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Ensuring Equitable Disaster Relief to Homeowners and Business Impacted by Natural Disasters

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ENSURING EQUITABLE DISASTER RELIEF TO HOMEOWNERS AND BUSINESSES IMPACTED BY NATURAL DISASTERS

*By Christine Fazio**

INTRODUCTION

In May 2014, the White House released its National Climate Assessment that predicted more natural disasters will occur as a result of climate change.¹ Similar to the severe losses to real and personal property that residents and businesses in New York faced for the first time due to Superstorm Sandy and Hurricanes Irene and Lee,² residents and businesses throughout the United States will

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1. U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE CHANGE IMPACT IN THE UNITED STATES: U.S. NATIONAL CLIMATE ASSESSMENT (2014), available at <http://www.whitehouse.gov/climate-change>.

2. Hurricanes Irene (late August 2011) and Lee (early September 2011) caused historic flooding when areas already impacted by Irene were further inundated by Lee. For example, areas in Binghamton, New York, that had not been underwater since its levee was built following flooding in 1934 were flooded when the combined results of Irene and Lee swelled the Susquehanna River to a record-breaking level of at least 25 feet. Corey Kilgannon, *Flooding Persists in Southern Tier of New York*, N.Y. TIMES, Sept. 10, 2011, at A17; see also Nat'l Weather Serv., *Susquehanna River at Binghamton*, ADVANCED HYDROLOGIC PREDICTION SERVICE,

<http://water.weather.gov/ahps2/hydrograph.php?wfo=bgm&gage=BNGN6> (last visited May 29, 2014).

Superstorm Sandy caused about 300,000 people in New York City to be flooded unexpectedly because they lived outside of the at-risk areas indicated on FEMA's flood zone maps, which include areas that have a 1% chance of being flooded in a given year, and many of the areas had never experienced flooding before. *E.g.*, N.Y.C. SPECIAL INITIATIVE FOR REBUILDING AND RESILIENCY, A STRONGER AND MORE RESILIENT NEW YORK 93 (2013), available at <http://www.nyc.gov/html/sirr/html/report/report.shtml>; Al Shaw et al., *Federal Flood Maps Left New York City Unprepared for Sandy, and FEMA Knew It*,

likely face substantial property damage for the first time as natural disasters continue to increase in number and strength. The National Climate Assessment reports that “the intensity, frequency, and duration of North Atlantic hurricanes, as well as the strongest (Category 4 and 5) hurricanes, have all increased since the early 1980s” and will continue to increase going forward.³ Furthermore, heavy precipitation events have increased across the nation over the last thirty to fifty years, which will lead to more flood damage both in low-lying coastal areas and inland areas which have little history of prior flooding.⁴ In the western United States, more intense droughts are expected to lead to more frequent and intense forest fires,⁵ especially in the Southwest, where projections state that the burn area could increase by 50% in the Rockies and 74% in California.⁶ Although scientists are still researching the link between climate change and severe storms, studies suggest that areas that experience severe thunderstorm events, particularly the Midwest and Southeast, can expect an increase in the frequency and intensity of these events, including wind damage, hail, and tornadoes.⁷ It is therefore

SCIENTIFIC AMERICAN, Dec. 6, 2013, <http://www.scientificamerican.com/article/federal-flood-maps-left-new-york/>. See generally NATURAL RESOURCE DEF. COUNCIL, PREPARING FOR CLIMATE CHANGE: LESSONS FOR COASTAL CITIES FROM HURRICANE SANDY (2014) (going into depth about the FEMA map, the people and buildings impacted by flooding, and improvements that could be made to the system).

Some residents who were in the flood zone nonetheless thought they were safe because the areas had not actually experienced major flooding for many decades. In Midland Beach, Staten Island, where eleven people died in the flooding, long-time residents claimed that there had been no major flooding since the construction of a raised highway along the ocean in the 1950s, and even less flooding since the construction of a drainage system in the 1970s, and many life-long residents could not remember any property- or life-threatening floods affecting the nearly 2000 homes in the neighborhood until Sandy. Kirk Semple and Joseph Goldstein, *How a Beach Community Became a Deathtrap*, N.Y. TIMES, Nov. 10, 2012, at A1; Matthew Schuerman, *Deadly Topography: The Staten Island Neighborhood Where 11 Died During Sandy*, WNYC NEWS, Feb. 25, 2013, <http://www.wnyc.org/story/271288-tricked-topography-how-staten-island-neighborhood-became-so-dangerous-during-sandy/>.

3. U.S. GLOBAL CHANGE RESEARCH PROGRAM, *supra* note 1, at 41–42.

4. *Id.* at 36–37, 40.

5. *Id.* at 178.

6. *Id.* at 468. For information on current California drought conditions, see *California Drought*, CA.GOV, <http://ca.gov/drought/>.

7. *Id.* at 20, 43.

foreseeable that federal funds will be required to help homeowners and businesses rebuild after natural disasters throughout the nation.⁸

However, individuals requiring federal funds in order to reconstruct or repair their damaged homes and businesses might be surprised to learn the time it takes to receive disaster recovery, mainly due to the number of laws and regulations that must be met prior to funds being turned over to individuals.⁹ Homeowners and business owners with financial resources and good private insurance (including flood) require only building permits from the local municipality in order to repair their homes and businesses. Individuals that need federal funding to rebuild (essentially the poor, working class and middle class) must await the completion of review

8. For instance, federal funding was provided to homeowners and businesses in Louisiana, Mississippi, Alabama and Florida after Hurricane Katrina. *See, e.g., HURRICANE KATRINA: WHAT GOVERNMENT IS DOING?* (2006), available at <http://www.state.gov/documents/organization/150082.pdf>. Funding announcements for other flooding events can be found on the Federal Emergency Management Agency website. *See, e.g.,* Press Release, FEMA, Flood Victims May Be Eligible for Grants to Help with Disaster-Related Needs and Expenses (Sept. 15, 2000), <http://www.fema.gov/news-release/2000/09/15/flood-victims-may-be-eligible-grants-help-disaster-related-needs-and>.

9. Over 20,000 New York City residents who have applied for funding are still on waiting lists. Editorial, *Sandy Recovery Still Lagging*, N.Y. TIMES, Apr. 18, 2014, A22; Amy Lieberman, *Doubt Still Lingers for New Yorkers Devastated by Hurricane Sandy*, HUFFINGTON POST N.Y. (May 22, 2014, 10:59 AM), http://www.huffingtonpost.com/amy-lieberman/hurricane-sandy-recovery_b_5372475.html.

This has lead Comptroller Scott Stringer to call New York's 'Build It Back' Program an "unmitigated disaster" and form the Sandy Oversight Unit to investigate the problem Tom Wroblewski, *Comptroller Stringer Calls Build It Back "Unmitigated Disaster"*, STATEN ISLAND LIVE (May 28, 2014, 6:09 AM), http://www.silive.com/news/index.ssf/2014/05/comptroller_stringer_calls_bui.html .; *see also* N.Y.C. COMPTROLLER, NYC COMPTROLLER STRINGER ANNOUNCES SANDY OVERSIGHT UNIT AND AUDIT OF "BUILD IT BACK" (2014).

Similar problems abound in New Jersey, where thousands of residents are still on waiting lists. Erin O'Neill, *Hurricane Sandy Victims Make Do in Trailers As They Wait to Rebuild*, NJ.COM (Mar. 15, 2014, 10:29 AM), http://www.nj.com/politics/index.ssf/2014/03/sandy-hit_nj_families_make_do_in_trailers_as_they_wait_to_rebuild.html.

New Jersey Governor Chris Christie recently sought a third round of federal aid money in order to help those residents rebuild. *Christie: New Federal Aid Will Rebuild All Eligible Sandy-Damaged Homes*, CNN N.Y. (May 28, 2014, 7:12 PM), <http://newyork.cbslocal.com/2014/05/28/christie-new-federal-aid-will-rebuild-all-eligible-sandy-damaged-homes/>.

under a number of environmental laws, which might include environmental review under the National Environmental Policy Act (“NEPA”), a review as to whether the premises are potentially eligible for listing on the National Register of Historic Places, a review as to whether any wetlands or threatened or endangered species are located on the premises, an analysis of alternatives to rebuilding in the 100-year floodplain, and a coastal zone consistency analysis.¹⁰ These reviews involve a number of state and federal agencies. Thus, for example, a homeowner with a good flood insurance policy and available funds can rebuild the basement and first floor of his home quickly regardless of whether the home is over 50 years old or there might possibly be a wetland or endangered species in the back yard, but a neighbor across the street that needs federal funding might need to await a one to two year period to rebuild his basement and first floor so that these environmental review processes can be completed.¹¹

If the purpose of the federal funding is to aid residents and businesses in rebuilding, particularly those that suffered a loss due to a natural disaster for the first time, with the goal of returning those individuals and businesses back to their productive uses, thus revitalizing the economy, it is questionable why Congress requires all these environmental review processes just to reconstruct a home or business within its existing footprint (and when discussing reconstruction, this often refers to rebuilding damaged basements and first floors after a flood event, not entire home reconstructions). The result is inequitable experiences between those with resources who are able to rebound back to their normal lives after a natural disaster

10. For discussion of these requirements, see *infra* text and footnotes 15 to 17.

11. On the second year anniversary of Hurricane Sandy, numerous articles came out regarding the fact that too many businesses and residences had still not been returned to pre-storm condition. See, e.g., *2 Years After Superstorm Sandy, Recovery Still Slow*, AP, Oct. 29, 2014, available at <http://www.cbsnews.com/news/superstorm-sandy-anniversary-arrives-as-towns-continue-healing/>; Scott Gurian, *Two Years After Hurricane Sandy, New Jersey's Recovery Trudges Along*, NJSPOTLIGHT, Oct. 29, 2014, available at <http://www.njspotlight.com/stories/14/10/29/two-years-after-hurricane-sandy-new-jersey-s-recovery-trudges-along/>; Akiko Matsuda, *Some Still Waiting for Help 2 Years After Sandy*, USA TODAY, Oct. 28, 2014, available at <http://www.usatoday.com/story/news/nation/2014/10/28/some-still-waiting-for-help-2-years-after-sandy/18087741/>.

and those without resources who get caught in a bureaucratic maze of regulatory reviews.

Congress can expedite the distribution of funds if, when enacting disaster recovery legislation, it exempts homeowners and businesses seeking funds for the first time due to a natural disaster from the numerous environmental reviews as long as the rebuilding is in the same general footprint and does not increase the size of the building. Such an exemption in disaster recovery legislation would allow a more equitable and expedited response to natural disasters and in fact would help to rejuvenate the economy more quickly in impacted communities. This limited exemption should be very narrow; the environmental review procedures should still be applied to individuals who want to rebuild on the same site that had been devastated by a disaster before, for expansion projects, and for other projects that do not involve a like-kind replacement.

I. EXISTING FEDERAL DISASTER RECOVERY PROGRAMS

Congress and the President routinely sign legislation to provide funding to communities, homeowners, and businesses after a national disaster is declared.¹² While funding to respond to the immediate emergency can be granted quickly,¹³ funding that becomes available to homeowners and businesses for rebuilding and repairs is generally in the form of Community Development Block Grants (“CDBG”) administered through the U.S. Department of Housing and Urban Development (“HUD”).¹⁴ HUD requires grant recipients to complete

12. *E.g.*, Emergency Supplemental Appropriations for Needs Arising from Hurricane Katrina, Pub. L. No. 109-61, 119 Stat. 1988 (2005) (appropriating \$10.5 billion for Hurricane Katrina disaster relief, which was followed by a further \$51.8 billion in a later bill); Disaster Relief and Recovery Supplemental Appropriations Act of 2008, Pub. L. No. 110-329, 122 Stat. 3585 (2008) (appropriating \$23.4 billion in disaster relief funds for Midwest floods, California wildfires, and several hurricanes); Supplemental Appropriations Act of 2010, Pub. L. No. 111-212, 124 Stat. 2302 (2010) (appropriating \$5.5 billion in disaster relief, including for several tornadoes and wildfires as well continuing Katrina relief); Disaster Relief Appropriations of 2013, Pub. L. No. 113-2, 127 Stat. 4 (2013) (appropriating \$60 billion for Superstorm Sandy disaster relief).

13. *See* 44 C.F.R. 10.13 (2014) (stating that FEMA may take immediate action in emergency situations without regard for environmental impact).

14. *See, e.g.*, Pub. L. No. 113-2, 127 Stat. 4, at 15 (appropriating \$3.8 billion to HUD “for necessary expenses related to disaster relief, long-term recovery,

review under numerous environmental laws prior to federal funding becoming available.¹⁵

While the environmental review for the repair and reconstruction of a building that does not change a use or increase the density by 20 percent can be expedited because such review falls under the NEPA categorical exclusion,¹⁶ federal funding cannot be distributed until the agency responsible for administering the CDBG program certifies that all the requirements under 24 CFR §§ 58.5 and 58.6 have been met. For instance, the responsible agency might need to consult with the State Historic Preservation Officer if the impacted building is 50 years or older to ensure the rebuilding does not create an adverse effect on a property that is on the National or State Register of Historic Places or is eligible for such listing.¹⁷ Thus, a homeowner that has a house over 50 years old that is not listed as landmarked or listed on the National Register can receive a building permit to rebuild, but a homeowner that seeks federal funding must first have a cultural resource expert or staff at the State Historic Preservation Office or other federal or state agency conclude that the home is not eligible for listing on the National or State Register, or if eligible, would have no adverse effect.¹⁸ The § 58.5 list requires compliance with floodplain management and wetland protection executive orders, coastal zone management, sole source aquifers, wild and scenic rivers, Clean Air Act general conformity, environmental justice, and HUD noise and hazardous materials standards.¹⁹ Certainly after a disaster, staff at the numerous agencies are making herculean efforts to complete these reviews, working long hours, but the volume of work and the documentation to demonstrate compliance takes time. The result is that home and business owners may not have funds to repair their homes and businesses until many months – or even years – after a natural disaster.

restoration of infrastructure and housing, and economic revitalization in the most impacted and distressed areas”).

15. *See, e.g.*, 24 C.F.R. §§ 55, 56, 58 (2014).

16. 24 C.F.R. § 58.35(a).

17. 24 C.F.R. § 58.5(a).

18. 36 C.F.R. § 800.4(c)–(d) (2014).

19. 24 C.F.R. § 58.5(a)–(j). Additionally, § 58.6 requires that residents in FEMA’s identified flood hazard zones must comply with the National Flood Insurance program, and they must not be in areas affected by the Coastal Barrier Resources Act. 24 C.F.R. § 58.6(a)–(c).

For example, while Sandy hit New York City on October 29, 2012, a recent report released by the New York City Mayor's office found that as of December 31, 2013, no reimbursement checks to home owners had been issued notwithstanding that 11,066 homeowners had gone to an intake meeting.²⁰ As of April 17, 2014, reimbursement checks had been issued to 30 residents.²¹ New York City explained some of the problems with complying with federal procedures and policies: (a) priority for CDBG funds has to be low and middle-income families, resulting in delays as incomes are verified; (b) verification to ensure there is no duplication of federal benefits, including the issuance of Small Business Administration loans that was offered by FEMA immediately after Sandy hit slows down the process; (c) environmental assessments take time to prepare; and (d) failure to obtain flood insurance can disqualify otherwise eligible beneficiaries, among other issues.²² The delays in funding experienced after Sandy are an echo of delays in funding after earlier disasters, notably Katrina²³ and the Midwest floods of 2008.²⁴

II. SUGGESTIONS FOR FUTURE DISASTER RECOVERY LEGISLATION

If the purpose of disaster recovery legislation is to aid the rebuilding of homes and business of those most impacted by a disaster, administering the funds to the people who need it must be done more quickly. One solution would be for Congress to create an exemption to the 24 CFR 58.5 requirements and NEPA in limited

20. GOLDSTEIN ET AL., ONE CITY, REBUILDING TOGETHER: A REPORT ON THE CITY OF NEW YORK'S RESPONSE TO HURRICANE SANDY AND THE PATH FORWARD 17 (2014), available at http://www1.nyc.gov/assets/home/downloads/pdf/reports/2014/sandy_041714.pdf.

21. *Id.*

22. *Id.* at 12–13.

23. HEALTH POLICY INSTITUTE, IN THE WAKE OF KATRINA: THE CONTINUING SAGA OF HOUSING AND REBUILDING IN NEW ORLEANS 8, 10–12 (2007), <http://www.jointcenter.org/hpi/sites/all/files/InTheWakeofKatrina.pdf> (explaining that as of March 20, 2007, a year and a half after Katrina, less than 4,000 of over 100,000 applications for rebuilding funds had been approved in New Orleans).

24. Susan Saulny, *After Iowa Flood, Feeling Just a Bit Ignored*, N.Y. TIMES, Aug. 28, 2009, at A1 (explaining that as of August 2009, over a year after the flood, only \$689 million of the promised \$3.1 billion in federal disaster aid had been spent to rebuild in Cedar Rapids).

circumstances when enacting disaster recovery legislation. Namely, for homes and businesses that are seeking federal funding for the first time as a result of a natural disaster and which involve replacement and repair that do not increase the building density by 20% or change the use, review under NEPA and 24 CFR § 58.5 should be exempt. Funding can still be conditioned on the property being elevated above the base flood elevation level,²⁵ but that evidence can be in the form of a building permit.

The suggested exemption should be a narrow one in that it focuses on homeowners and businesses that are impacted for the first time from a natural disaster (not those who rebuild on barrier islands or other high risk areas and have been subject to repeat disasters) and only applies to essentially like-kind replacement. Rebuilding on the same footprint is not the type of activity that would result in significant environmental impacts, either individually or cumulatively. In fact, leaving homes and businesses in damaged and deteriorated conditions for such a long time while the federal reviews are conducted is creating a harmful public health and environmental impact.²⁶ This suggested exemption also treats persons of all incomes more equitably and will allow homeowners and businesses to resume their normal lives more quickly and return the local economy back to the pre-natural disaster condition. And this exemption should not impact government buyback programs for areas that should be left as open space in perpetuity.²⁷ As long as our

25. See generally *Base Flood Elevation*, FEMA, <http://www.fema.gov/national-flood-insurance-program/base-flood-elevation/> (last updated Aug. 16, 2013, 2:19 PM).

26. See, e.g., *Nicholas Rizzi*, *Mold Spreading from Abandoned Homes Worries Residents Returning After Sandy*, DNA INFO., July 3, 2013, <http://www.dnainfo.com/new-york/20130703/new-dorp-beach/mold-spreading-from-abandoned-homes-worries-residents-returning-after-sandy>; *Katie Honan*, *Bank Owned Homes Left Abandoned After Sandy Pose Health Threat: Neighbors*, DNA INFO., July 13, 2014, <http://www.dnainfo.com/new-york/20140613/neponsit/bank-owned-homes-left-abandoned-after-sandy-pose-health-threat-neighbors>; *Ryan Lavis*, *For Those Who Remain, Neighborhood Like 'Ghost Towns' Two Years After Hurricane Sandy*, SILIVE.COM, Oct. 27, 2014, http://www.silive.com/news/index.ssf/2014/10/neighborhoods_abandoned_after.html.

27. FEMA's Hazard Mitigation Assistance Program includes several state programs in which FEMA funds 75% of the cost of eligible buybacks in presidentially designated disaster areas where the land is cleared and left undeveloped. FEMA, HAZARD MITIGATION ASSISTANCE UNIFIED GUIDANCE

society has made the decision to enact legislation to help individuals rebuild their homes and businesses after a natural disaster, the distribution of such aid needs to occur more quickly; otherwise, the protracted review process is stagnating these individuals' opportunity to get back on their feet, which in turn stifles economic recovery.

(2013), available at <http://www.fema.gov/media-library/assets/documents/33634?id=7851>. For more information about the program, see generally *Hazard Mitigation Assistance – Property Acquisition (Buyouts)*, FEMA, <http://www.fema.gov/application-development-process/hazard-mitigation-assistance-property-acquisition-buyouts> FEMA (last updated Dec. 27, 2012, 12:01 PM).

Examples of HMA programs include a buyout administered by the Alabama Emergency Management Agency on Dauphin Island between 2000 and 2005; *Home Buy-Outs Create Green Space on Dauphin Island*, U.S. DEPT. OF HOMELAND SECURITY, <https://www.llis.dhs.gov/content/home-buy-outs-create-green-space-dauphin-island> (last visited May 29, 2014); a buyout of frequently flooded homes administered by the Iowa Homeland Security and Emergency Management Division in Des Moines between 2008 and 2009; *Flood Buyout Eases Homeowners*, U.S. DEPT. OF HOMELAND SECURITY, <https://www.llis.dhs.gov/content/flood-buyout-eases-homeowners> (last visited May 29, 2014); and a post-Sandy buyout program administered by the Governor's Office of Storm Recovery in New York; see generally *NY Rising Buyout and Acquisition Programs*, GOVERNOR'S OFFICE OF STORM RECOVERY, <http://stormrecovery.ny.gov/ny-rising-buyout-and-acquisition-programs> (last visited May 29, 2014).