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Keynote Address--Per Aspera Astra: Forseeable Natural Hazards-- A Safer Future for Universities [and Colleges] Founded on Ethics, Sustainability, Good Business, and the Law

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Recommended Citation

Capps, Erin, "Keynote Address--Per Aspera Astra: Forseeable Natural Hazards--A Safer Future for Universities [and Colleges] Founded on Ethics, Sustainability, Good Business, and the Law" (2013). *DRU Workshop 2013 Presentations – Disaster Resistant University Workshop: Linking Mitigation and Resilience*. Paper 41.

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Per Aspera Ad Astra : A Safer Future for
Universities Founded on Ethics, Sustainability,
Good Business, and the Law.

***UNO-CHART: Disaster Resistant University
Workshop***

March 22, 2013

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Natural Hazard Mitigation Association



Why Mitigate?

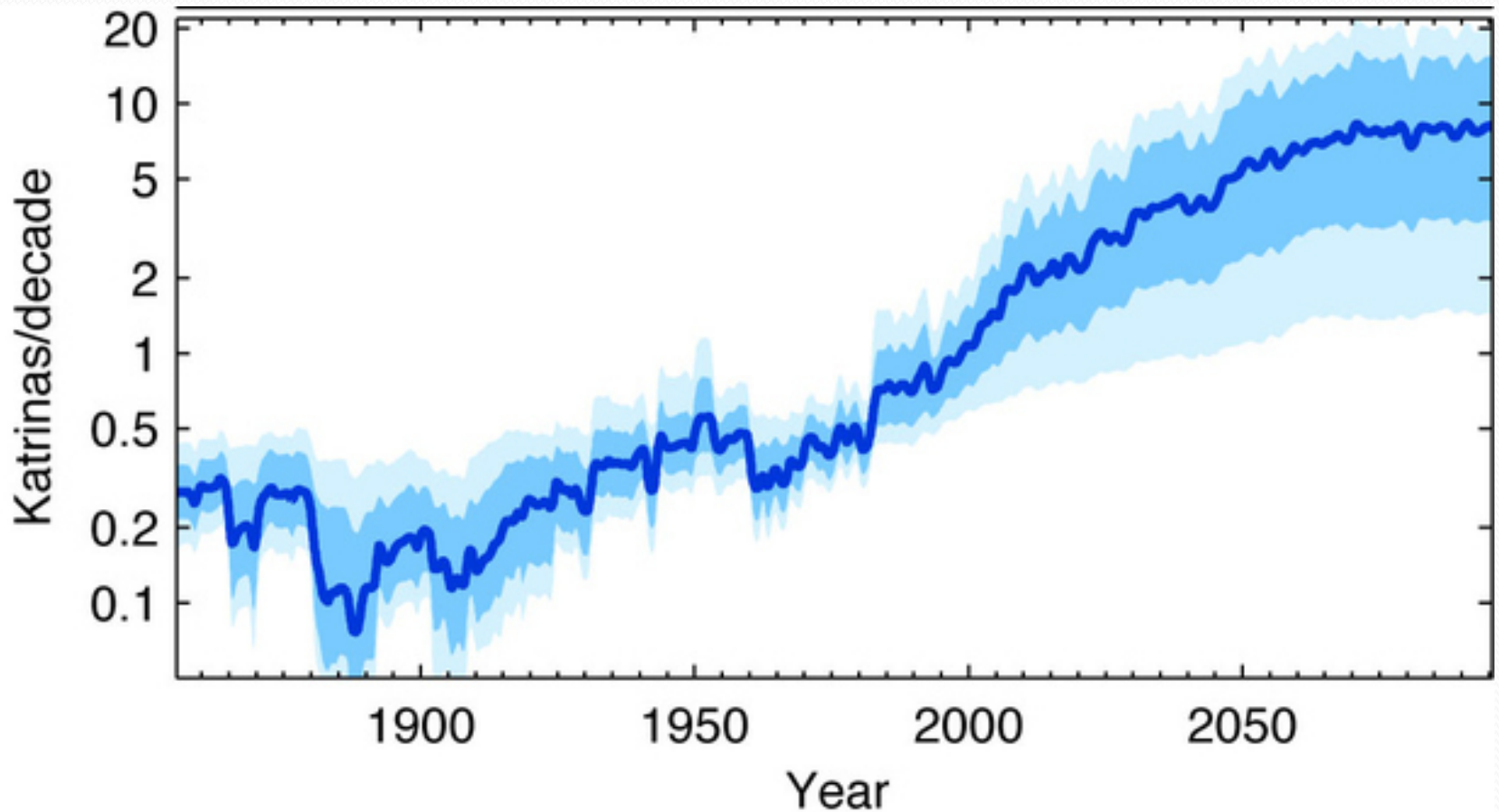
"Disaster risk reduction is not a luxury. It's an essential insurance policy for a more disaster-prone world, and one of the smartest, most cost-effective investments we can make in our common future. The benefits of this investment will be calculated not only in dollars saved, but most importantly, in saved lives."

Jan Egeland, Former U.N. Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator

Trends in Damages Following Natural Events

- Wind, Flood, Earthquake, Wildfire losses are increasing quite dramatically
- Demographic trends indicate great future challenges
- More challenges from sea level rise
- Even more challenges likely from climate change

More Frequent Hurricanes



Demographic Trends: The Future

- From a space perspective, land areas over the United States can absorb more people if distributed.
- ***But....more than half of Americans live within 50 miles of the Atlantic, Pacific, Gulf and Great Lakes coasts on just a fifth of the country's land area, according to Census data.***
- More than half of the built environment that we will see in 2025 did not exist in 2002. By 2025, this number is expected to increase to 75 percent.

Impact to Universities

- Damage to infrastructure
- Potential injuries/fatalities
- Psychological effects
- Hindered growth

Mitigation Means Beyond the Minimum

Even If We Perfectly Implement Current
Standards,

Damages Will Increase.

Not just building back, but building back safer and stronger.

*Current approach should include how to minimize future damages
vs. how to make a building work in a hazardous location.*

Safe Development Is Affordable

- The American Institutes for Research study supports the idea that elevation and floodproofing have a significant impact
- Hazard mitigation has a proven 4 to 1 payback
- NHMA is currently working on a White Paper which indicates that the payback for “Safe Development” from the beginning of a project may be more than 100-1

Mitigation Trend

The American Bar Association (ABA) has subscribed to the White Paper on Hazard Mitigation prepared by the National Emergency Management Association (NEMA) under contract to FEMA

In Resolution 114 ABA voted in February 2011 to:

- a) Support hazard mitigation through disaster planning;*
- b) Recognize the role of state and local government;*
- c) Give due regard to property rights*
- d) Legal issues*

No Adverse Impact Floodplain Management

- What is No “Adverse Impact Floodplain Management”?
- ASFPM defines it as “...an Approach that ensures the action of any property owner, public or private, does not adversely impact the property and rights of others”

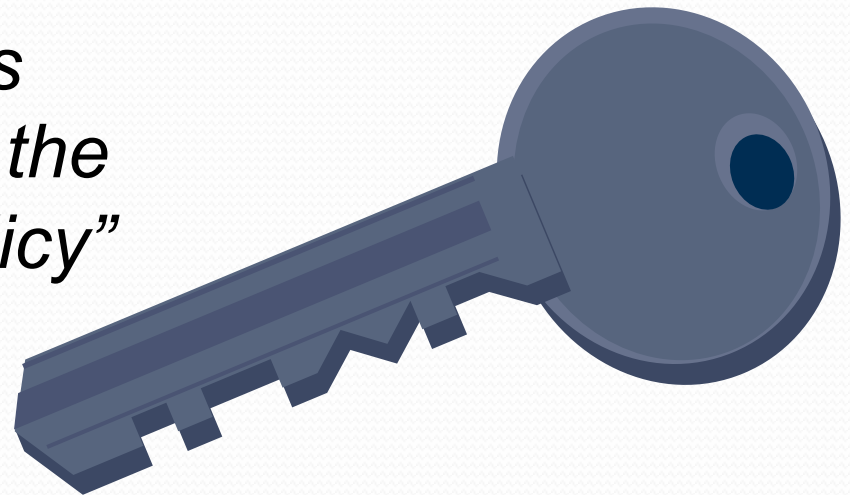
No Adverse Impact Explained

NAI is a concept/policy/strategy that broadens one's focus from the built environment to include how changes to the built environment potentially impact other properties.

NAI broadens property rights by protecting the property rights of those that would be adversely impacted by the actions of others.

No Adverse Impact Rules

- *State, Regional & Local Government Working With the Private Sector, Universities, and Hospitals is the Key*
 - *Develop and adopt NAI community-based plans*
 - *Adopt NAI strategies*
 - *Educate citizens on the “Good Neighbor Policy”*



How To Follow the No Adverse Impact Principle

- Identify ALL the Impacts of a Proposed Development
- Determine ALL the Buildings which will be Impacted
- Notify Potentially Affected Persons of the Impact of any Proposed Development

How To Follow the No Adverse Impact Principle

- Design or Re-Design the Project to Avoid Adverse Impacts
- Require Appropriate Mitigation Measures Acceptable to the University and the Affected Members of the Community or Stakeholder Groups

What is the Result of Following the No Adverse Impact Principle?

- With NAI, People that may be Impacted can Voice their Concerns.
- *Really Turns the Usual Development Process Around!*

No Adverse Impact - A New Concept?

- Sic utere tuo ut alienum non laedas
- More Information in ASFPM website:
 - <http://www.floods.org/index.asp?menuID=460>
 - Toolkit on Common Sense Floodplain Management

Indiana Supreme Court Used *Sic Utere* as a Basis to Expand Groundwater Rights Doctrine in 1982

*“...the use or non-use intended to be made of the water, and other circumstances have come to be regarded as more or less influential in this class of cases and **have justly led to an extension of the maxim, "Sic utere tuo ut alienum non laedas" to the rights of landowners over subterranean waters**, and to some abridgment of their supposed power to injure their neighbors without benefiting themselves.”*

See, Wiggins et al. v. Brazil Coal et al., Court of Appeals of Indiana, First District, 440 N.E.2d 495; 1982 Ind. App. LEXIS 1397, September 30, 1982

Overview of Liability

Who Can Sue A Professional:

- a) Almost Anyone*
- b) Employees*
- c) The Public*
- d) Sub-dividers*
- e) Contractors*
- f) Employer*
- g) Any Additional Ideas?*

Grounds for Suit

- Standard of Care for Professionals is Increasingly High as Professionals Develop Increasingly Sophisticated Design Methods
- Rule of the Reasonable Person is now Interpreted as “Expert” Level

Proof Of Causation Of Harm Is Easier Now Than In Past Times

- Forensic Hydrologists
- Forensic Hydraulic Engineers

An Illustration of the Trend in the Law Towards Recovery by Injured Parties

- Paul v. Landsafe Flood Determination, Inc., No. 07-60652 (5th Cir. Dec. 5, 2008)
- Plaintiff Allowed to Sue to Recover From Flood Determination Allegedly in Error
- The Court Noted that a Flood Zone Determination was the Kind of Professional Opinion for Which it is Foreseeable that Justifiable and Detrimental Reliance by a Reasonable Person Would Be Induced.

The Theme

- They did not do No Adverse Impact Planning!!!
- They did not Identify the Impacts of the Development Activity
- They did not Notify the Soon- to- Be Afflicted Members of the Community
- They did not Re-Design or Re-Consider the Project
- They did not Require Appropriate and Necessary Mitigation Measures

Landowner Does Not Have All Rights Under The Law

- No Right to be a Nuisance
- No Right to Violate the Property Rights of Others
- No Right to Trespass
- No Right to be Negligent
- No Right to Violate Laws of Reasonable Surface Water Use; or Riparian Laws
- No Right to Violate the Public Trust

Hazard Based Regulation And The Constitution

- Hazard Based Regulation Generally Sustained Against Constitutional Challenges
- Goal of Protecting the Public is Accorded ***ENORMOUS DEFERENCE*** by the Courts

Summary

No Adverse Impact and Mitigation are:

- a) Legal
- b) Equitable
- c) Practical
- d) Defensible in Court

First Part Of The Solution: Do It Right

- Conservative Calculations And Design
- Consider Upstream Conditions
- Consider Consequences Of Failure

Take Away Messages For Today

Mitigation:

- We Throw Money at Problems After They Occur
- You Can Pay a Little Now or Lots Later
- The Legal System is Ready to Help You Pay Later

Benefits to Universities for NAI/ Mitigation

- Louisiana State University supports building safer, stronger, smarter
 - <http://www.fema.gov/mitigationbp/brief.do?mitsslId=9651>
- Tulane University develops Disaster Resilience Leadership Academy (DRLA)
 - <http://www.fema.gov/mitigationbp/bestPracticeDetail.do;jsessionid=AA8B50A75DDA41226E896B9C4D996163.WorkerPublic3?mitsslId=9731>
- DHS support for school safety
 - <http://www.dhs.gov/school-safety>

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