By Wendy Lathrop, LS, CFM

Wendy Lathrop is licensed as a Professional Land Surveyor in NJ, PA, DE, and MD, and has been involved since 1974 in surveying projects ranging from construction to boundary to environmental land use disputes. She is a Professional Planner in NJ, and a Certified Floodplain Manager through ASFPM.

Just Say "No"

Early December 2007 newspapers carried an article entitled, "Scotsman Says 'No' to Trump". It seems "The Donald" had approached Michael Forbes to buy his 23-acre farm and was told that the land was not for sale at any price. Apparently the offer of $750,000, "well above market value", was not enough to make the fisherman and farmer give up the land he and his 83-year-old mother love and where they plan to live out their lives. Each side is calling the other "greedy", in part because a British businessman had offered to pay out $1.5 million just to stand in Trump's way of smearing a 1,400 acre $2 billion dollar golfing complex across the countryside. But Forbes is having none of that, either. It is not about the money for him.

For small independent business owners, just saying "no" is a tough proposition. We cannot guarantee where the next project will come from, how well it will pay, or even if it will go to completion once underway. It isn't often we feel we can afford to turn away work, particularly in today's iffy economy.

About two years ago, a would-be client was referred to me to help him with a brownfields redevelopment project. This is, on the face of it, just the kind of work I like, furthering the cause of reuse rather than adding to sprawl. It was an old industrial site on a river bank, and it was in the 1%-annual chance floodplain. That meant that if there were to be any financing of the purchase or the project, flood insurance would be mandatory. The redeveloper was not so independently wealthy that he could proceed without the assistance of his friendly neighborhood banker. So I had to break the bad news: while I could help him jump through the regulatory hoops to get the approvals he sought, being in compliance with land use rules is not the same as an exemption from mandatory flood insurance requirements. So while we most likely would succeed in efforts to acquire all the necessary permits and approvals, there would still be an insurance issue. That is not necessarily a show-stopper. But the lowest floor elevation of this particular structure and the soil that it sat upon were seven feet below the base flood elevation.

Here's a little basic information about flood insurance: premiums are related to how much above or how far below base flood elevation the lowest floor elevation is. Structural and contents coverage rates are based on this relationship. At a foot above base flood elevation, the premiums are less than when right at that regulatory limit. Two feet above, rates are even lower. On the other hand, rates at a foot below base flood elevation are higher than when directly at that elevation, and they are higher still at two feet below base flood elevation. After that, the tables just show an asterisked note: "See agent for rating." Translation: "Open your checkbook and take a deep breath." At seven feet below base flood elevation, I knew the annual flood insurance rates would rival the mortgage. Conveying this information to the would-be client, I told him I could not in good conscience help him to bankrupt himself. The only option to make it financially feasible would be to open up the lowest floor to allow the inevitable floodwaters to flow freely. Unless he would be willing to structurally alter the building to do this, I could not, as a professional, agree to help him. He decided not to buy the building, and I slept reasonably well that night.

We live in litigious times. Developers sue municipalities to allow new residential construction on marginal lands, and the new homeowners sue the municipalities for having allowed construction in areas subject to shifting soils, mud flows, and high water tables. Surveyors contribute to site plans for development

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in floodplains and engineers certify to soil compaction on the developed sites. But will water restrain itself, remaining within its mapped limits and abstaining from subsurface penetration and saturation that will lead to sinking structures and lawsuits?

We can't just walk away from every potentially damaging project, or we would find ourselves with no work at all. But we should be looking for other ways to say "no" when our professional judgment tells us to be wary.

The first point to remember is that there is no privity of contract in our work. Time and again, the courts have told us that our professional work is appropriate for use by anyone who might reasonably be expected to rely upon it. Thus we have "ultimate user" laws in some states, requiring that the surveyor determine who the ultimate user of the work is, even if contracted through someone else. *Rozny v. Marnul* (250 NE 2d 656, Supreme Court of IL, 1969) told us a long time ago that performing lot surveys for a developer doesn't mean that the actual lot purchasers are barred from using the same plans or suing the surveyor for damages. That means that if our survey was prepared for a certain purpose, that purpose had better be clear on the plan and in our files. An excellent example of failing in that clarity and work being used for a purpose presumably not anticipated by the surveyor is *Bell v. Jones* (523 A. 2d 982, DC Court of Appeals, 1986). Both parties were found to be negligent in their professional practice by failing to ascertain the full scope of work and its purpose–and neither had kept any records of the agreement regarding what the work entailed.

If we take on projects that worry us, mere disclaimers will not suffice to protect us. But what we can do to "just say no" to liability is to keep good records about what we did agree to do and what we did not agree to do, about any notice that we provided our clients when problems arose, the timeliness and form of that notice, and any responses to questions from our clients that indicated unanticipated conditions or concerns. We can "just say no" to liability and negligence by being smart in business as well as in our application of surveying knowledge. And if we can't practice in a way that will allow us to do this, we should "just say no" to the project itself.