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REAL ESTATE

NEW JERSEY ENACTS LAW REQUIRING NOTICES OF FLOOD-PRONE AREAS IN REAL ESTATE TRANSACTIONS

By Gordon Duus | July 17, 2023

On July 3, 2023, the New Jersey legislature enacted, over Governor Murphy's conditional veto, a statute (Senate Bill 3110; P. L. 2023, c. 93) requiring sellers and landlords of commercial and residential property to provide notices of flood-prone areas to purchasers and tenants before the transaction becomes binding.

Rental Property. For leases, the law amends the New Jersey Truth-in-Renting Act, N.J.S.A. 46:8-43 et seq., to require every landlord to notify in writing each of the landlord's tenants, prior to lease signing or renewal, whether the property is located in the Federal Emergency Management Agency ("FEMA") Special Flood Hazard Area ("100-year floodplain") or Moderate Risk Flood Hazard Area ("500-year floodplain") and if the landlord has actual knowledge that the rental premises or any portion of the parking areas of the real property containing the rental premises has been subjected to flooding. The law does not apply to (1) landlords who lease commercial space or residential dwellings for less than one month, (2) residential dwellings in a premises containing not more than two units, (3) owner-occupied premises containing not more than three units, or (4) hotels, motels, or other guest houses serving transient or seasonal guests for a period of less than 120 days.

If the lease is in writing, the required notice may be included in the written lease, but for residential leases the notice must be a separate rider, individually signed or otherwise acknowledged by the tenant and written in not less than 12-point typeface. The New Jersey Department of Community Affairs ("DCA"), in consultation with the New Jersey Department of Environmental Protection ("DEP"), is directed to develop and publish a model notice to be used by landlords. The provisions of the act applicable to leases are not effective until the 90th day after the publication of the model notice by the DCA.

The model notice is to contain the heading "Flood Risk" and questions for the landlord to answer regarding the landlord's actual knowledge of past flooding of the property. The questions regarding the property being in a FEMA Special or Moderate Risk Flood Hazard Area shall not contain the option for "unknown." To determine how the questions are to be answered, FEMA's current flood insurance rate maps for the leased premises area must be consulted. The landlord will be required to answer whether the rental premises or any portions of the parking areas of the real property containing the rental premises ever experienced any flood damage, water seepage, or pooled water due to a natural flood event and, if so, the number of times that has occurred.

The notice to residential tenants must also indicate that flood insurance may be available to renters through FEMA's National Flood Insurance Program to cover their personal property and contents in the event of a flood and that standard renter's insurance does not typically cover flood damage.

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The DCA, in consultation with the DEP, is to prepare a notification that statewide flood risks are increasing and that the tenant may review these risks by going to the website that the DEP must ensure is managed with current and scientifically-supported information, which is linked to the website of the DCA. The DEP website is required to include information to allow property owners to look-up whether a particular mailing address is in the FEMA Special or Moderate Risk Flood Hazard Area, and the landlord's obligation to disclose that fact, beyond actual knowledge, does not take effect until the DEP website is in place.

If a landlord violates the law by failing to make the disclosure that the property is in a FEMA Special or Moderate Risk Flood Hazard Area, the tenant can terminate the lease by giving a written notice to the landlord. If a landlord violates the law and flooding occurs that damages a tenant's personal property, affects the habitability of the lease premises, or affects tenant's access to the leased premises, the tenant may pursue all legal remedies under the law to recover damages recognizing the landlord's failure to disclose critical information. Termination of a lease is effective when the tenant surrenders possession of the dwelling. Not later than the 30th day after the termination of the lease, the landlord must refund to the tenant all rent or other amounts paid in advance under the lease for any period after the effective date of the lease termination.

Real Estate Sales. For sales, the law also amends the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq., to require sellers of real property to disclose, on the property condition disclosure statement, whether the property is located in the FEMA Special or Moderate Risk Flood Hazard Area and any actual knowledge of the seller concerning flood risks of the property to the purchaser before the purchaser becomes obligated under any contract for the purchase of the property.

The Division of Consumer Affairs ("Division"), in consultation with the DEP, DCA and New Jersey Real Estate Commission, is to add certain specific questions to the property condition disclosure statement concerning certain flooding risks to a property being sold. The Division is to revise its regulations under the Consumer Fraud Act regarding the property condition disclosure statement to incorporate the requirements of the law, which it is required to publish on the Division's website. The provisions of the act applicable to real estate sales are not effective, and a seller of real estate is not required to use the revised form, until the 90th day following the publication of the revised form on the Division's website.

The disclosure statement must contain the heading "Flood Risk" and ask the seller the following questions:

- 1. Is any or all of the property in the Special Flood Hazard Area ("100-year floodplain") or a Moderate Risk Flood Hazard Area ("500-year floodplain") according to FEMA's current flood insurance rate maps?
- 2. Is the property subject to any requirement under federal law to obtain and maintain flood insurance on the property? Properties in the Special Flood Hazard Area with mortgages from federally regulated or insured lenders are required to obtain and maintain flood insurance.
- 3. Have you ever received assistance from, or are you aware of any previous owners receiving assistance from FEMA, the U. S. Small Business Administration, or any other federal disaster flood assistance for flood damage on the property? For properties that have received flood disaster assistance, the requirement to obtain flood insurance passes down to all future owners.
- 4. Is there flood insurance on the property? A standard homeowner's insurance policy typically does not cover flood damage.
- 5. Is there a FEMA elevation certificate available for the property? If so, it must be shared with the buyer. An elevation certificate is a FEMA form, completed by a licensed surveyor or engineer, that provides critical information about the flood risk of the property and is used by flood insurance providers to determine the appropriate insurance rating for the property.

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- 6. Have you ever filed a claim for flood damage to the property with any insurance provider? If the claim was approved, what was the amount received?
- 7. Has the property experienced any flood damage, water seepage, or pooled water due to a natural flood event, such as heavy rainfall, coastal storm surge, tidal inundation, or river overflow? If so, how many times?

The Division, in consultation with the DEP, must include in the disclosure requirements and form to be distributed to purchasers of real property before the purchaser becomes obligated under any contract for the purchase of the property, that statewide flood risks are increasing and that the purchaser may review these risks by going to the website that the DEP shall create and ensure is managed with current and scientifically-supported information, linked to and published on the website of the DCA. The DEP's website is required to include information that helps property owners provide the disclosures required by this statute, and the requirement for seller to disclose if the property is in the FEMA Special or Moderate Risk Flood Hazard Area, beyond actual knowledge, takes effect after the DEP website is in place.

While the statute does not specify the remedies of the purchaser if the seller fails to accurately make the required notice, presumably the purchaser can terminate the contract prior to closing or rescind the contract after closing. *Weintraub v. Krobatsch*, 64 N.J. 445 (1974) (failure of a seller to make a required disclosure to purchaser on a significant issue justifies rescission).

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