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How New Jersey Can Mitigate Climate Change on its Coasts Through Nuisance-Based Restrictions on Development

Jennifer Garster *

I. Introduction

New Jersey's 127 miles of coastline¹ play a vital role in the state's economy and its residents' way of life. While coastal communities have a long history of storms and flooding, sea level rise and changes in hurricane activity create new risks. This vulnerability demands climate change adaptation policies. Notwithstanding the importance of New Jersey's coastline and its vulnerability, the state is legally ill-equipped to handle the threats of global warming.²

According to New Jersey's Department of Environmental Protection (NJDEP), much of the state's densely populated coastal areas are vulnerable to the effects of climate change, including flooding, increasingly frequent storms, erosion, and sea level rise.³ In New Jersey, 62,209 homes are at risk of chronic flooding by 2045.⁴ These homes are worth more than \$26

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¹ NORBERT P. PSUTY & DOUGLAS D. OFIARA, COASTAL HAZARD MANAGEMENT: LESSONS AND FUTURE DIRECTIONS FROM NEW JERSEY 9–10 (Rutgers Univ. Press eds., 2002).

² This Comment uses the terms “global warming” and “climate change” interchangeably.

³ *New Jersey's Coastal Community Vulnerability Assessment and Mapping Protocol*, NJDEP OFF. OF COASTAL MGMT. ii (Dec. 2011) [hereinafter NJDEP Assessment and Protocol], <https://www.nj.gov/dep/cmp/docs/ccvamp-final.pdf>.

⁴ Tom Davis, *Here's How Many NJ Towns, Homes Are at Risk of Chronic Flooding*, PATCH (June 25, 2018), <https://patch.com/new-jersey/pointpleasant/here-s-how-many-nj-towns-homes-are-risk-chronic-flooding>.

billion, house approximately 79,000 people, and contribute nearly \$390 million to local property tax bases.⁵ Despite these hazards, new construction and reconstruction continue in the state's 239 coastal towns, and municipalities have yet to respond to these realities.⁶ Shoreline developments throughout New Jersey have “frequently occurred without adequate regard for coastal hazards.”⁷ A study by Climate Central, a Princeton-based research group, and Zillow, the national real estate firm, “estimated that 3,087 homes [were] built [in New Jersey] between 2009 and 2017—together worth more than \$3 billion” in areas that are expected to flood once a year by 2050.⁸

In protecting our coastlines, the government must balance private property rights against the threats of climate change. Adaptation strategies, such as dune replenishment, have become common methods of coastline protection, but they come at an expense to the public.⁹ In most cases, coastal projects require the government to exercise its eminent domain power to obtain possession of strips of private property on coastal lots.¹⁰ New Jersey, despite the importance of its coast, does not have statutory or judicial policies to address legal issues when private property

⁵ *Id.*

⁶ *Sustainable & Resilient Coastal Communities: A Comprehensive Coastal Hazard Mitigation Strategy Final Report*, NEW JERSEY FUTURE 1 (Sept. 2017), <https://www.njfuture.org/wp-content/uploads/2017/12/New-Jersey-Future-Resilient-Coastal-Communities-Project-Report-2017.pdf>.

⁷ Susanne C. Moser et al., *Coastal Zone Development and Ecosystems*, in *Climate Change Impacts in the United States: The Third National Climate Assessment*, 579 U.S. GLOBAL CHANGE RESEARCH PROGRAM ED. 589 (May 2014).

⁸ Jon Hurdle, *Estimate Revised Up of New Shore Homes Imperiled by Sea-level Rise, Storm Surge*, NJ SPOTLIGHT NEWS (Aug. 14, 2019), <https://www.njspotlight.com/2019/08/19-08-13-estimate-rises-of-new-shore-homes-imperiled-by-sea-level-rise-and-storm-surge/>.

⁹ See T.J. Campbell & L. Benedet, *Beach Nourishment Magnitudes and Trends in the U.S.*, SI 39 J. OF COASTAL RESEARCH 57, 63 (2006), available http://www.cerf-jcr.org/images/stories/09_tom.pdf; James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 MD.L. REV. 1279, 1308 (1998).

¹⁰ See, e.g., *Property Owners Throw Cold Water on N.J. Shore Protective Dunes Plan*, W. VA. PUB. BROADCASTING (May 26, 2015, 3:47 PM), <http://wvpublic.org/post/property-owners-throw-cold-water-nj-shore-protective-dunes-plan>.

rights and the threats of global warming are in balance. The state is legally unprepared for handling the threat of climate change.

This Comment evaluates the effectiveness and feasibility of climate change adaptation measures and argues that New Jersey, at the state and local level, must adopt holistic, data-driven solutions to adapt to this new reality, protect properties from flooding and storm surges, and preserve our coastal environment. A comprehensive regulatory scheme aimed at mitigating the effects of global warming would recognize that development in areas vulnerable to repeated flooding is a nuisance that the government should regulate to minimize and phase out. This Comment calls on New Jersey State courts to take an expansive approach to public nuisance doctrine under regulatory takings jurisprudence. By recognizing that climate-driven regulations, as a form of nuisance prevention, are immune from takings claims, courts can facilitate environmental protection measures. This Comment argues that regulation for the purposes of environmental protection is a public purpose. If an area is vulnerable to the effects of climate change, then it is per se a nuisance to continue using that land. Courts should broadly construe nuisance doctrine to serve as a preclusive defense to landowners' regulatory takings claims.

Part II will explore the harms of climate change and its impact on New Jersey's coastline. It will provide data on rising sea levels, tidal flooding, the frequency and extent of storm surges, and erosion and the economic impacts of these phenomena. In Part III, this Comment will introduce state and local governments' land use regulation through the zoning power and takings power.

In Part IV, this Comment will critique New Jersey's response to climate change and the various existing strategies. This section will also discuss the limitations of the use of eminent

domain and zoning powers. Part V will advocate for an expansion of the nuisance doctrine to prevent the development of vulnerable coastal communities.

Finally, in Part VI, this Comment will make a proposal for how New Jersey can mitigate the effects of climate change on coastal communities through land use regulations. It will outline policy and statutory recommendations that should be incorporated into coastal communities' planning ordinances. The law would overtly recognize nuisance prevention as a legitimate land use control.

II. Climate Change and its Effects on New Jersey Coastline

A. Assessing the Harms of Climate Change

Global climate change is a change to “the average weather conditions over an extended period of time.”¹¹ In the last fifty years, human activity has altered the environment on an unprecedented scale through greenhouse gas (GHG) emissions.¹² GHGs, such as carbon dioxide, in the atmosphere retain heat from sunlight, causing Earth to warm.¹³ As Earth warms, previously frozen regions melt, causing rising sea levels—a significant threat because approximately forty percent of the world’s population lives in coastal areas.¹⁴

A 2019 Rutgers University and Department of Environmental Protection report predicted that, by 2070, sea levels will rise nearly four feet in New Jersey, a projection that is two-times the global average.¹⁵ Using information from the report, a map “shows that nearly all of the

¹¹ Joseph F.C. DiMento & Pamela Doughman, *Introduction: Making Climate Change Understandable*, in CLIMATE CHANGE: WHAT IT MEANS FOR US, OUR CHILDREN, AND OUR GRANDCHILDREN, 1 (MIT Press 2014).

¹² See *Causes of Climate Change*, EPA, <http://www.epa.gov/climatechange/science/causes.html> (last visited Jan. 5, 2021) (finding that since the industrial era, humans have notably increased the amount of greenhouse gases emitted into the atmosphere); see generally, *Overview of Greenhouse Gases*, EPA, <http://www.epa.gov/climatechange/ghgemissions/gases.html> (last visited Jan. 5, 2021)

¹³ See *Causes of Climate Change*, *supra* note 12; see generally, *Overview of Greenhouse Gases*, *supra* note 12.

¹⁴ Economics and Demographics, NOAA OFFICE FOR COASTAL MGMT. (2020), <https://coast.noaa.gov/states/fast-facts/economics-and-demographics.html>.

¹⁵ NJDEP Assessment and Protocol, *supra* note 3, at 5.

Jersey Shore south of Point Pleasant Beach, as well as areas of Essex, Hudson, Passaic, Union, Cumberland and Salem counties, could be under water by 2070.”¹⁶ From 1911 to 2019, the sea level rose 1.5 feet along the New Jersey coast, compared to a 0.6 feet total change in the global mean sea level.¹⁷ Future projections of sea level rise indicate that New Jersey’s coastal areas are likely to experience sea level rise of 0.5 to 1.1 feet between the years 2000 and 2030, and 0.9 to 2.1 feet between 2000 and 2050.¹⁸

New Jersey residents have also experienced more high-tide floods, or “sunny-day flooding,” in the absence of an associated storm.¹⁹ The frequency of high tides exceeding the current high-tide flood threshold will continue to increase with sea level rise.²⁰ The average of high-tide floods in the 1950s was less than one per year.²¹ Between 2007 and 2016, Atlantic City averaged eight high-tide floods per year.²² Based on the projected range of sea level rise, Atlantic City will experience 17 to 75 days of expected high-tide flooding in 2030, and 45 to 255 days in 2050.²³

A 2019 report by the Rhodium Group concluded that tidal flooding has more than doubled.²⁴ Since 1980, sea level has risen nearly six inches, and the number of homes at risk of sunny-day flooding has increased 110%.²⁵ This affects approximately 23,000 homes and

¹⁶ Davis, *supra* note 4.

¹⁷ *New Jersey’s Rising Seas and Changing Coastal Storms: A Summary of the 2019 Science and Technical Advisory Panel*, RUTGERS (Nov. 2019) [hereinafter Rutgers Panel Summary], https://climatechange.rutgers.edu/images/STAP_SUMMARY_FINAL_FINAL_11-25-19.pdf.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Rutgers Panel Summary, *supra* note 17.

²⁴ Hannah Hess et al., *New Jersey’s Rising Coastal Risk*, RHODIUM GROUP (Oct. 29, 2019), <https://rhg.com/research/new-jersey-flooding-hurricanes-costs-climatechange/>.

²⁵ *Id.*

commercial buildings worth a total of \$13 billion.²⁶ According to the study, the counties most at risk from flooding are Ocean, Cape May, Atlantic, and Monmouth.²⁷

Coastal storms, such as tropical storms, hurricanes, and nor'easters, produce storm surges, the impact of which is heightened by tides and winds.²⁸ Storm surge flooding can wash over barrier islands and create new inlets, thereby endangering protected wetlands.²⁹ Studies have also shown that the frequency and extent of storm surges have increased since the 1980s; therefore, more of today's buildings are now at risk of flooding once during a 30-year mortgage.³⁰ Another threat is coastal erosion—one of the most common and persistent hazards.³¹ Wind, currents, and waves are the main contributors to erosion and are exacerbated by storms.³²

The scientific community is in agreement about the effects of global warming.³³ This Comment does not attempt to investigate the existing data and merely seeks to use this consensus as an aid in developing mitigation strategies.

B. The Economic Impact of Climate Change

Rising sea levels, storm surges, and erosion not only have ecological impacts, but also threaten the highly developed Jersey Shore.³⁴ Coastal flooding endangers private property, roads and bridges, storm-water infrastructure, utilities, and businesses.³⁵ The Rhodium Group's 2019

²⁶ *Id.*

²⁷ *Id.*

²⁸ NJDEP Assessment and Protocol, *supra* note 3, at 4.

²⁹ *Id.*

³⁰ Hess et al., *supra* note 24.

³¹ NJDEP Assessment and Protocol, *supra* note 3, at 4.

³² *Id.*

³³ See Consensus: 97% of Climate Scientists Agree, NASA, <http://climate.nasa.gov/scientific-consensus/> (last visited November 1, 2020).

³⁴ See Laura Mansnerus, *New Jersey is Running Out of Open Land it can Build On*, N.Y. TIMES (May 24, 2003), <http://www.nytimes.com/2003/05/24/nyregion/new-jersey-is-running-out-of-open-land-it-can-build-on.html>.

³⁵ NJDEP Assessment and Protocol, *supra* note 3, at 4.

report focused on the economics of coastal risk from climate change.³⁶ The report estimated that, since the 1980s, between 62,000 and 86,000 more homes and commercial properties, worth a combined value of more than \$60 billion, are now in areas with a 1-in-30 chance of hurricane flooding.³⁷ New Jersey coastline's exposure is projected to grow.³⁸ Based on sea level rise projections, an additional 73,000 to 113,000 buildings worth a combined \$60 billion to \$96 billion will likely be in the 1-in-30-year floodplain by 2050.³⁹

The effects of rising temperatures and sea levels are already having a significant impact on property values.⁴⁰ Research by First Street Foundation⁴⁰ suggests that tidal flooding caused by rising sea levels has reduced home values in New Jersey by \$4.5 billion.⁴¹ Tropical storm Sandy, which made landfall in 2012, alone cost New Jersey \$29.4 billion.⁴²

These projections of climate change and its effects serve as important baselines for developing policy directions, including changes to land use regulation, that New Jersey must adopt to address these challenges. Some see environmental regulation of private property as antithetical to economic growth.⁴³ However, as is evident from the massive costs of Hurricane Sandy,⁴⁴ “annual flooding will stifle growth more than any regulation.”⁴⁵

³⁶ Hess et al., *supra* note 24.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Tom Johnson, *What's Ahead for NJ — More Tidal Flooding, More Battering from Hurricanes?*, NJ SPOTLIGHT NEWS (Oct. 29, 2019), <https://www.njspotlight.com/2019/10/whats-ahead-for-nj-more-tidal-flooding-more-battering-from-hurricanes/>.

⁴¹ *Id.*

⁴² Chris Francescani, *Chris Christie: Hurricane Sandy New Jersey Damage Will Cost At Least \$ 29.4 Billion*, HUFFINGTON POST (Nov. 23, 2012), http://www.huffingtonpost.com/2012/11/23/chris-christie-hurricane-sandynewjersey_n_2179909.html.

⁴³ Naomi Klein, *Capitalism vs. the Climate*, THE NATION (Nov. 9, 2011), <https://www.thenation.com/article/archive/capitalism-vs-climate/>.

⁴⁴ Francescani, *supra* note 42.

⁴⁵ Matthew Knoblauch, *Land and Water Use in the United States: You Probably Shouldn't Build There*, 16 SUSTAINABLE DEV. L. & POL'Y 4, 13 (2015).

III. New Jersey's Land Use Regulation Options for Tackling Flooding

New Jersey has several options, albeit inadequate, to tackle the threat of climate change. The Government may exercise its power of eminent domain to condemn entire properties or obtain easements over properties for purposes such as dune replenishment. Localities may also use their zoning powers to regulate land use and development in coastal areas prone to flooding. Exercise of the takings and zoning powers, however, may lead to litigation if the government does not provide just compensation or the regulation's economic deprivation is so extreme that it has the effect of a taking.

Parts A and B provide a primer on land use regulation, including state and local actors' power to enact zoning ordinances for the public welfare and use eminent domain. Part C focuses on the claims private property owners may have against the government for taking such measures.

A. A Primer on Zoning

The Tenth Amendment of the United States Constitution explicitly reserves those powers not so delegated for the States.⁴⁶ This reservation of powers enables states to regulate land use. As industrialization and urbanization sent people from rural to urban and suburban areas in the early 1900s, some centralized control over land use patterns became necessary.⁴⁷ Local governments were best equipped to deal with these local changes.⁴⁸ By the late 1920s, to

⁴⁶ U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”).

⁴⁷ See JOHN R. NOLON ET AL., LAND USE AND SUSTAINABLE DEVELOPMENT LAW: CASES AND MATERIALS 35 (9th ed. 2017) (“Increased congestion in streets, deplorable housing conditions, new high rise buildings . . . and changing land use patterns raised numerous conflicts among private land owners.”).

⁴⁸ See *id.* at 2–4 (“Local governments were regarded . . . as creatures of the state, authorized by state law to exercise a wide variety of powers affecting the health, safety, and welfare of their citizens It is within [the] context of state reserved authority, that cities, through state constitutional and statutory delegations, regulate land use today.”).

promote the adoption of zoning ordinances by municipalities, the United States Department of Commerce created two standard enabling acts as guides for states to adopt when promulgating their own legislation.⁴⁹ The Standard Zoning Enabling Act, published in its final version in 1926, encouraged states to empower local governments to regulate zoning, including the power to regulate the height, size, use, and location of buildings, the size of lots, and population density.⁵⁰ In 1928, the Standard City Planning Enabling Act encouraged municipalities to develop comprehensive plans for “harmonious development” in order to “best promote health, safety, morals, order, convenience, prosperity, and general welfare”⁵¹

These standard acts were published shortly after the landmark case *Village of Euclid v. Ambler Realty*, which held that zoning was a valid exercise of the states’ police powers.⁵² The Village of Euclid adopted a comprehensive zoning ordinance that regulated and restricted “the location of industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc.”⁵³ Ambler Realty Company owned a tract of land in the village and argued that the ordinance operated “to reduce the value of [its] lands and destroy their marketability for industrial, commercial[,] and residential uses” and constituted “a present invasion into [its] property rights” and a violation of due process.⁵⁴

⁴⁹ Standard State Zoning Enabling Act and Standard City Planning Enabling Act, American Planning Association (2021), <https://www.planning.org/growingsmart/enablingacts/>.

⁵⁰ U.S. Dep’t of Commerce A Standard State Zoning Enabling Act § 1 (1926), https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/SZENablingAct1926.pdf (“For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.”).

⁵¹ U.S. Dep’t of Commerce, City Planning Enabling Act § 7 (1928), https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/CPEnabling%20Act1928.pdf.

⁵² 272 U.S. 365, 397 (1926).

⁵³ *Id.* at 380.

⁵⁴ *Id.* at 386.

The Court upheld the ordinance as “a valid exercise of authority,”⁵⁵ but cautioned that the zoning power is not without limit:

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation.⁵⁶

New Jersey has several coastal zoning statutes. The Municipal Land Use Law (MLUL) of 1976 is New Jersey’s enabling legislation for municipal land use and development planning and zoning.⁵⁷ The state legislature also passed the Coastal Area Facility Review Act (CAFRA) in 1973 “to protect the unique and fragile coastal zones of the State.”⁵⁸ This Act calls upon the state to assist “in the assessment of impacts, stemming from the future location and kinds of developments within the coastal area, on the delicately balanced environment of that area” so as to avoid “continuing and ever-accelerating serious adverse economic, social and aesthetic effects.”⁵⁹ CAFRA requires that all coastal areas be dedicated to uses “which promote the public health, safety and welfare, protect public and private property, and are reasonably consistent and compatible with the natural laws governing the physical, chemical and biological environment of the coastal area.”⁶⁰ CAFRA was significantly expanded in 1993, and the threshold for issuance of permits by the DEP was heightened to provide greater protection to sensitive coastal areas.⁶¹ At this time, however, the legislature also repealed a prior version of the CAFRA statute that directed the DEP to compose a long-term environmental management strategy for coastal areas.⁶² Today, the Coastal Zone Management Rules promulgated by NJDEP establishes the

⁵⁵ *Id.* at 397.

⁵⁶ *Id.* at 387.

⁵⁷ Municipal Land Use Law, N.J. STAT. ANN. §§ 40:55D-25–52:27D-310 (West 2017).

⁵⁸ *In re Egg Harbor Assocs. (Bayshore Centre)*, 464 A.2d 1115 (1983).

⁵⁹ Coastal Area Review Act, N.J. STAT. ANN. § 13:19-2 (West 2016), https://www.nj.gov/dep/landuse/download/13_19.pdf.

⁶⁰ *Id.*

⁶¹ Committee Statement, N.J. STAT. ANN. 13:19-2 (West Supp. 2002).

⁶² N.J. STAT. ANN. § 13:19-16, *repealed by L. 1993, c. 190, § 2* (effective July 19, 1994).

rules regarding the development of coastal resources and requires a coastal permit for waterfront development.⁶³

With respect to post-storm beach restoration, the NJDEP has enacted regulations applicable “to all beaches which are impacted by coastal storms with a recurrence interval equal to or exceeding a five-year storm event.”⁶⁴ These after-the-fact responses to storms, however, are inadequate to fight the full scope of the impending threat of climate change.

Environmental protection interests are often incompatible “with traditional landowner beliefs in the freedom to use legally owned land as they wish.”⁶⁵ Despite the widespread acceptance of zoning and planning in the post-*Euclid* century, there remains a tension between governmental regulation and private ownership of land. This tension will escalate as the government increasingly regulates land use to mitigate the effect of climate change. Further, states, in exercising their zoning power, also risk running afoul of the Takings Clause of the Fifth Amendment, addressed below.⁶⁶

A unique problem—problem of the nonconforming use—occurs when ownership and use of a property predate a zoning ordinance prohibiting such use.⁶⁷ In the interest of eliminating inconsistent uses and achieving uniformity within a zoning area, the state may impose restrictions on nonconforming landowners by limiting expansion or reconstruction of the property.⁶⁸ In New Jersey, though, nonconforming use statute provides that “[a]ny nonconforming use or structure existing at the time of the passage of an ordinance may be

⁶³ N.J. ADMIN. CODE § 7:7-1.1; 7:7-2.1–2.5 (2021).

⁶⁴ N.J. ADMIN. CODE § 7:7-10.3 (2021).

⁶⁵ Jonathan E. Cohen, *A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based Environmental Controls*, 22 B.C. ENV'T. AFF. L. REV. 307, 329 (1995).

⁶⁶ See Section III.D.

⁶⁷ John R. Nolon, *Well Grounded: Using Local Land Use Authority to Achieve Smart Growth*, *Environmental Law Institute*, 447, 452 (2001).

⁶⁸ NOLON ET AL., *LAND USE AND SUSTAINABLE DEVELOPMENT LAW: CASES AND MATERIALS*, 35, 187 (2012).

continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof.”⁶⁹ The statute thus allows shoreline homeowners to repair storm damages. It also enables these homeowners to come into conformance with new zoning standards for climate-change mitigation by, for example, raising their homes to avoid flooding.

B. A Primer on Eminent Domain

Eminent domain may be useful in mitigating the ecological and economic harms of climate change because it enables the state to take land that is vulnerable to repetitive flooding. The Takings Clause of the Fifth Amendment to the United States Constitution imposes two limitations on the state’s power to exercise eminent domain: the government (1) can only take property for “public use” and (2) must provide “just compensation.”⁷⁰ The New Jersey Constitution likewise provides: “[p]rivate property shall not be taken for public use without just compensation.”⁷¹ The New Jersey Supreme Court has held that the protections afforded by the State’s constitution are “coextensive” with the protections afforded by the United States Constitution.⁷²

Any use that is dedicated to a public purpose qualifies as a valid public use.⁷³ The public use doctrine has expanded in recent years, giving legislatures broad latitude in determining what

⁶⁹ N.J. STAT. ANN. § 40:55D-68 (West 2020).

⁷⁰ U.S. CONST. amend. V; *see also* N.J. CONST. of 1947, art. IV, § 6, P 3 (“Any agency . . . which may be empowered to take or otherwise acquire private property for any public [uses] . . . may be authorized by law . . . but such taking shall be with just compensation.”).

⁷¹ N.J. CONST. art. I, § 20.

⁷² *Mansoldo v. State*, 898 A.2d 1018 (N.J. 2006).

⁷³ *Kelo v. City of New London*, 545 U.S. 469, 479, 481 (2005) (“It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.” (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954))).

needs justify the exercise of the takings power.⁷⁴ Although the government “may not take the property of A for the sole purpose of transferring it to another private party B,” it “may transfer property from one private party to another if future use by the public is the purpose of the taking” or, for example, if the purpose of the taking is economic development.⁷⁵

The Constitution’s guarantee of just compensation ensures that the property owner will be “in the same position monetarily as he would have occupied if his property had not been taken.”⁷⁶ Therefore, compensation is just if it is based on the fair market value of the property at the time of the taking.⁷⁷

In *City of Long Branch v. Liu*, beachfront property owners claimed that the state owed them compensation for the taking of their property for a state-funded beach renourishment project.⁷⁸ The City of Long Branch passed an ordinance creating a redevelopment project, which sought to acquire oceanfront property, including the commercial property owned by the plaintiffs, the Lius’s.⁷⁹ Plaintiffs rejected the City’s \$900,000 offer and the City initiated a condemnation action.⁸⁰ At this time, the property had increased by two acres from the deed description due to a beach replenishment project undertaken by the Army Corps of Engineers in the 1990s.⁸¹ The Lius family argued that the City’s action should account for the increased shoreline landmass resulting from the replenishment project and that they should be compensated for the taking of this newly created land.⁸² The New Jersey Supreme Court applied the doctrine

⁷⁴ Dana Berliner, *Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain*, INST. FOR JUST. (April 2003), <https://ij.org/report/public-power-private-gain/>.

⁷⁵ *Kelo*, 545 U.S. at 481.

⁷⁶ *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973) (quoting *United States v. Reynolds*, 379 U.S. 14, 16 (1970)).

⁷⁷ *See, e.g., id.* at 474.

⁷⁸ 4 A.3d 542, 547 (N.J. 2010).

⁷⁹ *Id.* at 546.

⁸⁰ *Id.*

⁸¹ *Id.* at 546–47.

⁸² *Id.* at 547.

of avulsion because the average high water mark remained the boundary line between state-owned and privately-owned property.⁸³ Therefore, the court held that the plaintiffs could not be recompensed for the taking of property to which they had no right.⁸⁴

C. Regulatory Takings

Even when the government does not overtly exercise its eminent domain power and initiate a condemnation proceeding, a landowner may argue that a land use regulation works, in effect, as a taking.⁸⁵ A regulatory taking includes (1) ad hoc balancing takings and (2) categorical takings that are either (a) physical takings or (b) total takings.⁸⁶

An ad hoc balancing claim involves government regulations that have unreasonably “interfered with [the claimant’s] distinct investment-backed expectations.”⁸⁷ In *Penn Central Transportation Co. v. City of New York*, the Supreme Court used an ad hoc balancing test to determine whether a regulatory taking had occurred.⁸⁸ *Penn Central* involved a challenge to New York City’s historic landmarking law, which precluded the development of air space above Grand Central Terminal.⁸⁹ The Supreme Court balanced several factors: the owner’s ability to continue current use, the mitigating effects of transferable development rights, the reciprocity of the law’s burdens and benefits, and the distinct investment-backed expectations; ultimately, the Court upheld the law.⁹⁰ The Court added that the landowner’s economic interests must be

⁸³ *Id.* at 555.

⁸⁴ *City of Long Branch*, 4 A.3d at 555.

⁸⁵ *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

⁸⁶ *See id.* at 124–38 (finding that physical takings and state and local regulation may constitute unconstitutional takings requiring just compensation); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

⁸⁷ *Penn Cent.*, 438 U.S. at 124.

⁸⁸ *See generally id.* at 104.

⁸⁹ *Id.* at 107.

⁹⁰ *Id.* at 138.

weighed against the nature of the government action and whether it can be characterized as a physical invasion or a mere interference for the public good.⁹¹

In a physical takings claim, private property owners must allege that the government has authorized a physical occupation of all or part of their property.⁹² In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, the Supreme Court indicated that the government's right to renourish and protect the coastline might be superior to the rights of private landowners.⁹³ The Florida legislature had passed the Beach and Shore Preservation Act in 1961, creating procedures for beach restoration and renourishment projects by depositing sand on eroded beaches (restoration) and maintaining the deposited sand (renourishment).⁹⁴ Walton County and the city of Destin received permits to restore seven miles of beach that had been eroded by hurricanes.⁹⁵ Members of a nonprofit corporation who owned beachfront property alleged that the state and local governments' restoration projects were unconstitutional takings because it deprived them of their rights to accretion.⁹⁶ The Supreme Court held that there was no taking because the restoration and renourishment projects did not infringe on coastal landowners' rights.⁹⁷ The Court deduced two principles from Florida law: (1) the state, as the owner of submerged land adjacent to beachfront property, has the right to fill that land, and (2) the avulsion, or exposure of previously submerged land, belongs to the state even if it interrupts a beachfront property owner's contact with the water.⁹⁸ Because the plaintiffs could

⁹¹ *Id.* at 124.

⁹² *See* *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 426 (1982); *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992).

⁹³ 560 U.S. 702 (2010).

⁹⁴ *Id.* at 709.

⁹⁵ *Id.* at 711.

⁹⁶ *Id.*

⁹⁷ *Id.* at 731.

⁹⁸ *Id.* at 730.

not show that they had rights to future avulsions or contact with the water that trumped the state's right to fill submerged land, there was no taking.⁹⁹

In categorical total takings claims, property owners argue that they were required to “sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave [their] property economically idle.”¹⁰⁰ *Lucas v. South Carolina Coastal Council* demonstrates when coastal protection may go “too far” as to be considered a taking.¹⁰¹ There, the Court held that the Beachfront Management Act (BMA) in South Carolina, which barred Lucas from erecting structures on his beachfront property, totally deprived the property of all beneficial uses and constituted an economic wipeout.¹⁰² The Court concluded that the BMA was a per se taking.¹⁰³

The New Jersey Supreme Court in *Spigle v. Beach Haven*, however, rejected a categorical takings claim that a regulation was so onerous as to bar any real beneficial use.¹⁰⁴ In response to a disastrous storm that hit Long Beach Island, New Jersey, in 1962, Beach Haven adopted an ordinance preventing construction east of an ocean-side geographic line.¹⁰⁵ The plaintiffs had erected fences extending ocean-ward, in violation of the ordinance, and the defendant removed the fences.¹⁰⁶ Plaintiffs filed suit and sought damages for the demolition of the fence, arguing that the “ordinance [was] unconstitutional because if the regulations were enforced against their particularly described land they would be deprived of its use.”¹⁰⁷

⁹⁹ *Stop the Beach Renourishment*, 560 U.S. at 730.

¹⁰⁰ *Lucas v. S.C. Coastal Council*, 505 U.S. 1019 (1992).

¹⁰¹ *Id.* at 1030.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ 218 A.2d 129, 136, 138 (N.J. 1966).

¹⁰⁵ *Id.* at 130–31.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 137.

The New Jersey Supreme Court held that the defendants produced un rebutted evidence “that it would be unsafe to construct houses [ocean-ward] of the building line . . . because of the possibility that they would be destroyed during a severe storm—a result which occurred during the storm of March 1962.”¹⁰⁸ Further, the court noted, “that such regulation prescribed only such conduct as good husbandry would dictate that plaintiffs should themselves impose on the use of their own lands.”¹⁰⁹

A New Jersey appellate court reached a similar conclusion based on a due process argument in *McGovern v. Borough of Harvey Cedars*:

“[i]n light of the island’s history of devastating storm damage, we cannot say that an ordinance prohibiting building close to the water’s edge in order to protect the dunes and to prevent property damage from storms, is irrational, arbitrary or lacking a real and substantial relationship to the purpose of protecting the public health, safety and welfare.”¹¹⁰

Spiegle and *McGovern* indicate New Jersey courts’ willingness to recognize the heightened public interest at stake when the government regulates for purposes of protecting our coastlines. They also suggest that these interests may be superior to the property rights of landowners.

In attempting to regulate use of coastal property to mitigate sea level rise, New Jersey is likely to face more regulatory takings claims. Courts’ approaches to these claims, whether for categorical or ad hoc balancing takings, should grant wide latitude and flexibility to municipalities when the zoning ordinance is enacted for purposes of adapting to climate change.

New Jersey’s options—zoning ordinances and the exercise of eminent domain powers—are inefficient, delayed responses to the threat of global warming. These options may lead to increased litigation if the state does not provide just compensation or the regulation’s economic deprivation is so extreme that it affects a taking. Part IV critiques such options and Part V

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *McGovern v. Borough of Harvey Cedars*, 401 N.J. Super. 136, 148 (Super. Ct. App. Div. 2008).

advocates for an expansive view of nuisance law to prevent development in vulnerable coastal communities and serve as an affirmative defense to landowners' takings claims.

IV. Critique of New Jersey's Existing Options to Fight Climate Change

In response to the impending threats of climate change and recent superstorms such as Hurricane Sandy, New Jersey has considered a variety of programs and doctrines as a means of adapting and mitigating these threats. In 2019, Gov. Phil Murphy signed an executive order creating the Climate and Flood Resilience Program at the state's Department of Environmental Protection.¹¹¹ The order established an Interagency Council on Climate Resilience, comprised of sixteen state agencies, to develop short-term and long-term plans.¹¹² Prior to this order, the Sustainable and Resilient Coastal Communities project, funded by the NJDEP, released a report that outlined strategies municipalities can take to respond to rising seas levels.¹¹³ These include refocusing development and capital investments, enacting more resilient building standards, and protecting wetlands.¹¹⁴ The report also directed the state to support communities by adopting uniform projections of sea level rise to determine how projects and programs receive state funding, creating a coast-wide adaptation plan to serve as a framework, revising the state's land use laws to require risk management on the part of localities, and developing sustainable financing sources to help communities implement adaptation measures.¹¹⁵

¹¹¹ *Exec. Ord. No. 89*, NJ.GOV (Oct. 29, 2019), <https://nj.gov/infobank/eo/056murphy/pdf/EO-89.pdf>; Brent Johnson, *N.J. Needs More Protection Against Future Powerful Storms, Murphy Says*, NJ ADVANCE MEDIA (Oct. 29, 2019), <https://www.nj.com/politics/2019/10/nj-cant-stop-the-next-sandy-but-we-can-be-more-resilient-murphy-says-in-announcing-new-initiative.html>.

¹¹² Johnson, *supra* note 111.

¹¹³ *Sustainable & Resilient Coastal Communities: A Comprehensive Coastal Hazard Mitigation Strategy*, NEW JERSEY FUTURE (Sept. 2017), <https://www.njfuture.org/wp-content/uploads/2017/12/New-Jersey-Future-Resilient-Coastal-Communities-Project-Report-2017.pdf>; David Kutner, *New Report Outlines Coastal Resilience Strategies*, NEW JERSEY FUTURE (Dec. 13, 2017), <https://www.njfuture.org/2017/12/13/resilient-coastal-communities-report/>.

¹¹⁴ Kutner, *supra* note 113.

¹¹⁵ *Id.*

All of these strategies have legal implications for eminent domain jurisprudence, regulatory takings jurisprudence, and nuisance doctrine.

This section will analyze and critique the current options implemented by and available to New Jersey. Part A critiques the use of eminent domain as a means of acquiring easements for beach restoration projects. Part B discusses the limits of the public trust doctrine since it is best applied to undeveloped areas and not New Jersey's highly developed coastline. Finally, Part C exposes the inherent limitations in the National Flood Insurance Program (NFIP) and voluntary buyout programs, which represent ad hoc responses to storm damage and unsustainable methods of fighting climate change-related property loss.

A. Eminent Domain's Limited Use as a Means of Acquiring Easements for Beach Restoration Projects

One potential solution state and local governments can implement is the use of eminent domain to condemn at-risk properties.¹¹⁶ Eminent domain, however, is an extreme measure that is fact-intensive, costly, controversial, and leads to community disruption.¹¹⁷ This Comment argues that it should be a last-resort effort to acquire parts of property, specifically, for dune replenishment projects.¹¹⁸ The methods discussed in this section are only narrowly useful for combatting the effects of climate change in certain instances but insufficient for protecting New Jersey coastlines from all the effects of climate change moving forward.

The federal government has presented state and local officials nationwide with a difficult choice: “[a]gree to use eminent domain to force people out of flood-prone homes, or forfeit a

¹¹⁶ See Section III.B.

¹¹⁷ Christopher Flavelle, *Trump Administration Presses Cities to Evict Homeowners from Flood Zones*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/climate/government-land-eviction-floods.html?action=click&module=Top%20Stories&pgtype=Homepage>.

¹¹⁸ See *Borough of Harvey Cedars v. Karan*, 70 A.3d 524, 527 (N.J. 2013).

shot at federal money they need to combat climate change.”¹¹⁹ This choice is part of an effort by the Army Corps of Engineers to protect Americans from flooding and coastal storms.¹²⁰ At the end of 2015, “the Corps said that voluntary programs were ‘not acceptable’ and that all future buyout programs ‘must include the option to use eminent domain, where warranted.’”¹²¹ The Corps has a formula to decide which homes should be condemned:

It estimates how much damage a house is likely to suffer in the next 50 years, then compares that to what it would cost to buy and tear down the house, plus moving expenses for the owner. If the buyout costs less, the homeowner is asked to sell for the assessed value of the home. That price is not negotiable, and neither is the offer.¹²²

Although New Jersey has declined to evict residents,¹²³ the Corps is pressing the state to use eminent domain or face loss of federal funds to fight climate change.¹²⁴ Gene Pawlik, spokesman for NJDEP, said in 2020: “Eminent domain procedures should only be used when direct purchase negotiations with land owners fail to reach an agreement on price or when land title matters prevent closing the transaction, and the planned project cannot be completed for the greater public benefit without acquisition of those properties.”¹²⁵

While New Jersey is unlikely to resort to eminent domain as a means of condemning entire properties, this power remains a viable option for taking easements over beachfront properties for purposes of beach replenishment programs. An easement is an interest in land in another’s possession, entitling the easement holder to limited use or enjoyment of that land.¹²⁶

¹¹⁹ Flavelle, *supra* note 117.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Jon Hurdle, *Should NJ Use Eminent Domain to Take Coastal Properties Threatened by Sea-Level Rise?*, NEW JERSEY SPOTLIGHT NEWS (Mar. 16, 2020), <https://www.njspotlight.com/2020/03/should-nj-use-eminent-domain-to-take-coastal-properties-threatened-by-sea-level-rise/>.

¹²⁵ *Id.*

¹²⁶ *See Mahony v. Danis*, 469 A.2d 31, 34–35 (1983).

Beach nourishment programs take sand from other sources and place it on an eroded beach to build up dunes and broaden coastal surfaces.¹²⁷ But this often creates a costly cycle of erosion and replenishment.¹²⁸

The New Jersey Supreme Court addressed the use of eminent domain to obtain an easement in *Borough of Harvey Cedars v. Karan*, a case that arose out of a dune building project on Long Beach Island (LBI).¹²⁹ LBI is a densely populated barrier island in Ocean County, and the island's tourism-related industries significantly contribute to the county's \$14.2 billion gross income.¹³⁰ In recognition of LBI's massive economic contribution, the federal government and the island's municipalities jointly established a storm protection and beach restoration project in 2008.¹³¹ This included a dune renourishment plan to enlarge the dunes and protect homes from flooding during storm surges.¹³² These dunes were either adjacent to or on private property, and state and local governments were responsible for acquiring the property.¹³³ In the borough of Harvey Cedars, sixty-six property owners gave the municipality permission, leaving sixteen properties over which the municipality had to exercise eminent domain.¹³⁴ One of the properties belonged to the Karans.¹³⁵ The borough offered them \$300 for the right to build a dune on their ocean-side property; the Karans refused, arguing that they deserved more compensation because the dune would diminish their ocean view.¹³⁶ The municipality initiated the condemnation

¹²⁷ NORBERT P. PSUTY & DOUGLAS D. OFIARA, COASTAL HAZARD MANAGEMENT: LESSONS AND FUTURE DIRECTIONS FROM NEW JERSEY 10, 174–77 (Rutgers Univ. Press eds., 2002).

¹²⁸ *Id.*

¹²⁹ *Borough of Harvey Cedars v. Karan*, 70 A.3d 384 (N.J. 2013).

¹³⁰ Ken McGill & Jon Gray, *The 2011 Economic Impact of Tourism in Southern Ocean County, NJ: Key Metrics and Evaluation*, ROCKPORT ANALYTICS 4 (2012), <http://visitlbiregion.com/wp-content/uploads/2014/05/SOCC-2011-Econ-Impact-Final-10-2012-compact.pdf>.

¹³¹ *Borough of Harvey Cedars*, 70 A.3d at 527.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 527–28.

¹³⁵ *Id.* at 528.

¹³⁶ *Id.*

procedure and a commission appointed by the trial court¹³⁷ determined that compensation be set at \$700.¹³⁸ Again, the Karans refused, relying on New Jersey’s condemnation jurisprudence.¹³⁹ New Jersey higher courts had instructed lower courts to disregard the public benefits that would accrue through the condemnation, even if the property at issue would benefit, as well.¹⁴⁰ The trial court judge concluded that the jury should not hear the benefits of the dune project, and the jury calculated that Harvey Cedars owed the Karans \$375,000 in compensation.¹⁴¹

On appeal, the New Jersey Supreme Court opted to change its approach to partial takings cases. It determined that when calculating the amount of just compensation owed, it must consider the public benefit—here, the storm protection provided by the dunes.¹⁴² In cases where eminent domain is used to take an easement, i.e., partial takings, New Jersey courts did not have a straightforward method of determining the fair market value of the property for compensation purposes.¹⁴³ Eschewing its own precedent, the Court held: “the fair-market considerations that inform computing just compensation in partial takings cases should be no different than in total-takings cases. They are the considerations that a willing buyer and a willing seller would weigh in coming to an agreement on the property’s value at the time of the taking.”¹⁴⁴

¹³⁷ See Eminent Domain Act of 1971, N.J. STAT. ANN. § 20:3–12(b) (West 2020) (“Upon determination that the condemnor is authorized to and has duly exercised its power of eminent domain, the court shall appoint 3 commissioners to determine the compensation to be paid by reason of the exercise of such power.”).

¹³⁸ Petition for Certification and Appendix on Behalf of Plaintiff/Petitioner Borough of Harvey Cedars at 10, Karan, 70 A.3d 524 (No. A-4555-10T3).

¹³⁹ *Borough of Harvey Cedars*, 70 A.3d at 528.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 531.

¹⁴² *Id.* at 526.

¹⁴³ *Id.* at 535.

¹⁴⁴ *Id.* at 540.

After the state supreme court handed down its decision, the parties settled for \$1.¹⁴⁵ The Army Corps constructed a two-story-high dune in 2008.¹⁴⁶ It was because of these dunes that the Karans' \$1.7 million home withstood Hurricane Sandy, which ravaged parts of the coast without improved barriers.¹⁴⁷

It is evident that the use of eminent domain to condemn one's entire property is problematic from a mitigation policy point of view because it is fact-intensive, costly, and controversial. Eminent domain, however, is an effective tool in acquiring easements to build dunes as part of beach renourishment projects. Dune restoration and beach renourishment are primary means of protecting the shoreline from rising sea levels.¹⁴⁸ As sea levels rise, tidal marshlands and beaches migrate inland.¹⁴⁹ These lands can keep pace with a 0.1 inch per year rate of sea level rise; New Jersey's current rate of sea level rise, however, is 0.11 to 0.16 inches per year, a rate that is expected to increase.¹⁵⁰ Despite these threats, "[t]here is currently no coordinated, interagency effort to identify agreed upon estimates for future sea level rise."¹⁵¹ In formulating New Jersey's broader plan to adapt and mitigate the effects of climate change, condemnation proceedings should be used to obtain easements where beachfront property owners are resisting such protective measures. In conjunction with beach replenishment and like

¹⁴⁵ Mary Ann Spoto, *Harvey Cedars Couple Receives \$1 Settlement for Dune Blocking Ocean View*, NJ.COM (Sept. 25, 2013), http://www.nj.com/ocean/index.ssf/2013/09/harvey_cedars_sand_dune_dispute_settled.html.

¹⁴⁶ Nicholas Huba & Kirk Moore, *Harvey Cedars Homeowners Demand Payment from Town for Spoiling Ocean View*, ASBURY PARK PRESS (Dec. 20, 2012, 3:12 PM), <http://archive.app.com/article/20121125/NJNEWS2002/311250050/>.

¹⁴⁷ *Id.*

¹⁴⁸ STATE OF NEW JERSEY 2019 ALL-HAZARD MITIGATION PLAN, § 5.2 Coastal Erosion & Sea Level Rise, NJDEP OFF. OF COASTAL MGMT. 3 (2019).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

programs, courts should take an expansive approach to nuisance doctrine, as discussed below in Part V, to enable the state to accomplish its mitigation strategies.¹⁵²

B. Limits of the Public Trust Doctrine

Another potential legal solution to mitigate the effects of climate change is an extension of the public trust doctrine.¹⁵³ This doctrine is based on the premise that certain areas are of such public importance that they are unsuited for private ownership and better held by the government in trust for the people.¹⁵⁴ In 2019, Governor Murphy enshrined the public trust doctrine into state law.¹⁵⁵ The statute ensures that people’s ownership of coastal shorelines is held in trust by the state and other public entities, protecting the public’s right to access these public trust lands.¹⁵⁶

The New Jersey Supreme Court expanded this doctrine in *Borough of Neptune City v. Borough of Avon-by-the-Sea*, recognizing that the “public’s rights in tidal lands . . . extend [to] recreational uses, including bathing, swimming, and other shore activities.”¹⁵⁷ The court emphasized that the “public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.”¹⁵⁸

In *Matthews v. Bay Head Improvement Association*, the state’s highest court further expanded the doctrine to include the public’s right to access some privately owned beaches under

¹⁵² See Section V.

¹⁵³ David M. Carboni, *Rising Tides: Reaching the High-Water Mark of New Jersey’s Public Trust Doctrine*, 43 RUTGERS L.J. 95, 97 (2012).

¹⁵⁴ *Id.* at 100.

¹⁵⁵ 2018 Legis. Bill Hist. N.J. S.B. 1074.

¹⁵⁶ N.J. Stat. § 13:1D-151.

¹⁵⁷ 294 A.2d 47, 54 (N.J. 1972).

¹⁵⁸ *Id.*

certain circumstances.¹⁵⁹ While holding that the association’s restriction on beach access to residents only was contrary to the public’s right to enjoy ocean-related recreation, the *Matthews* court also noted the need to accommodate the private property owners’ rights.¹⁶⁰ Because much of New Jersey’s vulnerable coastline is highly developed,¹⁶¹ however, this doctrine is of limited applicability to the state’s current situation because it is best applied to undeveloped areas such as tidal lands.

C. Problems with the National Flood Insurance Program and Voluntary Buyout Programs

The National Flood Insurance Program (NFIP) is a federally-backed flood-insurance program intended to expand protection for homeowners whose standard homeowners’ insurance does not cover flood damage.¹⁶² Homeowners seeking to file a claim must comply with the NFIP’s standards.¹⁶³ Under the NFIP, New Jersey has the third-highest repetitive loss.¹⁶⁴ Since the 1970s, more than 3,300 New Jersey homes and businesses have been repeatedly flooded and rebuilt.¹⁶⁵ Repairs have been covered under the NFIP and have cost about \$700 million.¹⁶⁶ Seventy percent of these properties have been repaired at least five times, with a median payment for each flood of about \$25,000.¹⁶⁷ Hurricane Sandy resulted in an additional 144,000 claims and \$6.25 billion in debt, “as well as allegations that thousands of homeowners were wrongfully

¹⁵⁹ 471 A.2d 355, 365 (N.J. 1984).

¹⁶⁰ *Id.* at 368–69.

¹⁶¹ See Section II.B.

¹⁶² See *National Flood Insurance Program: What is the National Flood Insurance Program (NFIP)?*, BENEFITS.GOV, <https://www.benefits.gov/benefit/435> (last visited Jan. 7, 2021).

¹⁶³ See *Filing a Flood Insurance Claim*, FEMA.GOV (Aug. 17, 2016), <https://www.fema.gov/disaster/4277/updates/filingflood-insurance-claim>; Flood Plain Management Criteria for Flood-Prone Areas, 44 C.F.R. § 60.3(e)(2) (2019).

¹⁶⁴ Carla Astudillo, *These N.J. Properties Flood Over and Over Again, Costing Taxpayers Like You Millions*, NJ ADVANCE MEDIA (July 17, 2018), https://www.nj.com/data/2018/07/these_nj_properties_flood_over_and_over_again_costing_taxpayers_like_you_millions.html.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

denied payouts by companies administering flood insurance on FEMA’s behalf.”¹⁶⁸ What exacerbates the issue is that there is no limit to the number of claims an individual can make and the emphasis is on rebuilding, not mitigating.¹⁶⁹

Federal guidelines under the NFIP require elevation or demolition if damage is estimated at fifty percent or more of the home’s value.¹⁷⁰ Beachfront properties, however, are assessed too low compared to their high property value.¹⁷¹ This is because the NFIP’s building standards are based on the Flood Insurance Rate Map (FIRM), which does not account for future flooding.¹⁷² Although these standards may be effective today, their future effectiveness will reduce as the FIRM fails to reflect changing flood conditions.¹⁷³

While the NFIP could, in theory, discourage development in areas prone to flooding since potential buyers would have to consider the cost of insurance when buying a home,¹⁷⁴ the opposite has occurred. After NFIP’s enactment, development in flood-prone areas increased.¹⁷⁵ NFIP premiums are cheap and do not accurately reflect the risk of flooding and, in effect, subsidize the development of previously undesirable land.¹⁷⁶ But, “[m]aking the homeowners pay rates that reflect their true flood risk could . . . mean sharp premium hikes and a public

¹⁶⁸ Brady Dennis, *The Country’s Flood Insurance Program Is Sinking. Rescuing It Won’t Be Easy*, WASH. POST (July 16, 2017), https://www.washingtonpost.com/national/health-science/the-countrys-flood-insurance-program-is-sinking-rescuing-it-wont-be-easy/2017/07/16/dd766c44-6291-11e7-84a1-a26b75ad39fe_story.html?utm_term=.ce79e46b7c90.

¹⁶⁹ Astudillo, *supra* note 164.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² See Christopher P. Jones et al., *Evaluation of the National Flood Insurance Program’s Building Standards*, viii, AM. INSTS. FOR RESEARCH (2006), https://www.fema.gov/media-library-data/20130726-1602-20490-5110/nfip_eval_building_standards.pdf.

¹⁷³ *Id.*

¹⁷⁴ Ernest A. Abbott, *Flood Insurance and Climate Change: Rising Sea Levels Challenge the NFIP*, 26 FORDHAM ENV’T. L. REV. 10, 26–27 (2014).

¹⁷⁵ Sarah Fox, *This is Adaptation: The Elimination of Subsidies Under the National Insurance Program*, 39 COLUM. J. ENV’T. L. 205, 219 (2014).

¹⁷⁶ *Id.* at 217; see also Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisitions of Private Property Interests on the Coasts*, 27 HARV. ENV’T. L. REV. 295, 309–10 (2003).

backlash over affordability.”¹⁷⁷ Congress must decide whether to raise rates on the one in five homeowners who pay below-market premiums.¹⁷⁸ The NFIP is currently financially insolvent and relies on bailouts from the federal government.¹⁷⁹ As of December 2019, the NFIP is \$20.525 billion in debt.¹⁸⁰

The NFIP also provides funding for buyout programs. These programs have their own inherent limitations due to limited funding, their voluntary nature, and their reactive rather than proactive responses. Through the Hazard Mitigation Grant Program, “FEMA, the administrative agency responsible for the NFIP, is allowed to fund up to 75% of the expenses of voluntary buyouts.”¹⁸¹ These subsidies, however, vary based on the timing of the buyout plan: “the 75% contribution occurring only after a federally-declared major disaster.”¹⁸² The present structure thus “incentivizes states and localities to voluntarily buy out homeowners and property, but to wait until after a disaster declaration to do so.”¹⁸³

NJDEP’s Blue Acres program, implemented after Hurricane Sandy, buys back vulnerable properties on a voluntary basis.¹⁸⁴ Blue Acres relies on a number of eligibility requirements.¹⁸⁵ Criteria include a property’s history of repeated flooding¹⁸⁶ and whether the acquired property is suitable for recreational activities.¹⁸⁷ The program targets clusters of flood damaged homes or

¹⁷⁷ Dennis, *supra* note 168.

¹⁷⁸ *Id.*

¹⁷⁹ Abbott, *supra* note 174, at 34.

¹⁸⁰ *Introduction to the National Flood Insurance Program (NFIP)*, CONG. RSCH. SERV. (Dec. 23, 2019), <https://fas.org/sgp/crs/homesecc/R44593.pdf>.

¹⁸¹ Austin Johnson, *Bigger Waters and Rising Tides: Searching for Enduring Reform to the National Flood Insurance Program in Today’s Politics*, 57 HOUS. L. REV. 227, 242 (2019).

¹⁸² *Id.*

¹⁸³ *Id.* at 243.

¹⁸⁴ See Astudillo, *supra* note 164; John Lovett, *Moving to Higher Ground: Protecting and Relocating Communities in Response to Climate Change*, 42 VT. L. REV. 25, 45–48 (2017).

¹⁸⁵ See N.J. ADMIN. CODE § 7:36–23.1 (2021).

¹⁸⁶ See *What is the Green Acres/Blue Acres Program?*, MCLTRG.ORG, <http://hub.mcltrg.org/what-is-the-green-acresblueacres-program/>.

¹⁸⁷ See N.J. ADMIN. CODE §§ 7:36-4.2, 7:36-15.2.

entire neighborhoods for purchase, offers up to 100% of the pre-storm value of the home, and seeks to demolish these homes to create conservational areas.¹⁸⁸ As of 2016, the program has extended 900 offers and has successfully purchased almost 700 homes.¹⁸⁹

While the program appears to be successful, there are several criticisms. As a strictly voluntary program, the cluster approach requires collective participation of willing sellers.¹⁹⁰ This leads to the problem of holdouts, which would require use of eminent domain to initiate a condemnation proceeding, an option which is undesirable to many. Jeff Tittel, director of the New Jersey Sierra Club, argues that the Jersey Shore is being excluded from the program.¹⁹¹ Most of the “program’s \$300 million budget has purchased homes in neighborhoods with values far lower than many Sandy-flooded Shore communities.”¹⁹²

There has also been political backlash to the Blue Acres Program. Local politicians claim that this affects municipalities’ tax base.¹⁹³ Mayor Robert Campbell of Downe Township stated that his township “stands to lose 6%, or \$9 million, in ratables – after having already lost 10% of the ratable base after Sandy.”¹⁹⁴ Federal agencies are also putting pressure on municipalities by making the availability of future assistance contingent on localities’ participation in the buyout.¹⁹⁵

¹⁸⁸ Lovett, *supra* note 184, at 45–46.

¹⁸⁹ *Id.* at 48.

¹⁹⁰ *Id.* at 47.

¹⁹¹ See Amanda Oglesby, *Shore Still Left out of Flooding Buyout?*, ASBURY PARK PRESS (Aug. 10, 2016), <http://www.app.com/story/news/local/land-environment/2016/08/10/shore-still-left-out-flooding-buyout/88529652/>.

¹⁹² *See id.*

¹⁹³ Don E. Woods, *First Sandy, Now Blue Acres Buyout Could Be ‘Nail in Coffin’ for N.J. Shore Town*, NJ.COM (Feb. 3, 2016), http://www.nj.com/cumberland/index.ssf/2016/02/blue_acres_could_destroy_shore_communities_officia.html.

¹⁹⁴ *Id.*

¹⁹⁵ See Christopher Flavelle, *A New Strategy for Climate Change? Retreat*, BLOOMBERG VIEW (Aug. 22, 2016), <https://www.bloomberg.com/view/articles/2016-08-22/nj-s-blue-acres-program-a-new-strategy-for-climate-change>.

Voluntary buyout programs, and other NFIP-related remedies, represent ad hoc responses to storm damage. With the impending threats of climate change, however, the state must work to mitigate property loss, not just respond to it after a disastrous storm hits. The NFIP as it currently operates is an unsustainable method of fighting property loss due to climate change.

V. Expanding Nuisance Doctrine

To succeed in holding back the sea, New Jersey must adopt data-driven solutions based on the theory that repetitive flooding and the destruction of natural resources is per se a nuisance. Eminent domain, public trust doctrine, the NFIP, and voluntary buyout programs have limited applicability and are ill-suited to mitigate the effects of global warming. Instead, this Comment advocates for New Jersey courts to adopt an expansive view of nuisance law to combat further development in vulnerable coastal communities. Environmental regulations that restrict the development and destruction of wetlands and other aquatic resources can be construed as laws preventing harm to the community, thereby serving as government's defense to landowners' takings claims.

Some commentators have suggested the use of nuisance law to combat further development in vulnerable coastal communities.¹⁹⁶ Nuisance law balances private landowners' property rights against those of the neighboring community.¹⁹⁷ This option is premised on the notion that "the destruction of wetlands or other aquatic resources constitutes a public nuisance."¹⁹⁸ Many jurisdictions have found that the destruction of these resources is a "community harm," and some have gone even further to hold that such nuisances serve as a

¹⁹⁶ See Christine A. Klein, *The New Nuisance: An Antidote to Wetland Loss, Sprawl, and Global Warming*, 48 B.C. L. REV. 1155 (2007).

¹⁹⁷ *Id.* at 1158–59.

¹⁹⁸ *Id.* at 1203.

“preclusive defense” to a landowner’s takings claim.¹⁹⁹ Nuisance doctrine can come into play when weighing the burdens against the benefits of an alleged government taking. One could argue that land use inconsistent with environmental conservation measures is not part of a landowner’s bundle of property rights.²⁰⁰ Not all courts, however, are willing to adopt such a premise.²⁰¹

Lucas v. South Carolina Coastal Council provides that nuisance doctrine may function as an affirmative defense in cases where government regulation deprives property of all economically beneficial use.²⁰² Petitioner Lucas had purchased two residential lots in Charleston County, South Carolina, that he intended to build homes on.²⁰³ The Beachfront Management Act (BMA), however, had the effect of barring Lucas from erecting any habitable structures on these two parcels.²⁰⁴ Lucas argued that the BMA extinguished his property’s value and amounted to a taking.²⁰⁵ Justice Scalia, writing for the majority, agreed. The Court held that when a state enacts a regulation depriving the landowner of all economically beneficial use, the state may avoid paying compensation only if the landowner’s use was not part of the landowner’s original title, but rather inherited through preexisting restrictions imposed by state property law and nuisance law on land ownership.²⁰⁶ The Court reasoned that nuisance doctrine, as an affirmative defense, should be considered in an “antecedent inquiry into the nature of the owner’s estate.”²⁰⁷ At this

¹⁹⁹ *Id.* at 1204–05.

²⁰⁰ *Id.*

²⁰¹ See Klein, *supra* note 196, at 1176 (citing *Rapanos v. United States*, 547 U.S. 715, 722 (2006)) (Supreme Court refused to “recognize the national interest in preserving healthy wetland ecosystems.”).

²⁰² 505 U.S. 1003, 1027–30 (1992).

²⁰³ *Id.* at 1006–07.

²⁰⁴ *Id.* at 1007.

²⁰⁵ *Id.* at 1009.

²⁰⁶ *Id.* at 1031.

²⁰⁷ *Id.* at 1027.

stage, the government bears the burden of proving that “the proscribed use interests were not part of [the landowner’s] title to begin with.”²⁰⁸

The Court remanded the case to determine whether state common law would have prevented Lucas from erecting a habitable structure on his land.²⁰⁹ On remand, the South Carolina Supreme Court found that state common law principles did not prevent a nuisance; therefore, a taking had occurred.²¹⁰

Justice Kennedy’s concurrence stressed the importance of a broad construction of the defense, asserting that “the common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society.”²¹¹ This “antecedent inquiry” has suspended “the principle question in a traditional takings analysis—did the government go too far?” until the court considers the question, “did the landowner go too far?”²¹² Recognition of nuisance doctrine as a defense to takings claims enables the government when regulating for purposes of mitigating the effects of global warming, to prevail in the early stages of litigation.

The New Jersey Supreme Court might favor Justice Kennedy’s theory of nuisance doctrine as evidenced from its decision in *Karan*.²¹³ Holding that it was an error to not instruct the jury on the benefits of a protective sand dune, the *Karan* court reasoned that the burden to the individual property owner “may be infinitesimal compared to the value added to their home by the dune protection.”²¹⁴ Likewise, in *Chirichello v. Zoning Board of Adjustment*, the New Jersey Supreme Court observed that environmental regulations restricting private land use “may have a

²⁰⁸ *Lucas*, 505 U.S. at 1027.

²⁰⁹ *Id.* at 1031.

²¹⁰ *Lucas v. S.C. Coastal Council*, 309 S.C. 424, 428 (1992).

²¹¹ *Id.* at 1035 (Kennedy, J., concurring).

²¹² *Klein*, *supra* note 196, at 1191.

²¹³ 70 A.3d 524, 515–16 (2013).

²¹⁴ *Id.*

greater claim to public interest than traditional zoning.”²¹⁵ As the *McGovern* court noted: “we cannot say that an ordinance prohibiting building close to the water’s edge in order to protect the dunes and to prevent property damage from storms, is irrational, arbitrary or lacking a real and substantial relationship to the purpose of protecting the public health, safety and welfare.”²¹⁶ This suggests that New Jersey courts may have a proclivity towards “liberalizing legal theories based on nuisance or public trust doctrine.”²¹⁷ By granting claims of environmental protection greater weight in the regulatory takings analysis, New Jersey courts would support legislative efforts of climate change mitigation.

VI. A Proposal for New Jersey

Although New Jersey has attempted to use several of the previously discussed methods to mitigate the effects of climate change, these methods are inadequate for fully protecting our coastlines from imminent environmental and economic damage. This Comment urges New Jersey courts and legislature to overtly recognize nuisance prevention as a legitimate land use control and defense to regulatory taking claims.

Lawmakers faced with the threat of climate change must adopt holistic, data-driven solutions to adapt to the new reality of a warming Earth, protect properties from flooding and storm surges, and defend our unique coastal environment. First and foremost, New Jersey must require the Climate and Flood Resilience Program, established by Governor Murphy, to collaborate with state agencies to develop short-term and long-term plans that not only mitigate the effects of climate change but also adapt to this new reality. Both state and local governments

²¹⁵ 397 A.2d 646, 652–53 (N.J. 1979) (determining that New Jersey’s statutory protection of wetlands is of elevated importance); Cohen, *supra* note 65, at 362.

²¹⁶ 401 N.J. Super. 136, 148 (Super. Ct. App. Div. 2008).

²¹⁷ Knoblauch, *supra* note 45, at 13.

must implement the programs' recommendations into statutory zoning schemes and voluntary buyout programs.

Part A of this section will advocate for an expansion of preexisting statutory protections to barrier islands and other coastal areas. Part B recommends that zoning ordinances be improved to discourage development in vulnerable coastal areas, include stricter non-conforming use guidelines, and overtly recognize nuisance law as a legitimate land use control and defense to regulatory takings claims. Finally, Part C suggests the use of voluntary buyout programs as a last resort when the same effect cannot be achieved through zoning.

A. Extension of Existing Wetland Protections to Barrier Islands and Coastal Areas

New Jersey has a body of law dealing with environmental protection aimed at conserving ecological areas such as coastal and freshwater wetlands.²¹⁸ The regulations establish specific factors to consider when determining whether a proposed activity in such areas is in the public interest.²¹⁹ These factors include the public's interest in preserving natural resources and the ecological value of the wetlands, interest of private landowners in economic development, extent of public and private need for the proposed activity, practicability of alternative sites, permanent beneficial or detrimental effects of the proposed activity, and quantity of wetlands that will be disturbed.²²⁰ These environmental laws constitute exceptional protection of wetlands. The environments affected by climate change, however, are not limited to wetlands. This Comment calls on New Jersey to extend such protections to coastal areas and barrier islands—regions that are equally valuable from an ecological perspective since they often protect wetlands.²²¹

²¹⁸ See N.J. STAT. ANN. §§ 13:9A-1–13:9B-1 (West 2020).

²¹⁹ *Id.* § 13:9B-11.

²²⁰ *Id.*

²²¹ See NJDEP Assessment and Protocol, *supra* note 3, at 4.

B. Updated Zoning Ordinances, Recognition of Nuisance Doctrine, and Limits of Eminent Domain

This comment argues that zoning ordinances be used to discourage development in flood-prone areas. Local planners must use up-to-date flood mapping and climate change projections to determine which coastal areas are most at risk from rising sea level. Based on predictions of who is most at-risk, planners should impose stricter guidelines for new development in these areas. Such regulations would expand upon that which is already authorized by the MLUL.²²² Currently, the MLUL authorizes regulations that include zoning for low-density uses, establishing minimum requirements for construction, and requiring setbacks from shorelines.²²³ Municipalities should take such regulations one step further and limit property owners' ability to rebuild structures subject to repetitive flood losses.

This may present a problem of the nonconforming use—when ownership and use of a property predates a zoning ordinance prohibiting such use.²²⁴ In the interest of eliminating such uses and achieving uniformity within a zoning area, the state may impose restrictions on nonconforming landowners by limiting expansion or reconstruction of the property.²²⁵

In New Jersey, “[a]ny nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof.”²²⁶ The statute thus allows shoreline homeowners to repair storm damages. It also enables these homeowners to

²²² N.J. STAT. ANN. §§ 40:55D-25–52:27D-310 (West 2017).

²²³ N.J. STAT. ANN. §§ 40:55D-25–52:27D-310 (West 2017).

²²⁴ Nolon, *supra* note 67.

²²⁵ NOLON ET AL., *supra* note 68.

²²⁶ N.J. STAT. ANN. § 40:55D-68 (West 2020).

come into conformance with new zoning standards for climate-change mitigation by, for example, raising their homes to avoid flooding.

The MLUL does not define what constitutes partial destruction.²²⁷ In *Motley v. Borough of Seaside Park Zoning Board of Adjustment*, however, the New Jersey Appellate Division held that a landowner's demolition of his nonconforming property did not qualify as a partial destruction, but rather, a total destruction.²²⁸ In *Motley*, the plaintiff owned a property in Seaside Park Borough that was restricted to single-family use.²²⁹ The property was a nonconforming, preexisting use because the two structures built before the enactment of the zoning ordinance did not conform to the ordinance's lot and setback requirements.²³⁰ After suffering water damage from water pipes that had burst, the entire structure had to be removed.²³¹ The plaintiff tore down the structure to its foundation for reconstruction, and the Zoning Board issued a stop work order, concluding that the reconstruction exceeded the plaintiff's zoning permit.²³² The *Motley* court noted that there is a policy of closely restricting nonconforming uses and stated the applicable inquiry: "the test of whether a nonconforming use or structure may be restored or repaired is whether there has been some quantity of destruction that surpasses mere partial destruction."²³³ The property was then severely damaged in Superstorm Sandy.²³⁴

In coastal areas prone to flooding and erosion, preexisting uses must be phased out by gradually reducing development and discouraging new growth. While localities are not allowed to take active steps to eliminate nonconforming uses, they may impose restrictions on them and

²²⁷ *See id.*

²²⁸ 62 A.3d 908, 917 (N.J. Super. Ct. App. Div. 2013).

²²⁹ *Id.* at 911.

²³⁰ *Id.*

²³¹ *Id.* at 911–12.

²³² *Id.* at 914.

²³³ *Id.* at 915–16.

²³⁴ *Motley*, 62 A.3d at 911 n.1.

prohibit their expansion.²³⁵ By making a strict distinction between partial and total destruction, municipalities and courts can impose more stringent restrictions in coastal areas already ravaged by storm surges and flooding. Phasing out such uses will also minimize the damage sustained during coastal storms and rising sea levels, thereby reducing the cost of such damage.

New Jersey should enact new statutes recognizing that development in areas already vulnerable to repeated flooding is a nuisance that the government can regulate to minimize and mitigate. These statutes should declare that regulation for the purposes of environmental protection is a public purpose; thereby, they would overtly recognize nuisance prevention as a legitimate land use control and defense to regulatory taking claims. Under *Lucas*, the legislature's findings must be based on common law principles.²³⁶ Since this Comment argues that New Jersey Courts are open to the notion that the common law of nuisance is robust enough to protect oceanfront communities, the legislature would echo and reinforce the common law. Therefore, the statutes would codify the common law principles of nuisance. New Jersey laws should declare that if an area is so vulnerable to the effects of climate change—flooding, storm surges, erosion, etc.—then it is per se a nuisance to continue using that land. This would save the state the expenses associated with defending a condemnation proceeding and further conservationist interests.

The New Jersey Supreme Court's holding in *Mansoldo v. State* suggests this sort of expansive view of nuisance law.²³⁷ In that case, the NJDEP had restricted construction on Mansoldo's vacant property which was in a floodway to limit flood damage.²³⁸ Mansoldo was

²³⁵ See *Fred McDowell, Inc. v. Bd. of Adjustment*, 757 A.2d 822, 829 (N.J. Super. Ct. App. Div. 2000); *Conselice v. Borough of Seaside Park*, 817 A.2d 988, 992 (N.J. Super. Ct. App. Div. 2003).

²³⁶ 505 U.S. 1019, 1031 (1992).

²³⁷ 898 A.2d 1018 (N.J. 2006).

²³⁸ *Id.* at 1020–21.

thus prevented from constructing two residential buildings that were otherwise permitted.²³⁹ The *Mansoldo* court reversed the lower court decisions and established the proper inquiry: whether the regulation denied the landowner all economically beneficial use of the property and, if so, whether the state was required to pay just compensation unless property and nuisance law principles precluded the intended use.²⁴⁰

Similarly, in *Seven Mile Island, L.L.C. v. Planning Bd. of Avalon*, the New Jersey Appellate Division announced a deferential approach to municipalities' broad police powers.²⁴¹ At issue in *Seven Mile Island* was the Borough of Avalon's enactment of beach protection ordinances, which prohibited the construction of pools in dune areas and whether these ordinances were preempted by CAFRA or the MLUL.²⁴² The court held that municipalities on barrier islands vulnerable to storm damage might "adopt ordinances consistent with and similar to, but more stringent than, CAFRA's requirements in order to address its local concerns."²⁴³ Further, it concluded that a prohibition "on construction of swimming pools in dunes, an environmentally sensitive area, is rationally related to an important public purpose."²⁴⁴

Mansoldo and *Seven Mile Island* evince New Jersey state courts' willingness to defer to localities initiatives to protect its vulnerable areas. Municipalities should enact ordinances that declare that once a building in a coastal area has suffered storm damage, the landowner cannot rebuild. To limit such damage in coastal areas, municipalities must restrict what construction is allowed through ordinances such as those at issue in *Mansoldo* and *Seven Mile Island*. State courts, to ensure the effectiveness of local climate change mitigation efforts, should conclude

²³⁹ *Id.*

²⁴⁰ *Id.* at 1024.

²⁴¹ No. A-5270-07T3, 2009 WL 1750422, *24, *26 (2009) (Super. Ct. App. Div. June 23, 2009).

²⁴² *Id.* at *1-2.

²⁴³ *Id.* at *22.

²⁴⁴ *Id.* at *27.

that such restrictions do not constitute a regulatory taking because of the nuisance exception announced in *Lucas*.²⁴⁵ Recognition that the cycle of rebuilding structures and consequent destruction of coastal resources is a public nuisance would serve as a preclusive defense to landowners' regulatory takings claims.

If the same result could not be achieved through zoning regulations, local governments may resort to the use of eminent domain. This Comment urges that use of eminent domain be limited to obtaining easements across a property. Climate change mitigation strategies, such as beach renourishment projects, pose minimal burdens on the individual property owner while adding invaluable protection from storm surges and flooding. New Jersey courts have already demonstrated a proclivity towards this liberal theory of nuisance doctrine and should overtly incorporate this into takings jurisprudence to prevent unnecessary litigation.

C. Voluntary Buyout Programs as a Last Resort

New Jersey should only resort to voluntary buyout programs in those cases where the same effect could not be achieved through zoning. Voluntary buyout programs are limited in application because they are not feasible on a large-scale level, because of their voluntary nature, and because they are often used ad hoc—available to homeowners only after their homes have been destroyed by flooding.²⁴⁶ Such programs, however, can be revised by statute to serve as a more proactive climate adaptation strategy that integrates scientific data on an areas' susceptibility to flooding. By focusing on small communities of property owners, buyout programs can avoid resistance that comes along with taking away a municipality's tax base.²⁴⁷

²⁴⁵ See *Lucas v. S.C. Coastal Council*, 505 U.S. at 1027–30.

²⁴⁶ See Section IV.C.

²⁴⁷ See Lovett, *supra* note 184, at 45–46.

These programs must also ensure that buyout prices adequately re-capture homeowners' value of their property and social capital while assisting homeowners in relocating.²⁴⁸

All these remedies require community engagement. State and local actors must ensure that climate change mitigation is an interactive process with opportunities for public input. Zoning regulations, dune replenishment projects, and voluntary buyout programs all have potential to disrupt communities. Engaging locals in the conversation around climate change and coastal protection is crucial to ensuring the success of these measures and reducing the potential for litigation.

VII. Conclusion

To succeed in holding back the sea, New Jersey must adopt data-driven solutions based on the theory that repetitive flooding and the destruction of natural resources is per se a nuisance. Rising sea levels threaten private and public interests alike and therefore require a collective solution. All the tools necessary to adapt to rising sea levels are in place—the scientific models predicting sea level rise, zoning and takings powers, and jurisprudence that can insulate localities from takings claims based on nuisance doctrine. These tools now must be put to use. New Jersey must shift its focus from recovery to mitigation and adaptation, from reactive measures to proactive measures. Nuisance doctrine is an evolving solution to the evolving problem of global warming.

²⁴⁸ *See id.*