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### ZONING AND LAND USE PLANNING

# Legal Hurdles for Coastal Residents Rebuilding After Sandy

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Superstorm Sandy caused unprecedented damage throughout the New York City, Long Island, and Westchester County areas, as well as in parts of New Jersey and Connecticut. On Long Island alone, the storm's high winds and resultant storm surge and flooding destroyed over 2,000 homes, with about 100,000 others severely flooded or damaged.<sup>1</sup>

Property owners who are seeking to rebuild or repair their homes and other structures are facing a significant number of hurdles, including the need to comply with a host of local zoning and permit rules. These requirements range from the flood protection mandates contained in local community laws that have been passed as a condition of participating in the National Flood Insurance Program (NFIP) to the standards contained in various state and local codes.

Since Superstorm Sandy, there has been some government action to make it easier for property owners to begin to move forward. Unfortunately, however, overlapping jurisdictions and changes to rules for building in coastal areas are leaving many in limbo.

This column discusses some of the rules and corresponding actions that officials have

taken so far, and certain key issues for which action would undoubtedly be welcomed.

#### DEC General Permit

On Oct. 31, the New York State Department of Environmental Conservation (DEC) issued a "general permit"<sup>2</sup> authorizing certain activities under Environmental Conservation Law (ECL) Article 25 (Tidal Wetlands), Article 15, Title 5 (Excavation and Fill in Navigable Waters), and Article 34 (Coastal Erosion Hazard Areas) in DEC Regions 1, 2, and 3 (Nassau and Suffolk Counties; New York City; and Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester Counties). The general permit included authorization for the following activities within New York's Coastal Erosion Hazard Area (CEHA):

1. Stabilization of existing functional storm-damaged dwellings, decks, and walkways with temporary bracing and pilings;
2. Construction of a single four foot wide access walkway to access damaged dwellings;
3. Installation of up to four rows of sandbags or one cubic yard sand cubes at the toe of storm damaged structures or eroded escarpments;
4. Placement of sand and/or material equivalent to existing material at the toe of eroded escarpments;
5. Reconstruction of existing functional stairways;
6. Re-grade eroded dunes;

7. Reconstruction of existing functional bulkheads and shoreline erosion structures in-kind/in-place; and
8. Repair and reconstruction of existing public roads, bridges, utilities and other public infrastructure.

Under the general permit, a property owner can begin work without waiting for the DEC to approve a plan, so long as the work is covered by one of the specific actions listed above. The property owner only needs to file a "Notice of Intent" (NOI) to notify DEC of work to be done under the general permit, which the DEC has said can be filed electronically.<sup>3</sup> A property owner can begin work upon submission of the NOI, but should make certain to take photographs of all relevant structures and site conditions prior to performing any work authorized by the general permit—and then also immediately upon completion of work.

It is crucial that property owners carefully comply with the provisions and limitations of the general permit, including, if applicable, the DEC's coastal erosion design structure guidance<sup>4</sup> and floodplain rebuilding guidance,<sup>5</sup> before beginning work and that they recognize that actions that are not specifically described within the general permit will still require a standard CEHA permit from the DEC. They also should understand that all actions remain subject to local regulation.

Construction activities that are not covered by the general permit may present the greatest challenges to property owners who

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seek to rebuild because many local coastal erosion hazard area laws discourage and, in some cases, prohibit, the reconstruction of structures that were damaged or destroyed by coastal flooding and erosion. For instance, the Town of Southampton's CEHA law provides that the reconstruction of a non-conforming building or structure is prohibited within an erosion hazard area.<sup>6</sup> In the Village of Sagaponack, the reconstruction or modification of lawfully preexisting erosion protection structures is prohibited in any erosion hazard area, except in certain emergency situations immediately necessary to protect the public health, safety, or welfare.<sup>7</sup> Property owners who are aggrieved by the law may seek a variance from the Coastal Erosion Hazard Board of Review to allow the structures to be reconstructed, but only if they can demonstrate "exceptional hardship" under the criteria set forth in the village's CEHA law.

### Flood Damage Prevention

Property owners whose homes and other structures sustained damage also must consider the flood protection requirements of the NFIP that are incorporated in state and local building codes. Since the primary goal of the federal flood insurance program is to break the damage-rebuild-damage cycle, the program requires that all new, substantially improved, and substantially damaged<sup>8</sup> structures within mapped flood hazard areas meet specific floodplain development standards that are designed to minimize damage from future floods.

These standards require that all new and reconstructed structures have their first floor elevated so that they are above the current base flood elevation of the designated flood zone. Indeed, Housing Secretary Shaun Donovan, who is in charge of the federal government's Hurricane Sandy Rebuilding Task Force, already has warned that Long Island homes in FEMA-designated flood zones may need to be elevated to prevent damage from future storms.<sup>9</sup>

Although raising the elevation of a structure's first floor obviously will make the structure less prone to future flood damage, the consequence of doing so is that the overall height of the structure also is likely to be raised, which may cause the structure

to exceed the maximum permitted building height under local zoning rules. Municipalities will have to decide how to reconcile the requirements of two laws. Fortunately, local municipalities generally are sympathetic to the plight of their residents and committed to seeing their communities rebuilt as soon as possible. Indeed, some actions by local governments to expedite construction already have occurred.

For example, Suffolk County officials have said that they will expedite their review of permit applications filed by property owners who are rebuilding after Sandy—and the county is waiving certain application fees.<sup>10</sup>

The Town Board of the Town of Riverhead, on eastern Long Island, has adopted two resolutions<sup>11</sup> that could serve as a model for other municipalities seeking to assist property owners in the post-Sandy rebuilding process.

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In the first resolution, the board cited the DEC's approval of the Riverhead Planning Board as the administrator to approve the activities covered by the general permit within coastal erosion hazard areas and expressed the town's desire to expedite the process of approving requests to repair property damaged by Sandy. It then directed the Riverhead Planning Board, the Planning Department, and the Riverhead Conservation Advisory Council "to expedite all applications and plans" for activities authorized under the general permit.

The town board also waived fees for various permits, including building permits, electrical permits, and fire prevention permits, for businesses and residents applying for permits to repair damage caused by Hurricane Sandy until Feb. 1, 2013.

As another example, in an effort to help its residents, the Village Board of the Vil-

lage of Huntington Bay recently adopted a resolution authorizing the building inspector to exercise his discretion to waive certain building permit processing requirements in an effort to facilitate and expedite Sandy-related repairs and reconstruction.

### Actions Awaited

In light of the numerous rules and regulations that property owners must comply with for post-Sandy construction, and despite the efforts by local municipalities to assist property owners in the rebuilding process, property owners will be faced with difficult decisions that will dictate if, how, and where they can reconstruct. State and local governments may wish to consider doing more, such as streamlining the permit process or allowing local zoning regulations to yield to federal and state laws that are designed to prevent future flood damage. Such actions would be welcomed by property owners affected by Superstorm Sandy who want nothing more than to put their lives back to normal as soon as possible.

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1. See, e.g., Sarah Crichton, "Officials: Sandy Destroys More Than 2,000 LI Homes," *Newsday* (Dec. 10, 2012), available at <http://www.newsday.com/long-island/officials-sandy-destroys-more-than-2000-li-homes-1.4316744>.

2. See GP-0-12-006, available at [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/gp012006sandypermit.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/gp012006sandypermit.pdf).

3. See [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/noiinstgp012006.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/noiinstgp012006.pdf).

4. See <http://www.dec.ny.gov/lands/86534.html>.

5. See <http://www.dec.ny.gov/lands/75774.html>.

6. See Code of the Town of Southampton, § 138-17(C)(1).

7. See Code of the Village of Sagaponack, § 42-17.

8. A structure is deemed to have suffered "substantial damage" when the cost of rebuilding the structure is equal to 50 percent or more of the market value of the structure before the damage occurred. See 44 C.F.R. 59.1.

9. See Robert Brodsky, "Sandy rebuilding chief calls for some LI homes to be elevated," *Newsday* (Dec. 19, 2012), available at <http://www.newsday.com/long-island/politics/spin-cycle-1.812042/sandy-rebuilding-chief-calls-for-some-li-homes-to-be-elevated-1.4352911>.

10. See Paul Larocco, "Suffolk waives some fees for post-Sandy rebuilding," *Newsday* (Dec. 3, 2012), available at <http://www.newsday.com/long-island/suffolk/suffolk-waives-some-fees-for-post-sandy-rebuilding-1.4287782>. The state has taken similar action with respect to DEC fees. See "Governor Cuomo Announces Extensions for State Permits, License Renewals and Payments for Businesses Impacted by Hurricane Sandy," available at <http://www.governor.ny.gov/press/11712licenser renewals>.

11. See <http://www.scribd.com/doc/115665902/Riverhead-Town-Board-Meeting-Dec-4-2012>.