

# Connecticut's Legal Challenges in the Face of Sea Level Rise

by Audrey Elzerman



Yard damage in Old Lyme following Superstorm Sandy. Photo: J. Barrett

Imagine you are a property owner along Connecticut's shoreline and you share a common seawall with your neighbor. Now suppose a storm, one like Superstorm Sandy, destroys that seawall. Do you need permission to rebuild your seawall to protect your property from further erosion, and from whom? What happens if you rebuild, but your neighbor does not? If you suffer further erosion in the next storm, do you have a legal claim against your neighbor or your town? Can you interfere with your neighbor's right to enjoy and use his property as he sees fit if his choices are causing damage to your own?

Connecticut's shoreline is changing more than ever as a result of sea level rise and storm activity. "Storms Irene and Sandy, as well as subsequent nor'easters, have had a major impact on the Connecticut shoreline, causing major erosion in some areas and accretion in others," says Bruce Hyde, Land Use Educator with the University of Connecticut's Center for Land Use Education and Research (CLEAR). The state and its municipalities and property owners must plan for and respond to these physical changes—a process that is raising new types of legal questions.

CLEAR and Connecticut Sea Grant are working together to help governments and property owners prepare for and adapt to shoreline change. One of the ways they do this is through the Connecticut Climate Adaptation Academy (CAA), which addresses questions and concerns associated with climate change and sea level rise. In November, 2015, a CAA workshop, Legal Issues in the Age of Climate Adaptation,

provided state and municipal officials and other Connecticut residents the chance to learn and ask questions about Connecticut's regulatory challenges and how shoreline change will affect their interests.

CLEAR and Connecticut Sea Grant partnered with the Marine Affairs Institute at Roger Williams University School of Law (MAI) and Rhode Island Sea Grant Legal Program to follow up on the workshop. MAI staff run the Rhode Island Sea Grant Law Fellow Program, which connects law students with organizations in need of legal research and analysis on ocean and coastal issues. Through this program, I have been working to answer legal questions raised by workshop attendees. We began by separating the questions into four areas, including:

- potential liability of the state, towns, and officials to tort claims brought by property owners;
- potential for regulatory takings resulting from erosion and inundation;
- shifting property and regulatory boundaries resulting from erosion and beach nourishment projects; and
- permitting and liability issues for flood and erosion control structures.

In each area, we researched the Connecticut laws, regulations, and cases needed to answer the questions raised by participants. This research was then compiled into a series of four fact sheets. Hyde says, "in these fact sheets, municipal officials and coastal residents will find information on legal issues pertaining to shoreline protection, property rights and government liability, as well as for longer-term issues such as those caused by sea level rise."

This article provides highlights from my findings in each area. Additional information and detail on each of these topics, including the fact sheets, are available online on the CLEAR website, at: <http://climate.uconn.edu/caa/>.

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## Government Tort Liability

Liability for damage or harm to a person or property as a result of wrongful conduct is known as tort liability. Local governments and governmental entities, their employees, and members of their boards and commissions may be subjected to tort lawsuits in connection with municipal activities like identifying properties at risk of future sea level rise. For example, if a town does not inform the owner of a property it identifies as potentially at risk of flooding, and that property is damaged, may the owner successfully sue the town? What about town employees or board members who made the decision? And conversely, if a town provides flood risk information in a coastal resiliency plan, and property values are reduced in at-risk areas, could affected property owners successfully sue the town or its employees? We analyzed Connecticut's statutes and cases to determine whether and under what conditions the state, a municipality, or government officials may be liable to property owners under tort law for such damage claims.

Generally, the state has sovereign immunity from tort lawsuits based on its decisions, even if they result in damage to individual property owners. Local municipalities and their employees are also protected from liability by statutory and common-law immunities in Connecticut, as are members of municipal boards and commissions.

The general rule is that a municipality is immune from liability for negligence unless the legislature has enacted a statute limiting that immunity. In Connecticut, property owners may sue a local municipality for damages resulting from the municipality's negligent performance of "ministerial" acts. Ministerial acts are those that are done in a set manner without any exercise of judgment or discretion, like issuing a driver's license. Ministerial acts are written out by ordinance, regulation, rule, policy, or other directive.

Conversely, municipalities are not liable for acts or omissions which require the exercise of judgment or discretion—so-called "governmental acts." The law provides immunity for governmental acts and omissions in order to protect the freedom of municipal officers to make decisions independent of the threat of lawsuits. Based on my research, most coastal land use decisions made by municipalities and their agents are discretionary and not ministerial. As a result, no negligence liability is likely for approving or denying permits or for informing residents of areas subject to heightened flood risk. Other specific statutory immunities, such as for permitting decisions, would apply even if general immunities did not.

On the other hand, Connecticut law provides several exceptions from governmental act immunity, including acts that involve malice, statutes that explicitly assign liability to a municipality, and any circumstance that demonstrates to a public official that failure to act would be likely to subject an individual person to imminent harm. If any of these exceptions applied, a municipality could be liable; however, these exceptions are narrowly tailored and have not been used in lawsuits surrounding coastal management decisions.

## Government Takings

The "takings clause" is a provision in both the federal and state constitutions requiring the government to compensate property owners when its actions "take" private property. We reviewed federal and state takings cases to determine when and how state regulations may require the government to compensate a property owner for limiting the use of his or her land.

A taking may occur through physical occupation of property or through a regulation that unconstitutionally restricts the use of property. Takings

law cannot be changed through legislation alone because it is grounded in the federal and state constitutions. As a result, local and state governments must either plan for payment of compensation when enacting laws and regulations that will result in takings or tailor their efforts to avoid causing a taking.

Under *Lucas v. South Carolina Coastal Council*, any regulation that deprives a property owner of complete beneficial or economic use of his or her property is a *per se*, or total, taking under the federal constitution. Prior to *Lucas*, Connecticut courts adopted a similar, but even broader, "practical confiscation" test in *Bauer v. Waste Management of Connecticut*, under which a taking was held to occur when a regulation deprived a property owner of any "economically viable use of his land other than exploiting its natural state"—even if the regulation removed less than 100% of the value of the property. Connecticut courts have not significantly reconsidered *Bauer* since *Lucas*, however, so the continuing importance of the practical confiscation test is uncertain.

A regulation that diminishes the value of property but does not give rise to a *per se* taking may nonetheless require compensation. Courts determine whether a taking has occurred in such cases under the federal constitution by applying a three-factor balancing test laid out by the Supreme Court in *Penn Central Transportation Co. v. City of New York*. Connecticut courts apply an analogous three-factor balancing test to determine whether an action has created a "significant restriction" on land use that must be compensated. The three factors considered to determine whether a regulatory taking has occurred in Connecticut are: (1) the degree of diminution of the value of the land; (2) the nature and degree of public harm to be prevented; and (3) the alternatives available to the property owner. Government inaction can also result in a taking in the rare case where the government failed to

carry out a mandatory action and the property owner detrimentally relied on it happening.

Recent federal takings decisions have shed new light on takings related to flood control infrastructure. In *Arkansas Game & Fish Commission v. U.S.*, the Supreme Court held that the U.S. Army Corps of Engineers could be held liable under takings for harm to state forest areas caused by deviations from the Corps' normal water diversion operations spelled out in its Water Control Manual. In *St. Bernard Parish v. U.S.*, the Court of Federal Claims similarly determined that the Corps could be liable for failure to properly maintain the Mississippi River Gulf Outlet, resulting in increased hurricane-related storm surge and flooding in New Orleans. These holdings suggest that creation and maintenance of such infrastructure may both result in takings liability for responsible governments if they enhance coastal flooding in other areas or fail due to improper maintenance.

These cases suggest that Connecticut municipalities should carefully consider the takings impacts of regulations. When making regulations related to coastal management and land use, they may be subject to liability—especially if they create flood or erosion control structures that cause harm in unprotected locations or which may fail if improperly maintained.

## Property and Permitting Boundaries at the Shoreline

The determination of the boundary between public and private areas of the shoreline can be a topic of substantial interest and dispute, especially as the environment changes over time. Two separate types of boundaries exist at the shoreline: *property* boundaries that

separate private property from public trust lands, and *regulatory* boundaries that define where state agencies have jurisdiction for implementation of state law.

Coastal property boundaries are based on common law principles expressed in cases, which define the shoreline boundary in Connecticut as the mean high-water mark. As a result, anything above the mark is private property, and lands (including submerged lands) below the mark are held in trust for the public by the state.

Regulatory boundaries under the state Coastal Management Act are based on the “coastal jurisdiction line” (CJL), which is based on a “specifically determined elevation.” Under Connecticut law, any “dredging, erection of structures and placement of fill in tidal, coastal or navigable waters” waterward of the CJL requires a permit from the Department of Energy and Environmental Protection (DEEP). The CJL does not affect or alter common law principles or the locations of the property lines that are determined based on those principles.

We analyzed how these two boundary lines may shift over time as a result of sea level rise and shoreline change. Both property and regulatory boundaries may shift over time as a result of sea level rise and gradual and sudden changes in the shoreline, but they do so differently.

Changes in the property boundary depend on whether shoreline change occurs gradually or suddenly. The shoreline may change gradually through accretion and erosion, or it may undergo sudden changes, which are known as avulsion. Storms are a classic avulsive events that may change



Sand erosion in Old Lyme after a coastal storm. Photo: J. Barrett

a shoreline dramatically in a short space of time. Beach nourishment, or the addition of sediment to restore a shoreline or widen a beach, is also classified as avulsion. Shoreline property boundaries shift landward and waterward due to erosion and accretion. However, avulsion does not move property lines. As a result, property owners may restore their land back to the property line if lost to a storm; however, they do not gain title to new beach areas added as a result of nourishment.

The location of the CJL is affected by shoreline changes, but is unaffected by the speed of that change. As a result, the CJL will move inland or waterward due to either accretion and erosion or avulsion. If the CJL moves landward after an avulsive event, then a permit logically will be required for recovery of areas that remain private property but previously were landward of the CJL. DEEP has simplified the permitting process in such cases by issuing a “General Permit for Coastal Storm Response” that authorizes landowners to undertake certain activities in preparation for or response to coastal storm events without an individual permit or certificate. The general permit goes into effect after a declaration by the DEEP Commissioner and authorizes certain activities to recover land lost to avulsion. Federal permits, however, may also be required before storm response activities can begin.

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## Flood and Erosion Control Structures

Flood and erosion control structures protect much of Connecticut's shoreline. A wide variety of flood and erosion control structures are used along Connecticut's coastline. These include structures placed in the water, along the shoreline, or inland, and they include "armoring" and "green infrastructure" approaches. Coastal flood and erosion control structures are subject to federal, state and local permitting. A structure's location and design will determine who can deploy it and the permitting process. This section reviews some of the key permits that may be required.

At the federal level, any structure waterward of the high tide line requires a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act. At the state level, structures waterward of the CJL require a permit from DEEP. Minor projects meeting certain conditions, including repair of a flood and erosion control structure, are presumptively approved. Other projects will require an individual permit or may be authorized under a Certificate of Permission. Finally, the municipal zoning commission must approve the coastal site plan for all proposed shoreline flood and erosion control structures landward of the CJL. Structures must be approved if "necessary and unavoidable" to protect certain types of property, including infrastructure and houses built prior to 1995.

Seawalls and breakwaters are two common types of flood and erosion control structures of interest to stakeholders that illustrate differing permit requirements for structures placed on land and in the water. Breakwaters, by definition, are placed in the water. As a result,

they are on public land and therefore require public agency leadership. Once proposed, they will require permits from both the Army Corps and DEEP, as well as municipal approval. Permitting for seawalls depends on where they are located. Seawalls located partially or wholly below the CJL will in most cases require both a DEEP permit and a federal Section 404 permit. Conversely, no permit is required from either DEEP or the Corps for a seawall located above the CJL and high tide line. In such cases, however, municipal approval is required through the coastal site plan review process. And seawalls located both above *and* below the CJL will require municipal, state, and federal approvals.

Permitting and construction of flood and erosion control structures may also give rise to lawsuits challenging government action or seeking damages from neighbors.

Denial of a permit for construction of a seawall may lead a property owner to consider lawsuits to challenge the permit process and decision or to seek damages from the loss of property. Legal challenges by property owners to Connecticut permit requirements as a whole have been denied by the state courts, so successful challenges to the permit would need to allege a specific failure during the permitting process. A successful suit of this type would most likely result in reconsideration of the permit application rather than financial penalties.

Lawsuits among neighbors may arise if a seawall pushes waves onto neighboring properties or causes increased erosion there. Similarly, declining to build or failing to maintain a seawall may allow erosion behind a seawall constructed by a neighbor. Theories of liability in such cases may include violation of the duty to provide lateral support, trespassing, and/ or creating a private nuisance.

No Connecticut cases have yet addressed questions of nuisance based on seawall construction or maintenance, but

such questions have been raised elsewhere. A series of Washington cases held that claims under both nuisance and trespass by a plaintiff against a neighbor for causing seawater flooding as a consequence of increased seawall height could proceed even though the defendant had obtained a permit for the seawall from the state agency. Similarly, Massachusetts courts have allowed nuisance, trespass, and negligence claims arising from erosion related to construction of groins and revetments. Each such case has turned on whether the plaintiff could show that the structures caused substantial harm to the plaintiff. The existence of a state permit for the activity has not barred recovery in these cases; on the other hand, violation of permit conditions, including the duty to maintain a seawall, could be relevant factors supporting liability.

## Conclusion

Understanding Connecticut law related to liability and permitting around the shoreline is critical for municipalities and others seeking to carry out governmental duties without incurring current or future legal costs. In many instances, state law shields towns and their officials from liability, but in some instances, municipal decisions may give rise to liability from takings or other sources. Municipalities can identify potential liability through careful forward planning, a task that is increasingly important due to sea level rise and increased storm activity affecting shoreline properties.

### ABOUT THE AUTHOR:

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