Beach SAMP / STORMTOOLS
Changes to the Landscape of Municipal Liability
Liability exposure for:

- Public information
  - Accuracy and reliance (negligence)

- Planning and Policymaking
  - Failure to plan (negligence)

- Infrastructure maintenance
  - Failure to adapt (temp. takings, negligence, nuisance)
  - Abandonment (takings, statutory injunction)

- Permitting
  - Wrongful permitting (negligence)
Wrongful permitting:

- Duty
  - Public Duty Doctrine

- Negligence
  - How does the permit address unique site hazards?

- Cause in Fact / Proximate Cause
  - More specific information means more foreseeability

- Damages
  - State Tort Claims Act damage cap: $100,000
— State Tort Claims Act:
  — Sovereign Immunity waived
  — Non-proprietary functions - damages capped at $100,000

— Public Duty Doctrine protects *non-proprietary* functions
  — Exceptions: Special Duty and Egregious Conduct

— “A municipality should not be the general insurer of every construction project within its limits.”
Special Duty

- Plaintiffs “specifically come within the knowledge of the [town] so that the injury to that particularly identified plaintiff can be or should have been foreseen.”

In a storm-damaged house:

– Special Duty

– Did the permitting process involve continued contact beyond the norm?

– “[T]he building inspector ... had specific knowledge of certain irregularities and violations of the condominiums, had attended meetings with the architect, had received written notice of specific building-code violations, and had returned to the condominiums on a number of occasions to view the repair work”

Egregious Conduct

– “The [town] has knowledge that it has created a circumstance that forces an individual into a position of peril and subsequently chooses not to remedy the situation.”


1) Created a situation of “extreme peril”
2) Actual/constructive knowledge of peril
3) Inaction within reasonable time
In a storm-damaged house:

- **Egregious Conduct**
  - Hazard creation - A matter of degree?
  - Actual or constructive knowledge
    - *Haworth*: “nothing in the record indicates that the town was aware that the houses were subject to flooding when it issued the certificate of occupancy or that the flooding posed a position of extreme peril.”
  - Inaction - How do permit conditions deal with the hazard?
In a storm-damaged house:

- **Causation: Foreseeability**
  - Foreseeability increases with better science
    - Subdivision review re: septic systems
    - Reasonable care in gathering information extends to analyzing flood risk.
    - Filings claim that regulatory findings of fact about climate change created a duty to maintain stormwater systems
Wrongful permitting:

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  - State Tort Claims Act damage cap: $100,000
Proactive steps:

- **Rigorous permit/variance grants**
  - Explicitly discusses flooding risks; conditional on adaptations
  - Conforms to an explicit zoning/planning climate change policy/standard
  - Ensure disclaimers cover storm and flooding damage

- **Policies**
  - Ensure binding portions of comprehensive plans address climate change
  - Add to permit/variance review process, e.g. checkbox in application forms
  - Incentives: e.g. define municipal zoning height limit from base flood

- **Public education**

- **Specific notice to property owners**