Let the Buyer Beware: A Comparison of Flood-Related Real Estate Disclosure Laws of Virginia and Other States

Emily Snyder

Clay Kulesza

Follow this and additional works at: https://scholarship.law.wm.edu/vcpclinic

Part of the Environmental Law Commons, and the State and Local Government Law Commons

Repository Citation

Copyright c 2020 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository. https://scholarship.law.wm.edu/vcpclinic
Let the Buyer Beware:
A Comparison of Flood-Related Real Estate Disclosure Laws of Virginia and Other States

Photo courtesy of Elizabeth Andrews

Emily Snyder, J.D. 2020
Virginia Coastal Policy Center
William & Mary Law School

Clay Kulesza, J.D. Candidate 2021
Virginia Coastal Policy Center
William & Mary Law School

Spring 2020
About the Authors

Emily Snyder graduated from William & Mary Law School in May 2020. She is from Pittsburgh, Pennsylvania and graduated from The Pennsylvania State University in 2016. At William & Mary Law School she has served as the Director of Alumni Relations for the Student Intellectual Property Society and as the Online Editor for the William & Mary Law Review. She joined the Practicum I class of the Virginia Coastal Policy Center in the Spring 2020 semester and hopes to practice intellectual property law following graduation.

Clay Kulesza is a second year-student at William & Mary Law School. He is a native Virginian who graduated from the University of Virginia in 2018 with a B.A. in Environmental Thought and Practice. At William & Mary, Clay served as Secretary for the Student Environmental and Animal Law Society in 2019 and is an Articles Editor for the William & Mary Law Review. He joined the Practicum I class of the Virginia Coastal Policy Center in the Spring 2020 semester and plans to intern for the Southern Environmental Law Center this summer.

About the Virginia Coastal Policy Center

The Virginia Coastal Policy Center (VCPC) at the College of William & Mary Law School provides science-based legal and policy analysis of ecological issues affecting the state’s coastal resources, by offering education and advice to a host of Virginia’s decision-makers, from government officials and legal scholars to non-profit and business leaders.

With two nationally prominent science partners – the Virginia Institute of Marine Science and Virginia Sea Grant – VCPC works with scientists, local and state political figures, community leaders, the military, and others to integrate the latest science with legal and policy analysis to solve coastal resource management issues. VCPC activities are inherently interdisciplinary, drawing on scientific, economic, public policy, sociological, and other expertise from within the University and across the country. With access to internationally recognized scientists at VIMS, to Sea Grant’s national network of legal and science scholars, and to elected and appointed officials across the nation, VCPC engages in a host of information exchanges and collaborative partnerships.

VCPC grounds its pedagogical goals in the law school’s philosophy of the citizen lawyer. VCPC students’ highly diverse interactions beyond the borders of the legal community provide the framework for their efforts in solving the complex coastal resource management issues that currently face Virginia and the nation.

VCPC is especially grateful to the Virginia Environmental Endowment for providing generous funding to support our work as well as to establish the clinic in fall 2012.
I. INTRODUCTION

“I myself was a flood victim. We didn’t discover until just days before closing that we were in a special flood hazard area [sic]. . . . We were a young military family. After the flood we were displaced for five months, we lost all contents [of our house] . . . and barely [had] any money to make our mortgage payments.”

Real estate disclosure laws vary from state to state, but there is a uniform need across the country for individuals and families to be well-informed about the conditions affecting a home before closing. Purchasing a home is typically the largest financial decision a person will make over the course of their lifetime, so it is critical that homeowners know of any conditions that could affect the value and longevity of their homes before committing to decades of debt. Some states have specific laws that protect buyers from unknown information by requiring a seller to disclose certain pieces of information to all potential buyers. However, in other states, this transfer of information is often impeded by a longstanding Common Law principle of property law: caveat emptor, or “let the buyer beware.”

In states where caveat emptor is the prevailing view of property disclosures, a seller does not have to disclose any information to a potential buyer that buyers could discover on their own through due diligence. However, the reality is that this “due diligence” often requires a greater expenditure of time and resources than some people have available, or requires expertise about latent property defects that many people simply do not have. One area where this problem is particularly salient is in the disclosure of floodplains and other high-risk flood zones. The Association for State Floodplain Managers has calculated that flooding causes $17 billion in damages on average every year in the U.S., and because of state “buyer beware” laws, many home buyers are unaware of the serious risks that flooding poses to their property until it is too late. Virginia is one such state that lacks an effective flood disclosure requirement. However, the topic of flood disclosure laws is especially important in this state because of the high rates of recurrent flooding and relative sea level rise besetting our coastal lands.

3 See, e.g. CAL. GOV’T CODE § 8589.4(a) (2020) (requiring disclosure of whether a piece of real property is located in a flood zone to all potential transferees).
4 77 AM. JUR. 2D Vendor and Purchaser § 264 (2020).
5 Id.
8 See VA. CODE. ANN. § 55.1-703(B)(10) (requiring that only recommendations to check into flooding risks, not site-specific flooding disclosures, must be included in residential real estate contracts).
Despite the ever-growing threat of flooding that many places in the nation are currently facing, Virginia is far from the only place in the U.S. to not mandate flooding disclosures of any kind throughout the course of a real estate transaction. Virginia is joined by twenty other states in which sellers are not required to disclose flood-related information to a buyer prior to selling their property. In some other states, such as New York, disclosures are expected, but the state also allows home sellers to pay a fee in order to evade the disclosure requirement. Although there are twenty-nine states that do require some type of flood-related disclosure during the course of a real estate transaction, the content and scope of these disclosures varies drastically state-by-state.

Given the patchy framework of flood disclosure laws in the U.S., it is not surprising that many people have argued for a nationwide standard when it comes to flood disclosure requirements. According to a national survey conducted by the Pew Charitable Trusts, 74% of respondents favored nationwide requirements for home sellers to disclose repeated property flooding, and for buyers of those properties to be required to subsequently purchase flood insurance. Notably, support for these flood disclosure measures came from all sides of the political spectrum, and the proposed requirements were backed by respondents living inland as well as those residing in coastal communities. Despite this broad public support for mandatory disclosure requirements, a nationwide standard has not materialized, and states have been left to specify which property disclosures must be made prior to a transfer of property.

This white paper examines the state of flood disclosure laws for residential real estate transactions in Virginia and compares them to those of other states that have much more rigorous disclosure laws. Part II explores the history behind Virginia’s current “buyer beware” laws and examines previous attempts at establishing stricter real estate disclosure laws surrounding “special flood hazard areas”. Part III surveys a number of disclosure laws from other states that have successfully required sellers to disclose the risk of flooding in some capacity, and examines the events or circumstances that led to the enactment of those laws. Finally, Part IV concludes with an examination of the policy implications of implementing more stringent disclosure requirements in the Commonwealth.

---


10 States with Best, Worst Home Flood Damage Disclosure Laws, INS. J. (Aug. 16, 2018), https://www.insurancejournal.com/news/national/2018/08/16/498388.htm (“In 21 states, home sellers are not required by law to disclose to buyers whether their home has ever flooded or whether they will be required to purchase flood insurance.”)

11 See id.

12 See id. (noting that “[t]wenty-nine states and Washington, D.C. have an array of disclosure requirements”).

13 Pew Flood Insurance Survey 2019, PEW CHARITABLE TR., https://www.pewtrusts.org/-/media/assets/2019/06/pew-charitable-trusts-flood-policy-survey-disclosure-summary.pdf (last visited July 14, 2020). The study asked homeowners about disclosures “if a property has flooded repeatedly” but did not define further the frequency or source of this flooding. Id.

14 See id. Pew reported that, per its research, “86% of Democrats, 72% of Independents, and 65% of Republicans are in favor of the proposal.” Id. In addition, Pew noted that inland and coastal residents both supported the proposal at a 74% rate. See id.
II. THE CURRENT STATE OF DISCLOSURE LAWS IN VIRGINIA

A. Virginia as a “Buyer Beware” State

Virginia has long subscribed to the theory of *caveat emptor* for real estate transactions, which places a duty upon all potential buyers of real property to exercise “ordinary care and prudence” to ensure that the property is free of defects and damage. Conversely, this means that sellers of real property have to disclose few pieces of information to a potential buyer, even if the seller knows of conditions or material facts that would dissuade a buyer from purchasing the property. And the few pieces of information that a seller of residential property is required to disclose to a potential buyer—the presence of a military air installation, defective drywall, pending violations against the property, or previous use of the location as a methamphetamine lab—have no relevance to protecting home buyers from recurrent flooding or informing them of past flood damage.

Aside from these sparse mandatory disclosures, Virginia goes beyond the bare minimum of “absolutely no disclosures” by requiring a seller to inform a potential buyer of conditions that could be affecting a residential property. Virginia’s Residential Property Disclosure Act (“RPDA”) requires sellers to explicitly inform buyers that “[t]he owner makes no representations” regarding a number of potential circumstances that could be present on the property. These statements serve to nudge the buyer to investigate the conditions or restrictions mentioned in the disclosure statements, but stop short of providing the buyer with any meaningful information about the property. It then becomes the duty of the buyer to search through recorded deeds; contact local, state, and federal agencies; or hire professionals to determine the full extent of the property’s features. But ultimately, if the buyer does not investigate these potential circumstances, the seller faces no liability for any defects that he or she might have known about but did not disclose.

One provision of the RPDA of particular importance concerns whether or not a piece of land is susceptible to recurrent, or even infrequent, flooding. Specifically, sellers are not required to tell a potential buyer whether real property is located in a “special flood hazard area” (“SFHA”). A SFHA refers to floodplains and land areas with a high risk for flooding as defined by the Federal Emergency Management Agency (“FEMA”). The clause goes on to provide

---

15. Bruce Farms, Inc. v. Coupe, 219 Va. 287, 293 (1978) (recognizing *caveat emptor* as the default common law rule in Virginia absent any affirmative actions taken by state or local legislatures).
18. See id.
20. See id.
22. See Special Flood Hazard Area, FEMA (May 23, 2019, 5:51 PM), https://www.fema.gov/special-flood-hazard-area. The Virginia legislature did not clearly define the term “special flood hazard areas” in Virginia’s RPDA, but based on references to FEMA in the RPDA and references to FEMA’s definition of “special flood hazard areas” in
potential buyers with suggested steps they could take (but again, steps they do not have to take) to inform themselves of the floodplain status of the property: obtaining certifications or official determinations about whether the property is located in a SFHA; reviewing local, state, or federal maps depicting floodplains; contacting FEMA or the Floodplain Management Program of the Virginia Department of Conservation and Recreation (“DCR”) and reviewing their websites for information about flood zones; and determining whether flood insurance would be required to live in that location. While taking all of these steps would certainly inform a buyer of the potential flooding risks of a property, many buyers do not have the ability to do so due to monetary or temporal restraints. Ultimately, this non-disclosure scheme permits uninformed buyers to move into homes that face significant flooding risks and regularly experience flooding damage, yet it provides buyers with no recourse when they only learn this information after they have closed on a home.

B. History of Flood Disclosure Laws in Virginia

The Virginia legislature added “buyer beware” language regarding SFHAs to the Virginia RPDA relatively recently, but there have been other efforts to impose stricter disclosure requirements on sellers that have met with varying degrees of success.

1. 2015 – The Initial “Buyer Beware” Language

For the majority of Virginia’s history, there was no codified law in place that dealt with the presence of SFHAs on real property, and the original RPDA, passed in 1992, made no mention of floodplains or the like. The first appearance of any reference to flood zones was in 2015 when the original caveat emptor language regarding SFHAs was added to the RPDA. The original language of the proposed bill would have added the bare minimum “buyer beware” language to the RPDA regarding SFHAs, but the final version included recommended actions that buyers should take in order to determine whether a parcel of residential property is located in a SFHA, and was adopted as follows:

10. The owner makes no representations with respect to whether the property is located in one or more special flood hazard areas and purchasers are advised to exercise whatever due diligence they deem necessary, including (i) obtaining a flood certification or mortgage lender determination of whether the property is...

other parts of the Virginia Code, it seems likely that the state legislature intended the terms to have the same meaning. See VA. CODE ANN. §§ 55.1-703, 55.1-1206; see also VA. CODE ANN. § 15.2-976.

23 VA. CODE ANN. § 55.1-703(B)(10).
25 See supra note 21 and accompanying text.
located in one or more special flood hazard areas, (ii) review of any map depicting special flood hazard areas, and (iii) whether flood insurance is required, in accordance with terms and conditions as may be contained in the real estate purchase contract, but in any event, prior to settlement pursuant to such contract. 29

As previously discussed, the term “special flood hazard areas” is not defined anywhere in the RPDA but can be reasonably understood to have the same meaning as FEMA’s definition of “special flood hazard areas.” 30

While it would be helpful to understand the circumstances and reasoning behind the legislature’s decision to add this language to the RPDA, there are no meaningful legislative history documents or outside sources that shed any light on the subject. It appears that the bill was supported by the Virginia REALTORS, a group that has a significant amount of sway in the Virginia legislature, 31 on the grounds that potential property purchasers should know that annual flood insurance may be required to own a piece of real property located in a SFHA. 32 However, the bill stopped short of requiring the seller to disclose prior flooding history or whether flood insurance would be required to own a specific piece of land, and the regional REALTORS’ websites asserted that it was still the buyer’s duty to expend time and resources to determine whether the property would require flood insurance (or would be at risk of any flooding). 33

2. 2019 – The First Failed Attempt to Require Disclosure

While the initial addition of the caveat emptor language to the RPDA provided buyers with some resources to determine the potential flooding risks for a property, it did not go so far as to require sellers to disclose whether a property was located in a SFHA. The majority of that investigation still resided with potential buyers. However, the 2019 legislative session saw the introduction of a bill that would have required these disclosures. House Bill (HB) 2175, introduced by Delegate Kelly Convirs-Fowler, sought to update the RPDA in a number of significant ways. 34 First, and most importantly for the purposes of this paper, the bill proposed to completely remove the “buyer beware” language regarding SFHAs and replace it with language that would require a property owner to give a potential buyer written disclosure anytime a property owner “has actual knowledge that the property is located in one or more special flood hazard areas.” 35 Additionally,

29 VA. CODE ANN. § 55-519(B)(10).
30 See supra note 22 and accompanying text.
31 See By the Numbers, VIRGINIA REALTORS (2019), https://www.virginiarealtors.org/advocacy/rpac/by-the-numbers/.
33 See Veverka & Coya, supra note 32; Wetzel, supra note 32.
35 Id.
the bill proposed to add language requiring landlords to give the same written notice to potential tenants should a dwelling unit be located in a SFHA.36

This bill would have represented a significant change to Virginia’s *caveat emptor* principles by requiring residential property sellers to affirmatively disclose information rather than placing the burden on buyers to investigate the characteristics of properties. However, the Virginia REALTORS did not support this new mandatory disclosure language, instead preferring to maintain the “buyer beware” status quo of Virginia’s residential property disclosure laws.37

HB 2175 was initially referred to the Virginia House of Delegates’ Subcommittee on General Laws #2 for discussion and debate,38 but because the subcommittee meetings were neither transcribed nor recorded, there is very little indication of how the bill was received by the subcommittee members and which parties supported or opposed the bill. During a phone call with Rhena Hicks, one of Delegate Convirs-Fowler’s Legislative Aides, Ms. Hicks indicated that at least one source of opposition to the original language of the bill came from the REALTORS, who did not want to see a change in Virginia’s *caveat emptor* system.39 The bill thereafter underwent massive modifications in the subcommittee, and the substitute bill that the subcommittee recommended to the House Committee on General Laws barely resembled its first incarnation.40 The substitute bill had none of the original language about required disclosures, and the only new change proposed to the RPDA was to add a new clause to the existing *caveat emptor* language recommending that potential home buyers contact FEMA or the Virginia DCR for more information about whether the property is located in a SFHA.41 While it is unclear how this bill amendment evolved, Ms. Hicks noted that the Virginia REALTORS supported this new version of the bill,42 and Delegate Convirs-Fowler herself noted that the substitute language had been vetted and approved by the Virginia Housing Commission.43 Yet, even this watered-down substitute did not make it out of the House Committee on General Laws, this time due to purely political considerations rather than based on lobbying pressure.44 Against the protest of Delegate

36 Id.
39 Telephone Interview with Rhena Hicks, Legislative Aide for Delegate Convirs-Fowler of the Virginia General Assembly (Mar. 17, 2020).
41 Id.
42 Telephone Interview with Rhena Hicks, supra note 39.
44 Telephone Interview with Rhena Hicks, supra note 39.
Convirs-Fowler and other committee members, the substitute bill was tabled by a majority vote of the committee members.\textsuperscript{45}

While HB 2175 may have died in committee, the substituted language of the bill was subsequently added to Senate Bill (SB) 1292, introduced during the same legislative session by Senator Jill Vogel. The original version of the bill (as passed in the Virginia Senate) added just a few words to the RPDA in a section wholly unrelated to the provision pertaining to SFHAs.\textsuperscript{46} However, because Senator Vogel’s bill proposed to amend the language of the same Code section as Del. Convirs-Fowler’s bill concerning the RPDA, Delegate Convirs-Fowler reached out to Senator Vogel regarding the opportunity to add her substituted “buyer beware” language to SB 1292.\textsuperscript{47} Senator Vogel agreed to add Delegate Convirs-Fowler’s language to her bill,\textsuperscript{48} and upon reaching the House General Laws Subcommittee #4, a substitute of SB 1292 was adopted that included the same SFHA “buyer beware” language about contacting FEMA or the DCR as was in the substituted version of HB 2175.\textsuperscript{49}

The substituted version of SB 1292 was reported by the House Committee on General Laws with no objections or debate,\textsuperscript{50} and went on to pass in the House and the Senate before being signed into law by the Governor of Virginia.\textsuperscript{51} The final version of the bill, which represents the most recent amendment to the SFHA language of the RPDA, added the following suggestion to potential buyers when determining if a tract of land is located in one or more SFHAs: “contact[] the Federal Emergency Management Agency (FEMA) or visit[] the website for FEMA’s National Flood Insurance Program or for the Virginia Department of Conservation and Recreation’s Flood Risk Information System.”\textsuperscript{52} While it seems likely that this added language could further assist buyers in determining whether a home is located in a SFHA, this language still does not guarantee that a buyer will actually investigate these details or know about the risks of flooding before buying a home.

3. 2020 – A Second Failed Attempt

The most recent iteration of a mandatory flood zone disclosure law in Virginia rose and fell during the 2020 legislative session. Two bills were introduced to the legislature that would

\textsuperscript{47} Telephone Interview with Rhena Hicks, surpra note 39.
\textsuperscript{48} Id.
\textsuperscript{52} VA. CODE ANN. § 55.1-703(B)(10) (2020).
have added mandatory flood zone disclosure language to the RPDA, one in the Virginia House of Delegates—HB 858, introduced once again by Delegate Convirs-Fowler—and one in the Virginia Senate—SB 342, introduced by Senator Mamie Locke.

SB 342 was identical to the original version of the 2019 HB 2175: it would have introduced language to the RPDA that required property owners to give potential buyers written disclosures about any actual knowledge that the property owner had about SFHAs, and would have imposed the same requirement on landlords when they contracted with potential tenants. However, the history behind SB 342 is disappointingly brief: the bill was referred to the Senate Committee on General Laws and Technology, and on the very first day the Committee met, the bill was stricken at the request of Senator Locke. There was no public debate, no testimony given in the committee, and no clear indication of why Senator Locke pulled her own bill from consideration.

While this lack of information is unfortunate, the legislative history behind HB 858 is much more readily available. HB 858 would have enacted almost the exact same language as SB 342, but with some additional language that did not pertain to flooding disclosures. In addition to mandatory seller disclosure of any actual knowledge of SFHAs, HB 858 would have required a property owner to disclose the presence of any stormwater management features on the property (like Best Management Practices (“BMPs”)), and would have modified the existing language of the RPDA regarding the presence of impounding structures or dams on the property. The bill was assigned to the House of Delegates’ General Laws Subcommittee on Housing and Consumer Protection and was discussed in great detail at a hearing on January 30, 2020.

At this hearing, there were a number of proponents that spoke up in favor of the bill before the entire Subcommittee. The bill’s patron, Delegate Convirs-Fowler, discussed the great importance of the bill not just to Virginians living on the coasts but to all citizens of the Commonwealth, as the dangers of flooding can be felt in nearly every part of the state under the right circumstances. Those who testified in support of the bill at the Subcommittee meeting

61 Id. (statements of Del. Convirs-Fowler in support of HB 858) (Jan. 30, 2020, 6:15 PM to 6:20 PM).
included: Rear Admiral (Ret.) Ann Phillips, Special Assistant to Governor Northam for Coastal Adaptation and Protection; a representative from the Virginia League of Conservation Voters; and a handful of Virginia citizens and military members who were the victims of extreme flooding events. All those present agreed that the traditional caveat emptor approach to flood zone disclosure was insufficient and that mandatory disclosures must be implemented in order to protect citizens from unknowingly subjecting themselves to extreme and recurrent flooding events.

There was only one opponent to the bill that spoke at the subcommittee meeting: John “Chip” Dicks, a former Virginia House of Delegates member. As a representative for the Virginia REALTORS, he expressed a number of concerns regarding HB 858. Mr. Dicks first pointed out that Virginia has been very proactive in enacting disclosure laws, and pointed out that the RPDA already has language pertaining to SFHAs and stormwater management features (albeit “buyer beware” language). He further pointed out that sellers are consumers just as much as buyers are, and this new mandatory disclosure language would place an unfair burden upon sellers of real property. Mr. Dicks also raised the industry’s concern that this mandatory language would be an unwelcome shift away from the “buyer beware” principles that have been employed in Virginia for so long. Finally, Mr. Dicks argued that the application of these mandatory disclosures to landlord-tenant relationships was completely unwarranted because all of Virginia’s current landlord disclosures were based on special circumstances that were simply not present in this situation.

After hearing from the REALTORS’ lobbyist, the Chair of the Subcommittee recommended that Delegate Convirs-Fowler reconvene with the Virginia REALTORS at a later date to determine if some final consensus could be reached before HB 858 was finally voted on. In an attempt to find this middle ground, there was a meeting held between Delegate Convirs-Fowler, the REALTORS, and members of Governor Northam’s administration, but the group

---

62 Id. (statements of Ann Phillips, Spec. Assistant to Gov. Northam; Grace Maguire, League of Conservation Voters; William Jennings; Virginia Waterberg, Cmty. Leader of Stop the Flooding NOW; Kerrie Obbink; Curt Clark; and William “Skip” Stiles in support of HB 858) (Jan. 30, 2020, 6:26 PM to 6:35 PM).
63 Id.
64 Id. (statements of John “Chip” Dicks, Legislative Counsel for Virginia REALTORS, in opposition to HB 858) (Jan. 30, 2020, 6:35 PM to 6:42 PM), https://virginiageneralassembly.gov/house/committees/commstream.html (navigate to Jan. 30, 2020, then go to “Housing” video starting at 5:46 PM).
65 Id.
66 Id.
67 Id.
68 Id. Mr. Dicks noted that this would not likely be an issue anyway as “most landlords today require renter’s insurance,” so any flood damage that occurred would be handled through renter’s insurance or through the landlord. Id. However, this viewpoint overlooks the fact that tenants could be displaced (potentially with no reimbursement from insurance for rent paid during the displacement) for long periods of time due to flooding events that they never knew were a danger to the property, and does not recognize the potential loss of items of extreme sentimental value which would not be covered by renter’s insurance.
never reached a clear consensus or compromise regarding the language of HB 858. Ultimately, HB 858 was left in the committee and failed because it was never scheduled for a vote.

III. THE CURRENT STATE OF DISCLOSURE LAWS IN OTHER STATES

As mentioned in the introduction, over half of the states in the U.S. do require that home sellers disclose some amount of flood-related information to potential buyers. Some states have taken an active role by crafting specific disclosure forms via statute, or have empowered the state’s real estate commission to create such a form. Louisiana and Texas have some of the most extensive flood disclosure requirements in the U.S., and stand as a sort of “gold standard” for what Virginia could consider when looking to implement measures to ensure that its citizens are able to make well-informed real estate decisions. It is possible that Virginians may see the required disclosures in Louisiana and Texas as too great a leap from the current “buyer beware” standards in the Commonwealth; if so, it may be helpful to turn to states with more modest disclosure requirements as guidance for first steps in expanding the information shared during a property transfer. There are many states to choose from, but in particular the disclosure requirements in Delaware, California, and several Midwestern states showcase the variety of information that may be mandated in a property disclosure form. After exploring the current disclosure framework in all of the states mentioned above, this paper will consider the positives and negatives of implementing these disclosure schemes.

A. The “Gold Standard”

1. Louisiana

Louisiana currently has some of the most thorough and extensive mandatory flood disclosure requirements in the U.S. Prior to a transfer, property sellers in Louisiana must complete a disclosure document that was created by the Louisiana Real Estate Commission pursuant to state law. While this state law empowers the Louisiana Real Estate Commission to create a property disclosure document which sellers of residential real property must complete, the law does not specifically require flood-related information to be disclosed. Thus, although Louisiana currently requires extensive flood-related disclosures to be made during a property transaction, the Louisiana Real Estate Commission could alter these requirements in the future.

The Louisiana disclosure form does require an array of flood-related and other information about the property so that buyers may be informed before they purchase. If the disclosure document is provided after a potential buyer has made an offer on the property, the buyer has a seventy-two

---

70 Telephone Interview with Rhena Hicks, supra note 39.
72 See, e.g., Climate Resilience: How States Stack Up on Flood Disclosure, NRDC, https://www.nrdc.org/flood-disclosure-map (last visited July 14, 2020) (explaining that 21 states do not have requirements for sellers to disclose a property’s flood risks or previous damage, but that the “other 29 states have varying degrees of disclosure requirements”). This website, created by the Natural Resources Defense Council, provides an overview of all the states’ requirements for real estate flood disclosures.
74 See id.
hour window to withdraw the offer without penalty, and if the offer is withdrawn, any deposit or earnest money must be returned to the buyer.\textsuperscript{75} The Louisiana disclosure document therefore provides a significant timeframe within which potential buyers may consider all of the known risks and benefits associated with a particular property in order to make an informed decision as to whether or not to move forward with the purchase.

When it comes to flood disclosures, the Louisiana disclosure form specifically mandates disclosure of several categories of information to which sellers can respond with yes, no, or no knowledge.\textsuperscript{76} These mandatory disclosures extend to specific information about flooding, including whether there has been: (1) any previous flooding, water intrusion, accumulation, or drainage issues with respect to the land;\textsuperscript{77} (2) any previous flooding of any structure on the property;\textsuperscript{78} (3) any determination that part (or all) of the property is a wetland, as established by the U.S. Army Corps of Engineers under § 404 of the Clean Water Act;\textsuperscript{79} (4) any flood zone classification and the source of that information (the form then provides a link to the FEMA Flood Insurance Rate Maps);\textsuperscript{80} (5) any flood insurance on the property;\textsuperscript{81} (6) any flood elevation certification;\textsuperscript{82} and (7) any previous receipt of FEMA aid money or other federal disaster flood assistance, including the amount of aid received.\textsuperscript{83}

The extensive disclosure requirements in Louisiana have led to some confusion on the part of Louisiana realtors as to how to properly complete the many disclosures for their clients. For example, the Louisiana Real Estate Commission acknowledged that it continued to receive questions in 2019 from realtors who represented sellers that were struggling to find the necessary information regarding the amount of FEMA disaster aid received by prior owners.\textsuperscript{84} Though the


\textsuperscript{76} See id.

\textsuperscript{77} Id. at § 1(6). The disclosure form does not specifically ask about the source of the flooding or water intrusion, but if a seller has experienced any of these things they are asked to explain “the nature and frequency of the defect.” Id.

\textsuperscript{78} Id. at § 3(14). This provision, though similar to the first, focuses on the structures on the property, rather than the land itself; again, the disclosure form does not specifically ask about the source of the flooding, but if there has been flooding the seller must explain “the nature and frequency of the defect.” Id.

\textsuperscript{79} Id. at § 1(5).

\textsuperscript{80} See id. at § 1(7).

\textsuperscript{81} See id. at § 3(15). The form does not differentiate between mandatory or voluntary insurance policies, but requires those with insurance to attach a copy of the policy declarations page. Id.

\textsuperscript{82} See id. at § 3(16).

\textsuperscript{83} See id. at § 6(45).

\textsuperscript{84} Amy P. Fennell, Patricia B. McMurray, & Danielle Aymond, \textit{Understanding the Duty to Notify of, Obtain and Maintain}, L.A. REALTORS (Feb. 22, 2019), \url{https://www.larealtors.org/publications/2019/2/22/understanding-the-duty-to-notify-of-obtain-and-maintain} (stating that several realtors had contacted Louisiana Realtors to “inquire about how to find the necessary information to complete the sample Addendum 1 when their sellers do not know the amount of FEMA aid received by previous owners of the property”). To address the problem raised by realtors regarding receipt of previous federal aid, the Louisiana Real Estate Commission provided a new sample addendum, which realtors could use to represent that “[a] former owner, other than the current seller of the Property, is believed to have previously received Federal financial assistance…for flood-related damage.” \textit{Flood Insurance Purchase Requirement Addendum, Addendum 2, L.A. REALTORS},
Louisiana Real Estate Commission has attempted to provide guidance regarding the completion of these disclosures, it is clear that questions remain for both realtors and sellers.

2. Texas

Texas similarly has significant flood disclosure requirements, most recently expanded in September 2019. The flood disclosure requirements in Texas were updated almost entirely as a response to the devastation that the City of Houston faced following Hurricane Harvey in 2017.\(^85\) Hurricane Harvey caused an estimated $125 billion in damage, making it “the second-most costly hurricane to hit the U.S. mainland since 1900.”\(^86\) The damage to Houston was not only extensive; it was also largely uninsured. A study conducted after Hurricane Harvey revealed that of the estimated $125 billion in damage, 70% of that damage was uninsured, leaving property owners with no clear way to afford rebuilding.\(^87\) Given the devastation that Houston encountered in 2017 and the shock some homeowners felt as their homes flooded—and the additional surprise that other homeowners felt when they realized that their homes were in a location designed specifically to flood as part of the reservoir water management system\(^88\)—it is perhaps unsurprising that expanded flood disclosure requirements went into effect in Texas in September 2019.\(^89\)

The Texas Real Estate Commission has subsequently approved a “Seller’s Disclosure Notice” which reflects the updated disclosure requirements.\(^90\) The Texas disclosure form asks sellers to state “yes” or “no” regarding if they are aware of the following: (1) present flood insurance coverage;\(^91\) (2) prior flooding “due to a failure or breach of a reservoir or a controlled or emergency release of water from a reservoir”;\(^92\) (3) previous flooding in a structure “due to a natural flood event” (separately, the disclosure form also asks if there has been water damage “not due to a flood event”);\(^93\) (4) whether the property is located in a 100-year flood plain, a 500-year


\(^88\) See Neena Satija, Kiah Collier, & Al Shaw, Everyone Knew Houston’s Reservoirs Would Flood—Except for the People Who Bought Homes Inside Them, PROPUBLICA (Oct. 12, 2017), https://projects.propublica.org/graphics/harvey-reservoirs (explaining how those living in neighborhoods located within Houston’s reservoirs, and thus in a designated flood pool, realized “that in big enough rainstorms, their neighborhoods are actually designed to flood. And nobody told them about it.”).

\(^89\) See Buchele, supra note 85.


\(^91\) See TX Disclosure Notice, § 6. The form does not distinguish between mandatory or voluntary flood insurance, however. Id.

\(^92\) Id.

\(^93\) Id.; see also id. at § 4 (asking about water damage not due to a flood event).
floodplain, a floodway, a flood pool, or a reservoir (the form defines all of these terms);\(^{94}\) (5) whether the seller has filed a claim for flood damage to any insurance provider, including the National Flood Insurance Program (“NFIP”);\(^{95}\) and (6) whether the seller has received financial assistance from FEMA or the U.S. Small Business Administration for flood damage.\(^{96}\)

Although the Texas disclosure form has recently been expanded, some Texas residents, particularly in Houston, are still unsatisfied with the post-Harvey landscape. In September 2019, a poll of Houston residents conducted by Houston Public Media found that “Houston residents ranked flooding as the most important problem facing the city and its neighborhoods” and over one third said that Houston was “doing a poor job of addressing it.”\(^{97}\) The real estate flood disclosure expansion had only been in place for a month by the time of the October survey, but it is clear from the survey results that Houston’s residents were still hoping for better information about their risks and realities. In a separate poll also conducted by Houston Public Media, members and candidates for the Houston City Council were asked several questions about future flooding policy.\(^{98}\) The majority of candidates supported additional disclosure requirements outside just a property sale; when asked if they would support requiring landlords to disclose a property’s flood risk to potential renters, those interviewed almost universally answered that they would support such a measure.\(^{99}\) Home buyers and renters in Texas may now be pleased to see the expanded disclosure provisions in their state, but it is unfortunate that it took a horrific weather event like Hurricane Harvey to force the state’s disclosure regime to change. Other states like Virginia may be wise to make changes to better prepare Virginians for their flooding risks, rather than waiting for an event on the scale of Hurricane Harvey to compel reactive measures to do so.

Though Virginia’s climate reality is not exactly the same as Louisiana’s or Texas’s, all three states face a future that will feature sea level rise and increasingly serious weather events.\(^{100}\) This reality will pose significant challenges for coastal communities across the U.S., all of which will have to learn to grapple with a future that includes more flooding. It is critical that property owners are aware of any flood-related information about their properties so as to make informed decisions about pursuing any possible adaptation efforts, rebuilding, or retreat. However, because Virginia still prefers a policy of “buyer beware” and, therefore, does not currently require home sellers to make any property-specific flood-related disclosures, it may be more feasible for the Commonwealth to begin by increasing its mandatory disclosure requirements in a more modest

---

94 See id. at § 6 (stating further that if a property is located within any of the listed classifications, the seller must explain that designation).
95 See id. at § 7.
96 See id. at § 8.
98 See id.
99 See id. (finding that out of 73 candidate polls returned, only 2 candidates for Houston City Council answered “no” or “it depends” when asked if they would “support requiring landlords to disclose a property’s flood risk to potential renters”).
100 Wuebbles, D.J., et al., Executive Summary of the Climate Science Special Report: Fourth National Climate Assessment, Volume I, U.S. GLOBAL CHANGE RES. PROGRAM, 9, 16 (2017), https://science2017.globalchange.gov/downloads/CSSR2017_PRINT_Executive_Summary.pdf (explaining that temperature and precipitation extremes are becoming more common, that “global average sea level has risen by about 7-8 inches since 1900” and that the global sea level is expected to continue to rise).
way. Fortunately, there are many states that have flood disclosure requirements that fall somewhere between Virginia and Louisiana and Texas in quantity and scope, and these disclosure schemes can provide buyers more protection without transforming Virginia’s real estate landscape overnight.

B. Alternative Disclosure Regimes

1. Delaware

A little further up the Atlantic coast from Virginia, the State of Delaware has moderate requirements when it comes to flood disclosures. Pursuant to state law, the Delaware Real Estate Commission is empowered to develop a standard form that can be used as the “Seller’s Disclosure of Real Property Report,” which was last updated by the Commission in 2017, and includes mandatory disclosures of five items related to flooding.\(^{101}\) Although this disclosure form addresses some significant information related to flooding history, it is not as extensive as Louisiana’s set of requirements. The Delaware disclosure form asks: (1) if the property is located in a flood zone or wetlands area;\(^{102}\) (2) if there are drainage or flood problems impacting the property;\(^{103}\) (3) if the current owner carries flood insurance (if yes, the form asks for the policy number and insurance agent, as well as the annual cost of the policy);\(^{104}\) (4) if the property has standing water for more than 48 hours after raining;\(^{105}\) and (5) if the property has ever been damaged by flooding.\(^{106}\)

Unlike the Louisiana disclosure form, Delaware does not ask sellers for disclosures related to flood elevation certification, nor does it mandate disclosure of any previous receipt of FEMA aid money or any other federal flood disaster relief. Despite these exclusions from the Delaware disclosure form, it certainly reflects a robust disclosure scheme that requires some acknowledgements of previous or potential flooding and water problems associated with a property.


\(^{102}\) See DE Disclosure Report, § VI(51). Neither “flood zone” nor “wetlands area” is explicitly defined in the disclosure form. The form does point sellers to “[s]tate websites containing helpful information” including the Delaware Department of Natural Resources and Environmental Control website, through which it is possible to find a legal definition of the term “wetlands area.” See 7 DEL. ADMIN. CODE § 7502-5.0 (defining “wetlands”). Though this would be a helpful guide for sellers, it is not obvious that “wetlands area” was explicitly intended to have the same meaning in the DE Disclosure Report. Delaware also provides a State Regulated Wetlands Map Index on another government website. See Delaware Dept. of Natural Resources and Environmental Control, State Regulated Wetlands Map Index, DELAWARE.GOV, https://dnrec.alpha.delaware.gov/water/wetlands-subaqueous/state-regulated-wetlands/ (last visited July 14, 2020).

\(^{103}\) See DE Disclosure Report, § VI(52).

\(^{104}\) See id. at §§ VI(53), VI(54). The Delaware Disclosure Report does not differentiate between mandatory or voluntary insurance. Id. The Report does ask the home seller if any insurance claims have been made on the property in the past five years, but does not specify that these claims must be related to flooding or other water damage. See id. § VI(55).

\(^{105}\) See id. at § VI(56).

\(^{106}\) See id. at § VII(65). Though the provision does not ask for any explicit disclosure about the source of the flooding, it does ask for a brief description to be supplied at the end of the disclosure form. Id.
2. California

On the opposite coast, California’s state law requires that several specific flood-related disclosures be made during a real estate transaction. In California, unlike in any of the states previously discussed, the “Real Estate Transfer Disclosure Statement” (“Disclosure Statement”) is statutorily created, and embodied in California Civil Code § 1102.6. California’s standard Disclosure Statement mandates that home sellers disclose whether they are aware of certain conditions by selecting “yes” or “no” for each of the following: (1) flooding or drainage problems; and (2) major damage to the property or any of the structures from flooding. Although these disclosures appear to barely scratch the surface of flood-related information, California also requires a Natural Hazard Disclosure Statement (“NHD Statement”) be submitted with each property transfer. With this mandatory NHD Statement, California imposes a duty to disclose certain additional pieces of information in all transfers of real property.

The California NHD Statement is also statutorily created, and it requires that sellers represent, based upon their knowledge and “maps drawn by the state and federal governments,” whether (1) the property lies within a SFHA (as designated by FEMA); and (2) the property lies within an area of potential flooding shown on a dam failure inundation map. The NHD Statement form provided by the state includes an important warning to those receiving the form that “the maps on which these disclosures are based estimate where natural hazards exist. They are not definitive indicators of whether or not a property will be affected by a natural disaster.”

Interestingly, California’s guidance when it comes to the NHD Statement essentially encourages home sellers to contract with a third-party company to complete the NHD Statement, instead of the seller or real estate agent completing it themselves. When sellers and their realtors submit NHD Statements that are “prepared by a licensed engineer, land surveyor, geologist, or expert in natural hazard discovery,” the sellers and agents essentially receive a liability shield from any potential errors, inaccuracies, or omissions provided in the third-party report. This is similar to the approach used for title reports developed by title insurance companies and serves as a significant incentive for home sellers to engage a third-party to prepare the NHD Statement. As a

107 CAL. CIV. CODE § 1102.6 (West 2020) (“The disclosures required by this article pertaining to the property proposed to be transferred are set forth in, and shall be made on a copy of, the following disclosure form.”).
108 See id. The Disclosure Statement does not ask about the source of the flooding, however. Id.
109 See id.
111 CAL. CIV. CODE § 1103.2 (West 2020).
112 Id.
result, countless private companies have popped up offering to complete NHD Statements for a variety of prices, ranging from about $50-$100 per statement.\footnote{See, e.g., \textit{Pricing}, \textsc{CERTIFIED} NHD, \url{https://www.certifiednhd.com/pricing} (last visited July 14, 2020) (indicating that a “standard residential report” regarding natural hazard disclosures costs $69); \textit{Order Your NHD Report}, \url{NHD.REPORT}, \url{https://nhd.report/order?gclid=EAIaIQobChMI8oXSuO315wIyF7b1Ch0Zsw7dEAAYASAAEgJvK_D_BwE} (last visited Apr. 27, 2020) (stating that a “residential” report, covering the required 6 state hazard disclosures, and other information, costs $53.99); \textit{California Natural Hazards Disclosure Reports}, \textsc{DISCLOSURE SOURCE} NHD, \url{https://www.disclosuresource.com} (last visited July 14, 2020) (listing that a report for residential properties, including the six natural hazard zones, has a fee of $99.00).} Some realtor groups that have long resisted mandatory flood disclosure requirements have suggested that a “Carfax-like” third-party entity, such as those in California, might provide the most complete information for potential home buyers.\footnote{Wes Shaw, \textit{Do Specific Flood Disclosures Make Buyers More Prepared?}, \textsc{REALTOR MAG.} (June 7, 2019), \url{https://magazine.realtor/news-and-commentary/feature/article/2019/06/do-specific-flood-disclosures-make-buyers-more-prepared}.} For now, it seems, California is relying upon both mandated disclosures and third-party research entities in order to ensure that its homebuyers are better informed about the flooding risks of property ownership.

### 3. Midwestern States

There are many places in the U.S. that will face different threats as a result of climate change. States in the Midwest, for example, are not facing the exact dangers that sea level rise poses to a state like Virginia. Yet many of those states have greater flood disclosure requirements than Virginia. Several states in the Midwest, notably Michigan and Ohio, as well as the nearby Commonwealth of Pennsylvania, mandate some type of flood-related disclosure requirement in a real estate transaction.

Michigan, for example, has a statutorily-created disclosure form for sellers to complete.\footnote{See \textsc{MICH. COMP. LAWS ANN.} § 565.957 (West).} When it comes to flood-related disclosures, the form asks about: (1) flood insurance on the property;\footnote{See \textit{id.} (referring to question #11 under the section titled “Property conditions, improvements & additional information”).} (2) existing flooding or drainage problems;\footnote{See \textit{id.} (focusing on question #5 under the section titled “Other Items”).} and (3) major damage to the property from flooding.\footnote{See \textit{id.} (referring to question #6 under the section titled “Other Items”).} Although this information is unlikely to provide homebuyers with all of the information they may want in order to make an informed decision before purchasing a property, it is still much more helpful for buyers than what Virginia’s laws currently require.

In Ohio, the residential property disclosure form is actually created by the State’s Director of Commerce.\footnote{\textsc{OHIO REV. CODE ANN.} §5302.30(D)(1) (West 2020) (providing that director of commerce “prescribe the disclosure form to be completed by transferors,” and that the form include, but not be limited to, information}} Although a few specific types of disclosures in the form are prescribed by Ohio law, allowing the Director of Commerce to draft the real estate disclosure form does permit for some changes to be made to the form without parties becoming embroiled in a potentially lengthy and political process to amend any legislation.\footnote{\textsc{OHIO REV. CODE ANN.} §5302.30(D) (West 2020).} The most recent draft of the Residential Property Disclosure Form includes: (1) flood insurance on the property; (2) existing flooding or drainage problems; and (3) major damage to the property from flooding.
Disclosure Form available from the Ohio Department of Commerce was published in 2013, and asks sellers to disclose: (1) if there has been any previous or current water leakage, accumulation, or excess moisture; (2) if there has been any water or moisture-related damage to floors, walls, or ceilings as a result of flooding; and (3) if the property is located in a designated flood plain or the Lake Erie Coastal Erosion Area. Like Michigan, Ohio’s real estate disclosure form indicates that states are able to carefully craft their mandatory disclosure forms in a way to better inform homebuyers, without necessarily being as objectionable to sellers and real estate agents as the laws in states like Louisiana or Texas.

While slightly outside of the Midwestern region, the Commonwealth of Pennsylvania provides another helpful example of a more modest scheme of the mandatory disclosures required throughout a real estate transaction. Pennsylvania requires that sellers disclose several flooding-related pieces of information. Among other mandatory disclosures related to material defects about the property, sellers are required to state whether they are aware of: (1) any past or present water leakage in the house or other structures; (2) any classification stating that the property (or part of it) is located in a flood zone or wetlands area; and (3) any past or present drainage or flooding problems affecting the property generally. In addition to the statutorily-created disclosures above, the Pennsylvania Real Estate Commission is authorized by law to promulgate a separate property disclosure statement to cover all of the necessary disclosures in Pennsylvania. Thus, adding to the three required disclosures above, the resulting disclosure form asks sellers to state: (1) if there has been any water intrusion in the basement, crawl space, or in the house or other structures; (2) if the property is in a “wetlands area” or in a designated SFHA; (3) if the seller maintains flood insurance on the property; and (4) if there has been flooding mitigation (the document asks for sellers to explain any information that they have, such as the dates and extent of flood damage). Like Michigan and Ohio, Pennsylvania’s mandatory property disclosures are not nearly as extensive as those in Louisiana or Texas, but still do a better job than Virginia of providing buyers with a baseline of information related to flooding on the property.

regarding the source of the water supply, the nature of the sewer system, the condition of structures on the property, the presence of hazardous materials or substances, and a few other items).


124 See 49 PA. CODE § 35.335a(6). The disclosure statement does not specifically indicate whether this water damage is the result of flooding as opposed to plumbing or other issues, but does ask if any repairs have been made. Id.

125 See 49 PA. CODE § 35.335a(13)(iv) (asking if this property “or part of it” is located “in a flood zone or wetlands area”). Neither “flood zone” nor “wetlands area” is specifically defined in the statute.

126 See 49 PA. CODE § 35.335a(13)(v). The form created in the statute also does not specifically ask about the source of any past or existing flooding. Id.

127 68 PA. STAT. AND CONST. STAT. ANN. § 7304 (West 2015) (stating that a “form of property disclosure statement that satisfies the requirements of this chapter shall be promulgated by the State Real Estate Commission”).

128 See Pennsylvania Association of Realtors, Seller’s Property Disclosure Statement, DONALDJWEISS.COM, https://www.donaldjweiss.com/Sellers-Property-Disclosure-Statement.pdf (last visited July 14, 2020) (providing an example of the disclosure form promulgated by the Pennsylvania Association of Realtors in 2015. As above, the form does not explicitly define “wetlands area,” and it also does not explain whether it refers to mandatory or voluntary flood insurance (or both). See id. An updated version of the form is available only to members of the organization; see Seller’s Property Disclosure Statement, PA. ASS’N Realtors, https://www.parealtors.org/standard-forms/sellers-property-disclosure-statement/ (last visited July 14, 2020)). Sellers are able to respond by checking “yes,” “no,” “unknown,” or “not applicable.” See id.
IV. POLICY ARGUMENTS FOR & AGAINST MANDATORY FLOOD DISCLOSURE LAWS

The likely reason that twenty-one states within the U.S. do not yet mandate flood disclosures for real estate transactions is because there is much debate as to the benefits or shortcomings of mandatory flood disclosures. This paper will first examine the positive aspects of flood disclosure laws and then explain the reasons why some believe these measures would be a hindrance to certain groups.

A. Benefits of Mandatory Flood Disclosures

There are several interrelated benefits to having mandatory flood disclosure requirements. To begin with, it is generally positive to allow property buyers to make informed decisions before investing in a property. As a result of these informed decisions, a second benefit is that consumers will have greater trust in the real estate market as a whole. Additionally, those informed property owners will be able to play a more active role in protecting their property and mitigating the risk of damage from flooding. Finally, these mandatory disclosures would likely allow local governments to save money that would otherwise be spent providing emergency services to those living in regularly flooded homes.

In the twenty-one states in the U.S. that do not mandate flood disclosure requirements, buyers on the real estate market can find themselves saddled with homes that are subject to flooding or other damage, without any explicit prior warning. Although “buyer beware” is a common refrain in real estate, in most markets, including residential real estate, the very best consumer is an informed consumer. Yet people living in states without flood disclosure requirements can find themselves owning a property subject to recurrent flooding or previous water damage without notice. And matters may worsen: homeowners who are blindsided by flooding can often find themselves without any meaningful government financial assistance to help them recover or rebuild. In addition to the challenges that homeowners face when they are unprepared to deal with flooding, the lack of disclosures can distort market signals and over-value properties, prompting buyers to continue purchasing homes in potentially unsafe areas. As mentioned previously, purchasing a home can represent the largest investment a person will make in their entire lives, so the more information that potential buyers can get about residential properties before closing, the better position they are in to make decisions about how to invest their money.

One of the critical advantages of disclosing all known information in a transaction is the benefit to the market as a whole. For markets to truly function efficiently, “participants need full

129 See Shaw, supra note 116.
132 See supra note 2 and accompanying text.
information.”

Those within the realtor market, like any other market, understand that “[d]enying consumers basic information about known water damage in a home would threaten America’s real estate market.” As indicated by the statements made before the Virginia House of Delegates Subcommittee on Housing and Consumer Protection on January 30, 2020, failures to adequately disclose flood risks can feel like a betrayal to home buyers, and makes the unsuspecting market participant feel like a victim of a deception. This feeling naturally expands beyond Virginia as well. A survey conducted of Canadian homeowners found that most who transacted in real estate wanted “to be treated fairly during a real estate transaction by receiving accurate information about the perils facing their prospective property.” Like the U.S., Canada’s regulations regarding mandatory disclosures in real estate transactions exist on a provincial level (akin to the state-level regulations in the U.S.) as opposed to a national level. In both countries it is also true that informing buyers of flood risks empowers them to decide whether to attempt to mitigate the risk of living or working in an area, or to move elsewhere. Without knowledge about a property’s flooding history, potential buyers are unable to adequately prepare for the risks associated with future flooding. Thus, in mandating flood disclosures in real estate transactions, states can ensure that they are informing consumers, bolstering faith in the real estate market, and better preparing homebuyers for the need to adapt and mitigate damage from potential flooding.

One of the long-term benefits of mandating flood-related disclosures is the fact that knowledgeable homeowners will be better able to play an active role in protecting themselves against future flood damage. As a preliminary matter, disclosing flood-related information can help prevent homeowners being caught by surprise when it comes to flooding or water damage on their property. Eliminating the element of surprise will meaningfully help property owners to prepare for their risks and thereby mitigate damage. But, in order for property owners to even be in the position of making wise decisions regarding mitigation measures, they must first fully understand their flood risks.

Having informed, pragmatic property owners in an area can help to limit the long-term damage of flooding and allow communities and families to rebuild.

Finally, informing buyers of the risks of moving into a home that regularly floods or is at high risk of flooding could also result in state and local governments spending less money on emergency services and post-disaster rebuilding costs. As it currently stands, state and local

---

133 See Scata, supra note 131.
134 Shaw, supra note 116 (quoting then-President of the National Association of Realtors, John Smaby).
135 See supra notes 61-63 and accompanying text.
136 See supra note 1 and accompanying text.
137 Daniel Henstra & Jason Thistlethwaite, Buyer Beware: Evaluating Property Disclosure as a Tool to Support Flood Risk Management, CTR. FOR INT’L GOVERNANCE INNOVATION 1, 3 (May 2018).
138 See id. (stating that “[i]n Canada, the conduct of real estate transactions is regulated by provincial governments, so rules about property disclosure vary across the country”).
139 See id. at 4.
140 See Scata, supra note 131.
142 See Shaw, supra note 116.
governments expend immense resources in response to major disaster events (like significant flooding events), collectively spending millions of dollars to not only provide emergency services to people that are trapped in their homes or require some kind of rescue, but also subsequently rebuilding damaged or destroyed infrastructure after the catastrophe has ended.\textsuperscript{144} It makes sense that people who do not know about the risk of flooding to their properties could be caught off-guard when their homes and streets become inundated with water. But by alerting these homebuyers to the risk of flooding and flood damage \textit{prior} to these disaster events, homeowners can either choose not to move into that area—avoiding the risk of flooding completely—or they can take preemptive steps to mitigate the risk of flooding before government money ever needs to be spent.\textsuperscript{145} Both outcomes lead to the same result: if more people \textit{are} prepared for their risks, state and local governments will not need to spend as much money providing emergency services to families that are unprepared for flooding events, and these governments will also not need to rebuild as much damaged infrastructure if mitigation measures can be enacted prior to a major weather event.

\textbf{B. Flood Disclosure Drawbacks}

Several problems related to mandatory flood disclosure requirements have been raised by scholars and realtors, however. The general fears about \textit{mandatory} flood disclosure requirements include worries about increased chances of legal disputes between transacting parties, whether sellers can be expected to know about past and present risks on their property, and potential harm to property values. These concerns will be explored in turn.

Daniel Henstra and Jason Thistlethwaite from the Centre for International Governance Innovation noted that, in Canada, some worry that property disclosures actually increase the chance of legal disputes between parties, because buyers often mistake the document for a formal warranty (this is true despite disclaimers to the contrary).\textsuperscript{146} Henstra and Thistlethwaite warn that such concerns may lead to inconsistency in the use of disclosure forms if home sellers seek to avoid the risk of legal exposure.\textsuperscript{147} This concern about inconsistent use is particularly problematic for the scholars because in the Canadian provinces, “sellers are not legally obligated to provide property disclosure statements, even if the buyers request them.”\textsuperscript{148} While concerns about increased litigation over the legal import of these documents is a reasonable concern, if the use of these disclosure forms is made mandatory by state or national law, even the potential for litigation between the buyer and seller would likely not prevent compliance with the law; in fact, compliance would likely prevent any liability that a realtor or seller might face for failing to provide mandated disclosures.\textsuperscript{149} In this way, mandatory flood disclosure requirements would eliminate the problem of inconsistent use of disclosure forms that Henstra and Thistlethwaite illustrate.

\textsuperscript{144} See id.
\textsuperscript{145} See supra notes 141-142 and accompanying text.
\textsuperscript{146} See Henstra & Thistlethwaite, supra note 137 at 5.
\textsuperscript{147} See Henstra & Thistlethwaite, supra note 137 at 5.
\textsuperscript{148} Henstra & Thistlethwaite, supra note 137 at 4.
\textsuperscript{149} Realtors and sellers in states with mandatory disclosure laws are likely to provide these documents, in part because the realtor often faces a penalty of some kind for failing to comply. See, e.g., LA. STAT. ANN. § 37:1455 (2018) (stating that the Louisiana Real Estate Commission may censure, revoke the license, registration or certificate, levy fines, impose civil penalties, or require continuing education if a real estate professional has: committed any violation of the Louisiana Real Estate License Law, failed to disclose to a buyer a known material
Henstra and Thistlethwaite also question whether sellers can really be expected to know or understand all of the information asked on the forms, so as to answer them truthfully. Noting that flood risk information typically is “of poor quality and is difficult to access,” the two scholars wonder how feasible it is for sellers to provide property buyers with sufficient information to actually understand the flooding risks facing the property. Although writing from Canada, Henstra and Thistlethwaite identify a major issue in America as well. Many sellers and buyers in a real estate transaction are directed, if at all, to consult government-created flood maps, which are often woefully inadequate. FEMA’s Flood Insurance Rate Maps (FIRMs) are mostly outdated and fail to account for climate change (including sea level rise and increasing precipitation).

Understanding the FIRMs can be challenging, and some states like California have sought to make things easier for sellers who are trying to determine their location within a particular flood zone by incentivizing the use of third-party researchers. However, California’s NHD Statement asks if the property lies within a SFHA as defined by FEMA, thus falling back into the outdated and often inadequate categorization established by that agency. California has attempted to ameliorate the failings of its form, to an extent, by noting on the NHD Statement that “the maps on which these disclosures are based estimate where natural hazards exist. They are not definitive indicators of whether or not a property will be affected by a natural disaster.” Still, many property buyers could consider the information contained in the NHD Statement to comprehensively represent their risks.

As a result of the known inadequacies of the FIRMs and the general resistance to state-mandated flood disclosures, many third-party entities have been created to address these concerns. The goal of these third-party entities is to provide property buyers with information that is more up-to-date, accounts for the realities of climate change, and is potentially more objective than information that could be provided by a property’s seller. Many of these private entities also hope to provide their services in states that do not require any flood-related disclosures during the course of a real estate transaction. The company Coastal Risk, for example, is based out of Florida and offers reports reflecting the company’s analysis of a particular property’s risk so that owners can make informed decisions about purchasing, insuring, and mitigating or repairing water damage in

---

150 See Henstra & Thistlethwaite, supra note 137 at 5.
151 Id.
152 See, e.g., First Street Foundation Mission, FIRST STREET FOUND., https://firststreet.org/mission/ (last visited July 14, 2020) (noting that “75% of FEMA maps are outdated” and that more maps are incomplete, leaving an estimated “27 million Americans out of the 100-year floodplain”). See also R.J. Lehmann, Do No Harm: Managing Retreat by Ending New Subsidies, R STREET POLICY STUDY NO. 195. 4 (Feb. 2020), https://www.rstreet.org/wp-content/uploads/2020/02/195.pdf (explaining that the Flood Insurance Rate Maps that FEMA uses are “badly out of date” and “fail to acknowledge the ways changing climactic and development patterns…have shifted the risk of flooding”).
154 See CAL. CIV. CODE §1103.2 (West 2020).
155 CAL. CIV. CODE §1103.2 (West 2020).
157 See Who We Are, Coastal Risk, https://floodscores.com/about/ (last visited July 14, 2020) (providing a short video explaining the company’s work in Norfolk, VA).
159 See id. The conclusion of each “Flood and Climate Risk Assessment” includes a page referring to the sources used by Coastal Risk to obtain the data for each report. These sources of data include Fathom (a pioneer in modeling flood risk across river channels), FEMA Flood Hazard Boundaries and Wind Zones, the Community Rating System (which registers actions taken by municipalities to manage flood plains and reduce community risk), and several other entities. See id.
160 See, e.g., Report Card: Coastal Flooding, STATES AT RISK, https://reportcard.statesatrisk.org/hazards/coastal-flooding (last visited April 27, 2020) (stating that Florida faces “enormous coastal flooding risks” and that the state has 3.5 million people currently living in a 100-year coastal floodplain which is “by far the most of any state”); Report Card: Inland Flooding, STATES AT RISK, https://reportcard.statesatrisk.org/hazards/inland-flooding (last visited April 27, 2020) (stating that “Florida has the most people living in the FEMA 100-year floodplain”). See also Miami Herald Editorial Board, supra note 130.
162 Id.
acknowledged, however, that “more work must be done if we want to fundamentally change behavior and not simply rely on regulations to force change.”164 For Brody, this means capitalizing on interactive web tools that can be used and understood by everyone.165

In addition to the Buyers Be-Where tool in Texas, the First Street Foundation has formed as a nonprofit research group, partnering with academics and researchers across the U.S.166 The entity has not yet released its First Street Foundation Flood Model (FSF Flood Model), but its goal is to calculate past, present, and future flood risk in the hopes of providing free, public access to this information.167 The FSF Flood Model will provide information that incorporates anticipated environmental changes, including sea level rise and increased precipitation, when calculating the probability of flooding.168 Although providing updated maps that better calculate real flood risk is a lofty and admirable goal, it appears that the FSF Flood Model is aimed at providing this information to researchers who will be better able to analyze economic and social impacts of the country’s flooding risk.169 This may be disappointing for property buyers and sellers, but First Street Foundation does provide free and public access to the Foundation’s property-level flood risk analyses, which can be found through a tool called “Flood iQ” which serves as the First Street Foundation’s “online database and visualization tool.”170 Flood iQ allows interested individuals to enter an address and find the property’s flood risk in terms of hurricane storm surge, and does account for sea level rise.171 As of the writing of this paper, however, the flood mapping available via Flood iQ is quite limited, with only a few states and cities having flood risk data available.172 While both Buyers Be-Where and First Street Foundation provide tools to the public, the tools do not cover vast regions of the country, and many may not know that these tools exist.

Though Virginia follows a buyer-beware regime for its real estate transactions, its property buyers are not helpless. Virginians have access to the Virginia Flood Risk Information System (VFRIS), a tool which is specifically targeted towards realtors, as well as property buyers and sellers, who want to evaluate an area’s flood risk.173 VFRIS compiles information gathered from FEMA maps, the U.S. Fish and Wildlife Service, and advanced mapping software constructed by Esri to provide individuals with a better understanding of the flooding risks associated with a

---

164 See Brody, supra note 141.
165 See id.
166 See Flood Lab Partners, FIRST STREET FOUND., https://firststreet.org/flood-lab/ (last visited July 14, 2020) (explaining that experts will use data from the foundation’s Flood Model to answer pressing questions regarding the economic impacts of flooding in America, and listing several of the research experts who are from “top academic institutions” in the U.S.). [Note: Another First Street Foundation tool, SeaLevelRise.org, breaks down the risks, causes, and solutions to sea level rise. VCPC Director, Elizabeth Andrews, serves on a team of local experts for the SeaLevelRise.org tool. See About Us, SeaLevelRise.org, https://sealevelrise.org/about-us/ (last visited July 14, 2020).]
168 See id.
169 See id.
170 Id.
172 See id.
particular location. See id. This tool was created through the collaboration of Virginia’s DCR and the Virginia Institute of Marine Science (VIMS), and is accessible through ADAPTVA. ADAPTVA is a website that provides Virginians with “evidence-based planning for climate change” by utilizing resources that forecast the impact of climate change on communities within Virginia, and by providing additional tools that can help individuals to assess the risk of climate change impacts to specific areas. Through ADAPTVA and the VFRIS tool, Virginians can determine if a location is within a SFHA as designated by FEMA, in addition to seeing any information related to the location’s annual chance of being flooded by certain flood depths, changes since the last FIRMs issuance from FEMA, and the presence of any portions of the Coastal Barrier Resource System. However, ADAPTVA importantly acknowledges that “flooding may occur in property outside an SFHA or moderate flood hazard area.”

In addition to VFRIS, the ADAPTVA website includes an interactive map that allows users to layer scientific predictions on a map of Virginia in order to again visualize potential risks for a certain area. Using this tool, Virginians can view the low, intermediate, and extreme predictions for future sea level rise in Virginia, and thus will be better aware of the possible risk these changes could pose to a particular property or location. Those using the Interactive Map can also have the tool map possible vulnerable populations at risk, pinpoint the location of important infrastructure, and map out shoreline management measures. Through this free website, Virginians curious about the potential flood risk of a particular property can rely on ADAPTVA’s tools to help determine the flood zone classification, and future flood risks, of a location within the Commonwealth. As in Florida, this can prove a critical tool given that property sellers in Virginia are not currently obligated to disclose any of this information to potential buyers. ADAPTVA, like the Buyers-Be-Where and FSF Flood Model tools, can help to alleviate the deficiencies of FEMA’s outdated flood maps and provide potential property buyers, as well as property sellers, with more comprehensive information as to a property’s existing and future flood risks.

The biggest supposed drawback of mandating flood disclosure information is that such disclosures may harm property values. The anticipated drop in property values is likely the reason

174 See id. VFRIS utilizes Esri’s Geographic Information System (“GIS”) software for its project. See id. The company Esri touts itself as the “global market leader in GIS” and its software is used by more than 350,000 organizations. See Who We Are, ESRI, https://www.esri.com/en-us/about/about-esri/who-we-are (last visited July 14, 2020).
175 Id.
177 See ADAPT VIRGINIA, supra note 173. The Coastal Barrier Resources Act established the Coastal Barrier Resources System (CBRS) in order to prevent federal expenditures or the increase of development in places that are “hurricane-prone, biologically rich coastal barriers.” Coastal Barrier Resources System, FEMA, https://www.fema.gov/coastal-barrier-resources-system (last visited July 14, 2020). Thus, developments within the CBRS are not eligible for federal funding or financial assistance including, importantly, the National Flood Insurance Program. See id.
178 See ADAPT VIRGINIA, supra note 173.
180 See id.
181 See id.
182 See supra Part IIA.
that realtor coalitions around the country continue to argue against mandatory flood disclosures, noting repeatedly that “a national real estate disclosure requirement is not the answer.”\textsuperscript{183} Both property sellers and realtors dealing with past or potential flooding damage are forced to grapple with how to “protect the value—including the resale value—of your home.”\textsuperscript{184} Managing this often includes proving how well a property was repaired, working with flood insurance companies and FEMA to settle claims, and ensuring that all documentation is properly accounted for.\textsuperscript{185} In fact, the negative impact of being located in a flood-prone area on resale value has been substantiated in a few studies. One study found that if a property is identified as being in a 100-year flood zone, it will have a roughly 4.1% discount relative to properties that are not within that 100-year flood zone.\textsuperscript{186}

Although studies such as this would appear to reflect a nightmare realized, other empirical analysis suggests that this effect on property values is temporary; in at least two instances property values recovered in 1-2 years following a major flood event, in part because of the infusion of government relief funds, which bolstered restoration.\textsuperscript{187} Disputing that flood-related disclosures are the death-knell of property values, researcher Stephen Yeo from Risk Frontiers in Australia compared studies conducted in the U.S., Canada, New Zealand, and Australia in order to examine the actual impact of flooding-related disclosures on property values after significant flood events or a floodplain designation.\textsuperscript{188} One of the most significant pieces of information that Yeo gleaned from his analysis is that the occurrence of a flood event, as opposed to the giving of a floodplain designation, is likely to have a much greater impact on property values.\textsuperscript{189} Thus, the mandated disclosure of significant flood damage may have a greater impact on a property’s value than simply stating that it falls within a FEMA floodplain classification. Yeo also acknowledged, however, that some property values can be hard to properly evaluate, given that a property may have both negative attributes due to floodplain designation, and positive attributes due to possible water views or access.\textsuperscript{190}

Beyond these general trends, Yeo noted that the studies examining the effect of flood disclosures on property values have ended with results that are extremely contradictory.\textsuperscript{191} In all of the studies evaluated by Yeo, the disclosure of a property’s location within a floodplain had


\textsuperscript{185} Id.


\textsuperscript{188} See generally id.

\textsuperscript{189} See id. at 36.

\textsuperscript{190} See id. at 38-39.

\textsuperscript{191} See id. at 37. Yeo cites the different purposes of the studies, different data and methods, varying quality (and thus varying controls within the studies), and different contexts as factors that have contributed to the conflicting results. See id. at 37-39.
almost no effect on property values. In locations that did see a fall in property values due to a significant flood event, most properties saw a return to pre-flood value within 5-10 years, though the timeline varied significantly from location to location. In several instances this period of recovery time was much less. For example, the Australian town Nyngan saw property values fall 60% following a levee-break, but values recovered within a year.

Furthermore, a separate study conducted by Chun-Hao Chang, Krishnan Dandapani, and Ken H. Johnson at Florida International University found that when property owners marked a property’s flood zone status as “unknown,” this uncertainty actually decreased the likelihood that the transaction on a given property would be completed. This study thus determined that uncertainty over flood zone status also has a “noticeably negative impact on the probability of a successful marketing effort” of a property on the market. It is clear that, in the end, “information asymmetries . . . can lead to costs for both buyers and sellers in an exchange transaction.” Thus, mandating the disclosure of all possible information may help to eliminate uncertainty and these information asymmetries, while providing benefits to both buyers and sellers.

V. CONCLUSION

Without a national mandate requiring flood-related information to be disclosed by sellers in real estate transactions, the duty to enact such a requirement will remain with the states for the foreseeable future. Although Virginia has repeatedly wrestled with whether or not to enact mandatory disclosure requirements when it comes to the presence of SFHAs, other states have taken the leap and enacted laws requiring similar disclosures. Some states have required sellers to complete extensive disclosures prior to a property transfer, covering everything from flood damage to flood insurance coverage, flood zone classification, and the receipt of flood relief aid money. There are more moderate flood disclosure mandates in other states, however, that could provide a clear guide for Virginia if it wished to require sellers to disclose some information about flood damage or flood insurance without straying too far from its current “buyer beware” regime. There are policy arguments to be made both favoring and disfavoring such disclosures and Virginia will likely continue to grapple with these arguments in the future. But based upon the personal statements and stories of homeowners shared in the 2020 Virginia House of Delegates Subcommittee on Housing and Consumer Protection hearing, it appears that many Virginians believe that it is time to give the “buyer beware” system a second look.

---

192 See id. at 40-41 (stating that in Oak Grove, Oregon, the “enforcement of floodplain regulations had no dampening effect on residential land values” and that in Ontario, Canada there was “no significant relationship between floodplain designation…and selling price of homes” and finally noting that in Coromandel, New Zealand there were no downturns in the property market that were clearly “attributable to the release of flood hazard maps”).

193 See id. at 40-41 (noting that in Oak Grove, Oregon, the “depressed effect lasted for 5-8 years” while the timeline for Wilkes-Barre, Pennsylvania’s value-recovery was approximately 30 months, and in two towns in California, properties that were “slightly flooded” recovered within 4-6 years). But see id. at 40-41 (explaining that houses flooded in Des Plaines, Illinois did decrease in value but took just over two years to recover to their pre-flood value, and in Ontario, Canada there was no significant difference in the property values of flooded or non-flooded properties just four years after a major flood).

194 See id. at 41.

195 See Chang et al., supra note 186 at 173.

196 See Chang et al., supra note 186 at 181.

197 See Chang et al., supra note 186 at 182.