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PRACTICE MITIGATION BUYOUTS



After the Buyouts: Managing Land in the Floodplain

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Over the past 30 years, it has become increasingly common for states and communities to buy out flood-damaged properties from homeowners anxious to exit flood-prone lands. Occasionally, other disasters also lead to buyouts in vulnerable areas. The aim is typically to reduce flood losses in the future, making communities more resilient, by shifting development to less vulnerable locations. But once local government acquires those properties, what happens next? The community has presumably acquired new obligations with fewer property taxes to support them. What land-use and management strategies work best to preserve the intended benefits of taking such action?

It is easy to cite the benefits of open space, particularly in riparian corridors: enhanced wildlife habitat, new and potential recreation options, and increased flood resilience, to name just a few. But those benefits do not simply materialize out of thin air. Most of the time, they require some planning supported by diligent research and political commitment to community goals for the acquired lands. It also requires an awareness of the conditions placed upon such properties by whatever grants or tax revenues are used to buy them. These are not simple open space acquisitions if such transactions even exist. Understanding the rules that govern floodplain or other disaster-related buyouts is critical to long-term success and avoiding unnecessary legal problems in the future.

This article focuses first on the legal and financial support for disaster-related land acquisitions, and then addresses how communities rezone and remap the affected areas before, during, and after disasters. The second half discusses how communities manage the acquired lands, dealing with costs, neighboring properties that were not acquired,

mitigation strategies, and alternative uses that may provide environmental and recreational benefits, and in some cases, income to support long-term maintenance.

THE CONTEXT FOR LAND ACQUISITION

Communities generally initiate hazard-related buyouts of private property under one of two circumstances. The first involves the willingness of owners to sell properties damaged in a disaster, either because the damage is extensive, typically at least half of market value, or so repetitive that owners want to leave. In these cases, the federal government typically provides most of the money following a presidential disaster declaration. The degree to which communities prepare for these situations varies widely but reflects a growing concern with resilience and, sometimes, impacts of climate change.

The second circumstance, however, involves ongoing planning to address mitigation needs and does not depend on post-disaster federal grants. It tends to focus on the use of more stable and consistent sources of state and local money to support strategic land acquisitions, but the recent expansion of pre-disaster mitigation grant funding under the Federal Emergency Management Agency (FEMA) may alter that balance considerably.

PAYING FOR BUYOUTS

Because presidential disaster declarations can release large amounts of money for hazard mitigation projects, funds controlled by FEMA tend to dominate discussion of potential buyouts after disasters. Some of the largest disasters that have entailed substantial flooding have been hurricanes, but inland floods, such as the Mississippi Valley floods of 1993 and 2008, have caused extensive damage as well. Also, buyouts

as a mitigation solution are not limited to flooding. As an example, Hawai'i County, which covers the "Big Island" in Hawaii, has recently used buyouts to relieve homeowners of lands that were inundated by lava in the 2018 Kilauea volcanic eruption. One huge difference in that situation is that, unlike water, which rises and then dissipates, lava stays in place once it cools, although much of it flows all the way downhill to the sea, expanding the island's shoreline. In addition, communities in Washington State have considered or implemented buyouts in areas susceptible to landslides. The goal in all these cases is to prevent future losses of life and property from disasters.

However, federal support for buyouts comes in various forms, and not all from FEMA. In addition to the long-standing Hazard Mitigation Grant Program (HMGP), created as part of the Stafford Disaster Relief and Emergency Assistance Act in 1988, FEMA also manages Flood Mitigation Assistance (FMA), and more recently added Building Resilient Infrastructure and Communities (BRIC), because of provisions in the 2018 Disaster Recovery Reform Act. The difference is that HMGP requires a presidential disaster declaration, whereas BRIC distributes funds largely through an annual national competition on a pre-disaster basis. FMA focuses on flood resilience and is not available for other types of hazard mitigation. It is distributed on a competitive basis using grant applications. The one common ingredient is that FEMA insists on deed restrictions that limit future uses of buyout parcels to some type of open space in perpetuity, though communities sometimes negotiate with FEMA regional officials about how that is defined and what is allowed. What is clear is that, one way or another, these funds involve hundreds of millions of dollars annually, and

while mitigation often involves approaches other than land acquisition in disaster-prone areas, the amount devoted to buyouts has grown over time.

In contrast, another major source of federal disaster aid that may be applied to mitigation is Community Development Block Grant—Disaster Recovery (CDBG-DR), allocated by Congress in response to specific declarations and managed by the U.S. Department of Housing and Urban Development. A section of the Housing and Community Development Act of 1974 authorizes the use of CDBG funds as payment of a non-federal share required in connection with a federal grant-in-aid program, allowing these funds to be used to meet match requirements for HMGP. CDBG funds are also used outside the 100-year, or one percent annual chance, floodplain and do not require that the land be dedicated to open space, but they do entail a host of other rules pertaining to community benefits and assistance to low- and moderate-income populations. For communities that wish to retain flooded buyout properties for possible future redevelopment, it is critical to prepare and adopt a strategy about which federal funds are used in

one area versus another. For example, Cedar Rapids, Iowa, which evacuated 10 percent of the city during a major flood in June 2008, limited use of HMGP funds to buyouts within the 100-year floodplain to create a greenway while developing flood control infrastructure to protect other areas. The 2008 flood was so huge that inundation covered much of the 500-year (0.2percent annual chance) floodplain and even beyond. Additionally, CDBG-DR funds were used for acquisition and clearance of some of these areas. Seth Gunnerson, a planner in the Community Development & Planning Department, says that newer developments in these areas, such as the Newbo shopping complex, must nonetheless elevate their ground floor at least one foot above base flood elevation. Flood mitigation is still important. It is also important to note that this occurred prior to the adoption of current, more restrictive CDBG-DR rules.

For the moment, he notes, the greenway area along the river has acquired a new temporary storage use because of a different disaster. The August 10, 2020, derecho that struck Cedar Rapids hardest of any place in Iowa destroyed thousands of trees. Many of

those, covered in snow in February, lay along the riverfront awaiting final disposition.

Support for buyouts may also come from state and even local sources. New Jersey, for instance, has a grant program known as Blue Acres, and New York has its NY Rising Buyout and Acquisition Programs, established with federal post-disaster funds. Those programs played major roles in supporting buyouts following Hurricane Sandy, which devastated parts of both states in October 2012. Terri Turner, AICP, development services administrator for the Augusta, Georgia, Planning & Development Department, says her city acquired some lands with support from Georgia's Green Acres program. That support was limited, but the city has also used revenue from a Special Purpose Local Option Sales Tax (SPLOST), another Georgia option, for acquisitions that pass a cost-benefit test. While the federal deed restrictions obviously do not apply, she reports that the city and county nonetheless "mimic" the federal restrictions to limit such lands to open space. Local sales tax increments like SPLOST have been used in various jurisdictions around the country to supplement federal funds and to make money available before disasters as a means of reducing future losses. Austin, Minnesota, has also used local option sales taxes to support land acquisitions and flood mitigation, but then auctioned off the structures for relocation, investing the proceeds in even more home acquisitions.

Some jurisdictions may also collaborate with nonprofit land trusts that sometimes receive donations of property from owners seeking tax deductions. These trusts may subsequently sell the land to a local government for a nominal price like \$1 to facilitate public management or larger land strategies.

Finally, a few jurisdictions, like the well-known example of Charlotte/Mecklenburg County, North Carolina, have implemented a stormwater utility fee that funds buyouts and other forms of flood mitigation. In all those cases, deed restrictions depend on state or local, rather than federal, policy.

One function of addressing hazard mitigation in a comprehensive plan or some other planning framework in advance of a



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Cedar Rapids has pursued a strategy focused on both buyouts and redevelopment with flood mitigations since the 2008 floods, exemplified by the retail development pictured here.

disaster is to establish clear priorities for how various available funds can best be deployed to achieve the community's goals in using buyouts both to achieve disaster recovery goals and to reduce future flood risk. Decisions made on the fly can have serious unintended consequences.

WHAT ABOUT ZONING?

Once a community has acquired flood-damaged parcels using funds that require placing them in open space for perpetuity, or even if a community decides, as Augusta did, to implement such deed restrictions on its own, it also acquires the legal responsibility to police those deed restrictions. While some choose to rely on the deed restrictions to speak for themselves, that is not a strategy that George Homewood, FAICP, planning director for Norfolk, Virginia—where sea level rise is a serious concern for future land use—endorses. Lands acquired with such restrictions, he says, “should be rezoned into some kind of open space.” While local officials or others may come to forget or ignore the deed restrictions over time, he says, rezoning makes clear that the area is off-limits for future development.

It is equally important to change zoning maps to make those restrictions clear, and to enter that information on GIS maps for the relevant neighborhoods. These steps help to show elected officials, planners, developers, and anyone else potentially interested in redevelopment that the area in question simply is no longer available.

Why is this important? Local governments that have used federal funds for buyouts remain legally responsible for complying with the deed restrictions and are potentially liable for failure to do so. Reliance on deed restrictions alone may provide some institutional memory, but also invites the

potential for collective amnesia as turnover occurs both among city or county employees and elected officials.

That does not mean that every jurisdiction rezones. For example, Tim Trautman, program manager for the Engineering & Mitigation Program at Charlotte-Mecklenburg Storm Water Services, in North Carolina, says “We don’t rezone our buyouts,” and that problems are limited to occasional objections by neighbors to use of such areas for construction staging and access. But this may be the sort of exception that helps to prove the larger point. The Charlotte/Mecklenburg County program, using a local stormwater utility fee to generate funds, invested \$58 million in flood mitigation, including buyouts, between 2000 and 2014. This sustained and ongoing level of monitoring and implementation is simply not typical of most local buyout efforts, which are often episodic following a specific disaster.

For example, Woodbridge, New Jersey, undertook a significant buyout effort after Hurricane Sandy. Stacy Curry, grant

manager in the Woodbridge police department, says that numerous homes suffered damage that made them uninhabitable. “Unfortunately,” she says, “investors saw this as an opportunity. They were moving in and buying properties to fix and flip or to fix and rent. The township of approximately 100,000 people along the Woodbridge River near the Atlantic coast wanted “to eliminate risk in this area” and had to act quickly. To date, says Curry, about 400 properties were eligible for buyouts, and the state has purchased 166 of them, totaling about 24 acres out of approximately 3,000 acres of regulatory floodplain.

The township drew a border around the buyout area and adopted an Open Space Conservation/Resiliency Zone to forestall problems as it proceeded with the buyouts. The new zone did not permit improvements on existing structures without mitigation, “such as elevation.” The net effect was to require such improvements from investors seeking permits, but it also affected rental properties when there was a change in



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A property buyout in Hillsborough County, Florida, in the process of being converted to green space.

tenancy, as a new certificate of occupancy would not be allowed without the required flood mitigation. The ordinance says simply that “New construction is not permitted” within the OSC/R zone. The zone does permit “unimproved open space,” however, “to preserve lands in a natural state for recreation and conservation purposes” and limits improvements to features such as trails, nature walks, and dog parks. It also includes a series of requirements for building design concerning elevation, flood vents, and the location of utility systems. The conservation zone was applied in several neighborhoods that were heavily affected by flooding because of Sandy.

Cedar Rapids also restricted development where riverfront areas in the 100-year floodplain required such limitations, but Gunnerson adds that the city, as the result of its 2015 *Envision Cedar Rapids* plan, undertook a complete rewriting of its zoning code into urban, traditional, and suburban districts, much of which aimed at making large areas more amenable to redevelopment after the 2008 floods, including enabling smaller lots for replacement housing under its ROOTS affordable housing program. Nonetheless, the city maintains zoning limitations within the “mandatory buyout” areas where FEMA deed restrictions apply, while using its downtown flood protection projects to enhance the reinvestment prospects for areas that remain viable and where it used CDBG-DR funds for buyouts that it did not wish to convert into permanent open space.

OPEN SPACE STRATEGIES

Land acquisition and rezoning are far more likely to be the end of the beginning of the story than the beginning of the end. Buyouts may take a few years to implement, and rezoning can generally be done much faster, but managing the use of open space is forever. This simple fact places a high premium on thoughtful planning not only about what uses are allowed but about the long-term benefits they can generate for the community. Thinking should go well beyond a fixation on the loss of property taxes as the lands are retired from active development.

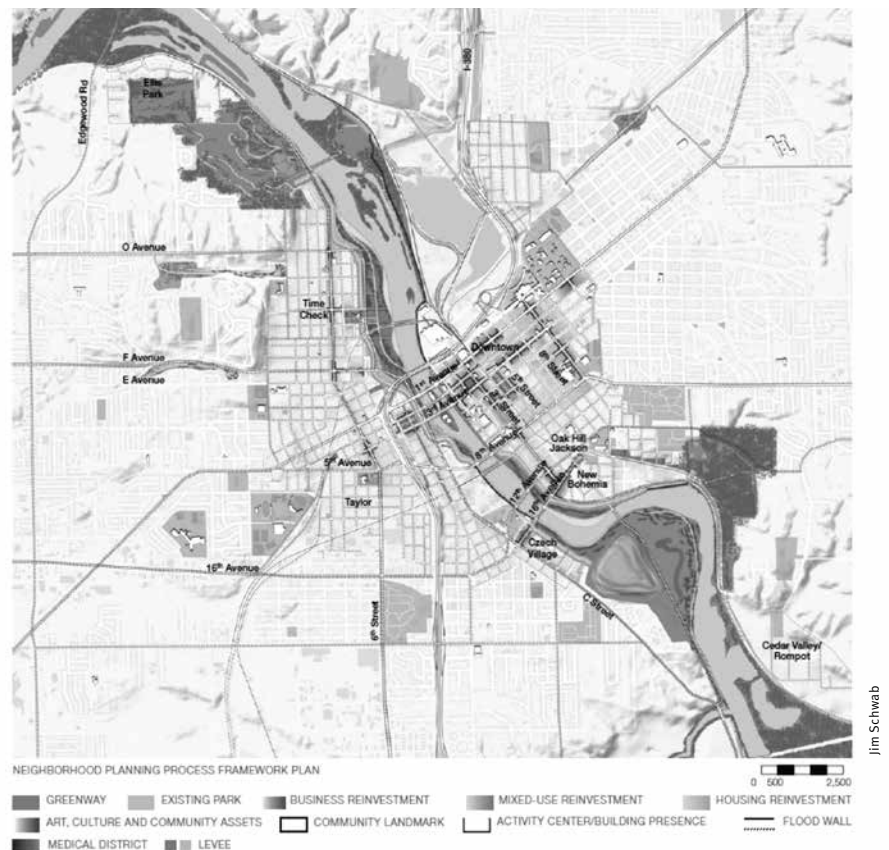
Cost Considerations

Cost is a factor because open lands still require some degree of maintenance, much of which may vary depending on the nature of the neighborhood that remains. Buyouts under the HMGP are voluntary and do not allow local use of eminent domain, so the possibility always exists of a patchwork of acquired parcels where homes are demolished and removed alongside others that remain, perhaps because they suffered less damage and owners chose to stay. This can require a continued presence of utility infrastructure, whereas a larger contiguous area of buyouts may allow its removal. However, even that, particularly in older or smaller towns, may pose a challenge if maps are inadequate in identifying the location

of such utilities. And then there is the question of lawns. Mary-Carson Stiff, of Wetlands Watch, a nonprofit working with Chesapeake and Norfolk on pilot programs in Virginia, reports that mowing there costs an average of \$2,000 annually per parcel. That may not sound like much, but with enough properties, she notes, “it adds up.”

The Challenge of Checkerboarding

Even with a mixture of buyouts and people who stay, known commonly as “checkerboarding,” there are ways to reduce or minimize those costs. Turner says that Augusta maintains “very few of our properties.” Many “are woods now.” To the extent that neighbors complain about allowing them to “go to nature,” she says, the city is



➡ Green space on the riverfront in downtown Cedar Rapids.

open to their offers for alternate uses. One neighbor offered to train dogs on an adjacent property, removing hurdles every evening, and mowing the grass for free. As a precaution, however, “this sort of thing is written into an agreement with the city attorney.” This sort of option should not be hard to include in a zoning code, as well, and serves to offload some of the maintenance costs on to willing users for approved uses. Turner cites another case where some properties were near a swimming pool, and the users simply wanted parking spaces.

Turner also notes the potential for abuse if dumping or illegal squatting were to occur. This is probably a larger problem in cities than in small towns, where such activity is more likely to be noticed quickly, depending on its location. Here, Turner notes another option. She says that a local land trust maintains green space properties for the city, and as part of its agreement, monitors periodically for such activity. When it is discovered, she says, the city’s environmental services staff cleans up while code enforcement staff and marshals “go through the stuff to figure out who did it and put them in jail.”

It is, of course, far easier to plan alternative uses for green space parcels when the community can acquire large chunks of contiguous land, whether that comes through single large purchases or widespread consensus among property owners in a neighborhood that the time has come to vacate a repetitively flooded area. Achieving this goal often takes a significant amount of outreach by planners and others to property owners, and sometimes a significant element of good luck. Maintaining and prioritizing a list of eligible parcels even before disaster strikes can certainly pave the way to better results.

One essential resource in this regard is a guide produced by the Environmental Law Institute (ELI) in collaboration with the University of North Carolina’s Institute for the Environment. ELI has also produced a dozen case studies of how communities have managed buyout lands. The guide notes that “local governments often take ownership of these sites with little or no funding for, or guidance on, post-acquisition restoration,

long-term management, and maximization of community benefits.”

One section deals with the management of floodplain acquisitions to maximize such community benefits as wildlife habitat and flood resilience. The study notes that local and state hazard planners and habitat managers can work together to “align property acquisition priorities with existing conservation priorities in their watersheds.” The list of allowable uses with federal mitigation grants provides considerable latitude outside redevelopment, where prohibition is the underlying goal as a means of reducing future flood losses. Planners in some communities have demonstrated ingenuity. The ELI guide offers the example of Kinston, North Carolina, which created the multiuse Neuseway Nature Center with nature trails, educational exhibits, community ponds, a playground, and a campground, while the parks department in Rocky Mount, North Carolina, used such areas to establish dog parks and athletic fields. In other parts of the country, some communities have opted for prairie grass lands as an environmental restoration project. Many of these possibilities can be designed to enhance existing green infrastructure.

The pilot project underway at Wetlands Watch, says Stiff, was “inspired” in part by the ELI research but seeks to take the issue to the next level—how communities can financially support the growing number of floodplain land acquisitions, particularly in communities affected by sea level rise, that must be effectively managed for future environmental benefits.

Wetland Mitigation Banking

One option that may apply under some circumstances is wetland mitigation banking. DuPage County, Illinois, on the western end of the Chicago metropolitan area, has experienced periodic flooding along the DuPage River, the eastern branch of which flows through and alongside the Morton Arboretum, itself a major tourist attraction and nature asset of the region, in an unincorporated area of the county. The flooding has affected numerous properties in the Valley View residential area, says Paul

Hoss, planning and zoning administrative coordinator in the county’s Building and Zoning Department. The county and state have acquired properties along Route 53, a state highway running north and south, with an entrance to the western side of the arboretum. The county is using some of the properties for mitigation banking as part of a larger floodplain management strategy that recently included joining the National Flood Insurance Program’s Community Rating System (CRS). Hoss says the larger benefits of their approach countywide have been reduced flood insurance premiums through CRS, in which the county’s flood reduction activities through buyouts helped achieve an immediate Class 6 rating, translating to a 20 percent premium savings for residents and property owners. One complicating factor is that the state plans to widen Route 53 north of the arboretum entrance from two to four lanes, which already exist to the south. Route 53 may still be blocked occasionally by flooding, but probably less often, Hoss says.

Community Gardens

Community gardens are another popular option, and while the strategies for leasing and maintaining space are beyond the scope of this article, technical resources in almost every state are available through cooperative extension services, other university programs, state agencies, consultants, and community land trusts. In many cases, easements and even transfers of property to nonprofits like land trusts are viable options for ensuring long-term maintenance, though it will be important to vet the organizations under consideration to ensure they can meet their obligations. Government agencies with substantial expertise and experience in open space management include, at the federal level, the Natural Resources Conservation Service, and at the state and regional levels, entities such as resource conservation districts.

Woodbridge, New Jersey, for instance, tapped the Rutgers Cooperative Extension Wildlife Conservation and Management Program for assistance. The resulting plan examined site conditions, identified appropriate open space and recreational

opportunities, and provided numerous recommendations with corresponding cost estimates. The plan identifies several attractive options for community gardens, but what is most viable and appropriate within the limitations of deed restrictions and other legal factors will vary with the circumstances of individual communities. The essential point is not to ignore readily available technical expertise.

CRITICAL FACTORS FOR SUCCESSFUL LAND ACQUISITIONS

This article is but a starting point for identifying the land-use issues connected with floodplain and other disaster-related land acquisitions. Good planning will involve consideration of such issues both before and after disasters because the aftermath of a disaster is a poor time to consider the question for the first time. Start identifying local, regional, state, and federal resources now, and list and prioritize the areas that may need to be considered for buyouts for any significant local hazards. Think ahead of time about the environmental and regulatory objectives that must be considered in developing an effective strategy, and, if possible,

embed them in the next iteration of your local comprehensive plan.

More importantly, do not underestimate the challenge posed by buyout strategies after a major disaster. The combination of practical and legal issues involved do not lend themselves to easy answers. In fact, the answers can be complex and require significant preparation and research. In any case, start by examining options for establishing some sort of open space zoning category to constrain development in areas where reducing flood risk is crucial.

But also think about how open space lands can either bring such substantial recreational and habitat benefits that the community may be willing to spend the necessary money to support them, or how creative reuse of the property, such as community gardening or even projects like production of prairie grass seed for sale to farmers and land managers, may generate income. Alternatively, get the community, especially remaining neighbors, involved in the solutions, for example, by allowing adjoining property owners to use vacant lots for picnic grounds or similar uses if they commit to mowing the grass. Just check on the

limitations to ensure the proposed uses fit within the restrictions.

Finally, and it cannot be said enough, if the community is likely to face the prospect of hazard-related land acquisitions, be sure to incorporate the issue into the process at all levels. Be proactive; anticipate the problem and be prepared.

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REFERENCES

Charlotte-Mecklenburg Storm Water Services. 2012. *Flood Risk Assessment and Risk Reduction Plan*. Prepared by AECOM. <https://bit.ly/38uK1E6>

Environmental Law Institute. Floodplain Buyout Case Studies. Series of PDFs available online at <http://bit.ly/3t3lsWT>

Environmental Law Institute and UNC Institute for the Environment. 2017. *Floodplain Buyouts: An Action Guide for Local Governments on How to Maximize Community Benefits, Habitat Connectivity, and Resilience*. <http://bit.ly/3bvflIB>

Federal Emergency Management Agency. 1998. Property Acquisition Handbook for Local Communities: A Summary for States. Available online at <https://bit.ly/3l121ez>

Ruppert, Thomas, John Fergus, and Enio Russe-Garcia. 2018. "Managing Property Buyouts at the Local Level: Seeking Benefits and Limiting Harms." *Environmental Law Reporter*, 6-2018, 48 ELR 10521.

Rutgers New Jersey Agricultural Extension Station. 2016. *Woodbridge Township Open Space and Flood Plain Restoration Plan*. Woodbridge Township, Middlesex County, New Jersey. Final Draft. <https://bit.ly/3vbwUO>



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