

# Legal/Legislative

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Rebuilding after Superstorm Sandy presents many challenges. Environmental impacts from the Storm and the scope of damage to flood prone areas will fuel a long-term debate and policy discussions about climate change and environmental restrictions on future development. Those whose business, home or property has been damaged or destroyed by the Storm face the more immediate and practical concern of the ability to repair and reconstruct damaged or destroyed structures in a manner that is economically viable and with minimal delay.

The availability of funding through insurance, low interest loans and grants will be critical in the rebuilding effort. FEMA will not provide disaster relief to businesses in the form of grants. However, information that is provided to FEMA will be used to obtain disaster relief from the United States Small Business Administration (“SBA”) which is the primary source of federal disaster relief for small businesses. The SBA can provide loan assistance up to \$2 million and businesses can apply for a loan to cover the damages to their real estate inventory and/or economic loss. Registering with FEMA will also insure that businesses will be eligible for any state and/or federal disaster relief programs that may eventually become available.

Typically, if the state or federal government makes any disaster grants available to small businesses, the programs are administered by, or done in conjunction with, FEMA.

State, local and federal permitting requirements will need to be carefully assessed. FEMA Advisory Base Flow Elevations maps released December 15, 2012 will determine the required elevation of structures in connection with the Federal Flood Insurance Program. DEP will use these maps in certain areas, and municipalities will also likely rely on them as well. Consideration of these elevations will be critical in deciding whether, where and how to rebuild and in determining what State and municipal approvals may need to be obtained.

DEP issued an Administrative Order, approved by Governor Christie, immediately following the Storm temporarily waiving some of the permitting requirements applicable under the Flood Hazard Area Control Act, Freshwater Wetlands Protection Act, and CAFRA rules for certain in-kind repair and/or replacement of public infrastructure by governmental agencies provided various conditions are met. The Order should help facilitate the rebuilding effort by reducing some of the administrative burden typically associated with the environmental regulatory process for construction in coastal areas. The Order recognizes the need to protect public health and safety through sound infrastructure, and expedited infrastructure improvements should in turn help promote private reconstruction and redevelopment efforts.

DEP has not taken similar action outside of the context of public infrastructure. However, some

DEP programs contain emergency, exemption, or expedited approval provisions that should be considered in the rebuilding context. Generally various DEP rules allow reconstruction of legally existing structures within same footprint. Some elements to consider are listed below.

**Valid permits** – Determine whether prior permits remain valid. Waterfront development permits for structures below MHWL remain valid for a fixed 5 year term even after work is completed.

**Regulatory exemptions** – Several exemptions exist under CAFRA and the Waterfront Development Law.

Structures regulated under CAFRA can be elevated on pilings without a permit provided there is no excavation on beach/dune and no enlargement of the structure. When elevating structures, municipal height restrictions will need to be carefully considered. CAFRA allows reconstruction of any development legally existing on July 19, 1994 damaged/destroyed by a storm, in-kind or landward if the landward construction will have less environmental impact. Enlargement of any building is exempt under CAFRA regulations provided no increase in the building footprint occurs.

For Waterfront Development permitting, the Zane exemption applies to reconstruction in-kind of residential dock and bulkhead structures and non-residential boating structures legally existing prior to January 1, 1981. For upland waterfront development structures, reconstruction and enlargement of a single family home more than 100’ from the MHWL is exempt from permitting. Additionally, reconstruction/enlargement of any structure located more than 100’ of the MHWL may take place provided the enlargement is not greater than 5,000 square feet and there is no change in land use. Additionally, some minor changes may be made to existing structure or manufacturing operations without approval if there is no impact to regulated Special Areas or in existing cleared areas.

**PERMIT-BY-RULE** – CAFRA and the Flood Hazard rules contain various permits-by-rule that allow specific categories of activities to take place without application for a permit. For example, under CAFRA, single family home may be expanded landward 400 square feet. Critical in the Flood Hazard context are permits-by-rule to reconstruct a single family home without a flood hazard permit if you meet conditions including construction of the first floor elevation to 1 foot above the flood hazard area design flood. Permits-by-rule also exists for reconstruction of a lawfully existing non-habitable structure outside of a floodway; a 300-square foot addition if outside floodway; repairing a lawfully existing structure; repaving lawfully existing roadway or parking area. Applicable conditions must be carefully reviewed and considered, and as a general rule of thumb,

construction of the first floor elevation must be 1 foot above the flood hazard area design flood. Additionally, advance notice must be provided to DEP.

### **REBUILD WITH CHANGES OR MODIFICATIONS –**

Unless an exemption or permit-by-rule applies, proposed reconstruction with modification will likely require submission of application for approval to DEP. Emergency permit provisions exist under CAFRA and the Flood Hazard rules. In general, there must be imminent threat to public health, safety, or the environment. DEP must be notified and verbal authorization obtained after an inspection. An after the fact application submission is required, and DEP may add additional conditions to the final permit. For applications not involving a request for emergency approval, consideration should be

given to whether previously existing resources have been changed as a result of the storm. For example, where dunes have been eliminated, there may be greater ability to customize development as a result. The existence of previously recorded conservation restrictions should also be considered. It may be possible to modify such instruments based on changed environmental conditions. Sandy has changed the physical landscape. Change in the regulatory landscape has in some instances already occurred and more change is likely. Those rebuilding after the Storm should proceed with confidence by carefully assessing applicable regulatory requirements.

