

SECTION 15: ENFORCEMENT AND RECORDS

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Note: The floodplain administrator cannot assume that construction and development will proceed as spelled out in the approved permit. This section covers the inspections that are needed to verify compliance and the possible enforcement steps that may need to follow to bring the property into compliance. It ends with the records that are needed to document that all was done right (or be used to show that it wasn't).

15.1. INSPECTIONS

Follow-up conversations and inspections are vital to ensure that the applicant adheres to the permit's requirements. Taking a hands-off attitude toward construction can create many problems for both the project's owners and the community.

The most effective way to ensure compliance is to inspect the site frequently during construction. This is particularly important in the early phases of work on a building because that is when errors in location or elevation of the lowest floor can be found and corrected. An inspection program also puts builders, developers, and property owners on notice that the community will insist that projects are completed in compliance with regulations.

A series of three inspections for every project is recommended, especially any project that involves construction of a building.

15.1.1. First inspection

This inspection should be done before ground is broken. Ideally, this site visit should be after the site is staked out to check the plans in relation to the ground and lot boundaries. The site as identified on the proposed plans must be consistent with actual ground conditions.

The following should be checked:

- The location of the floodplain and floodway boundaries.
- Setbacks from lot lines, channel banks, etc.
- Floodway encroachments, if applicable.

If the building, filling, etc., as staked out are in violation of the approved plans or of the ordinance requirements, the developer must be notified to make revisions. The project must not be allowed to proceed until the administrator has gone back and verified that it is in compliance.

15.1.2. Second inspection

The second inspection of a project involving a new building or addition to a building should be scheduled just before installation of the lowest floor. The administrator needs to ensure that the lowest floor will be built at the height stipulated in the permit application and that the foundation is the type specified in the plans.

The type of foundation dictates the inspection schedule:

- If the building is on a slab foundation, the inspection is best done when the forms are placed. The administrator can check the proposed floor elevation by checking the elevation of the top of the forms. Pouring the slab can be approved if the forms are high enough.
- If the building is on an elevated foundation (crawl space, piles, etc.), the inspection is best done when the foundation is completed. If the top of the foundation is high enough, the placement of the floor can be approved. It should be verified that the crawl space floor is higher than the lowest adjacent grade, or the area will be considered a basement under NFIP rules.
- If the building is to be floodproofed and the floodproofing technique is easy to identify — such as a reinforced concrete stem wall up to the FPE — this inspection should be conducted when that portion of the project is completed.

Making sure a structure is properly elevated is the key to the entire regulatory process. If this doesn't happen, the permit process is a wasted effort. Therefore, an inspection at the point of initial construction, where changes to the height of the foundation can be made without major difficulty, is best. Once the foundation is poured or laid, it can be very expensive for the property owner to change the building location or the elevation of the lowest floor.

Checking elevations

The floor elevation at this stage can be confirmed in one of two ways. First, the builder can submit a survey of the floor elevation. This survey must be done by a surveyor or engineer.

The second way is to have the floodplain administrator check the elevation:

- Before construction or sometimes as part of the first inspection, the developer's surveyor or the community's engineer can shoot an elevation reference mark to a nearby stationary object such as a tree or telephone pole. The mark should be at the same elevation as the height to which the lowest floor should be elevated.
- During the second inspection, a hand level is used to determine whether the lowest floor will be as high as the reference mark. This will give a rough estimate that the building will be close to the correct elevation. A hand level will not give accurate elevations so, if there is any doubt, a survey should be obtained.

Note: Neither approach relieves the builder of having to provide an as-built elevation or floodproofing certificate when the project is done. This elevation check simply verifies that the building will be elevated or floodproofed to the proper elevation before it is too late to make changes.

During the second inspection, the following should also be checked:

- Whether any fill meets the necessary compaction, slope, and protection standards contained in the local regulations.
- Whether the building's location matches the permit application plans.
- The number and size of crawlspace or enclosure openings.
- Whether any part of the project encroaches into the floodway.

15.1.3. Third inspection

The third and last inspection is conducted as the project nears completion. The purpose of this "final" inspection is to:

- Ensure that the foundation and floor elevation has not been altered since the second inspection.
- Check the submitted as-built elevation or floodproofing certificate with actual conditions.
- Verify that enclosures below the lowest floors have adequate openings.
- Ensure that nothing subject to flood damage, such as a furnace or air conditioning unit, has been located below the lowest floor.
- Check for floodway encroachments. If an IDNR permit was issued, make sure the construction is in compliance with the permit.
- Check the anchoring system used in securing manufactured homes.
- Obtain photographs to document compliance. Retain the photographs in the permit file. These photographs can be useful if the property owner later makes alterations to the building without obtaining permits. Be sure to document the date and circumstances under which the photographs were taken.

Certificate of occupancy: After the project passes final inspection, many communities issue a document called a certificate of occupancy, certificate of compliance, or use permit.

This certificate allows the owner to move in to the newly constructed building or addition. Usually a new building cannot be sold until the seller has this certificate. Some utility companies will not start service until the certificate is presented. Therefore, if the project does not comply with the permit requirements, withholding the certificate of occupancy can prevent the owner from using or occupying the building.

Before a certificate is completed, the floodplain administrator must make sure that all needed documents are received and checked. An elevation certificate is required along with the other forms noted in Section 15.4.

15.1.4. Compliance/Later inspections

Certifying a structure for occupancy is the final step in the permit process. However, the property must remain in compliance with the local ordinance and the conditions under which the permit was issued.

The floodplain administrator's office should periodically check to ensure that the property continues to remain in compliance over time. Later inspections are particularly important when a structure contains an enclosure below the lowest floor. Such areas can be easily modified and made into habitable spaces in violation of regulations.

In some cases, the administrator can issue a permit or certificate of occupancy with the condition that the community is allowed to make future inspections. Check with the community's attorney on appropriate language.

15.1.5. Post-damage inspection

After a flood, fire, tornado, or other natural or man-made damage, the community has an obligation to inspect floodplain buildings. The floodplain administrator should move quickly as most homeowners are quick to begin their repairs. Flyers should be distributed during this inspection, letting property owners know what type of repair work requires a building permit.

The floodplain administrator must determine if the structure has been "substantially damaged." In general, if the flood crested 2 feet above a building's adjacent grade, the administrator should carefully check the building's damage.

For additional information on post-damage inspections, see Section 19 on disaster operations.

15.2. ENFORCEMENT ACTIONS

Adequate, uniform, and fair enforcement means two things:

1. all development in a floodplain must have a permit, and
2. all development with a permit must be built according to the approved plans.

In order to ensure that development is meeting these requirements, the administrator must monitor the floodplain and, where necessary, conduct an inspection of a property. The floodplain administrator should be sure to review his or her authority to gain access onto private property with the community's attorney.

If development activities without permits or contrary to the approved plans are discovered, the floodplain administrator must enforce the ordinance. There are several methods for enforcing the ordinance. This section explores these methods.

15.2.1. Voluntary compliance

The best approach is to convince the developer or property owner that complying with the ordinance is in his or her own best interest. This may take some explanation of the flood hazard and how the rules protect the property (or neighboring properties) from that hazard.

If the issue is protection of a building, the flood insurance rate table in Section 17 can show how expensive insurance could be. Even if the developer or the current property owner is not interested in flood insurance, future owners may want it and probably will be required to purchase it as a condition of a mortgage or loan. Expensive flood insurance may make the building very difficult to sell.

Should voluntary efforts not work, here are the other compliance tools.

15.2.2. Administrative steps

The first steps in enforcement involve what the floodplain administrator can do as an ordinance administrator. The following should be reviewed with the community's attorney before starting:

- Contact the property owner or building contractor in person or by telephone to explain the concerns. A deadline should be given to respond to the concerns.
- Follow up by notifying the property owner in writing (preferably via certified mail).
- Post a violation notice on the property.

If a problem is found during construction of a permitted project, the floodplain administrator has additional tools:

- If the violation is a serious one, or if the problem still exists after a follow-up inspection, the floodplain administrator can issue a stop-work order or revoke the permit.
- The certificate of occupancy can be withheld until the problem is corrected. Usually utilities will not be turned on or a bank loan will not be closed until the certificate of occupancy is issued.
- The floodplain administrator can request a Section 1316 denial of flood insurance (see Section 15.3.8).

15.2.3. Help

Help in dealing with violations is often available from other sources. The first point of contact can be IDNR. In 1997, IDNR published *Floodplain Compliance Manual*, which has guidance on pursuing violations and example citations. In addition, staff will work with local officials to determine the best way to deal with a particular violation and to provide expert advice.

If the project is in a floodway (or a floodplain where no floodway has been mapped), construction without an IDNR permit may be a violation of State law. If the project is in a wetlands area,

development without a Corps of Engineers permit may be a violation of Federal law. The administrator should contact IDNR and the Corps to ascertain whether the project is a violation. If so, discuss mutual enforcement actions. It is important that IDNR and FEMA are kept apprised of the problems and progress. IDNR and FEMA staff can assist in pursuing a violation.

If a pattern of a lack of enforcement is found during a Community Assistance Visit, FEMA may consider one of the compliance actions discussed in Section 3. Floodplain administrators need to show that they are doing more than relying only on Section 1316.

15.3. LEGAL RECOURSES

15.3.1. Coordination with the attorney

If the administrative measures do not bring results, the floodplain administrator should go back to the community's attorney and discuss the next steps. Generally, the attorney will write a letter, listing the violations and how the owner can comply.

The administrator can help the attorney by having complete records of all correspondence and meetings with the person accused of the violation and dated photographs showing the violation. The administrator should also identify what section of the ordinance was violated, when, how, and what was specifically allowed in the approved permit.

The administrator should advise the attorney about what actions can be taken that will bring the project into compliance. Depending on the violation, these actions could include removing the building (or other project), retrofitting the building to protect it, applying for a variance, or revising the maps to remove the problem from the floodplain or floodway.

If the letter does not bring compliance, the attorney can take the case to court and request that additional enforcement measures be brought to bear.

15.3.2. Penalty clause

A requirement of participation in the National Flood Insurance Program (NFIP) is that the community's ordinance must be enforceable. Generally, this means that there is a penalty for violating the ordinance's provisions.

CFR 44 Section 59.2(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.*

The FEMA and IDNR model ordinances have suggested wording for a penalty clause for local ordinances. It is probably the same language as in most community's regulations. This language gives the community and the attorney the authority to pursue a penalty for violations of the ordinance. All floodplain administrators should review his/her ordinance to make sure a penalty clause exists.

15.3.3. Fine

The ordinance should establish a maximum fine per offense. The State model ordinance has a minimum fine of \$20 per day and a maximum fine of \$750 per day. Usually each day a violation continues is considered a separate offense. This approach encourages a quick remedy to the problem. Some communities double the fee for violating the ordinance if construction was begun without a permit.

A per-day fine for a summary offense from a local district justice or magistrate can be difficult to get because many courts believe that such a severe financial penalty does not fit the infraction. However, the threat of seeking the fine may be sufficient to persuade a property owner to remedy the violation.

15.3.4. Recordation

Depending on the ordinance's authority, the floodplain administrator may be able to record the violation in the property's deed records. This will inform potential purchasers as well as "cloud the deed," making it hard for the owner to sell the property or the buyer to obtain title insurance. This approach is more appropriate for new developments that are likely to be sold in the near future.

15.3.5. Injunction

An injunction is a court order to stop further noncompliant conduct. A temporary restraining order will be issued if the activity can be shown to be a danger to the public and that immediate irreparable harm can occur.

15.3.6. Housing court

Dealing with the judicial system can be expensive and difficult. A case has to wait its turn and compete with many cases for attention.

To speed up the enforcement process, some communities enact special enforcement ordinances to create a municipal housing court or a building court. This is a local judicial body that has several advantages:

- The judge or administrative judge will be familiar with housing or building code law.
- The community has more control over when cases will be heard.
- Such courts usually are less formal. For example, the defendant may not need to have an attorney present.

15.3.7. Tickets

Some communities in Illinois have begun using the housing court and citation or "ticket" approach for enforcing local zoning violations. This approach may also be used to enforce floodplain regulations if the floodplain management ordinance is based on the zoning authority.

This enforcement system would mirror local zoning enforcement techniques that already exist in the community. The Illinois Municipal Code (5/11-13-3) allows cities and villages to appoint enforcement officers who shall enforce ordinances. The Code further states that a board of appeals shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of any ordinance. Counties have similar authority.

This language means that the enforcement officer can issue citations or tickets. As for a board of appeals, if the municipality already has a zoning board, it can use that system and procedure to hear floodplain violations. As an alternative, the Code also permits municipalities to delegate hearings to a hearing officer who can hear and decide appeals from the citations.

Once the citation is issued, the person charged may appeal the citation to the board or the hearing officer, whichever system the community uses. The appeal shall be taken within 45 days of the action complained of by filing a notice of appeal with the officer in charge of receiving such notice.

The appeal must specify the grounds for appeal. There is no set time period in which the board or officer must hear the appeal, however, the Code requires that a reasonable time be fixed. Moreover, “due notice” must be given to the parties once the appeal will be heard and a decision must be rendered within a reasonable time. Once the board or the hearing officer has made a finding, it will constitute a final administrative decision which is subject to judicial review.

If the floodplain ordinance is based on the building code statutory authority, municipalities with a population over 100,000 can use a Code Hearing Department as per 5/11-31.1-2 of the Illinois Municipal Code. Under this system, when a building inspector finds a violation, he or she issues a multiple copy violation notice and forwards one copy to the violator and one to the Hearing Department.

A hearing date is set which shall not be less than 30 nor more than 40 days after the violation is reported. At the hearing, a hearing officer presides but the strict rules of evidence do not apply. The hearing officer’s finding is also subject to judicial review.

Finally, there are limits on the types of sanctions which can be imposed for violations. The Municipal Code states that no fine or penalty shall exceed \$500 and no imprisonment shall exceed 6 months for one offense. (However, each day a violation is in place is considered a separate offense.) Check with the attorney before discussing imprisonment.

15.3.8. Section 1316

Section 1316 of the National Flood Insurance Act authorizes FEMA to deny flood insurance on a property declared by a State or community to be in violation of their floodplain management regulations.

Section 1316 is used when all other legal means to remedy the violation have been exhausted and the structure is still noncompliant. Section 1316 is a way the NFIP can support communities in the enforcement of their ordinances. Check with IDNR or the FEMA Regional Office on how Section 1316 has been used.

If invoked under Section 1316, denying flood insurance means:

- Insurance coverage will be terminated as of the date FEMA issues the Section 1316 declaration letter.
- No new or renewal policy can be issued on the property.
- No claim can be paid on any policy on the property, even if one is inadvertently issued or renewed.
- The property may be difficult or impossible to sell.
- The market value of the property may fall.
- The cost of suffering flood damage without insurance may be too great a risk for the property owner.
- Lending institutions holding the property's mortgage may threaten to foreclose.
- Any permanent reconstruction will be denied disaster assistance.

In some cases a Section 1316 insurance denial will be sufficient to convince the property owner to correct the violation. Section 1316 also has the advantage of limiting any taxpayer liability if the building is damaged by a flood, as the owner will be ineligible for an insurance claim or disaster assistance.

Section 1316 is designed to supplement enforcement work, not replace it. The floodplain administrator needs to continue enforcement work to bring the violation into compliance.

If a structure that has received a Section 1316 declaration is made compliant with the community's floodplain management ordinance, then the Section 1316 declaration can be rescinded by the community and flood insurance eligibility restored.

Declaration: The declaration itself must be in writing, from the community to the FEMA Regional Office. It must include at least the five items depicted in 44 CFR 73.3 (d).

44 CFR § 73.3(d) *A valid declaration shall consist of:*

- (1) The name(s) of the property owner(s) and address or legal description of the property sufficient to confirm its identity and location;*
- (2) A clear and unequivocal declaration that the property is in violation of a cited State or local law, regulation or ordinance;*
- (3) A clear statement that the public body making the declaration has authority to do so and a citation to that authority;*
- (4) Evidence that the property owner has been provided notice of the violation and the prospective denial of insurance; and*
- (5) A clear statement that the declaration is being submitted pursuant to section 1316 of the National Flood Insurance Act of 1968, as amended.*

If the community has a procedure for issuing a formal citation for violations, and if the citation includes all five of the components listed above, the citation can serve as a valid declaration. If such a procedure does not exist, then a letter from the appropriate authorized official to the property owner and FEMA that contains all five of the components listed above will constitute a valid declaration. Citations containing ambiguous language cannot be accepted for purposes of Section 1316.

15.4. RECORDS

Records show what was approved and what was told to the developer, forming a “paper trail” needed for administrative or legal proceedings related to development projects. Such records are vital if the project violates the ordinance. They also give future owners information about the property.

Records are also checked by FEMA or IDNR to determine if the community is in full compliance with the NFIP.

This section reviews what records must — or should — be kept to meet the community’s obligation to the NFIP.

15.4.1. Permit file

A community should have a permit record system that is keyed to a geographical identifier (not just a building permit number) such as: street address, subdivision, lot and block number, township, section and range, or county assessor’s property ID number.

A file should be kept for each permit application. The files should have some indicator on the folder to show that it is a floodplain permit, such as a different color file folder or file label.

Permit files should contain copies of these items, as appropriate:

- The permit application form and all attachments, including the site plan.
- All correspondence pertinent to the project.
- Floodplain and floodway data prepared by the developer.
- Engineering analyses of floodway encroachments and watercourse alterations.
- Special engineering designs for enclosures below the FPE.
- Any variances or appeals proceedings.
- Records of inspections of the project while under construction.
- Documentation of the “as-built” lowest floor elevation of all new and substantially improved buildings.
- Certification of the elevation to which any nonresidential building has been flood-proofed.
- Certificates of compliance or occupancy.

Keeping these records is a requirement to participate in the NFIP; there is no statute of limitations as to how long they should be kept. The administrator may want to keep a separate log, record, or file of floodplain permits so those files can be retrieved to show FEMA or the IDNR staff.

It is not necessary to keep the entire building plans and other documents longer than is required for local code purposes. However, here are some reasons to keep floodplain permit materials for as long as possible:

- If the community allows below-FPE enclosures, the floodplain administrator will need the approved ground floor plans in case of future violation issues.
- If a flood insurance ‘submit-to-rate’ issue arises, the floodplain administrator has to be able to show whether the building was originally built according to regulations.
- Communities in the Community Rating System must keep and make available elevation and floodproofing certificates.

15.4.2. Elevation certificate

The permit file needs an official record that shows how high new buildings and substantial improvements were elevated. This is needed both to show compliance with the ordinance and for the owner to obtain a flood insurance policy.

There is no mandated form for keeping building elevation records, but it is strongly recommended that the FEMA's Elevation Certificate Form be used.

If a community is participating in the Community Rating System, the FEMA form must be used for new construction and substantial improvements to existing buildings. Insurance agents writing flood insurance policies also must use the form to properly rate many types of buildings. FEMA encourages communities to use the form to help their residents obtain flood insurance without additional cost and IDNR's northeastern Illinois model ordinance specifies its use.

The FEMA packet includes the two-page FEMA Form 81-31, Elevation Certificate, and instructions on how to complete it. Additional copies of the packet are available at no cost from FEMA.

The Elevation Certificate form can also be downloaded from FEMA's website in both .pdf format and Microsoft Word. The Microsoft Word version allows the user to enter the appropriate information and when complete, print the form. The software version can be used, and elevation records can be kept on a computer database; however the original signed "hard copy" of the surveyor's certification must still be kept.

The responsibility for obtaining and filing an elevation certificate rests on the local permit official. Part or all of the form may be completed by a land surveyor, engineer, architect, or local official authorized by ordinance to provide floodplain management information. Most communities require the permit applicant to obtain the elevation certificate.

Completing and maintaining the FEMA Elevation Certificate is an important element of a floodplain management program and a key part of the IAFSM Floodplain Manager Certification Exam.

The floodplain administrator may give property owners or surveyors blank forms and expect them to complete the entire form. This practice does not relieve local officials in CRS communities from the requirement to ensure that the forms are complete and accurate. In non-CRS communities, the permit official should at least double-check the form to ensure that it is complete and that Sections A and B (on property and map information) are correct.

The local permit official is also responsible for Section G. Although it is optional, it contains some good information that helps determine if a building is compliant. Item G8 is particularly important. The floodplain administrator should make a habit of completing this section for every new building in the SFHA.

15.4.3. Elevation certificates and annexations

The FEMA Elevation Certificate form is self-explanatory. One problem arises when a community annexes Special Flood Hazard Areas in the unincorporated areas of the county. This situation can lead to considerable confusion as to flood zone determination, as well as knowing which community number and panel numbers should be used on Elevation Certificates and other NFIP documents.

This will no longer be a concern once a countywide FIRM is the regulatory flood map. Until the community uses a countywide FIRM, the following will assist floodplain administrators in filling out or checking the Elevation Certificates:

Flood zone determination: If the subject property is located within areas annexed from the county, use the county flood maps to determine the appropriate flood zone.

Community Identification Number: In item B1 of Section B of the FEMA form (“NFIP Community Name & Number”), use the municipality’s NFIP ID number once a property is annexed.

Flood Map Panel Number: For property located in an annexed area, for item B4 of Section B (“Map and Panel Number”), use the entire county ID and panel number— “370087 0005,” not just “0005.” For sites within the “area not included,” state “No NFIP Map.” For items B5 – B7, refer to the county’s map.

15.4.4. Floodproofing certificate

Floodproofing means making a building watertight, or substantially impermeable to floodwaters. It is an option only allowed for nonresidential buildings.

Designs for a floodproofed building must account for flood warning time, rate of rise of floodwaters, uses of the building, mode of entry to and exit from the building and the site, floodwater velocities, flood depths, debris impact potential, and flood frequency. FEMA’s Technical Bulletin 3-93, *Non-Residential Floodproofing Requirements and Certification for Buildings Located in Special Flood Hazard Areas*, has a detailed discussion on each of these considerations.

For insurance rating purposes, the building’s floodproofed design elevation must be at least one foot above the BFE to receive rating credit. If floodproofed only to the BFE, the floodproofing credit cannot be used, resulting in higher flood insurance rates.

44 CFR Sections 60.3(b)(5) and (c)(4) require the community to obtain and maintain a licensed professional engineer’s certification that a nonresidential building was properly floodproofed. The floodplain administrator is encouraged to use the one-page FEMA certification form because it fulfills NFIP insurance rating needs as well as floodplain management requirements. It can also be downloaded from FEMA’s website.