

**Climate Adaptation Academy Fact Sheet #3**

# Governmental Tort Liability for Disclosure of Flood Hazard Information

Connecticut Sea Grant  
Avery Point Campus  
1080 Shennecossett Rd.  
Groton, CT 06340

860-405-9106  
clear@uconn.edu  
climate.uconn.edu

*This fact sheet was written by Audrey Elzerman, Rhode Island Sea Grant Law Fellow, in association with the Marine Affairs Institute at Roger Williams School of Law and Rhode Island Sea Grant Legal Program.*

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Local governments and governmental entities, their employees, and members of their boards and commissions may be subjected to lawsuits in connection with municipal activities. This fact sheet reviews claims that may arise against them under tort law for negligence related to coastal management actions.

## Elements of Negligence

Connecticut courts have adopted the four generally-accepted elements of negligence under the common law. These include: (1) a *duty* by the defendant to the plaintiff; (2) *breach* of that duty by the defendant; (3) that the breach of the duty *caused* injury; and (4) that the plaintiff suffered actual *injury*.<sup>1</sup> In the context of government negligence liability, plaintiffs must show the existence of a private duty owed by the governmental entity or agent to the plaintiff rather than a duty to the public at large.<sup>2</sup>

In addition to showing each of the four elements of negligence, plaintiffs must overcome substantial governmental immunities that bar most negligence claims against the state, municipalities, and their agents and employees. In most instances, these immunities will apply to negligence claims related to coastal management decisions made by either the state or municipalities.

## State and State Employee Immunity

The State of Connecticut, including state agencies, is protected from actions, including tort claims, under the doctrine of sovereign immunity.<sup>3</sup> The doctrine of sovereign immunity provides that neither the State nor its officers and agents can be sued without its consent, except in particular circumstances that are “few and narrowly construed.”<sup>4</sup> To overcome the presumption of sovereign immunity, a plaintiff must establish that “(1) the legislature, either expressly or by force of a necessary implication, statutorily waived the state’s sovereign immunity; or (2) in an action for declaratory or injunctive relief, the state officer or officers against whom such relief is sought acted in excess of statutory authority, or pursuant to an unconstitutional statute.”<sup>5</sup> Relevant coastal management statutes do not waive immunity, limiting state exposure to negligence liability in this context.

## Municipal Immunity

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Connecticut municipalities, like the State itself, are protected from liability by certain immunities under state law. The Connecticut Supreme Court has noted that, “[a]s a matter of Connecticut’s common law, ‘the general rule . . . is that a municipality is immune from liability for negligence unless the legislature has enacted a statute abrogating that immunity.’”<sup>6</sup> Connecticut statutes do make municipalities liable for certain claims, including for certain negligent acts and omissions by employees and for creating a nuisance.<sup>7</sup>

Only certain types of negligent acts and omissions result in liability. Municipalities are liable for damages resulting from negligent performance of “ministerial” acts or omissions by their employees and agents who are “acting within the scope of [their] official duties.”<sup>8</sup> Ministerial acts are those “performed in a prescribed manner without exercise of judgment or discretion.”<sup>9</sup> Ministerial acts may be required by city charter provision, ordinance, regulation, rule, policy, or other directive.<sup>10</sup> Conversely, municipalities are *not* liable (but may in some cases be required to indemnify their employees<sup>11</sup>) for “acts or omissions which require the exercise of judgment or discretion”—so-called “governmental acts.”<sup>12</sup> Connecticut 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.<sup>13</sup> The determination of whether an act involves an exercise of judgment is a question of law decided on a case-by-case basis.<sup>14</sup>

Exceptions from governmental act immunity include: (i) acts involving malice, wantonness, or intent to injure; (ii) statutes explicitly providing for liability; and (iii) “when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person [or class of persons] to imminent harm.”<sup>15</sup> The “identifiable person-imminent harm exception” has not been applied to land use cases in Connecticut and is unlikely to apply to coastal management permitting or information-disclosure decisions.<sup>16</sup>

Municipalities also enjoy statutory immunity associated with ten specific claims, including several immunities that are relevant to coastal management. These immunities include, but are not limited to, claims arising from:

- the condition of natural or unimproved areas;
- the condition of water management structures (*e.g.*, tide gates);
- the temporary condition of a road or bridge resulting from weather, until the municipality is notified and has a chance to make the condition safe;
- issuance or denial of a permit or other approval that is discretionary by law (*i.e.*, the issuance of which is not a matter of right); and
- inspection of property to determine compliance with the law or health or safety hazards, unless the municipality had notice of a violation or hazard.<sup>17</sup>

## Municipal Employee Immunity

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Municipal employees and officers are “generally protected from personal liability for land use decisions” in Connecticut.<sup>18</sup> This immunity is parallel to the immunity of municipalities themselves, including with respect to immunity against claims resulting from discretionary acts (and the exceptions to that immunity)<sup>19</sup> and the ten specific immunities discussed above for municipalities.<sup>20</sup> Under these immunities, employees are largely immune from negligence liability for coastal management decisions:

“Most actions of members of land use agencies when reviewing applications are governmental acts since they are performing a function delegated by statute to the agency and its members. . . . Even though an application is filed by someone with an interest in specific property, the review function is required by statute for benefit of the public. In addition, almost all actions of agency members would be discretionary and not ministerial on land use applications.”<sup>21</sup>

Even if employees are not immune, municipalities may be required to indemnify them for liability. Connecticut has “effectively circumvented the general common law immunity of municipalities from vicarious liability for their employees’ acts by permitting injured plaintiffs to seek indemnification from a municipal employer for such acts under certain circumstances and after conformance with certain statutory requirements . . . .”<sup>22</sup> This indemnification requires the municipality to pay a judgment against an employee for physical injury or damage to persons or property, provided that the employee was “acting in the performance of his duties and within the scope of his employment” and that the employees actions were not “wilful or wanton.”<sup>23</sup>

## Immunity of Members of Boards and Commissions

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Local board members qualify for a very broad protection from liability. Members of boards and commissions are not “personally liable for damage or injury resulting from *any* act, error, or omission made in the exercise of such person’s policy or decision-making responsibilities,” provided that they were “acting in good faith, and within the scope of [their] official functions and duties, and [were] not acting in violation of any . . . code of ethics regulating [their] conduct.”<sup>24</sup> However, members of boards and commissions are not shielded from liability for their actions that cause damage or injury as a result of “reckless, willful or wanton misconduct.”<sup>25</sup>

## Liability for Acts and Omissions Related to Flood Risks

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A variety of state and municipal actions related to coastal management may raise questions and concerns about potential tort liability. These include review and permitting of shoreline development and decisions to inform, or not inform, the public about current and expected flood risks. These state and municipal actions generally will not give rise to negligence liability in Connecticut, however.

The Coastal Management Act requires state and municipal entities to take several actions when presented with shoreline development proposals. These actions include state Department of Energy and Environmental Protection (DEEP) permitting of flood and erosion control structures below the coastal jurisdiction line and municipal review of coastal site plans. The Coastal Management Act does not waive any immunities, such that liability for these actions is only possible if another exception to sovereign or municipal immunity applies. No such exception applies.

- As a state agency, DEEP is protected by sovereign immunity under which liability will only accrue if the statute is unconstitutional or an employee implements it in an unauthorized way.
- Coastal site plan review is a governmental act that requires the exercise of discretion, such that municipalities and their employees (and board members) are specifically shielded from liability unless an exception applies. The only potentially applicable exception would be imminent harm; however, as discussed above, this exception is narrowly construed and is highly unlikely to apply

in this instance—particularly given the statutory authorization for property owners to fortify property in advance of hurricanes and tropical storms.<sup>26</sup>

Informing current or prospective property owners about flood hazard information—or failure to disclose such information—may also give rise to liability concerns. The state and municipalities may provide information on future flood hazards to property owners and to the federal government through participation in the National Flood Insurance Program (NFIP).<sup>27</sup> They may or may not also share flood hazard information through coastal resiliency plans or other mechanisms—including information calculated based on different methodologies from NFIP.

Disclosure of expected flood hazards and impacts on property and infrastructure may reduce property values, which could give rise to lawsuits by current property owners. On the other hand, failure to disclose this type of information could cause future buyers to overpay, opening up the possibility of lawsuits based on failure to disclose.

Lawsuits against municipalities based on information disclosure will not succeed for several reasons. First, municipalities do not have a private duty to disclose (or not) information to particular property owners or potential buyers—instead, the duty, if any, is to the public as a whole. Second, municipalities are not statutorily obliged to disclose the likelihood of future coastal flooding, so their information disclosure decisions are discretionary. Therefore, these decisions are governmental acts for which municipalities and their employees are immune from negligence liability. If necessary, municipalities could also argue that they are specifically shielded from liability to the extent that information disclosure is an “inspection of [] property . . . to determine whether the property . . . contains a hazard to health or safety.”<sup>28</sup>

Finally, information disclosure decisions will not give rise to takings liability. As more thoroughly discussed in another fact sheet in this series, a taking occurs when the government physically occupies a property or deprives it of beneficial use by regulation.<sup>29</sup> Information disclosure is not regulatory and would not be a taking.

## Questions Answered

In November 2015, Connecticut Sea Grant and CLEAR held a workshop on the legal aspects of climate adaptation. Participants were asked to write down questions or issues they had about the topic. Over fifty questions were asked and a complete list can be found on the Adapt CT website at <http://climate.uconn.edu/caa/>. **This Fact Sheet answers the following questions from the workshop:**

### Flood

1. Is there a legal liability to a town for identifying properties that may be flooded in the future by sea level rise in a coastal resilience plan?

### Government Action (zoning/plans/regulations)

13. If a municipal authority has reason today to believe that areas of the community are at risk of sea level rise within the next fifty years, including risk to supporting infrastructure, what obligation does the municipality have to inform current and future property owners of their exposure to that risk?

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<sup>1</sup> See *Murdock v. Croughwell*, 848 A.2d 363, 367-68 (Conn. 2004), quoting RESTATEMENT (SECOND), TORTS § 314 (1965).

<sup>2</sup> *Shore v. Stonington*, 444 A.2d 1379, 1382 (Conn. 1982).

<sup>3</sup> See, e.g., *Housatonic R.R. Co. v. Comm'r of Revenue Servs.*, 21 A.3d 759, 764 (Conn. 2011).

<sup>4</sup> *DaimlerChrysler Corp. v. Law*, 937A.2d 675, 711 (Conn. 2007), quoting *C.R. Klewin Northeast, LLC v. Fleming*, 932 A.2d 1053 (Conn. 2007).

<sup>5</sup> *Miller v. Egan*, 828 A.2d 549, 559 (Conn. 2003) (internal citations omitted).

<sup>6</sup> *Grady v. Town of Somers*, 984 A.2d 684, 692 (Conn. 2009), quoting *Williams v. New Haven*, 707 A.2d 1251 (1998).

<sup>7</sup> Conn. Gen. Stat. § 52-557n; *Grady v. Town of Somers*, 984 A.2d at 692, citing *Spears v. Garcia*, 818 A.2d 37 (Conn. 2003); *Sanzone v. Bd. Police Comm'rs Of City of Bridgeport*, 592 A.2d 912, 918 (Conn. 1991) (discussing ambiguity in meaning and extent of § 52-557n).

<sup>8</sup> Conn. Gen. Stat. § 52-557(n)(a)(1) (imposing liability more specifically for “damages to person or property caused by (A) [t]he negligent acts or omissions of [the municipality] . . . or any employee, officer or agent thereof acting within the scope of his employment or official duties; (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit; and (C) “acts of the political subdivision which constitute the creation or participation in the creation of a nuisance”).

<sup>9</sup> *Martel v. Metro. Dist. Comm'n*, 881 A.2d 194, 202 (Conn. 2005); *Belanger v. City of Hartford*, 578 F. Supp.2d 360, 366 (D. Conn. 2008), quoting *Spears v. Garcia*, 818 A.2d 37 (Conn. 2003) (“Governmental acts ‘are

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performed wholly for the direct benefit of the public and are supervisory or discretionary in nature,’ whereas ministerial acts ‘refer to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion.”).

<sup>10</sup> *Violano v. Fernandez*, 907 A.2d 1188, 1196 (Conn. 2006).

<sup>11</sup> Conn. Gen. Stat. § 7-465; *see also* Grady, 984 A.2d at 693-94 (discussing indemnity as source of municipal liability)

<sup>12</sup> Conn. Gen. Stat. § 52-557n(a)(2).

<sup>13</sup> *Doe v. Peterson*, 903 A.2d 191, 197 (Conn. 2006), quoting *Haddock v. New York*, 553 N.E.2d 987 (N.Y. 1990) (“Discretionary act immunity ‘reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury.”).

<sup>14</sup> *Haynes v. City of Middletown*, 101 A.3d 249, 255 (Conn. 2014).

<sup>15</sup> *Violano v. Fernandez*, 907 A.2d 1188, 1194 (Conn. 2006), quoting *Doe v. Petersen*, 903 A.2d 191, 197 (Conn. 2006). “The identifiable person-imminent harm exception requires plaintiffs to meet three requirements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm.” *Haynes*, 101 A.3d at 255 (internal quotation omitted); *see also* *Edgerton v. Town of Clinton*, 86 A.3d 437, 446 n.13 (clarifying that satisfaction of the identifiable person-imminent harm test is sufficient to prove the existence of a private duty).

<sup>16</sup> Robert A. Fuller, Conn. Prac., Land Use Law & Prac. § 43:10 (4<sup>th</sup> ed. 2015); *see also* *Haynes*, 101 A.3d at 258, quoting *Violano v. Hernandez*, 907 A.2d 1188 (Conn. 2006) (“[I]f a harm is not so likely to happen that it gives rise to a clear duty to correct the dangerous condition creating the risk of harm immediately upon discovering it, the harm is not imminent. This reading . . . is consistent both with the meaning of the word ‘imminent’ and with our case law holding that the imminent harm to identifiable persons exception ‘represents a situation in which the public official’s duty to act is [so] clear and unequivocal that the policy rationale underlying discretionary act immunity—to encourage municipal officers to exercise judgment—has no force.”).

<sup>17</sup> Conn. Gen. Stat. § 52-557n(b).

<sup>18</sup> Robert A. Fuller, Conn. Prac., Land Use Law & Prac. § 43:10 (4<sup>th</sup> ed. 2015).

<sup>19</sup> *Evon v. Andrews*, 559 A.2d 1131 (Conn. 1989) (“While a municipality itself was generally immune from liability for its tortious acts at common law, its employees faced the same personal tort liability as private individuals. A municipal employee however, has a qualified immunity in the performance of a governmental duty, but he may be liable if he misperforms a ministerial act, as opposed to a discretionary act. The word ‘ministerial’ ‘refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion.’ (internal quotations and citations omitted)).

<sup>20</sup> Conn. Gen. Stat. § 52-557n(b).

<sup>21</sup> Robert A. Fuller, Conn. Prac., Land Use Law & Prac. § 43:10 (4<sup>th</sup> ed. 2015).

<sup>22</sup> *Sanzone v. Bd. Of Police Comm’rs of City of Bridgeport*, 592 A.2d at 921.

<sup>23</sup> Conn. Gen. Stat. § 7-165(a).

<sup>24</sup> Conn. Gen. Stat. § 52-557n(c) (emphasis added).

<sup>25</sup> *Id.*

<sup>26</sup> *See* Conn. Gen. Stat. § 22a-111a.

<sup>27</sup> 42 U.S.C. § 4101(a)(1)(2).

<sup>28</sup> Conn. Gen. Stat. § 52-557n(b)(8).

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