

January 2016

Proactive Natural Disaster Recovery and Resilience in the Northeast: Should Governments Exercise Buyout Programs and, if Necessary, Eminent Domain, to Prevent Disaster?

Stellina Napolitano

Elisabeth Haub School of Law at Pace University, snapolitano@law.pace.edu

Follow this and additional works at: <http://digitalcommons.pace.edu/pelr>

 Part of the [Disaster Law Commons](#), [Environmental Law Commons](#), [Land Use Law Commons](#), [Natural Resources Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Stellina Napolitano, *Proactive Natural Disaster Recovery and Resilience in the Northeast: Should Governments Exercise Buyout Programs and, if Necessary, Eminent Domain, to Prevent Disaster?*, 33 Pace Env'tl. L. Rev. 325 (2016)

Available at: <http://digitalcommons.pace.edu/pelr/vol33/iss2/6>

NOTE

Proactive Natural Disaster Recovery and Resilience in the Northeast: Should Governments Exercise Buyout Programs and, if Necessary, Eminent Domain, to Prevent Disaster?

Stellina Napolitano

I. INTRODUCTION

In light of the devastation left behind by the three most recent natural disasters in the northeast region—Hurricane Irene, Tropical Storm Lee, and Superstorm Sandy—local and state governments are now implementing “buyout programs” in order to protect the future of beachfront and flood-prone communities. These programs may not be a perfect solution, so, while positions differ on whether to pursue taking private properties by use of eminent domain, it may be a favorable option in order to attain the ultimate goal of safety and resilience against future disaster. Section II of this paper will analyze the background and impacts that Irene, Lee, and Sandy left on the Northeast. A factual layout of these disasters’ damages, causalities, and other particulars is essential to properly understanding the need for appropriate relief functionality. Next, Section III will define general legal principles and changes that have been made in effort to provide safer communities in anticipation of natural disasters. The fourth section will analyze specific state’s buyout programs as a form of disaster relief, which includes an inquiry into their functions, funding, and options available to property owners. Section V will discuss the government’s power of eminent domain and introduce it as a promising option to achieve the goals that the buyout programs

may not have the ability or authority to reach, as well as provide examples of where and how it has been used. Next, Section VI will outline the beneficial aspects of eminent domain as opposed to the more commonly known negative connotations associated with the principle. In conclusion, Section VII will discuss how eminent domain could positively affect disaster prone areas, despite government hesitance to use it in fear that the public will view their actions as an abuse of authority.¹

II. BACKGROUND OF THE NORTHEASTERN NATURAL DISASTERS

In less than five years, the Northeast region has been devastated by three major storms, Hurricane Irene, Tropical Storm Lee, and Superstorm Sandy, all of which left significant detrimental impacts. The first of the natural disaster trilogy to take its toll was Hurricane Irene. Though Irene was downgraded from a hurricane to a tropical storm by the time it reached the Northeast,² it is still most commonly recognized as *Hurricane Irene*, and was still responsible for a vast amount of damages. Irene formed on August 15th, 2011, and traveled from the South to the Northeast approximately two weeks later on August 28th with gusting seventy-five-mph winds.³ Millions of people along the coast were left without electrical power due to the heavy rains and flash flooding.⁴ Within the Northeast area, the two states most significantly hit by Irene were Vermont, affecting 225 municipalities from rain downfall and flooding,⁵ and New Jersey, causing mass amounts of electrical difficulties and totaling in

1. DARREN SPRINGER, NGA CTR. FOR BEST PRACTICES, ISSUE BRIEF: STATE POLICY AND THE EXERCISE OF THE POWER OF EMINENT DOMAIN, <http://www.nga.org/files/live/sites/NGA/files/pdf/05StatePolicyEminent.pdf> [<http://perma.cc/54VM-2Z5F>].

2. *Hurricane Irene Slams into New Jersey, Shuts Down NYC*, NBC NEWS, http://www.nbcnews.com/id/44297053/ns/weather/t/hurricane-irene-slams-new-jersey-shuts-down-nyc/#.VFkyS_14prM [<http://perma.cc/XZ4D-H6TX>].

3. Matt Daniel, *The History of Hurricane Irene*, EARTHSKY (Aug. 30, 2011), <http://earthsky.org/earth/the-history-of-hurricane-irene> [<http://perma.cc/A923-CCYX>].

4. *Id.*

5. *Vermont ANR Releases Climate Change Report "Lessons from Irene"*, VERMONTBIZ (Feb. 13, 2012, 4:12 AM), <http://www.vermontbiz.com/news/february/vermont-anr-releases-climate-change-report-lessons-irene> [<http://perma.cc/K7ZU-7E78>].

2016] *PROACTIVE NATURAL DISASTER RECOVERY* 327

three fatalities.⁶ As for New York suburban areas, Irene's aftermath seemed relatively subtle and was most prominent in commuter difficulties and inconveniences, such as loss of power on subways and railroads, as opposed to property damage and personal injury.⁷ The storm had a much stronger presence in northern New York, causing devastating flooding around the Catskills and an overall death toll of nine people within the state.⁸ Irene especially contributed to mass flooding in upstate New York localities, such as the Town of Sidney, due to their location on the banks of the Susquehanna River.⁹

Hurricane Irene was followed shortly after by Tropical Storm Lee, which formed and traveled to the Northeast in the early days of September 2011 and primarily affected northern New York.¹⁰ While Lee did not have the power and statistics to qualify as a hurricane,¹¹ its consequences were nevertheless damaging to hundreds of municipalities. Rainfall ranged from ten to twelve inches and caused substantial record-breaking flooding along the Susquehanna River once again.¹² Lee's flooding was able to reach homes that had never before experienced flood-related damages

6. Sam Dolnick, *Recovery is Slower in New York Suburbs*, N.Y. TIMES (Aug. 28, 2011), http://www.nytimes.com/2011/08/29/nyregion/wind-and-rain-from-hurricane-irene-lash-new-york.html?pagewanted=all&_r=0 [<http://perma.cc/JP97-NN26>].

7. *See id.*

8. *Hurricane Irene Death Toll Rises to at Least 44*, NBC NEWS (Aug. 30, 2011, 6:18 PM), <http://www.nbcnews.com/id/44314551/ns/weather/t/hurricane-irene-death-toll-rises-least/#.VfXWjZ1Viko> [<http://perma.cc/Z4SN-FL4T>]; Kevin Dolak et al., *Irene: Flooding Cuts Off Towns in Vermont, New York*, ABC NEWS (Aug. 29, 2011), <http://abcnews.go.com/US/hurricanes/hurricane-irene-flooding-cuts-off-towns-vermont-york/story?id=14402696> [<http://perma.cc/AU62-K8PF>].

9. *History of Sidney, New York*, SIDNEY, N.Y., <http://www.sidneychamber.org/history.htm> [<http://perma.cc/L9KS-PTHT>].

10. *See* Matt Flegenheimer, *Northeast is Soaked Again, Forcing Evacuations*, N.Y. TIMES (Sept. 8, 2011), <http://www.nytimes.com/2011/09/09/nyregion/remnants-of-tropical-storm-soak-an-already-battered-northeast.html> [<http://perma.cc/G9T4-SKSQ>].

11. To qualify as a hurricane a storm must, for example, reach a wind speed of at least 74 miles per hour and have a temperature of at least 80 degrees. *See FAQ*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (last visited Sept. 13, 2015), <http://www.aoc.noaa.gov/faq.htm> [<http://perma.cc/98LD-BLP9>].

12. Steve Stanne, *Perfect Storms—How Hurricane Irene and Tropical Storm Lee Slammed NY*, N.Y. STATE CONSERVATIONIST, Aug. 2012, at 12, http://www.dec.ny.gov/docs/administration_pdf/0812perfectstorms.pdf [<http://perma.cc/CD5Y-9MW6>].

and, consequently, thirty thousand people in New York alone were forced to evacuate their homes.¹³ There were a total of ten fatalities as a result of Lee, all of which were from Pennsylvania.¹⁴

Then came Superstorm Sandy. Beginning as a tropical wave in the Caribbean, Sandy eventually traveled to the Northeastern region of the United States on October 29th, 2012, with winds reaching up to eighty mph.¹⁵ Millions of homes and businesses lost electrical power, including those that were not even particularly damaged by the storm's rain or flooding. Schools had to be closed and public transportation had been suspended, destroyed, or was functioning on a delayed schedule.¹⁶ Gas rationing had begun just a few short days after the storm hit, which made it nearly impossible to find fuel in affected areas.¹⁷ Rhode Island, New York, Connecticut, Delaware, Maryland, Massachusetts, and New Jersey had all declared a state of emergency with deaths totaling around 117, damages estimated at \$30 billion,¹⁸ and thousands forced to evacuate to public shelters.¹⁹ Chaos had erupted once again in the Northeast.

Initially, safety and shelter was a priority for recovery after disaster strikes. The Federal Emergency Management Agency (FEMA) assisted in assuring that temporary housing was provided to disaster victims through programs such as the Sheltering and Temporary Essential Power (STEP) program that allowed access to power, heat, and hot water.²⁰ All proper

13. MICKEY BROWN, U.S. DEP'T OF COMMERCE, REMNANTS OF TROPICAL STORM LEE AND THE SUSQUEHANNA RIVER BASIN FLOODING OF SEPTEMBER 6-10, 2011, at 12 (2012), <http://www.nws.noaa.gov/om/assessments/pdfs/LeeSusquehanna12.pdf> [<http://perma.cc/ZVX5-TEGB>].

14. *Id.* at 13.

15. Tim Sharp, *Superstorm Sandy: Facts About the Frankenstorm*, LIVESCIENCE (Nov. 27, 2012, 10:50 AM), <http://www.livescience.com/24380-hurricane-sandy-status-data.html> [<http://perma.cc/7F5W-BJAE>].

16. CNN Library, *Hurricane Sandy Fast Facts*, CNN, <http://www.cnn.com/2013/07/13/world/americas/hurricane-sandy-fast-facts/> (last updated Nov. 5, 2014) [<http://perma.cc/84U3-ZWM4>].

17. *Id.*

18. *Id.*

19. LINDA I. GIBBS & CASWELL F. HOLLOWAY, CITY OF NEW YORK, HURRICANE SANDY AFTER ACTION REPORT AND RECOMMENDATIONS TO MAYOR MICHAEL R. BLOMBERG 32 (2013), http://www.nyc.gov/html/recovery/downloads/pdf/sandy_aar_5.2.13.pdf [<http://perma.cc/KG45-MVYB>].

20. *Id.*

2016] *PROACTIVE NATURAL DISASTER RECOVERY* 329

reactive measures were taken by STEP and other several other nonprofit recovery organizations, but after the chaos subsides, governments must recoup and take *proactive* measures to avoid future inevitable damages.

III. POST-DISASTER GENERAL LEGISLATIVE CHANGES

One of the most significant changes in disaster relief legislation was the Sandy Recovery Improvement Act (SRIA)²¹ of 2013, signed by President Barack Obama on January 29th, 2013,²² which structured a national strategy that will reduce future costs, fatalities, and injuries stemming from natural disasters.²³ In addition to SRIA, city governments have also taken the initiative to prevent disaster to communities and residences and to ensure quality safety. Several building regulations have been amended and created in order to increase sustainability in the event of disaster. For example, in New York, buildings with a minimum of five stories will now be required to add faucets in common areas to allow access to water that is usually cut off on higher floors when a building loses electrical power due to flooding.²⁴ The requirement will immediately apply to any new residential construction.²⁵ As for existing buildings that are now legally nonconforming,²⁶ they will have eight years to correct the piping

21. Sandy Recovery Improvement Act of 2013, Pub. L. No. 113-2, § 1101, 127 Stat. 39 (2013), <https://www.congress.gov/113/plaws/publ2/PLAW-113publ2.pdf> [<https://perma.cc/6GJ8-JKNM>].

22. *Sandy Recovery Improvement Act of 2013*, FEMA, <https://www.fema.gov/sandy-recovery-improvement-act-2013> [<https://perma.cc/KAQ5-2CWS>] (last updated Nov. 12, 2015).

23. JARED T. BROWN ET AL., CONG. RESEARCH SERV., ANALYSIS OF THE SANDY RECOVERY IMPROVEMENT ACT OF 2013, at 22 (2013), <http://fas.org/sgp/crs/misc/R42991.pdf> [<http://perma.cc/9RNB-6DB8>].

24. Mireya Navarro, *New Building Codes Passed After Lessons from Hurricane Sandy*, N.Y. TIMES (Nov. 14, 2013), <http://www.nytimes.com/2013/11/15/nyregion/new-building-codes-passed-after-lessons-from-hurricane-sandy.html> [<http://perma.cc/HV4B-7VEJ>].

25. *Id.*

26. A nonconforming use “exists when a zoning code is changed, but a parcel of land that is already being used for something disallowed by a new zoning code is ‘grandfathered in.’” Legal Info. Inst., *Nonconforming Use*, CORNELL U. L. SCH., http://www.law.cornell.edu/wex/nonconforming_use [<http://perma.cc/H5LT-BU5Z>].

and add the fixtures.²⁷ The Federal Register mentions that certain building standards will be changed to require elevating homes near unsafe areas.²⁸ Other building reformation suggestions include “floodproofing” utility rooms in existing buildings, as well as placing boilers and electrical power rooms on a higher floor level or even on a roof if possible.²⁹ Despite these preventive building regulation changes, some homes in flood-prone areas will still inevitably be affected should another natural disaster occur. In order to significantly prevent disaster in flood-prone areas, several governments are turning to “buying out” private property in order to eliminate home destruction on waterfront properties. Buyouts require the cooperation of property owners to take part in the program in order for it to take effect. If cooperation is not met, governments are still left with the option to exercise eminent domain.

IV. EXAMPLES OF STATE BUYOUT PROGRAMS

A buyout program is a plan to negotiate the purchase of a property owner’s home for a specific purpose, such as protecting future damage in a high-risk hazardous area.³⁰ As defined by the Federal Register, a “buyout” is an “acquisition of properties located in a floodway or floodplain that is intended to reduce risk from future flooding.”³¹ Buyouts are subject to several requirements. First, property acquired “will be dedicated and maintained in perpetuity for a use that is compatible with open

27. Navarro, *supra* note 24.

28. Third Allocation, Waivers, and Alternative Requirements for Grantees Receiving Community Development Block Grant (CDBG) Disaster Recovery Funds in Response to Hurricane Sandy, 79 Fed. Reg. 62,182, 62,194 (Oct. 16, 2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-10-16/pdf/2014-24662.pdf> [<http://perma.cc/W2FB-XX6Z>].

29. Hurricane Sandy: Building Code and Zoning Reform Suggestion, Citizens Hous. & Planning Council, <http://postsandyinitiative.org/wp-content/uploads/2013/05/CHPC-Sandy-Memo.pdf> [<http://perma.cc/HA4T-FMSA>].

30. Tom Streissguth, *What is a Home Buyout Program?*, THE NEST, <http://budgeting.thenest.com/home-buyout-program-20932.html> [<http://perma.cc/5URY-VBR5>].

31. Allocations, Waivers, and Alternative Requirements for Grantees Receiving Community Development Block Grant Disaster Recovery Funds in Response to Disasters Occurring in 2011 or 2012, 78 Fed. Reg. 32,262, 32,266 (May 29, 2013), <http://www.gpo.gov/fdsys/pkg/FR-2013-05-29/pdf/2013-12683.pdf> [<http://perma.cc/8YUN-PVLE>].

2016] *PROACTIVE NATURAL DISASTER RECOVERY* 331

space, recreational, or wetlands management practices.”³² No other structure will be allowed to be erected unless it is a public facility related to an open space such as a park or recreational area.³³ There will be no additional disaster assistance permitted to whoever has already received assistance in regards to their acquired property.³⁴ Also, grantees are allowed the discretion to choose whether their buyout program will compensate using a pre-flood home valuation or a post-flood home valuation.³⁵ While buyout programs are an expensive solution to circumvent future damages and rescue efforts caused by disaster,³⁶ they are in fact excellent examples of proactive planning in hopes of accomplishing long term safety goals and resiliency. A buyout program serves as a mitigation effort to alleviate foreseeable devastating consequences. These programs will allow for the government to dedicate areas that are familiar in dealing with disaster repercussions to be transformed into a public area free of residential housing, thereby minimizing future disaster clean-up efforts as well as personal injuries. Some states that were repetitively hit by Hurricane Irene, Tropical Storm Lee, and Superstorm Sandy have turned to buyout programs as their choice of resiliency.

A. New York—NYRCR Program and Buyout Programs

In light of the past three major storms, Governor Andrew M. Cuomo founded the New York Rising Community Reconstruction (NYRCR) Program in an effort to establish resiliency and assist communities in implementing projects to rebuild, sustain, and prevent future damages.³⁷ The plans for each community are driven by the locality’s Planning Committee, the entity responsible for assessing “storm damages and current risk, identified community needs and opportunities and developed

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Streissguth, *supra* note 30.

37. *Communities*, N.Y. ST.: GOVERNOR’S OFF. OF STORM RECOVERY (GOSR), <http://stormrecovery.ny.gov/community-reconstruction-program> [<http://perma.cc/KQH9-BZP2>].

recovery and resiliency strategies.”³⁸ The NYRCR Program covers five major regions of the state, including Capital Region/North Country/Mohawk Valley, Catskills/Hudson Valley, Long Island, New York City, and Southern Tier/Central New York.³⁹ Community Development Block Grant (CDBG) dollars, ranging from \$3 million to \$25 million, will be given to communities through this NYRCR Program.⁴⁰ Other sources of funding include state, local, nonprofit, and private resources.⁴¹

Implemented within the NYRCR Program are New York Rising Buyout and Acquisition Programs.⁴² These programs target homes in high-risk areas that are vulnerable and susceptible to flood damages.⁴³ An owner who wishes to partake in the voluntary program will be entitled to 100% of their property’s pre-storm fair market value, as well as any available incentives to move (which range between five and fifteen percent).⁴⁴ An initial ten percent incentive serves to achieve as much homeowner participation as possible, while an additional five percent incentive may be acquired should a homeowner choose to relocate to a residence within the same county from which they were bought out.⁴⁵ Properties located along beachfronts that are bought out will serve as a “coastal buffer zone” in perpetuity.⁴⁶ Properties that are not incorporated into a

38. *NY Rising Community Reconstruction Plans*, N.Y. ST.: GOVERNOR’S OFF. OF STORM RECOVERY (GOSR), <http://stormrecovery.ny.gov/nyrcr/final-plans> [<http://perma.cc/YD22-E95F>].

39. *Id.*

40. *Id.*

41. *Id.*

42. “The Housing Recovery Program also manages the State’s voluntary Buyout & Acquisition Programs, which were established to purchase the properties of interested homeowners whose homes were substantially damaged or destroyed during Superstorm Sandy, Hurricane Irene or Tropical Storm Lee.” *Buyout & Acquisition Programs*, N.Y. ST.: GOVERNOR’S OFF. OF STORM RECOVERY (GOSR), <http://stormrecovery.ny.gov/housing/buyout-acquisition-programs> [<http://perma.cc/8XN2-E37V>].

43. GOVERNOR’S OFFICE OF STORM RECOVERY, STATE OF NEW YORK ACTION PLAN AMENDMENT NUMBER 8: CONSOLIDATED ACTION PLAN FOR COMMUNITY DEVELOPMENT BLOCK GRANT DISASTER RECOVERY 14 (2015), http://stormrecovery.ny.gov/sites/default/files/uploads/122314_apa8_fortranslation.pdf [<http://perma.cc/62UM-2LCZ>].

44. *Id.* at 51.

45. *Id.* at 52.

46. *Id.* at 51.

2016] *PROACTIVE NATURAL DISASTER RECOVERY* 333

buyout program will be considered “acquisitions,” meaning that homeowners will instead be entitled to the *post*-storm fair market value of their property,⁴⁷ as well as a homeowner resettlement incentive.⁴⁸ The two programs share an essential purpose and goal but differ slightly in execution regarding the valuation of compensation given to the property owners.

One area currently planning on implementing their buyout plan is Sidney, New York. Sidney is located in Delaware County on the banks of the Susquehanna River, the longest river on the east coast, and is especially prone to flooding.⁴⁹ After both Hurricane Irene and Tropical Storm Lee, Delaware County as a whole suffered over \$16 million in damages.⁵⁰ In light of the extensive damage from flooding, property values were diminishing.⁵¹ Resiliency measures such as amending land use policies within the County have reduced the area’s susceptibility to damage caused by natural disaster.⁵² However, Sidney chose to also implement a more proactive solution to minimize future natural disaster damage, which is reflected in their Long Term Community Recovery planning process.⁵³ The Village formulated a plan to acquire all property in vulnerable areas in order to restore the land to its natural state, while building recreational areas that will ultimately reduce any risk of flooding from the river into nearby neighborhoods.⁵⁴ One example of a project Sidney has taken on is a plan to acquire \$1.5 million for a

47. *Id.* at 51–52.

48. The homeowner resettlement incentive is “equal to a maximum of the difference between the post-storm and pre-storm values of the property.” GOVERNOR’S OFFICE OF STORM RECOVERY ET AL., BUYOUT AND ACQUISITION POLICY MANUAL: NY RISING BUYOUT PROGRAM 11 (2014), https://stormrecovery.ny.gov/sites/default/files/uploads/nys_buyouts_policy_manual_20140407.pdf [<https://perma.cc/D79V-ZXAX>].

49. PROSOURCE TECHS., LLC, NY RISING HOUSING RECOVERY PROGRAM: ENVIRONMENTAL ASSESSMENT FOR 1-4 UNIT RESIDENTIAL PROPERTIES, DELAWARE COUNTY 8 (2014), [http://www.nyshcr.org/Programs/NYS-CDBG-DR/DelawareCounty1-4UnitRehabNEPAEA\(revised\).pdf](http://www.nyshcr.org/Programs/NYS-CDBG-DR/DelawareCounty1-4UnitRehabNEPAEA(revised).pdf) [<http://perma.cc/3392-5RET>].

50. *Id.*

51. *Id.* at 10.

52. *Id.* at 20.

53. VILL. OF SIDNEY PLANNING COMM., VILLAGE OF SIDNEY CONCEPTUAL PLAN, at iii (2013), https://stormrecovery.ny.gov/sites/default/files/crp/community/documents/sidney_conceptual_nyrcr_plan_w_snapshot.pdf [<https://perma.cc/GME3-GMD7>].

54. *See id.*

privately owned 120-acre farm, known as the Riverlea Farm, which will be paid for with the CDBG dollars granted by the County.⁵⁵ Keeping long term goals in mind, Sidney's Mayor, Andy Matviak, said: "Rather than worry about rain coming each and every month or season and what are we going to do for our residents . . . [i]t will allow us to maintain our community, and hopefully our community will grow."⁵⁶ Residents of bought-out areas will be moved to a more secure area on the edge of the Village, where the Village hopes to eventually develop affordable housing.⁵⁷

Oakwood Beach in Staten Island, located on the eastern shore of the island, has essentially the same buyout plan as Sidney. Oakwood Beach experiences "routine flooding" and a majority of residents, particularly from the Fox Beach community, are willing to participate in a buyout program; in fact, 133 out of 165 residential homes have already signed up to accept a buyout offer.⁵⁸ Governor Cuomo has announced Fox Beach as the "testing ground" for the buyout program.⁵⁹ However, not all areas that are commonly affected by storms and flooding are so willing to participate in a buyout program. Joseph Addabbo Jr. represents three neighborhoods in Queens with waterfront properties, most of which were affected by the recent natural disasters. Addabbo stated that out of the 300,000 residents that he represents, only three people had confronted him about selling their property to the government.⁶⁰ This is the type of situation that can prevent a successful managed retreat from the water. Without cooperation from homeowners, a buyout

55. Matt Porter, *Flood Recovery Plan Unveiled Village of Sidney*, WBNG (Dec. 20, 2013), <http://www.wbng.com/news/video/Flood-recovery-plan-unveiled-for-village-of-Sidney-236803401.html> [<http://perma.cc/4XDS-JFQD>].

56. *Id.*

57. See VILL. OF SIDNEY PLANNING COMM., *supra* note 53, at 3-3.

58. Thomas Kaplan, *Cuomo Seeking Home Buyouts in Flood Zones*, N.Y. TIMES (Feb. 3, 2013), http://www.nytimes.com/2013/02/04/nyregion/cuomo-seeking-home-buyouts-in-flood-zones.html?hp&_r=2& [<http://perma.cc/72PE-BH4R>].

59. David Howard King, *Hurricane Sandy Buyouts Cause Storm of Confusion, Worry From Politicians*, GOTHAM GAZETTE (May 1, 2013), <http://www.gothamgazette.com/index.php/housing/4233-hurricane-sandy-buyouts-cause-storm-of-confusion-worry-from-politicians?tmpl=component&print=1> [<http://perma.cc/Z87E-Y6ET>].

60. Kaplan, *supra* note 58.

2016] *PROACTIVE NATURAL DISASTER RECOVERY* 335

program will be left incomplete and ultimately ineffective in its purpose.

B. New Jersey—Buyout Program

The state of New Jersey has created the Green Acres Program, which “serves as the real estate agent for the Department of Environmental Protection (DEP).”⁶¹ The Green Acres Program acquires land which will be used to construct state parks, forests, natural areas, and wildlife management areas.⁶² In 2007, prior to the monumental storms, the Green Acres, Farmland, Blue Acres, and Historic Preservation Bond Act⁶³ authorized \$12 million to be used solely in order to purchase land from homeowners willing to sell within the flood areas of the Delaware River and Passaic River, in order to serve recreation and conservation purposes.⁶⁴

Governor Chris Christie has now dedicated a portion of the Blue Acres Program specifically to post-Superstorm Sandy municipalities.⁶⁵ The Superstorm Sandy Blue Acres Program intends to purchase 1300 residential homes in New Jersey by use of Federal Emergency Management Agency (FEMA) funds, the Department of Housing and Urban Development (HUD) funds, and also state funds.⁶⁶ The valuation method for this buyout program will be home appraisals at the pre-storm market value by use of comparables from houses sold before Sandy.⁶⁷ The \$300

61. *State Land Acquisition Program*, ST. OF N.J. DEP'T OF ENVTL. PROT., <http://www.nj.gov/dep/greenacres/state.html> [<https://perma.cc/9E47-682H>] (last updated Jan. 5, 2016).

62. *Id.*

63. LEG. BUDGET & FIN. OFFICE, LEGISLATIVE FISCAL ESTIMATE, S. 212-3005, at 2 (N.J. 2007), ftp://www.njleg.state.nj.us/20062007/S3500/3005_E1.PDF.

64. *Blue Acres Floodplain Acquisitions*, ST. OF N.J. DEP'T OF ENVTL. PROT., http://www.nj.gov/dep/greenacres/blue_flood_ac.html [<http://perma.cc/SRR6-66B4>] (last updated Jan. 5, 2016).

65. The Superstorm Sandy Blue Acres Program “seeks to purchase clusters of homes in towns hit hard by Sandy and previous storm and flooding events.” *Blue Acres: A Buyout Program for Flood-Prone Homes*, WOODBRIDGE TWP, N.J. 3, <http://www.twp.woodbridge.nj.us/LinkClick.aspx?fileticket=95HTGXnKilc=&tabid=2296> [<http://perma.cc/D5ZG-F9CW>].

66. *Id.* at 2.

67. *Id.* at 4.

million dollar program began on May 16, 2013,⁶⁸ and had already closed 107 buyouts in just slightly over one year from launch.⁶⁹ As of October 2014, the DEP closed 181 home purchases, 78 of which have already been demolished.⁷⁰

New Jersey's other resiliency strategies include more general ideas such as new community design plans that will tend to the needs of flood hazard areas, as well as turning to local land use laws in order to determine the most effective way to handle the process of rebuilding post-disaster.⁷¹ In addition, New Jersey has several homeowners reconstruction programs to assist financial needs of homeowners who wish to rebuild. The two main programs are the Homeowner Reconstruction, Rehabilitation, Elevation and Mitigation (RREM) program and the Hazard Mitigation Grant Program (HMGP) Elevation program.⁷² The former allows eligible homeowners to apply for up to \$150,000 to put towards rebuilding their residence at an elevated standard, while the latter provides up to \$30,000 to assist homeowners in elevating their single-family home.⁷³ The HMGP Elevation program is limited to Sandy-impacted areas, although the home need not have been actually damaged by Superstorm Sandy to qualify for the elevation assistance funds.⁷⁴

68. *Frequently Asked Questions*, ST. OF N.J. DEP'T OF ENVTL PROT., <http://www.nj.gov/dep/greenacres/pdf/faqs-blueacres.pdf> [<https://perma.cc/D7GF-GR6M>] (last updated Sept. 16, 2015).

69. News Release, State of N.J. Dep't of Env'tl. Prot., Christie Administration Announces the State Passes the 100 Mark on Post-Sandy Home Buyouts (May 27, 2014), http://www.nj.gov/dep/newsrel/2014/14_0052.htm [<http://perma.cc/52Z7-2UNS>].

70. News Release, State of N.J. Dep't of Env'tl. Prot., Christie Administration Announces Superstorm Sandy Blue Acres Acquisition Meeting in Pompton Lakes (Oct. 16, 2014), http://www.nj.gov/dep/newsrel/2014/14_0115.htm [<http://perma.cc/H6CK-6NZ5>].

71. *Resiliency*, ST. OF N.J. GOVERNOR'S OFF. OF RECOVERY & REBUILDING, <http://nj.gov/gorr/resiliency/> [<http://perma.cc/9JRF-FGAW>].

72. *Has Your Home or Rental Property Been Damaged by Superstorm Sandy and You Need Financial Assistance to Repair or Rebuild?*, ST. OF N.J. DEP'T OF COMMUNITY AFF., http://www.21online.com/media/propertydocuments/9/3/2/122932_1.pdf [<http://perma.cc/93NB-BNLU>].

73. *Id.*

74. *Hazard Mitigation Grant Program (HMGP) Elevation Program*, ST. OF N.J. DEP'T OF ENVTL PROT., <http://www.nj.gov/dep/special/hurricane-sandy/hmgp.htm> [<https://perma.cc/F2ZM-S69P>] (last updated Feb. 12, 2016).

2016] *PROACTIVE NATURAL DISASTER RECOVERY* 337

New building regulations, such as the new elevation requirements, are one of New Jersey's proactive resiliency movements that are especially helpful to those who wish to remain on their property. However, storms and flooding have proven to be unpredictable, sometimes passing over areas that were expected to be substantially hit and other times causing more damage than originally anticipated. If the elevation requirements would sustain a home against storms equivalent to previous ones, then the regulations would be flawlessly effective in their purpose. However, the possibility always remains that a larger storm, tidal wave, or a new flood record will come about that may surpass the new home elevation levels. Realizing, of course, that realistically there could never be a perfect regulation that would allow a home to sustain any and all natural disasters, it is not realistic to pick apart these new regulations and deem them totally ineffective. However, a buyout program such as New Jersey's Blue Acres program *would* assure that homeowners living in common disaster areas would not be affected by any future unpredictable water damage.

C. Vermont—Buyout Program

Vermont was especially damaged by Hurricane Irene, which left the state with the worst flood damages seen in eighty-three years.⁷⁵ With the mass flooding, loss of power, and approximately 3500 homes damaged from the storm,⁷⁶ Governor Peter Shumlin initiated the proactive movement towards acquiring federal funding for disaster recovery, resiliency, and resistance. Vermont's Congressional delegation admitted that Irene was a learning experience that shook the state, but they

75. Adam Silverman & Donna Leinwand Leger, *Irene Causes Vermont's Worst Flooding in 83 Years*, USA TODAY, <http://usatoday30.usatoday.com/weather/storms/story/2011-08-29/Irene-leaves-waterlogged-mess-in-Vermont/50175534/1> [<http://perma.cc/C6KZ-VX3K>] (last updated Aug. 30, 2011). "The flooding of November 1927, also the result of a tropical storm that traveled from the Bahamas, is Vermont's benchmark disaster. . . ." *Id.*

76. Steve Zind, *Three Years After Irene, Buyout Applications Still Being Processed*, VT. PUB. RADIO (Aug. 8, 2014), <http://digital.vpr.net/post/three-years-after-irene-buyout-applications-still-being-processed> [<https://perma.cc/V3KN-3PYU>].

will now be able to assess how to minimize disasters for the future.⁷⁷

In March 2012, Governor Shumlin announced that \$19.8 million would be invested into a recovery program that will further the goal of reducing damage due to flooding as well as help homeowners rebuild and retreat from flood plain areas.⁷⁸ The Hazard Mitigation Grant Program (HMGP) allows eligible homeowners to sell their property back to the government for compensation to avoid risk of future damage.⁷⁹ There are a total of 72 projects involved.⁸⁰ The HMGP provides money that will mitigate risks, with federal funding covering seventy-five percent of the projects' expenses⁸¹ and the other twenty-five percent local match will be covered by the state committed Community Development Block Grant–Disaster Recovery (CDBG-DR) funds.⁸² While the program, in comparison to other states such as New York and New Jersey, is much smaller in project size and funding amounts, it is a beneficial and essential measure necessary in order to assure safety and minimize damage as much as possible.

The program had a slow start; after its first year only three home sales had been closed for buyout.⁸³ Vermont Division of

77. Gov. Peter Shumlin, *Vermont's Congressional Delegation and FEMA Announce Major Flood Recovery Investments*, PATRICK LEAHY, <http://www.leahy.senate.gov/press/gov-peter-shumlin-vermonts-congressional-delegation-and-fema-announce-major-flood-recovery-investments> [<http://perma.cc/X5WA-SW7L>].

78. *Id.* Other mitigation projects include public infrastructure upgrades, flood proofing buildings, public education, and outreach efforts and planning activities that will allow the state to better withstand flood damages. *Id.*

79. *Id.*

80. *Id.* Many of the seventy-two named projects consist of multiple properties. In total, there are seventy-six primary residences and another twenty-two rental properties. *Id.*

81. Zind, *supra* note 76.

82. Gov. Shumlin: *Homeowners Complete Home Buyout Process*, VT. GOVERNOR PETER SHUMLIN (Mar. 27, 2013), <http://governor.vermont.gov/newsroom-Gov-Shumlin-Homeowners-Complete-Home-Buyout-Process> [<http://perma.cc/77QV-S3RW>] (“The 25 percent match is being made available to communities through the Two Rivers Ottauquechee Regional Commission, which is administering the funding.”); *Vermont Buyout Program*, COASTLINES PROJECT (Apr. 24, 2013), <http://coastlinesproject.wordpress.com/2013/04/24/vermont-buyout-program/> [<http://perma.cc/J67Q-K7XX>].

83. Gov. Shumlin: *Homeowners Complete Home Buyout Process*, *supra* note 82.

2016] *PROACTIVE NATURAL DISASTER RECOVERY* 339

Emergency Management and Homeland Security Director, Joe Flynn, admits that the process is long, and many property owners are getting anxious waiting for their checks as they want to move on with their lives and forget about the disaster that took place.⁸⁴ However, though slow, the process had moved along steadily. As of August 2014, 156 home buyout applications were submitted, 108 have been approved, and 76 have been closed with the property owners receiving their buyout compensation checks.⁸⁵

While homeowners' anxiousness for their buyout checks showed a sense of support for retreating as a resiliency measure, in 2012 FEMA amended the mitigation grant program that gave homeowners another option besides a buyout. The amendment to the program allowed for funding to be put towards elevating their homes above flood level instead of moving, which many people opted to do.⁸⁶ However, as Irene has proven, unexpected natural disasters have great potential for damages that sometimes cannot be foreseen or estimated. Even if a home elevation increase could allow a house to withstand the force of Irene, it is not guaranteed to withstand *any* storm of unpredictable force. The buyout program is a solution aimed toward long term goals and damage mitigation in perpetuity. The programs are promising, but if they cannot be implemented due to unwilling residents, there is always another option to ensure safety on the waterfronts of these states.

V. EMINENT DOMAIN

The authority of eminent domain is the power of a government to take private property for a variety of public uses.⁸⁷ One mandatory requirement is that the government must provide just compensation to the property owner, as stated in the Takings Clause in the Fifth Amendment of the United States

84. *Id.*

85. Zind, *supra* note 76; Homes eligible for Vermont's HMGP will be purchased at the home's fair market value. Gov. Shumlin: *Homeowners Complete Home Buyout Process*, *supra* note 82.

86. Zind, *supra* note 76.

87. SPRINGER, *supra* note 1, at 2 ("State and local governments use eminent domain to acquire property for important development projects that attract new businesses and provide affordable housing, new schools, jobs, parks and recreation facilities, and transportation infrastructure.").

Constitution.⁸⁸ The just compensation provision of the Takings Clause applies to states through the Fourteenth Amendment, which allows property owners the protection of their property rights.⁸⁹ The U.S. Supreme Court's test to determine whether a taking of private property is sufficient to meet the public use requirement is to decide whether or not the condemnation of land will serve a public purpose.⁹⁰

States have incorporated eminent domain into their own legislation and constitutions in order to regulate its use and ultimately decide which "public uses" would trigger the procedure.⁹¹ Eminent domain is used cautiously by states in fear of political consequences stemming from a view that the government is abusing their power.⁹² However, being as non-coercive as possible, eminent domain can often be used as "leverage" to negotiate with property owners.⁹³ Perhaps even a simple sense of awareness that eminent domain is a viable option for the government to pursue under these circumstances, a property owner would then be more inclined to participate in a buyout program option.

While controversial and somewhat dreaded, there are several circumstances in which both the government and homeowner would benefit from the use of eminent domain. For example, if a homeowner owes more on a mortgage than what their home is currently worth (or was worth pre-storm), a buyout program would not adequately compensate that owner and would leave the managed retreat project incomplete. In a simpler example, what if several homeowners simply refuse to partake in a buyout program, rendering its safety and resiliency goals ineffective and ultimately contributing to the ongoing public expense to maintain those few isolated properties? How have states in the Northeast, if at all, assessed the need for eminent domain with respect to completing a buyout program for natural disaster resiliency?

88. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

89. *National Eminent Domain Power*, FINDLAW, <http://constitution.findlaw.com/amendment5/annotation14.html> [[http://perma.cc/ PL96-Z2LX](http://perma.cc/PL96-Z2LX)].

90. SPRINGER, *supra* note 1, at 2.

91. *See id.*

92. *Id.*

93. *Id.*

A. Eminent Domain in New York

In the state of New York, a condemnor of private property is required to publicize a brief synopsis of their findings as to how a proposed project is in fact a public use and therefore acquirable through the use of eminent domain.⁹⁴ The condemnor is to specify the public use, benefit, or purpose of the project; the location of the project; the general effect on the environment and residents of the locality; and other relevant factors.⁹⁵

Governor Cuomo does not support the use of eminent domain in order to claim homes that refuse the buyout offers and incentives for their property.⁹⁶ As the buyout program is wholly voluntary, New York will not use eminent domain. However, having the state government exercise its authority for eminent domain would assure the overall future safety of communities commonly affected by natural disasters. Homeowners in New York have differed in opinion on whether to remain on their disaster-prone property.⁹⁷ Barbara Brancaccio, a spokeswoman for the governor's Office of Storm Recovery (OSR), admitted that people may even enjoy having more space around their property.⁹⁸ Of course, what she is referring to is the benefit that people would enjoy if they chose not to leave their property while their surrounding neighbors left. In this type of circumstance, any given shoreline would be unaesthetically pleasing due to the random isolated homes that opted to not move, but aesthetics are usually not a primary worry. Homeowners that choose to not take part in the buyout program will limit the overall effectiveness of its goal and purposes. Also, having homes remain in disaster-prone areas means that there will continue to be public funds spent on repairs and cleanup costs should another disaster strike.

94. See N.Y. EM. DOM. PROC. LAW § 204 (McKinney 2003).

95. *Id.* § 204(B).

96. Shawn Boburg, *Rebuild vs. Retreat: Christie and Cuomo Offer Contrasting Plans in Wake of Sandy*, NORTHJERSEY.COM (Mar. 15, 2013, 5:21 AM), <http://www.northjersey.com/news/rebuild-vs-retreat-christie-and-cuomo-offer-contrasting-plans-in-wake-of-sandy-1.589124> [<http://perma.cc/YC2A-H4V3>].

97. See Genevieve Belmaker, *After Sandy, Staten Island Community Chooses State Buyout*, EPOCH TIMES (Jan. 20, 2014), <http://www.theepochtimes.com/n3/459607-after-sandy-community-chooses-state-buyout/> [<http://perma.cc/5BJ4-ZKM5>].

98. *Id.*

For these reasons, New York should reassess its view on exercising eminent domain in order to properly complete the NYRCR Program. There should, of course, be regulations contemplating which properties should be condemned, such as the most vulnerable or most damaged properties. As far as state statutory requirements for a condemnor to base their conclusions on elements, such as whether or not the property will serve a public use and the general effect on the environment, all elements are able to be met.⁹⁹ A foreseeable point of argument would be whether or not a taking to prevent storm damage is a taking for a public use or benefit. However, safety is an adequate reason to acquire property through a taking, where the purpose is to better the general welfare of a public community.

B. Eminent Domain in New Jersey

New Jersey's state constitution, like the U.S. Constitution, allows for the use of eminent domain to acquire land for a public use in return for just compensation to the property owner.¹⁰⁰ New Jersey also faces the issue of whether or not the taking of beachfront properties by use of eminent domain will serve a public purpose. While New Jersey has an implemented buyout plan that may have to assess the need for eminent domain, currently Governor Chris Christie is looking to exercise the authority in another way; he seeks to acquire property easements rather than full property ownership.¹⁰¹

Governor Christie's dune replenishment project, designed by the U.S. Army Corps of Engineers, is a plan to construct sand dunes along beachfront properties that would sustain storm surges.¹⁰² The U.S. Army Corps is confident that these projects are necessary in order to reduce risk from future storms in

99. See EM. DOM. PROC. LAW § 204(B).

100. "Private property shall not be taken for public use without just compensation . . ." N.J. CONST. art. I, § 20.

101. NJ101.5 Newsroom, *Christie Won't Rule Out Use of Eminent Domain in Dune Fight*, NEW JERSEY 101.5 (Mar. 25, 2013, 9:41 PM), <http://nj1015.com/christie-wont-rule-out-use-of-eminent-domain-in-dune-fight/> [<http://perma.cc/7J8U-4757>].

102. *Id.* The dunes will be approximately twenty-five feet wide with seventy-five-foot wide berms and 175 acres of dune grass along an eleven-mile beachfront stretch. *Id.*

2016] *PROACTIVE NATURAL DISASTER RECOVERY* 343

vulnerable areas.¹⁰³ Of course, in order to construct these sand dunes, the state must acquire easements from beachfront property owners. Approximately 2000 easements are needed for the project to be completed, and thus far around 800 owners have refused to grant an easement.¹⁰⁴ Governor Christie is not opposed to using eminent domain in order to acquire such easements to assure safety along the state's coastline. In fact, he has been anything but shy in expressing his true feelings about people who are opposed to surrendering property easements to the government, stating, "[w]hatever action I have to take, I will take to protect this state."¹⁰⁵ Most owners are refusing to accept a perpetual easement of their property because it will interfere with their view of the beach. However, Governor Christie has not shown sympathy to those concerned about their beachfront view in light of the lost lives and excessive damages caused by the coastal storms.¹⁰⁶ The Governor is quoted as saying, "I am not going to permit people's desire to have a better view of the Atlantic Ocean imperil entire municipalities in this state again."¹⁰⁷

In a landmark case for the state, Harvey and Phyllis Karan, landowners in the New Jersey beachfront community of Harvey Cedars, were brought to court on a condemnation action seeking a portion of the couple's property in order to build sand dunes for future storm protection.¹⁰⁸ After the Superior Court returned a jury verdict for the owners for \$375,000 and the Appellate

103. *Christie Administration and United States Army Corps Announce Schedule to Move Forward on Beach and Dune Projects*, ST. OF N.J. GOVERNOR CHRIS CHRISTIE (Oct. 17, 2013), <http://www.state.nj.us/governor/news/news/552013/approved/20131017b.html> [<http://perma.cc/YL32-5F5A>].

104. Jacob Gershman, *Storm Over Eminent Domain Brews in New Jersey*, WALL STREET J.: L. BLOG (Dec. 26, 2013, 11:55 AM), <http://blogs.wsj.com/law/2013/12/26/storm-over-eminent-domain-brews-in-new-jersey/> [<http://perma.cc/UM95-RG5H>].

105. NJ101.5 Newsroom, *supra* note 101.

106. Bill Ward, *NJ Beachfront Owners Hold Out for Eminent Domain*, N.J. EMINENT DOMAIN L. BLOG (Oct. 24, 2013), <http://www.nj eminentdomain.com/state-of-new-jersey-nj-beachfront-owners-hold-out-for-eminent-domain.html> [<http://perma.cc/M2X8-XL4T>] ("We can no longer be held back from completing these critical projects by a small number of owners who are selfishly concerned about their view while putting large swaths of homes and businesses around them at risk." (quoting Governor Christie)).

107. NJ101.5 Newsroom, *supra* note 101.

108. *Harvey Cedars v. Karan*, 70 A.3d 524 (N.J. 2013).

Division affirmed, the Borough appealed.¹⁰⁹ The Supreme Court made clear that the Karans were entitled to just compensation for the taking of their property, but they reversed and remanded the case due to a miscalculation in the award stating that, “[t]o calculate [a homeowner’s] loss, we must look to the difference between the fair market value of the property before the partial taking and after the taking.”¹¹⁰ In spite of the ruling, the Karans subsequently surrendered their property, most likely due to political and community pressure, and received a total of one dollar as compensation for 3400 square feet of land.¹¹¹ The Karans’ conveyed easement allows for the construction of a twenty-two-foot dune on their property.¹¹² The Mayor of Harvey Cedars, Jonathan Oldham, claimed that the settlement outcome “sends a message” to those who want to hold out on easements for shore protection.¹¹³

New Jersey’s authority to exercise eminent domain seems to go beyond being used as gentle persuasion and negotiation with landowners and appears more persistent. The state is concerned about the safety of their communities so its ultimate goal is for complete compliance with the resiliency projects. The state has the power vested in their constitution and, if need be, it should continue to exercise it when necessary in order to have a successful resiliency program.

C. Eminent Domain in Vermont

Vermont’s legislation expressly specifies authority to use eminent domain for the purposes of flood control projects.¹¹⁴ Pursuant to a flood control project, the Commissioner of the Department of Environmental Conservation may petition to

109. *Id.*

110. *Id.* at 527.

111. Ward, *supra* note 106.

112. MaryAnn Spoto, *N.J. Takes 2 Big Steps Towards Dune-Building Projects to Fortify Weary Beaches*, NJ.COM (Sept. 25, 2013, 2:28 PM), http://www.nj.com/ocean/index.ssf/2013/09/harvey_cedars_dunes_sandy.html [<http://perma.cc/9EF6-NXC9>].

113. *Id.*

114. VT. STAT. ANN. tit. 12, § 1040(b)(4) (West 2005) (“This section shall not affect the authority of an entity authorized by law to use eminent domain for the following purposes: . . . water, wastewater, stormwater, flood control, drainage, or waste disposal projects.”).

2016] *PROACTIVE NATURAL DISASTER RECOVERY* 345

acquire real estate by use of eminent domain when necessary.¹¹⁵ “Necessity” reasonably considers the greatest public good.¹¹⁶ Although legislation expresses that eminent domain could be used to pursue a flood control project, there has been no mention of using that route to accomplish Vermont’s buyout programs or other resiliency measures. As already stated, Vermont’s projects are smaller than those of other states, and property owners appear to be satisfied with their options to either retreat from the water or elevate their homes above flood levels.¹¹⁷ While choosing to elevate one’s property does not guarantee perpetual safety, seeing as storms have the ability to cause unpredictable damage, Vermont seems to be content with the choices given to communities, especially since major disasters are not entirely common. The uncommon nature of mass destruction from natural disasters could possibly be why Vermont has chosen not to exercise eminent domain, or even speak on the topic, considering it often comes with political backlash. However, with positive feedback and compliance from property owners, eminent domain may not be necessary in this particular state.

Though unrelated to acquiring flood-prone properties, Governor Shumlin expressed his opinion about eminent domain during a dispute over the construction of a natural gas pipeline. Vermont Gas has pursued easement agreements with seventy percent of the property owners needed in order to pursue the construction of a new forty-one-mile-long gas pipeline.¹¹⁸ Governor Shumlin stated that the company must avoid eminent domain at all costs and must provide better reasoning for how it will benefit the public good besides tax benefits.¹¹⁹ While the gas pipeline issue differs from Vermont’s buyout and acquisition program, it still illustrates the Governor’s position on eminent domain. His position is another potential reason why the state

115. *Vermont Eminent Domain Laws*, USLEGAL, <http://eminentdomain.uslegal.com/state-laws-on-eminent-domain/vermont/> [http://perma.cc/4ACQ-YZUN].

116. *Id.*

117. Zind, *supra* note 76.

118. John Herrick, *Shumlin to Step in if Vermont Gas Pursues Eminent Domain*, VTDIGGER.ORG (Aug. 25, 2014, 7:21 PM), <http://vtdigger.org/2014/08/25/shumlin-step-vermont-gas-pursues-eminent-domain/> [http://perma.cc/P3LG-6SKQ].

119. *Id.*

has not ventured to suggest using eminent domain to acquire property in situations where it is avoidable.

D. Benefits of Exercising Eminent Domain

Traditionally, governments choose to exercise eminent domain when they need land for public purposes such as building a bridge, highway, or making improvements to land.¹²⁰ However, eminent domain has also been used for reasons pertaining to stimulating the economy, increasing access to resources, increasing public safety, and enhancing environmental cleanup.¹²¹ Despite these public purposes, the concept remains controversial in nature, as citizens are historically not fond of the idea of their government seizing their property for a public use. Many have been left with the misconceived, blanket perception that eminent domain is a coercive, bullying tactic that the government uses to pursue their wants and desires.

Admittedly, there have been times when eminent domain has been used in the United States for reasons that would benefit one group of people while causing detriment to others. Since the 1960s, eminent domain has been associated with urban redevelopment projects, which were sometimes quite misguided. The San Francisco Redevelopment Agency, for example, once used eminent domain to acquire a low-income neighborhood for the purpose of replacing their homes with “high-end” hotels.¹²² The project forced 4000 low-income citizens to relocate.¹²³ Projects such as these sometimes cloud the beneficial perception of eminent domain. For example, that same San Francisco agency used eminent domain to pursue another redevelopment project. However, this time the agency acquired an abandoned hotel for the purpose of constructing affordable housing, leaving

120. Charles A. Szypszak, *Ten Common Misconceptions About Eminent Domain*, POPULAR GOV'T, Winter 2009, at 43, 43, <http://sogpubs.unc.edu/electronicversions/pg/pgwin09/article4.pdf> [<http://perma.cc/FC7Z-3ZLE>].

121. JAMAR OWENS ET AL., *THE POWER OF EMINENT DOMAIN 8* (Univ. of N.C. Kenan-Flagler Bus. Sch. ed., 2005), <https://extranet.kenan-flagler.unc.edu/kicse/ORIG%20Shared%20Documents/Power%20of%20Eminent%20Domain.pdf> [<https://perma.cc/9FP4-KQ2Q>].

122. Stan Mack, *Positive & Negative Effects of Eminent Domain*, SFGATE, <http://homeguides.sfgate.com/positive-negative-effects-eminent-domain-49409.html> [<http://perma.cc/3HMP-L8MZ>].

123. *Id.*

2016] *PROACTIVE NATURAL DISASTER RECOVERY* 347

surrounding neighbors pleased.¹²⁴ Positive impacts of certain urban redevelopment projects can't automatically cancel out the misuse of the power of eminent domain seen in many others across the country. Yet, eminent domain, when used properly and sensitively can be a powerful tool to accomplish the critical goal of increasing resiliency. Having the public be aware of the potential benefits, especially in such safety compromising situations, would hopefully diminish the negativity usually associated with eminent domain.

While that specific agency exercised eminent domain for redevelopment purposes, it should be noted that using eminent domain for resiliency purposes in the Northeast would serve an even higher general purpose than redevelopment. Not to say that redeveloping an area to accommodate low-income residents is not a well deserving purpose, but pursuing eminent domain to complete governmental resiliency projects against natural disasters would provide perpetual safety to proven dangerous waterfronts. Using eminent domain to achieve resiliency will be tackled as fairly as possible, assuring that the homeowner will be justly compensated. Shedding light on the end result of what eminent domain could provide for a disaster-prone area will hopefully allow people to be more accepting of the policy and ultimately recognize its benefits. Of course, public acceptance will be conditioned on the execution of eminent domain, making sure that actual *just* compensation is attained and that governments do not abuse their authority in the process.

VI. CONCLUSION

While New York is currently choosing to retain a voluntary buyout program, an assessment of the benefits of eminent domain shows that there is at least room for consideration of incorporating eminent domain into the state's resiliency scheme. New York would not have to wholly adopt eminent domain into their plans in order to have a successful buyout program, but at least considering it to be a reasonable option would allow the State to exercise eminent domain based on certain conditions or

124. Andy J. Wang, *Jury Speaks: Hugo Hotel Must Go, for \$4.6M*, CURBED S.F. (Sept. 11, 2009, 9:44 AM), http://sf.curbed.com/archives/2009/09/11/jury_speaks_hugo_hotel_must_go_for_46m.php, [http://perma.cc/22CE-3QFB].

criteria. New York could assess whether or not to pursue eminent domain in a given area based on factors such as the magnitude of past destruction, fatalities, environmental impact, susceptibility to damage, and many others. These factors will assist in finding which areas are most prone to the risks of natural disaster. This way, the public can see and realize that the government is not being abusive in its power, but is instead taking into consideration several surrounding circumstances before deciding to retain their property. Vermont has also decided against the use of eminent domain and instead is pursuing voluntary buyout programs or home elevation as their prime resiliency tactic. Deeming that their projects are smaller than those of other states that were devastated more drastically, Vermont does not feel the necessity for eminent domain. Another possible reason for avoiding eminent domain could be because the concept carries a negative political association, and taking private homeowners' property would generally not reflect positively on the government. However, eminent domain does not always have to constitute a total taking and result in relocation for the homeowner. New Jersey has already opted to exercise eminent domain in order to construct sand dunes. Though this does require an easement on a homeowner's land, it does not completely take their property and allows them to remain on the land while protecting their home. This is another option that resilient states such as New York and Vermont should consider.

The aftermath of Hurricane Irene, Tropical Storm Lee, and Superstorm Sandy left thousands of municipalities in the Northeast in shambles. Efforts to build back stronger than before are implemented in states' various projects and programs. Included in recovery efforts and future planning are building regulation alterations, the creation of resilient coastal barriers to withstand natural disaster, and buyout programs for the vulnerable properties in progression towards a managed retreat. As these proactive and precautionary measures are surely significant steps toward the prevention of future disasters, states should be encouraged to take an initiative in at least considering the benefits of exercising their power of eminent domain. Though typically not a favorable option because of community backlash, eminent domain could assist in leading to a successful and

2016] *PROACTIVE NATURAL DISASTER RECOVERY* 349

complete resiliency project and ensure overall future safety against natural disaster for susceptible waterfront properties.