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Land Use Law Update: New York's New Climate Change Resiliency Law

By Sarah J. Adams-Schoen

New York State's lawmakers passed 2,603 bills over the course of the 2013-14 session, 658 of which passed both houses.¹ Although counties and local governments are likely focusing their attention on budget-related items such as the property tax freeze/rebate program, local governments—and zoning and planning officials and practitioners in particular—should also take note of the newly enacted Community Risk and Resiliency Act (CRRA).²

Governor Andrew Cuomo signed the CRRA into law on September 22, 2014, in conjunction with Climate Week 2014 in New York City, proclaiming that "New York State will not allow the national paralysis over climate change to stop us from pursuing the necessary path for the future."³ The Governor described the Act as "a comprehensive package of actions that help strengthen and reimagine our infrastructure with the next storm in mind." The legislation implements some of the recommendations made by the NYS 2100 Commission, established following Superstorm Sandy.⁴

The CRRA amends the Environmental Conservation Law, Agriculture and Markets Law, and Public Health Law.⁵ The Act requires New York State agencies to consider sea level rise and some other future physical climate risks in certain permitting, funding and regulatory decisions, including smart growth assessments; siting of wastewater treatment plants and hazardous waste transportation, storage and disposal facilities; design and construction regulations for petroleum and chemical bulk storage facilities and oil and gas drilling permits; and the designation of properties listed in the state's Open Space Plan.⁶ The Act also requires the New York Department of Environmental Conservation (DEC) to adopt sea level rise projections by January 1, 2016, and to update those projections every five years.⁷

Of particular note to municipal officials and lawyers, as well as land use scholars and practitioners, the Act also:

- (1) Requires the DEC and New York Department of State (DOS) to work together to prepare model local zoning laws to help communities incorporate measures related to physical climate risks into their local laws, and to provide guidance on the implementation of the Act, including the use of resiliency measures that utilize natural resources and natural processes to reduce risk.⁸
- (2) Provides funding, subject to appropriation, to municipalities for local waterfront revitalization planning projects that mitigate future climate risks. Projects may include preparation of new

local laws, plans, and studies, and construction projects.⁹

- (3) Allows the imposition of contractual requirements and conditions upon any municipality that receives state assistance payments for waterfront revitalization pursuant to ECL section 54-1101 "to ensure that a public benefit shall accrue from the use of such funds by the municipality including but not limited to, a demonstration that future physical climate risk due to sea level rise, and/or storm surges and/or flooding, based on available data predicting the likelihood of future extreme weather events, including hazard risk analysis data if applicable, has been considered."¹⁰
- (4) Provides funding on a competitive basis, subject to appropriation, to municipalities or not-for-profits toward the cost of coastal rehabilitation projects that consider future climate risks.¹¹
- (5) Allows the Commissioner of the Office of Parks, Recreation and Historic Preservation to enter into maintenance and operation agreements for open space land conservation projects in urban areas or metropolitan park projects with municipalities, not-for-profits, and unincorporated associations, if the project demonstrates consideration of climate-change related risks.¹²



According to Governor Cuomo, the law responds to the significant risks New Yorkers face from increases in both sea level (approximately 13 inches since 1900 along New York's coast) and the proportion of total precipitation that arrives in heavy rainfall events.¹³ Indeed, the International Panel on Climate Change's (IPCC) most recent assessment report (AR5) warns that climate-related weather extremes pose extreme risks to human health and well-being, including: "alteration of ecosystems, disruption of food production and water supply, damage to infrastructure and settlements, [and] morbidity and mortality."¹⁴

Significantly for municipalities throughout New York, the IPCC warns that these risks are exacerbated by "a significant lack of preparedness."¹⁵ Although municipal governments have taken more action to protect against climate-related risks than the federal government or state governments, U.S. municipalities nevertheless lag behind their counterparts throughout the world.

According to a survey administered in 2011, the United States has the lowest percentage of cities pursuing adaptation planning out of all regions surveyed (59%), while Latin American and Canadian cities have the highest (95% and 92% respectively).¹⁶

Moreover, not only are many localities unprepared for climate-related risks, many land-use planning and zoning practices are actually *increasing* local vulnerability.¹⁷ Thus, it is of critical importance that “city and municipal governments act[] now to incorporate climate change adaptation into their development plans and policies and infrastructure investments.”¹⁸

However, adjusting land-use regulations and taking other local actions to build resilience requires technical expertise and resources that many localities lack. Local governments throughout the United States need more state (and federal) support for climate-related risk adaptation and mitigation planning and implementation. Nearly all U.S. cities report that securing funding for adaptation is a challenge (95%) and only 6% of U.S. cities report that the federal government fully understands the realities they face with respect to adaptation.¹⁹ Here in New York, a number of NY Rising communities recently identified the need for just this kind of technical assistance in their Community Reconstruction Plans.²⁰

New York’s new law is the first state climate change law in the nation to require state agencies to collaborate on the development of model codes, and one of only a small handful of state laws that require the compilation and analysis of state-specific climate data.²¹ Hopefully, the Community Risk and Resiliency Act is a major step in the direction of providing the support to localities that they need to prepare for and mitigate climate-related risks.

Endnotes

1. See New York State Association of Counties, 2014 NEW YORK STATE LEGISLATIVE SESSION SUMMARY: THE IMPACT ON NEW YORK’S COUNTIES (TENTATIVE) 4 (July 7, 2014), available at <http://nysac.org/legislative-action/documents/NYSAC2014NYSLegSessionSummary-final-7-3-14.pdf>.
2. Community Risk and Resiliency Act, 2014 N.Y. Laws ch. 335. The Act becomes effective on March 21, 2015, and applies to all applications and permits received after the adoption of guidance on the implementation of the Act but no later than January 1, 2017. *Id.* § 19. The text of the bill (Assembly Bill 06558/Senate Bill 06617-B) is available at http://assembly.state.ny.us/leg/?default_fld=&bn=A06558&term=2013&summary=Y. The Act was approved in both houses by wide margins, and had support from a diverse group of stakeholders including: The Nature Conservancy in New York, The New York League of Conservation Voters, The Business Council of New York State, the General Contractors Association, The Reinsurance Association of America, The American Institute of Architects New York State, The Municipal Arts Society of New York, Audubon New York, Natural Resources Defense Council, Environmental Advocates of New York, and The Adirondack Council. See LegiScan, VOTES: NY S6617 | 2013-2014 | NY GENERAL ASSEMBLY, <http://legiscan.com/NY/votes/S06617/2013> (last visited Oct. 25, 2014); LegiScan, BILL SPONSORS: NY S6617 | 2013-

2014 | NY GENERAL ASSEMBLY, <http://legiscan.com/NY/sponsors/S06617/2013> (last visited Oct. 25, 2014).

On a related note, the Governor also signed into law this session Senate Bill 06959, which extended the deadline for eligible municipalities to exercise the provisions of the Superstorm Sandy Assessment Relief Act, and Senate Bill 03702, which provides a process for rebating property taxes on residential property seriously damaged by Superstorm Sandy in cities of one million or more.

3. State of N.Y., Exec. Chamber Proclamation (Sept. 21, 2014), available at <http://www.governor.ny.gov/sites/default/files/documents/ClimateWeek2014.pdf>. The Governor also proclaimed the week of September 22-28, 2014 “Climate Week.” *Id.*
4. See generally N.Y. State, Governor Andrew M. Cuomo, NYS 2100 COMMISSION, <http://www.governor.ny.gov/NYS2100Commission> (last visited Oct. 24, 2014).
5. Community Risk and Resiliency Act, 2014 N.Y. Laws ch. 335.
6. *Id.* §§ 2-5, 9, 14, 14a, 15. For the most part, the physical climate risks addressed by CRRA are limited to sea level rise, storm surges and flooding. Consequently, although CRRA applies to both coastal and inland flood-prone areas, CRRA does not require consideration of climate-change related risks unrelated to flooding such as heat waves, wildfires, and drought.
7. *Id.* § 17.
8. *Id.* § 14 (“The department of state, in cooperation with the department of environmental conservation, shall prepare model local laws that include consideration of future physical climate risk due to sea level rise, and/or storm surges and/or flooding, based on available data predicting the likelihood of future extreme weather events including hazard risk analysis and shall make such laws available to municipalities.”); *id.* § 16 (requiring DEC, in consultation with DOS to prepare implementation guidance and develop guidance on “the use of resiliency measures that utilize natural resources and natural processes to reduce risk”). CRRA does not mandate a deadline for the model laws, and municipalities are not required to adopt them.
9. *Id.* § 10.
10. *Id.*
11. *Id.* § 11.
12. *Id.* §§ 6, 7. The Act also applies to the Commissioner of Agriculture and Markets evaluation of applications for state funding for local farmland protection programs, *id.* § 12, the Commissioner of Health’s evaluation of applications for state funding for drinking water projects, *id.* § 13, and DEC’s consideration of applications for permits under the following programs: protection of waters; sewerage service for realty subdivisions; liquefied natural and petroleum gas; mined land reclamation; freshwater wetlands; tidal wetlands; and coastal erosion hazard areas, *id.* § 15. Note, however, that some of DEC’s largest programs are not included in the list of covered programs, including water supply and water transport; wild, scenic and recreational rivers; water quality certifications; State Pollutant Discharge Elimination System; air pollution; and solid and hazardous waste collection, treatment, and disposal. See Michael B. Gerrard, *New Statute Requires State Agencies to Consider Climate Risks*, N.Y.L.J., Nov. 13, 2014, p. 1.
13. Press Release, Governor Cuomo Signs Community Risk and Resiliency Act (Sept. 22, 2014), available at <http://www.governor.ny.gov/press/09222014-resiliencyact>.
14. IPCC, *Summary for Policymakers*, in CLIMATE CHANGE 2014: IMPACTS, ADAPTATION AND VULNERABILITY. CONTRIBUTION OF WORKING GROUP II TO THE FIFTH ASSESSMENT REPORT OF THE INTERNATIONAL PANEL ON CLIMATE CHANGE 6 (Christopher B. Field et al. eds. 2014) (footnote omitted), available at <http://www.ipcc.ch/report/ar5/wg2/>.
15. *Id.*

16. JoAnn Carmin et al., PROGRESS AND CHALLENGES IN URBAN CLIMATE ADAPTATION PLANNING: RESULTS OF A GLOBAL SURVEY 14 (2012), *available at* <http://www.icleiusa.org/action-center/learn-from-others/progress-and-challenges-in-urban-climate-adaptation-planning-results-of-a-global-survey>. The United States also has the lowest percentage of cities that have completed an assessment of their vulnerabilities and risks (13%). *Id.* at 10.
17. See Press Release, *supra* n. 13 (“climate changes, coupled with land-use planning, zoning and investment that allow and sometimes encourage development in at-risk areas, have resulted in more people, businesses and public infrastructure existing in vulnerable areas”).
18. IPCC, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION AND VULNERABILITY. CONTRIBUTION OF WORKING GROUP II TO THE FIFTH ASSESSMENT REPORT OF THE INTERNATIONAL PANEL ON CLIMATE CHANGE, ch. 8 at 6 (2014), *available at* <http://www.ipcc.ch/report/ar5/wg2/>.
19. Carmin et al., *supra* n. 16, at 24; see also Don Knapp, *Survey: U.S. Cities Report Increase in Climate Change Impacts, Lag Global Cities in Planning*, on Sustainable Cities & Counties Blog, http://www.icleiusa.org/blog/survey_us_cities_report_increase_in_climate_impacts_lag_in_adaptation_planningworldwide-progress-on-urban-climate-adaptation-planning (last visited Aug. 16, 2014).
20. See NY Rising Community Reconstruction Program, COMMUNITY RECONSTRUCTION PLANS, *available at* <http://stormrecovery.ny.gov/nyrcr/final-plans> (last visited Oct. 27, 2014).
21. See, e.g., Alaska Department of Environmental Conservation, ALASKA'S CLIMATE CHANGE STRATEGY: ADDRESSING IMPACTS IN ALASKA EXECUTIVE SUMMARY 2-2 (revised Jan. 2010), http://www.climatechange.alaska.gov/aag/docs/aag_ES_27Jan10.pdf (referencing various projections made by the Alaska Climate Research Center); *id.* at 4-10, 11, 12, 13 (recommending creation of coordinated, accessible statewide system for key data collection, analysis, and monitoring); COLORADO CLIMATE ACTION PLAN 27 (Nov. 2007), *available at* http://www.colorado.gov/governor/images/nec/CO_Climate_Action_Plan.pdf (stating intent to work with federal and state agencies and water users to establish and maintain clearinghouse of updated climate projection data).

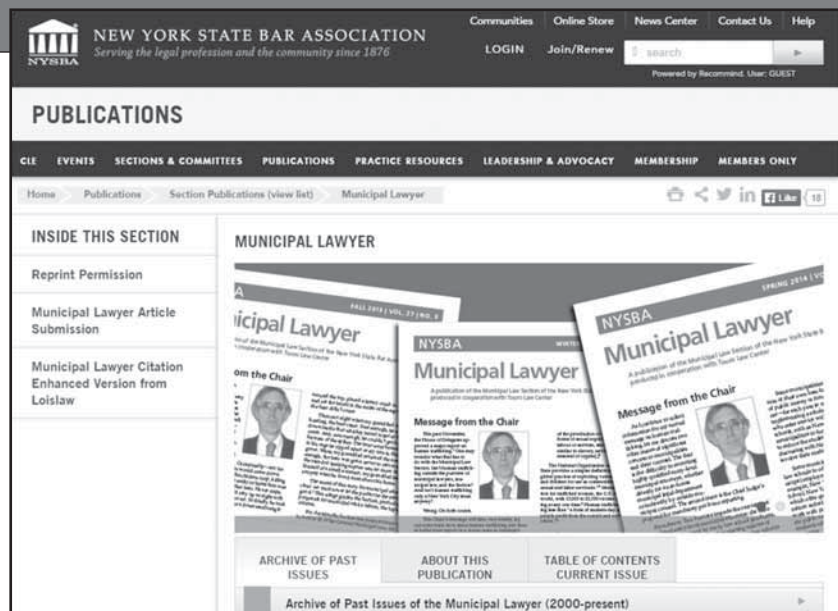
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