Urban Environmental Law and Policy

Draft Syllabus February 2017

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2 Credit Seminar

Course Description and Expected Learning Outcomes

In the late nineteenth and early twentieth centuries, local governments pioneered the introduction of environmental regulations in the United States to address problems such as air pollution.[[1]](#footnote-1) The municipal role in environmental regulation was obscured to a large extent with the passage of the landmark federal environmental statutes in the 1970s and the wave of federal regulation that followed to protect air and water quality. However, in the past decade, as climate change has become a live threat, local governments in selected cities in the United States have reasserted a leadership role in environmental law and policy. New York City in particular has been a major environmental leader, first under Mayor Michael Bloomberg and continuing under Mayor Bill de Blasio.

This class will provide an overview of contemporary urban environmental law and policy. It will focus on environmental initiatives in New York City, but also address pioneering environmental initiatives in other cities. The seminar will begin with an overview of the framework in which local governments make environmental law, and the threats of preemption that they face from federal and state law. Then the class will focus on five issue areas where leading local governments such as New York’s currently are active in developing environmental law: (1) climate mitigation and adaptation, (2) transportation, (3) waste management, (4) preserving open green spaces, and (5) water quality protection. Several themes will cut across our discussion of these issues: the links between municipal initiatives and state and federal environmental law, and the extent to which higher levels of lawmaking impinge on municipal initiatives; the political and economic factors that explain the resurgence of interest in environmental law at the local level; and the distinct tools that local governments use to pursue environmental objectives such as land use regulation and urban planning.

**Major Topics:**

1. Introduction
2. The Scope of Local Legislative Power Over the Environment
   1. Home Rule and Preemption of Local Environmental Laws
   2. Separation of Powers in Municipal Government and Environmental Review
3. Climate Change Mitigation and Adaptation
   1. Building Energy Efficiency
   2. Renewable Energy Deployment
   3. Climate Resilience: Flood Proofing and Infrastructure
4. Urban Transportation Mobility: Mass Transit, Bikesharing, Carsharing, Ridesharing and Driverless Cars
5. Waste Management and Environmental Justice
6. Open Spaces: City Parks, Urban Agriculture and Green Roofs
7. Brownfield Remediation
8. Watershed Protection

**Grading:**

We expect the final grades to reflect the following components:

* Class participation (including participation in class debates): 25%
* Choice of 8 reaction papers (3-4 pages each) or final paper: 75%

**Classes and Reading Assignments:**

1. **Introduction**

* **Class #1: The What and Why of Urban Environmental Law**
  + *What is urban environmental law?*
  + *Why do cities develop environmental law?*
  + *Should local governments take a leading role in addressing global issues such as climate change as well as local environmental issues?*

* + - United Nations, World’s Population Increasingly Urban with More than Half Living in Urban Areas (July 10, 2014)
    - The City of New York, Mayor Michael R. Bloomberg, PlaNYC (2007) (read pages 3 – 11)
    - The City of New York, Mayor Bill de Blasio, One City Built to Last (2014) (read pages 5 – 17)
    - Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 Harv. Envtl L. Rev. 553, 579 (2001)
    - Miranda Schreurs, *From the Bottom Up: Local and Subnational Climate Change Politics*, 17 J. of Envt’l Dev. 343 (2008)
    - Richard B. Stewart, *States and Cities in Global Climate Regulation: Unitary v. Plural Architectures*, 50 Arizona L. Rev. 681 (2008)

1. **The Scope of Local Legislative Power Over the Environmental**

* **Class #2: Home Rule and State Preemption of Local Environmental Laws**

*The origins and breath of Home Rule authority*

* New York State Constitution Art. IX
* *Adler v.* *Deegan, 251 N.Y. 467, 489 (N.Y. 1929) (with Cardozo concurrence)*
* *Greater N.Y. Taxi Ass’n v. State, 21 N.Y.3d 289 (2013)*
* *Roberta A. Kaplan & Jacob H. Hupart, Can New York City Govern Itself? The Incongruity of the Court of Appeals’ Recent Cases Regarding Regulation of New York City by New York City, 78 Albany L. Rev.105 (2015)*

*Intrastate preemption, local water quality regulations and fracking bans*

* *Jancyn Mfg. Corp. v. Suffolk City, 518 N.E.2d 903, 907-08 (N.Y. 1987) (on local authority to regulate sources of water pollution)*
* Joseph De Avila, Mike Vilensky and Russel Gold, New York Communities Can Ban Fracking, Court Rules*,* Wall Street Journal (June 30th, 2014)
* *Wallach v. Dryden et al., 16 N.E.3d 1188 (N.Y. 2014) (on local authority to pass zoning ordinances banning fracking)*
* **Class #3: Environmental Review and Separation of Powers**

*Separation of Powers within Local Government and Agency Rulemaking Authority*

* *Boreali v. Axelrod, 517 N.E.2d 1350 (N.Y. 1987)*
* *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene, 16 N.E.3d 538 (N.Y. 2014) (the “soda ban” case)*
* *Brief of Amicus Curiae Paul A. Diller, et al., in support of Respondents, N.Y.S. Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept of Health and Mental Hygiene, N.Y.S. Court of Appeals (2013)*

*Environmental Review and the State Environmental Quality Review Act (SEQRA)*

* *Spitzer v. Farrel*, 791 N.E.2d 394 (N.Y. 2003) (on standard of review under SEQRA)
* *Save the Pine Bush, Inc., v. City of Albany,* 918 N.E.2d 917 (N.Y. 2009) (on standing under SEQRA)
* New York State [Environmental Conservation Law § 27–0101](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000075&cite=NYECS27-0101&originatingDoc=I093d9c1748d811db8ac4e022126eafc3&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))
* New York Civil Practice Laws and Rules § 7803

1. **Climate Change Mitigation and Adaptation**

* **Class #4: Reducing Building Energy Use (combine into 1 class)**

*Building energy disclosure and information regulations; the split incentive problem; preemption of municipal building codes; the Energy Policy Conservation Act*

* + - City of New York, Greater, Greener Building Plan (2009), *available at* http://www.nyc.gov/html/planyc2030/downloads/pdf/greener\_greater\_buildings\_final.pdf
    - New York City Mayor’s Office of Sustainability, One City Built to Last, 18-39
    - Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 Univ. Penn. L.Rev, 613, 618-629 (1999.)
    - *New York State Restaurant Association v. New York City Board of Health*, 556 F.3d 114 (2d Cir. 2009) (on compelled speech)
    - Ole Michael Jensen et al, *Market Response to the Public Display of Energy Performance Rating at Property Sales*, 93 Energy Policy 229 (2016)
    - Chris Neme, Meg Gottstein & Blair Hamilton, Regulatory Assistance Project, Residential Efficiency Retrofits: A Roadmap for the Future (2011)
    - *Air Conditioning, Heating and Refrigeration Inst. v. City of Albuquerque*, 835 F. Supp. 2d 1133 (D.N.M. 2010)
    - *Building Industry Association of Washington v. Washington State Building Council*, 683 F.3d 1144 (9th Cir. 2012)
* **Class # 5: Renewable Energy Deployment – Rooftop Solar**

*Solar rights and solar access laws.*

* + - Michael Neibauer, Sun Block: D.C. Bill Would Require Compensation When Solar Access Obstructed, Washington Business Insider (March 23, 2015)
    - San Francisco Environment, Protecting Solar Access (December 2012)
    - Sara C. Brodin, *Solar Rights*, 89 Boston University Law Review 1218 (2009).
    - Garrick B. Pursely & Hannah J. Wiseman, *Local Energy*, 60 Emory L. J. 878 (2010)
    - Troy A. Rule, *Shadows on the Cathedral: Solar Access Laws in a Different Light*, University of Illinois L. Rev. 851 (2010)
    - *Garden Lakes Community Ass’n v. Madigan*, 62 P.3d 983 (Ariz. App. Div. 2003)
* **Class #7: Climate Resilience: Flood Proofing and Infrastructure**

*Urban planning in flood zones and the National Flood Insurance Program*

* Maxine Burkett, *Duty and Breach in an Era of Uncertainty: Local Government Liability for Failure to Adapt to Climate Change*, 20 George Mason L. Rev. 775 (2013).
* Greg Allen, As Waters Rise, Miami Beach Buildings Higher Streets and Political Willpower, All Things Considered, NPR (May 10, 2016), *available at* http://www.npr.org/2016/05/10/476071206/as-waters-rise-miami-beach-builds-higher-streets-and-political-willpower
  + - GAO, High Risk Series: An Update (February 2015). Read pages 385-390 on the National Flood Insurance Program.
    - Robert Lee Hotz, New York Outspends Other Cities on Climate-Change Countermeasures, Wall Street Journal, February 29, 2016
    - The City of New York, Mayor Bill de Blasio, One New York: The Plan For a Strong and Just City. Read pages 4-7 and 216-251
    - Wharton Center for Risk Management and Decision Processes, Addressing Affordability in the National Flood Insurance Program: Means-Tested Vouchers Coupled with Mitigation Loans (Summer 2013) (4 page issue brief)

1. **Urban Transportation Mobility**

* **Class #8: Congestion Pricing, Low Emissions Zones and Taxation Authority**
  + *Metropolitan Taxicab Board of Trade v. City of New York* (2d. Cir. 2009)
  + Roderick Hills, *Congestion Pricing: Is State Legislation Necessary?* City Law, 13(3) Center for New York City Law 68 (2012)
  + Erin Adele Scharff, *Taxes as Regulatory Tools An Argument for Expanding New York City’s Taxing Authority*, 86 N.Y.U. L. Rev. 1556 (2011)
  + Bruce Schaller, *New York City’s Congestion Pricing Experience and Implications for Road Pricing Acceptance in the United States,* 17 Transportation Policy 266 (2010).
  + Claire Holdman et al, *Review of the Efficacy of Low Emission Zones to Improve Urban Air Quality in European Cities*, 111 Atmospheric Environment 161 (2015).
* **Class #9: Mass Transit, Bikesharing, Carsharing, Ridesharing and Driverless Cars**
  + - *Wallen v. St. Louis Metropolitan Taxi Comm’n*, 2016 WL 5,846,825 (E.D. Miss. 2016)
    - http://onlinepubs.trb.org/onlinepubs/sr/sr319.pdf.
    - Janette Sadik-Khan & Seth Solomonow, Street Fight: Handbook For An Urban Revolution (2016)
    - Kate Galbraith, Are Uber and Lyft Helping or Hurting the Environment?, The Guardian, January 21, 2016, http://www.theguardian.com/environment/2016/jan/21/uber-lyft-helping-hurting-environment-climate-change
    - Amy X. Wang, Self-Driving Cars Could Spell the End of the Taxi Industry. Is That a Good Thing? Slate, July 7, 2015, <http://www.slate.com/blogs/future_tense/2015/07/07/self_driving_cars_a_new_department_of_energy_sponsored_report_finds_self.html>
    - Yonah Freemark, The Interdependence of Land Use and Transportation, The Transport Politic, February 5, 2011, <http://www.thetransportpolitic.com/2011/02/05/the-interdependence-of-land-use-and-transportation/>
    - Katrina M. Wyman, *Taxi Regulation in the Age of Uber*, N.Y.U. Journal of Legislation and Public Policy (forthcoming)

1. **Waste Management**

* **Class #9: The Siting of Waste Treatment Facilities and Environmental Justice**

*Nuisance litigation to combat noxious odors and local air pollutants; waste management plans and the distribution of marine transfer stations.*

* + - Vicki Been, *What’s Fairness got to do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78(1) Cornell L. Rev. 1001 (1993)
    - Complaint, *Mothers on the Move v. New York Organic Fertilizer Company*
    - New York Post, NYOFCO Plant Winds Down (July 14, 2010)
    - Jose M. Serrano, Bronx Asthma Study Legislation Headed to Governor Cuomo’s Desk for Signature, New York State Senate (July 8, 2016)
    - New York City Solid Waste Management Plan (2006), *available at* <http://www1.nyc.gov/assets/dsny/docs/about_swmp_ch3_0815.pdf> (read pages 1 - 7)
    - *ACORN v. Bloomberg*, 824 N.Y.S.2d 752 (N.Y. Co. Sup. Ct. 2006)
    - Yoav Gonen, *City Agrees to Spend $30 million to Move Garbage Ramp*, New York Post (Aug. 1, 2015)
* **Class #10: Waste Reduction Strategies and Safe Disposal of Ozone Depleting Substances**

*Plastic bag taxes, fees and bans; Solid Waste Disposal Act; municipal taxation authority; regulating the disposal of ozone depleting substances.*

* + - Sarah Maslin Nir, State Senate Takes Aim at Plastic Bag Fee in New York City, New York Times (January 17, 2017)
    - *Laredo Merchants Association v. City of Laredo*, 2016 WL 4376627 (on Solid Waste Disposal Act)
    - N.Y. Const., art. XVI, sec. 1
    - *Society of Plastics Industry, Inc., v. City of New York* 326 N.Y.S.2d 788 (1971) (on municipal taxation authority)
    - *Ass’n of Home Appliance Mfrs. v. City of New York*, 36 F. Supp. 366 (S.D.N.Y. 2014) (on New York City’s regulation of appliances containing CFCs)
    - New York City Department of Sanitation, *available at* https://www1.nyc.gov/assets/dsny/docs/about\_Final-Rules-Governing-Recovery-of-Refrigerants\_0815.pdf

1. **Open Spaces**

* **Class #11: Managing the City’s Parks**

*Alienation and management of parks lands subject to the Public Trust Doctrine; the creation of parks; promotion of urban biodiversity.*

* + - *Glick v. Harvey*, 25 N.Y.3d 1175 (2015) (on alienation of park lands and the public trust doctrine)
    - *Friends of Van Cortland Park v. City of New York* , 95 N.Y.2d 623 (2001) (on management of parks subject to the public trust doctrine)
    - N.Y.U.’s Plan to Expand Is Approved by Council, New York Times (July 25, 2012)
    - Roy Rosenzweig & Elizabeth Blackmar, The Park and the People (1992), (skim introduction, read pp 59 – 79)
    - In re C/S 12th Avenue LLC v. City of New York 32 A.D.3d 1 (2006) (on condemnations for public use)
    - Mark A. Goddard et al., *Scaling Up from Gardens: Biodiversity Conservation in Urban Environments*, 25(2)Trends in Ecology and Evolution 90 (2010)
    - New York City Charter, Ch. 21 §§ 531-533
* **Class #12: Urban Agriculture and Green Roofs**

*Rationale for promoting urban agriculture; zoning restrictions and siting green infrastructure; nuisance claims to prevent urban agriculture.*

* + - Caroline Saunders & Andrew Barber, *Carbon Footprints, Life Cycle Analysis, Food Miles: Global Trade Trends and Market Issues*, 60(1) Political Science 73 (2008)
    - *City of St. Paul v. Nelson*, 404 N.W.2d 890, 891-92 (Minn. Ct. App. 1987)
    - Sara Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores* 87(2) Tulane Law Review 231 (2012)
    - Strook & Strook & Lavan LLP, New York City’s Zoning Resolution Becomes Greener (May 3, 2012) *available at* http://www.stroock.com/siteFiles/Pub1193.pdf

*Green roofs, environmental justice and access to open spaces; promotion of urban biodiversity.*

* + - Jackie Snow, Green Roofs Take Root Around the World, National Geographic (October 27, 2016)
    - Alexandra Dapolito Dunn, *Siting Green Infrastructure: Legal and Policy Solutions to Alleviate Urban Poverty and Promote Health Communities*, 37 Boston College Envt’l Aff. L. Rev. 42 (2010)
    - Jennifer R. Wolch, Jason Byrne & Joshua P. Newell, *Urban Green Space, Public Health, and Environmental Justice: The Challenge of Making Cities ‘Just Green Enough’* 125 Landscapes and Urban Planning 234 (2014)

1. **Brownfields**

* **Class #13 Brownfield Remediation**

*Defining brownfields; federal, state and municipal authority over brownfield remediation*

* + - Daniel Schlesigner, *Revisiting New York’s Brownfield Cleanup Program: An Analysis of a Voluntary Cleanup Program That Lost Its Way*, 3 Albany Governmental L. Rev. 403 (2010).
    - *Lighthouse Pointe Property Assoc. v. NYS Dept. of Envtl Conservation* , 924 N.E.2d 801 (N.Y. 2010) (on definition of a “brownfield site”)
    - *Parking Lot Meets Brownfield Standards*, 17 City L. 61 (May/June 2011)
    - Litigation Predicted As New York Issues New Brownfield Rules, Bloomberg/BNA (August 2, 2016)
    - Mark McIntyre, How PlaNYC Will Facilitate Brownfield Redevelopment, 54 New York Law School L. Rev. 431 (2010)
    - Memorandum of Agreement Between the New York State Department of Environmental Conservation and the New York City Office of Environmental Remediation (July 10, 2012)
    - Robert D. Bullard et al., Toxic Wastes and Races at Twenty: 1987 – 2007 x-xxi (2007)

1. **Watershed Protection**

* **Class #14 Watershed Protection and the Maintenance of Safe Drinking Water**

*New York City authority over, and responsibility for watershed protection; the Safe Drinking Water Act and Surface Water Treatment Rule.*

* + - *People v. Van Buren*, 830 N.E.2d 1130 (N.Y. 2005)
    - Mark Buchanan, Great Cities Must Watch Their Watersheds, Bloomberg View (August 16, 2016)
    - National Research Council, Watershed Management for Portable Water Supply: Assessing the New York City Strategy 23-44 (2000)
    - Safe Drinking Water Act, 42 U.S.C. § 300g–1(a),(b)(7)(C)(i)
    - Surface Water Treatment Rule, 40 C.F.R. §§ 141.70-75
    - Michael C. Finnegan, New York City’s Watershed Agreement: A Lesson in Sharing Responsibility, 14 Pace Envt’l L. Rev. 577 (1996)
    - Andrew C. Revkin, New York City Sued by U.S. on Water Filtration Plant, N.Y. Times (April 25, 1997)
    - *United States v. New York*, 198 F.3d 360, 362-363 (2d Cir. 1999)
    - Browse: New York City’s Water Supply System ([link](http://www.nyc.gov/html/dep/html/drinking_water/wsmaps_wide.shtml))

1. Richard L. Revesz, Federalism and Environmental Regulation: A Public Choice Analysis, 115 Harv. Envtl. L. Rev. 553, 579 (2001). [↑](#footnote-ref-1)