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



Photo courtesy of Elizabeth Andrews

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About the Authors



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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.

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questions, or suggestions.

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.”¹

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,² 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.³ 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.”⁴

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.⁵ 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.⁶ 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.,⁷ 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.⁸ 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.⁹

¹ *Hearing on H.B. 858 Before the H. Subcomm. on Hous. and Consumer Prot.*, 2020 Leg. (Va. 2020) (statements of Kerrie Obbink on behalf of HB 858) (Jan. 30, 2020, 6:31 PM), <https://virginiageneralassembly.gov/house/committees/commstream.html> (navigate to Jan. 30, 2020, then go to “Housing” video starting at 5:46 PM).

² Adam Eric Greenberg & Hal E. Hershfield, *Financial decision making*, 2 CONSUMER PSYCHOL. REV. 17, 24 (2019).

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.*

⁶ *See* Julia Schenk, *22.1 Disclosures & the Unwelcome Return of Caveat Emptor*, 51 J. MARSHALL L. REV. 407, 413 (2018).

⁷ Association of State Floodplain Managers (ASFPM), FACEBOOK (Feb. 11, 2020), <https://www.facebook.com/ASFPM/photos/a.313447088670958/3754133737935592/?type=3&theater>.

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).

⁹ *See* Larry P. Atkinson et al., *Sea Level Rise and Flooding Risk in Virginia*, SEA GRANT L. & POL’Y J., Winter 2013, at 4-11; *see also* *Sea Level Wise*, VA. BEACH, <https://www.vbgov.com/government/departments/public-works/comp-sea-level-rise/Pages/default.aspx> (last visited July 14, 2020). “Relative sea level rise” is a phenomenon where the combination of global sea level rise and regional land subsidence has led to relatively greater rates of sea level rise

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.¹⁰ 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.¹¹ Although there are twenty-nine states that do require some type of flood-related disclosure during the course of a real estate transaction,¹² 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.¹³ 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.¹⁴ 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.

in the southern Chesapeake Bay region compared to other coastal areas. Jack Eggleston & Jason Pope, *Land Subsidence and Relative Sea-Level Rise in the Southern Chesapeake Bay Region*, US GEOLOGICAL SURVEY 2 (2013), <https://pubs.usgs.gov/circ/1392/pdf/circ1392.pdf>.

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,¹⁵ 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.¹⁶ 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.¹⁷ 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 lab¹⁸—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.¹⁹ 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.²⁰ 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”).²¹ A SFHA refers to floodplains and land areas with a high risk for flooding as defined by the Federal Emergency Management Agency (“FEMA”).²² 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).

¹⁶ *Kuczanski v. Gill*, 225 Va. 367, 369 (1983) (quoting *Horner v. Ahern*, 207 Va. 860, 863-64 (1967)).

¹⁷ *See* VA. CODE ANN. §§ 55.1-704 to -708 (2020) (requiring disclosure of specific features in very few circumstances).

¹⁸ *See id.*

¹⁹ VA. CODE ANN. § 55.1-703(B).

²⁰ *See id.*

²¹ VA. CODE ANN. § 55.1-703(B)(10) (originally enacted as VA. CODE ANN. § 55-519(B)(10) (2015), amended 2019).

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.²³ 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.²⁴ 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,²⁵ 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.²⁶ 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.²⁷ The original language of the proposed bill would have added the bare minimum “buyer beware” language to the RPDA regarding SFHAs,²⁸ 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).

²⁴ See *Hearing on H.B. 858 Before the H. Subcomm. on Hous. and Consumer Prot.*, 2020 Leg. (Va. 2020) (statements of Del. Conviris-Fowler in support of HB 858) (Jan. 30, 2020, 6:15 PM to 6:20 PM), <https://viriniageneralassembly.gov/house/committees/commstream.html> (navigate to Jan. 30, 2020, then go to “Housing” video starting at 5:46 PM) (discussing how many military members need to secure housing quickly and often do not know about presence of flood plains until it is too late to back out of a real estate transaction).

²⁵ See *supra* note 21 and accompanying text.

²⁶ Virginia Residential Property Disclosure Act, VA. CODE ANN. § 55-517 to -525 (1992).

²⁷ VA. CODE ANN. § 55-519(B)(10) (2015).

²⁸ H.B. 1642, 2015 Leg. (Va. 2015) (prefiled Jan. 9, 2015), <https://lis.virginia.gov/cgi-bin/legp604.exe?151+ful+HB1642> (companion bill to S.B. 775); S.B. 775, 2015 Leg. (Va. 2015) (prefiled Dec. 29, 2014), <https://lis.virginia.gov/cgi-bin/legp604.exe?151+ful+SB775> (companion bill to H.B. 1642).

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 Convors-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/>.

³² See Josh Veverka & Mary Beth Coxa, *Take Note: Virginia’s New Laws Take Effect July 1, 2015*, N. VA. ASS’N OF REALTORS (May 1, 2015), <https://www.nvar.com/realtors/news/re-view-magazine/article/may-jun-2015/2015-05-06-new-laws-virginia-new-laws-take-effect> (“[B]uyers should be able to identify whether properties that are located in FEMA-determined special flood hazard areas [sic] will need additional flood insurance.”); Jim Wetzel, *The Legislative Line Number 4 February 21, 2015*, VA. PENINSULA ASS’N OF REALTORS (February 23, 2015), <https://vpar.realtor/the-legislative-line-number-4-february-21-2015/> (“[W]e propose amending the Code to add language to the Virginia Residential Property Disclosure Statement’s list of disclosures that advises the purchaser to exercise due diligence in investigating whether the property resides within a special flood hazard area [sic].”).

³³ See Veverka & Coxa, *supra* note 32; Wetzel, *supra* note 32.

³⁴ H.B. 2175, 2019 Leg. (Va. 2019) (prefiled Jan. 8, 2019), <https://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+HB2175>.

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 Convors-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 Convors-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.*

³⁷ See Anthony Reedy, *Protecting Your Ability to Do Business*, Virginia REALTORS (Aug. 2, 2019), <https://www.virginiarealtors.org/2019/08/02/protecting-your-ability-to-make-money/> (noting that the 2019 bill to add mandatory disclosure language regarding SFHAs would have impeded Virginia’s realtor community from conducting business).

³⁸ H.B. 2175, 2019 Leg. (Va. 2019) (assigned to H. Gen. Laws Subcomm. #2 Jan. 16, 2019), <https://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+HB2175>.

³⁹ Telephone Interview with Rhena Hicks, Legislative Aide for Delegate Convors-Fowler of the Virginia General Assembly (Mar. 17, 2020).

⁴⁰ See H.B. 2175-H1, 2019 Leg. (Va. 2019) (H. Gen. Laws Subcomm. #2 recommended reporting with substitute Jan. 22, 2019), <https://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+HB2175H1>.

⁴¹ *Id.*

⁴² Telephone Interview with Rhena Hicks, *supra* note 39.

⁴³ *Hearing on H.B. 2175-H1 Before the H. Comm. on Gen. Laws*, 2019 Leg. (2019 Va.) (statements of Del. Convors-Fowler on behalf of HB 2175-H1) (Jan. 29, 2019, 2:28 PM to 2:33 PM), <https://virginiageneralassembly.gov/house/committees/commstream.html> (navigate to Jan. 29, 2019, then go to “General Laws” video starting at 2:05 PM). The Virginia Housing Commission is part of Virginia’s Division of Legislative Services and is responsible for conducting studies and making recommendations to Virginia’s General Assembly regarding bills that concern housing, real property, and community development. *Virginia Housing Commission*, VA. DIV. OF LEGISLATIVE SERVS., <http://dls.virginia.gov/commissions/vhc.htm> (last visited July 10, 2020).

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.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.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 1292.⁴⁷ Senator Vogel agreed to add Delegate Convirs-Fowler’s language to her bill,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 2175.⁴⁹

The substituted version of SB 1292 was reported by the House Committee on General Laws with no objections or debate,⁵⁰ and went on to pass in the House and the Senate before being signed into law by the Governor of Virginia.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.”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

⁴⁵ H.B. 2175-H1, 2019 Leg. (Va. 2019) (tabled in H. Comm. on Gen. Laws Jan. 29, 2019), <https://lis.virginia.gov/cgi-bin/legp604.exe?191+vot+H11V0087+HB2175>; see *Hearing on H.B. 2175-H1 Before the H. Comm. on Gen. Laws*, 2019 Leg. (Va. 2019) (statements of Del. Convirs-Fowler and Del. Bulova on behalf of HB 2175-H1, and statements of Del. Gilbert in opposition to HB 2175-H1) (Jan. 29, 2019, 2:28 PM to 2:34 PM), <https://virginiageneralassembly.gov/house/committees/commstream.html> (navigate to Jan. 29, 2019, then go to “General Laws” video starting at 2:05 PM).

⁴⁶ S.B. 1292, 2019 Leg. (Va. 2019) (passed in Senate Jan. 29, 2019), <https://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+SB1292>.

⁴⁷ Telephone Interview with Rhena Hicks, *supra* note 39.

⁴⁸ *Id.*

⁴⁹ S.B. 1292-H1, 2019 Leg. (Va. 2019) (H. Gen. Laws Subcomm. #4 recommended reporting with substitute Feb. 12, 2019), <https://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+SB1292H1>.

⁵⁰ S.B. 1292-H1, 2019 Leg. (Va. 2019) (reported from H. Comm. on Gen. Laws with substitute Feb. 14, 2019), <https://lis.virginia.gov/cgi-bin/legp604.exe?191+vot+H11V0270+SB1292>.

⁵¹ S.B. 1292-H1, 2019 Leg. (Va. 2019) (signed into law by Governor Northam Mar. 18, 2019), <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=191&typ=bil&val=sb1292>.

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 858,⁵³ introduced once again by Delegate Convirs-Fowler—and one in the Virginia Senate—SB 342,⁵⁴ 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.⁵⁵ 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.⁵⁶ 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.⁵⁷

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.⁵⁸ 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.⁵⁹ 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, 2020.⁶⁰

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.⁶¹ Those who testified in support of the bill at the Subcommittee meeting

⁵³ H.B. 858, 2020 Leg. (Va. 2020) (prefiled Jan. 7, 2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HB858> (companion bill to S.B. 342).

⁵⁴ S.B. 342, 2020 Leg. (Va. 2020) (prefiled Jan. 6, 2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+SB342> (companion bill to H.B. 858).

⁵⁵ *Compare id.*, with H.B. 2175, 2019 Leg. (Va. 2019) (prefiled Jan. 8, 2019), <https://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+HB2175>.

⁵⁶ S.B. 342, 2020 Leg. (Va. 2020) (stricken at request of Sen. Locke in S. Comm. on Gen. Laws and Tech. Jan. 15, 2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?201+vot+S12V0005+SB0342>.

⁵⁷ *See Hearing on S.B. 342 Before the S. Comm. on Gen. Laws and Tech.*, 2020 Leg. (Va. 2020) (motion to strike SB 342 passed by committee) (Jan. 15, 2020, 3:31 PM), http://virginia-senate.granicus.com/MediaPlayer.php?view_id=3&clip_id=2863 (at minute 3 of video).

⁵⁸ *Compare* H.B. 858, Leg. 2020 (Va. 2020) (prefiled Jan. 7, 2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HB858>, with S.B. 342, 2020 Leg. (Va. 2020) (prefiled Jan. 6, 2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+SB342>.

⁵⁹ H.B. 858, Leg. 2020 (Va. 2020) (prefiled Jan. 7, 2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HB858>.

⁶⁰ *Hearing on H.B. 858 Before the H. Subcomm. on Hous. and Consumer Prot.*, 2020 Leg. (Va. 2020) (debate over HB 858) (Jan. 30, 2020, 6:15 PM to 6:46 PM), <https://virginiageneralassembly.gov/house/committees/commstream.html> (navigate to Jan. 30, 2020, then go to “Housing” video starting at 5:46 PM).

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.⁶² 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.⁶³

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 858.⁶⁴ 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).⁶⁵ 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.⁶⁶ 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.⁶⁷ 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.⁶⁸

After hearing from the REALTORS’ lobbyist, the Chair of the Subcommittee recommended that Delegate Convors-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.⁶⁹ In an attempt to find this middle ground, there was a meeting held between Delegate Convors-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 Wasserberg, 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.

⁶⁹ *Id.* (statements of Del. Simon, Chair of H. Subcomm. on Hous. and Consumer Prot., recommending further discussion and compromise on HB 858) (Jan. 30, 2020, 6:44 PM to 6:46 PM), <https://virginiageneralassembly.gov/house/committees/commstream.html> (navigate to Jan. 30, 2020, then go to “Housing” video starting at 5:46 PM).

never reached a clear consensus or compromise regarding the language of HB 858.⁷⁰ Ultimately, HB 858 was left in the committee and failed because it was never scheduled for a vote.⁷¹

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.⁷² 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.⁷³ 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.⁷⁴ 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.

⁷¹ H.B. 858, Leg. 2020 (Va. 2020) (left in H. Comm. on Gen. Laws Feb. 11, 2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB858>.

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.

⁷³ See LA. STAT. ANN. § 9:3198 (2018).

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.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.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;⁷⁷ (2) any previous flooding of any structure on the property;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;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);⁸⁰ (5) any flood insurance on the property;⁸¹ (6) any flood elevation certification;⁸² and (7) any previous receipt of FEMA aid money or other federal disaster flood assistance, including the amount of aid received.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.⁸⁴ Though the

⁷⁵ See *Property Disclosure Document*, LA. REAL EST. COMMISSION (revised Jan. 1, 2020), <http://lrec.gov/wp-content/uploads/2020/02/01-01-20ResidentialPropertyDisclosure.pdf> (last visited July 14, 2020) [hereinafter LA Property Disclosure Document]. See also *Mandatory Forms*, LA. REAL EST. COMMISSION, <https://lrec.gov/forms/mandatory-forms/> (last visited July 14, 2020) (providing a link for the Residential Property Disclosure Form).

⁷⁶ See *id.*

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.*

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.*

⁷⁹ *Id.* at § 1(5).

⁸⁰ See *id.* at § 1(7).

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.*

⁸² See *id.* at § 3(16).

⁸³ See *id.* at § 6(45).

⁸⁴ Amy P. Fennell, Patricia B. McMurray, & Danielle Aymond, *Understanding the Duty to Notify of, Obtain and Maintain*, LA. REALTORS (Feb. 22, 2019), <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.” *Flood Insurance Purchase Requirement Addendum, Addendum 2*, LA. 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 system⁸⁸—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

<https://static1.squarespace.com/static/583f50c959cc68cd8a1385d3/t/5c7086f34785d30b34396ead/1550878451317/Legal+Line++Understanding+the+Notify+of+Obtain+and+Maintain+5.pdf> (last visited July 14, 2020). Later the form also states “[t]he Seller did not personally receive the assistance and the amount of assistance received by the previous owner was not disclosed to the current Seller.” *Id.*

⁸⁵ See, e.g., Mose Buchele, *In Texas, Home Sellers Must Now Disclose More About the Risk of Flooding*, NPR (Oct. 27, 2019, 7:00 AM), <https://www.npr.org/2019/10/27/772996585/in-texas-home-sellers-must-now-disclose-more-about-the-risk-of-flooding>.

⁸⁶ *2017 Hurricane Harvey: Facts, FAQs, and How to Help*, WORLD VISION, <https://www.worldvision.org/disaster-relief-news-stories/2017-hurricane-harvey-facts>. See also National Hurricane Center, *Costliest U.S. Tropical Cyclones Tables Updated*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. (Jan. 26, 2018), <https://www.nhc.noaa.gov/news/UpdatedCostliest.pdf>.

⁸⁷ See Robert Armstrong & Oliver Ralph, *Climate Change: Can the Insurance Industry Afford the Rising Flood Risk?* (Feb. 18, 2020), <https://www.ft.com/content/757d4cf8-4e51-11ea-95a0-43d18ec715f5>.

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.

⁹⁰ See *Seller’s Disclosure Notice*, TEX. REAL EST. COMMISSION <https://www.trec.texas.gov/forms/sellers-disclosure-notice> (last updated Sept. 1, 2019) [hereinafter TX Disclosure Notice].

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.

⁹⁷ Jen Rice & Katie Watkins, *Here’s How Houston City Council Candidates Say They Would Fight Flooding*, HOUS. PUB. MEDIA (Oct. 17, 2019, 6:00 AM), <https://www.houstonpublicmedia.org/articles/news/2019/10/17/349086/city-council-survey/>.

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.

¹⁰¹ See DEL. CODE ANN. tit. 6, § 2578 (West); *Seller’s Disclosure of Real Property Condition Report*, DELAWARE.GOV, https://dprfiles.delaware.gov/realestate/DREC_Property_Disclosure_Condition_Report.pdf (effective Oct. 1, 2017) [hereinafter DE Disclosure Report].

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 § 1102.6.¹⁰⁷ 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;¹⁰⁸ and (2) major damage to the property or any of the structures from flooding.¹⁰⁹ 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.¹¹⁰

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.¹¹¹ 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."¹¹²

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.¹¹³ 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.¹¹⁴ 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.*

¹¹⁰ *See* CAL. CIV. CODE §§ 1103-1103.14 (West 2020); *Quick Guide: Natural Hazard Disclosure Statement*, CAL. ASS'N REALTORS, <https://www.car.org/-/media/CAR/Documents/Transaction-Center/PDF/QUICK-GUIDES/Quick-Guide---Natural-Hazard-Disclsoure-NHD-Statement.pdf?la=en&hash=14CF614D916E7CF9D29B17C1B8E4C6BA86DDC1B8> (last visited July 14, 2020).

¹¹¹ CAL. CIV. CODE § 1103.2 (West 2020).

¹¹² *Id.*

¹¹³ *See* CAL. CIV. CODE § 1103.4 (West 2020); *Quick Guide: Natural Hazard Disclosure Statement*, CAL. ASS'N REALTORS, <https://www.car.org/-/media/CAR/Documents/Transaction-Center/PDF/QUICK-GUIDES/Quick-Guide---Natural-Hazard-Disclsoure-NHD-Statement.pdf?la=en&hash=14CF614D916E7CF9D29B17C1B8E4C6BA86DDC1B8> (last visited July 14, 2020).

¹¹⁴ CAL. CIV. CODE § 1103.4 (West 2020); *Quick Guide: Natural Hazard Disclosure Statement*, CAL. ASS'N REALTORS, <https://www.car.org/-/media/CAR/Documents/Transaction-Center/PDF/QUICK-GUIDES/Quick-Guide---Natural-Hazard-Disclsoure-NHD-Statement.pdf?la=en&hash=14CF614D916E7CF9D29B17C1B8E4C6BA86DDC1B8> (last visited July 14, 2020).

result, countless private companies have popped up offering to complete NHD Statements for a variety of prices, ranging from about \$50-\$100 per statement.¹¹⁵ 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.¹¹⁶ 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.¹¹⁷ When it comes to flood-related disclosures, the form asks about: (1) flood insurance on the property;¹¹⁸ (2) existing flooding or drainage problems;¹¹⁹ and (3) major damage to the property from flooding.¹²⁰ 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.¹²¹ 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.¹²² The most recent draft of the Residential Property

¹¹⁵ See, e.g., *Pricing*, CERTIFIED NHD, <https://www.certifiednhd.com/pricing> (last visited July 14, 2020) (indicating that a “standard residential report” regarding natural hazard disclosures costs \$69); *Order Your NHD Report*, NHD.REPORT, https://nhd.report/order?gclid=EAIAIQobChMI8oXSuO315wIVF7bICh0Zsw7dEAAAYASAAEgJyK_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); *California Natural Hazards Disclosure Reports*, DISCLOSURE SOURCE NHD, <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).

¹¹⁶ Wes Shaw, *Do Specific Flood Disclosures Make Buyers More Prepared?*, REALTOR MAG. (June 7, 2019), <https://magazine.realtor/news-and-commentary/feature/article/2019/06/do-specific-flood-disclosures-make-buyers-more-prepared>.

¹¹⁷ See MICH. COMP. LAWS ANN. § 565.957 (West).

¹¹⁸ See *id.* (referring to question #11 under the section titled “Property conditions, improvements & additional information”).

¹¹⁹ See *id.* (focusing on question #5 under the section titled “Other Items”).

¹²⁰ See *id.* (referring to question #6 under the section titled “Other Items”).

¹²¹ See OHIO ADMIN. CODE 1301:5-6-10 (2020); see also OHIO REV. CODE ANN. § 5302.30(D) (West 2020).

¹²² 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

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.¹²³ 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;¹²⁴ (2) any classification stating that the property (or part of it) is located in a flood zone or wetlands area;¹²⁵ and (3) any past or present drainage or flooding problems affecting the property generally.¹²⁶ 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.¹²⁷ 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).¹²⁸ 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).

¹²³ *Residential Property Disclosure Form*, OHIO DEP'T OF COM. (2013), https://www.com.ohio.gov/documents/real_COMResidentialPropertyDisclosureForm.pdf (last visited July 14, 2020). The form does not define a "designated flood plain," however. *Id.*

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.¹²⁹ 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.¹³⁰ 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.¹³¹ As mentioned previously, purchasing a home can represent the largest investment a person will make in their entire lives,¹³² 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.

¹³⁰ Miami Herald Editorial Board, *Don't Scam Florida Home Buyers. Require Sellers to Reveal a Home's Flooding Risk*, MIAMI HERALD: OPINION, (Nov. 10, 2019, 9:14 AM), <https://www.miamiherald.com/opinion/editorials/article237207923.html>.

¹³¹ See Joel Scata, *Digital Dialogue No. 2: Improving Flood Risk Disclosure*, WHARTON RISK MGMT. & DECISION PROCESSES CTR.: DIGITAL DIALOGUES (Jan. 2019), <https://riskcenter.wharton.upenn.edu/digital-dialogues/improving-flood-risk-disclosure/>.

¹³² See *supra* note 2 and accompanying text.

information.”¹³³ 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.”¹³⁴ As indicated by the statements made before the Virginia House of Delegates Subcommittee on Housing and Consumer Protection on January 30, 2020,¹³⁵ 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.¹³⁶ 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.”¹³⁷ 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.¹³⁸ 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.¹³⁹ Without knowledge about a property’s flooding history, potential buyers are unable to adequately prepare for the risks associated with future flooding.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² 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.¹⁴³ 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.

¹⁴¹ See Sam Brody, *Digital Dialogue No. 2: Improving Flood Risk Disclosure*, WHARTON RISK MGMT. & DECISION PROCESSES CTR.: DIGITAL DIALOGUES (Jan. 2019), <https://riskcenter.wharton.upenn.edu/digital-dialogues/improving-flood-risk-disclosure/>.

¹⁴² See Shaw, *supra* note 116.

¹⁴³ See *What We Don’t Know About State Spending on Natural Disasters Could Cost Us*, Pew Charitable Trusts (June 19, 2018), <https://www.pewtrusts.org/en/research-and-analysis/reports/2018/06/19/what-we-dont-know-about-state-spending-on-natural-disasters-could-cost-us>.

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.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 *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.¹⁴⁵ Both outcomes lead to the same result: if more people *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.

B. Flood Disclosure Drawbacks

Several problems related to mandatory flood disclosure requirements have been raised by scholars and realtors, however. The general fears about *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).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.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.”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.¹⁴⁹ In this way, mandatory flood disclosure requirements would eliminate the problem of inconsistent use of disclosure forms that Henstra and Thistlethwaite illustrate.

¹⁴⁴ *See id.*

¹⁴⁵ *See supra* notes 141-142 and accompanying text.

¹⁴⁶ *See* Henstra & Thistlethwaite, *supra* note 137 at 5.

¹⁴⁷ *See* Henstra & Thistlethwaite, *supra* note 137 at 5.

¹⁴⁸ Henstra & Thistlethwaite, *supra* note 137 at 4.

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.¹⁵⁰ 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.¹⁵¹ 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).¹⁵²

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.¹⁵³ 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.¹⁵⁴ 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.”¹⁵⁵ 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

defect regarding the condition of real estate, *or failed to provide a buyer or seller with a written property disclosure form* for sales involving residential real property).

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”).

¹⁵³ CAL. CIV. CODE §1103.4 (West 2020); *Quick Guide: Natural Hazard Disclosure Statement*, CAL. ASS’N REALTORS, <https://www.car.org/-/media/CAR/Documents/Transaction-Center/PDF/QUICK-GUIDES/Quick-Guide--Natural-Hazard-Disclsoure-NHD-Statement.pdf?la=en&hash=14CF614D916E7CF9D29B17C1B8E4C6BA86DDC1B8> (last visited July 14, 2020).

¹⁵⁴ See CAL. CIV. CODE §1103.2 (West 2020).

¹⁵⁵ CAL. CIV. CODE §1103.2 (West 2020).

the future.¹⁵⁶ While it is based out of Florida, Coastal Risk provides consultation services to properties located in other states as well, and was even hired by a historic church in Norfolk, VA recently to assist in strengthening the church’s resiliency.¹⁵⁷ Coastal Risk examines and explains any potential FEMA designation for a property (for example, whether the property is in a SFHA or not), but its reports go further than this as well.¹⁵⁸ The Coastal Risk report provides risk assessments for heavy rainfall flood risk, poor drainage areas, the likelihood of river flood risk, tidal flooding risk, and storm surge risk (among a few other things) based on data from a variety of national organizations and agencies.¹⁵⁹ This is a critical tool for Floridians especially given that the state does not mandate any flood disclosure requirements (even though Florida is at the greatest risk for inland flooding and is tied with Louisiana for the highest risk of coastal flooding).¹⁶⁰ Although Coastal Risk’s “Flood Scores” tool purports to provide current and future vulnerability for a home or business, it is not clear how seriously climate change or sea level rise is taken into account when crafting the reports.¹⁶¹ The information provided by Coastal Risk can provide a great help to real estate transactions, but it does cost \$49 to order an analysis of a single-family residence, and this must be done by the buyer *before* purchasing.¹⁶²

Beyond for-profit entities, there are several research groups that are based out of, or have partnered with, higher educational institutions in the U.S. in order to inform property buyers and sellers in the nation about flooding risks. Run through Texas A&M University’s Center for Texas Beaches and Shores, the tool “Buyers Be-Where” allows prospective home buyers to enter a street address and receive a flooding risk assessment for the specific property based on federal flood mapping data.¹⁶³ Sam Brody, the Director of the Center for Texas Beaches and Shores,

¹⁵⁶ See *Resilience Begins With Understanding Your Risks*, COASTAL RISK, <https://floodscores.com> (last visited July 14, 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).

¹⁵⁸ See *Flood and Climate Risk Assessment: Sample Report*, COASTAL RISK, <https://mk0floodscores48y68a.kinstacdn.com/wp-content/uploads/2020/01/CRCFNHRA131AltonRdMiamiBeachFL.pdf> (last visited July 14, 2020).

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.

¹⁶¹ See *Resilience Begins With Understanding Your Risks*, COASTAL RISK, <https://floodscores.com> (last visited July 14, 2020).

¹⁶² *Id.*

¹⁶³ *Interactive Web Tools: Buyers Be-Where*, TEX. A&M U. GALVESTON, <https://www.tamug.edu/ctbs/web-tools.html#buyers-be-where> (last visited July 14, 2020) (explaining the tool created by the Center for Texas Beaches and Shores at Texas A&M University at Galveston); *About CTBS*, TEX. A&M U. GALVESTON, <https://www.tamug.edu/ctbs/> (last visited July 14, 2020) (explaining that Buyers Be-Where evaluates a property “along multiple natural and human induced hazards”); see also Katie Riordan, *Can a Web Tool Help Coastal Texans Assess Their Flood Risk? A Professor Thinks So.*, TEX. TRIBUNE (Sept. 27, 2017, 12:00 AM), <https://www.texastribune.org/2017/09/27/can-webtool-help-people-assess-their-flood-risk-professor-thinks-so/>

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

(explaining that at the time of the article, the website’s data was based upon whether “the federal government considers [the property] at risk of flooding,” but also noting an intent to incorporate “more nuanced flood risk data” into the system in the future).

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).]

¹⁶⁷ See *First Street Foundation Mission*, FIRST STREET FOUND., <https://firststreet.org/mission/> (last visited July 14, 2020).

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ *Id.*

¹⁷¹ See *What’s Your Flood Risk?*, FLOODIQ, <https://floodiq.com> (last visited July 14, 2020).

¹⁷² See *id.*

¹⁷³ See *Tools*, ADAPT VIRGINIA, http://adaptva.org/info/tools_fr.html (last visited July 14, 2020).

particular location.¹⁷⁴ This tool was created through the collaboration of Virginia’s DCR and the Virginia Institute of Marine Science (VIMS), and is accessible through ADAPTVA.¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷ However, ADAPTVA importantly acknowledges that “flooding may occur in property outside an SFHA or moderate flood hazard area.”¹⁷⁸

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.¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹ 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.¹⁸² 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.*

¹⁷⁶ ADAPTVA: *Evidence-Based Planning for Changing Climate*, ADAPT VIRGINIA, <http://adaptva.org> (last visited July 14, 2020).

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.

¹⁷⁹ See *Adapt VA Interactive Map*, ADAPT VIRGINIA, http://cmap2.vims.edu/AdaptVA/adaptVA_viewer.html (last visited July 14, 2020).

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² See *supra* Part II.A.

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.”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.”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.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.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.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.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.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.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.¹⁹¹ In all of the studies evaluated by Yeo, the disclosure of a property’s location within a floodplain had

¹⁸³ Austin Perez, *Digital Dialogue No. 2: Improving Flood Risk Disclosure*, WHARTON RISK MGMT. & DECISION PROCESSES CTR.: DIGITAL DIALOGUES (Jan. 2019), <https://riskcenter.wharton.upenn.edu/digital-dialogues/improving-flood-risk-disclosure/>. Perez is the Senior Policy Representative for the National Association of REALTORS®. *See id.*

¹⁸⁴ Robert Scheffy and Boyd Bryan, *After the Flood—Strategies for Protecting the Value of Your Home*, NAT’L L. REV. (Sept. 6, 2016), <https://www.natlawreview.com/article/after-flood-strategies-protecting-value-your-home>.

¹⁸⁵ *Id.*

¹⁸⁶ *See* Chun-Hao Chang et al., *Flood Zone Uncertainty and the Likelihood of Marketing Success*, 19 J. HOUSING RES. 171, 173 (2010) (citing D.M. Harrison, G.T. Smersh, & A.L. Schwartz, *Environmental Determinants of Housing Prices: The Impact of Flood Zone Status*, J. REAL EST. RES. 3-21 (2001)).

¹⁸⁷ *See* Stephen Yeo, *Effects of Disclosure of Flood-Liability on Residential Property Values*, AUSTL. J. EMERGENCY MGMT. 35, 37 (Jan. 2003).

¹⁸⁸ *See generally id.*

¹⁸⁹ *See id.* at 36.

¹⁹⁰ *See id.* at 38-39.

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.¹⁹² 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.¹⁹³ 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.¹⁹⁴

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.¹⁹⁵ 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.¹⁹⁶ It is clear that, in the end, "information asymmetries . . . can lead to costs for both buyers and sellers in an exchange transaction."¹⁹⁷ 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.