

Variations to Post-Superstorm Sandy Substantial Damage Determinations

By National Flood Insurance Program regulation, variations to a community's substantial damage regulations contained in the community's Flood Damage Prevention Ordinance may only be given to elevation and floodproofing mitigation requirements structures that qualify for State and Federally listed structures at the discretion of the local Floodplain Administrator. Variations for hardship under the NFIP must be exceptional, unusual, and peculiar to the property involved. Mere economic or financial hardship alone is not exceptional. Inconvenience, aesthetic considerations for non-historic structures, physical handicaps, personal preferences, or the disapproval of one's neighbors cannot qualify as an exceptional hardship under the NFIP because these problems can be resolved through other means without the granting of a variance.

Substantial damage and improvement determinations are a statutorily-required duty of a local Floodplain Administrator as part of a community's agreement to enforce the National Flood Insurance Program regulations 44 CFR 59 and 60. However, variations related to a Floodplain Administrator's substantial damage decision-making may be appealed to the body, generally a Planning or Zoning Board, designated to hear variations (or sometimes referred to as appeals) in the local Flood Damage Prevention Ordinance. For efficiency after Superstorm Sandy, some appeal bodies with extensively damaged areas also established a working group to make recommendations to the appeal body.

Recently, some purchasers or owners of substantially damaged properties have contested Superstorm Sandy-related Substantial Damage Determinations to their local Floodplain Administrator. Generally, these requests have centered around how market valuation was determined. Because these determinations appeal a Floodplain Administrator's decision-making, this request should be made to the appeal body as a formal variance. Depending upon the municipality's established post-Sandy substantial damage process and the opinion of legal counsel, the appeal body can decide to either hear or decline the variance request. If a request to hear the variance is granted, it is recommended that the appeal body also require documentation from the applicant including but not limited to the type, cost, and extensiveness of repairs performed after Superstorm Sandy including the fair market cost of labor to fully evaluate the percentage of substantial improvement to the structure based upon the contested market value. The Floodplain Administrator should also provide a recommendation for approval or denial to the appeal body which may include but is not limited to the substantial damage process in place at the time, the market valuation used, the value of all construction permits obtained, an evaluation of Ordinary Maintenance and Minor Work projects performed under the Uniform Construction Code (see N.J.A.C. 5:23-1.4 with specific conditions listed as 2.7 and 2.17A), an evaluation of labor costs, tax assessment photographs, and the high water marks on and damage to nearby structures.

Substantial Damage Determinations and Floodplain Permit Requirements After October 29, 2021

Substantial damage determination records and correspondence, like all other floodplain management records, are the responsibility of the local Floodplain Administrator and must be kept in perpetuity by the National Flood Insurance Program community.

Prior to the passing of the October 29, 2021 ICC deadline, owners of unmitigated substantially damaged structures should be notified by the Floodplain Administrator in a certified letter that they must consult with the local Construction Official and Floodplain Administrator if the structure will not be mitigated by the deadline. This letter should reference the initial substantial damage letter and request that the property owner negotiate and finalize a reasonable and achievable compliance schedule with both the Floodplain Administrator and the Construction Official prior to the ICC deadline. The date of this letter should be memorialized in the violations section of the community's flood damage prevention permit. (For an example of a violations section, please see the [Model Flood Damage Prevention permit](#)).

After the deadline, the structure will be considered in violation of the community's Flood Damage Prevention Ordinance unless a mutually agreed upon, reasonable and achievable compliance schedule outlining mitigation milestones towards achieving a final Certificate of Occupancy and final sign-off on the Flood Damage Prevention Permit. A reasonable compliance schedule outlines the end date by which the property owner's compliance plan for structure mitigation results in either the elevation, demolition, floodproofing/retrofitting, or relocation of the structure and all applicable permit documentation supporting mitigation completion has been received and approved by both the Floodplain Administrator and the Construction Official. An achievable compliance schedule should identify milestones for the finalization of plans for site development activities (i.e. activities related to demolition, structure modification, site redevelopment, and structure relocation including any State-required certifications by a registered design professional), the receipt of all identified and applicable Federal, State, and local permits, project construction and/or demolition completion dates, and project closeout documentation submissions. The compliance schedule proposal should also include a certification that the property owner has the funds available to complete the proposed project milestones by the compliance schedule end date. Both the Construction Official and the Floodplain Administrator will evaluate and provide comments on the proposed compliance schedule as part of the negotiation process and work with the property owner to finalize the compliance schedule. It is recommended that communities consider developing a template to include with their certified letters to guide property owners in providing the information necessary for negotiating a reasonable and achievable compliance schedule.

If a reasonable and achievable compliance schedule cannot be negotiated and implemented before the October 29, 2021 deadline and/or compliance schedule milestones are not achieved after the October 29, 2021 deadline, the property will be considered in violation of the community's Flood Damage Prevention Ordinance and the municipality can take actions under N.J.S.A 40:49-5 or through N.J.A.C. 5:23, as applicable to address structure mitigation. The Flood Damage Prevention Permit should remain open until the structure is mitigated.

As applicable to all structures with violations of NFIP regulations, if a community has undertaken all enforcement actions available through local and State authorities to achieve compliance, and the violation has not been corrected, the community may, as a last resort, request that the structure be declared uninsurable through Section 1316 of the National Flood Insurance Act of 1968.