

ENVIRONMENTAL LAW

NY, New Jersey Adopt Laws Requiring Flood Risk Disclosure for Homebuyers, Tenants

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In the wake of several incidents of unprecedented rainfall and disastrous flooding, both New York and New Jersey have adopted laws requiring the sellers of residential properties to tell buyers, and landlords to tell tenants, about known flood risks. The New Jersey law also requires disclosures in commercial transactions.

A New York enactment also eliminates the commonly-used ability of sellers to avoid making property disclosures (not only about flood risk) by taking \$500 off the purchase price.

New York Law for Sellers and Buyers

Chapter 484 of the New York Laws of 2023, signed by Governor Kathy Hochul on Sept. 22, 2023, amends Real Property Law Sec. 462(2) by adding several items to the Property Condition Disclosure Statement that sellers of one- to four-family dwellings must provide to buyers before signing a binding contract of sale. (The law does not apply to condominium units, cooperative apartments, or unimproved property on which housing will be built.) All these items are to be “based upon the seller’s actual knowledge at the time of signing” the statement; separate investigation is not required.

Among the new items that must be disclosed are whether the structure has “experienced any water penetration or damage due to seepage or a natural flood event”; whether a claim for flood damage has been filed with an insurance company; whether the property is in a floodplain designated by the Federal Emergency Management Agency (FEMA); and whether the property has, or is required to have, flood insurance.

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As we noted in our Sept. 9, 2020 column, “The Perils of Relying on FEMA Flood Maps in Real Estate Transactions,” most FEMA flood maps are out of date and do not reflect expected future flooding as a result of climate change. (See also our Nov. 9, 2022 column on “Extreme Weather and Chemical and Waste Management Regulations,” which discussed the need to update regulations to address extreme weather risks to industrial, storage, and waste facilities.)

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Several other services do provide property-specific projections. In New York City, the NYC Flood Hazard Mapper presents projections under different greenhouse gas emission scenarios.

If after providing the disclosure statement but before the closing the seller “acquires knowledge which renders [the statement] materially inaccurate,” the seller is required to provide the buyer with a revised statement.

New York law had allowed sellers to avoid providing a Property Condition Disclosure Statement by reducing the purchase price by \$500, and doing so had become standard practice in many parts of the state. The new enactment eliminates this option for all items on the Disclosure Statement, not just those about flooding.

Finally, the law states that sellers “shall be liable only for a willful failure to perform the requirements of this article. For such a willful failure, the seller shall be liable for the actual damages suffered by the buyer in addition to any other existing equitable or statutory remedy.”

This law becomes effective March 20, 2024.

New York Law for Landlords and Tenants

On Dec. 23, 2022, Governor Hochul signed Chapter 768 of the Laws of 2022, creating Real Property Law Sec. 231-B. It took effect June 21, 2023. It provides that every residential lease shall disclose “any prior flood damage to the leased premises due to a natural flood event, such as heavy rainfall, coastal storm surge, tidal inundation, or river overflow, that the lessor knows or reasonably should know has occurred to such premises and the nature of any such damage.”

The lease must also disclose whether the property is within a FEMA designated floodplain or the 100-year or 500-year floodplain. The landlord is required to determine this; unlike the law concerning property sales, this disclosure is not limited to what the party already knows. For most locations, this information can be obtained online from the FEMA Flood Map Service Center; enter the address and then click on “Dynamic Map.”

Residential leases must also provide notice that flood insurance is 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.”

New Jersey Law

On July 3, 2023, Governor Phil Murphy signed Bill S3110/A4783, which became Chapter 93, adding C.46:8-50. It has requirements for both landlords and sellers. Unlike the new York laws, it applies to commercial as well as residential properties.

The law amends the New Jersey Truth-in-Renting Act to require every landlord to notify each tenant in writing prior to lease signing or renewal whether a property is located in a FEMA 100-year or 500-year floodplain, “and if the landlord has actual knowledge that the rental premises or any portion of the parking areas ... has been subjected to flooding.” Seasonal rentals of less than 120 days and various other kinds of buildings are exempt.

Each lease is also required to have a notice similar to that required in New York about the availability of renters’ insurance.

If a landlord fails to disclose that the property is in one of these FEMA zones and a tenant subsequently learns that it is, the tenant may terminate the lease; and if a flood occurs that damages a tenant’s personal property, “the tenant may pursue all legal remedies under the law to recover damages recognizing the landlord’s failure to disclose critical information.”

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With respect to property sales, the seller must, before contract, disclose whether the property is in one of the FEMA zones, “and any actual knowledge of the seller concerning flood risks of the property.”

The law requires the Department of Consumer Affairs to prepare a model notice to tenants and an amended property condition disclosure statement for sellers. The requirements become applicable 90 days after this language is published.

The Department of Environmental Protection is required to create a user-friendly look-up tool to identify whether a property is located within a flood plain.

Conclusion

Climate projections show that both coastal and inland flooding are going to worsen in the decades to come. Flood risk varies considerably from place to place, and both prospective buyers and tenants would be wise to include this risk in their calculus of where to locate, if they have a choice.

Information about a property’s flood history is especially important. According to a study by the consulting firm Milliman, New York home buyers who purchase previously flooded homes can expect to pay, on average, more than \$90,000 over a 30-year mortgage to repair flood related damage in comparison to a home that has not previously flooded.

No federal law currently requires disclosure of flood risk to home buyers, although the Federal National Mortgage Association (Fannie Mae) has urged the enactment of such a requirement, as already exists for lead-based paint. According to an August 2023 report from the Natural Resources Defense Council, more than one-third of states have no statutory or regulatory requirement that a seller must disclose a property’s flood risks or past flood damages to a potential buyer.

With these new laws, New York and New Jersey are no longer on that list.