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Cutting Edge New York City Green Building Laws Enacted

BY DAVID J. FREEMAN AND JESSE HINEY

A package of legislation putting New York City squarely in the forefront of promoting green buildings was signed by Mayor Michael Bloomberg on December 28, 2009. The intent of the new laws is to lower the environmental impact of New York's built environment and create the ability to benchmark a building's energy efficiency against similarly situated buildings. However, the laws also impose significant responsibilities and costs on building owners.

This client alert includes a brief summary of the newly-enacted (1) New York City Energy Conservation Code, (2) Audits and Retro-Commissioning Law, (3) Lighting and Retrofit Law, and (4) Energy and Water Use Benchmarking Law.¹

New York City Energy Conservation Code

Effective July 1, 2010, New York City will have a new Energy Conservation Code ("NYCECC"). NYCECC is the stricter New York City counterpart to the Energy Conservation Construction Code of New York State and will serve as a set of standards for building energy performance in New York City. The new law requires that any alteration, no matter what percentage of the building system it affects, must be code compliant. By comparison, the State Code applies only to alterations that impact more than 50 percent of a building system or sub-system.

In addition, the new law imposes requirements which make certain that energy conservation will remain at the forefront in New York City construction. It requires that the Commissioner of Buildings prepare and propose amendments to the NYCECC on a periodic basis to ensure that it meets or exceeds the latest requirements and revisions to the State Code. To this end, the Commissioner is required to establish an advisory committee of registered design professionals and environmental advocates who are knowledgeable in energy efficiency and conservation, as well as construction and real estate professionals and representatives of appropriate labor organizations, to provide advice and recommendations regarding revisions to the NYCECC.

Before enactment, exemptions from compliance were added for landmarked and historic buildings.

Audits and Retro-Commissioning Legislation

Under this law, owners of large buildings in New York City must undergo an energy audit, submit an energy efficiency report, and (with certain exceptions) implement the recommendations of the report at least once every ten years. These requirements apply to (i) any building that exceeds 50,000 gross square feet, (ii) two or more existing buildings on the same tax lot that together exceed 100,000 gross square feet, and (iii) two or more buildings held as condominiums that are governed by the

same board of managers and that together exceed 100,000 gross square feet ("Covered Buildings"). The due dates for submission of energy efficiency reports are staggered based on the calendar year that corresponds with the last digit of a building's tax block number. The first energy efficiency reports are due beginning in calendar year 2013.

Under the new law, an energy audit must be conducted under the supervision of an approved agency meeting the qualifications to perform audits, shall consist of an analysis of the base building systems, and must identify (i) all "reasonable"² retro-commissioning (non-capital work such as repairs and maintenance) or retrofit (capital alterations) measures that would reduce energy use and/or the cost of operating the building if implemented, (ii) the annual energy savings, cost to implement, and "simple payback"³ for each identified measure, (iii) the benchmarking output pursuant to the EPA Portfolio Manager tool, (iv) a breakdown of energy usage by system and the predicted energy savings by system after implementation of the proposed measures, and (v) an assessment of how the energy used within tenant spaces impacts energy consumption of the central system based on a representative sample of spaces.

After conducting an audit, the energy professional must prepare an audit report that includes:

1. the date or dates the audit was performed; and
2. items (i) through (v) above.

The building owner must implement the retro-commissioning measures identified in the audit report and then file an energy efficiency report with the Department of Finance. The report must contain (a) a certification by an energy professional that the Covered Building is in compliance with the provisions of the Audit and Retrofit Law, (b) a copy of the energy audit, (c) copies of the approved construction documents for any required retro-commissioning, (d) sign-offs that any required work has been completed, and (e) other such information relating to energy consumption as determined by the Department of Buildings.

The Audits and Retro-Commissioning Law is effective immediately. An exception is made for owners who determine, and substantiate, that the actual cost of the measures proposed exceed the cost estimates by at least 20% and that the simple payback may exceed 7 years.

All retro-commissioning in response to an audit must be performed on the base building systems by or under the supervision of a retro-commissioning agent prior to filing an energy efficiency report to ensure proper operating protocols, calibration and sequencing, cleaning and repair, and to ensure that all permits are in order. The retro-commissioning agent must document the retro-commissioning efforts, including details of the project team and building, testing protocols, audit findings, and deficiencies corrected. The law provides an exemption for qualifying high performance buildings, including EPA Energy Star compliant buildings, LEED Certified buildings and buildings that maintain a specific combination of high-efficiency features, the implementation of which are certified by a registered design professional.⁴

As onerous as these provisions may seem, they are considerably watered down from the bill as initially proposed. Those provisions would have required owners to implement an "optimum bundle" of energy-saving provisions identified by the energy professional, including any capital alterations, significantly increasing the costs of compliance for building owners.

Lighting Retrofits Legislation

This law requires that, on or prior to January 1, 2025, the lighting systems of all Covered Buildings must be upgraded to comply with the standards for new lighting and electrical systems as promulgated by NYCECC § 805. A non-exclusive list of the elements affected include lighting controls, tandem wiring, exit signs, interior lighting power requirements and, as applicable, exterior lighting. The owner of a Covered Building is required to file a report prepared by a registered design professional or a licensed master or special electrician certifying compliance with the law prior to January 1, 2025.

In addition, the law requires the installation, by January 1, 2025, of sub-meters in tenant spaces that (i) exceed 10,000 gross square feet on one or more floors of a Covered Building let or sublet to the same person, or (ii) consist of a floor of a Covered Building larger than 10,000 gross square feet consisting of tenant spaces let or sublet to two or more different persons. Once installed, the meters must be read on a monthly basis, and each tenant must be provided with a monthly statement showing the amount of electricity measured for each area covered by the sub-meter.

The initial version of the legislation would have required upgrades to both electrical power and lighting systems by December 31, 2022, and immediate upgrades to both electrical and lighting systems any time a renovation with an estimated cost of \$50,000 or more took place, irrespective of whether the renovation included electrical work.

Energy and Water Use Benchmarking

As a means of giving building owners the ability to determine how water- and energy-efficient their buildings are on a comparative basis, the Energy and Water Use Benchmarking Law requires owners to input their buildings' water and energy usage into an online benchmarking tool created by the U.S. Environmental Protection Agency. Starting in 2010 for City Buildings⁵ and 2011 for Covered Buildings, by February 15 of every year owners will be required to obtain, and tenants will be required to report, any tenant's separately metered energy usage for the previous calendar year. Then, by May 1, 2010 for City Buildings and May 1, 2011 for Covered Buildings, and on every May 1st thereafter, owners are required to input their buildings' energy usage directly into the online benchmarking tool.

The City's Office of Long-Term Planning and Sustainability is working with utility providers to enable them to upload the benchmarking information directly. If an owner's utility company uploads the benchmarking information directly, the owner will not be obligated to do so. For water usage, benchmarking is required only for those City Buildings and Covered Buildings for which the Department of Environmental Protection has equipped automatic meter reading equipment and the equipment has been in operation for the entirety of the previous calendar year.

All benchmarking information will be posted on the Internet by the Department of Finance no later than September 1, 2011 for City Buildings, September 1, 2012 for non-residential Covered Buildings and September 1, 2013 for residential Covered Buildings, and no later than every September 1st thereafter for each category of subject buildings. The available information will include (1) the building's energy utilization index (energy use per square foot), (2) water use per square foot, (3) where available, a rating that compares the energy use with similar buildings, and (4) a comparison of data across calendar years for any year the building was benchmarked.

Conclusion

These new energy performance and reporting standards represent an ambitious effort to address energy use in buildings, which is estimated to account for almost 80% of New York's carbon footprint. As such, they are a critical element in achieving Mayor Bloomberg's goal of a 30% reduction in the City's global warming emissions by 2030.

Nevertheless, the new laws, and the regulations to be promulgated thereunder, will pose significant challenges for New York City building owners and operators and their tenants. A great deal of their impact and effectiveness will depend on how they are implemented, both by the relevant agencies and by building owners and operators, over the next several years.



We will keep you posted on developments in the implementation of these statutes as they occur. If you have any questions concerning these issues, please do not hesitate to contact either of the following Paul Hastings lawyers:

New York

David J. Freeman
212-318-6555

davidfreeman@paulhastings.com

Jesse Hiney
212-318-6578

jessehiney@paulhastings.com

¹ For a description of the proposed legislation that led to these laws, please see the Paul Hastings Client Alert of May 5, 2009. See http://www.paulhastings.com/assets/publications/1299.pdf?wt.mc_ID=1299.pdf.

² The legislation does not define "reasonable".

³ "Simple payback" is defined as the number of years it takes to pay back an energy efficiency investment (i.e., cost divided by annual energy savings).

⁴ The law also provides that (a) if a Covered Building qualifies as financially distressed, an owner may apply for a one-year extension; and (b) if an owner, despite good faith efforts, is unable to complete the required measures prior to the scheduled due date for such report, the owner may apply for up to two extensions of not more than one year each.

⁵ A City Building, with certain exceptions, is a building having more than 10,000 gross square feet that is owned by the City or for which the City regularly pays all or part of the annual energy bills.