



ALERT

REBUILDING POST-SANDY: THE QUANDARY POSED BY FEMA'S NEW "ADVISORY BASE FLOOD ELEVATIONS"

By Thomas Daniel McCloskey

Executive Summary

This Alert hopes to sensitize readers to the issues that are emerging in the post-Sandy rebuilding process and to urge both caution and patience when considering the finite alternatives – and funding resources – out there.

We are now almost eight weeks post-Sandy. As recovery and cleanup efforts continue, with power restored to virtually all who lost it, attention has turned to repairing the damage and the gargantuan rebuilding task ahead.

The scope and magnitude of the damage wrought by Sandy has been graphically depicted in post-storm photographs, aerials and videos from fly-overs of the worst affected regions of the coastline and landward. Most homeowners and businesses with properties located in the coastal flood zones and other flood-prone areas that were ravaged by wind, wind-driven rain, flooding and an unprecedented storm surge have quickly come to realize the complexities involved in seeking financial and other assistance, as well as in processing insurance claims. The labyrinth of procedures, documentation, inspection, damage evaluation and claims adjusting processes – both with primary homeowner insurance carriers and flood insurance carriers – is dizzying.

Making matters worse, the interplay by and among local municipal, county, state and federal agencies (including FEMA) having or exercising jurisdiction over the rebuilding effort further complicates the process and continues to be a source of confusion for those looking for relief and direction. In reality, unintended government inertia will continue to impinge upon the collective desire (and zeal) to rebuild – and well before the issue of who is going to pay

for it or how it might be subsidized is even put on the table.

And yet, to blunt the severe economic (and emotional) impact of Sandy, the resoluteness and determination of all "Jersey Strong" New Jerseyans and the laudable, aggressive efforts of the Christie Administration to rebuild our severely damaged shore communities, boardwalks, tourist attractions and the infrastructure that supports it all, grows stronger with every day that passes, curtailed, suppressed if not blinded only by the harsh realities of the inter-governmental/regulatory matrix that one must pass through to secure a building permit to actually rebuild.

True, local building code officials have been issuing permits, albeit on a limited basis, to homeowners to facilitate things like electrical system repairs, removal and replacement of wet or damaged sheetrock, and so on – things needed to render a home habitable so that residents can return home. But not for homes or properties that have been deemed "substantially damaged" and thus subject to more scrutinizing review, wholesale rebuilding, or, demolition and rebuilding entirely anew. Simply put, buildings or structures located in a special flood hazard area that are determined to be "substantially damaged" must be brought into compliance with the minimum requirements of the community's National Flood Insurance Program (NFIP) compliant floodplain management laws or ordinances.

Communities participating in the NFIP program determine a flood damaged home to be "substantially damaged" if the costs to repair or rebuild are equal to or exceed 50 percent of the municipality's equalized assessed valuation of the structure.

Consider, for example, a property located in a

designated flood hazard zone assessed at \$250,000 for tax purposes locally, which assessment is further broken down by allocating a value of \$200,000 to the land and \$50,000 as the value for its “improvements”, or structure. If the cost estimate to repair the structure damaged by the storm or flooding event equals or exceeds \$25,000 (50 percent of \$50,000), under NFIP-compliant flood mitigation or floodplain ordinances on the books at the local municipal level, the house is deemed to be “substantially damaged” and must be repaired or rebuilt in accordance with the current flood ordinances and construction codes.

In the context of repairing or rebuilding “substantially damaged” properties in post-disaster scenarios, however, the question then becomes – as it has now post-Sandy – which are the controlling “current flood ordinances and construction codes”: Either those on the books pre-disaster, or those that are adopted by necessity post-disaster? Clearly, the latter comes into being locally in order to conform to revised or adjusted minimum standards and requirements for rebuilding – and thus become the new version of “current flood ordinances and construction codes” – that will ensure one’s ability to secure federally-backed, taxpayer-subsidized flood hazard insurance for the rebuilt structure. As described below, these determinations will depend on “BFE’s” and especially newly released “ABFE’s”.

The Pertinent Acronyms - BFE’s and ABFE’s

When first built or acquired, a residential home or commercial building located in a designated flood zone will have had a flood elevation certificate issued from the local flood mitigation officer on file that determined the minimum “base flood elevation” above which the home or building was to be built – or was built – thus certifying that it was in conformance with the minimum standard for building elevation then prevailing.

The term “base flood” means the flood has a 1 percent chance of being equaled or exceeded in any given year (formerly known as the “100-year flood”). The “base flood elevation” (BFE) means the height at which there is a 1 percent or greater chance of flooding in any given year.

BFE’s are established by FEMA as part of the NFIP. BFE’s are depicted on Flood Insurance Rate Maps (FIRMS), and represent the minimum standard for building elevation requirements. The NFIP regulations require that new or reconstructed structures be elevated at or above the BFE. It is these standards that serve as the basis(es) for the adoption of floodplain management ordinances at the local level by municipalities. Of course, the development of floodplain management ordinances may still be subject to any supervening requirements the state may require, not only in

respect of floodplain management but also the requirements of the statewide construction code(s) and any amendments or modifications the state may adopt or require in the actual repair, rebuilding or retrofitting process, post-disaster, to address and/or forecast for damage prevention in the future.

NFIP regulations set forth at 44 CFR 60.1(d) state the NFIP criteria are minimum standards for the adoption of floodplain management regulations, and the municipalities may exceed, i.e., render higher or more stringent, the minimum criteria if they deem it necessary for more comprehensive and stricter floodplain management regulations. If more stringent requirements are adopted and imposed at the local and state levels, they will take precedence over the NFIP minimum standards. It is local community officials that have access not only to FEMA floodplain mapping data for the FEMA region at issue, but also, more importantly, knowledge of local conditions that may require, for human safety, higher standards than the minimum criteria.

Advisory Base Flood Elevations (ABFE’s) are revised elevations depicted on maps that include geospatial layers and represent the new BFE for building and rebuilding¹. The ABFE’s provide improved and updated flood hazard data created by FEMA in a post-disaster setting when the information on the FIRMS no longer accurately depicts an area’s true flood risk – either because of the severity of the disaster in relation to the data available when the original BFE’s were issued, intervening catastrophic events, or changes in coastal or flood plain areas. While they are described as “advisory”, the reality is that they represent the new elevations that “substantially damaged” structures will need to be raised to in any rebuilding scenario if a property owner has any hope of securing flood hazard insurance anew.

The Set-Up

On Saturday, December 15, 2012, FEMA issued its new ABFE guidelines for the New Jersey and New York coastlines; and specifically, for Atlantic, Bergen, Burlington, Cape May, Essex, Hudson, Middlesex, Monmouth, Ocean and Union Counties in New Jersey, and for Bronx, Kings, New York, Richmond, Queens and Westchester Counties in New York.

FEMA reported that this information is intended to help communities and property owners make informed decisions about rebuilding their homes and businesses. The new maps have been released incorporate this advisory data. This information has resulted in new, higher flood elevations and/or a new, higher risk flood zone designation. These flood elevations and flood risk zones affect the minimum

building requirements in the communities and the flood insurance rates charged.

Now that the FEMA has released its long-awaited revised floodplain mapping and the new ABFE's, a quandary of revolutionary-esque proportions looms on the immediate horizon. As much as homeowners and coastal business property owners want to rebuild, the landscape is laden with a whole host of hidden trip-wires for the unwary that, without professional advice and navigation of or around them, will lead most property owners to an economic no-man's land.

At this juncture, two items have acute relevance and merit the immediate attention of legal, engineering and construction professionals alike. As they say, the devil is in the details.

First, FEMA's recently completed ABFE maps update mapping that was last completed more than 20 years ago. The new maps revise the risk assessment of flooding and flood damage in 120 communities in 10 New Jersey counties and six New York counties, with approximately 1,800 miles of coastline. FEMA spent the last two years creating these maps and new ABFE's, which were scheduled to be released in the spring of 2013, well before Superstorm Sandy even hit the radar screens or forecasts. However, in light of the impact of Sandy, FEMA determined it necessary and prudent to release the maps now in order to inform and assist the affected local communities plan their rebuilding initiatives, seek out federal mitigation financial assistance and, most likely along the way, amend local floodplain management ordinances and commensurate requirements of local building and construction codes in order to conform to the ABFE's. Such amendment and conformance, in turn, will ultimately meet as yet-to-be-determined NFIP requirements for the issuance of flood insurance; and, no doubt, establish significantly higher flood insurance premiums.

Second, the recently released maps and ABFE's neither accounted for nor were based upon the actual storm surge results of Superstorm Sandy. Nevertheless, a scrutinizing analysis of the new mapping and ABFE's reveals that the high risk flood zone designations have widened, and new BFE's will require the elevation of "substantially damaged" structures anywhere from three to five feet higher, or even more than five feet depending on the area – or some other type or combination of flood damage mitigation methodology that will pass muster with FEMA.

Framing The Quandary

Going back to the original example of the "substantially damaged" home situated in a high risk flood zone having an assessment of \$250,000, let's assume the

home was located in an affected coastal town and had an original BFE was five feet. A review of the new flood zone mapping released on December 15th reveals that this very same property now has a new ABFE of nine feet. The homeowner and policyholder has met with his/her flood insurance adjusters and the adjusters of the primary homeowner's insurance carrier, and is navigating the stressful process of negotiating and adjusting their loss claim. As they near – or think they are nearing – a settlement of the property damage claim that will yield them a draft or drafts for settlement proceeds, the homeowner is anxious to get about the task of hiring contractors to commence the repair and rebuilding process. This is where it gets sticky.

To get a permit to rebuild, one typically must first secure a flood elevation certificate from the local flood mitigation officer who is assigned the task of implementing and enforcing the municipality's local floodplain management ordinance. The issuance of a flood elevation certificate is a condition precedent to the issuance of a building permit by the local construction code official. Regardless of whether a homeowner has one that is still in effect, one that has expired since first issued or none at all, most flood mitigation officers in communities located in a designated flood zone have been hesitant post-Sandy to issue flood elevation certificates in the absence of further direction from the New Jersey Department of Community Affairs Division of Building and Construction Code Enforcement (DCA) and/or New Jersey Department of Environmental Protection (NJDEP) at the state level. State regulatory officials have been hesitant to act or give guidance to local communities yet unless and until further direction is issued from FEMA. That is, until December 15th.

As previously noted, for nearly two years prior to Sandy, FEMA officials had been out and about the task of re-mapping and updating flood maps in the region where flood zones were created more than 20 years ago based upon data then available. The restudying effort included specifically areas of the New Jersey and New York coastlines shown of NFIP "Flood Insurance Rate Maps", or "FIRMS", for these areas. Before Sandy, while the re-mapping was finally completed, the updated FIRMS have yet to be finalized and will likely not be issued for at least another six to nine months from now. Nevertheless, because of Sandy, FEMA determined it imperative that ABFE's be provided to assist local municipalities, counties and the states of New Jersey and New York in devising and supporting the rebuilding effort.

Being ready to rebuild is one thing. Being able to

actually rebuild is an altogether different predicament to overcome.

The Quandary

Homeowners and owners of business properties located in a flood hazard zone that were “substantially damaged” by Sandy now face this multi-faceted dilemma. The local flood mitigation officer, in conjunction with the municipality’s engineering department, has inspected the property and made a determination that the structure is “substantially damaged”. From the property owner’s perspective, the questions then become:

What do I do? Do I have flood insurance coverage? If so, does my policy cover the added costs anticipated to raise or elevate my home or building to comply with the new ABFE’s? If not, then what do I do?

Most properties located in designated flood hazard zones will likely have flood insurance, especially those that have been acquired, or built, and financed by banks or other lending institutions that require such insurance as a condition of a mortgage or business loan. The standard NFIP policy does contain coverage for just such a circumstance, which is known and referred to as Increased Cost of Compliance Coverage (ICC). The coverage, though limited to \$30,000, if deemed applicable will be available to fund essentially four repair or rebuilding options.

Four Options Covered: Floodproofing, Relocation, Elevation, or Demolition (FRED, for short).

The four “FRED” options the policyholder can pursue to comply with his/her/its local community’s floodplain management ordinance and help reduce future flood damage to the subject structure or building are described by FEMA as follows. As FEMA instructs, it is entirely up to the policyholder to decide which of these options is best suited (if even affordable): ‘

1. *Floodproofing*. This option is available primarily for non-residential buildings. It involves making a building watertight through a combination of adjustments or additions of features to the building that reduces the potential for flood damage.
2. *Relocation*. This moves the building “out of harm’s way”.
3. *Elevation*. This raises the building to or above the flood elevation level adopted by the municipality; or, in the current situation, the new “ABFE’s.
4. *Demolition*. This tears down and removes the flood-damaged building “out of harm’s way”.

See FEMA’s NFIP publication entitled, "Increased Cost of Compliance Coverage – How You Can Benefit."

The Standard Flood Insurance Policy of the NFIP is issued to property owners through participating private carriers and is backed by FEMA. Its standard provisions for coverage also provide a limit of liability of up to \$30,000 for increased cost of compliance on rebuild, and only applies to policies with building coverage.

However, getting up to \$30,000 of coverage for “increased cost of compliance”, the policyholder must still be able to withstand the application of the policy’s “exclusions”. Excerpted below is a typical “exclusions” provision in a NFIP flood policy:

5. Exclusions

Under this Coverage D – Increased Cost of Compliance, we will not pay for:

- a. The cost to comply with any floodplain management law or ordinance in communities participating in the Emergency Program;*
- b. The costs associated with enforcement of any ordinance or law that requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess, the effects of pollutants.*
- c. The loss in value to any insured building or other structure due to the requirements of any law or ordinance.*
- d. The loss in residual value of the undamaged portion of a building demolished as a consequence of enforcement of any State or local floodplain management law or ordinance.*
- e. Any Increased Cost of Compliance under this Coverage D:

 - (1) Until the building is elevated, flood-proofed, demolished, or relocated on the same or to another premises; and*
 - (2) Unless the building is elevated, flood-proofed, demolished, or relocated as soon as reasonably possible after the loss, not to exceed 2 years (see 3.b).**
- f. Any code upgrade requirements, e.g., plumbing or electrical wiring, not specifically related to the State or local floodplain management law or ordinance.*
- g. Any compliance activities needed to bring additions or improvements made after the loss occurred into compliance with State or local floodplain management laws or ordinances.*
- h. Loss due to any ordinance or law that you were required to comply with before the current loss.*
- i. Any rebuilding activity to standards that do not meet the NFIP's minimum requirements. This includes any*

situation where you have received from the State or community a variance in connections with the current flood loss to rebuild the property to an elevations below the base flood elevation.

j. Increased Cost of Compliance for a garage or carport.

k Any structure insured under an NFIP Group Flood Policy.

l. Assessments made by a condominiums association on individuals condominium owners to apply increase costs of repairing commonly owned buildings after a flood in compliance with State or local floodplain management ordinances of laws.

6. Other Provisions.

a. Increased Cost of Compliance coverage will not be included in the calculation to determine whether coverage meets the 80 percent insurance-to-value requirement for replacement cost coverage as set forth in VII. General Conditions, V. Loss Settlement.

b. All other conditions and provisions of the policy apply."

The harsh reality is that even if the policyholder can make a case to the flood insurance adjuster that none of these exclusions can or should be applied to the particular circumstances presented, the coverage is limited to \$30,000. In all likelihood, that limit of coverage will be inadequate to fund the type of retrofitting or rebuilding methods required.

For example, if, in furtherance of FEMA's recently released flood zone re-mappings and ABFE's, the local municipality in a high risk flood hazard zone revises its floodplain management ordinances and/or construction codes and in them adopts the new ABFE's, the ABFE's will become the controlling law at the local level. The municipality has the right to impose even greater or stricter standards than the minimum requirements suggested by the applicable, site-specific FEMA ABFE. As a result, the local flood mitigation officer, as a condition of (i) his/her issuance of a flood elevation certificate (the condition precedent to the building permit) which, in turn is a condition of (ii) the local construction code's issuance of a rebuilding permit, and in conjunction with the construction code official, could very well require retrofitting substantially damaged structures, or even a rebuilding anew. Retrofitting or rebuild might conceivably involve such things as:

- Elevating the structure or building to above the new ABFE;
- Eliminating basements;
- Raising crawl space elevations;
- Installing FEMA-approved, and IBC endorsed flood

vents; and/or

- Elevating mechanical devices such as hot water heaters, boilers, furnaces, etc.

Performing even one, and certainly any combination of more than one, of these retrofitting methods might very well equal or well exceed the \$30,000 limit of coverage for "increased cost of compliance". So, where does the extra funding come from? The typical policyholder would resist the notion of having to obtain a low-interest loan from the SBA, public or private sectors to fund the retrofitting/rebuilding effort and thus add to existing mortgage indebtedness – assuming, of course, their mortgagees consented to subordinated encumbrances behind their positions. In the end, a homeowner or business property owner may very have no coverage or independent resources available to fund the obligatory increased cost of compliance; and, even if he/she/they did have the financial resources on-hand to do so, may very well think twice about actually rebuilding.

But here's the hidden Catch-22: Property owners can access ICC funding for the cost of elevating to the new Advisory BFE's only if their municipality adopts the Advisory Maps!

Therein lies the quandary that FEMA's new ABFE's have placed homeowners and business-property owners in. It could not have been better described than by FEMA Hazard Mitigation Branch Deputy Director, Bill McDonnell, who, following FEMA's release of the new flood maps on December 15th, was quoted in one newspaper account thusly:

"There are a number of programs to assist in communities and individuals rebuilding. It's important that people know their risk, so they should look at the map that's available [] on the [FEMA] website. Then they need to make informed decisions and work with the resources available through their federal flood insurance, state, local and non-government agencies. Each individual must write their own recovery story; each individual makes a decision on how they are going to recover."

The clear lesson here: Before attempting to rebuild, it is imperative that property and business owners consult their legal, engineering and construction professionals, in conjunction with their local government officials, to determine the local building code, permit, and mandatory elevations requirements for repairing, retrofitting and/or rebuilding.

Otherwise, in the zeal to rebuild, the disaffected property owner may be unwittingly punching a fast-track ticket for a ride to that economic no man's land.

If you have any questions regarding the subject matter of this Alert please feel free to contact Thomas Daniel McCloskey at 609.896.457 or tmccloskey@foxrothschild.com, Henry L. Kent-Smith at 609.896.4584 or hkent-smith@foxrothschild.com, or Carl A. Maio at 215.918.3616 or camai@foxrothschild.com.

Below we offer some topic-related links for your immediate consideration and assistance:

Pertinent Links:

[Post-Storm Rebuilding Guidance](#)

[Information for Disaster Survivors and Recovering Communities](#)

[Hurricane Sandy Advisory Base Flood Elevations\(ABFEs\) in New Jersey and New York](#)

[What is my Advisory Base Flood Elevation \(ABFE\)?](#)

[Advisory Base Flood Elevations: What Your Community Needs to Know](#)

[Flood Mitigation Ideas](#)

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1.The ABFE's also have additional letter designations that further classify and define the expected risk. They are referred to as "Advisory Flood Hazard Zones V and A". Under FEMA guidelines, Zones V and A are defined as follows: Advisory Zone V is comprised of the area subject to high velocity wave action (a 3-foot breaking wave) from the 1 percent annual chance coastal flood. Zone V is subject to more stringent building requirements than other zones because these areas are exposed to a higher level of risk. Advisory Zone A is comprised of the area subject to storm surge flooding from the 1 percent annual chance coastal flood. There areas are not subject to high velocity wave action but are still considered high risk flooding areas.



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