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# New Jersey Flood Risk Disclosure Law – New Requirements for New Jersey Landlords and Sellers of Real Estate

By Jack Vrablik

## **Introduction and Background**

On July 3, 2023, Governor Phil Murphy signed Senate Bill 3110; P. L. 2023, c. 93 into law, thereby amending N.J.S.A. 46:8-50 and N.J.S.A. 56:8-19.2 (the “**Flood Disclosure Law**” or the “**Law**”). Under the Flood Disclosure Law, landlords and sellers of residential and commercial real estate in New Jersey will soon be required to make disclosures to prospective tenants and buyers regarding a property’s flooding history and whether the property is located in the Federal Emergency Management Agency (“**FEMA**”) Special Flood Hazard Area or Moderate Risk Flood Hazard Area.

In passing the Flood Disclosure Law, New Jersey became the 30<sup>th</sup> state to require these types of disclosures from landlords and real estate sellers. The impetus behind the amendment is the increased frequency of severe flooding events in New Jersey, most recently due to the remnants of Hurricane Ida in 2021, and the related economic consequences renters and buyers of real estate suffer as a result. Alluding to these issues, and in demonstrating his support for the Law, Governor Murphy stated that before the Flood Disclosure Law, New Jersey residents were left “vulnerable to unknowingly putting themselves at risk of losing their homes and business to flooding.”<sup>1</sup>

## **Implementation and Timing**

Although the Flood Disclosure Law is technically already in effect, the disclosure requirements, which are the teeth of the law, do not yet apply for either landlords or sellers. For



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landlords, the disclosure requirements will not apply to new leases or lease renewals until 90 days after the New Jersey Department of Community Affairs publishes to its website a model notice (the “**Model Notice**”) containing the requirements set forth in the amended N.J.S.A. 46:8-50. Similarly, the disclosure requirements for real estate sales agreements will not apply until 90 days after the New Jersey Division of Consumer Affairs publishes to its website a revised form of the property condition disclosure statement (the “**Property Condition Disclosure Statement**”) that includes the specific requirements set forth in the amended N.J.S.A. 56:8-19.2. As of the date of this article, neither the Model Notice nor the revised form of Property Condition Disclosure Statement have been published.

### **Disclosure and Notice Requirements**

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#### Landlords (N.J.S.A. 46:8-50)

Landlords will be required to provide notice to tenants, in writing, of the flood related disclosures listed below before a new lease or lease renewal is executed by the tenant. For commercial tenants, the disclosures may be included in the lease or renewal. For residential tenants, the disclosures must be provided in a separately signed rider to the lease or renewal. Subject to the Note Regarding Floodplain Disclosure, detailed below, these disclosures are to be based on the landlord’s *actual knowledge*.

The disclosure requirements, as they will be set forth in the Model Notice, are as follows:

- “Is any or all of the rental property located wholly or partially in the Special Flood Hazard Area (“100-year floodplain”) according to FEMA's current flood insurance rate maps for the leased premises’ area?;
- Is any or all of the rental property located wholly or partially in a Moderate Risk Flood Hazard Area (“500-year floodplain”) according to FEMA's current flood insurance rate maps for the leased premises’ area?; and



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- 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?”<sup>2</sup>

There is no requirement in N.J.S.A. 46:8-50 to use the Model Notice so long as these disclosures are provided.

In addition to the disclosures above, all residential leases must also contain the following notice to tenants: “Flood insurance may be available to renters through FEMA’s National Flood Insurance Program to cover your personal property and contents in the event of a flood. A standard renter's insurance policy does not typically cover flood damage. You are encouraged to examine your policy to determine whether you are covered.”<sup>3</sup>

The notice requirements do not apply to (i) short-term tenancies or stays of less than 120 days; (ii) owner-occupied residential premises containing three or less units; or (iii) non-owner-occupied residential premises containing two or less units.<sup>4</sup>

#### Sellers (N.J.S.A. 56:8-19.2)

Using the Property Condition Disclosure Statement, sellers will be required to provide notice to buyers, in writing, of the flood related disclosures listed below before the buyer becomes obligated under any agreement to purchase real estate. Subject to the Note Regarding Floodplain Disclosure, detailed below, these disclosures are to be based on the seller’s *actual knowledge*.

The Property Condition Disclosure Statement must include the following flood-related disclosures:

- “Is any or all of the property located wholly or partially in the Special Flood Hazard Area (“100-year floodplain”) according to FEMA’s current flood insurance rate maps for your area?



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- Is any or all of the property located wholly or partially in a Moderate Risk Flood Hazard Area (“500-year floodplain”) according to FEMA’s current flood insurance rate maps for your area?
- 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, also known as high-risk flood zones, on FEMA’s flood insurance rate maps with mortgages from federally regulated or insured lenders are required to obtain and maintain flood insurance. Even when not required, FEMA encourages property owners in high-risk, moderate-risk, and low-risk flood zones to purchase flood insurance that covers the structure and the personal property within the structure. Also note that properties in coastal and riverine areas may be subject to increased risk of flooding over time due to projected sea level rise and increased extreme storms caused by climate change which may not be reflected in current flood insurance rate maps.
- Have you ever received assistance, 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 to the property? For properties that have received federal disaster assistance, the requirement to obtain flood insurance passes down to all future owners. Failure to obtain and maintain flood insurance can result in an individual being ineligible for future assistance.
- Is there flood insurance on the property? A standard homeowner's insurance policy typically does not cover flood damage. You are encouraged to examine your policy to determine whether you are covered.
- Is there a FEMA elevation certificate available for the property? If so, the elevation certificate must be shared with the buyer. An elevation certificate is a FEMA form, completed by a licensed surveyor or engineer. The form provides critical information about the flood risk of the property and is used by flood insurance providers under the National Flood Insurance Program to help determine the appropriate flood insurance rating for the property. A buyer may be able to use the elevation certificate from a previous owner for their flood insurance policy.



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- Have you 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, coastal storm surge, tidal inundation, or river overflow? If so, how many times?"<sup>5</sup>

If the seller answers “yes” to any of the above, the seller must also provide an explanation. In addition to the disclosures above, the Property Condition Disclosure Statement must also include a notice indicating that “Statewide flood risks are increasing” and informing buyers that they can review these risks by going to the New Jersey Department of Environmental Protection (“**DEP**”) website (such portion of the DEP website does not exist as of the date of this article; the DEP is tasked with creating it as part of the Flood Disclosure Law).<sup>6</sup>

#### Note Regarding Floodplain Disclosure

The Flood Disclosure Law requires the DEP to add to its website “a user-friendly look-up tool searchable by mailing address that identifies if a property is in the FEMA Special or Moderate Risk Flood Hazard Area.”<sup>7</sup> Before this tool is available, the requirement for landlords and sellers to disclose if the property is in either such Flood Hazard Area is limited to the landlord’s or seller’s actual knowledge. Once the tool is active, landlords and sellers will be required to use the tool and make disclosures according to its results.

#### **Penalties for Disclosure Violations**

##### Landlords (N.J.S.A. 46:8-50)

If a landlord fails to disclose to its tenant that the property is located in either a FEMA Special or Moderate Risk Flood Hazard Area, and the tenant subsequently discovers that the property is in either Flood Hazard Area, the tenant may immediately terminate the lease without penalty upon written notice to the landlord. If a landlord fails to make any of the disclosures



required by N.J.S.A. 46:8-50 “and flooding occurs that results in damage to a tenant's personal property, affects the habitability of the leased premises, or affects the 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.”<sup>8</sup>

#### Sellers (N.J.S.A. 56:8-19.2)

Unlike landlords, the Law does not include express remedies available to a buyer in the event a seller breaches its disclosure duties under the statute. Nevertheless, it is prudent for sellers to infer that buyers will be able to seek similar remedies as tenants in the event a seller fails to disclose that the property is in a Flood Hazard Area or fails to disclose other required information related to prior flooding events that impacted the property.

### **Practice Tips for Commercial Property Landlords and Sellers**

#### Landlords (N.J.S.A. 46:8-50)

The Flood Disclosure Law does not include a provision that prohibits tenants from waiving their rights under N.J.S.A. 46:8-50, a type of provision which does appear in other tenant’s rights statutes. Nevertheless, “[e]xculpatory clauses [are always] void as against public policy in residential leases”, so these practice tips only apply to leases for commercial property.<sup>9</sup>

Although exculpatory clauses favoring a landlord are not barred from commercial leases, they are disfavored by courts and therefore “are strictly construed against a landlord.”<sup>10</sup> However, since the Law is brand new, neither the Law itself nor any lease addressing the Law’s disclosure requirements have been interpreted or tested by the courts, and it may be a number of years before the courts make any such rulings. Without the benefit of judicial interpretation, it is in landlords’ interest to apply a conservative reading to the Law’s disclosure requirements.

For example, landlords must disclose whether the leased premises or its parking area have ever experienced “flood damage”, “water seepage” or “pooled water”, but these terms are not defined by the Law.<sup>11</sup> In the absence of a statutory definition or a court’s interpretation, the plain



meaning of the terms should be applied. By doing so here it becomes clear that the threshold for disclosure is low. Specifically, “flood damage” means any sign of water damage, “water seepage” means any entry of water into the premises, and “pooled water” means a puddle of any size.

In preparing commercial lease agreements, landlords should err on the side of making disclosures but should also seek limitations on liability from tenants in exchange. For example, a landlord may seek an acknowledgement from its tenant that landlord made the disclosures required by N.J.S.A. 46:8-50, and as a result, the landlord and tenant agree that the tenant, absent proof of actual fraud, will be precluded from seeking the early termination or damages remedies provided under the statute.

#### Sellers (N.J.S.A. 56:8-19.2)

Commercial property sales are typically negotiated by parties with sophisticated real estate knowledge. Commercial property sales also generally include extended due diligence periods during which buyers have the opportunity to inspect the property with a host of subject matter experts, perform detailed tests, interview the current occupants, and complete other aspects of diligence before being obligated to consummate the purchase of the property. Residential property sales, on the other hand, are much more likely to involve parties with little or no prior real estate knowledge, and while residential property sales involve some level of diligence, including certain inspections, there is typically far less diligence completed with respect to a residential property sale as compared to a commercial property sale. With less sophisticated parties involved and less diligence completed as part of residential property sales, it could be riskier for sellers of residential property to seek waivers from buyers with respect to N.J.S.A. 56:8-19.2.

New Jersey law allows parties to waive certain statutory, and even constitutional, rights in contracts so long as the party making the waiver has full knowledge of the rights it is waiving and demonstrates a “clear and unmistakable” intent to surrender them.<sup>12</sup> “No particular form of words is necessary to accomplish a clear and unambiguous waiver of rights”, but waiver provisions steeped in legalese can be rejected for not sufficiently putting a buyer on notice that it is waiving its rights.<sup>13</sup>

In connection with the extensive diligence opportunities typically afforded to buyers in commercial property sales, it is common for sellers to include broad disclaimers regarding the



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status and condition of the property, which are subject only to limited representations and warranties from the seller. Sellers should consider bolstering these disclaimer sections to include a specific waiver, from buyers, of buyers' right to receive the disclosures under N.J.S.A. 56:8-19.2. Provided that the waiver is clear and specific, and is set forth in connection with an acknowledgment by buyer of its substantial opportunity to complete its own due diligence, it is likely that sellers of commercial property will be able to negotiate their disclosure duties under N.J.S.A. 56:8-19.2 out of sales contracts.

### **Next Steps**

For further information and guidance regarding compliance with the Flood Disclosure Law, please reach out to the author – Jack Vrablik in the firm's Corporate and Real Estate practice groups – or reach out directly to your regular OLSS contact.

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<sup>1</sup> Conditional Veto of Senate Bill No. 3110 (Third Reprint), State of New Jersey 220<sup>th</sup> Legislature (2023).

<sup>2</sup> N.J.S.A. 46:8-50.b.(1)-(3).

<sup>3</sup>*Id.* at c.





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<sup>4</sup>*Id.* at g.

<sup>5</sup> N.J.S.A. 56:8-19.2.b.(1)-(8).

<sup>6</sup> N.J.S.A. 56:8-19.2.c.

<sup>7</sup> N.J.S.A. 46:8-50.d.; N.J.S.A. 56:8-19.2.c.

<sup>8</sup> N.J.S.A. 46:8-50.e.

<sup>9</sup>*Ultimate Computer Servs., Inc. v. Biltmore Realty Co.*, 183 N.J. Super. 144, 151 (App. Div. 1982).

<sup>10</sup>*Id.*

<sup>11</sup> N.J.S.A. 46:8-50.b.(3).

<sup>12</sup>*Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 442 (2014).

<sup>13</sup>*Id.*