

Managing Property Buyouts at the Local Level: Seeking Benefits and Limiting Harms

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Summary

Efforts to conduct buyouts of at-risk properties are an increasingly popular resilience tool, especially in response to massive flooding losses in recent years and the financial predicament of the National Flood Insurance Program. Calls for buyouts increased after Superstorm Sandy, with both New York and New Jersey dedicating funds to voluntary buyout programs. In some communities, an exclusive focus on the vulnerability of individual properties may lead to an implementation that causes harm to neighborhoods and communities. Based on development of a model local government ordinance for Florida communities, this Article analyzes how communities can participate in and support buyout implementation to seek to achieve the benefits of reduced flood risk while avoiding the most negative impacts of buyouts. It details the need for careful drafting due to federal and state requirements, which may require targeted exemptions limiting local government support for and implementation of specific federal or state buyout programs.

I. Introduction and a Caveat

State and local governments across the country, often with federal hazard mitigation funding, have used buyouts of at-risk properties as a way to protect people from flooding, avoid flood losses, and lessen the costs to flood insurance providers.¹ Costlier storms, sea-level rise (SLR), and climate change have increased the focus on buyouts as a tool to create natural buffers along the coast, help protect nearby neighborhoods and businesses from flooding, and make flood insurance more financially viable. Evidence clearly demonstrates that flood mitigation through acquisition and demolition or relocation of buildings on at-risk properties saves money overall for society,² and is the best way to protect people and property from harm.³

Still, use of buyouts comes with challenges. Despite the importance of the goals of fiscal sustainability for flood insurance and protecting people and property while safely

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1. See, e.g., David A. Lewis, *The Relocation of Development From Coastal Hazards Through Publicly Funded Acquisition Programs: Examples and Lessons From the Gulf Coast*, 5 SEA GRANT L. & POL'Y J. 98, 120-26 (2012) (describing post-Katrina rebuilding and buyouts in Louisiana). See also Sandra Zellmer & Christine Klein, *Mississippi River Stories: Lessons From a Century of Floods and Hurricanes*, 60 SMU L. REV. 1494-95 (2007) (noting that in Missouri after the 1993 flood on the Mississippi River, 90% of hazard mitigation funds went to buyouts and more than 10,000 buildings were removed), available at <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1486&context=smulr>. For one of the most high-profile and recent federal programs that includes buyouts on a communitywide scale and planned relocation of an entire community, see Isle de Jean Charles, *About the Project* (noting “[a]pproximately \$48 million of the award is dedicated to resettling the Isle de Jean Charles Band of the Biloxi-Chitimacha-Choctaw tribe. . . . The award will fund a resettlement model that is scalable, transferable and supportive of cultural and social networks” (citing Louisiana January 25, 2016, press release)), <http://www.coastalresettlement.org/about-the-project.html> (last visited Apr. 23, 2018).
2. See, e.g., NATIONAL INSTITUTES OF BUILDING SCIENCES, NATURAL HAZARD MITIGATION SAVES: 2017 INTERIM REPORT 27, 86 (2017) (noting that riverine flood mitigation activities have a 7:1 economic benefit and noting that “while considered a costly mitigation option, buyouts do provide the greatest societal benefit in the form of permanent avoidance of loss”), https://www.nibs.org/page/ms2_download.
3. Lewis, *supra* note 1, at 126 (citing Mississippi coastal improvement plan environmental impact statement).

developing the coast, authority over mitigation programs involves a confusing patchwork of local, state, and national government bodies, laws, and regulations. Further, when such programs do not specifically reflect each community and its unique needs, use of such programs can lead to potential problems, such as trapping some vulnerable property owners in a degraded neighborhood, reducing housing supply, compromising neighborhood integrity, shrinking the property tax base, causing urban decay, and creating higher per capita cost of infrastructure and basic services for local governments.

At the same time, buyouts of at-risk properties, combined with increasing rates of SLR, climate change, and stronger storm events, create two additional challenges: (1) larger and larger areas of land will contain properties subject to repeat flooding that could then be targeted for buyouts, and (2) increasing numbers of buyouts will create stronger expectations on the part of other property owners that they “deserve” a buyout, too, if their property becomes a severe repetitive loss (SRL) property. Buyouts also frequently pay a premium *above market value* as an incentive to property owners to participate.⁴ Expectations of a buyout, maybe even at a premium, may both perversely *increase* the value of at-risk properties and lead to more risk taking and less mitigation by property owners.⁵

To reiterate, we recognize the many benefits of buyouts to mitigate the risks to property owners, the risks to communities, and the fiscal challenges faced by the National Flood Insurance Program (NFIP) in decreasing the burden posed by repetitive loss (RL) and SRL properties.⁶ Buyouts

do offer maybe the quickest, most politically expedient way to address the most notorious RL properties. However, since they also carry the potential for some negative impacts *at the local level*, we have limited ourselves here to addressing these local impacts. At the same time, extremely important issues and questions surround buyouts regarding financial, subsidy, economic policy, and long-term legal implications of buyouts; the complexity of these topics meant their inclusion would overshadow discussion of the more on-the-ground and pragmatic local implications of buyouts that are our present focus, so they are left for another day.⁷

Thus, while this Article indicates potential pitfalls for local communities when they use buyouts as a hazard mitigation tool, such observations do not mean we support keeping federal taxpayers on the hook for flooding or other disaster losses or for indefinitely keeping people in high-risk areas. In fact, we, through our work, recognize the clear need for relocation out of some hazardous areas as risks continue to increase due to SLR and climate change. Our limited goal here remains only to encourage discussion about how to address some unintended consequences of buyouts at the local level.

The Article first develops hazard mitigation and fiscal concerns as the context for buyouts. It then lays out the federal, state, and local patchwork of laws and regulations relevant to buyouts, and moves on to highlight unintended consequences that may result from traditional hazard mitigation buyouts. We make a case for local governments and communities exercising more careful control over the when, where, and how of buyout implementation so that the hazard mitigation goals of buyouts can be integrated into the goals, priorities, and plans of the local community. To that end, the Article concludes with a model ordinance that empowers local governments, within appropriate legal limits, to more carefully integrate their hazard mitigation goals with other concerns that may arise in the implementation of buyout programs.

4. *Cf., e.g.*, CDBG DISASTER RECOVERY BUYOUT PROGRAM GUIDELINES (noting that the “guidelines demonstrate a program electing to . . . include[c] a ‘bonus’ award to incentivize individuals to purchase a new home in their city or county,” and noting that “In addition to the pre-flood fair market value of the property, eligible owners may also receive a replacement housing award of up to \${insert amount}.”), *available at* https://www.hudexchange.info/resources/documents/Disaster_Recovery_Buyout_Program_Guidelines.docx (last visited May 2, 2018).

In addition to the proposed “bonus” or “incentive” above pre-flood market value mentioned above, it should be noted that even offering the pre-flood value of property itself is very likely a subsidy, since typically property values decline in an area after a major disaster.

5. As an example, consider that flood insurance available to many properties through the National Flood Insurance Program (NFIP), especially when such coverage is subsidized, has resulted in a *decreased* perception of risk and *increased* property values. Chad J. McGuire, *Considering the Role of Government in Communicating Climate Change: Lessons From the US Public Flood Insurance Program*, in 3 HANDBOOK OF CLIMATE CHANGE COMMUNICATION 349, 351, 355-57 (Walter Leal Filho et al. eds., Springer 2018), https://link.springer.com/chapter/10.1007/978-3-319-70479-1_22. However, note that the NFIP will immediately begin to charge full-risk rates for any repetitive loss (RL) or SRL property that is offered mitigation assistance from the Federal Emergency Management Agency (FEMA) but rejects such an offer. 42 U.S.C. §4014(g)(2)(B)(i)-(ii).

6. Pub. L. No. 112-141, or what came to be colloquially known as the Biggert-Waters Act of 2012, in §100225(f) repealed former §1368 of the NFIP (Repetitive Loss Priority Program and Individual Priority Property Program). However, the terms “repetitive loss” and “severe repetitive loss” remain part of the NFIP. *See, e.g.*, 42 U.S.C. §§4011(b)(1), 4014(a)(2)(B), (g)(2)(B),

4014(h) (defining “severe repetitive loss property”), 4104c(a)(2), (c)(2)(A)(ii), 4104(d)(1)-(2), 4104(h)(2)-(3) (defining “severe repetitive loss structure”), and §4121(a)(7) (defining “repetitive loss structure”).

7. In addition to potential problems that may arise at the local level with extensive use of buyouts, other longer-term and big-picture concerns may emerge. For example, does public funding of buyouts undermine more accurate assessment of risk by the market and by private actors? How do local governments contribute to the vulnerability of private property that subsequently needs to be acquired through buyouts? Can—and should—federal taxpayers generally be financially responsible for risks created primarily by private actors and local governments? These and many other important policy questions related to vulnerability of private properties and how to mitigate the hazards to such property go beyond our present scope. This Article confines itself to the narrower question of how local governments can most effectively balance important local interests with an interest in decreasing flood risk through buyouts.

II. Hazard Mitigation as Context for Buyouts

When a property or a neighborhood experiences repeated flooding, costs for the property owner, the community, the state, and the federal government or private insurance claims can rapidly escalate.⁸ Flooding may impact the stability of a home or an entire neighborhood, damage or destroy personal property, impact property values, and lead to injuries, other health impacts, or loss of life. Emergency responders may risk their own lives to help residents escape rising waters.⁹ Buyouts of hazard-prone properties form a core hazard mitigation strategy to protect communities from these types of disasters.

Hazard mitigation is defined as any sustained action taken to reduce or eliminate long-term risk to people and property from natural hazards and their effects. Hazard mitigation is the only phase of emergency management specifically dedicated to breaking the cycle of damage, reconstruction, and repeated damage.¹⁰ Mitigation means taking action now through analyzing risk and then reducing risk or ensuring against it. Hazard mitigation takes place before disasters, along with emergency preparedness and recovery preparedness.

While reducing risks to life and property stand alone as excellent goals that buyouts seek to achieve, buyouts are also animated by a desire to decrease the economic costs of flood losses to the NFIP. For example, just 1% of NFIP-insured properties have accounted for 30% of the total NFIP losses over the history of the NFIP.¹¹ Examples of just how absurd the situation can be abound. One article noted both a \$56,000 house outside of Baton Rouge, Louisiana, that has flooded about 40 times and made \$430,000 in flood claims and a house assessed at \$72,400 in Houston, Texas, that has received more than \$1 million in flood insurance payouts.¹²

The fiscal unsustainability of the current NFIP structure is demonstrated by the fact that the U.S. Congress in late 2017 had to forgive \$16 billion of the NFIP's then-approximately \$25 billion debt to the U.S. Treasury.¹³ This allowed

the Federal Emergency Management Agency (FEMA) to continue borrowing money from the Treasury to ensure the ability of the NFIP to pay insurance claims resulting from 2017 flood losses, including those from Hurricanes Harvey, Irma, and Maria.

III. Federal Legal Framework for Mitigation and Buyout Programs

A. The Stafford Act

The federal government lacks authority to interfere in land use or building construction decisions at the local level.¹⁴ However, the federal government has a significant incentive to change these practices because it faces ever-increasing annual costs for disaster recovery.¹⁵ Congress provided a legal basis for the federal government to influence local land use or building construction practices indirectly by passing the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988. Section 322 of the Stafford Act requires:

[A] condition of receipt of an increased Federal share for hazard mitigation measures under subsection (e), a State, local, or tribal government shall develop and submit for approval to the President a mitigation plan that outlines processes for identifying the natural hazards, risks, and vulnerabilities of the area under the jurisdiction of the government.¹⁶

Changes to federal law in late 2017 may result in fewer funds than ever being available for federal hazard mitigation programs through FEMA.¹⁷ Less money for mitiga-

Congress and FEMA intended that, insofar as practicable, NFIP be funded with premiums collected from policyholders. However, the program, by design, is not actuarially sound because Congress has historically authorized FEMA to offer subsidized premium rates for policies covering certain structures to encourage prospective customers who might become insured to join the program. As a result, NFIP has not been able to generate sufficient premiums to cover losses and other program costs, and FEMA has needed to borrow money from Treasury to pay for claims in some years.

GAO, OVERVIEW OF GAO'S PAST WORK ON THE NATIONAL FLOOD INSURANCE PROGRAM, GAO-14-297R FLOOD INSURANCE 4 (2014). See also RAWLE O. KING, CONGRESSIONAL RESEARCH SERVICE, THE NATIONAL FLOOD INSURANCE PROGRAM: STATUS AND REMAINING ISSUES FOR CONGRESS (2013).

8. News Release, FEMA, For Communities Plagued by Repeated Flooding, Property Acquisition May Be the Answer (May 28, 2014), <https://www.fema.gov/news-release/2014/05/28/communities-plagued-repeated-flooding-property-acquisition-may-be-answer>.
9. *Id.*
10. FEMA, U.S. DEPARTMENT OF HOMELAND SECURITY, HAZARD MITIGATION ASSISTANCE GUIDANCE 1 (2015), available at https://www.fema.gov/media-library-data/1424983165449-38f5dfc69c0bd4ea8a161e8bb7b79553/HMA_Guidance_022715_508.pdf.
11. Alice C. Hill & Craig Fugate, *The Same Houses Flood Every Year and We Keep Paying for Them*, HILL, July 31, 2017, <http://thehill.com/blogs/pundits-blog/energy-environment/344607-the-same-houses-flood-every-year-and-we-keep-paying-for>.
12. *Id.*
13. Fiscal unsustainability of the NFIP has long been a concern of the Congressional Research Service, the U.S. Government Accountability Office (GAO), and the Congressional Budget Office. For example: "By design, the [NFIP] is not actuarially sound—that is, its premiums and fees are insufficient to cover the average claims and expenses expected over the long run." CONGRESSIONAL BUDGET OFFICE, VALUE OF PROPERTIES IN THE NATIONAL FLOOD INSURANCE PROGRAM 1 (2007). The GAO concluded:
14. MICHAEL K. LINDELL ET AL., FUNDAMENTALS OF EMERGENCY MANAGEMENT 192 (2006), available at <https://training.fema.gov/hiedu/aemrc/booksdownload/fem/>.
15. *Id.* Cf. also National Oceanic and Atmospheric Administration (NOAA), National Centers for Environmental Information, *Billion-Dollar Weather and Climate Disasters: Overview*, <https://www.ncdc.noaa.gov/billions/> (last visited Apr. 23, 2018). As of publication of this Article, the U.S. House of Representatives had passed H.R. 4667, providing for \$81 billion of additional supplemental appropriations for disaster relief and assistance. H.R. 4667, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/house-bill/4667>.
16. Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, §322, 102 Stat. 4689 (1988), amended by 42 U.S.C. §5165.
17. H.R. 4460, the Disaster Relief Reform Act, will affect funds distribution as it would allow funds to be diverted from FEMA's hazard mitigation programs to U.S. Army Corps of Engineers-type flood control projects, which will leave even less federal funding for mitigation activities such as volun-

tion will likely result in even greater future expenses for disaster relief, a role of the federal government frequently criticized as promoting increased coastal development.¹⁸

In Florida, mitigation is an integral part of the role of the Division of Emergency Management. The Bureau of Mitigation administers several federal mitigation grant programs including the Hazard Mitigation Grant Program (HMGP), Pre-Disaster Mitigation Program (PDMP), Flood Mitigation Assistance Program (FMAP), Severe Repetitive Loss Program (SRLP), and the Repetitive Flood Claims Program (RFCP).¹⁹ Section 404 of the Stafford Act²⁰ authorizes the HMGP, while the PDMP is authorized by §203 of the Act.²¹

B. The NFIP and the Community Rating System

The NFIP, created in 1968, also owes its genesis in large part to a desire of the federal government to seek to reduce federal disaster costs by encouraging more responsible development practices that decrease flood risk at the local level. The NFIP was also created to provide an insurance option in light of the virtual unavailability of private flood insurance at the time.

A property must be in a community that participates in the NFIP to be covered by a flood insurance policy (for the structure and/or its contents). As of July 20, 2017, FEMA indicates that only 10 Florida communities did not participate in the NFIP.²² The NFIP aims to reduce the impact of flooding on private and public structures by providing affordable insurance to property owners, and by requiring participating communities to adopt and enforce floodplain management regulations that help mitigate the effects of flooding on new and improved structures that meet FEMA's minimum regulatory criteria as reflected in the community's ordinances. The federal grant programs listed in Section III.A are administered by FEMA for the purpose of reducing the risk of flood damage to older structures. Overall, the NFIP seeks to reduce the socioeconomic

impact of disasters by promoting the purchase and retention of flood insurance.²³

Through the Flood Insurance Reform Act of 2004, Congress directed FEMA to develop a program to reduce future flood losses for SRL properties. The primary objective of the SRL properties strategy is to eliminate or reduce the damage to property and the disruption to life caused by repeated flooding.²⁴ The Biggert-Waters Flood Insurance Reform Act of 2012 eliminated the SRLP.²⁵

Today, the FMAP, which continues to focus on the mitigation of SRL properties, makes funding available for a variety of flood mitigation activities. Under the FMAP, FEMA provides funds to state and local governments to make offers of assistance to SRL NFIP-insured property owners for mitigation projects that reduce future flood losses such as: (1) acquisition or relocation of at-risk structures and conversion of the property to open space; (2) elevation of existing structures; or (3) dry floodproofing of historic properties.²⁶ FEMA funding, appropriated by Congress, is available through the National Flood Insurance Fund for flood hazard mitigation projects as well as plan development.

The NFIP's Community Rating System (CRS) recognizes floodplain management and outreach activities performed by communities that exceed the NFIP minimum standards.²⁷ Under the CRS, communities can be rewarded for doing more than simply regulating the construction of new buildings to the minimum NFIP standards. Under the CRS, the flood insurance premiums of a community's residents and businesses are discounted to reflect that community's work to reduce flood damage to existing buildings, manage development in areas not mapped by the NFIP, protect new buildings beyond the minimum NFIP protection level, preserve and/or restore natural functions of floodplains, help insurance agents obtain flood data, help people obtain flood insurance, and conduct community education about flooding and future climate conditions.²⁸

Section 520 of the NFIP's CRS Coordinator's Manual focuses on acquisition and relocation, and encourages communities to acquire, relocate, or otherwise clear exist-

ary buyouts. See Letter From Chad Berginnis, Executive Director, Association of State Floodplain Managers, Inc., to Members of House and Senate Leadership, U.S. Congress (Dec. 18, 2017) (Oppose HR 4660—Disaster Relief Reform Act (DRRA)), <http://www.floods.org/ace-images/ASFPM-LetterHR4460-12-18-2017Final.pdf>; Press Release, House Transportation and Infrastructure Committee, House Passes Bill to Ensure American Communities Are Better Prepared for Disasters (Dec. 21, 2017), <https://transportation.house.gov/news/documentsingle.aspx?DocumentID=402090>.

18. Cf., e.g., McGuire, *supra* note 5, at 351, 355-56 (noting in Section 1 that disaster relief, along with publicly subsidized flood insurance, decreases perceptions of risk, thus promoting greater demand for coastal property at higher prices, which results in more at-risk coastal development). However, see H.R. 4667, 115th Cong., at 11 (2017) (providing up to \$50 million "to improve weather forecasting, hurricane intensity forecasting and flood forecasting and mitigation capabilities, including data assimilation from ocean observing platforms and satellites"), <https://www.congress.gov/bill/115th-congress/house-bill/4667>.
19. See Florida Division of Emergency Management, *Mitigation*, <https://www.floridadisaster.org/dem/mitigation/> (last visited Apr. 23, 2018).
20. 42 U.S.C. §5170c.
21. *Id.* §5133.
22. FEMA, U.S. DEPARTMENT OF HOMELAND SECURITY, COMMUNITY STATUS BOOK REPORT, FLORIDA 12, <https://www.fema.gov/cis/FL.pdf>.

23. See, e.g., FEMA, *The National Flood Insurance Program*, <https://www.fema.gov/national-flood-insurance-program> (last updated Apr. 6, 2018).

24. FEMA, U.S. DEPARTMENT OF HOMELAND SECURITY, GUIDANCE FOR SEVERE REPETITIVE LOSS PROPERTIES 1 (2014), available at https://www.fema.gov/media-library-data/1397160168082-76c012cb85d8834b415abad-b5a8827ae/20_srl_508_june2014.pdf.

25. Biggert-Waters Flood Insurance Reform Act of 2012, subsection (b)(4)(B)-(E), Pub. L. No. 112-141, §100225(F), 12 Stat. 405, redesignated subparagraphs (C)-(E) as (B)-(D), respectively, and struck out former subparagraph (B) that read as follows: "section 1368 (Repetitive Loss Priority Program and Individual Priority Property Program)." While the Biggert-Waters Flood Insurance Reform Act of 2012 eliminated the pilot "Repetitive Loss Priority Program and Individual Priority Property Program," the NFIP continues both to address and to focus hazard mitigation efforts on reducing the cost of RL and SRL properties. See, e.g., 42 U.S.C. §§4011(b)(1), 4014(a)(2)(B), (g)(2)(B)(i)-(ii), 4104c(a)(2), (c)(2)(ii), (h)(2)-(3), 4121(a)(7).

26. See *supra* note 24, at 2.

27. FEMA, U.S. DEPARTMENT OF HOMELAND SECURITY, NATIONAL FLOOD INSURANCE PROGRAM COMMUNITY RATING SYSTEM COORDINATOR'S MANUAL 110-2 (2017 ed.), available at <https://www.fema.gov/media-library/assets/documents/8768>.

28. *Id.*

ing buildings out of the flood hazard area, specifically properties identified in the RL list and the SRL list.²⁹ The program credits the acquisition of a property and either the demolition of the building or the relocation of the building outside the regulatory floodplain. Credit is provided as long as an insurable building is removed from the regulatory floodplain and the community can document that the property (or that portion of the property that lies within the regulatory floodplain) will remain vacant. An RL building receives twice the credit of a non-RL property.³⁰

As of February 2017, 22,235 communities across the United States and its territories voluntarily participated in the NFIP by adopting and agreeing to enforce flood-related building codes and floodplain management regulations,³¹ with Florida representing about 40% of policies nationwide.³² However, flood losses continue to increase dramatically.³³

In summary, while the floodwaters eventually recede, the discomfort of mind or body caused by floods is long-lasting. The impact of a flood may have structurally damaged even well-built structures. Water-laden walls and floors may set the stage for the development of hard-to-remove mold that can present health risks for vulnerable residents, particularly those with compromised or weak immune systems, children, and the elderly. Repeated flooding may leave homes uninhabitable and unlikely to attract a buyer.

Even though there is no specific requirement to acquire or relocate an at-risk structure and convert the property to open space, as other mitigation alternatives are available, state and local officials will prioritize SRL properties within their jurisdictions for SRL grants and for CRS credits. They may contact the owner directly to offer a voluntary buyout if they determine that acquisition is the appropriate mitigation activity that will most effectively reduce future flood losses.³⁴ For these reasons, states and federal governments have acted by offering voluntary buyouts to homeowners in neighborhoods that have been repeatedly flooded.

IV. State Legal Framework for Mitigation Programs

State hazard mitigation plans (SHMPs) are required under §322 of the Stafford Act to receive federal hazard mitigation grants.³⁵ A state with a FEMA-approved enhanced SHMP is eligible to receive increased funds under the

HMGP following a disaster declaration. In accordance with 44 C.F.R. Part 201, all applicants for the PDMP and FMAP must have a FEMA-approved state or tribal (standard or enhanced) SHMP by the application deadline and at the time of obligation of the award.³⁶ State agencies and federally recognized tribes applying for HMGP funding must have a FEMA-approved state or tribal (standard or enhanced) SHMP at the time of the presidential major disaster declaration and at the time HMGP funding is obligated to the recipient or subrecipient.

FEMA's Climate Change Adaptation Policy³⁷ directs FEMA programs and policies to integrate considerations of climate change adaptation. The mitigation planning regulation³⁸ requires consideration of the probability of future hazard events as part of the risk assessment to reduce risks and potential damage.³⁹ Conducting a risk assessment based on climate change data, the sensitivity of the planning area to climate change impacts, and the ability of a state and communities to adapt to climate change impacts, is one way to plan for the probabilities of future hazard events.⁴⁰

SHMPs are not explicitly required to include buyout programs. However, because all mitigation measures submitted to the state for funding under FEMA's Hazard Mitigation Assistance (HMA) programs—which include the HMGP, PDMP, FMAP, SRLP, and RFCP—must be consistent with the SHMP,⁴¹ it can be inferred that any buyout program implementation should comply with the SHMP.

V. Local-Level Legal Framework for Mitigation and Buyout Programs

Likewise, state, local, and regional plans are required for communities to be eligible for these same mitigation grant funds.⁴² Similar to the state's mitigation plan, the purpose of the local mitigation strategy (LMS) is to reduce or eliminate the impact of hazards within a community and diminish the loss of life and property damage.⁴³ Any LMS must also be consistent with the state plan. Without an

29. *Id.* at 520-2.

30. *Id.* at 520-5.

31. GAO, FLOOD INSURANCE: COMPREHENSIVE REFORM COULD IMPROVE SOLVENCY AND ENHANCE RESILIENCE 4 (2017), <http://www.gao.gov/assets/690/684354.pdf>.

32. NATIONAL RESEARCH COUNCIL, THE NATIONAL ACADEMIES, AFFORDABILITY OF NATIONAL FLOOD INSURANCE PROGRAM PREMIUMS 69 (2015), *available at* <https://www.nap.edu/download/21709#>.

33. *See, e.g.*, FEMA, U.S. DEPARTMENT OF HOMELAND SECURITY, IMPACT OF NATIONAL FLOOD INSURANCE PROGRAM (NFIP) CHANGES 2 (2013), https://www.fema.gov/media-library-data/20130726-1909-25045-0554/bw12_sec_205_207_factsheet4_13_2013.pdf.

34. FEMA, *supra* note 24, at 2.

35. 42 U.S.C. §5165.

36. 44 C.F.R. §201.4(a) (2017).

37. FEMA, U.S. DEPARTMENT OF HOMELAND SECURITY, ADMINISTRATOR POLICY: FEMA CLIMATE CHANGE ADAPTATION POLICY STATEMENT (2012) (2011-OPPA-01) *available at* https://www.fema.gov/media-library-data/20130726-1919-25045-3330/508_climate_change_policy_statement.pdf.

38. 44 C.F.R. pt. 201 (2017).

39. FEMA, U.S. DEPARTMENT OF HOMELAND SECURITY, STATE MITIGATION PLAN REVIEW GUIDE 13-18 (2015), https://www.fema.gov/media-library-data/1425915308555-aba3a873bc5f1140f7320d1ebeb18c6/State_Mitigation_Plan_Review_Guide_2015.pdf.

40. FEMA, *Hazard Mitigation Planning Frequently Asked Questions* ("How Will FEMA Determine if a State Addressed Climate Change?"), <https://www.fema.gov/hazard-mitigation-planning-frequently-asked-questions> (last updated Feb. 13, 2018).

41. FLORIDA DIVISION OF EMERGENCY MANAGEMENT, STATE OF FLORIDA ENHANCED HAZARD MITIGATION PLAN §5.1.1 (2013), <https://www.floridadisaster.org/globalassets/importedpdfs/section-5-funding-and-projects-final.pdf>.

42. 42 U.S.C. §5165.

43. Florida Division of Emergency Management, *Local Mitigation Strategy*, <https://www.floridadisaster.org/dem/mitigation/local-mitigation-strategy/> (last visited Apr. 23, 2018).

approved LMS, a county will be unable to apply for many federal grants.

In the same way, all mitigation measures submitted to the state for funding under FEMA's HMA programs must be located in a vulnerable area as identified in the LMS.⁴⁴ The plan must document what existing plans, studies, reports, and technical information were reviewed. Examples of the types of existing sources reviewed include, but are not limited to, the SHMP, local comprehensive plans, hazard-specific reports, and flood insurance studies. The plan must document how relevant information was incorporated into the mitigation plan.⁴⁵ Thus, it can be inferred that integration of the CRS components is also required in the LMS.

Hence, it appears that, though the LMS does not explicitly have a requirement to include buyout programs, any buyout program implementation should comply with and be included in the LMS; this is mandatory if the buyout program is part of the community's CRS activities. Although local governments are required to meet specified criteria to be eligible for mitigation grant funds, there is no obligation for a local government to make itself eligible for such grant funds. In addition, a local government is not prohibited from creating its own hazard mitigation grant program. In fact, like higher levels of government, local "[g]overnments can acquire hazard areas and put them into open space use. For example, many local governments have acquired flood hazard areas as greenways and other open spaces."⁴⁶

Summarizing, authority over mitigation programs is often a confusing patchwork of local and national government bodies, laws, and regulations. The legal research indicated the need for careful drafting of any ordinance due to the ample amount of federal and state requirements that relate to mitigation activities such as property buyouts.

VI. Other Important Considerations: SLR and Climate Change

The most significant consequence of SLR is flooding in the vicinity of tidal waters. As sea levels rise higher for the foreseeable future, tidal flooding is expected to occur more often and cause more disruption, even rendering some areas unusable at all within the 30-year period of a typical home mortgage.⁴⁷ SLR will render increasingly large areas of land

worthless, literally underwater. The number and severity of tidal flooding events over the coming decades portend significant impacts on property, infrastructure, communities, and the daily lives of affected populations. So-called nuisance flooding—which causes public inconveniences such as recurring road closures, overwhelmed storm drains, and compromised infrastructure—has increased on U.S. coastlines, between 300% and 925% since the 1960s, according to a National Oceanic and Atmospheric Administration (NOAA) technical report.⁴⁸

And SLR adds to flood hazards. Inland flooding may increase in areas that did not previously have tidally influenced outfalls when SLR causes drainage outfalls that were previously above the high water line to now be below the high water line. FEMA does not mandate the inclusion of estimated SLR for HMA project applications. However, the state or local community may use SLR to consider future conditions in mitigating future flood risk.⁴⁹ A state, territorial, or tribal emergency management agency, in coordination with the state NFIP coordinator and the local applicant, may decide to include SLR in an HMA project application.⁵⁰

FEMA does not require that any mitigation plan use the term "climate change," but the plan must include a summary of the probabilities of future hazard events as well as changes in future conditions.⁵¹ The mitigation planning regulation at 44 C.F.R. Part 201 does not prescribe the specific hazards that must be addressed, nor the specific data or methodology to use to assess risks.⁵² However, state risk assessments must provide an overview of the type and location of all natural hazards that can affect the state, including the "probability of future hazard events, using maps where appropriate."⁵³ Conducting a risk assessment based on climate change data, the sensitivity of the planning area to climate change impacts, and the ability of states and communities to adapt to climate change impacts represent ways to plan for the probabilities of future hazard events.⁵⁴

44. FLORIDA DIVISION OF EMERGENCY MANAGEMENT, *supra* note 41, §5.1.1.

45. Cf. FEMA, U.S. DEPARTMENT OF HOMELAND SECURITY, LOCAL MITIGATION PLAN REVIEW GUIDE 17 (2011), *available at* https://www.fema.gov/media-library-data/20130726-1809-25045-7498/plan_review_guide_final_9_30_11.pdf.

46. JON KUSLER, FLOOD RISK IN THE COURTS: REDUCING GOVERNMENT LIABILITY WHILE ENCOURAGING GOVERNMENT RESPONSIBILITY 31 (2011), <http://biotech.law.lsu.edu/blog/Kusler2011-Flood-Risk-In-The-Courts-Reducing-Government-Liability-While-Encouraging-Government-Responsibility.pdf>.

47. See, e.g., *As Sea Level Rises, Coastal Communities Brace for More Frequent, Destructive Tidal Flooding*, HOMELAND SECURITY NEWS WIRE, Oct. 9, 2014, <http://www.homelandsecuritynewswire.com/dr20141009-as-sea-level-rises-coastal-communities-brace-for-more-frequent-destructive-tidal-flooding>. See also NOAA, U.S. DEPARTMENT OF COMMERCE, NOAA TECHNICAL REPORT NOS CO-OPS 073, SEA LEVEL RISE AND NUISANCE FLOOD FREQUENCY CHANGES AROUND THE UNITED STATES (2014), https://tidelandcurrents.noaa.gov/publications/NOAA_Technical_Report_NOS_COOPS_073.pdf.

48. NOAA: "Nuisance Flooding" an Increasing Problem as Coastal Sea Levels Rise, NOAA, Oct. 31, 2014, http://www.noaanews.noaa.gov/stories2014/20140728_nuisanceflooding.html.

49. FEMA, U.S. DEPARTMENT OF HOMELAND SECURITY, INCORPORATING SEA LEVEL RISE (SLR) INTO HAZARD MITIGATION ASSISTANCE (HMA) BENEFIT COST-ANALYSIS: FREQUENTLY ASKED QUESTIONS (FAQs) (2013) [hereinafter INCORPORATING SLR INTO HMA BENEFIT COST-ANALYSIS], https://www.fema.gov/media-library-data/1387903260455-e6faefb55a3f69d866994fb036625527/HMA_Sea_Level_Rise_FAQ_12-23-2013.pdf. Cf. also FEMA, *supra* note 45, at 19-20.

50. INCORPORATING SLR INTO HMA BENEFIT COST-ANALYSIS, *supra* note 49.

51. FEMA, *supra* note 40 ("Are States and Tribal Governments Required to Include the Term 'Climate Change' to Receive FEMA Approval?").

52. For communities that participate in the CRS of the NFIP and want to receive credit for considering SLR, the CRS mandates use of at least the NOAA 2012 "intermediate-high" projection for 2100. FEMA, *supra* note 24.

53. 44 C.F.R. §201.4(c)(2)(i) (2016).

54. See *id.*; FEMA, *supra* note 40 ("Are States and Tribal Governments Required to Include the Term 'Climate Change' to Receive FEMA Approval?").

VII. Voluntary Buyout Programs

An eligible mitigation project activity under all the programs discussed—HMGP, PDMP, and FMAP—is property acquisition and structure demolition/relocation, which involves the voluntary⁵⁵ acquisition of an existing flood-prone structure and, typically, the underlying land, and conversion of the land to open space through the demolition or relocation of the structure.⁵⁶ The property must be deed-restricted in perpetuity to open space uses to restore and/or conserve the natural floodplain functions.

It is called a “voluntary” flood buyout program because participants (i.e., the federal government, the state government, the local government, and the property owner) must voluntarily participate in the program. The city or county cannot use the community’s power of eminent domain to purchase property with federal funds; these must be strictly voluntary acquisitions of the property.⁵⁷ This condition creates an important and significant limiting factor that constrains local government control, because it creates a blanket prohibition on eminent domain in buyout programs funded at the federal level. The applicant must commit not to use eminent domain should the property owner choose not to participate, and must verify that the property is not needed as part of an intended planned project.⁵⁸

To be eligible for a buyout grant, an applicant must acquire the full fee title of properties or retain such interest. Properties that are eligible for acquisition include those where:

- The property will be acquired from a willing, voluntary seller;
- The property contains a structure that may or may not have been damaged or destroyed due to an event;
- For the FMAP, RFCP, and SRLP, the property contains a structure insured by the NFIP at the time of application submittal;
- All incompatible easements or encumbrances can be extinguished;
- The property cannot be contaminated with hazardous materials at the time of acquisition, other than incidental demolition or household waste;
- Any relocated structure must be placed on a site located outside of the special flood hazard area (SFHA), outside of any regulatory erosion zones, and

in conformance with any other applicable state or local land use regulations;

- The property cannot be part of an intended, planned, or designated project area for which the land is to be acquired by a certain date, and/or where there is an intention to use the property for any public or private future use inconsistent with the open space deed restrictions and FEMA acquisition requirements (e.g., roads and flood control levees);
- The property will not be subdivided before acquisition, except to separate out those portions outside the identified hazard area, such as the SFHA or any risk zone identified by FEMA.⁵⁹

VIII. Potential Problems With Buyout Programs

Mitigating the risk of loss of life and property damage clearly represents a desirable goal for communities. The strategy that most effectively eliminates flood risk is managed relocation; buyout programs may be a part of relocation.⁶⁰ However, lost in the midst of mitigation may be other important goals that land use and governmental measures should aim to accomplish. These include the creation and maintenance of safe and thriving communities for people, family, and human relationships.⁶¹

While the benefits of buyouts are evident from a hazard mitigation perspective and may also be a long-term good financial decision for the NFIP in the absence of other reforms, and while their cost is crucial in determining the feasibility of buyouts, these certainly are not the only criteria to consider. In assessing the impact of a buyout program, local governments should consider the impacts on property owners unable to sell at the price offered, the burden on the availability and affordability of housing, the decrease in property tax base (especially waterfront property), the loss of neighborhood character and integrity, the loss of social capital, plus the higher cost of infrastructure and basic services on a per capita basis. In the case of local buyout programs, there exists an added consideration: unrealistic public expectations that problems for property owners should always result in buyouts.

The model ordinance presented in this Article offers an example of how local governments can strive to most fully consider and balance their hazard mitigation goals through buyouts with the potential downsides of using buyouts. This section discusses some of the potential, unintended impacts of buyouts.

55. Lewis, *supra* note 1, at 115 (contrasting FEMA regulations prohibiting use of eminent domain with hazard mitigation funds and federal law that does not prohibit this).

56. See FEMA, *Hazard Mitigation Assistance Mitigation Activity Chart*, <https://www.fema.gov/hazard-mitigation-assistance-mitigation-activity-chart> (last updated June 20, 2017).

57. See FEMA, U.S. DEPARTMENT OF HOMELAND SECURITY, HAZARD MITIGATION ASSISTANCE PROGRAM GUIDANCE 38, available at https://www.fema.gov/media-library-data/20130726-1721-25045-3264/web_page_3_acq_guidance_06_20_08.pdf.

58. *Id.*

59. *Id.* at 38-39.

60. ROBERT FREUDENBERG ET AL., LINCOLN INSTITUTE, BUY-IN FOR BUYOUTS (2016), <http://www.lincolnst.edu/publications/articles/buy-buyouts>.

61. Shelby D. Green, *Building Resilient Communities in the Wake of Climate Change While Keeping Affordable Housing Safe From Sea Changes in Nature and Policy*, 54 WASHBURN L.J. 527, 572-73 (2015).

A. Impact on “Trapped” Property Owners

The prohibition on use of eminent domain in federally funded buyout programs protects property owners from involuntary involvement in a buyout.⁶² However, as has been the case in recent buyout programs, there are those property owners who are unable to participate because the amount offered for their property is inadequate to cover what they owe on the property. New Jersey’s Blue Acres Program has found that 15% of property owners fall into this category⁶³; they are trapped by finances in what may be a degraded neighborhood. As with other adverse impacts, it is most likely the most vulnerable who are thus involuntarily excluded from the program. The adoption of resiliency measures must embrace the plight of persons whose vulnerability may be defined by limited economic means and lack of social and familial resources. Before adopting and implementing any kind of buyout program, planners and governmental authorities should carefully consider all those who are likely to be negatively impacted.⁶⁴

B. Reduction in and Affordability of the Housing Supply

Buying out existing properties reduces the available housing stock, very possibly resulting in increased cost for housing. As with “trapped” property owners, this will most likely adversely impact those least able to adjust to their changed circumstances.

C. Compromised Neighborhood Character and Integrity

Community character and integrity develop through social networks, local institutions, aesthetic appeal, and a community’s relationship to the surrounding area. In addition to the effect of flooding and buyout programs on economic health and institutional trust, the social and psychological impact on communities must be evaluated.⁶⁵ For homeowners, the decision to leave a community can be traumatic, especially if adequate and affordable housing is hard to find nearby.

In addition to loss of residential properties, loss of small businesses can compromise the integrity of a neighborhood. Local businesses that provide jobs and necessary goods and services commensurate with local demographics can be lost in the process of a buyout. Along with the economic impact, local businesses can also serve as venues where personal interactions help to establish and maintain a sense of social cohesion. As with the previous impacts, this can be expected to most heavily impact minority and

low-income families, especially those with limited mobility due to lack of private transportation.

On a higher level, urban planning’s dubious history of relocating low-income communities, ostensibly for the greater good, stands as a reminder of how well-intentioned, even necessary, measures such as managed retreat can have disproportionately negative impacts on low-income communities if they are not carefully considered in close consultation with residents.⁶⁶

There are multiple relocation scenarios after the acquisition. Some people choose to move, but stay in the same city or town; others move outside of the city or town but stay in the same county; others move outside of the county entirely.⁶⁷ Attempting to keep residents that relocate within the local government’s tax district helps minimize the fiscal impacts. Residents must be enticed to stay in the community. All this helps maintain the tax base and the social fabric of the community; children may be able to attend schools with many of the same classmates from their previous neighborhoods, and friends formerly living nearby may remain near each other.⁶⁸ Some studies show that relocated households find only marginal improvement in housing conditions, but most experience higher costs. They tend to cluster near the displacement project.

When programs acquire sizeable contiguous clusters of properties, the social unity of a neighborhood can be preserved if residents relocate within clustered sites. However, the concept of community cohesion can also work against buyouts. Because people and communities who emerge from a storm often identify as “survivors,” this sentiment makes them more likely to oppose relocation. The key is to apply integrated planning well before a disaster to minimize the possible negative impacts of buyouts on communities’ social capital.⁶⁹

D. Reduced Property Tax Base

For local governments, the loss of tax revenue from bought-out properties can have a serious impact on the local budget, because property taxes, based on the assessed value of property, are often a key funding source for local governments. Because they are based on assessed value, property taxes vary widely by land use, class, and location.⁷⁰ Fiscal impact analyses can help cities and towns estimate the financial consequences of different development types and land use decisions. Converting private property to public or nonprofit ownership removes the property from the local government’s tax rolls, thus reducing local government tax receipts. Since properties adjacent to a water body are often more valuable than inland properties, the resulting loss of

62. However, see *supra* note 55.

63. Christopher Flavelle, *A New Strategy for Climate Change? Retreat*, BLOOMBERG, Aug. 22, 2016, <https://www.bloomberg.com/view/articles/2016-08-22/nj-s-blue-acres-program-a-new-strategy-for-climate-change>.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. See NOAA, Office for Coastal Management, *Peer-to-Peer Case Study—Out of Harm’s Way: Relocation Strategies to Reduce Flood Risk*, <https://coast.noaa.gov/digitalcoast/training/kinston-flood-risk.html> (last visited Apr. 23, 2018).

69. *Id.*

70. FREUDENBERG ET AL., *supra* note 60.

taxable property value from a buyout to reduce flood risk may be disproportionately large for a local government.

In addition, for eligible communities, FEMA typically funds 75% of the cost of property acquisition with the municipality and state contributing the remaining 25%. Any such contribution from the local government could also be considered another source of loss or erosion of tax revenue for cities and counties.

E. Increased Cost for Infrastructure and Services

In the event that homeowners decide to remain and not participate in the voluntary buyout programs, streets, curbs, streetlamps, electrical and communications lines, water and sewer, and other infrastructure also need to remain despite serving fewer taxpaying and ratepaying property owners. Holdouts force counties, cities, and towns to keep providing municipal services (garbage pickup, water, sewage, road maintenance, snowplows, police, firefighters) to a shrinking tax base. In instances where buyouts are part of a larger resilience plan whereby purchased properties become part of natural or artificial infrastructure that helps protect against flooding, surge, or erosion, holdouts may also hamper implementation of such a plan to protect other properties.⁷¹

Increased per capita cost for local government services can harm local government finances if local government revenues do not increase enough to cover the increased per capita costs. But raising taxes and instituting new or increased service fees may cause gentrification, as those who cannot afford the increased costs in taxes and fees are forced to move and are replaced by a more affluent demographic who can pay these costs. By its nature, this result impacts the most vulnerable residents. In the extreme, loss of tax base and the resulting increase in per capita cost for local government services, with or without gentrification, can hamper the ability of a local government to provide even basic levels of critical services such as law enforcement and fire suppression.

A potential solution for this problem could be found by looking at what has happened in other cities around the country with similar problems. In Detroit, for example, a city affected for years by bankruptcy, government officials have contemplated consolidating some of the neighborhoods to allow the city to provide services to a smaller area more suited to its reduced population. According to Detroit Mayor Mike Duggan, who took office in January 2014, he was focused on answering the blight issue but with no intention of forcing anyone from home. “We’re not talking about cutting off services to anybody,” he said. “But at some point are we going to create positive incentives for people to move from the less populated areas into the more populated areas? At some point we’ll get to that.”⁷²

71. Flavelle, *supra* note 63.

72. Monica Davey, *Detroit Urged to Tear Down 40,000 Buildings*, N.Y. TIMES, May 27, 2014, <https://www.nytimes.com/2014/05/28/us/detroit-task-force-says-blight-cleanup-will-cost-850-million.html>. For further informa-

F. Unrealistic Public Expectations

Before undertaking a local buyout program, the local government should consider its fiscal implications. If implemented for one or a few property owners, such a program creates an expectation that other property owners will have the same option. However, rising seas and increasing flooding will increase the number of properties eligible for or desiring buyouts; yet there will come a time for many impacted local governments when buyouts have depleted the local tax base to the point that local government cannot contribute to paying for more buyouts. Similarly, it remains to be seen for how long and with how much funding the federal government will be the primary source to pay for buyouts. In effect, the local government has entered into a fiscal game of musical chairs where a final subset of property owners will be denied the options provided to other property owners.

The development of unrealistic expectations of property owners presents additional challenges. If expectations of a buyout for at-risk properties increasingly come to be viewed as “normal” and a “right,” it is possible that this perception could impact property law. While seldom understood or appreciated by the general public,⁷³ the law of property is far from a settled affair. Instead, what property rights mean under the law has always been a dynamic and changing affair based on many factors, including economics and social mores.⁷⁴ It may appear alarmist to think that our notion of property could possibly change so much as to assign a “right” to property owners that government buy them out when their property is at risk or devalued by increasing flooding and make government—and taxpayers—the insurers of private investment in property.⁷⁵ However, some property theorists have attempted to construct arguments that past government action can create new property rights⁷⁶ and that governmental failure to exercise its powers to protect property⁷⁷ might constitute takings.

Many potential problems immediately present themselves in making a radical switch from the United States’ past focus on protection of “negative” rights to be free from government interference to a new focus on “positive” rights to demand something of government. As noted above, in the case of buyouts, creating a “right” to buyouts could be a financial catastrophe for the federal government and

tion on the ongoing challenges of Detroit, see Detroit Future City, <https://detroitfuturecity.com> (last visited Apr. 23, 2018).

73. See, e.g., ERIC FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 7 (2003); ERIC FREYFOGLE, *ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND* xviii, xix (2007) [hereinafter FREYFOGLE, *ON PRIVATE PROPERTY*].

74. See, e.g., FREYFOGLE, *ON PRIVATE PROPERTY*, *supra* note 73, at xviii, 148.

75. The U.S. Supreme Court has stated that this is not the case. “[Constitutional protections] generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.” *DeShaney v. Winnebago Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

76. Michael Pappas, *A Right to Be Regulated?*, 24 GEO. MASON L. REV. 99 (2016).

77. Christopher Serkin, *Passive Takings: The State’s Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345 (2014).

existential threat to local or state government due to the amounts of property that will be threatened with increased flooding due to SLR.⁷⁸

Another potential hazard of creating a “positive” right to buyouts of flooding or at-risk properties is the “moral hazard” problem. Moral hazard “arises when persons have an incentive to engage in excessive risk-taking because someone else (the insurer) bears the risk.”⁷⁹ In the case of buyouts, the problem would be that a perceived “right” to a buyout in the future may lead potential purchasers of currently at-risk or going-to-be-at-risk property to purchase that property with the expectation that if a loss occurs, the government will need to be the “insurer” of their property through a buyout. With the widespread knowledge of rising seas, availability of SLR predictions, and dramatic advances in mapping of flood hazards and future frequency, it appears increasingly reasonable to expect that current property purchasers should be aware of such issues and understand the inherent risks, now and in the future, of property that they purchase.⁸⁰ Making property owners responsible for the purchase of at-risk properties and their own insurance to cover the risk creates the proper incentive for property purchasers to consider their investments carefully and not expect that if they purchase an at-risk property, the public will pay for their loss.

But this general rule of holding property owners responsible for their own choices about what property to purchase may seem unfair to those that purchased or acquired their property many years ago, before information was commonly available on the extent, and *increasing* nature, of coastal hazards. The purchasers from years ago maybe could not reasonably have been expected to understand the potential risk into which they were buying. One way to address this is to include time of purchase and length of

ownership when considering how to treat properties under a local buyout program.

One of the simplest ways to do this would be to use a single point in time, such as adoption of an ordinance similar to the one presented in this Article, as an event that helps determine how participation in a buyout program takes place. For example, maybe a property owner purchasing, or taking title, after passage of a local buyout ordinance is either not eligible to participate, or would only be eligible for a far lower price offer than a neighbor who had owned for a longer period of time.

Many permutations of such an approach are possible. While many permutations might contribute to addressing the idea of unrealistic expectations, fiscal overload on the local government, and the moral hazard problem, they may create problems of their own. For example, they could *increase* the incidence of holdouts and those trapped in a property where they owe more than they will be offered in a buyout.

Any local government that might choose to implement a version of the ordinance offered in this Article will have to establish for itself how to balance many competing interests, including a robust approach to undermining the potential for moral hazard versus potentially leaving more holdouts. The model ordinance oversimplifies this complex calculus, but retains an example of the option to address moral hazard by decreasing the amount of current property value that will be offered in the buyout program to anyone who has purchased a property since the passage of the buyout ordinance.

In summary, buyout programs focused on hazard reduction should consider and address the additional community issues presented here. The model ordinance presented in this Article encourages local governments to do this as much as possible within any constraints the local government might have in the form of federal, state, and local plans or requirements that might obligate the community to support buyouts to achieve other ends, such as maintenance of the community’s CRS rating or compliance with state or local plans.

IX. Ordinance Idea and Legal Issues Identified

Since owners of property in counties and municipalities expect officials to protect their health, security, and welfare, officials of any county or municipality usually seek to protect the local government from known, anticipated, or likely fiscal and social hazards that might inhibit the ability of the local government to continue to protect, to the extent feasible, their constituents. Buyouts of hazard-prone property present a challenge since, depending on the situation, they are subject to characterization as either a net positive or a net negative for any given community. Restrictions on participating in or contributing toward a property buyout program seek to address three of the four concerns presented above: availability and affordability of

78. Numerous studies have sought to calculate the value of real estate that would literally be underwater under various SLR scenarios. For example, Zillow released research in 2016 indicating that if sea levels were six feet higher today, Florida would lose 934,411 homes, worth \$413 billion. Melissa Allison, *The Effect of Rising Sea Levels on Coastal Homes*, ZILLOW, Aug. 2, 2016, <https://www.zillow.com/blog/rising-sea-levels-coastal-homes-202268/>. A report updated in April 2014 by Climate Central estimates that Florida has about \$145 billion in property value at less than three feet above the high tide line and up to \$544 billion of value and 1.4 million homes below six feet above mean high tide. CLIMATE CENTRAL, FLORIDA AND THE SURGING SEA: A VULNERABILITY ASSESSMENT WITH PROJECTIONS FOR SEA LEVEL RISE AND COASTAL FLOOD RISK (2014), <http://sealevel.climatecentral.org/uploads/ssrf/FL-Report.pdf>. While these two reports have quite different numbers for six feet of SLR in Florida, they clearly demonstrate that at-risk real estate cannot simply be purchased at market value in a state with an annual budget of \$82.3 billion in 2016.

79. Abraham Bell, *Conference: Legal Transitions: Is There an Ideal Way to Deal With the Non-Ideal World of Legal Change?: Not Just Compensation*, 13 J. CONTEMP. LEGAL ISSUES 29, 33 (2003).

80. Ideally, potential property purchasers of coastal property should receive notice about the potential hazards to property they consider purchasing. See, e.g., Thomas Ruppert, *Reasonable Investment-Backed Expectations: Should Notice of Rising Seas Lead to Falling Expectations for Coastal Property Purchasers?*, 26 J. LAND USE & ENVTL. L. 239 (2011). Florida’s rather meager current notice provision in statute has virtually no impact. See KEVIN WOZNIAK ET AL., FLORIDA SEA GRANT, TECHNICAL PAPER NO. 194, FLORIDA’S COASTAL HAZARDS DISCLOSURE LAW: PROPERTY OWNER PERCEPTIONS OF THE PHYSICAL AND REGULATORY ENVIRONMENT (2012), <http://nsgl.gso.uri.edu/flsgp/flsgps12001.pdf>.

housing, the potential for reduced property tax bases, and the potential for higher per capita cost of infrastructure and basic services.

The other issue, preserving neighborhood integrity, is addressed by establishing that any buyout that involves more than 20% but less than 100% of a contiguous area of private parcels will give rise to a rebuttable presumption that the buyout would compromise the integrity of a neighborhood. Therefore, the final determination of what constitutes an acceptable or unacceptable configuration will be at the discretion of the elected officials of the county or municipality.

Efforts to think more broadly about the impacts of hazard mitigation buyouts may lead to decisions that could present legal issues with restraint on alienation and potential conflicts of laws. We address these below before laying out the structure of the model ordinance.

A. Restraint on Alienation

An ordinance limiting local government participation in federally sponsored buyout programs must not constitute an illegal restraint on alienation of property. According to 44 C.F.R. §206.434(a), the following applicants are eligible for the HMGP: (1) any state, general purpose local government, and special district entity; (2) private nonprofit organizations that have an effective ruling letter from the Internal Revenue Service granting tax exemption status under I.R.C. §501(c), (d), or (e), or are able to demonstrate that they meet the requirements entitling them to nonprofit status under state law; and (3) federally recognized Indian tribes and authorized tribal organizations.

The idea of a restraint on alienation typically arises in the context of sales contracts, retained interests after a property sale, or homeowner association- or condominium-type restrictions.⁸¹ A local government ordinance establishing criteria under which the local government will not support or participate in a buyout program, through either submission of an application or providing funding for the local funding requirement, does not constitute a restraint on alienation, as property owners remain free to sell their property. The ordinance simply does not allow property owners to compel the local government to aid in the sale through local government participation in a buyout program. Refusal of a local government to aid in the sale of a property does not constitute a restraint on alienation.

A more challenging question arises if the local government ordinance prevented private nonprofit organizations, special district entities, federally recognized Indian tribes, and authorized tribal organizations from unilaterally deciding to enter or request a buyout program that *only* includes their own property and to sell their property in a buyout program that does not involve any local govern-

ment funding.⁸² Even this might not constitute a restraint on alienation.

The quintessential restriction on alienation is an absolute prohibition, which is void as against public policy.⁸³ However, even in the case of a local government ordinance prohibiting private nonprofit organizations, federally recognized Indian tribes, and authorized tribal organizations from unilaterally deciding to enter or request a state or federally backed buyout program for their property and to sell their property, the local government ordinance does not equal an absolute restraint on alienation. Rather, property owners are still free to sell their properties, but the potential context and purchasers may be diminished.

Such restriction might very well pass the “reasonableness test” that governs the validity of restraints on alienation.⁸⁴ The main factors taken into consideration by the courts when deciding the validity of restraint are the reasonableness of the restraint, the construction of the instrument, the possible violation of public policy, and the possible restraint of trade.⁸⁵ Additionally, restraints on alienation typically occur in title or deed restrictions, whereas this would be a government regulation.

B. Federal Preemption

Another potential legal issue presents itself in the form of whether federal law authorizing private nonprofit organizations, federally recognized Indian tribes, and authorized tribal organizations to apply for buyouts has preempted the authority of local governments to prohibit or place limits on these entities’ participation in buyouts.

The model ordinance presented in this Article opts to avoid possible legal issues of restraint on alienation and preemption by limiting application of the ordinance to only those buyouts where the local government itself is the local sponsor/applicant. As federal rules on buyout programs also allow private nonprofits and Indian tribes to be applicants, they will be allowed to apply for buyouts. Exempting these organizations should have less adverse impact on a community when the buyout is limited to property owned by the applying organization. As these organizations are tax-exempt, their exemption will not decrease the tax base. And it is hoped that in such situations, the buyout of the organization’s property will more universally remove all inhabitants and not trap underwater property owners or require ongoing maintenance of infrastructure and services for a reduced population.

82. If the proposed buyout by the nonprofit, special district entity, or federally recognized Indian tribe or authorized tribal organization included land not owned by one of these qualifying entities, the restraint-on-alienation analysis really should be no different from that of the local government generally since, again, the local government is not dramatically limiting the sale of property generally, but rather is simply not allowing a certain type of sale, which would likely pass the “reasonableness test” discussed briefly *infra*.

83. *Davis v. Geyer*, 9 So. 2d 727 (Fla. 1942).

84. *See, e.g.*, 2 FLA. JUR., ESTATES, POWERS, AND RESTRAINTS ON ALIENATION §70 (2017).

85. *Id.*

81. *See, e.g.*, Boyer, Florida Real Estate Transactions Ch. 190, §190.47 (LexisNexis Matthew Bender) (2017).

It may happen that private nonprofits or federally recognized Indian tribes or authorized tribal organizations apply directly for buyouts and include in the proposal private property not owned by the applying entity. This would increase the chance for the buyout to give rise to some of the potential negative effects of buyouts discussed above. Though, to be clear, an application for buyout by a special district entity, nonprofit organization, or federally recognized Indian tribe or authorized tribal organization cannot, as with a general local government, force a private property owner to participate in the buyout if one is ultimately offered.

It might be possible to successfully defend a local ordinance that would prohibit property owners from participating with private nonprofits or federally recognized Indian tribes or authorized tribal organizations. However, the model ordinance below takes a risk-averse stance that limits application of the ordinance to those cases in which the local government passing the ordinance would also be a direct applicant or funding partner.

C. Conflict of Laws

When state law and federal law conflict, federal law displaces, or preempts, state law, due to the Supremacy Clause of the U.S. Constitution.⁸⁶ Preemption applies regardless of whether the conflicting laws come from legislatures, courts, administrative agencies, or constitutions. Similarly, when state and local laws conflict, state law displaces, or preempts, local laws.

Placing restrictions on participating in or contributing toward a buyout, by the reasons previously established, could create an inherent conflict with some of the state and federal regulations that could target a preemption action. As previously discussed, §520 of the NFIP's CRS Coordinator's Manual (Acquisition and Relocation) encourages communities to acquire, relocate, or otherwise clear existing buildings out of the flood hazard area, specifically properties identified in the RL list and the SRL list. At the state level, compliance with the SHMP, as well as compliance with local or regional plans, is required for communities to be eligible for mitigation grant funds.

Therefore, a conflict could arise by placing restrictions on participating in or contributing toward a buyout program that involves a CRS or SRL property or is not in compliance with the LMS and the SHMP. The model ordinance presented below addresses these concerns by incorporating exceptions for properties that would create a conflict with the federal or state requirements local governments must meet to participate in the NFIP, the CRS of the NFIP, or hazard mitigation/disaster relief funding.

In summary, although some legal issues should be resolved before enacting a local buyout program ordinance, these do not present insurmountable obstacles.

X. Model Ordinance

We present a model ordinance to guide how the community participates in and supports buyout implementation within its boundaries to avoid the most negative impacts while also seeking to mitigate hazards when reasonable in the larger context of the local government's plans and needs.

MODEL BUYOUT ORDINANCE

ORDINANCE NO. 2018-_____

AN ORDINANCE OF THE [COMMISSION/COUNCIL] OF THE [COUNTY/MUNICIPALITY] OF _____, FLORIDA, RELATING TO [COUNTY/MUNICIPALITY] SUPPORT AND PARTICIPATION IN BUYOUT PROGRAMS OF AT-RISK PROPERTIES; MAKING FINDINGS OF FACT; ESTABLISHING A [BINDING/NONBINDING] REFERENDUM PROCESS FOR CONDUCTING A BUYOUT PROGRAM SPONSORED BY [COUNTY/MUNICIPALITY]; SETTING REQUIREMENTS FOR ACQUIRED PROPERTY; LIMITING PARTICIPATION IN SUCH PROGRAMS BASED ON VARIOUS CRITERIA; ESTABLISHING EXCEPTIONS; AND PROVIDING FOR SEVERABILITY AND AN EFFECTIVE DATE.

WHEREAS, property owners and residents of the [County/Municipality] of _____ expect officials of the [County/Municipality] to seek to protect them individually and their community from events and conditions that could cause them physical or fiscal harm; and

[Included for General Policy (health, safety, and welfare) reasons]

WHEREAS, the levels of service provided by a local government influence the value of property within the area it serves; and

[Included for General Policy reasons, available housing section, and tax base reduction considerations section]

WHEREAS, the [County/Municipality] provides [law enforcement, fire suppression, emergency medical, building and zoning, code enforcement, public works, regulatory, infrastructure, recreational, and other services] to its residents as feasible; and

[Included for General Policy reasons and cost of services consideration section]

WHEREAS, the [County/Municipality] levies and collects taxes and assessments on private property within its jurisdiction with which to pay for services provided to its residents; and

[Included for General Policy reasons and tax base reduction consideration section]

86. U.S. CONST. art. VI, §2.

WHEREAS, the tax base upon which property taxes and assessments can be collected is a major factor in determining the amount and quality of services a local government can afford to provide; and

[Included for General Policy reasons, tax base reduction consideration section, and cost of services consideration section]

WHEREAS, the [County/Municipality] [is/is expected to become] susceptible to [flooding, storm surge, coastal erosion, land subsidence, sinkhole formation, wildfire, etc.]; and

[Included for General Policy reasons]

WHEREAS, buyout of destroyed, damaged, or at-risk properties is one means government agencies use to address threats posed to private property by natural processes; and

[Included for General Policy reasons]

WHEREAS, government buyout of private property has in some instances had a deleterious impact on neighboring properties and/or the fabric of the neighborhood and/or the community as a whole; and

[Included for General Policy reasons, available housing section, and neighborhood character considerations section]

WHEREAS, government buyout of private property can leave trapped in a compromised neighborhood those who owe more on their property than the buyout program will offer and

[Included for General Policy reasons and impact on “trapped” property owners section]

WHEREAS, buyout of private property may create an expectation among other property owners in the vicinity that they, too, could be bought out if their property experiences similar circumstances; and

[Included for General Policy reasons and neighborhood character consideration section]

WHEREAS, expectations of buyouts may lead to “moral hazard”; and

[Included for General Policy reasons and unrealistic public expectations section]

WHEREAS, use of local funds to implement buyout of private property will over time eventually erode the local tax base to the point that the local government is no longer able to buy out the remaining property owners, creating two classes of owner—early participants who benefit from the buyout and those who later do not have that option available; and

[Included for General Policy reasons, neighborhood character section, tax base reduction considerations section, and unrealistic public expectations section]

WHEREAS, property owners do not have an inherent, legal right to have a government agency buy them out

when their property is destroyed, damaged, or threatened by natural processes; and

[Included for assurance of voluntary program, with no legal duty considerations, and unrealistic public expectations section]

WHEREAS, buyouts remove private property from the tax rolls; and

[Included for General Policy reasons and tax base reduction consideration section]

WHEREAS, officials of the [County/Municipality] have a fiduciary duty to protect the local government from known, anticipated, or likely fiscal hazards;

[Included for General Policy reasons]

NOW, THEREFORE, LET IT BE ENACTED BY THE [COUNTY/MUNICIPAL] [COMMISSION/COUNCIL] OF THE [COUNTY/MUNICIPALITY] OF _____, as follows:

SECTION 1. FINDINGS OF FACT. The above recitals are hereby adopted and incorporated herein as findings of fact.

SECTION 2. PURPOSE. The purpose of this Ordinance is to ensure that use of buyout programs within the jurisdiction of [County/Municipality] that promote protection of the people and property and mitigate risks associated with flooding, erosion, and other hazards to people and property do not unduly compromise other community values such as accessibility and affordability of property, tax burden, reasonable per capita costs of infrastructure, promotion of reasonable expectations on the part of property owners, promotion of purchaser responsibility for risks that may inhere in certain properties, and protecting the tax base and financial solvency of [County/Municipality].

[This segment describes the fundamental issue addressed by the ordinance: the balancing act that seeks to integrate both mitigation and broader community goals.]

SECTION 3. Section ##-##, _____ Code, is hereby amended to create a new subsection to read as follows:

Sec. ##-##. Buyout of private property.

(1) The [County/Municipality] will not participate in or contribute toward a buyout without first holding a [binding/nonbinding] referendum among electors in the [County/Municipality] to determine whether a majority of those voting are in favor of the [County/Municipality] participating in or contributing toward the buyout program. [OR]

(1) The [County/Municipality] will not participate in or contribute toward a buyout program unless:

A. [County/Municipality] action to participate takes place by ordinance;

B. The proposed ordinance has been reviewed and approved by the Planning Advisory Board [or similar local government advisory board]; and

C. A supermajority of at least _____ [number of votes adapted to reach supermajority level depending on size of local government legislative body] approves participation in the buyout program.

[Note the two alternatives for this section. This section focuses on ensuring broad awareness of and support for the local government to participate in a buyout program. The first option accomplishes this through a referendum. Referenda, however, can be expensive and time-consuming for local government. The second option ensures public awareness and support by ensuring that any action by ordinance, which already receives a reading at two publicly noticed meetings, is complemented by a third publicly noticed meeting of an advisory board. During such an action, property involved in the proposed buyout would be posted, leading to further awareness. If the local government would like to do still more, an additional option would be a first-class mailing to property owners within a specified distance of the buyout properties.]

(2) Any buyout program active within the [County/Municipality] will be structured and managed in such a manner that:

A. The agency conducting the buyout removes all improvements on properties that are bought out (unless the elected officials of the [County/Municipality] agree otherwise) and:

(1) Restores the soil to a natural profile, and the land is planted in a manner to protect the soil from erosion and provide a natural habitat or an aesthetically pleasing landscape as determined by the elected officials of the [County/Municipality]; and

(2) Enters into a formal agreement with the [County/Municipality] specifying by whom and in what manner the purchased land will be maintained;

(3) Reaches a formal agreement with the [County/Municipality] on the terms of a conservation easement that meets, at a minimum, Florida Statutes §704.06, and which includes in perpetuity retirement of any development rights from the property, unless development rights had been previously transferred or, as part of the buyout, are separated from the property and are included as part of the consideration paid to the property owner for the buyout; and

(4) Records in the public record the conservation easement reached through formal agreement with the [County/Municipality].

[This segment addresses numerous concerns raised in the discussion of buyouts, including the issue of decreased housing stock, erosion of tax base, and community cohesiveness. It does this by allowing for the possibility that the development intensity of bought-out properties could be transferred to safer property as long as any value for such transfer forms part of the payment to the voluntary seller. As long as such value can form part of the local cost share for the buyout, this

effectively decreases the cash cost for the local government at the same time that it can help offset some of the lost tax base by increasing density in safer areas. This would also result in more housing being available to offset the loss of housing. It should be noted that for such transfers of development rights to have value and succeed, local governments need to carefully study how they will generate a need for development credits and structure their transfer of development rights program.]

B. If the buyout will render significant portions of roads and other infrastructure unnecessary or redundant, the agency conducting the buyout will remove or properly abandon that infrastructure (unless the elected officials of the [County/Municipality] agree otherwise).

[This section addresses a critical issue too seldom considered in the context of a buyout: will the buyout decrease the tax base without saving the local government money that offsets that revenue loss? If the buyouts allow abandonment of some infrastructure, that may represent a savings. However, if a smaller tax base and user base now has to support the same infrastructure, this effectively increases the per capita maintenance cost of the infrastructure. When evaluating the potential economic impact of buyouts on per capita infrastructure costs, note that per capita infrastructure costs may vary dramatically among local governments and even within different parts of local governments' jurisdictions depending on the density of development served by the infrastructure as well as other factors such as how susceptible the infrastructure is to coastal hazards such as saline water intrusion or erosion damage.]

C. Owners of property in the buyout area who have owned that property for at least [five] years are compensated for their property in an amount that, in conjunction with any insurance or other funds they obtained as recovery from the event/condition that directly precipitated the buyout, leaves them clear of any debt associated with the property (i.e., the owners are not "trapped" with the property because they cannot afford to accept the amount offered by the agency buying them out). However, the buyout price, including any insurance or other funds they obtained as recovery from the event/condition that directly precipitated the buyout, if applicable, shall not exceed 150% of the fair market value of the property.

[This segment tries to avoid the problem of "trapped" owners that owe more than their property's value. Thus, this allows payments of up to 150%. Local governments should consider if they would prefer a higher or lower number; a higher number will decrease still further the number of "trapped" owners, but a lower number will make the program more economically efficient and viable and avoid the moral hazard problem discussed above.]

D. Owners of properties who take title to their property after the effective date of this ordinance shall not be eligible to participate in a buyout program sponsored in whole or part by the [County/Municipality].

[Local governments will have to carefully consider whether to include this segment. Including this will almost certainly create the very type of patchwork that does not allow an areawide buyout to clear areas large enough to allow abandonment of infrastructure or to repurpose areas for water storage, floodplain management, or surge protection. On the positive side, adding this segment clearly encourages property purchasers to be aware of the potential hazards, both current and future, affecting property they might purchase. This addresses the public policy problem of creating unrealistic expectations on the part of property owners. It also addresses the related problem of “moral hazard” if some level of government provides a buyout as a future “escape route” for property purchasers who purchased their property betting that it would be protected by major infrastructure improvements that never materialized.]

E. The integrity of neighborhoods is preserved (i.e., the buyout does not result in a patchwork of private parcels intermingled with bought-out parcels and/or roads and other infrastructure that become a burden on the local government or utility providers to operate and maintain). Any buyout that involves more than [20%] but less than 100% of a contiguous area of private parcels will give rise to a rebuttable presumption that the buyout would compromise the integrity of a neighborhood. The final determination of what constitutes an acceptable or unacceptable configuration is at the discretion of the elected officials of the [County/Municipality] in consultation with property owners in the area of the buyout.

[The 20% number used here is for illustrative purposes only. Local governments considering this ordinance should evaluate their own numbers. At the same time, the number itself may not be as important as the specifics of the proposed buyout and its impacts—social, economic, and physical—on the community. Thus, the local government legislative body should be accorded wide discretion in making a determination of a proposed buyout’s impact on neighborhood integrity. Nonetheless, when exercising this discretion, the local legislative body should be sure to justify the conclusion it reaches with reference to the types of concerns addressed by this model ordinance (i.e., access to and affordability of housing; per capita cost of services; “trapped” property owners; etc.).]

F. The fiscal integrity of the [County/Municipality] is preserved. The elected officials of the [County/Municipality] will enter into negotiations with the agency proposing and/or conducting the buyout to address the possibility that the buyout encompass all properties in the [County/Municipality] and that the local government entity be abolished or combined with an adjoining local government if the buyout will or might reduce the [County’s/Municipality’s] tax

base to the point that the levels of services for critical public services (e.g., law enforcement, fire suppression, emergency medical services, building and zoning, code enforcement, public works, regulatory, and infrastructure services) are significantly reduced or severely compromised. A buyout targeting more than [20%] of the [County’s/Municipality’s] tax base will give rise to a rebuttable presumption that the buyout would compromise the fiscal integrity of the [County/Municipality] and require the elected officials to formally consider the need for such negotiations.

[As with the preceding subsection, local governments should adapt the specific numbers to their situation and policy goals.]

G. The [County/Municipality] will neither use eminent domain nor participate in a buyout that uses or threatens to use eminent domain to force participation in a buyout.

SECTION 4. EXCEPTIONS. The provisions of Section 1 shall not apply to:

(1) Private nonprofit organizations, federally recognized Indian tribes, and authorized tribal organizations that, without the involvement of the [County/Municipality], unilaterally decide to enter or request a buyout program for their property and *for parcels surrounded by or adjacent to land owned by them*;

(2) Any property included in a state or federal buyout program that involves a property identified through the Community Rating System involvement of the [County/Municipality] as appropriate and targeted for a buyout;

(3) Any Severe Repetitive Loss—or similar designation—property; or

(4) Any property included in compliance with the Local Mitigation Strategies and the State Hazard Mitigation Plan.

[This section addresses any potential legal issues that might arise under claims of either restraint on alienation or, more likely, conflict with federal law.]

SECTION 5. SEVERABILITY. If any part, section, subsection, paragraph, subparagraph, sentence, phrase, clause, term, or word of this Ordinance, or the application thereof, is held or declared to be void, invalid, preempted, or unconstitutional for any reason by any court of competent jurisdiction, such holding or declaration shall not affect any other part, section, subsection, paragraph, subparagraph, sentence, phrase, clause, term, or word of this Ordinance, or the application thereof.

SECTION 6. EFFECTIVE DATE. This Ordinance shall be effective upon a certified copy being filed with the Florida Department of State.