

# Adapting to Climate Change, A Real Property Perspective:

Environmentally-supported Eminent Domain Proceedings in Natural Disaster Areas Are Redefining the 5<sup>th</sup> Amendment.

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After Super Storm Sandy hit the northeast coast, New York State Governor Andrew Cuomo was one of the first political figures to openly acknowledge climate change as a current global threat to both life and property. In front of a world audience, Governor Cuomo stated that he had told U.S. President Barack Obama, “We have a 100-year flood every two years now.” Governor Cuomo went on to say, “There has been a series of extreme weather incidents. That is not a political statement. That is a factual statement. Anyone who says there’s not a dramatic change in weather patterns, I think is denying reality.” New York City Mayor Michael Bloomberg and many other leaders throughout the world agreed with Governor Cuomo.<sup>1</sup>

Natural disasters as a result of weather-related events are more common now and unfortunately more destructive. U.N. Secretary-General Ban Ki-Moon has estimated direct losses from disasters at \$2.5 trillion dollars just in this century alone, with that amount steadily climbing.<sup>2</sup> The effect on real property is undeniable. Coastal storms and floods destroy homes on a grand scale with increasing regularity. Governments are forced to handle the overwhelming task of dealing with real property issues as a result of these natural disasters.

Recently, this task of recovery has presented a unique dilemma. Exactly how does the government respond to natural disasters regarding real property? The answer to this question is not easily accepted. In fact, when this issue of

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<sup>1</sup> Daily Mail Reporter, *Will global warming bring storm barriers to New York Harbor? Bloomberg and Cuomo blame Hurricane Sandy on climate change*, The Daily Mail Online (Oct. 30 2012, 7:20 pm), <http://www.dailymail.co.uk/news/worldnews/article-2225484/Hurricane-Sandy-Michael-Bloomberg-Andrew-Cuomo-blame-hurricane-climate-change.html#ixzz2lmJh2tss>.

<sup>2</sup> Associated Press, *Natural Disasters Have Cost the Global Economy \$2.5 trillion Since 2000*, Business Insider (May 15 2013, 8:10 pm), <http://www.businessinsider.com/natural-disasters-cost-25-trillion-2013-5#ixzz2lmRtEwbD>.

governmental response is examined thoroughly a frightening trend is revealed. Governments are using recovery efforts after natural disasters as an opportunity to take real property. An analysis of the recovery efforts themselves will provide the blueprint of how the governments are actually doing this.

Governmental entities have a statutory duty to ensure the public welfare of citizens residing in their cities, towns, counties and states. After natural disasters, this duty of public welfare becomes that much more important. Article XVII of the New York State Constitution states, "The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefore shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine."<sup>3</sup> As the constitution implies, there is a real need for the government to be able to control items, which may affect the health of citizens. This includes real property. After natural disasters, citizens are vulnerable to injury and disease from the damage to homes, land, and utilities. It is imperative that the government has the ability to manage these items. Through legislature, the constitution empowers the state and its subdivisions with the means to control real property as they determine.<sup>4</sup> This fact is crucial. The state and its subdivisions determine when and how to control real property. This determining ability is used by the state to maintain the public welfare and perform governmental functions.<sup>5</sup> Unfortunately this determining ability of the state is exactly where the problems first arise. Often, the citizen's right to control their own property conflicts with the government's need to control that same property. Many citizens find it appalling that a governmental body can simply come in and seize their land or their home. Still more do not know the government has this power.

A governmental body can take private property for public use with just compensation. The Fifth Amendment to the United States Constitution addresses the issue of the government's ability to seize private property for public use. This is commonly referred to as the 'Takings' clause. This clause of the Amendment has raised pivotal questions throughout our nation's history. What constitutes public use? By what measure is public use compared when applied to promote governmental agendas? Who determines the value of just compensation? When exactly does governmental control of a property become necessary for the public's use if the public has no access to the property being seized?

Most of the questions raised as a result of the takings clause of the Fifth Amendment are subjective in nature, meaning they are rarely answered in a broad sense. A judge or jury of a court hearing the question provides an answer based on their own subjective viewpoint of the facts applied to previous court rulings. Placing such a responsibility in one or a few people's hands allows those

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<sup>3</sup> N.Y. Const. Art. XVII §3

<sup>4</sup> See *United States v. Village of Farmingdale*, 43 F.Supp. 561 (1942).

<sup>5</sup> See *Bronx Chamber of Commerce v. Fuller*, 174 Misc. 524, 21 N.Y.S.2d. 474 (N.Y. Sup. Ct. 1940).

people to personally justify what they believe is the appropriate solution. There have been numerous court cases which have addressed this slippery slope issue. Perhaps no case has been more important in recent years than *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed. 439 (2005).

In *Kelo v. City of New London* (2005) the groundwork for government to speculate as to the future benefit of a specific piece of real property was established. The city of New London wanted to re-develop private real property through the use of a third party developer under the premise such action would better serve the public welfare. The government (the city of New London) was successful. Non-distressed real property was defined as being part of a blighted neighborhood and taken so that it may be re-developed. The future economic benefit of a government's ability to take private property and allow it to be developed by an outside party outweighed an individual's right to that property. Promoting the future public welfare of a community was the determining factor in the decision to take a strategically located property. This manner of justifying the forceful removal of an individual's right to possess property laid the foundation for future rulings so subjective in nature. If a governmental entity can justify public use based on future financial benefit, they can justify taking any property. This justification of future financial benefit will be the new strategy for governmental response following natural disasters.

It is the responsibility and the initiative of the government to direct recovery efforts following natural disasters. However, these recovery efforts following the destruction of private property are complicated and jurisdictional sensitive. After the destruction of Super Storm Sandy, the federal government allocated 2.1 billion dollars to the State of New York to aid with the rebuilding process.<sup>6</sup> The state, in turn, dispersed much of this aid to governmental organizations established to manage property restoration under their own authority. This trickle down effect of financial assistance from the federal government to the local governmental organizations often creates obscurity issues regarding whose interests are really being served. The individuals who own real property damaged and blighted by natural disasters may be left in a vulnerable position.

A few months before Sandy hit, the Biggert-Waters Flood Insurance Reform Act was quietly passed by Congress.<sup>7</sup> This bill authorized insurance companies to dramatically increase premiums in governmentally designated flood-prone communities. In this aspect, property owners in areas with the potential to be impacted by natural disasters are at the mercies of municipal zoning ordinances. Residents with real property in a flood zone designation are subject to astronomical insurance premiums. Many homeowners could not afford

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<sup>6</sup> FEMA, *A Year After Hurricane Sandy, More Than \$2.1 Billion In FEMA Public Assistance Grants In New York Helps Clear Debris, Reopen Public Facilities*, FEMA (Oct. 24, 2013 11:00 am), <http://www.fema.gov/disaster/4085/news>.

<sup>7</sup> FEMA, *Flood Insurance Reform Act of 2012*, FEMA (2012), <http://www.fema.gov/flood-insurance-reform-act-2012>.

to buy flood insurance before the storm hit. And without flood insurance or sufficient reconstruction aid after Sandy, the property will become blighted and subject to condemnation. Once this happens, governments can pursue eminent domain proceedings to take the property. So, in a very real way governments can use this zoning strategy to prevent the rebuilding of private property damaged through natural disasters; therefore encouraging blight and subsequent condemnation. Through the legal process of zoning, the government can promote the decay of privately owned property so that it may be seized and sold to a third party developer at a later date for profit to the city.

This is the first strategy for the government to use legal procedures such as a denial of building permits or zoning a property as flood prone in order to encourage a property's diminished value, eventually making it vulnerable to be taken through eminent domain. The second strategy is actually more solid for the government than the first.

“The legislature shall further provide for the acquisition of lands and waters, including improvements thereon and any interest therein, outside the forest preserve counties, and the dedication of properties so acquired or now owned, which because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people.”<sup>8</sup>

Section 4 of Article XIV of the New York State Constitution says essentially that if a piece of real property is pretty or significant, it can be taken. These are the two governmental strategies to take property. As discussed previously; if real property is ugly and blighted, it can be taken. And as discussed now; if real property is pretty and significant, it can be taken.

In conclusion, the government has every advantage at its disposal to take real property through eminent domain proceedings should it see fit to do so. And this fact alone should be of great concern, especially for homeowners following Super Storm Sandy. If Governor Andrew Cuomo is correct in his assumption. If Super Storm Sandy was only a precursor of events to come and natural disasters become something of a regular occurrence, then eminent domain proceedings will be the new strategy for governments to take advantage of climate change. And one has to wonder whether governments will eventually use this strategy to take property in areas prone to natural disasters even before the disasters occur.

Will the entire Rockaway peninsula be designated as a wetland preserve and taken? Will Battery Park City be taken to ensure the public welfare by protecting residents from a future hurricane? Will the old neighborhoods of Coney Island or Bay Ridge be condemned and offered up to bankers so that they may re-develop the properties into strip malls more able to withstand a high tide? It appears if the governments within the state of New York continue to use the two strategies previously mentioned, this may quite possibly be a likely scenario.

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<sup>8</sup> N.Y. Const. Art. XIV §4

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