

New Jersey Imposes New Flood Hazard Disclosure Requirements on Sellers and Landlords

Jack Fersko

Greenbaum, Rowe, Smith & Davis LLP Client Alert

March 18, 2024

What You Need to Know

- In response to increasing risks of significant flooding throughout the state, New Jersey enacted a Flood Hazard Disclosure Law which imposes certain disclosure requirements on landlords and sellers of real property effective March 20, 2024.
- The law applies to both the sale and exchange of real property, as well as lease transactions.
- The statute and its required disclosures present a number of significant questions for parties involved in New Jersey sale and lease transactions going forward.

The New Jersey statute concerning real property and flood notifications, commonly referred to as the Flood Hazard Disclosure Law, was **enacted** on July 3, 2023. The law imposes certain disclosure requirements on both landlords and the sellers of real property commencing **March 20, 2024**.

Sale Transactions

The Flood Hazard Disclosure Law applies to both sale and exchange transactions. The required disclosures must be made before a purchaser is obligated under a contract for the purchase. The disclosure must include whether the property is located in the FEMA Special or Moderate Risk Flood Hazard Area, as well as certain other disclosures enumerated below.

The seller's disclosure form must include the following questions, an explanatory answer to any question responded to in the affirmative, and further explanatory language required by the statute:

Attorneys

Jack Fersko

Published Articles (Cont.)

- Is any or all of the property located wholly or partially in the Special Flood Hazard Area (100-year floodplain) according to FEMA's flood insurance rate maps for the property?
- Is any or all of the property located wholly or partially in the Moderate Flood Hazard Area (500-year floodplain) according to FEMA's flood insurance rate maps for the property?
- Is the property subject to any requirement under federal law to obtain and maintain flood insurance?
- Has seller received assistance, or is seller aware of any previous owners receiving assistance, from FEMA, the U.S. Small Business Administration, or other federal disaster flood assistance for flood damage to the property?
- Is there flood insurance on the property?
- Is there a FEMA elevation certificate available for the property? If so, it must be shared with the buyer.
- Has seller ever filed a claim for flood damage to the property with any insurance provider, including the National Flood Insurance Program? If the claim was approved, what was the amount received?
- Has the property experienced any flood damage, water seepage, or pooled water due to a natural flood event, such as heavy rainfall, costal storm surge, tidal inundation, or river overflow? If so, how many times?

The disclosure form must also include a notice that statewide flood risks are increasing, and that the buyer may review these risks by going to the **website** that the New Jersey Department of Environmental Protection (DEP) will manage, which will be linked to and published on the New Jersey Department of Community Affairs (DCA) website. An **interim disclosure form** is available online pending the promulgation of regulations to implement the new legislation.

Although there is no express remedy set forth in the statute, in light of the requirement that the disclosure must be given before the buyer is obligated to purchase the property, a question remains whether a buyer will have a termination right when a seller has failed to make the required disclosure.

Lease Transactions

The flood hazard disclosures under the new law must be made before the lease signing or renewal and may be made either within the lease or by a separate disclosure document. Consultation is necessary with respect to disclosures for existing leases with renewal options.

The landlord's required disclosure form must include the following questions:

- Is any or all of the property located wholly or partially in the Special Flood Hazard Area (100-year floodplain) according to FEMA's flood insurance rate maps for the leased premises area;
- Is any or all of the property located wholly or partially in the Moderate Flood Hazard Area (500-year floodplain) according to FEMA's flood insurance rate maps for the leased premises area; and
- Has the rental premises or any portion of the parking areas of the real property containing the rental premises subject to the lease ever experienced any flood damage, water seepage, or pooled water

due to a natural flood event? If so, how many times?

There are severe consequences to a landlord that fails to provide the required notice. If the landlord violates the requirements, a tenant has a right to terminate the lease. In addition, if flooding occurs that results in (i) damage to the tenant's personal property, (ii) affects the habitability of the leased premises, or (iii) affects access to the leased premises, the tenant has a right to pursue all legal remedies.

An **interim disclosure form** is available online pending the promulgation of regulations to implement the new legislation.

Questions for Resolution

The Flood Hazard Disclosure Law presents a number of questions with respect to both sale and lease transactions. To begin with, the statute provides for disclosures to be made based on actual knowledge; however, the present form calls for best knowledge for a sale and fails to set forth any disclosure standard with respect to a lease transaction.

The published property condition disclosure form for sales simply adds the flood hazard disclosures to the form that historically has only been used for residential purposes. The form is overly broad, requiring disclosures pertaining to such matters as:

- Occupancy
- Roof condition
- The condition of basements and crawl spaces
- The history of termite and wood destroying insects
- Additions and remodeling
- Plumbing, water, sewage, electrical, heating and air conditioning systems
- Environmental hazards
- Deed restrictions

Such a broad disclosure will challenge the notion of an "As-Is" transaction. There is a question whether the full disclosure form is required or an abbreviated version that only addresses the flood hazard disclosures required by statute will satisfy the statutory requirements. Additional questions remain as well, including whether a buyer can validly waive the disclosures and available remedies, and the scope of the seller's investigation in answering the disclosure questions.

There also are a number of questions that require resolution in the lease context. Traditionally courts will enforce the agreements made between a commercial landlord and tenant set forth in a lease. In light of the new statute, several issues need consideration in future lease agreements, including whether:

Published Articles (Cont.)

- A landlord can include a waiver of the disclosure requirement and the related right to terminate;
- A traditional limitation of remedies provision in a lease in favor of the landlord will bind a tenant and the exercise of any of the statutory rights provided under the new disclosure law; and
- The disclosure should include a copy of any flood search undertaken by the landlord.

Because the statute requires disclosure prior to a renewal, landlords need to assess the situation of existing leases that include renewal options. The analysis will include a determination regarding:

- Whether landlords should send out the disclosure form to all existing tenants with renewal options;
- Whether landlords should require tenants to sign the form to acknowledge receipt; and
- What specific lease notice requirements pertain to the issuance of any disclosure notice.

Please contact the author of this Alert with questions concerning New Jersey's flood notification law and disclosure requirements under the statute.

Jack Fersko

Co-Chair, Real Estate Department

jfersko@greenbaumlaw.com

732.476.3354