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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. 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).

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.” 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.

The CRRA amends the Environmental Conservation Law, Agriculture and Markets Law, and Public Health Law. 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. 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.

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.

(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.

(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.”

(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.

(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.

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. 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.”

Significantly for municipalities throughout New York, the IPCC warns that these risks are exacerbated by “a significant lack of preparedness.” 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). Moreover, not only are many localities unprepared for climate-related risks, many land-use planning and zoning practices are actually increasing local vulnerability. 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.”

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. 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.

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. 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


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 certain “major projects,” including 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.


15. Id.

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”).


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/nee/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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