

Recovery and the Flood Damage Prevention Regulations

A White Paper prepared by the
Rehabilitation and Elevation Working Group

for the

New Orleans City Council Disaster and Recovery Committee

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Introduction

LLT led a working group formed at the request of the New Orleans City Council Disaster and Recovery Committee to address housing rehabilitation and recovery issues in compliance with the National Flood Insurance Program (NFIP) and the City of New Orleans Flood Damage Prevention Ordinance. The group was guided by twin goals, which compete with each other:

- Maximize the reuse and rehabilitation of existing structures to protect the fabric of the city's neighborhoods.
- Accelerate the demolition of structures that cannot be rehabilitated under current regulations while funding remains available to do so.

The working group initially focused on the NFIP exemption for designated historic structures and on permitting for rehabilitation of Road Home properties in LLT's inventory. However, it rapidly became apparent that a much broader set of issues needed to be addressed. This white paper outlines the results of the working group's efforts. It has been prepared as a summary for use by decision makers. Appendices of technical documents and reference materials are included for additional information.

Basic Facts

A number of critical facts became clear during the working group's research:

1. The city cannot avoid the existing Base Flood Elevations (BFEs). These are built in to the NFIP regulations and the city's Flood Damage Prevention Ordinance. If the city does not enforce the BFEs, it will be ineligible for flood insurance under federal law. It would take an act of Congress to change this.
2. In 2006, the city adopted a modified version of FEMA's Advisory Base Flood Elevations (ABFEs) which substantially increased the required elevations for rehabilitating many properties.
 - a. This made many rehabilitations uneconomical.
 - b. ABFEs were not mandated by FEMA regulations, even though that may have been the City's understanding at the time, and FEMA strongly recommended them.
 - c. The Louisiana Recovery Authority (LRA) required communities to adopt ABFEs in some form to be eligible for Long Term Community Recovery

3. New Digital Flood Insurance Rate Maps (DFIRMs) will become official in a few years – around 2013. The elevations in the DFIRMs will become the new BFEs. For most of the areas in New Orleans that are still recovering, the preliminary DFIRMs show elevations significantly higher than the current BFEs. Only a few areas would have lower BFEs.
4. The city cannot avoid the 50% tests for Substantial Damage and Substantial Improvement required by the NFIP regulations. The only exemptions are for historic structures and multifamily housing.
5. Under the technical requirements for calculating the 50% tests, most flood-damaged homes in New Orleans will be over the 50% thresholds, and would require costly elevation before rehabilitation in the vast majority of cases.
6. Except for Road Home Option 1 properties, no grant funding is presently available to elevate homes for rehabilitation.
7. Without elevation grant subsidies, rehabilitation is not economically feasible for the vast majority of flood-damaged structures.
8. LLT runs out of funding in 2012. At that point, no money will be available to maintain LLT properties in New Orleans, and no money will be available to demolish them.

Baseline Recommendations

The working group considered a number of options for action by the city, and recommends the following as a set of actions as a baseline. The City may decide to pursue some or all of these options. There is no “best” solution. Different actions by the City will have their own policy ramifications.

1. Drop the ABFE requirement for rehabbing existing structures, but keep the ABFEs in place for new construction.
 - a. This will increase the number of properties that can be economically rehabilitated
 - b. The City has a roughly three-year window of opportunity to encourage rehabs without elevating to ABFEs before the new DFIRMs become mandatory.
 - c. But there are downsides: rehabilitated houses below the new elevation requirements will probably face higher insurance rates due to the higher risk of flood damage
 - d. Long Term Community Recovery funding eligibility (for infrastructure) could be affected.
2. Request clarification/relief from the LRA requirement for ABFEs as applied to rehabilitating existing structures.

- a. CDBG Action Plan Amendment 12 requires compliance with the “latest available base flood elevations of the FEMA Flood Recovery Guidance unless exceptions are granted by the LRA based on reasonable alternatives where safety is not minimized.” See Appendix A, p. 4.
 - b. There appears to be some flexibility around the LRA requirement (for example, ABFEs do not apply in southeast St. Tammany Parish, where much of the housing rehab work is going on in that parish).
3. Immediately authorize demolition all LLT **non-historic** structures that are over 50% destroyed and below BFE.
 - a. Under current NFIP regulations, these structures cannot be rehabilitated without elevating, and no funding is available for elevation.
 - b. NCDC requirements should be waived for this class of LLT properties to eliminate the need for case-by-case application, notice, and hearings on demolishing these structures. There is no practical way to rehab them.
 - c. NOTE: The NCDC process cannot exempt a structure from flood elevation requirements. It is irrelevant to the NFIP regulations and to the City’s Flood Damage Prevention Ordinance.
 - d. Delaying demolition of this class of structures would only relegate them to a permanent blighted status after LLT maintenance funds run out in 2012.
4. If ABFE remains a requirement under the New Orleans Flood Damage Prevention Ordinance, all **non-historic** LLT structures below the ABFE should be immediately release for demolition, and the NCDC requirements should be waived, for the same reasons described above.
5. Continue the historic properties exemption from the elevation requirements, but clarify the specific properties that are exempt by adopting a listing by address.
 - a. The City should promulgate a comprehensive list of exempted structures, by specific street address, to facilitate identifying exempt properties. This would avoid the need for case-by-case identification of “contributing” structures in the City’s 29 National Historic Districts. See Appendix B for a list of National Historic Districts in New Orleans.
6. Revise the City of New Orleans Department of Safety and Permit application for Substantially Damaged or Substantial Improvement Application to include the Substantial Improvement test requiring the establishment of the “current value” of the structure as the basis for determining percent damage. Applicants should be made aware of the Substantial Improvement test and the potential for costly structure elevation if applicable. A proposed revised application form is provided in Appendix C.

7. All single family residential structures (including LLT properties) are subject to uniform application of the FEMA NFIP provisions including Substantial Damage and Substantial Improvement 50% tests. The City's permitting procedures should not single out LLT properties for tighter restrictions.
8. The city should prepare now to influence the new DFIRMs. After FEMA officially issues the DFIRMs, the City will have only 90-days to appeal.
 - a. For most of the City, required base flood elevations will go up, which will make rehabilitation unfeasible for even more properties. The affect will be dramatic in some areas.
 - b. From Gentilly eastward, preliminary DFIRMs increase the BFEs by about 2'.
 - c. Preliminary DFIRMs increase BFEs in the Lower 9th Ward by 10.5'.
 - d. The appeal must be based on technical and scientific data, which must be submitted within the 90-day appeal period. This will require significant engineering data and analysis.

Discussion of Baseline Recommendations

New Orleans generally, and LLT specifically, are in a race against time. Two "facts of life" require immediate decisions about LLT properties. The first is that when the new DFIRMs become official – probably around 2013 – the possibility of rehabilitating thousands of properties will be eliminated; new elevation requirements will make rehabilitation uneconomical. The second is money: by 2012, LLT's funding will run out, and no money will be left for either demolition or maintenance of LLT properties. At that point, the structures remaining in LLT's inventory will become orphans.

Dropping the ABFE requirement for rehabs would allow approximately 30% of LLT's structures to be rehabilitated, as opposed to only 10% if the ABFEs remain in place. The eventual arrival of the DFIRMs would eliminate the possibility of ABFE relief because the DFIRMs would trump the ABFEs. Keeping in mind that the non-LLT vacant properties in New Orleans are similar to the LLT properties, similar "rehab possible" figures are likely to hold for the City as a whole.

Because of time and budget constraints, LLT needs to move quickly on demolishing the remaining properties in New Orleans for which there is no realistic hope of rehabilitation. Approximately 400 non-historic LLT properties are greater than 50% damage and below BFE. These properties would need to be elevated for renovation or rebuilding. Because no funding is available for such an effort, these structures will simply continue to deteriorate with no hope of being rehabilitated. Further, no purpose would be served by considering these properties through the NCDC process. Even if NCDC wanted to save these non-historic properties from demolition they could not be rehabilitated under any scenario. They should be immediately released from demolition.

In addition to the 400 properties above, there are additional LLT homes above BFE but below ABFE – these properties would also require elevation under current New Orleans Municipal Code. If the City does not eliminate the ABFEs, then these homes are candidates for immediate demolition as well.

Summary of Findings, Elevation Requirements for Rehabs

1. For homeowners to qualify for flood insurance, a local jurisdiction is required to comply with National Flood Insurance Program (NFIP) regulations, which includes the adoption of a flood protection ordinance that meets FEMA’s standards in 44 CFR 60.3. See Appendix D for a copy of these regulations. See Appendix E for the federal NFIP statute.
 - Vintage 1984 Flood Insurance Rate Maps (FIRMs) define the Base Flood Elevations (BFEs). The FIRMs are based on old, inaccurate data, and are technologically obsolete. However, the 1984 FIRMs are still the only “official” maps recognized by the NFIP for regulatory purposes.
 - The City’s Flood Damage Prevention Ordinance is in Chapter 78 of the New Orleans Municipal Code. See Appendix F for a copy of the ordinance.
 - The City’s Flood Damage Prevention Ordinance actually exceeds NFIP’s minimum requirements because it includes a modified version of Advisory Base Flood Elevations (ABFEs) recommend by FEMA on April 12, 2006. See Appendix G for FEMA’s advisory guidance. The City adopted its own version of the ABFEs on August 25, 2006 (M.C.S. 22354, included here as Appendix H).
 - The ordinance requires elevating to the higher of (1) the old BFE based in the 1984 FIRMs, or the new ABFE adopted by the City. The ABFE is generally higher.
 - The City’s version of the ABFE is generally lower than FEMA’s ABFE. Both versions require an extra 3’ of elevation. However, the City measures the 3’ from the curb in front of the property. FEMA measures it from the highest adjacent ground.

2. The ABFEs are not required by FEMA
 - When the ABFEs were adopted by the City in 2006, the City’s understanding may have been that ABFEs were required by FEMA, but in reality the ABFEs were optional.
 - At the time, FEMA’s official publication said:

FEMA is encouraging local officials and citizens to adopt the elevation and freeboard recommendations for inside and outside of levee-protection made in this Guidance Document and to elevate structures accordingly.

...

Although the information provided here is advisory, communities should consider its use for rebuilding in a safer manner.

(See Appendix G, FEMA Advisory Base Flood Elevations for Orleans Parish, Louisiana)

- Information published on FEMA’s web site makes it clear that communities are not required to adopt ABFEs. A FEMA “Frequently Asked Questions” page addressing flood insurance provides the following:

IS MY COMMUNITY REQUIRED TO USE THE ADVISORY BASE FLOOD ELEVATIONS DEVELOPED USING THE METHODS IN THE FLOOD RECOVERY GUIDANCE?

A community participating in the National Flood Insurance Program (NFIP) is not required however; they are urged to use the Advisory Base Flood Elevations.

(See Appendix I for a complete copy of FEMA’s “Frequently Asked Questions.”)

- FEMA’s release of DFIRMs in early 2009 also made it clear that ABFEs were optional, as were the DFIRMS. See Appendix J, a FEMA news release that listed the choices available to local communities, including simply using old FIRMs without augmentation.
3. FEMA regulations under the National Flood Insurance Program (NFIP) define key terms related to structure damage, flood zones and conditions for rehabilitation or rebuilding. Two critical terms are “**Substantial Damage**” and “**Substantial Improvement.**”
- Both terms measure whether repair or rehab works exceeds 50% of a structure’s value, but they are calculated differently.
 - **Substantial Damage Definition:** Damage of a structure whereby the cost of restoring to its before damaged condition would **equal or exceed 50%** of the market value of the structure before the damage occurred. See Section 78-40 of the City’s ordinance in Appendix F.
 - **Substantial Improvement Definition:** Any reconstruction, rehabilitation, or other improvement of a structure, the cost of which **equals or exceeds 50%** of the market value of the structure before the start of construction. See Section 78-40 of the City’s ordinance in Appendix F.
 - **A structure must pass both tests** before a building permit may be issued. If it fails either test, a structure must be elevated to get a building permit, unless a historic structure or multifamily exemption applies.

- Most flooded structures in New Orleans will flunk the Substantial Improvement test before they flunk the Substantial Damage test.
 - A **Substantial Improvement** must elevate (or flood proof) and meet other applicable program requirements
 - If the structure is **Substantially Damaged**, it is automatically characterized as **Substantial Improvement** and must be elevated. This is a federal regulation. The City must comply to retain its eligibility for flood insurance.
 - Acceptable Damage Estimation Methodologies include:
 - Local officials with knowledge of local costs can make “qualified estimates”
 - Marshall and Swift cost estimating publications
 - Standard Building Code Mean Construction Cost Data
 - Building Inspection Departments
 - Emergency Management Agencies
 - Tax assessments
 - Damage assessment field surveys
 - Other State or Local Agencies
 - The City’s Department of Safety & Permits utilizes the post-Hurricane Katrina Damage Assessment Database to determine **Substantial Damage**. This is an acceptable methodology under FEMA regulations.
 - Homeowners may submit their own damage assessments for appeals; however they must be done by qualified personnel and must be comprehensive and accurate in compliance with FEMA guidelines.
4. Under NFIP regulations and the City’s Flood Damage Prevention Ordinance, Substantially Damaged houses and Substantial Improvements are treated ***exactly like new construction***. They must comply with the same elevation requirements.
 - This makes many rehab projects economically unfeasible.
 5. Substantial Damage and Substantial Improvement requirements have not been consistently applied in New Orleans, and the City’s building permit application form does not accurately reflect the ordinance requirements.

Summary of Findings, Historic Structures

1. Historic Structures are exempt from elevation requirements otherwise applicable to Substantially Damaged or Substantial Improvements.
 - The City’s Flood Damage Prevention Ordinance tracks the federal regulations, and takes full advantage of the exemption.
 - See Appendix K for NFIP guidance on regulating historic structures.

2. Only certain structures are exempt:
 - Listed National Historic Landmarks
 - “Contributing” structures in designated National Historic Districts (structures that are not themselves individually lists as National Historic Landmarks but whose presence adds to the character of the district).
 - Historic landmarks listed by the state
 - Historic landmarks listed locally.

3. State and local listings must be made in accordance with a process approved by the U.S. Department of Interior to be eligible for the exemption.
 - The local listing process does not have Department of Interior approval, but can probably get approved.
 - The non-approved status of the local listing process has minimal impact because most locally-designated structures are already “contributing” structures in designated National Register Historic Districts.

4. Status of LLT’s historic properties
 - LLT still has approximately 200 historic properties in New Orleans with no viable disposition plan.
 - These properties are on demolition “hold” because they were designated by the State Historic Preservation Officer (SHPO).
 - The cost of rehabilitating historic structures is beyond the mission of LLT
 - LLT working with non-Profits to develop and implement disposition options.
 - Historical archiving work is being completed with help from LLT and SHPO personnel (pre-requisite to rehabilitation, modification or demolition of the structures).
 - Options for SHPO properties:
 - Turn over appropriate SHPO designated properties to the Preservation Resource Center or other interested groups for rehabilitation
 - Selective salvage/selective recoupment)
 - Deconstruction
 - Demolition
 - SHPOs that are structurally unsafe can be the demolished after historical archiving is complete.

Summary of Findings, DFIRMs

1. FEMA is in the process of updating its Flood Insurance Rate Maps. The new ones will be published digitally, and are called Digital Flood Insurance Rate Maps, or DFIRMs.
2. Preliminary DFIRMs have been prepared for New Orleans, and have been reviewed with key players in the building and land use regulation community.
3. Preliminary DFIRMs have not been “officially” published, but are available on line at: http://www.lamappingproject.com/dfirm/Orleans_DFIRM/imap.html.
4. The preliminary DFIRMs would dramatically change BFEs in New Orleans.
 - BFEs in the Lakeview, Broadmoor, and Uptown areas would go down, in some cases by as much as 3.5 feet.
 - BFEs over the rest of the East Bank of New Orleans (from Gentilly eastward) would generally go up by about 2 feet (which is roughly comparable to the City’s current ABFEs)
 - BFEs in the Lower 9th Ward and Holy Cross area would go up as much as 10.5 feet
 - The West Bank of New Orleans would generally go up about 5 feet for those areas that have BFEs currently. (Significant areas of the West Bank do not have BFEs currently.)
 - See Appendix L for a general map of the changes.
 - See Appendix M for a map of ground elevations in New Orleans for reference.
5. Preliminary DFIRMs are calculated only for 100-year flood protection – nothing more.
6. Except for the Lower 9th Ward/Holy Cross area, the preliminary DFIRMs protect only against flooding from rainfall.
 - They assume that the levees hold.
 - They do not provide any margin of protection for levee failures.
7. DFIRMs for the Lower 9th Ward/Holy Cross area appear to assume that the levees do not provide 100 year protection, and therefore have much higher elevation requirements.
8. The DFIRMs are not yet mandatory.

- The DFIRMs are on hold until the new federal levees are complete (projected for 2011); new DFIRMs will be issued afterwards for review. See FEMA's August 12, 2009 Press Release, Appendix N.
- How the completion of the federal levees will affect the DFIRM elevations is unknown at this time.
- After revision and release, New Orleans will have only a 90-day time period to appeal, based on technical or scientific data.
- After any appeal is resolved, FEMA will publish a "Final Map Determination," and the City will have six months to adopt the new DFIRMs by ordinance or lose flood insurance eligibility.
- Unlike the ABFEs, the DFIRMs become mandatory
- The official DFIRMs would come out around 2013.

Working Group Background

The working group was formed at the request of the New Orleans City Council Disaster and Recovery Committee. As originally constituted, it consisted of the following:

Michael Taylor, Louisiana Land Trust, Chairman
 Brandon Badinger, State Historic Preservation Office
 Elliot Perkins, Historic Districts Landmarks Commission
 Jasmine Haralson, New Orleans Redevelopment Authority
 Ben Blanc, New Orleans Redevelopment Authority
 Paul May, Director, New Orleans Department of Safety and Permits

Staff support to the group's deliberations was provided by LLT and its consultants. (the team of CDM and Barowka & Bonura Engineers & Consultants, LLT's demolition Project Manager; and Butler, Snow, O'Mara, Stevens & Cannada, PLLC, LLT's legal counsel).

The full working group held four major meetings, and many other breakout meetings to address specific issues. This white paper was prepared by LLT based on the working group's research and deliberations.