

Buyout Programs

Introduction

Buyouts,¹ leasebacks,² and land acquisition³ (collectively “buyout programs”) are government programs whereby a government purchases and attains ownership rights of private property for some long-term planning purpose. Historically, these programs have been used to obtain lands in disaster-prone areas or to protect environmentally or culturally important resources. While there are no documented examples of a government entity purchasing land specifically due to the risk of sea level rise, there are examples of purchase programs acquiring low-lying coastal lands at risk of heavy storm-surge and flooding events.⁴ As coastal governments prepare for rising sea levels and expected increases in storm surge and flooding danger,⁵ these traditional purchase programs are an option for reducing community vulnerability and future disaster expenditure while providing a natural buffer for landward development.⁶

Buyout programs can be tailored to provide incentives—whether financial or otherwise—for the government purchaser and private seller.⁷ For coastal communities addressing sea level rise, the purchase of entire street blocks or neighborhoods is generally the most effective way

to create large, natural buffer zones that reduce storm surge impacts. There are also notable success stories in the flood-mitigation context of public purchase programs acquiring and restoring risk-prone lands for public use or ecosystem conservation.⁸ Leasebacks—buyout programs in which properties are leased back to their previous owners for some specified period—may be useful planning tools for a property owner who is willing to sell property but wants to maintain use of the land in the near-term. However, these acquisition programs should be additionally scrutinized to ensure that they are being used in the right context and for the correct time period.

Funding Considerations

A general criticism of buyout programs is that they are often not pursued until post-disaster scenarios have already made it clear (sometimes repeatedly) that human occupation within certain areas is unsustainable. Accordingly, local governments should work early in the planning process to build relationships with affected property owners. Achieving some sort of consensus is also important to avoid the “checkerboard effect” resulting from the acquisition of separate but disconnected coastal properties.⁹ A fiscal challenge of this proactive approach is that it potentially reduces the government’s funding by reducing the community’s tax base.¹⁰

1 A buyout program is a specific type of acquisition program in which the government purchases private land, demolishes any existing structures, and maintains the property as open space for public use. ANNE R. SIDERS, MANAGED COASTAL RETREAT: A LEGAL HANDBOOK ON SHIFTING DEVELOPMENT AWAY FROM VULNERABLE AREAS 109 (2013), available at https://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/Fellows/ManagedCoastalRetreat_FINAL_Oct%2030.pdf.

2 Leasebacks are acquisitions, with the added condition that the government leases the property back to the previous owner for some period. *Coastal Subregional Planning Project Appendices*, ASSOCIATION OF BAY AREA GOVERNMENTS, <http://www.abag.ca.gov/planning/subregional/cspp/cspp7.html> (last visited Oct. 9, 2017).

3 An acquisition can be any program where the government purchases private land for public use. ANNE R. SIDERS, ANATOMY OF A BUYOUT: NEW YORK POST-SUPERSTORM SANDY 2 (Vermont Takings Conference, 2013).

4 Press Release, FEMA, For Communities Plagued by Repeated Flooding, Property Acquisition May Be the Answer (May 28, 2014), available at <https://www.fema.gov/news-release/2014/05/28/communities-plagued-repeated-flooding-property-acquisition-may-be-answer>.

5 GARY GRIGGS ET AL., RISING SEAS IN CALIFORNIA: AN UPDATE ON SEA-LEVEL RISE SCIENCE, CALIFORNIA OCEAN SCIENCE TRUST 17 (Apr. 2017).

6 SIDERS, MANAGED COASTAL RETREAT, *supra* note 1, at 109.

7 These incentives could range from tax incentives for conservation easement dedications to “bonus payments” for relocating homeowners who agree to stay in the community. *Id.* at v & 7.

8 *Id.* at 117; see also *Land Acquisition Program*, STATE OF CALIFORNIA WILDLIFE CONSERVATION BOARD, <https://wcb.ca.gov/Programs/Acquisition> (last visited Oct. 9, 2017).

9 ROBERT FREUDENBERG ET AL., BUY-IN FOR BUYOUT: THE CASE FOR MANAGED RETREAT FROM FLOOD ZONES, LINCOLN INSTITUTE OF LAND POLICY 26 (2016), available at <https://www.lincolninst.edu/sites/default/files/pubfiles/buy-in-for-buyouts-full.pdf>.

10 For a discussion of the fiscal impacts buyout programs can have on communities, and how to mitigate those impacts by combining purchase programs with other adaptation mechanisms such as relocation, see *id.* at 34-42.

Funding is a paramount challenge for implementing purchase programs. The outright purchase of land can be costly, even if the eventual ownership of land provides coastal governments with the most flexibility and control over those properties at risk of sea level rise hazards. Post-disaster acquisition programs can be funded through Federal Emergency Management Agency's (FEMA) Hazard Mitigation Grant Program in communities with a FEMA-approved Local Mitigation Plan in place.¹¹ In these circumstances, federal dollars generally provide around 75% of the upfront costs while state and local sources are required to provide 25% of the purchase cost, alleviating some cost concerns.¹²

A Local Coastal Program (LCP) can include policies that encourage buyout programs.¹³ Regardless of funding and planning, a major obstacle for local communities initiating buyout programs will be holdout property owners. In these cases, governments might need to use eminent domain to acquire the holdout properties. Other legal considerations for implementing a buyout program might include working with state agencies and utility companies to safely move assets away from the coast. Buyouts can also be used in tandem with other coastal adaptation strategies, such as downzoning and transfers of development rights, to prompt successful voluntary retreat from rising seas and coastal hazards.

Federal and state law provide some funding options for communities seeking to preemptively acquire land. The California Coastal Commission is authorized to provide funds via Section 309 of the Coastal Zone Management Act for projects which specifically enhance the proactive mitigation of coastal hazards in light of sea level rise.¹⁴ As mentioned above, purchase programs can enable buying and restoring sensitive ecosystems such as wetlands and dune habitats.¹⁵ Where land characteristics are suitable, purchase programs using conservation grants may result in a triple bottom line of "risk reduction, natural

resource enhancement, and economic cost reduction."¹⁶ Furthermore, funds used for buyout programs should be considered investments in communities because they mitigate future disasters.¹⁷ This point is underscored by estimates that, on average, every \$1 spent mitigating future losses reduces those future losses by \$3.¹⁸

Examples

The devastation from Hurricane Sandy in 2012 precipitated several of the existing examples of buyout programs in the United States. There are a handful of case studies that are illustrative of factors that enable or limit the success of a buyout strategy. Two of these case studies are examined below.

Milford, Connecticut is a coastal town with the highest concentration of repetitive loss properties in the state.¹⁹ In an evaluation of the coastline of the North Atlantic coast, the U.S. Army Corps of Engineers noted that some engineered options may have limited success in areas constrained by available space and that, in these cases, land acquisition paired with relocation may be more effective as a long-term strategy to reduce the consequences of coastal hazards.²⁰ However, even with available funds from FEMA Hazard Mitigation Grants and U.S. Department of Agriculture (USDA) Floodplain Easement Programs, local stakeholders noted the loss of a municipal tax base as a major deterrent for accepting the buyouts as coastal property owners pay the highest property taxes.²¹

Mastic Beach, New York is a small coastal community on the south coast of Long Island, located just inland of a protective barrier island.²² Historic flooding events in recent decades have caused decisionmakers to look to buyout programs as a possible solution since at least the late 1990s.²³ After Hurricane Sandy, some residents investigated pursuing a buyout program, yet no local

11 See generally SIDERS, MANAGED COASTAL RETREAT, *supra* note 1; see also FEMA, LOCAL MITIGATION PLANNING HANDBOOK 9-4 (Mar. 2013), available at http://www.fema.gov/media-library-data/20130726-1910-25045-9160/fema_local_mitigation_handbook.pdf.

12 But local communities might pass these costs on to individual homeowners. FEMA, *supra* note 11, at 9-4.

13 CALIFORNIA COASTAL COMMISSION, SEA LEVEL RISE POLICY GUIDANCE 135 (2015).

14 See NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, COASTAL ZONE MANAGEMENT ACT SECTION 309 PROGRAM GUIDANCE 2016 TO 2020 ENHANCEMENT CYCLE (2014), available at https://coast.noaa.gov/czm/enhancement/media/Sect-309_Guidance_June2014.pdf.

15 See *Land Acquisition Program*, *supra* note 8.

16 MOLLY LOUGHNEY MELIUS AND MARGARET R. CALDWELL, CALIFORNIA COASTAL ARMORING REPORT: MANAGING COASTAL ARMORING AND CLIMATE CHANGE ADAPTATION IN THE 21ST CENTURY 35 (2015), available at <http://law.stanford.edu/wp-content/uploads/2015/07/CalCoastArmor-FULL-REPORT-6.17.15.pdf>.

17 SIDERS, MANAGED COASTAL RETREAT, *supra* note 1, at 111.

18 CONGRESS OF THE UNITED STATES CONGRESSIONAL BUDGET OFFICE, POTENTIAL COST SAVINGS FROM THE PRE-DISASTER MITIGATION PROGRAM 2 (2007).

19 ROBERT FREUDENBERG ET AL., *supra* note 9, at 47.

20 USACE MAIN REPORT. NORTH ATLANTIC COAST COMPREHENSIVE STUDY: RESILIENT ADAPTATION TO INCREASING RISK at 70 (2005).

21 ROBERT FREUDENBERG ET AL., *supra* note 9, at 47.

22 *Id.* at 48.

23 SUFFOLK COUNTY DEPARTMENT OF PLANNING, NARROW BAY FLOODPLAIN PROTECTION AND HAZARD MITIGATION PLAN 29 (1997).

community consensus on the topic could be reached.²⁴ However, the county where Mastic Beach lies, Suffolk, applied for buyout funding through the USDA Emergency Watershed Protection-Floodplain Easement Program.²⁵ Suffolk's application helped Mastic Beach property owners bypass resistance from local municipal officials.²⁶ Some of the properties implemented deed restrictions so that they would remain open space in perpetuity.²⁷

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²⁴ ROBERT FREUDENBERG ET AL., *supra* note 9, at 50.

²⁵ *Emergency Watershed Protection Program – Floodplain Easement Option*, USDA RESOURCES CONSERVATION SERVICE, https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/financial/ewp/?cid=nrcs143_008225 (last visited Oct. 31, 2017).

²⁶ ROBERT FREUDENBERG ET AL., *supra* note 9, at 50.

²⁷ *Id.*



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