

LSU Journal of Energy Law and Resources

Volume 9
Issue 2 *Spring 2021*

5-5-2022

Flip or Flop: Proper Determination of the Valuation for Disaster-Damaged Property in a Changing Climate

Brianne M. Bennett

Repository Citation

Brianne M. Bennett, *Flip or Flop: Proper Determination of the Valuation for Disaster-Damaged Property in a Changing Climate*, 9 LSU J. of Energy L. & Resources (2022)
Available at: <https://digitalcommons.law.lsu.edu/jelr/vol9/iss2/10>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in LSU Journal of Energy Law and Resources by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Flip or Flop: Proper Determination for the Valuation of Disaster-Damaged Property in a Changing Climate

TABLE OF CONTENTS

Introduction	481
I. Background.....	483
A. The Effect of Climate Change in the United States.....	484
B. Current Plans for Property in Danger Zones	486
II. Getting a Fair Deal.....	490
III. Three Tests for Valuation.....	494
A. Cost Approach.....	495
B. Sales Comparison Approach	496
C. Income Approach.....	498
IV. So Many Tests, so Little Assessment.....	499
V. A New Test: Value-in-Use	501
Conclusion.....	504

INTRODUCTION

For many people, the nightmare of a catastrophic natural disaster truly begins when the dust begins to settle.¹ Imagine a home, precious family photos, and family heirlooms being destroyed in a flood, wildfire, hurricane, or some comparable disaster. The homeowners do not have the money to rebuild, so their only option is to sell the property and move somewhere else. They receive a call from a real estate investor offering to buy their home for a fraction of what it was worth pre-disaster, and they sell it because they think they will not get a better price. However, they later find out that after the investors bought their home, the real estate

Copyright 2021, by BRIANNE M. BENNETT.

1. *After the Dust Settles*, THE FREE DICTIONARY, <https://idioms.thefreedictionary.com/after+the+dust+settles> [<https://perma.cc/VHJ6-BGP5>] (last visited Feb. 1, 2021).

investor turned around and sold it to someone else for profit, meaning the home was worth more than the price the original homeowners sold it for.

On the other hand, suppose the homeowners find out that they qualify for a federal buyout program. This program offers to buy their property for fair market value, which is determined to be close to or the same as what their property would have sold for before the disaster.² This deal seems fairer because the homeowners are getting what they believe their property is worth. However, neither of these options are equitable. If a real estate investor can sell a person's home and make a profit, it is worth more than they paid but that does not mean it has the same value that it did before the damage.

After every natural disaster, such as a massive flood, wildfire, or hurricane, there is a call for the federal government to buy out damaged property subjected to repeated disaster exposure.³ Proposed plans for dealing with the long-term impacts on property from natural disasters intensified by climate change include governmental buyouts.⁴ The main issue with these governmental buyout plans is, as demonstrated in the hypotheticals above, how can property impacted by natural disasters be properly assessed? Homeowners seem to expect, and most current buyout plans seem to pay, the fair market value of a home before the damage occurred. Although these plans are Government funded, those funds will only go so far. If the Government is paying pre-disaster prices for these homes, odds are that the money will not go far.⁵ On the other hand, real estate investors who buy up homes in these disaster zones pay a fraction of the pre-disaster value, only to turn around and sell the properties for a profit.⁶ These methods seem to be in direct conflict with the generally

2. See N.J. DEP'T OF ENVTL. PROT., FREQUENTLY ASKED QUESTIONS, SUPERSTORM SANDY BLUE ACRES BUYOUT PROGRAM (Sept. 16, 2015), <http://www.nj.gov/dep/greenacres/pdf/faqs-blueacres.pdf> [<https://perma.cc/H6XN-ZDRP>]; Greenville County "Buys Down the Risk" With Property Acquisition Program, FEMA: MITIGATION BEST PRACTICES, <https://www.greenvillecounty.org/FloodplainAdministration/pdf/GreenvilleCoBuysDowntheRiskweb.pdf> [<https://perma.cc/6766-DXDW>] (last visited Feb. 1, 2021).

3. N.J. DEP'T OF ENVTL. PROT., *supra* note 2; Greenville County "Buys Down the Risk" With Property Acquisition Program, *supra* note 2.

4. See *id.*; N.J. DEP'T OF ENVTL. PROT., *supra* note 2; Greenville County "Buys Down the Risk" With Property Acquisition Program, *supra* note 2.

5. See *id.*; N.J. DEP'T OF ENVTL. PROT., *supra* note 2; Greenville County "Buys Down the Risk" With Property Acquisition Program, *supra* note 2.

6. Konrad Putzier, *A Natural Disaster Wipes Out Your Home. Then the Buyers Come Calling*, WALL STREET J., (July 30, 2019, 10:59 AM), <https://www.wsj.com/articles/the-new-storm-chasers-real-estate-disaster-investors-11564498767?ns=prod/accounts-wsj> [<https://perma.cc/LLV6-PFWC>].

accepted fair market value test, which asks what a “willing buyer would pay in cash to a willing seller at the [current] time.”⁷

This Comment will explore the implications of the fair market value tests used to value property in a market ravaged by increasingly devastating natural disasters. Part I will discuss how damaged or unmarketable property is currently valued and the flaws in these current practices. Part II will examine whether a single currently accepted, uniform meaning to “fair market value” exists, even in situations where no market exists, or if this test is adapted by different courts to suit the needs of a particular case. Part III will address what the Government should be paying for disaster-prone property in this changing market and the different possible tests that may out-perform the “fair market value” test. Finally, this Comment will conclude with a suggestion as to which test may prove to be the most practical.

I. BACKGROUND

Individuals attempting to determine the monetary value of their property post-disaster may find themselves wondering, “What exactly constitutes a natural disaster and how can I determine if my property was damaged by one?” According to the World Health Organization, a natural disaster is “an act of nature of such magnitude as to create a catastrophic situation in which the day-to-day patterns of life are suddenly disrupted and people are plunged into helplessness and suffering, and . . . need food, clothing, shelter . . . and protection against unfavorable environmental factors and conditions.”⁸ Disasters can be organized into four categories according to their source.⁹ First, there are meteorological disasters, commonly called extreme weather, which include storms (tornados, hurricanes, snowstorms, cyclones, etc.), heatwaves, droughts, etc.¹⁰ Second are topological type disasters, which include disasters such as floods, avalanches, and landslides.¹¹ Third are telluric and tectonic disasters, including earthquakes and volcanic disasters.¹² The final type of disasters are accidents, which can range from failure of structures (such as

7. Olivia J. Sher, *A Recipe for Disaster: How Plaintiffs Seeking Compensation for Takings Following Natural Disasters Are Unfairly Burdened*, 93 TUL. L. REV. 419, 423 (2018).

8. M. ASSAR, GUIDE TO SANITATION IN NATURAL DISASTERS 14 (1971).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

dams, mines, or buildings), explosions, fires, collisions, vehicle crashes, to toxins in the water supply.¹³

The magnitude of any type of disaster is measured based upon the disaster's effects under five categories: (1) loss of or damage to human and animal life; (2) disruption of community services; (3) destruction of or damage to private and public property; (4) spread of communicable diseases; and (5) disruption of normal day-to-day activities.¹⁴ The following Section will address the changes in natural disaster frequency in the U.S. in recent years, as many of these devastating disasters are only being made worse by climate change.¹⁵

A. The Effect of Climate Change in the United States

Climate change is defined as a “change in global or regional climate patterns, in particular, a change apparent from the mid-to-late 20th century onward and attributed largely to the increased levels of atmospheric carbon dioxide produced by the use of fossil fuels.”¹⁶ The increase in the levels of greenhouse gases—namely carbon dioxide, which is known for its extreme heat-trapping nature—has caused the Earth's surface temperature to rise beyond the historical norm.¹⁷ The majority of this increase in surface temperatures has occurred in the last thirty-five years, with the five warmest years all occurring since 2010.¹⁸

This rise in surface temperatures, about two degrees during the 20th century, has caused ocean temperatures to rise as well.¹⁹ While a two degree increase may not seem especially high, it is important to know that at the end of the last ice age, the average temperature was only about five to nine degrees lower worldwide than current temperatures.²⁰

This rise in temperatures is causing ice sheets and ice caps to melt worldwide.²¹ Glaciers are shrinking, and ice normally found in rivers and

13. *Id.*

14. *Id.* at 14–15 (services include electricity, gas and other fuels, communications, water supplies, sewerage systems, food supplies, and public health).

15. *Climate Change*, OXFORD ENGLISH DICTIONARY (2d ed.1989); *The Effects of Climate Change*, NASA: GLOBAL CLIMATE CHANGE, <https://climate.nasa.gov/effects/> [<https://perma.cc/LRG6-P2UE>] (last updated Jan. 25, 2021).

16. *Climate Change*, OXFORD ENGLISH DICTIONARY (2d ed.1989).

17. *The Effects of Climate Change*, *supra* note 15.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

lakes is breaking up and melting earlier and earlier each year.²² In the last thirteen years, Greenland's ice sheets have decreased in mass by about 286 billion tons of ice per year, and Antarctica has lost approximately 127 billion tons of ice per year in the same period.²³ Melting ice has caused sea levels to rise nearly eight inches on average globally in the last century.²⁴ This is approximately double the increase in sea level seen in the previous century.²⁵ The rise in sea levels and temperatures causes drastic weather changes that resonate globally.²⁶

As temperatures continue to rise around the world, various parts of the U.S. will suffer drastic changes in climate patterns. The Northeast will see increases in heat waves, heavy downpours, and sea levels.²⁷ These changes will lead to more powerful storms and harsher flooding.²⁸ The North and Southwest will experience reduced streamflow, damaging their water supplies, as well as erosion and increases in ocean acidity.²⁹ The decrease in water levels will cause harsher droughts and increase the strength and severity of wildfires.³⁰ The Midwest will suffer intervals of extreme heat tempered by heavy downpours, and flooding will cause overwhelming damage to much of the country's farmland.³¹ These rapid shifts in temperature will elevate tornado conditions.³² The Southeast will see a decrease in the availability of drinking water, as a great increase in flooding overtakes and contaminates freshwater reserves.³³

Since a method to combat climate change in a way that prevents these disasters from escalating has yet to be developed, some states have begun to develop plans to buy out property in "danger zones."³⁴ These are areas where disasters are already a massive threat. Additionally, the danger in these areas will only continue to grow as climate change further bolsters the frequency and power of natural disasters.³⁵

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. FED. EMERGENCY MGMT. AGENCY, FACT SHEET: ACQUISITION OF PROPERTY AFTER A FLOOD EVENT (Nov. 15, 2018), <https://www.fema.gov/print/pdf/node/339692> [<https://perma.cc/3E8B-YFTJ>].

B. Current Plans for Property in Danger Zones

After a presidentially declared disaster, local officials may request a grant from the state to purchase properties that have been determined to be substantially damaged as a result.³⁶ The decision whether or not to offer these buyouts is then determined by the state, using money from the Federal Emergency Management Agency (FEMA) allocated to it through the Hazard Mitigation Grant Program.³⁷

One example of a state utilizing the buyout program can be seen in South Carolina. Greenville County, South Carolina, has been working on an aggressive property acquisition program since 1995.³⁸ After Hurricane Jerry dropped nearly twenty inches of rain and caused a massive flood event, county officials began working toward flood management practices that came to fruition in 2001.³⁹ The county established a Flood Task Force to examine local flood history including floodwalls, streambank stabilization, and home elevation.⁴⁰ Through watershed studies, the Flood Task Force found that new development of two local creeks upstream was causing severe flooding during storm events.⁴¹ In addition to development plans prohibiting property owners from building less than four feet above elevation and outside of the floodway, the county decided to move forward with acquisitions to protect homes and residents from harm during these flood events.⁴² The county now sets aside approximately \$1 million per year for an annual acquisition, usually between ten and twelve properties per year.⁴³ These buyouts are 100 percent county-funded, so homeowners pay nothing.⁴⁴ To date, nearly eighty-five acres of land have been purchased and turned into open space.⁴⁵

Another plan that utilizes FEMA assistance is the Blue Acres Program developed by the New Jersey Department of Environmental Protection in response to Superstorm Sandy.⁴⁶ Through this program, New Jersey will spend approximately \$300 million in federal disaster recovery funds,

36. *Id.*

37. *Id.*

38. Greenville County "Buys Down the Risk" With Property Acquisition Program, *supra* note 2.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. N.J. DEP'T OF ENVTL. PROT., *supra* note 2.

allowing homeowners to sell Sandy-damaged homes at pre-storm value in flood-prone areas.⁴⁷ The goal is to buy out clusters of homes or whole neighborhoods that will be turned into open space for conservation, reducing the risk of catastrophic flood damage and loss of human life.⁴⁸ The cost to homeowners is minimal, as most funding comes from a combination of federal and state funding, FEMA, the Hazard Mitigation Grant Program, the U.S. Department of Housing and Urban Development, and the Community Development Block Grant Program.⁴⁹

Additionally, proposed land solutions in Colorado include Larimer County's Open Lands Master Plan.⁵⁰ This plan proposes land acquisition as a tool to protect areas sensitive to geologic hazards.⁵¹ These sensitive areas include floodplains, stream corridors, steep slopes, and areas of high wildfire risks.⁵² The advantages of this program include congruent hazard mitigation and natural resource protection, and preventing property damage and loss of life, which will reduce private and public expenditures on disaster recovery.⁵³

The majority of these buyout plans base payments on government takings under the Fifth Amendment.⁵⁴ The Fifth Amendment of the United States Constitution contains the Takings Clause concerning private property, which states that "private property [shall not] be taken for public use, without just compensation" for it.⁵⁵ This means that the Government cannot come in and take someone's property without some form of repayment; if the Federal Government takes private land, the Government must pay "just compensation."⁵⁶ These obligations typically arise when

47. *Id.*

48. *Id.*

49. *Id.*

50. *Land Use Tool: Land Acquisition*, PLANNING FOR HAZARDS: LAND USE SOLUTIONS FOR COLORADO, <https://planningforhazards.com/land-acquisition> [<https://perma.cc/E3C7-UK5M>] (last visited Mar. 31, 2021); *see, e.g.*, OPEN LANDS MASTER PLAN, LARIMER CTY. DEP'T OF NAT. RES. (2015), https://www.larimer.org/sites/default/files/uploads/2017/larimer_county_open_lands_master_plan_2015.pdf [<https://perma.cc/CP9B-YHYV>].

51. *Land Use Tool: Land Acquisition*, *supra* note 50.

52. *Id.*

53. *Id.*

54. N.J. DEP'T OF ENVTL. PROT., *supra* note 2; *Greenville County "Buys Down the Risk" With Property Acquisition Program*, *supra* note 2.

55. U.S. CONST. amend. V.

56. *Just compensation*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Under the Fifth Amendment, a payment by the government for property it has taken under eminent domain – usu. the property's fair market value, so that the owner is theoretically no worse off after the taking.").

the Federal Government takes private property for urban renewal, drainage easements, highways, or other government projects.⁵⁷ This obligation of the Federal Government to pay just compensation for the property is also applied to the states through the Due Process Clause of the Fourteenth Amendment, which creates a safeguard against government interference with property, among other things, outside of sanctioned law.⁵⁸

These proposed buyout plans are not government takings because the Federal Government is not entering these communities and forcibly “taking” the property in return for “just compensation.” Research suggests that all buyout plans have been contracts between the government agency providing the money and individual homeowners selling their property.⁵⁹ These programs are voluntary, posing a minimal burden on the homeowners who choose to participate.⁶⁰ The main similarity between government takings and state buyouts is that both run on the premise of “just compensation,” which is the level of payment that the Federal Government or state is required to give the owner of private property taken for public use under the Fifth Amendment.⁶¹ Generally, what is considered to be “just compensation” in terms of property is Fair Market Value (FMV).⁶² In terms of property acquisition, FMV is generally determined by what a willing buyer would pay to a willing seller for an item in its normal market.⁶³

However, FMV is used for a variety of things and therefore has several definitions that vary slightly from area to area, making it difficult for the

57. *Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 229 (1897).

58. *Id.* at 241.

59. See *Greenville County “Buys Down the Risk” With Property Acquisition Program*, *supra* note 2; N.J. DEP’T OF ENVTL. PROT., *supra* note 2.

60. See *Greenville County “Buys Down the Risk” With Property Acquisition Program*, *supra* note 2; N.J. DEP’T OF ENVTL. PROT., *supra* note 2.

61. *Just compensation*, BOUVIER LAW DICTIONARY (6th ed. 1856).

62. *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 275 (1943); *United States v. Miller*, 317 U.S. 369, 374 (1943); see also *Olson v. United States*, 292 U.S. 264 (1934); *United States v. New River Collieries Co.*, 262 U.S. 341 (1923).

63. Treas. Reg. § 20.2031-1(b) (1965) (Fair Market Value has been defined as “the price at which property would change hands between a willing buyer and a willing seller, [if] neither [were] under any compulsion to buy or sell and both [had] reasonable knowledge of the relevant facts.” The regulation expands upon that definition to state that the FMV cannot be based upon “a forced sale . . . [or] the sale price of an item in a market other than that in which the item would be most commonly sold to the public.”).

courts to properly determine a general FMV test.⁶⁴ Some states have specific statutes defining FMV within their jurisdiction.⁶⁵ A major issue with using the FMV test for disaster-damaged property is that it can vary in different locations.⁶⁶ FMV is meant to be an accurate estimate of home value; however, most current buyout programs are valuing homes at pre-disaster pricing.⁶⁷ This estimate seems to be in direct conflict with accepted FMV Tests.⁶⁸

The FMV definition also implies that an actual market for these properties exists.⁶⁹ The non-equitable discrepancies between what state or federal buyout plans are paying (market price before the damage versus the much lower prices that real estate investors pay) seem to suggest that there is not truly a “fair market” from which to base these prices.⁷⁰ If the real estate investor turns around and sells your home for a profit, then it was worth more to a “willing buyer” than they bought it for, but the government paying full price for a damaged home is not what a “willing buyer” would pay either because they would not want to pay full price for damaged goods. These factors suggest that the various FMV tests commonly applied are insufficient for properly valuing post-disaster damaged properties.⁷¹ It is a serious issue because, with climate change exacerbating natural disasters, the number of disaster-damaged properties

64. John A. Kilpatrick et al., *Valuation of Impaired Property*, in WHEN BAD THINGS HAPPEN TO GOOD PROPERTY, at 3 (2004), <https://www.greenfieldadvisors.com/wp-content/uploads/2014/07/JK-Valuation-of-Impaired-Property-Chapter-6-formatted.pdf> [<https://perma.cc/S9B6-NDYA>].

65. See LA. REV. STAT. § 47:2321 (2019); KAN. STAT. ANN. § 79-503(a) (Westlaw 2020); NEB. REV. STAT. ANN. § 77-112 (Westlaw 2020).

66. See LA. REV. STAT. § 47:2321 (2019); KAN. STAT. ANN. § 79-503(a) (Westlaw 2020); NEB. REV. STAT. ANN. § 77-112 (Westlaw 2020).

67. See *Greenville County “Buys Down the Risk” With Property Acquisition Program*, *supra* note 2; N.J. DEP’T OF ENVTL. PROT., *supra* note 2.

68. Treas. Reg. § 20.2031-1(b) (1965). As stated above, government buyout plans often suggest pre-disaster prices as compensation for disaster properties but this is not “what a reasonable buyer would pay for the property in a normal market.”

69. The Fair Market Value requires that the “sale price of an item [cannot be] in a market other than that in which the item would be most commonly sold to the public.” Treas. Reg. § 20.2031-1(b).

70. See *Greenville County “Buys Down the Risk” With Property Acquisition Program*, *supra* note 2; N.J. DEP’T OF ENVTL. PROT., *supra* note 2; Putzier, *supra* note 6.

71. Kilpatrick et al., *supra* note 64, at 3.

and homeowners looking for a way to sell their damaged properties is only going to increase.⁷²

II. GETTING A FAIR DEAL

Since FMV is intended to reflect what a willing buyer would pay a willing seller of property, a property's value will naturally fluctuate with the market.⁷³ Factors that cause fluctuations in the housing market and declines in property prices can range from higher prices to interest rates, causing demand to fall because of environmental factors.⁷⁴ When the housing market declines or fails altogether, property values experience a decline because of a "cooling housing market."⁷⁵ However, while the housing market generally fluctuates, it can be drastically altered by natural disasters.⁷⁶ After natural disasters, real estate prices tend to drop in the immediate area, and even sometimes in the surrounding areas, while prices rise in unaffected areas.⁷⁷ This phenomenon occurs because people choose homes based on their amenities and location.⁷⁸ Most often, natural disasters destroy the property and the community around it.⁷⁹ As natural disasters increase in severity and occurrence, danger zones will only grow, and people do not want to live in areas constantly plagued by natural disasters and post-disaster construction.⁸⁰ The shifts in climate are so severe that experts suggest that more than 13 million Americans will have to relocate before the end of the century due to rising sea levels and more frequent damaging storms.⁸¹

Following several infamous natural disasters, property values saw massive changes. The property values in Baton Rouge, Louisiana, took a

72. See *Greenville County "Buys Down the Risk" With Property Acquisition Program*, *supra* note 2; N.J. DEP'T OF ENVTL. PROT., *supra* note 2.

73. *Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, 104 F. Supp. 3d 441, 539 (S.D.N.Y. 2015).

74. *Id.*

75. *Id.* at 548.

76. Eman Hamed, *How the Wildfires Will Affect California Real Estate Investors*, MASHVISOR (Nov. 29, 2018), <https://www.mashvisor.com/blog/wildfires-california-real-estate-investors/> [<https://perma.cc/2QBM-SYLA>].

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Prashant Gopal, *America's Great Climate Exodus is Starting in the Florida Keys*, BLOOMBERG GREEN (Sept. 20, 2019), <https://www.bloomberg.com/news/features/2019-09-20/america-s-great-climate-exodus-is-starting-in-the-florida-keys> [<https://perma.cc/XWP5-7FRQ>].

hit after the massive flooding in 2016.⁸² Following these August floods, the East Baton Rouge Parish Assessor's Office recalculated home values in and around the city for tax assessments.⁸³ While properties spared from the floods saw little to no change in property values, flooded properties saw a devastating loss in value.⁸⁴ For example, during these floods, a Target Superstore on Millerville Road, saw a \$3.2 million loss in FMV after taking on 29 inches of water.⁸⁵

In New Orleans, Hurricane Katrina decimated half of the housing market.⁸⁶ As a result of having fewer properties, prices in the housing market rose 17 percent following the storm, only to drop 10 percent in 2007.⁸⁷ However, even today many still struggle to find affordable housing in New Orleans due to blighted homes and properties that were never rebuilt following Katrina.⁸⁸

Rental prices shot up dramatically in Northern California following the 2017 wildfires which destroyed 6,500 structures, most of which were rental properties.⁸⁹ Housing costs in some areas rose as much as 30 percent.⁹⁰ With vacancies at 1.5 percent in some counties, there is

82. Andrea Gallo, *Data on Tax Assessments, Flood Losses for Every East Baton Rouge Property*, ADVOCATE (Jan. 23, 2017, 1:08 PM) https://www.theadvocate.com/louisiana_flood_2016/article_542aa8a6-e19a-11e6-a796-57548584d8e0.html [<https://perma.cc/Q7BG-V2YS>].

83. *Id.*

84. *Id.*

85. *EBRP Tax Roll*, OPEN DATA BR, <https://data.brla.gov/Housing-and-Development/EBRP-Tax-Roll/myfc-nh6n/data> [<https://perma.cc/4YXE-KHCX>] (search for "2001 Millerville Rd" and compare 2015 improvement values to 2016 for Property Number 2231638) (last visited Mar. 31, 2021).

86. Mark Fleming, *What the Post-Katrina Real Estate Market Can Tell Us About Hurricane Harvey's Impact on Houston*, FIRST AM. (Sept. 8, 2017), <https://blog.firstam.com/economics/what-the-post-katrina-real-estate-market-can-tell-us-about-hurricane-harveys-impact-on-houston> [<https://perma.cc/9DT3-3GAF>].

87. *Id.*

88. Gillian B. White, *A Housing Crisis Amid Tens of Thousands of Abandoned Homes*, ATLANTIC, (Aug. 20, 2015), <https://www.theatlantic.com/business/archive/2015/08/new-orleans-blight-hurricane-katrina/401843/> [<https://perma.cc/S7ZF-JG5N>].

89. Alan Greenblatt, *After Wildfires, Housing Crisis Complicates California's Rebuild*, GOVERNING (Apr. 2018), <https://www.governing.com/topics/transportation-infrastructure/gov-california-wildfires-homes-destroyed.html> [<https://perma.cc/9CTW-VKVD>].

90. *Id.*

practically nowhere to live.⁹¹ The frequency and severity of wildfires in California is only increasing. In 2018, California saw the most destructive wildfire season on record, prior to the 2020 season, as large wildfires erupted across the state, burning 1,665,746 acres, the largest acreage burn on record.⁹² Thousands of properties were destroyed, and those who hoped to rebuild could not afford to do so due to poor insurance payouts.⁹³ Even real estate investors who commonly buy up disaster-destroyed properties are hesitant to enter the California market.⁹⁴ However, some investors view these properties as the ultimate opportunity to expend minimal effort and obtain maximum profit.

Following the destruction caused by Hurricanes Michael in Florida and Harvey in Texas, real estate investors like David Dey began searching for properties to buy.⁹⁵ Within months of the storms, Dey and other investors bought properties in the disaster zones from individuals who either no longer wanted to live in that location or could not afford to rebuild.⁹⁶ Known as “disaster investors,” real estate investors like Dey buy up properties and earn profits from hurricane, wildfire, tornado, and other disaster-destroyed properties. By purchasing these homes for significantly less than they are worth pre-disaster, on average these investors turn a \$10,000–\$20,000 profit on a property, even without conducting any restoration efforts following the purchase.⁹⁷

These disaster investors freely admit that they use every tactic they know to get properties for the lowest prices possible.⁹⁸ A disaster investor in Panama City, Florida admittedly tries to “establish a connection, asking [the homeowners] about the people in the photos on the walls of what is left of their homes, and encourag[ing] them to sign a pre-written contract with an offer already listed.”⁹⁹ This investor says that the trick is to get the homeowners “at that low price right on the spot” so the homeowners do not have time to look for higher offers.¹⁰⁰ Ideally, people should be encouraged to move away from these areas as climate change is making them increasingly dangerous.¹⁰¹ If real estate investors are continuously

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Putzier, *supra* note 6.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *The Effects of Climate Change, supra* note 15.

buying and selling these properties, it is perpetuating a dangerous market that can result in massive amounts of property damage and loss of human life.¹⁰²

The few government buyout plans that exist for these natural disasters, however, tend to have the opposite problem.¹⁰³ Taxpayer buyouts in the areas highly affected by natural disasters will buy out the properties, bulldoze what remains of any structures, and turn it into green space.¹⁰⁴ This green space is a useful buffer against storms and flooding.¹⁰⁵ The big issue is that these programs are supposed to use a FMV test to determine the worth of the homes.¹⁰⁶ To apply the FMV test, there must be an actual market to base the valuation of the property on; assessors cannot invent a “hypothetical market” from which to base the assessment.¹⁰⁷ While these properties do have potential buyers, the Government and real estate disaster investors, these buyers do not create an equitable market from which to apply the FMV test.¹⁰⁸ While the wording of the Constitution does not specifically state that the FMV test must be equitable to the seller, it does seem to suggest that what the seller should receive for the property is what the property is truly worth to a buyer at the time of the sale.¹⁰⁹ It is inequitable for buyers to receive less just because one side is trying to earn a profit, but it is also inequitable for a buyer to receive exponentially more just because the test is being applied incorrectly.

Although not completely hypothetical, the market is not necessarily a real one either.¹¹⁰ While disaster investors offer the lowest prices they

102. *Id.*; Putzier, *supra* note 6.

103. *See Greenville County “Buys Down the Risk” With Property Acquisition Program*, *supra* note 2; N.J. DEP’T OF ENVTL. PROT., *supra* note 2.

104. Gopal, *supra* note 81.

105. *Id.*

106. *See Greenville County “Buys Down the Risk” With Property Acquisition Program*, *supra* note 2; N.J. DEP’T OF ENVTL. PROT., *supra* note 2.

107. Treas. Reg. § 20.2031-1(b) (1965).

108. *See id.*; Putzier, *supra* note 6. The government is offering to pay the full price of these homes while the disaster investors are on the opposite end of the line, offering homeowners way less than the property is worth. *Id.*

109. *See* Treas. Reg. § 20.2031-1(b) (stating that the Fair Market Value is “the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts,” this language suggests that both the seller and buyer are aware of what the property is worth to them and come to an equitable agreement of valuation).

110. The only two potential buyers are the Government and these disaster investors. A regular person shopping the housing market is not looking for a home that has been destroyed that they now have to rebuild.

think a homeowner will accept while still turning a profit for themselves, the Government values the properties at pre-disaster FMV.¹¹¹ The Government is overpaying because it is obvious that the homes are not worth what they were before the damage.¹¹² As a policy matter, the Government wants to buy out these properties at higher prices to incentivize homeowners to sell and move out of the disaster areas.¹¹³ However, the true issue is that the Government is unsure how to properly value these properties and, rather than addressing the issue, prefers to skirt around the question by offering pre-damage restitution instead.¹¹⁴

III. THREE TESTS FOR VALUATION

Very little case law exists on how to value disaster-damaged properties, and what does exist is far from uniform because most involve insurance law which varies from case to case.¹¹⁵ However, cases that touch on damaged property and focus on impairments, such as contamination or tax adjustments post-natural disasters, provide an analogous situation.¹¹⁶ Determining the impact an impairment has on real property requires an assessment, which can be used to determine FMV in a sale situation.¹¹⁷ Additionally, if the Government will be buying out these properties, the most accurate way to know what to pay would be with a general, standardized assessment. Appraisal methods in the U.S. are governed by

111. See *Greenville County "Buys Down the Risk" With Property Acquisition Program*, *supra* note 2; N.J. DEP'T OF ENVTL. PROT., *supra* note 2.

112. All the government buy-out plans are paying full price pre-disaster for homes that have been destroyed or damaged beyond repair and certainly are not worth that amount. Maybe they are paying this amount as an incentive for people to take the buyouts and move away from these areas, but it is not financially feasible for the government to pay this much for every person's property.

113. See *Greenville County "Buys Down the Risk" With Property Acquisition Program*, *supra* note 2; N.J. DEP'T OF ENVTL. PROT., *supra* note 2.

114. See *Greenville County "Buys Down the Risk" With Property Acquisition Program*, *supra* note 2; N.J. DEP'T OF ENVTL. PROT., *supra* note 2.

115. See *Wurzberg v. Kootenai Cty.*, 308 P.3d 936, 938 (Idaho Ct. App. 2013); *B.P. Oil Co. v. Bd. of Assessment Appeals*, 633 A.2d 1241, 1241 (Pa. Commw. Ct. 1993); *Schmidt v. Utah State Tax Comm'n*, 980 P.2d 690, 691 (Utah 1999).

116. *Schmidt*, 980 P.2d at 691. Property valuations in these cases are analogous to a proper natural disaster property evaluation because oftentimes contamination happens to a property and is completely out of the control of the resident, but they are forced to suffer the consequences of the contamination in terms of decreased property value.

117. Kilpatrick et al., *supra* note 64, at 1.

the Uniform Standards of Professional Appraisal Practice (USPAP).¹¹⁸ These standards were developed in the 1990s by the Appraisal Standards Board and have since been adopted by all states as a matter of law.¹¹⁹ These standards set aside three approaches of determining property value which will be examined through case law to demonstrate their functionality and effectiveness for property valuation.¹²⁰

A. Cost Approach

Under the Cost Approach, an appraiser begins with an estimate of the value of the land as if it were vacant, but ready for construction.¹²¹ The appraiser then estimates the cost of constructing improvements identical to what is currently there (reproduction cost).¹²² Finally, the appraiser estimates three categories of depreciation: (1) physical depreciation (wear and tear to the structure or contamination/construction defects); (2) functional depreciation (absence of necessary amenities); and (3) economic depreciation (effect of uncontrollable external forces).¹²³ The final value of the property is determined to be the total value of the property plus improvements, minus any depreciation.¹²⁴ The Cost Approach is the simplest of the three property valuation approaches, even though depreciation can be hard to calculate.¹²⁵

In the case of *B.P. Oil Company v. Board of Assessment Appeals*, B.P. Oil (“the Corporation”) challenged the property tax assessment of its land by the assessment board (“the Board”).¹²⁶ The Corporation owned a truck stop in Jefferson County, Pennsylvania.¹²⁷ In 1992, the Board determined the property had a FMV of \$2.4 million.¹²⁸ The Corporation contested the valuation, stating that the FMV should be reduced due to environmental contamination.¹²⁹ The Corporation presented evidence that the groundwater and soil on the property had been contaminated by a fuel leak

118. *Id.* at 3.

119. *Id.* at 1.

120. *Id.* at 3.

121. *Id.* at 4.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 6.

126. *B.P. Oil Co. v. Bd. of Assessment Appeals*, 633 A.2d 1241, 1241 (Pa. Commw. Ct. 1993).

127. *Id.*

128. *Id.*

129. *Id.* at 1242.

from underground storage tanks and pipelines.¹³⁰ This evidence indicated that the land was contaminated with toluene, ethylbenzene, benzene, and polynuclear aromatics.¹³¹ The Corporation introduced evidence that FMV is commonly reduced based on environmental factors.¹³² Additionally, the Corporation elicited expert testimony that it would take five years and \$653,370 to clean up the contamination.¹³³

Finally, the Corporation introduced the testimony of a real estate appraiser who, using the Cost Approach to determine FMV, testified that “fair market value of the property is calculated by subtracting the cost to cure the contamination from the value the property would have if it were not contaminated.”¹³⁴ The appraiser estimated the property value under the Cost Approach to be \$1,586,833 minus the estimated \$653,370 for decontamination, bringing the proper valuation to \$933,630.¹³⁵ The court found in favor of the Corporation, as the Board's only testimony was that of the assistant assessor for Jefferson County, Pennsylvania who stated he did not consider environmental factors in his assessment.¹³⁶ The court held that the Board's valuation of \$2.4 million was excessive when the environmental contamination was considered.¹³⁷ The court vacated the tax assessment and remanded the case for an assessment that was consistent with the Corporation's evidence.¹³⁸

B. Sales Comparison Approach

The Sales Comparison Approach is most frequently used for single-family residences.¹³⁹ This approach carries special weight in these circumstances, since the greatest concern in these increasingly dangerous disaster zones is the families that live in them.¹⁴⁰ A Sales Comparison Approach is based on equating the sales price of a comparable home in

130. *Id.*

131. *Id.*; *BTEX Chemicals*, QUEENSL. GOV'T, DEP'T OF ENV'T & SCI., <https://environment.des.qld.gov.au/management/activities/non-mining/fracking/btex-chemicals> [<https://perma.cc/W9GV-3B85>] (last updated May 30, 2012) (listing chemicals found in crude oil and known to have caused cancer and other health issues).

132. *B.P. Oil Co.*, 633 A.2d at 1242.

133. *Id.* at 1243.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. Kilpatrick et al., *supra* note 64, at 4.

140. *Id.*

terms of lot size, location, condition, amenities, etc. to the “subject” property.¹⁴¹ When utilizing this test, assessors employ a sales adjustment grid which accounts for the variations in the above categories, allowing for consistent adjustments.¹⁴² The Sales Comparison Approach is perhaps the most accurate test of FMV since it generally tests the current value of the property in the market.¹⁴³ This test is very useful for valuing homes but bears little weight in terms of valuation for business or rental properties.¹⁴⁴

In *Wurzburg v. Kootenai County*, the plaintiff owned a property interest in a vacant waterfront property in Kootenai County, Idaho.¹⁴⁵ It was undisputed that the property was an unbuildable parcel, subject to a reduction in value.¹⁴⁶ The parties disagreed on the amount of this reduction; the plaintiff argued that the reduction should be higher than what the county assessor stated.¹⁴⁷ The Kootenai County Assessor’s office applied a Sales Comparison Approach to the valuation, which involves valuing property based on the sales price of comparable parcels.¹⁴⁸ Neither party disputed the use of the Sales Comparison Approach.¹⁴⁹ Instead, the plaintiff argued that the approach was improperly applied since it did not reflect FMV because the county assessor did not go back far enough in time.¹⁵⁰ Accepting the Sales Comparison Approach as an approved method for determining FMV, and finding that Kootenai County provided sufficient evidence that the county assessor’s application of the test met State Tax Commission rules as well as national standards, the court ruled in favor of Kootenai County.¹⁵¹

141. *Id.* (The “subject property” is the property that is being valued through this method.).

142. *Id.*

143. *Id.*

144. *Id.* at 6.

145. *Wurzburg v. Kootenai Cty.*, 308 P.3d 936, 938 (Idaho Ct. App. 2013).

146. *Id.*

147. *Id.* (The plaintiff argued the reduction for 2010 should have been 2/3 of the property value, equaling \$76,350, while the county assessor placed the reduction at 1/2, equaling \$113,790. In 2011 both parties applied the same reduction percentage, equaling a \$96,912 valuation for the county assessor and a \$63,648 valuation for the plaintiff.).

148. *Id.* at 941.

149. *Id.*

150. *Id.* at 942.

151. *Id.* at 948.

C. Income Approach

Finally, the Income Approach is based on the income that the property will bring in.¹⁵² Simplified, the Income Approach analyzes a property's ability to generate income and converts that into an indication of value.¹⁵³ While useful for business and rental properties, the Income Approach is difficult to apply to residential properties because these types of property do not produce "income" unless sold.¹⁵⁴ Perhaps the most difficult way to value property, the Income Approach is further split into three different methods: (1) Gross Rent Multiplier; (2) Income Capitalization; and (3) Discounted Cash Flow.¹⁵⁵

In *Salt Lake City Southern Railroad Co. v. Utah State Tax Commission*, the petitioner, Salt Lake City Southern Railroad Company ("the Company"), sought review of the Utah State Tax Commission's ("the Commission") 1994 valuation of the petitioner's property.¹⁵⁶ The Commission's appraiser assessed the Company's property as having a FMV of \$1 million.¹⁵⁷ The Commission's appraiser employed the Income Approach to determine the property's value by computing a present value based upon an anticipated income of the property, including income derived from work performed on the property, a sale, or rental income.¹⁵⁸ Based upon the property's operational income as a railroad stop, the property value was determined to be \$1 million.¹⁵⁹ The Commission's appraiser called this a "unitary appraisal" since the valuation factored in FMV plus the property's operational value.¹⁶⁰ The Company asserted that the use of the Income Approach was improper because an easement on the property made the property intangible, rather than real property.¹⁶¹ Thus,

152. Kilpatrick et al., *supra* note 64, at 5.

153. *Cascade Court Ltd. P'ship v. Noble*, 20 P.3d 997, 999 n.6 (Wash. Ct. App. 2001).

154. Kilpatrick et al., *supra* note 64, at 6.

155. *Id.* at 5 (The Gross Rent Multiplier method is used to appraise rental properties and shows that they typically sell for a multiple of the gross monthly rent; the Income Capitalization method relies on an estimate of the net operating income generated by the property; the Discounted Cash Flow Technique is used to analyze subdivisions and returns for construction projects.).

156. *Salt Lake City S. R.R. Co. v. State Tax Comm'n*, 987 P.2d 594, 595 (Utah 1999).

157. *Id.* at 596.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

the Cost Approach should have been used.¹⁶² However, the Court determined that the Commission's appraisal of the property was proper because this was the only method that could accurately calculate the value of the working business property, regardless of the easement.¹⁶³

While all of these tests are useful in certain circumstances, none of them work as a generalized test for property valuation because they are all too specified and not applicable to all types of property.¹⁶⁴ As stated above, FMV is "the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts."¹⁶⁵ This test is not the test employed by any of the currently accepted appraisal methods.¹⁶⁶ It seems to suggest that the FMV test as defined by the Treasury Regulation is rarely applied, an idea reinforced by the wide discrepancies in the valuations of properties by real estate investors who are buying up disaster-damaged homes.¹⁶⁷

IV. SO MANY TESTS, SO LITTLE ASSESSMENT

Rather than altering one of the accepted valuation approaches or devising a new approach, the Government simply values property at a pre-disaster-damage price.¹⁶⁸ This is neither an accurate assessment of the worth of the property, nor is it cost-effective for the Government.¹⁶⁹ Programs designed this way will quickly run out of funding while thousands of families trying to move away from increasingly dangerous disaster zones are left scrambling to have their homes bought with maximum payout and minimal effort on their part.¹⁷⁰ The Great Climate Retreat has already begun in Houston, New Orleans, New York, and the

162. *Id.* at 598.

163. *Id.* at 600.

164. Kilpatrick et al., *supra* note 64, at 4.

165. Treas. Reg. § 20.2031-1(b) (1965).

166. Kilpatrick et al., *supra* note 64, at 4.

167. Putzier, *supra* note 6. These disaster investors will offer the absolute lowest price they can for these properties to make a profit rather than appraising the property and paying homeowners what it is worth. *Id.*

168. See Greenville County "Buys Down the Risk" With Property Acquisition Program, *supra* note 2; N.J. DEP'T OF ENVTL. PROT., *supra* note 2.

169. See Greenville County "Buys Down the Risk" With Property Acquisition Program, *supra* note 2; N.J. DEP'T OF ENVTL. PROT., *supra* note 2.

170. See Greenville County "Buys Down the Risk" With Property Acquisition Program, *supra* note 2; N.J. DEP'T OF ENVTL. PROT., *supra* note 2.

Florida Keys.¹⁷¹ Natural disaster damage in these areas and overly expensive insurance with a poor return has left homeowners in these areas stranded without enough money to move or rebuild.¹⁷²

The pricing for most of the federal buyout plans seems to be in direct dispute with what the Constitution says the Government should pay for property.¹⁷³ Though not technically called a “taking,” and therefore “just compensation” as defined under the Fifth Amendment is not necessarily applicable, the use of FMV suggests that the Government equates these voluntary buyouts to Government takings.¹⁷⁴ This process makes sense because, while voluntary, these buyouts involve the Government buying private land, and then turning it into open public space.¹⁷⁵ It is the very definition of a Government taking.¹⁷⁶ As stated before, the generally accepted test for “just compensation” is FMV.¹⁷⁷ However, by valuing disaster-damaged property at pre-disaster FMV, the Government is not using FMV at all because no true buyer is going to willingly pay the pre-damage price for this property.¹⁷⁸

When correctly applied, FMV is calculated at the time of the taking.¹⁷⁹ Therefore, to truly use FMV, the Government should send in assessors to apply one of the accepted tests to revalue the property after disaster strikes.¹⁸⁰ There are, however, problems with this which may explain why the Government has elected to simply apply pre-disaster-damage FMV, most often taken from a previous property tax assessment.¹⁸¹ Disaster-damaged properties can be difficult to access and may even be dangerous, making it hard for assessors to enter the property to properly assess the

171. Gopal, *supra* note 81 (The “Great Climate Retreat” is a massive movement of individuals moving out of areas bombarded by natural disasters that are only growing worse due to climate change.).

172. *Id.*

173. Treas. Reg. § 20.2031-1(b) (1965).

174. U.S. CONST. amend. V.

175. See *Greenville County “Buys Down the Risk” With Property Acquisition Program*, *supra* note 2; N.J. DEP’T OF ENVTL. PROT., *supra* note 2.

176. *Taking*, BLACK’S LAW DICTIONARY (10th ed. 2014). (“3. To acquire (property) for public use by eminent domain; (of a governmental entity) to seize or condemn property.”).

177. *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 275 (1943); *United States v. Miller*, 317 U.S. 369, 374 (1943); see also *Olson v. United States*, 292 U.S. 264 (1934); *United States v. New River Collieries Co.*, 262 U.S. 341 (1923).

178. Sher, *supra* note 7, at 433.

179. Treas. Reg. § 20.2031-1(b) (1965).

180. *Id.*

181. N.J. DEP’T OF ENVTL. PROT., *supra* note 2.

damage.¹⁸² Additionally, of the accepted assessment tests listed under the USPAP, only the Cost Approach is suitable for assessing damaged property, because the Cost Approach is the only valuation method that accounts for depreciation.¹⁸³

The very ideas of just compensation and FMV are based on a principle of equity.¹⁸⁴ These are designed to ensure that the Government, when buying out property, does not cheat an individual out of the money the individual deserves.¹⁸⁵ However, it is not equitable for the Government to pay pre-disaster value for a home that has been damaged.¹⁸⁶ This equates to overcompensation, and this approach will fail once funds dry up.¹⁸⁷ Since none of the currently accepted valuation tests properly evaluate disaster-damaged property, the only true equitable solution is to use a different test, one designed to build a base value and take into account how the property will be used to determine what the property is worth.¹⁸⁸

V. A NEW TEST: VALUE-IN-USE

The only way to get an accurate valuation of disaster-damaged properties is to apply a new test that not only accounts for the depreciation to the property, but also accounts for the value of the property as a source of profit in order to account for price value adjustments in both residential and commercial property.¹⁸⁹ To account for this, a proper test would be one that combines the Cost Approach test from the USPAP with a test that evaluates the property as well as any structures on the land.¹⁹⁰

A property's Value-in-Use is "the value of a property assuming specific use, which may or may not be the property's [h]ighest and [b]est [u]se, on the effective date of appraisal."¹⁹¹ This value may or may not be

182. Kilpatrick et al., *supra* note 64, at 3.

183. *Id.*

184. See U.S. CONST. amend. V; Treas. Reg. § 20.2031-1(b).

185. Sher, *supra* note 7, at 425.

186. It is not equitable to pay full value for something that is broken. No person would pay full market price for a broken television, so why should the Federal Government pay full market value for a home that is damaged or unlivable?

187. See Sher, *supra* note 7, at 433; *Greenville County "Buys Down the Risk" With Property Acquisition Program*, *supra* note 2; N.J. DEP'T OF ENVTL. PROT., *supra* note 2.

188. *Stinson v. Trimas Fasteners, Inc.*, 923 N.E.2d 496, 501 (Ind. T.C. 2010).

189. Kilpatrick et al., *supra* note 64, at 3.

190. *Id.*

191. Charlie Elliott, *Value in Use Appraisal, Addressed*, ELLIOTT (Mar. 29, 2018), <https://www.elliottco.com/publications/columns/value-in-use-appraisal-addressed/> [<https://perma.cc/MY27-T2EK>] (citing *Value-in-use*, DICTIONARY OF

equal to market value, but the factors on which it is based are fundamentally different.¹⁹² For example, if you own a farm on a parcel of land in an area where the parcels around yours are being bought up for a major construction project, it is likely that the market value will be higher than the Value-in-Use.¹⁹³ Value-in-Use is a valuation of the property for its use at the current time of the sale to the purchaser.¹⁹⁴ That means that, even though the original use of the property may no longer be applicable, the purchaser obviously intends it to be of some use and therefore it still holds some value.

Value-in-Use is a form of appraisal that is currently used in the world of real estate to value property when the property is obtaining income or additional value at a rate that would make the market value of the property, reflected by the value of a similar property in a similar area, non-representative of the actual property value.¹⁹⁵ It can also be a vital appraisal tool for properties where there is not always a suitable property of comparable value to help determine the market value of the property.¹⁹⁶ In practice, it is almost impossible to find one property that is truly comparable to another.¹⁹⁷

Additionally, market value, which is often used to determine FMV, typically presupposes that the property will remain in its existing use and therefore retain its current use and value.¹⁹⁸ That is simply not a practical valuation for property that has been ravaged by natural disasters. However, Value-in-Use takes into account the purpose of the property with the value of possible future use, along with any costs that might impede that use.¹⁹⁹ That makes it perfect for valuing disaster-damaged property that lacks a true market due to the absence of viable purchasers. The following case demonstrates how Value-in-Use is implemented in a residential situation.

REAL ESTATE APPRAISAL (6th ed. 2015)). Additionally, *highest and best use* is always the use that would produce the highest value for a *property*, regardless of its current use.

192. *Id.*

193. The amount that the individuals purchasing the land for the construction project would pay for the property is likely more than the profit earned by a small farm in a developing area.

194. *Stinson v. Trimas Fasteners, Inc.*, 923 N.E.2d 496, 501 (Ind. T.C. 2010).

195. Elliott, *supra* note 191.

196. John L. Gadd, *The Opinion of the College on Defining Value in Use*, VALUATION, June 1989, at 13, 13.

197. *Id.*

198. *Id.* at 17.

199. *Id.*

In *Schmidt v. Utah State Tax Commission*, the Supreme Court of Utah addressed a challenge to the assessed value of residential property owned by the plaintiffs in Sandy, Utah.²⁰⁰ The assessment was conducted by the Utah State Tax Commission (“the Commission”). Additionally, the Salt Lake County Board of Equalization (“the Board”) sought review of the Commission’s denial of a request for reconsideration of the property valuation.²⁰¹ The Commission valued the property at \$789,370, which an independent hearing officer for the Board reduced to \$706,000.²⁰² The Schmidts argued that the property should be valued at \$0 due to environmental contamination.²⁰³ As support, the Schmidts entered evidence to show that, based on three ground samples taken from various places on the property, the Utah Department of Environmental Quality (UDEQ) found the land was contaminated with high levels of lead and arsenic that warranted cleanup or environmental controls.²⁰⁴ The Schmidts also introduced evidence from an environmental cleanup company, Sitex Environmental, Inc., which estimated that the cost of cleaning up the property would be \$1,042,252.05.²⁰⁵ An independent appraisal was also introduced, valuing the property at negative \$334,000.²⁰⁶

The Board submitted evidence from the Salt Lake County Assessor’s office valuing the property at the above \$706,000, but then applied the standard practice of a twenty percent reduction to account for the contamination, and concluded a property value of \$563,900.²⁰⁷ The Board also contested the estimated cleanup costs, saying that the three samples were insufficient to show that the entire property was contaminated and that, while the letters from the UDEQ suggested cleanup, the letters did not mandate it.²⁰⁸ The Commission argued that if the property had a negative value, that would suggest the property was uninhabitable.²⁰⁹ Considering the Schmidts and their family lived on the property with no adverse effects, the property was clearly habitable.²¹⁰ The Commission instead applied a Value-In-Use test that treated the land and home

200. *Schmidt v. Utah State Tax Comm’n*, 980 P.2d 690, 690 (Utah 1999).

201. *Id.*

202. *Id.*

203. *Id.* at 690–91.

204. *Id.* at 691.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

separately.²¹¹ The Commission valued the property at \$0 as a result of the contamination but valued the home, which was still of use, at \$398,166 using the standard cost approach.²¹² Combining the two, the Commission determined that the total value of the property was \$398,166.²¹³ The Court found that the Commission's valuation of the property was proper.²¹⁴

The Value-In-Use test is the proper way to calculate the FMV of disaster-damaged property as it demonstrates the ability of property to satisfy a particular need at a particular time. By taking into account the value of the property and the value of any remaining structures on the land, this result is the most equitable price for the property. By applying the Value-in-Use test, the Government would pay homeowners the actual property worth.²¹⁵ Homes and structures on the property are unlikely to have much value to Government buyers, since in most buyout plans, these buildings will be bulldozed and the property will be turned into green space.²¹⁶ However, the underlying land is usually not contaminated in such a way that would damage its marketability, therefore the land itself still has value.²¹⁷ By paying homeowners the price of the land plus a nominal fee for any structures on the property, the Government and homeowners can reach an equitable solution that allows the highest number of homeowners to receive buyout opportunities without bankrupting Government buyout resources.

CONCLUSION

Rising sea levels, unprecedented droughts, and superstorms of increasing regularity ensure that U.S. citizens will soon have to either uproot their lives and move or suffer the consequences.²¹⁸ However, the lack of equitable options for these individuals make keeping their homes and families safe nearly impossible. When the two most viable options are to either sell your home to a real estate disaster investor for less than a

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 693.

215. *Stinson v. Trimas Fasteners, Inc.*, 923 N.E.2d 496, 501 (Ind. T.C. 2010). The current value of the property in use would be equitable to the current value of a damaged property. It is a more equitable way to determine the value the property has to the buyer at time of purchase.

216. *See Greenville County "Buys Down the Risk" With Property Acquisition Program*, *supra* note 2; N.J. DEP'T OF ENVTL. PROT., *supra* note 2.

217. Kilpatrick et al., *supra* note 64, at 7.

218. *The Effects of Climate Change*, *supra* note 15.

fraction of what it is worth, or to sell your home to the Government for an exorbitant amount, everyone loses. Individuals either get much less than they should, or they get too much which ensures Government reserves for these buyouts do not last long enough for everyone to benefit.

Federal Government buyouts are preferable to post-disaster real estate investor purchases because the Government pays more.²¹⁹ Government buyouts encourage people to move out of these disaster-prone areas, rather than real estate purchases which support a continued real estate market in these dangerous areas. Regardless, proper property valuation is a necessity. The Value-in-Use test is the only test that values the property at its proper value, taking into account the value of the property before the damage, reducing for depreciations, but also adding the use the property has and will have in the future. Utilizing the Value-In-Use test will ensure that citizens receive a sufficient amount for their property, without draining Government funds for these buyouts.

*Brianne M. Bennett**

219. See *Greenville County "Buys Down the Risk" With Property Acquisition Program*, *supra* note 2; N.J. DEP'T OF ENVTL. PROT., *supra* note 2.

* J.D./D.C.L. 2021, Paul M. Hebert Law Center, Louisiana State University. The author extends sincere gratitude to everyone who played a role in her writing process, namely: her faculty advisors, Professors Edward Richards and Marlene Krousel; the Volume VIII Editorial Board, particularly Katelyn Bayhi and Laura Marcantel; and the Volume IX Junior Associates and Editorial Board. Finally, the author would like to dedicate this Comment to her family and close friends for their endless patience, encouragement, and support during each phase of the writing process.