

NEWSBULLETIN

NOVEMBER 2009

Recent “Green” Legislation

By Kyle Hendrickson, Esq.

Across the United States and around the world governments are imposing requirements on the private sector in an attempt to reduce carbon emissions and combat global warming. As part of this broader push, both the United States and the City of New York have recently considered legislation aimed at reducing the amount of energy used by buildings by increasing energy efficiency. These pending laws have the potential to impose substantial expense and responsibilities upon building owners.

NEW YORK CITY LEGISLATION

Local Law 22 mandates that New York City reduce its greenhouse gas emissions by 30 percent by 2030. Because buildings have been estimated to account for approximately 80 percent of the greenhouse gas emissions of the City, four pieces of legislation were introduced on Earth Day, April 22, 2009, that aim to curb these emissions and move the City towards compliance with the mandate of Local Law 22. Specifically, this legislation would adopt the New York City Energy Conservation Code for all new construction and renovations, and require, for existing buildings larger than 50,000 square feet, energy audits and cost-effective retrofits for increased energy efficiency of existing large buildings, upgrades of lighting, and energy and water use benchmarking. All four pieces of legislation are currently before the Committee on Environmental Protection.

NEW YORK CITY ENERGY CONSERVATION CODE

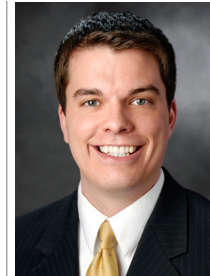
The proposed New York City Energy Conservation Code (the “Energy Conservation Code”) would set standards for energy performance that would apply to the design, construction, renovation and alteration of buildings in New York City. Importantly, all additions, alterations, renovations and repairs would be required to conform to the requirements of the Energy Conservation Code regardless of the percentage of the building or the building’s systems affected. In contrast, the New York State Energy Conservation Construction Code, from which the Energy Conservation Code was adopted, only applies when an alteration leads to the replacement of at least 50 percent of a building’s systems.

To ensure compliance with the Energy Conservation Code, all building permit applications would be required to include (i) a signed and sealed statement by a design professional or lead energy professional for the project that the plans and specifications are in conformance with the Energy Conservation Code, (ii) an energy analysis which must include the envelope, mechanical, service water heating, and lighting and power systems in accordance with the Energy Conservation Code for new building projects or a comparison of the proposed design to the prescriptive requirements of the Energy Conservation Code for building alteration projects, and (iii) the approved construction drawings for the project demonstrating conformance of the drawings with the energy analysis for every element of the energy analysis. Additionally, under the New York City Administrative Code, all construction documents would be required to provide detailed drawings of all architectural elements of the building showing compliance with the Energy Conservation Code as well as a certification that the design complies with the Energy Conservation Code.

LIGHTING RETROFITS

The pending legislation mandates that all lighting in buildings larger than 50,000 square feet be updated to comply with the new energy efficiency standards. The pending legislation specifically provides that beginning

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July 1, 2010, but prior to December 31, 2022 whenever there is a renovation project of any kind within a tenant space, with limited exceptions, the lighting system of the space must be upgraded. Additionally the lighting system of the entire building, including exterior lighting, must be upgraded prior to December 31, 2022, to comply with the standards for energy efficient lighting in either the new Energy Conservation Code or ASHRAE/IESNA 90.1. The upgrades are defined to include lighting controls (interior lighting controls, light reduction controls and automatic lighting shutoff), tandem wiring, exit signs, interior lighting power requirements, and exterior lighting. Finally, the building owner must file a report on or prior to December 31, 2022, prepared by a registered design professional certifying that the upgrades have been completed.

ENERGY AND WATER USE BENCHMARKING

Under the pending legislation, owners of buildings larger than 50,000 square feet will be required to benchmark the total use of energy (electricity, natural gas, fuel oil and steam) and water for each building by May 1 of each year. An owner would comply with its obligation by uploading the energy and water use information to an internet-based database developed by the United States Environmental Protection Agency. Where tenants are separately metered, a building owner will be required to obtain and tenants will be required to provide the tenant's energy and water use information.

After being uploaded and following an initial period of non-disclosure, the energy use information will be made available to the public. The information may include the following (i) the energy utilization index (energy use per square foot), (ii) carbon dioxide emissions per square foot, (iii) water use per square foot, (iv) a rating that compares the energy and water use of the building to that of similar buildings, and (v) a comparison of data across calendar years for the years the building was benchmarked. This publicly available information would enable property owners to learn the relative energy efficiency of their buildings in comparison to other similar buildings, and encourage the overall environmental performance of these large buildings.

AUDITS AND RETROFITS

Owners of buildings that exceed 50,000 square feet will be required to evaluate the energy efficiency of their buildings and make cost-effective energy efficiency improvements. The pending legislation would require energy audits of buildings once every ten years and the production of an energy efficiency report within three years of the energy audit.

The energy audit would be a systematic analysis of the building systems that are part of the building operation and controlled by the owner, and use energy or impact energy consumption including (i) the building envelope, (ii) equipment that serves the common, public, service or utility areas of the buildings, and (iii) building systems up to the point at which the systems connect to equipment installed by tenants. The energy audit, to be conducted by an energy professional, must identify (i) all reasonable retrofitting measures (capital alterations) and retro-commissioning measures (non-capital measures, i.e., repairs) available to the owner, (ii) the costs and energy savings associated with each measure, and (iii) all reasonable retro-commissioning and retrofit measures that will result in energy savings equal to the amount invested within seven years (the “Cost-Effective Measures”). The energy audit may also identify, at the owner's option, retrofit and retro-commissioning measures that will result in energy savings equal to or exceeding the energy savings of all of the Cost-Effective Measures. Under the pending legislation, the owner would be required to complete those retrofit and retro-commissioning measures identified by the energy audit or to complete the measures identified at the owner's option.

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Within three years of the energy audit, the owner of the building would be required to submit an energy efficiency report to the City. The energy efficiency report, prepared and signed by an energy professional, would include a certification by the energy professional that the covered building is in compliance with the provisions of the pending legislation. Additionally, the energy efficiency report must include (i) the energy audit, (ii) copies of approved construction documents for all required retro-commission and retrofit work, (iii) signs-offs that any required work has been completed, (iv) substantiation of post-audit computations of cost and cost-effectiveness, and (v) other information related to energy consumption as the City may require.

FEDERAL LEGISLATION

On June 26, 2009, the House of Representatives passed the American Clean Energy and Security Act of 2009 (H.R. 2454) (“ACESA”). Title II of ACESA, described as “comprehensive energy legislation,” addresses energy efficiency with Subtitle A focusing on energy efficiency programs for buildings. Subtitle A addresses, among other things (i) energy efficiency building codes, (ii) retrofitting buildings for increased energy efficiency, and (iii) energy performance labeling for buildings. The ACESA is currently under consideration by the Senate Committee on Environmental and Public Works.

SEC. 201. GREATER ENERGY EFFICIENCY IN BUILDING CODES

Pursuant to Section 201 of the ACESA, the Secretary of Energy would establish national energy efficiency building codes. Within one year of the creation of a national building code, states would be required to demonstrate that they have updated their building codes to meet or exceed the requirements of the national code, that they have adopted the national code, or that 80 percent of each state’s urban populations have adopted the national code or updated their building codes to equal or exceed the national code. If a state has not updated its building code or its local governments have not provided the appropriate certification, the national building code would apply.

Within two years of enactment of a new national energy efficiency code, states would be required to demonstrate compliance with the new code or that the state has been making “significant progress” towards compliance with the new code. Non-complying states would be ineligible for federal funds to be allocated under this Section of the ACESA as well as for a portion of all funding under the ACESA. The penalty for non-compliance would increase for each year of non-compliance.

Section 201 of the ACESA also authorizes direct enforcement of the new energy efficiency codes. The ACESA specifically provides that where a state and its local governments “fail to enforce” the applicable state or national energy efficiency building code, the Secretary of Energy would be required to enforce the codes. The Secretary of Energy is to establish enforcement procedures that include penalties applicable to violators of the energy efficiency codes.

BUILDING RETROFIT PROGRAM

Pursuant to Section 202 of the ACESA, the Administrator of the EPA would develop and implement standards for a national building retrofit policy designated Retrofit for Energy Performance (“REEP”). Under the REEP program, the Administrator of the EPA would implement a program to retrofit existing buildings for cost-effective energy efficiency. The REEP program would be administered by the states and would provide economic incentives to building owners to retrofit their buildings for increased energy efficiency. The incentives, which would increase in proportion with the improvement in energy efficiency obtained, would not be allowed to exceed more than 50 percent of the total cost to retrofit the building.

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BUILDING ENERGY PERFORMANCE LABELING PROGRAM

Under Section 204 of the ACESA, the Secretary of Energy would establish a building energy performance labeling program for the residential and commercial sectors. The label is to display achieved performance and designed performance data for the buildings. The information on the label will then be made available to owners, lenders, tenants, occupants and other interested parties so as to increase the public’s knowledge of a building’s energy performance.

CONCLUSION

The pending New York City legislation and the ACESA mandate increased energy efficiency for buildings in order to reduce greenhouse gas emissions and combat global warming. While compliance with these laws is expected to result in reduced energy expenses through increased energy efficiency, such savings may come at the expense of the imposition of significant costs and legal responsibilities on building owners.

The above article is an overview only, should not be considered legal advice and application of any laws regarding the aforementioned will be dependent upon specific facts and circumstances. For more information, please contact Lori Samet Schwarz or Kyle Hendrickson at 212-682-6800, lschwarz@zdlaw.com or khendrickson@zdlaw.com.