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Introduction: Superstorm Sandy & Its Impact on Coastal New Jersey

Fig. 1. Satellite view of Hurricane Sandy on October 28, 2012, approximately 36 hours before making landfall in New Jersey.¹



¹ NASA EARTH OBSERVATORY, *Geostationary Operational Environmental Satellite 13: Natural-Color Image of Hurricane Sandy*, <http://earthobservatory.nasa.gov/NaturalHazards/view.php?id=79553> (last visited November 30, 2013).

On the evening of October 29, 2012 and continuing into October 30, 2012, Superstorm Sandy (colloquially known as “Hurricane Sandy”) made landfall on the southern New Jersey coast.² At the time of landfall, President Obama had already declared federal states of emergency in New Jersey, New York, Connecticut, Massachusetts, Rhode Island, Pennsylvania, Maryland and the District of Columbia, mobilizing federal resources across the Mid-Atlantic and New England regions to respond to the impending destruction that Sandy would bring.³ Over the next few days, Hurricane Sandy battered the Eastern Seaboard, causing particularly intense destruction in the state of New Jersey. The central and northern areas of the Jersey Shore experienced massive storm surge-driven tidal flooding, damaging or completely destroying thousands of homes and buildings, decimating essential infrastructure like roadways, electrical grids, drinking water distribution systems and natural gas systems and displacing countless residents of the area. The “Gold Coast” area of New Jersey, a grouping of municipalities opposite Manhattan at the intersection of the lower Hudson River and New York Harbor, experienced similar surge-driven flooding with relatively few prevention and/or flood mitigation mechanisms in place; residents of the Gold Coast were trapped by flooding inside buildings en masse for several days, living without electricity and with limited or no support from municipal, state and federal emergency first responders. Those first responders were often unable to access areas in need of support due to the depth of floodwaters, the lengthy period of time necessary for the floodwaters to subside, and latent or hidden dangers created by impacted infrastructure (e.g. submerged electrical grid components, raw sewage, debris, et cetera). In total, Hurricane Sandy left in its wake at least 37 deaths and 2.7

² FEDERAL EMERGENCY MANAGEMENT AGENCY, *Hurricane Sandy: Timeline*, <http://www.fema.gov/hurricane-sandy-timeline> (last visited November 15, 2013).

³ *Id.*

million households without electricity in New Jersey and an estimated \$50 billion in damage across the affected Eastern Seaboard states.^{4 5}

Fig. 2. Aerial views of Mantoloking, New Jersey, a barrier island municipality on the central New Jersey coast, before and after Hurricane Sandy. Mantoloking became one of the proverbial “faces” of the destruction caused by Hurricane Sandy in New Jersey.⁶

⁴ Robin Respaut et al., *Factbox: Storm Sandy blamed for at least 132 deaths in U.S., Canada*, REUTERS (Nov. 16, 2012), <http://www.reuters.com/article/2012/11/16/us-storm-sandy-deaths-idUSBRE8AF0ZX20121116>.

⁵ ERIC S. BLAKE ET AL., NATIONAL HURRICANE CENTER, TROPICAL CYCLONE REPORT HURRICANE SANDY (2013), *available at* http://www.nhc.noaa.gov/data/tcr/AL182012_Sandy.pdf.

⁶ UNITED STATES GEOLOGICAL SURVEY, *Hurricane Sandy Pre- and Post-Storm Photo Comparisons – New Jersey*, <http://coastal.er.usgs.gov/hurricanes/sandy/photo-comparisons/newjersey.php> (last visited November 15, 2013).



Hurricane Sandy highlighted the importance of flood insurance for coastal New Jersey communities. Without a system of flood insurance, billions of dollars in property damage would be left uncompensated, devastating the livelihood of millions of coastal New Jersey residents. The National Flood Insurance Program provides such a system, but changes in the system will increase

flood insurance rates for owners of property in coastal New Jersey. This paper will first explore the legal landscape in New Jersey's coastal areas as it relates to flood insurance the mitigation and prevention of major tidal flood event impacts. This exploration shall include a summary of the major features of the National Flood Insurance Program, Flood Insurance Rate Maps and the Biggert-Waters Flood Insurance Reform Act. Next, this paper will briefly discuss the challenges faced by municipalities and individual homeowners in complying with changes to Flood Insurance Rate Maps and the National Flood Insurance Program in general. Finally best practices will be recommended for attorneys representing individuals, small businesses, developers and/or larger institutional clients seeking to acquire, maintain and/or expand their property interests in coastal New Jersey areas that are prone to major tidal flooding events.

This paper first endeavors to provide a brief summary of the impact of Superstorm Sandy on coastal New Jersey as a concrete example of the disparate impact that future climate change-driven weather events could have on the area. The paper then explores the legal landscape in New Jersey's coastal areas as it relates to the mitigation and prevention of major tidal flood event impacts. This exploration shall include a summary of the major features of the National Flood Insurance Program, Flood Insurance Rate Maps and the Biggert-Waters Flood Insurance Reform Act. Next, this paper will briefly discuss the challenges faced by municipalities and individual homeowners in complying with changes to Flood Insurance Rate Maps and the National Flood Insurance Program in general. Finally, the paper recommends best practices for attorneys representing individuals, small businesses, developers and/or larger institutional clients seeking to acquire, maintain and/or expand their property interests in coastal New Jersey areas that are prone to major tidal flooding events.

The Current Legal Landscape in Coastal New Jersey

The National Flood Insurance Program

The National Flood Insurance Program (hereinafter “NFIP”), codified at 42 U.S.C. § 4001 et seq., is a nationwide flood insurance system statutorily established over the past half century. Congress began development of this program in 1968 when it passed the National Flood Insurance Act; in this bill, Congress recognized that protective and preventative measures taken to prevent flood-related losses were simply not enough to prevent widespread hardships for owners of properties in flood-prone areas. Congress also acknowledged that it was not economically feasible for private insurance carriers to offer flood insurance to high-risk property owners at affordable premiums.⁷ At that time and even to date, most standard Homeowner’s Insurance policies expressly disclaim coverage for flood damage. Fully privatized flood insurance, while not prohibited by law, has never been an economically viable option; due to the magnitude and widespread nature of flood-related losses, homeowner’s insurance premiums would skyrocket if insurance carriers attempted to provide flood damage coverage in those policies.

The National Flood Insurance Act empowers the Federal Emergency Management Agency (hereinafter “FEMA”) to administer the NFIP. The NFIP is a federally funded insurance system in which FEMA, through the Federal Insurance Agency (FIA) works directly with municipalities to determine eligibility for flood insurance coverage. As administrator of the NFIP, FEMA works closely with over ninety private insurance carriers to offer flood insurance coverage to municipalities across the country.⁸ Municipalities that wish to secure flood insurance availability

⁷ 42 U.S.C. § 4001(b)(1) (2013).

⁸ NATIONAL FLOOD INSURANCE PROGRAM, *About the National Flood Insurance Program: The NFIP Partnership*,

for their residents must comply with and enforce minimum flood readiness and flood damage management standards promulgated by FEMA. Once FEMA has determined that a municipality has conformed to acceptable floodplain management standards, then individual property owners are able to purchase flood insurance policies through the FEMA-approved carriers; insurance premiums, while technically “set” by FEMA, may vary property to property according to flooding risks, date of construction, quality of construction, damage mitigation devices integrated into the structures and other similar factors. In addition to ensuring that flood insurance was available to at risk Americans, Congress also mandated that all federally backed lenders and private mortgage lenders require current flood insurance on all high-risk properties held or used as collateral on loans. Each of these aspects of the NFIP is discussed in greater detail below.

The flood insurance process begins when FEMA, through the FIA, notifies a municipality that it is considered to be within an area prone to flooding.⁹ FEMA promulgates minimum flood hazard mitigation standards in 44 C.F.R. § 60 et seq; municipalities must comply with these minimum standards to qualify for flood insurance protection under the NFIP. The regulation contains several requirements of particular import. First, when the FIA releases floodplain and flood hazard data, then that data supersedes all other state, local and private studies as the baseline for flood protection measures.¹⁰ Generally, FEMA conducts hydrologic and geologic studies to determine flood risks in particular areas. The agency releases the results of the studies in Flood Insurance Rate Maps (FIRMs); these maps delineate areas that are prone to flooding and classify them with lettered designations signifying varying levels of risk. Particular details of these maps

http://www.floodsmart.gov/floodsmart/pages/about/nfip_partnership.jsp (last visited November 26, 2013).

⁹ 42 U.S.C. § 4012 (2013).

¹⁰ 44 C.F.R. § 60 (2013).

are discussed below. However, for purposes of the basic structure of the NFIP, it is important to note that FIRMs are based upon FEMA's determination of the Base Flood Elevation (BFE), or the anticipated water level during the highest flood within a one hundred year period (the "hundred year flood"). 44 C.F.R. § 60.3 provides detailed guidance to municipalities on minimum floodplain management standards with the various FIRM zones. Most notably, this regulation generally requires municipalities to implement zoning and construction standards that mandate elevation of the lowest living areas of new construction and substantial improvements to at or above the BFE level.¹¹ When the FIA has not released controlling data or information, all new construction and substantial improvements must undergo a municipal permitting process in which the municipality determines whether that construction lies within a flood-prone area; if the municipality determines that the new structure is prone to flooding, then that municipality must ensure that the construction or improvements are designed and properly anchored to avoid flotation, collapse and lateral movement during times of flooding.¹²

Under the NFIP, all homeowners in areas designated by FEMA as flood prone are eligible for federally subsidized flood insurance. Also, under the 1968 Act, structures erected prior to a municipality's enactment of a FIRM (pre-FIRM) and having the lowest living areas below any new BFE were eligible for even greater subsidies for their flood insurance.¹³ These subsidies ensured that owners of existing structures would not be financially burdened by flood insurance premiums that reflected actual flood risks. In efforts to expand the program, Congress has increased the coverage limits on flood insurance, renewed subsidies (now subject to the reforms under Biggert-Waters, detailed below) and enacted requirements that communities seeking federal

¹¹ Id.

¹² 44 C.F.R. § 60.5 (2013).

¹³ 44 C.F.R. § 60.3 (2013).

development funding join the National Flood Insurance Program.¹⁴ Furthermore, private lenders and federally-backed lenders can only issue mortgages to property owners in NFIP communities if the owners secured comprehensive flood insurance protection spanning the life of the loan.¹⁵ The entire program, funded through the National Flood Insurance Fund, has expanded greatly since its inception; in 1978, under 1.5 million policies were in force, while in 2012 over 5.5 million policies were in force.^{16 17}

Flood Insurance Rate Maps (FIRMs)

As noted above, flood insurance rates under the NFIP are based upon Flood Insurance Rate Maps (FIRMs) promulgated by FEMA. After conducting a study of a flood prone area in cooperation with scientists, engineers and agencies at the federal and state levels, FEMA issues proposed flood rate maps.¹⁸ A large portion of coastal property in New Jersey is classified as lying within Special Flood Hazard Areas (SFHA), or an area that will be inundated by a base flood that occurs once every one hundred years.¹⁹ In SFHA FIRMs, FEMA generally grades the flood risks in two categories: Zone VE, which would experience storm driven waves of three feet or higher during the hundred year flood, or Zone AE, which would experience wave action lesser than three

¹⁴ Oliver A. Houck, *Rising Water: The National Flood Insurance Program and Louisiana*, 60 Tul. L. Rev. 61, 70-71 (1985).

¹⁵ 42 U.S.C. § 4012a (b) (2013).

¹⁶ 42 U.S.C. § 4017 (2013).

¹⁷ FEDERAL EMERGENCY MANAGEMENT AGENCY, *Total Policies in Force by Calendar Year*, <http://www.fema.gov/policy-claim-statistics-flood-insurance/policy-claim-statistics-flood-insurance/policy-claim-13-14> (last visited November 28, 2013).

¹⁸ 44 C.F.R. § 66.1(c) (2013).

¹⁹ *See* 42 U.S.C. § 4004(a)(1) (2013).

feet.²⁰ The FIRM for a given area also includes the Base Flood Elevation (BFE), a projection of the still water level during the hundred-year flood.²¹

Fig. 3. A graphical representation of the classifications and measurements contained in FIRMs.²²

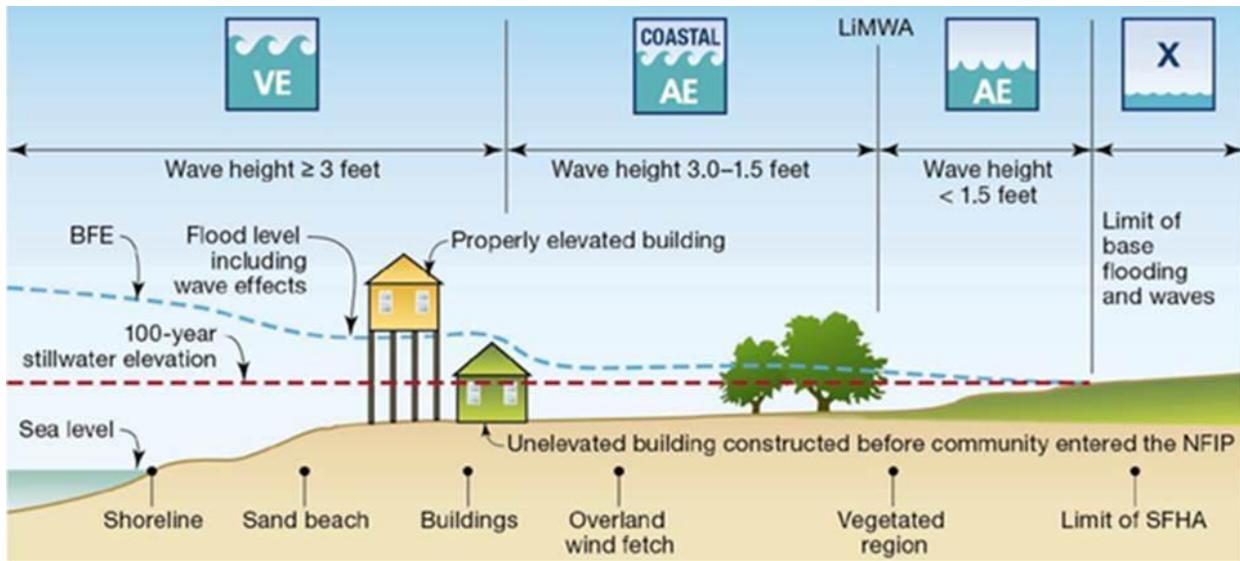


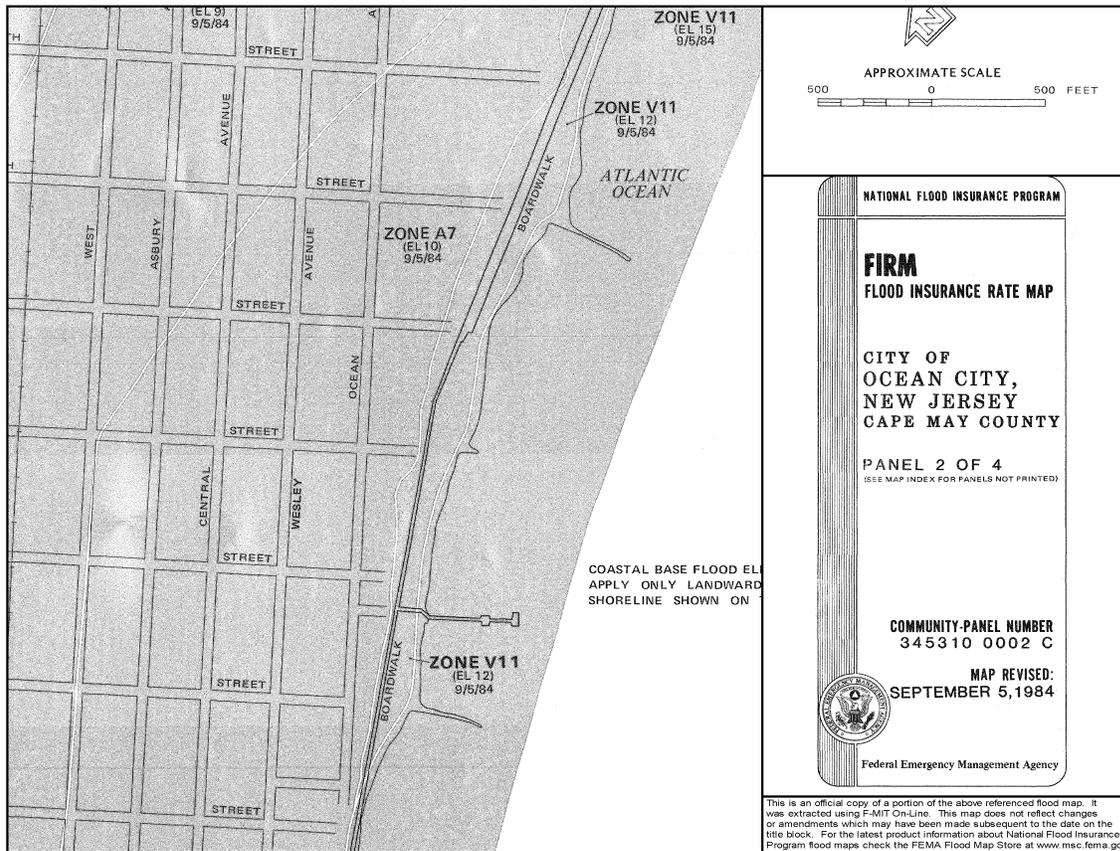
Fig. 4. A FIRMette of an oceanfront area of Ocean City, New Jersey. Note the varying flood risk zones denoted as “V11” and “A7.” Also note the varying BFEs below the zone designations.²³

²⁰ FEDERAL EMERGENCY MANAGEMENT AGENCY, *Coastal Flood Risk Study Process*, <https://www.fema.gov/protecting-homes/coastal-flood-risk-study-process> (last visited December 2, 2013).

²¹ FEDERAL EMERGENCY MANAGEMENT AGENCY, *Base Flood Elevation*, <https://www.fema.gov/national-flood-insurance-program/base-flood-elevation> (last visited December 2, 2013).

²² FEDERAL EMERGENCY MANAGEMENT AGENCY, *Coastal Flood Risk Study Process*, *supra* at note 20.

²³ FIRMette of Ocean City, NJ, FEMA MAP SERVICE CENTER, <https://msc.fema.gov/webapp/wcs/stores/servlet/mapstore/homepage/MapSearch.html> (search for



Following completion of a proposed FIRM, FEMA must circulate the FIRM to affected communities and allow for a 30-day comment period.²⁴ After the comment period, FEMA holds a meeting with officials from the affected municipalities to discuss floodplain management standards and the results of the flood risk study.²⁵ Next, FEMA publishes notice of the revised FIRM in the Federal Register and several other locality-specific means, and a 90-day appeal period begins.²⁶ During the appeal period, municipalities and individuals may submit technical data and

“900 Boardwalk, Ocean City, NJ 08226”; then follow “Retrieve Printed FIRM Panel” hyperlink).

²⁴ 44 C.F.R. §§ 66.5 (a)-(d) (2013).

²⁵ 44 C.F.R. § 66.5(f) (2013).

²⁶ 44 C.F.R. § 67.4 (2013).

comments in opposition to the revised FIRM.²⁷ After evaluating the materials submitted during the appeal period and making final changes, FEMA issues a Letter of Determination to the affected municipalities along with the final FIRM, both of which become effective six months after issuance.²⁸

When Hurricane Sandy struck New Jersey in October 2012, FEMA was in the midst of a new coastal flood study for all coastal counties in the state; as of the date of publication of this paper, those studies are ongoing and several preliminary FIRMs have been released. One major change that will be reflected in the new FIRMs will be FEMA's switch to the North American Vertical Datum of 1988 (NAVD 88) as the method for measurement of BFEs.²⁹ Previously, FEMA based its FIRM measurements on the National Geodetic Vertical Datum of 1929 (NGVD 29), which as the name indicates was completed by the federal government in 1929 without the benefit of GPS or other modern surveying techniques. According to FEMA's website, the switch from NGVD 29 to NAVD 88 in coastal New Jersey counties will result in decreases in actual first floor elevations of approximately one to one and a half feet.³⁰ For example, a coastal homeowner in Cape May County may believe that their home is elevated to 8 feet above BFE based upon NGVD 29 standards; with the change to NAVD 88, FEMA considers the same structure only to be elevated to 6.7 feet above BFE.

The Biggert-Waters Flood Insurance Reform Act of 2012

²⁷ Ibid.

²⁸ 44 C.F.R. §§ 67.8 – 67.11 (2013).

²⁹ FEMA REGION II, *Coastal Mapping and Analysis – Understanding Vertical Datums: Frequently Asked Questions*, <http://www.region2coastal.com/sandy/abfe/vertical-datum> (last visited November 27, 2013).

³⁰ Id.

On July 10, 2012, the Biggert-Waters Flood Insurance Reform Act of 2012 took effect and triggered what may be perceived as the start of a “sea change” in the NFIP. In passing this reform, Congress decided to amend flood insurance rates to more accurately reflect flood risk and to change how the new FIRMS affected flood insurance policyholders.³¹ Congress justified the reforms as measures to ensure the financial stability of the NFIP. Amongst the largest changes brought by Biggert-Waters is the elimination of subsidies for pre-FIRM structures.³² Beginning January 1, 2013, owners of non-primary residences with pre-FIRM subsidized rates will experience 25% annual increases in insurance premiums until the actual risk rate is reached.³³ Beginning on October 1, 2013, business owners with pre-FIRM subsidized rates and owners of smaller pre-FIRM subsidized residential properties that have experienced severe or repetitive flooding will experience the same 25% annual premium increases until actual risk rates are reached.³⁴ Furthermore, pre-FIRM subsidized policies on homes purchased after July 6, 2012 immediately increased to premiums reflecting actual risk upon the next policy purchase or renewal. And in late 2014 (at the earliest), communities whose FIRMS are updated will see increases in flood insurance premiums across all policies; the rate increases will be phased in over five years to reach actual risk rates based upon the updated FIRM.³⁵

³¹ FEDERAL EMERGENCY MANAGEMENT AGENCY, *The Biggert-Waters Flood Insurance Reform Act of 2012: An Overview*, <http://www.fema.gov/media-library/assets/videos/84674> (last visited December 5, 2013).

³² See FEDERAL EMERGENCY MANAGEMENT AGENCY, CHANGING RISKS CHANGING RATES, *available at* http://www.fema.gov/media-library-data/1381257512373-7b666dd6988d7f78f5ac4e9332e5d809/PreFIRM_Subsidy_ConBroch_October2013.pdf.

³³ H.R. 4348-512, 112th Cong. § 100205 (2012), *available at* <http://www.philadelphiafed.org/bank-resources/publications/consumer-compliance-outlook/2012/third-quarter/Biggert-Waters%20Act.pdf> (last visited December 7, 2013).

³⁴ *Id.*

³⁵ H.R. 4348-512, 112th Cong. § 100207 (2012), *available at* <http://www.philadelphiafed.org/bank-resources/publications/consumer-compliance-outlook/2012/third-quarter/Biggert-Waters%20Act.pdf> (last visited December 7, 2013).

New Jersey's Flood Hazard Area Control Act

Perhaps the most unique feature of the NFIP is the system of direct interaction between federal emergency management officials and municipalities with relatively little state-level intermediation. The New Jersey Legislature has empowered the New Jersey Department of Environmental Protection (hereinafter "DEP") to promulgate regulations relating to coastal flooding and land use in flood prone areas under the Flood Hazard Area Control Act, N.J.S.A. § 58:16A-50 et seq.; the DEP has exercised its statutorily-enumerated powers and has promulgated a set of flood hazard regulations in N.J.A.C. § 7:13-1.1 et seq. While these regulations prescribe various geotechnical methods for evaluating flood hazards in New Jersey (called Design Flood Elevations or "DFEs"), the state regulations adopt FIRMs in lieu of other techniques in all areas for which FEMA has issued such maps.³⁶ Since the entire New Jersey coast has been mapped by FEMA and FIRMs have been issued, the state has a very limited role in evaluating the precise tidal flood risks of each area. The state regulations do implement a permitting system for new construction and reconstruction of structures and require specific structural features designed to withstand anticipated flooding conditions.³⁷ The State of New Jersey also has some input into FEMA's final FIRMs, as FEMA allows states the opportunity to work with FEMA on revising preliminary FIRMs once they are released.

Despite the state's limited role in coastal flood hazard mitigation, one recently passed regulation is of particular import to property owners in coastal New Jersey; in January 2013, the DEP adopted Emergency Amendments to the Flood Hazard Area Control Act in response to the destruction caused by Hurricane Sandy. Under these amendments, all new structures or

³⁶ N.J.A.C. § 7:13-3.4 (2013).

³⁷ N.J.A.C. § 7:13-8.1 (2013).

reconstructions within coastal flooding areas must be constructed with the lowest habitable floor at least one foot above the BFE indicated on a given FIRM.³⁸ Beyond these regulations, flood risk mitigation is generally left to FEMA and affected municipalities.

Impact on Municipalities and Property Owners in Coastal New Jersey

Tourism in New Jersey accounts for approximately 7% of the state's total yearly GDP, making it the third largest economic sector behind pharmaceuticals and chemicals.³⁹ This burgeoning tourism industry is particularly reliant on the nine counties with coastline on the Atlantic Ocean: Atlantic, Burlington, Cape May, Essex, Hudson, Middlesex, Monmouth, Ocean, and Union Counties, respectively. According to the New Jersey Division of Travel and Tourism, in 2012 tourism in New Jersey's nine counties bordering the Atlantic Ocean accounted for approximately 75% (\$28.2 billion) of New Jersey's total tourism income of \$38 billion.⁴⁰ Tourism-based economic activity in those nine counties accounted for 328,658 jobs, or 65% of the state's total tourism-related jobs, and it provided a tax base of \$3.2 billion, or 71% of the state's total tourism-based tax revenues.⁴¹ Increases in flood insurance premiums could threaten this important industry, and adverse impacts could be seen on the state, municipal and individual levels alike.

In coastal New Jersey, large increases in flood insurance premiums over the coming years are virtually certain. As previously noted, pursuant to Biggert-Waters, federal subsidization of flood insurance premiums will be phased out over the coming years. As a result, owners of existing

³⁸ See N.J.A.C. § 7:13-11.5 (2013), available at <http://www.nj.gov/dep/docs/20130124flood-hazard-emergency-rule.pdf>.

³⁹ See TOURISM ECONOMICS, *The Economic Impact of Tourism on New Jersey*, available at <http://www.visitnj.org/new-jersey-tourism-research-and-information> (last visited November 4, 2013).

⁴⁰ Id.

⁴¹ Id.

structures will be faced with the prospect of skyrocketing flood insurance premiums as their rates climb towards actual risk rates. The rate increases brought by Biggert-Waters will be exacerbated by several other factors. First, the updated FIRMs for the New Jersey coast will likely aggressively raise BFEs, as the federal government and affiliated flood insurance carriers, like all insurance carriers, are always looking to lower the total amount of claims made. Second, the change from NGVD 29 to NAV 88 as the benchmark for BFEs in FIRMs could cause many properties to lose ground floor elevation, increasing flood insurance premiums.

Resultantly, municipalities must tread carefully in instituting zoning ordinances and construction standards that balance NFIP requirements and safety from flooding events with flood insurance costs. If the municipality chooses to leave its zoning ordinances as-is, it risks losing its ability to participate in the NFIP completely. This would be devastating for local economies, as lenders would not be willing provide mortgages on any new construction; new development would be completely stymied. But if a municipality decides to be overly aggressive with its flood mitigation standards, it risks inflating the both the costs of property ownership and rental prices beyond affordable levels. Property owners may not be able to afford the extra investment necessary to elevate structures to comply with aggressive “BFE-plus” zoning ordinances; those property owners who could afford such upfront costs would presumably pass those costs on to renters and/or customers. The increased costs across various markets could potentially depress real estate markets, the construction industry, and any tourism-based industries. The City of Ocean City, a barrier island community in Cape May County, demonstrates such a balance; it has adopted zoning ordinances complying with 44 C.F.R. § 60.3, but the city has recently passed an additional requirement that all new construction or reconstruction be built with the lowest living area no less

than two feet above BFE.⁴² These zoning ordinance changes have aided Ocean City in securing a higher FEMA Community Rating (a larger subsidy through discounts on premium) for the time being, but Biggert-Waters has indicated that FEMA will likely be reducing and/or eliminating those subsidies in the coming years.

For individual property owners, the changes to the National Flood Insurance Program and the updated FIRMs could have devastating consequences. Property owners building new structures or reconstructing structures could lower their premiums by elevating their structures above the BFE in their locality; the following chart provides an example of the impact of structural elevation on flood insurance premiums.

Fig. 5. Flood Insurance Rates for \$250,000 Residential Building Coverage (Contents Not Covered): FEMA flood insurance rates for AE-Zone, published October 2012. Note that the cost reclamation periods are based upon a \$250,000 structure under construction (not currently standing). Additional costs of elevation are estimated to be between 0.25% - 1.5% for each foot built above BFE.⁴³

Lowest Floor Elevation	Annual Insurance Premium	Premium Compared to a Building with a Lowest Floor at 100-Year Flood Elevation	Time to Reclaim Added Cost of Elevating**
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⁴² Douglas Bergen, *Ocean City Votes to Require Homes to be Lifted Higher*, PATCH.COM, <http://oceancity.patch.com/groups/politics-and-elections/p/ocean-city-votes-to-require-homes-to-be-lifted-higher> (last visited December 1, 2013).

⁴³ NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DIVISION OF LAND USE REGULATION, *Frequently Asked Land Use Permitting Questions Post Superstorm Sandy*, <http://www.nj.gov/dep/landuse/SandyFAQ.html#a1> (last visited December 1, 2013).

3 feet above	\$376	72% savings	1.9 to 11.4 years
2 feet above	\$448	67% savings	1.4 to 8.2 years
1 foot above	\$660	51% savings	0.9 to 5.4 years
At 100-year flood	\$1,359	NA	
1 foot below	\$4,527	233% increase	
2 feet below	\$5,924	336% increase	
3 feet below	\$7,204	430% increase	
4 feet below	\$9,551	603% increase	

As one can see, these property owners will be faced with greater initial building costs in order to secure flood insurance premiums savings over in the medium to long term future. While some property owners may be able to afford the up front costs of elevation, many others may be driven out of the new construction market completely. And the situation could be more dire for owners of existing structures; as updated FIRMs based on NAVD 88 benchmarks are released, property owners may find that their structures are farther away from “BFE-plus” building standards than they anticipated. Furthermore, their structures may have been placed into a higher risk classification, triggering the need for installation of more expensive flood mitigation features in those structures. Since their structures are already standing, the costs of additional elevation and installation of flood mitigation features are greater compared to those for property owners planning to build new construction or reconstructions. Existing property owners would be forced to find large amounts money to comply with new flood risk standards in order to maintain; many middle class property owners simply could not find such capital Selling their property and moving would appear to be an option, but unfortunately, existing property owners may experience a difficult time selling their property for a reasonable price, as buyers will likely discount the sellers’ asking prices by the costs of compliance with new flood mitigation standards. Consequently, the new FIRMs and Biggert-Waters could create severe financial difficulties for property owners in coastal New Jersey.

Best Practices for Attorneys in the Current Legal Landscape

Navigating the post-reform NFIP landscape can be daunting for an attorney who is new to the subject matter of flood insurance and coastal development. Whether representing an individual homeowner at the Jersey Shore or a multinational shipping company in the Newark Bay or New York Harbor Area, attorneys must be well-versed in the NFIP standards, the impending flood insurance rate changes and building standard changes triggered by Biggert-Waters in order to effectively represent his or her clients. If an attorney does not understand the implications of these changes, the client could face severe financial difficulties in the future. Below are some best practices suggestions to ensure that attorneys best represent their client's interests (and consequently, the lawyer's own best interests) in dealing with flood insurance in coastal New Jersey:

- 1. Obtain and scrutinize FEMA's most updated FIRM encompassing the area in which your client's property or potential property is located.** An essential part of adequately representing your client is determining in which FIRM zone your client's property or potential property is located. Most coastal property in New Jersey is classified as V (highest risk) or A (higher risk). Furthermore, BFEs may vary within similarly classified FIRM zones (e.g. one V-zone in a municipality may have a BFE of twelve feet, while another V-zone in the same municipality may have a BFE of fourteen feet). All flood insurance costs for the client ultimately stem from their property's classification on the FIRM. Consequently, this should be the attorney's first step when conducting due diligence on flood insurance premiums for a client.

- 2. Research any lenders that have provided financing to your client.** By statute, lenders must require a lendee to maintain flood insurance on any new flood-prone property subject to a mortgage. Biggert-Waters requires the lender to buy and maintain flood insurance on the collateralized property when the lendee fails to do so or allows coverage to lapse; the lendee can (and most likely will) be charged the premiums, even if they are higher than that of a comparable policy. Determining whether a lender is federally backed allows the attorney and the client to begin the search for appropriate flood insurance coverage early in any potential transaction. If the loan is sought through a private lender, the prudent attorney must still research the lender, but an excellent rule of thumb is to expect that a private lender will require flood insurance coverage in flood-prone areas.

- 3. Read all loan documents carefully, looking for any private lenders' flood insurance requirements.** Non-federally subsidized lenders are permitted to mandate continuous flood insurance coverage, or "forced-placement" coverage. In fact, most mortgage lenders will not execute loans collateralized with flood-prone property without proof of coverage at the inception of the loan. As this paper has repeatedly stated, flood insurance premiums may greatly increase the costs of property ownership in flood-prone areas. For individual homeowners or small businesses, the terms of loan agreements may not be negotiable; in this case, close reading of the agreement will serve to ensure that the attorney has fulfilled their duty to keep the client informed on matters affecting their interests. The client may then make a fully informed decision on how to proceed with loan arrangements. In the case of corporate clients, lenders may

be more willing to negotiate the terms of lending agreements to the benefit of the client. The attorney must still consult with the client and other financial advisors or officers to determine whether the risks of flood damage and resulting changes in the loan agreement are worth the time and legal fees necessary to remove a forced-placement clause.

4. **Advise the client to seek an updated survey and engineering report to determine the cost and feasibility of elevation of existing structures.** As noted above, Biggert-Waters is phasing out subsidized premiums for pre-FIRM structures and stepping up rates to reflect actual flood risk. Furthermore, the shift to NAV 88 in FIRMs could decrease structural elevations below NGVD 29 measurements. As a result, the client risks exposure to skyrocketing flood insurance premiums over the coming years if they leave an existing structure as-is. An updated survey may reveal that the unique characteristics of the client's property and/or structure position the property closer to conformance with the FIRM BFE. FEMA regulations allow individual property owners to file petitions for exemptions to FIRM classifications; despite the short term costs associated with the survey and/or engineering report, a successful petition could result in significant flood insurance savings to the client in the long run. In the alternative, an updated survey and an engineering court allows an attorney to effectively counsel the client as to the comparative costs of elevation of the structure versus payment of the increased flood insurance premiums on the structure as it currently stands.

- 5. Check the community's floodplain management requirements for general compliance with 44 C.F.R. § 60.** FEMA reserves the right to revoke NFIP coverage to communities that fail to comply with minimum NFIP standards. Revocation of NFIP coverage could lead to unavailability of flood insurance coverage for the client and, consequently, exorbitant costs pursuant to any forced-placement provisions and eventual defaults on loans. While the client, along with other residents of the community, may have a cause of action against the municipality for failure to comply with NFIP standards, the short to medium term impacts on the client could be irreparable regardless of legal action. As such, a review of the municipality's compliance with NFIP minimum standards before entering into loans or completing any transactions involving flood-prone property would best serve the interests of both the attorney and the client. But the attorney must also take into account the time required to evaluate the municipality's laws, the fee arrangement with the client and the client's willingness to expend funds on the matter. Individual homeowners are likely to have fewer funds, but the consequences of noncompliance by the municipality could be even direr than to larger corporate clients. The attorney must ultimately exercise good judgment in ascertaining and pursuing the appropriate course of action. A recommended first step is a thorough search for FEMA releases and/or reviews specific to the municipality.
- 6. Advise your clients to seek independent financial counsel before making any decisions to buy property, elevate or expand existing structures or sell any property.** While lawyers may have some expertise in financial matters, accountants and independent financial advisors are best equipped to advise clients on the impact of

property-related decisions on the client's finances. With the client's consent, develop a collaborative relationship with the client's financial advisors; a financial expert may not be well-versed on legal standards that appear to be non-financial in nature (like the NFIP), and lawyers may not be well-versed in strictly financial principles. A collaborative relationship will ensure that the client's interests are best served and that the client will be satisfied with the lawyer's level of service.

- 7. Join or start an organization that supports critical analysis and reform of the NFIP, FEMA regulations relating to the NFIP, and FEMA's internal processes for determining flood insurance rates.** As explained above, changes to the National Flood Insurance Program and new FIRMs could have dire consequences for individuals, businesses and municipalities in coastal New Jersey. Individuals, businesses and municipalities frequently need legal advice and obviously rely on lawyers for such. If these parties suffer financial difficulties, the base of potential business for lawyers will decrease. Advocating for well-reasoned and practical analyses of flood insurance and related reforms will aid lawyers in preserving their own business in the future.

Conclusion

As climate change continues to fuel more erratic weather patterns and global sea level rise, flooding will become an omnipresent danger in the daily lives of coastal New Jersey residents. To combat the devastating impact that flooding may have on these residents in the future, the federal government must continue to critically analyze the National Flood Insurance Program to ensure that it remains a reasonably affordable means of recovering from flood-related losses. Whether or

not the reforms instituted by Biggert-Waters are effective or affordable for New Jersey residents is yet to be seen. But regardless of the successes and/or failure of the NFIP after Biggert-Waters, flood insurance must remain a central focus in this country's quest to combat and control the effects of global climate change.