



**FEMA**

September 30, 2009

Mr. Roman Gastesi  
Monroe County Administrator  
1100 Simonton Street  
Key West, Florida 33040

Dear Mr. Gastesi:

This letter is in response to your proposal dated June 24, 2009, to modify the ongoing pilot inspection program in Monroe County, Florida. As you're aware, the Federal Emergency Management Agency (FEMA) agreed to develop a Pilot Inspection Program to allow Monroe County to conduct an inspection of insured structures with enclosures below the lowest floor of an elevated building believed to be noncompliant. When FEMA conducted a Community Assistance Visit in 1995, the problem of illegally constructed enclosures was identified as one of the more serious problems in the County's floodplain management program. The development of the Pilot Inspection Program, as codified in 44 CFR 59.30, was proposed as an alternative to probation under the National Flood Insurance Program (NFIP) because of the County's willingness to directly address the problem of noncompliant enclosures through the Inspection Program. We have reviewed the County's proposal and offer the following comments and concerns.

### **Summary of Existing Inspection Program**

You describe in three bullets in this section what you refer to as the "existing inspection program, approved by FEMA". However, only item 1. pertains to how the Pilot Inspection Program works. The last two items are not related to the Pilot Inspection Program: requiring property owners to obtain an inspection report if they sell or transfer title to a property and requiring property owners with below base flood elevation enclosures to obtain an inspection report if they seek a building permit and to remediate any identified noncompliant aspects of enclosures prior to issuance of a building permit. These two procedures appear to address non-insured structures with noncompliant enclosures below the lowest floor of elevated buildings.

FEMA supports and encourages the County to implement these compliance measures. These measures indicate a willingness in addressing the problem of illegally built enclosures. Monroe County should not repeal these compliance measures since they address noninsured buildings with noncompliant enclosures. If these measures are repealed, we will request that the County provide us with alternative measures to identify and take enforcement actions against non-compliant enclosures in non-insured buildings.

## **Background**

The last sentence on this page states, “Because this effort involved the National Flood Insurance Program and the Federal Insurance Administration, the onus of enforcement is shared by multiple entities.” We would like to clarify this statement. When Monroe County expressed an interest to join the NFIP in 1973, it agreed to adopt and effectively enforce NFIP floodplain management regulations that meet or exceed the NFIP requirements. FEMA, as a Federal agency, has no enforcement authority or responsibility to carry out the provisions of a local government’s zoning ordinance, building code, or other environmental protection ordinance, including a flood damage prevention ordinance. The onus for enforcing floodplain management regulations is on the community. FEMA’s responsibility is to ensure that communities that choose to join the NFIP have adopted floodplain management regulations that meet or exceed the NFIP requirements. FEMA also has a responsibility to assess a community’s floodplain management program and provide technical assistance to communities to ensure they are effectively enforcing their regulations. If floodplain management program deficiencies or violations are identified in a community and the community chooses not to address these issues, FEMA can take compliance actions against the community, such as placing the community on probation or suspending the community from the NFIP.

## **Limitations of the Current Inspection Procedure**

Under this section, Monroe County identified various issues it believes have hampered the current inspection program including lack of property owner awareness, limited shared awareness of all properties that are sold or transferred, an adversarial situation with certain owners, and a number of local court rulings. Also in this section, it states that there has been considerable increase in illegal construction activity without a permit. It states further that property owners perceive this requirement as an invasion of property and a violation of their private property rights.

Code enforcement can often result in controversy and adversarial relationships can form between the community and property owner. Controversy should not hinder the County from implementing its floodplain management regulations and taking an enforcement action when it identifies a violation. Property owners with illegally built enclosures often do not recognize the life-safety and property protection aspects that the regulations are designed to provide. Life-safety concerns exist when people are living in illegally constructed enclosures who may be lulled into believing these enclosures are safe, yet they are living several feet below the Base Flood Elevation. Property protection concerns arise because finished enclosures increase the flood damage potential to the foundation and to the elevated portion of the building. Improperly constructed enclosure walls and utilities can tear away and damage the upper portions of the elevated building exposing the building to greater damage. Improperly constructed enclosures can also result in flood forces being transferred to the foundation and to the elevated portion of the building with the potential for catastrophic collapse. This has been confirmed during numerous post-disaster damage assessments. Neglecting to effectively enforce the floodplain management regulations has potential consequences for the County such as an increase in potential liability, addressing housing needs for people who lived in

non-compliant enclosures following a disaster, and dealing with the increased damages and resulting repairs to buildings with noncompliant enclosures.

Monroe County cited lack of awareness among property owners as limiting implementation of the inspection program. To address this, the County should make every effort to inform its citizens about the requirements related to enclosures and why these requirements are important and the need for the inspection procedure. While that may not entirely alleviate the current controversy, the community is on record that it intends to effectively enforce its floodplain management regulations and it informs the public of the requirements.

In regard to code enforcement court cases described in this section, it doesn't appear that this is a major hindrance. The community should continue to pursue code enforcement cases in order to address the violations to the maximum extent practicable.

### **Optional Limited Amnesty Program Explained**

The County's proposal hinges on the concept of an "optional limited amnesty (OLA) program" from the pilot inspection program for structures built prior to March 14, 2002, with noncompliant lower level enclosures below the lowest floor. As outlined, OLA would take the following form:

- Monroe County would offer OLA to real property owners whose property contains a noncompliant lower level enclosure.
- The terms of OLA would specify that substantial improvements (defined in Monroe County's flood damage prevention ordinance) to enclosures trigger a requirement to bring enclosures into compliance.
- Owners would be required to apply for OLA, pay an enrollment fee, allow the County to perform a compliance inspection to document the baseline conditions of the enclosure (size, materials, usage, etc.), and apply for a special use permit.
- Each year owners will be required to apply for a special use permit and pay a special use permit fee.
- A portion of the OLA fees will pay for the County's costs of managing the program.

This proposal is unacceptable. Monroe County is creating an inequitable situation that exempts structures built prior to 2002 from enforcement of the County's floodplain management regulations. The proposal is inconsistent with the minimum requirements of the NFIP at 44 CFR 60.3 that the County adopted in order to participate in the NFIP by allowing noncompliant enclosures to exist and perpetuate. The proposal is also contrary to the requirement at 44 CFR 60.1(b) in which the County's floodplain management regulations must be legally enforceable and applied uniformly throughout the community to all publically and privately owned land within flood-prone areas, and the community must provide that the regulations take precedence over any less restrictive local laws, ordinance, or codes. Furthermore, this amnesty procedure is contrary to the Pilot Inspection Procedures established in 44 CFR 59.30. Twice the County has adopted a resolution in support of the Pilot Inspection Procedure in order to avoid probation in 1997 and 2002. The Limited Amnesty Proposal is not in keeping with the County's responsibility to protect the health, safety and welfare of its citizens.

The County needs to take ownership of the fact that those non-compliant enclosures increase the life-safety threat to citizens who live in lower level enclosures who may be unaware that they live several feet below the Base Flood Elevation. Furthermore, as described above, FEMA has evidence that the existence of noncompliant enclosures can increase the damages to the elevated portion of the building as well as to the foundation. For instance, we know that flood openings in the walls of an enclosure which allows the free flow of water greatly minimizes damages to elevated buildings in A Zones. We also know that properly designed breakaway walls result in little if any damages to elevated buildings in V Zones. There is also minimal damage because the uses are limited to parking, access, and storage. By creating an amnesty program, the County is placing property owners and tenants who live in lower level enclosures in an untenable situation. Tenants living in enclosures in a high risk area can not buy flood insurance and this loss will likely be significant to those who can least afford it. Property owners of the building will likely be faced with increased damages requiring more extensive repairs due to the noncompliant nature of the enclosure. As a result, both the elevated portion of the building and the enclosure may not be livable. After a flood disaster, there will likely be an increase in housing demand from property owners of structures with illegally built enclosures and from tenants who live in these enclosures.

If the County adopts this procedure, the County floodplain management regulations would be deemed non-compliant and FEMA would have to suspend the community for amending its floodplain management regulations so that they no longer meet the minimum requirements of the NFIP. On the other hand, if the County proceeds to implement the amnesty procedure through procedural measures, FEMA will view the implementation of the amnesty procedure as a major program deficiency that supports the creation and continuation of noncompliant enclosures. If the County proceeds to implement the amnesty program procedurally, FEMA would view this step as an abdication of the County's responsibility for a category of noncompliant structure. If Monroe County takes steps to exempt illegal enclosures from enforcement, FEMA would have to initiate probation because of the serious nature of the violations and the potential that an amnesty program has to undermine other provisions of the County's Floodplain Regulations.

Because Monroe County has a major problem with illegally built enclosures, the County needs to take positive steps to address this issue. Monroe County's current procedures that require an inspection report if a property owner sells or transfers title to a property is a step in the right direction. Also, a step in the right direction is the County's requirement that property owners with a below base flood enclosure are required to obtain an inspection report if they seek a building permit and to remediate any noncompliant aspects of the enclosure prior to issuance of a permit. Other steps the County should consider are:

- Limiting the size of enclosures to < 300 feet, or eliminate enclosures entirely; and,
- Require a non-conversion agreement for enclosures beneath the lowest floor. Some communities require permittees to execute a "non-conversion" agreement to document their understanding that the use of enclosures is limited, that conversion to other uses is not allowed, and that modification of enclosures may result in higher NFIP flood insurance rates.

If you have any questions about this letter you may contact me at 770-220-5416 or Susan Wilson of the FEMA Region IV Mitigation Division, at (770) 220-5414. Should you, or other members of your staff, have any other questions about the NFIP, you may contact Ms. Wilson.

Sincerely,

A handwritten signature in black ink that reads "Brad G. Loar". The signature is written in a cursive style with a large, prominent "B" and "L".

Brad G. Loar, CFM, Director  
Mitigation Division