeler Engineering appreciates this opportunity of providing professional services for you for the subject project.

Respectfully submitted,

CHRISTIAN WHEELER ENGINEERING

Charles H. Christian, GE 215

David R. Russell, CEG 2215

CHC:DRR

- cc: (6) Submitted
- (1) via fax (619) 223-0174
- (1) via david@cebins.com



001157

FLOOD BARRIER DIAGRAMS
AND SCHEMATICS

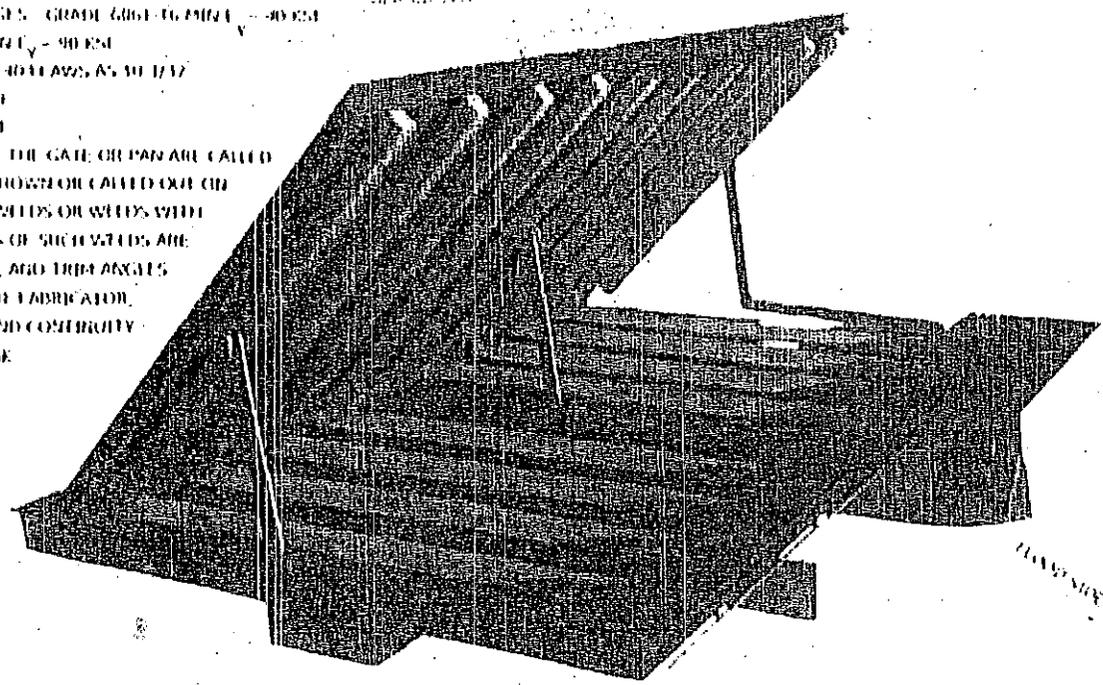
001160

1-D

NOTES:

- 1. FLOODGATE MATERIAL TO BE ALUMINUM AS FOLLOWS:
 GATE 5" X 2 1/2" EXTROUSIONS - GRADE 6061 T5 MIN. $F_y = 35 \text{ KSI}$
 GATE 2" X 2" X 1/16" THICKEN - GRADE 6061 T6 $F_y = 40 \text{ KSI}$
 PAN 1/4" THICK PLATE - GRADE 5052 H14 $F_y = 40 \text{ KSI}$
 FLAT BAR, ROUND BAR, STRUCTURAL ANGLES, CHISEL - GRADE 6061 T6 MIN. $F_y = 35 \text{ KSI}$
- 2. HINGE BOLTS TO BE STAINLESS STEEL - GRADE 304, MIN. $F_y = 90 \text{ KSI}$
- 3. ALUMINUM TO BE WELDED WITH ALUMINUM WIRE - PER AWS A5.10 (1977)
- 4. FLOODGATE TO BE 4000 PSI MINIMUM 20 DAY STRUCTURE
- 5. REINFORCING BARS TO BE A501 - 605 MIN. $F_y = 60 \text{ KSI}$
- 6. ALL WELDS REQUIRED FOR STRUCTURAL STRENGTH OF THE GATE OR PAN ARE CALLED OUT ON THESE DRAWINGS. ALL OTHER WELDING, NOT SHOWN OR CALLED OUT ON THESE DRAWINGS, ARE ESSENTIALLY NON-STRUCTURAL WELDS OR WELDS WITH NEGLECTABLE LOADS AND RESISTING STRESSES. EXAMPLES OF SUCH WELDS ARE AT SEAMS, Joints, STIFFENERS AND THROUGH THE PAN AND TRIM ANGLES OF THE GATE. THESE WELDS ARE TO BE SELECTED BY THE FABRICATOR, TAKING INTO CONSIDERATION ASSEMBLY, TRANSPORT AND CONVEYANCE REQUIREMENTS, AND MUST BE APPROVED BY FLDOR/HR/AAK.

NOTE: WINDU WALL FACTORY ID NOT SHOWN, INSTALLED BY C.F.

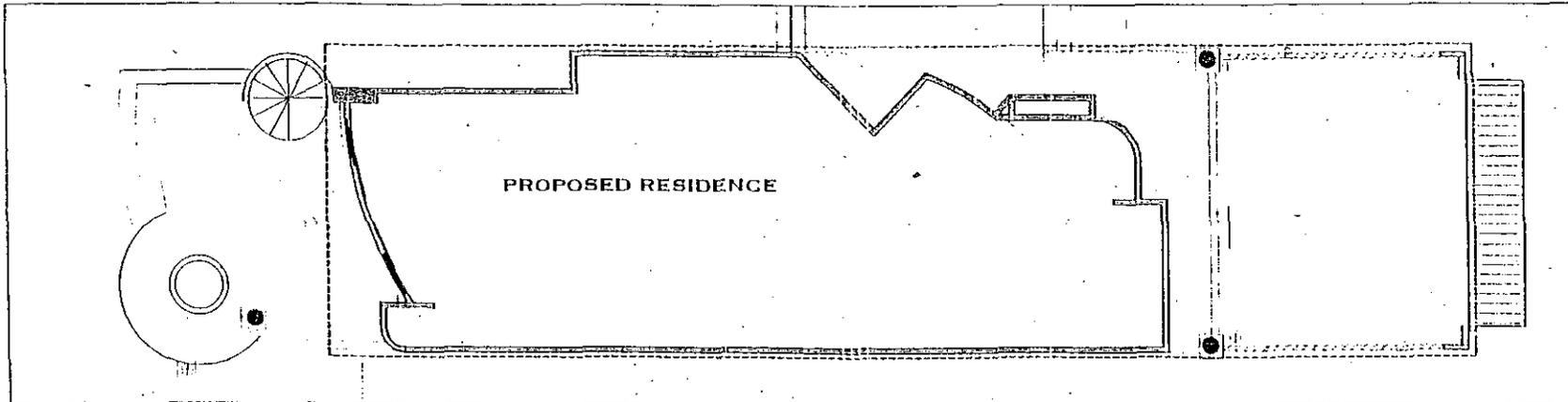


| | | |
|---|------------------------------|--|
| | CUSTOMER NAME WITH FIELD | |
| | "A" 0" X "C" 0" | |
| Revolutionary Flood Control <small>Advanced Technology - Proven Performance</small> | VERTICAL GATE 0000 | |
| | FLOODGATE SERIAL # 0000 | |
| <small>ALUMINUM FLOODGATE SYSTEM</small> | | <small>GENERAL PLANT WORK CENTER</small> |
| <small>DRAWN BY</small> CCB | <small>DATE</small> 03/20/00 | <small>SCALE</small> 1/8" = 1' |
| <small>BY</small> ADEN/HR/AAK | | |

NOTE: FLOODGATE VIEW MAY VARY BY EXACT DEPTH OF GATE

EXHIBIT 1-D

"FLOODGATE" BARRIER



PL

DRIVEWAY

INDICATES EXTENT OF FULL HEIGHT "FLOODPROOFING OF BAEMENT AND RETAINING WALLS TO 1'-0" ABOVE BASE FLOOD LEVEL 9.6

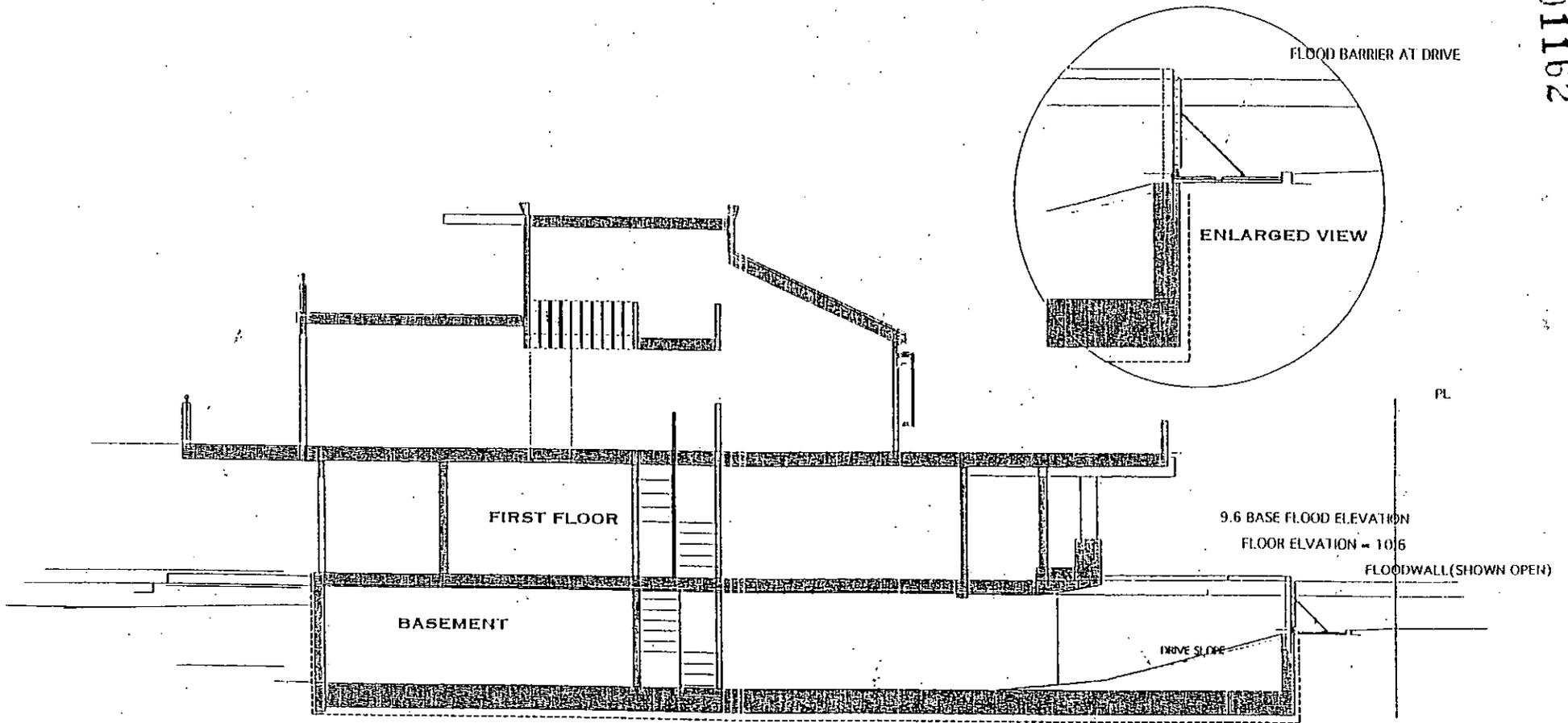
SITE

EXHIBIT 1-A

1A

001162

9.1

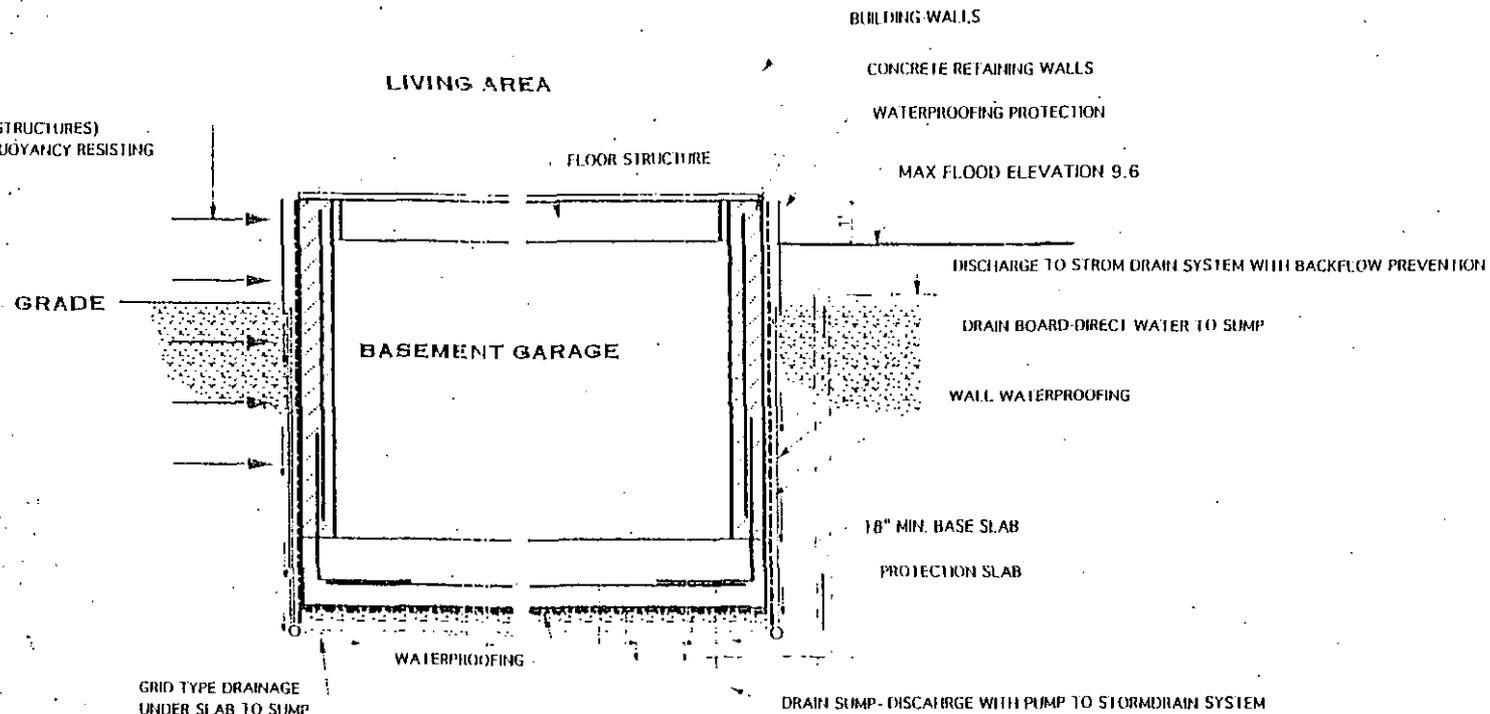


CROSS SECTION

FULL "FLOODPROOFING" OF BASEMENT PER SECTION 1-C

EXHIBIT 1-B

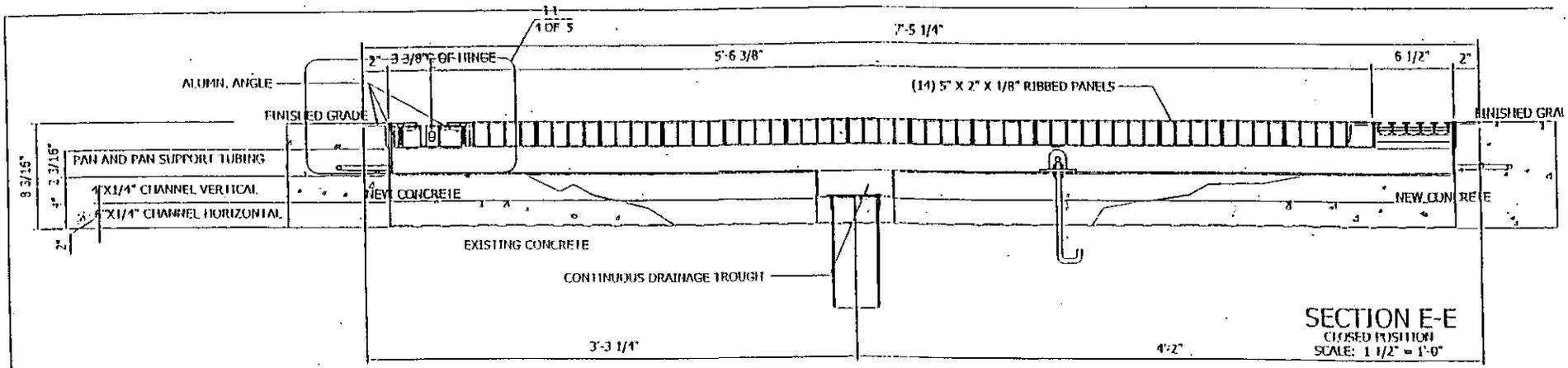
WALLS TO BE DESIGNED TO WITHSTAND SURCHARGE OF FLOOD WATER (FLOOD LOADS) PER IBC AND NFPA(2003), AND SEI/ASCE-7 (MINIMUM DESIGN LOADS FOR BUILDINGS AND OTHER STRUCTURES) AND FEMA BULLETIN 3-93AS TO HYDROSTATIC AND BUOYANCY RESISTING DESIGN



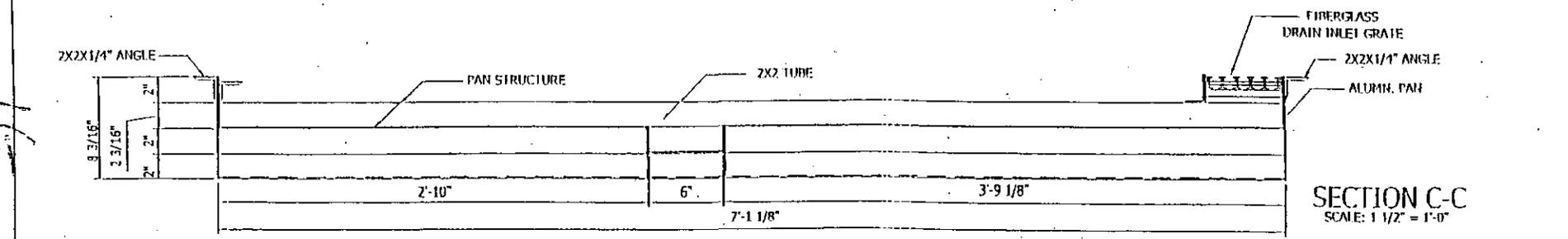
STEBBINS RESIDENCE
SCHEMATIC FLOOD PROOFING DESIGN (DRY FLOODPROOFING)
BASEMENT GARAGE

EXHIBIT 1-C

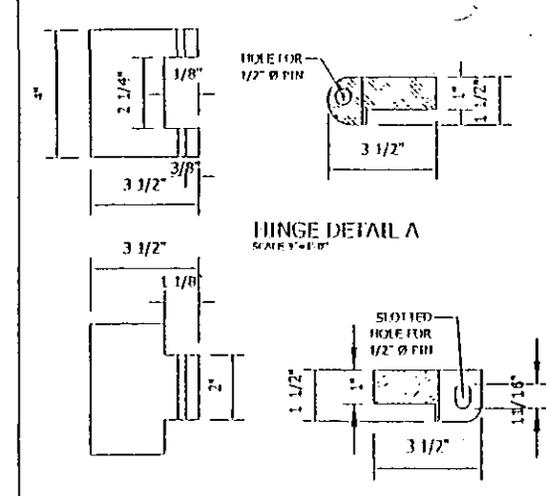
001165



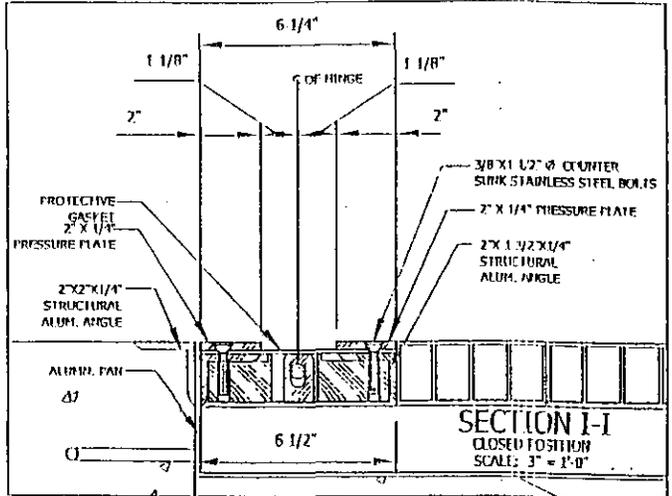
SECTION E-E
CLOSED POSITION
SCALE: 1 1/2" = 1'-0"



SECTION C-C
SCALE: 1 1/2" = 1'-0"

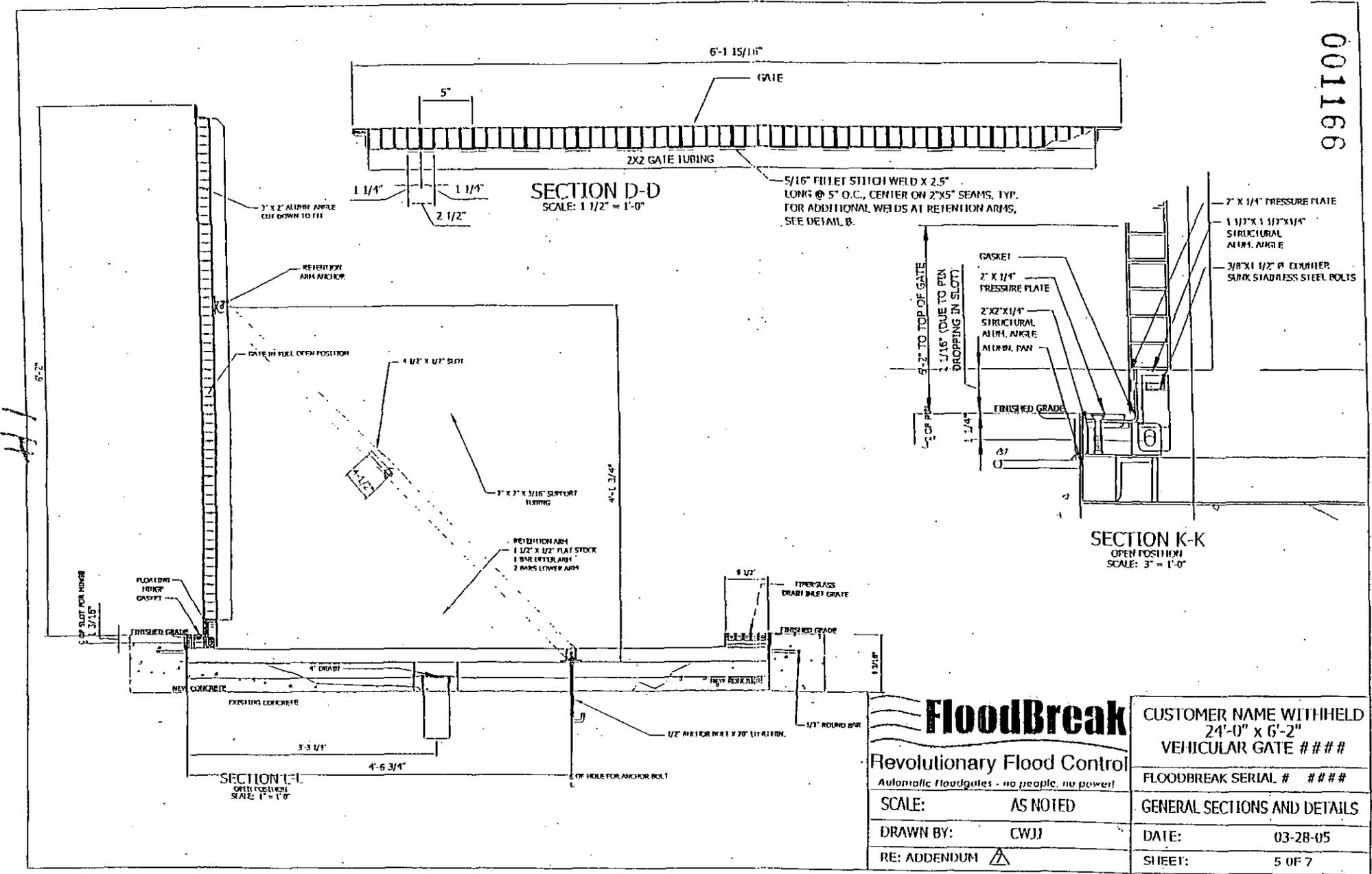


HINGE DETAIL A
SCALE: 3" = 1'-0"



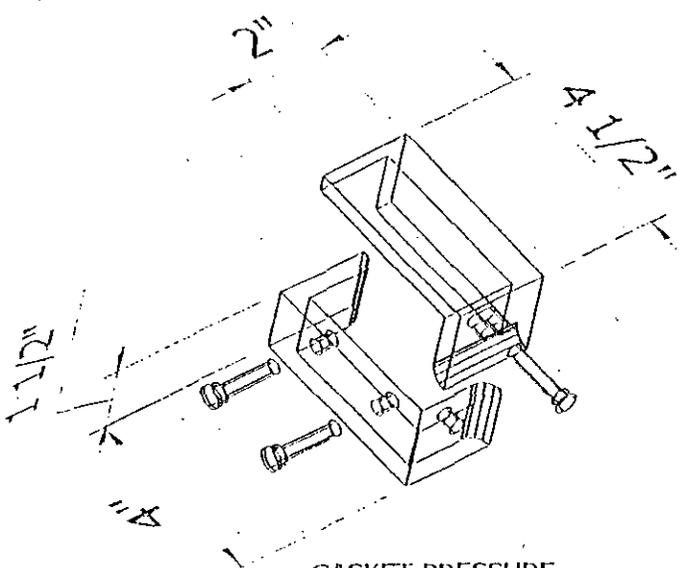
SECTION I-I
CLOSED POSITION
SCALE: 3" = 1'-0"

| | |
|---|--|
| | CUSTOMER NAME WITHHELD 24'-0" x 6'-2" VEHICULAR GATE ### |
| | FLOODBREAK SERIAL # ### |
| Revolutionary Flood Control Automatic Floodgates - no people, no power! | GENERAL SECTIONS AND DETAILS |
| SCALE: AS NOTED | DATE: 03-28-05 |
| DRAWN BY: CWJJ | SHEET: 4 OF 7 |
| RE: ADDENDUM | |

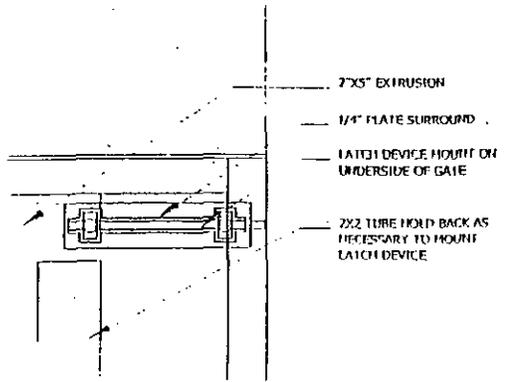


| | |
|---|--|
| | CUSTOMER NAME WITHHELD 24'-0" x 6'-2" VEHICULAR GATE ### |
| | FLOODBREAK SERIAL # ### |
| Revolutionary Flood Control <i>Automatic floodgates - no people, no power!</i> | GENERAL SECTIONS AND DETAILS |
| SCALE: AS NOTED | DATE: 03-28-05 |
| DRAWN BY: CWJJ | SHEET: 5 OF 7 |
| RE: ADDENDUM | |

001167

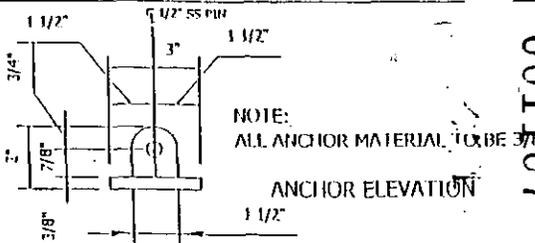
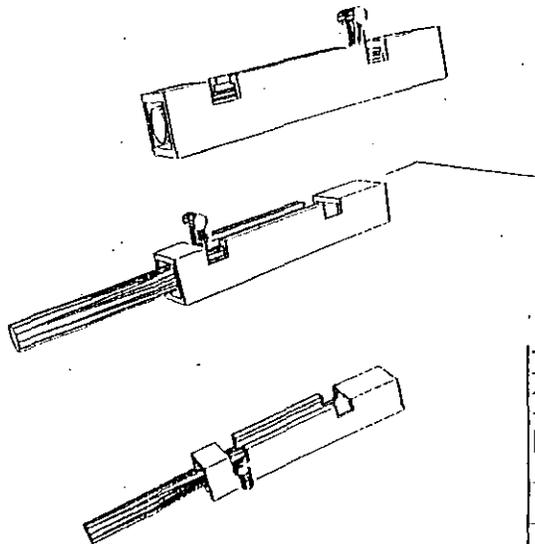


GASKET PRESSURE BRACKET
SCALE: N.T.S.



SURFACE MOUNTED LATCH
SCALE: 3" = 1'-0"

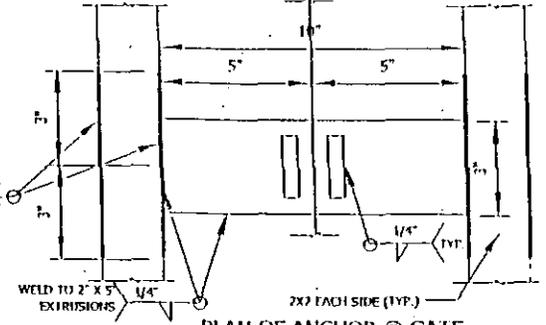
- 7x5" EXTRUSION
- 1/4" PLATE SURROUND
- LATCH DEVICE MOUNT ON UNDERSIDE OF GATE
- 2X2 TUBE HOLD BACK AS NECESSARY TO MOUNT LATCH DEVICE



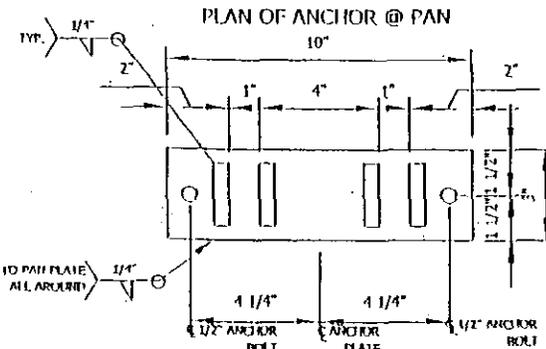
NOTE: ALL ANCHOR MATERIAL TO BE 304 SS

ANCHOR ELEVATION

6" LONG WELD TO 2" X 5" EXTRUSIONS, EACH SIDE EACH 2" X 2" CENTER ON 3" WIDE PLATE, TYP. AT ALL RETENTION ARMS. SIMILAR AT PAN.



PLAN OF ANCHOR @ GATE



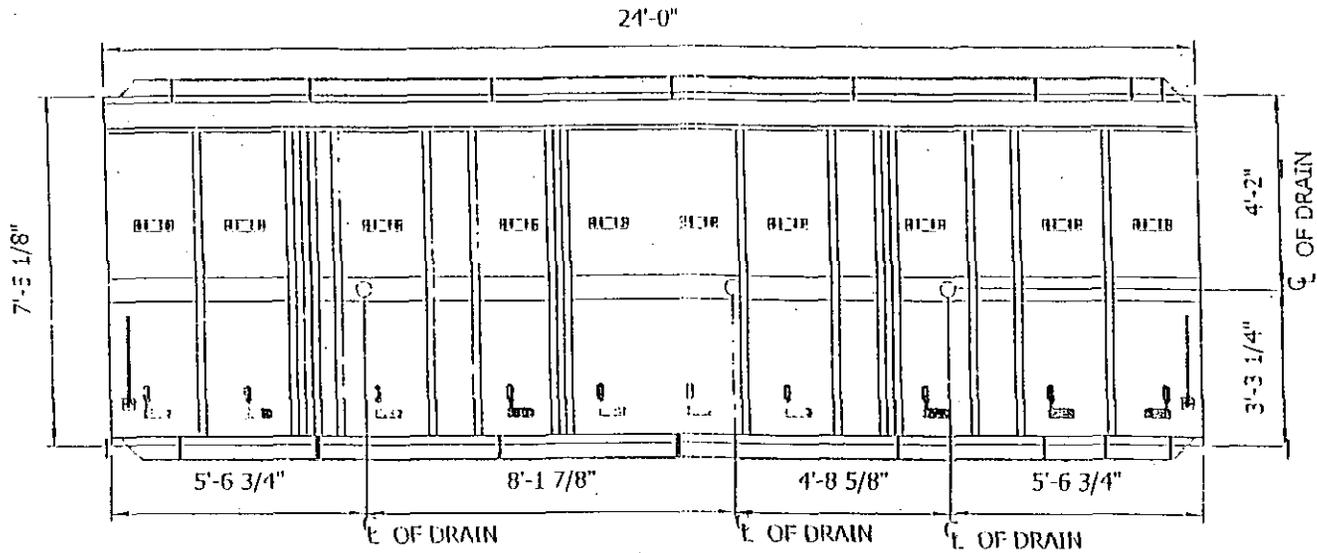
PLAN OF ANCHOR @ PAN

DETAIL B - RETENTION ARM ANCHORS
SCALE: 3" = 1'-0"

FloodBreak
 Revolutionary Flood Control
Automatic floodgates - no people no power
 SCALE: AS NOTED
 DRAWN BY: CWJJ
 RE: ADDENDUM

| | |
|------------------------------|-----------------------------------|
| CUSTOMER NAME WITHHELD | 24'-0" x 6'-2" VEHICULAR GATE ### |
| FLOODBREAK SERIAL # | ### |
| GENERAL SECTIONS AND DETAILS | |
| DATE: | 03-28-05 |
| SHEET: | 6 OF 7 |

001168



PAN AND DRAIN LAYOUT
SCALE 1/2"=1'-0"

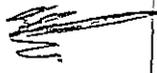
| | |
|--|---|
|  FloodBreak Revolutionary Flood Control <i>Automatic floodgates - no people, no power</i> | CUSTOMER NAME WITHHELD 24'-0" x 6'-2" VEHICULAR GATE #### |
| | FLOOBBREAK SERIAL # #### |
| SCALE: AS NOTED | PAN PLAN LAYOUT AND SECTION |
| DRAWN BY: CWJJ | DATE: 03-28-05 |
| RE: ADDENDUM  | SHEET: 7 OF 7 |

001169

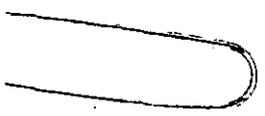
~~P~~



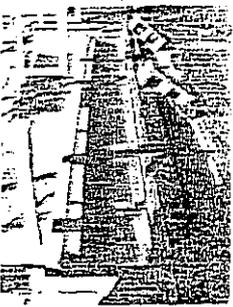
FLOODGATE DOWN
NOTE DECOMMISSION FACIE



~~P~~



~~P~~



IK

Shows in
Applicant Exhibit
1B

FLOODBREAK

Floodbreak is a flood barrier that automatically rises in times of flooding to protect your property. It can be placed in front of any opening and be designed for any flood water level.

Floodbreak resembles a hinged box that is recessed into the ground in front of the opening. Because it is recessed, it lays completely flat to the surrounding area, allowing unrestricted access at all times. It has been engineered for extreme loads. Example: Floodbreak is able to withstand the weight of a fully loaded truck driving over it. The top of the barrier can be covered with almost any finish material, making it blend in with the surrounding areas.

The greatest attribute of this product is that the flood water makes it work.

There is no human or electrical input needed for this system to operate. Its operation is very simple.

The recessed box is attached to the local storm drainage system, which allows normal rain accumulation to simply drain away. When the storm drain systems have filled up, the box can no longer drain and water starts to accumulate.

As the water rises in the box, the buoyancy of the lid starts to lift the barrier. Rubber flanges on the sides and at the hinge prevent water from passing around the barrier. The barrier will rise with the water and will lower as the water recedes.



001173

FLOOD BARRIER PROJECT LIST

(FLOOD BARRIER SHOWN IN EXHIBIT 1712)

001175



Unlimited Applications, Inc

7077 Southwest 46th Street • Miami • Florida • 33133
Phone (305) 663-9333 • C.C. 93BS00433 • Fax (305) 663-0603

UA PROJECT LIST

www.floodbarrier.com

Here is a list of some of our flood barrier projects completed (over \$ 5,000.00). If you need a complete list of all our projects, please let me know. You will notice that our this list shows a mix of new construction and retrofits. Most of the contractors listed are well know and established.

Project: Williams & Sonoma
Address: 1035 Lincoln Road
Miami Beach, Florida

Contractor: Fisher Development
1485 Bayshore Drive
San Francisco, California

Project: Portofino Retail Space
Address: 500 South Pointe Drive
Miami Beach, Florida

Contractor: Fisher Development
1485 Bayshore Drive
San Francisco, California

Project: BeBe Clothes
Address: 1025 Lincoln Road
Miami Beach, Florida

Contractor: Groden Stamp Construction
65 N.W. 168th Street
N. Miami Beach, Florida

Project: Eastview Hotel
Address: 1516 Washington Avenue
Miami Beach, Florida

Contractor: Groden Stamp Construction
65 N.W. 168th Street
N. Miami Beach, Florida

Project: Portofino Office Center
Address: 404 Washington Avenue
Miami Beach, Florida

Contractor: Miller Solomon Construction
8491 N.W. 17th Street
N. Miami, Florida

Project: Pottery Barn
Address: 1045 Lincoln Road
Miami Beach, Florida

Contractor: Fisher Development
1485 Bayshore Drive
San Francisco, California

Project: Quittner Building
Address: 532-543 Lincoln Road
Miami Beach, Florida

Contractor: Groden Stamp Construction
65 N.W. 168th Street
N. Miami Beach, Florida

Project: Polo Sport
Address: 740 Collins Avenue
Miami Beach, Florida

Contractor: Groden Stamp Construction
65 N.W. 168th Street
N. Miami Beach, Florida

Project: Club Monaco Clothiers
Address: 624 Collins Avenue
Miami Beach, Florida

Contractor: Groden Stamp Construction
65 N.W. 168th Street
N. Miami Beach, Florida

Project: 711 Retail Space
Address: 711 Washington Avenue
Miami Beach, Florida

Contractor: Ragosa Engineering
46 N.W. 36 Street
Miami, Florida

(FLOOD SAMPLER IN (2))

001176

Project: Geophora Shop
Address: 721 Collins Avenue
Miami Beach, Florida

Contractor: Spectrum Builders
1231 S.W. 132 Court
Miami, Florida

Project: Nathan Rainer Building
Address: 1026-36 Lincoln Road
Miami Beach, Florida

Contractor: DA Construction
1551 N.W. 82nd Avenue
Miami, Florida 33126

Project: Stanley Meyers Clinic
Address: 1221 71st Street
Miami Beach, Florida

Contractor: Pino-Fonticiella Construction
1140 W. Flagler Avenue
Miami, Florida

Project: Ameritrust Bank
Address: 447 41st Avenue
Miami Beach, Florida

Contractor: Glace & Company
1006 N. Federal Highway
Lake Worth, Florida

Project: Ballet Villet Parking & Shops
Address: 700 Block Collins Avenue
Miami Beach, Florida

Contractor: Goldman Properties
804 Ocean Drive
Miami Beach, Florida

Project: Multi-Use Building
Address: 763 Collins Avenue
Miami Beach, Florida

Contractor: Goldman Properties
804 Ocean Drive
Miami Beach, Florida

Project: Alton Road Retail Center
Address: 1570 Alton Road
Miami Beach, Florida

Contractor: Art Construction Company
349 Greco Avenue
Coral Gables, Florida

Project: City National Bank
Address: 475 41st Street
Miami Beach, Florida

Contractor: Waas, Phillips, Adler
1400 N.W. 107th Avenue
Miami, Florida

Project: West Avenue Parking Garage
Address: 1000 West Avenue
Miami Beach, Florida

Contractor: Whiting Turner Construction
1000 Corporate Drive
Fort Lauderdale, Florida

Project: Atlantic Center
Address: 119 Washington Avenue
Miami Beach, Florida

Contractor: Buildtech, LLC
407 Lincoln Road
Miami Beach, Florida

Project: Biscayne Village
Address: 1901 Biscayne Blvd.
Miami, Florida

Contractor: Chase Construction
8491 N.W. 17th Street
Miami, Florida

Project: Home Depot
Address: 4000 Route # 4
Keene, New Hampshire

Contractor: R.L. Spencer
222 Highbridge Street
Fayetteville, North Carolina

Project: Bayshore Golfcourse
Address: 2500 Bayshore Drive
Miami Beach, Florida

Contractor: Tran Construction
505 Lincoln Road
Miami Beach, Florida

Project: Minute Man, Inc
Address: 804 S. Redding Road
Birmingham, Alabama

Contractor: Oil Equipement Company
555 South Avenue, #4
Birmingham, Alabama

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(Shown in IB)

Project: Rivertowne Country Club
Address: 8555 Rivertowne Road
Mount Pleasant, North Carolina

Contractor: Centex Construction
3001 Rivertowne Parkway
Mount Pleasant, North Carolina

Project: The Shops At South Beach
Address: 500 Collins Avenue
Miami Beach, Florida

Contractor: Suffolk Construction
515 N. Flagler Road
West Palm Beach, Florida

Project: The Ratner Building
Address: 1023-1036 Lincoln Road
Miami Beach, Florida

Contractor: Groden Stamp Construction
65 N.W. 168th Street
N. Miami Beach, Florida

Project: Reyos Del Sol
Address: 185 N.W. 13th Avenue
Miami, Florida

Contractor: Deiant Construction
7380 N.W. 77th Court
Miami, Florida

Project: War Veteran's Field House
Address: 556 Route 856
Huntington, Pennsylvania

Contractor: Poole Anderson Construction
Box 576
Huntington,

Project: Levi Shop
Address: 825 Collins Avenue
Miami Beach, Florida

Contractor: Brodson Construction
167 NE 39th Street
Miami, Florida

Project: Vip Honda
Address: North Plainfield, NJ
Downtown

Contractor: One Key Construction
Brooklyn, NY

Project: Outback Steakhouse
Address: Clearwater Beach Road
Clearwater, Florida

Contractor: Venture Construction
15 N. Falkenberg Road
Tampa, Florida

Project: The Cosmopolitan
Address: 122 Washington Avenue
Miami Beach, Florida

Contractor: Suffolk Construction
515 N. Flagler Road
West Palm Beach, Florida

Project: Summit Brickell
Address: 1200 S. Miami Avenue
Miami, Florida

Contractor: Bovis Lend Lease
1200 S. Miami Avenue
Miami, Florida

Project: Ballast Pointe Park
Address: 1500 Interbay Drive
Tampa, Florida

Contractor: La Chase Construction
1025 Oak Avenue
Tampa, Florida

Project: The Solara Spa & Resort
Address: 8801 Collins Avenue
Miami Beach, Florida

Contractor: Welbro Construction
800 Trafalgar Court
Orlando, Florida

Project: Mary Brickell Village
Address: South Miami Ave.
2nd Street, Miami

Contractor: Bovis Lend Lease
1200 S. Miami Avenue
Miami, Florida

Project: Met One
Address: 100 Biscayne Blvd.
Downtown Miami

Contractor: Suffolk Construction
515 N. Flagler Road

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West Palm Beach, Florida

Project: Il Lugano
Address: 333 NE 32nd Avenue
Fort Lauderdale, FL 33308

Contractor: Moss and Associates
228 SE 12th Avenue
Ft. Lauderdale, FL 33301

Project: The Meridian
Address: 2000 Meridian Ave.
Miami Beach, FL 33139

Contractor: Kauffman Lynn
2151 N.W. Boca Raton Blvd.
Suite 100
Boca Raton, FL 33431

Project: Seybold Pointe Condominium
816 N.W. 11th Street

Contractor: Delant Construction
7380 N.W. 77th Court
Miami, Florida 33165

Project: Sea Forest Beach Club
Address: Exercise Room
New Port Richie, Florida 34652

Contractor: Quality Reconstruction
5600 Sea Forest Drive
New Port Richie, Florida 34652

Project: Telefutura Television Station
Address: 145 NW 89th Place
Miami, FL 33166

Contractor: J.E Gamas
4241 Palm Lane
Miami, Florida 33147-3346

Project: Brac Informatics Centre
Address: 2100 Island Drive
Cayman Brac, Cayman Islands

Contractor: Brac Informatics Centre
2100 Island Drive
Cayman Brac, Cayman Islands

Project: Digital Process Center
13525 N.W. 25th Street
Miami, FL 33165

Contractor: J.E Gamas
4241 Palm Lane
Miami, Florida 33147-3346