



# Flooding, Eminent Domain, and Government Authority

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Flooding is the most frequently occurring natural disaster in Connecticut, and scientists expect the occurrence and intensity of flooding events to increase in the future due to climate change.<sup>1</sup> Currently, up to 107,000 properties in Connecticut are at risk of a catastrophic flooding event,<sup>2</sup> threatening lives, property losses, and infrastructure damage. As flooding risks increase, state and local governments may consider exercising their eminent domain authority to take properties vulnerable to flooding in order to reduce the risks posed to people and properties.

This paper will examine the legal authority Connecticut and its municipalities have to take properties for flooding prevention purposes. Part 1 will look at how Connecticut classifies flood risks. Part 2 will explore the state and municipal eminent domain authority. It will assess the application of the eminent domain power for flood prevention purposes, as well as explain the discretion granted to the state and municipalities in determining which properties to take. Although this paper is focused on preventative flood planning, it will briefly consider emergency takings.

## 1 How does Connecticut classify flood risks?

Connecticut determines a property's vulnerability to flooding risks with the Federal Emergency Management Agency's (FEMA) flood insurance rate maps. These maps classify properties as special flood hazard areas (SFHAs) (areas within a 100-year floodplain), areas of moderate flood risk (areas with a risk between the limits of a 100-year and 500-year floodplain), or areas of minimal flood risk (areas within a 500-year floodplain).<sup>3</sup> Connecticut has 235,000 acres of SFHAs and an additional 88,689 acres of moderate or minimal flood risk areas.<sup>4</sup> FEMA also classifies specific properties in flood-prone areas. Properties that have been repeatedly flooded are considered repetitive loss

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<sup>1</sup> Conn. Dep't of Emergency Servs. & Pub. Prot., 2019 Connecticut Natural Hazards Mitigation Plan Update 158, 183 (2019), <https://perma.cc/49V8-DZUG>; U.S. Env'tl. Prot. Agency, What Climate Change Means for Connecticut (2016), <https://perma.cc/EP69-5EEJ>.

<sup>2</sup> Alexander Soule, New model suggests 46K CT properties at greater risk of flooding, The Hour, June 29, 2020, <https://perma.cc/X6YF-P3CT>. Federal Emergency Management Agency (FEMA) more conservatively estimates 60,400 properties are at risk of catastrophic flooding. *Id.*

<sup>3</sup> Fed. Emergency Mgmt. Agency, Flood Zones, <https://perma.cc/V4G2-CSXT>, U.S. Dep't of Agric., Definitions of FEMA Flood Zone Designations, <https://perma.cc/6TTS-9N6R>.

<sup>4</sup> Conn. Dep't of Emergency Servs. & Pub. Prot., 2019 Connecticut Natural Hazards Mitigation Plan Update 159 (2019), <https://perma.cc/49V8-DZUG>.

properties or severe repetitive loss properties, depending on the frequency and extent of the damages from flooding.<sup>5</sup> As of 2018, Connecticut had 3,368 repetitive loss properties and 163 severe repetitive loss properties.<sup>6</sup> Of the repetitive loss properties, 148 had been mitigated.<sup>7</sup> Repetitive loss properties and severe repetitive loss properties are eligible for government funding for mitigation activities, which may include government acquisition of the properties.<sup>8</sup> So far, the government has typically acquired properties through buyouts.<sup>9</sup> Although there are efforts to mitigate flood risks, thousands of properties remain vulnerable to flooding.

## 2 When can Connecticut and its municipalities exercise eminent domain over properties vulnerable to flooding?

This section will explain the legal basis for Connecticut's eminent domain authority and discuss when Connecticut and its local governments can use eminent domain in a flooding context.

### 2.1 Connecticut's eminent domain authority

Governmental eminent domain authority is rooted in the Constitution. The Fifth Amendment, which applies only to the federal government, holds: "nor shall private property be taken for public use, without just compensation."<sup>10</sup> The eminent domain clause applies to the states through the Fourteenth Amendment.<sup>11</sup> In addition, the Connecticut constitution recognizes the authority of the state to exercise eminent domain power.<sup>12</sup> Federal standards and interpretations of eminent domain in the Supreme Court are binding on the states, but states may place additional restrictions on the exercise of eminent domain powers in their jurisdictions.<sup>13</sup>

Connecticut has delegated eminent domain authority to multiple state agencies.<sup>14</sup> A primary agency in Connecticut flooding prevention is the Department of Energy and Environmental Protection (DEEP). DEEP has authority to take property "for any purpose or activity relating to or compatible with [its] functions."<sup>15</sup> Among its many functions, it establishes flood control or alleviation

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<sup>5</sup> *Id.* at 175. Repetitive loss properties are those properties that have been flooded twice in a ten-year period (more than ten days apart and have received at least \$1,000 each time from NFIP). *Id.* at 175-176. Severe repetitive loss properties are those properties that, since 1978, have either received four or more separate claim payments of \$5,000 or more each, or have received two or more separate claim payments where the total value exceeds the value of the property. *Id.* at 176.

<sup>6</sup> *Id.* at 175-176.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*; *id.* at app. 5.

<sup>9</sup> *See, e.g.*, Nicholas Boke, Buyout Program Helps Floodplain Owners Relocate, *ecoRI*, July 20, 2016.

<sup>10</sup> U.S. CONST. amend. V.

<sup>11</sup> *Id.* at amend. XIV.

<sup>12</sup> CONN. CONST. art. I, § 11.

<sup>13</sup> *Kelo v. City of New London*, Conn., 545 U.S. 469, 489 (2005).

<sup>14</sup> *Bugryn v. City of Bristol*, 774 A.2d 1042, 1046 (Conn. App. Ct. 2001); *see, e.g.*, CONN. GEN. STAT. §§ 13b-36 (Department of Transportation), 22a-25 (Department of Energy and Environmental Protection); 8-82 (Department of Economic and Community Development).

<sup>15</sup> CONN. GEN. STAT. § 22a-25.

measures<sup>16</sup> and provides advice, assistance, and approval for municipal flood prevention projects.<sup>17</sup> DEEP authority to take property thus extends to taking properties as needed for flood prevention or control projects.

Municipalities also have broad eminent domain authority.<sup>18</sup> In addition to the broad authority granted to municipalities, the state legislature has delegated authority to municipal flood and erosion control boards specifically to take any property “which it determines is necessary for use in connection with the flood prevention, climate resilience and erosion control system.”<sup>19</sup> Both state and municipal entities play a role in flood prevention planning and can use eminent domain to accomplish those plans.

## 2.2 Eminent domain criterion: public use

Government entities can only exercise eminent domain for a “public use.” In order for a municipality to successfully take property for flooding prevention purposes, flooding prevention must be considered a “public use” or “public purpose.”<sup>20</sup>

Typically, courts are deferential to the legislature’s determination of what constitutes a public use,<sup>21</sup> “unless the use be palpably without reasonable foundation.”<sup>22</sup> Courts will generally only question whether the taking was for a public purpose, not whether the use is properly considered a public use. In Connecticut, a public use “defies absolute definition, for it changes with varying conditions” of society, technology, science, and other circumstances.<sup>23</sup> Combined with the deference to legislatures, there is a broad range of what courts will accept as public uses.

The Connecticut legislature has granted municipal flood and erosion control boards the authority to exercise eminent domain for flooding prevention and climate resilience purposes.<sup>24</sup> This indicates that the legislature believes flooding prevention and climate resilience are public uses. It is likely that flooding prevention and climate resilience are a “reasonable foundation” for a public use, and courts are unlikely to question the legislature’s judgement.<sup>25</sup> Because flooding prevention is a public use, the broad grants of eminent domain authority to the state, agencies, and municipalities also encompass takings for flooding prevention. Therefore, the municipal flood and erosion control boards, the

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<sup>16</sup> *Id.* § 22a-342.

<sup>17</sup> *Id.* §§ 22a-319; 25-94.

<sup>18</sup> CONN. GEN. STAT. § 7-148(c)(3)(A).

<sup>19</sup> CONN. GEN. STAT. § 25-86.

<sup>20</sup> *Kelo v. City of New London, Conn.*, 545 U.S. 469, 469 (2005).

<sup>21</sup> *Id.* at 483.

<sup>22</sup> *Kelo v. City of New London*, 843 A.2d 500, 527 (Conn. 2004); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)).

<sup>23</sup> *Barnes v. City of New Haven*, 98 A.2d 523, 527 (Conn. 1953).

<sup>24</sup> CONN. GEN. STAT. § 25-86; *see also* *In re U.S.*, 28 F. Supp. 758, 764 (W.D.N.Y. 1939) (finding that flood prevention control measures are in the public interest if the legislature decides).

<sup>25</sup> Although not binding, a Connecticut court has previously found flooding prevention to be a “laudable” public purpose. *Dooley v. Town Plan & Zoning Comm’n of Fairfield*, 197 A.2d 770, 773 (Conn. 1964).

municipalities, the state, and agencies with broad grants of eminent domain power can exercise eminent domain in order to reduce flooding risks.

Although it is unlikely courts would question the categorization of flooding prevention as a public use, the state or municipalities could protect their decision by additionally framing the public use as the preservation of ecologically significant areas.<sup>26</sup> Courts have previously found that the protection of land for wildlife and the preservation of the natural environment are public uses.<sup>27</sup> Floodplains often contain wetlands and other ecologically valuable areas.<sup>28</sup> Connecticut's estuaries and tidal wetlands, for example, offer valuable ecosystem services<sup>29</sup> and, due to their low-lying nature, often overlap with FEMA-designated floodplains. Ecological preservation, as well as flooding prevention, are both widely accepted public uses for which takings are appropriate.

### 2.3 Determining which properties to condemn

A unique factor of eminent domain in a climate change context is the difficulty of determining which properties to take and when to take them.<sup>30</sup> Increased riverine and coastal flooding is expected in the future due to climate change,<sup>31</sup> but scientific predictions are limited as to the precise timing and locations of future flooding events.<sup>32</sup> State and municipal governments interested in condemning land for flood prevention may struggle to determine which properties to take for the most effective flood prevention programs.

Like for public uses, courts defer to the government entity exercising eminent domain powers in choosing which properties to take to effectuate a project for a public use.<sup>33</sup> The Supreme Court recognizes that “our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts.”<sup>34</sup> Most statutes do not define standards or criteria that government entities should use to determine when or which properties to take. The law granting municipal flood and erosion control boards power to condemn properties is slightly clearer. It states that a board may condemn a property “which it determines is necessary for use in connection with future flood prevention, climate resilience and erosion control system.”<sup>35</sup> This statute gives broad discretion to the boards to take properties which they determine is “necessary” for a flood prevention program or climate resilience program. No state government entity or municipal boards

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<sup>26</sup> Maye C. Emlein, Comment, Rising to the Challenge: Managed Retreat and the Takings Clause in Maine's Climate Change Era, 73 Me. L. Rev. 169, 192 (2021).

<sup>27</sup> See *North Dakota v. U.S.*, 460 U.S. 300, 309 (1983); *Bartlett v. Zoning Comm'n of Old Lyme*, 282 A.2d 907, 910 (Conn. 1971).

<sup>28</sup> Fed. Emergency Mgmt. Agency, Floodplain Natural Resources and Functions 8-1, <https://perma.cc/428L-WGA2>.

<sup>29</sup> See Conn. Dep't of Energy & Envtl. Prot., What are tidal wetlands?, <https://perma.cc/L5CT-55G3>; see, e.g., Wetlands of Distinction, Connecticut River Estuary, <https://perma.cc/3AKL-JGKQ>.

<sup>30</sup> Emlein, *supra* note 26, at 195.

<sup>31</sup> U.S. Envtl. Prot. Agency, What Climate Change Means for Connecticut (2016), <https://perma.cc/EP69-5EEJ>.

<sup>32</sup> Emlein, *supra* note 26, at 195.

<sup>33</sup> *Kelo v. City of New London, Conn.*, 545 U.S. 469, 488-489 (2005).

<sup>34</sup> *Id.* at 488.

<sup>35</sup> CONN. GEN. STAT. § 25-86.

has described when they would consider a taking “necessary” for their public use plans, but courts would likely be deferential to the government’s determination that a taking is necessary.

Unlike Connecticut, the U.S. Army Corps of Engineers (the Corps) has developed a formula to determine which properties to take in response to climate change threats. The Corps estimates the likely value of damage a house will incur over the next fifty years and compares it to the cost to buy and tear down the house and move the owner.<sup>36</sup> If the value of buying out the house is less, the Corps will offer to buyout the home, and if refused, will exercise its eminent domain power.<sup>37</sup>

Although Connecticut has not yet provided the criteria it considers when determining which properties to condemn, it would likely consider which properties are currently in floodplains, the available scientific predictions of future risk, the needs of the surrounding community and environment, and, like the Corps, the economic value of condemning properties. Ultimately, however, state and local governments will likely have discretion in determining which properties to take based on their expertise and the needs of the community.

## 2.4 Emergency takings

The Connecticut governor has authority to exercise eminent domain for civil preparedness emergencies, which include hurricanes, floods, storms, and high water that either the U.S. president or the Connecticut governor declare to be an emergency.<sup>38</sup> During these times, the Connecticut governor may use their eminent domain authority “in such manner as he deems for the best interests of the state or its inhabitants . . . .”<sup>39</sup> As with non-emergency takings, the government must pay just compensation.<sup>40</sup> Although most flood prevention planning and associated takings will occur well in advance of flooding events, emergency takings allow the government to take properties as required during or soon before a flooding event.

## 3 Conclusion

Connecticut faces the risk of increased flooding events due to climate change. In order to prepare for and reduce the risk of future floods, state or local governments may choose to exercise eminent domain in order to execute flood prevention and resilience plans. Many state and local government entities have authority to take private properties for public uses, which include flooding prevention and climate resilience. Courts will likely defer to the government as to which properties to take and when to take them. Although most planning will happen in advance of flooding, in an emergency,

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<sup>36</sup> Christopher Flavelle, Trump Administration Presses Cities to Evict Homeowners from Flood Zones, N.Y. Times, Mar. 11, 2020, <https://perma.cc/3PBT-2L38>.

<sup>37</sup> *Id.*

<sup>38</sup> CONN. GEN. STAT. §§ 28-1, 28-11.

<sup>39</sup> *Id.* § 28-11(b).

<sup>40</sup> *Id.* § 28-11(d), (e).

the governor may execute an emergency taking. Although takings can be unpopular, the state and local governments can use their authority to accomplish their flood planning goals.