

A Lawyer's View of Green Building Initiatives

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The Lost Opportunity

- ◆ Energy Policy and Conservation Act of 1975
 - restricts new federal leasing to buildings that will likely meet or surpass the 45% energy reduction
 - federal "energy audits" of buildings and implement systematic life-cycle costing procedures
 - every agency must design an 10-year plan to meet the reduction goals
- ◆ Energy Conservation Standards for New Buildings Act of 1976-(Title III-Public law 94-385)
 - Directs the HUD to publish proposed performance energy conservation standards for new commercial and residential buildings w/I 3 years.
- ◆ Energy Conservation in Existing Buildings Act of 1976 (Title IV)
- ◆ Powerplant and Industrial Fuel Use Act of 1978 (42 USC 8301)

Lost Opportunity

- ◆ National Energy Conservation Policy Act of 1978 (NECPA)
 - DOE establish energy performance targets for Federal buildings
 - HUD determine if mandatory Federal EE standards for all residential dwelling units necessary
 - 1% of square footage in all Federal buildings be retrofitted by 1980. All by 1990.
 - Federal leasing preference to buildings using solar/renewable energy or minimize life cycle costs
- ◆ Solar Energy and Energy Conservation Act of 1980 (Pub Law 96-824, Tit. V)
 - DOE to publish rules for state energy conservation plans for commercial buildings and multifamily dwellings

Building Impacts

- ◆ 39% of GHG Emissions, increasing 2% per year
 - 49% of SO₂
 - 25% of NO_x
 - 7% methane (C/D, fireplaces, stoves)
- ◆ 70% of Electricity Consumption
- ◆ 39% of Energy Use
- ◆ 58% building end-use energy from on-site fuels

Building Impact Cont'd

◆ Residential

- 30% residential space heating
- 11% residential a/c
- 12% water heating
- 12% lighting
- 59% of housing are single family consume 73% of residential energy (2nd largest building sector consumer)

◆ Commercial

- 21% lighting
- 12% space heating
- 9% a/c
- balance for water heating, refrigeration


Building Stock

- ◆ 5 billion sf new construction
- ◆ 5 billion sf renovation
- ◆ 95% Commercial Buildings <50K SF
- ◆ Half of building stock will be existing buildings in 2050
- ◆ NYC-85% of buildings in 2030 will be existing buildings

IPCC Climate Change 2007

- ◆ “Buildings offer the largest share of cost-effective opportunities for GHG mitigation”
- ◆ “Achieving a lower carbon future will require very significant efforts to enhance programmes and policies for energy efficiency in buildings well beyond what is happening today”

Features of Local Initiatives

- ◆ Ordinances, Guidance, Regulations
 - ◆ Building Code
 - ◆ Energy Code
 - ◆ Zoning
 - ◆ Planned Development Communities (CC&R)
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- A decorative graphic at the bottom right of the slide, consisting of a silhouette of a mountain range in shades of teal and light blue.

Local GB Programs: Sticks and Carrots

- ◆ Mandatory or Optional
- ◆ modified LEED rating system
 - minimum points,
 - specific environmental issues
- ◆ Expedited Reviews (Non-Discretionary Entitlements)
- ◆ Bonus Density Incentives
- ◆ Real Estate Disclosure/Transfer
- ◆ Financial

Local Financial Incentives

- ◆ May Be Tiered based on rating level
- ◆ State or Local Tax Credits or Abatements
 - Income Tax for Owners and Tenants
 - Property Tax Abatement or Exemption
 - Multi-Purpose Tax (Corporate, income, etc)
 - Timing on when to submit exemption
- ◆ Fee Waiver or Rebates
- ◆ Partial or Full Reimburse TP Fees
- ◆ Utility rebates
- ◆ Grants/Loans
- ◆ Leasing Assistance
- ◆ Technical Assistance (no TP certification)
- ◆ Public Recognition

Local Enforcement

- ◆ Stop Work Orders
- ◆ Require Substitution of Materials
- ◆ Withhold/Revoke Approvals
 - Compliance prior to COO
 - TCO Subject to Certification
- ◆ Penalties/Reimburse Waived Fees
- ◆ Bond Forfeiture
- ◆ Prohibit Future Participation

Common Green Building Issues

- ◆ LEED Failure or decertification
- ◆ Green Roof Problems
- ◆ Mold
- ◆ Product Unavailability or Delays
- ◆ Product Substitution
- ◆ Productivity Claims
- ◆ Material Recycling
- ◆ Energy Performance

Some Legal Issues

- ◆ What Standard (specific, revised?)
- ◆ Who Bears Risk (tenant, owner, professional)?
- ◆ Lease Issues (level, allocation, expense language, other tenants)
- ◆ What is a Failure?
 - loss of funding
 - fail to obtain certification
 - lost tenant
- ◆ Breach of Green Covenant
- ◆ What is Material Breach
- ◆ LEED certification/decertification

Negligence

- ◆ Negligence
 - duty/breach
 - traceable
 - foreseeable
- ◆ Define Duty of Care (level of performance)
 - LEED experience
 - Inducement to Employ Firm
 - Specify standard to be achieved

Breach of Contract

- ◆ Contractual Relationship
- ◆ Breach
 - Compliance with Law
 - Indemnity
 - Warranty
- ◆ Measure of Damages
 - Liquidated Damage
 - Damage Limitations (cap and consequential)

Damages

- ◆ Loss of tax credits/abatements/waivers/rebates
- ◆ Withholding of COO
- ◆ Penalties
- ◆ Forfeiture of Deposits
- ◆ Reputable Risk/Marketing
- ◆ Lawsuits

Others Causes of Actions

- ◆ Consumer Protection
- ◆ Fraud
- ◆ Misrepresentation
- ◆ Product Liability

Green Building Litigation

◆ Pre-emption/Local Standards

- Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque, No. 8-633 (D.N.M. 9/30/10)
- *Building Industry Association of Washington v Washington State Building Council* (W.D.Wash.)
- Washington-Nile School District (Ohio)

◆ Loss of Tax Credits

- Southern Builders v Shaw Development, No., 19-C-07-011405 (Somerset Cty Cir. Ct, Md 2008)

Litigation Cont'd

◆ Construction Loan Payments

- *Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp.*, 889 N.Y.S.2d 793 (App. Div., 4th Dep't 2009).

◆ Property Assessed Clean Energy

- *Town of Babylon v Federal Housing Finance Authority, et al*, (E.D.N.Y. 10/26/10)
- *State of California v Federal Housing Finance Authority*, No. C10-03084 (N.D.CA.)
- *NRDC v Federal Housing Finance Authority*, 10-cv-7647 (S.D.N.Y. 10/5/10)

Litigation Cont'd

◆ Buyer's Remorse

- *Barber v West Chelsea Development Partners LLC, No. 1G104645 (NY Sup. Ct. 4/8/20)-*
- *Guidumal and Keeley v Site 16/17 Development LLC et al, No. 1010598 (NY Sup. Ct. 5/6/10)*

◆ Disgruntled Professional

- *Gifford v USGBC, No. 10-cv-7747 (S.D.N.Y. 10/8/10)*

NYC

- ◆ **Local Law 84/09-Benchmarking**
 - 50K sq ft (city-owned 10sq ft)
 - Annual benchmarking (5/1/11)
 - energy (electric, gas, oil) and water
 - EPA Portfolio Manager
 - 9/1/12 (DOF posting non-residential)
 - 9/1/13 (DOF residential)
- ◆ **Local Law 85/09 (NYCECC)**
 - alterations, renovations and repairs base building systems
- ◆ **Local Law 87/09 (Audits/RC)**
 - 50K sq ft
 - Base Building Systems (retrofits)
 - n/a for Energy Star/LEED EB-OM
 - 10 years beginning 2013 (tax block #)
 - DOF To Notify 3 yrs prior to date

Enforcement?

- ◆ 1 RCNY 102-01
 - Immediately Hazardous Violation
 - Major Violation
 - Lesser Violation (class 3)
- ◆ ECB NOV
 - Hazardous or Non-Hazardous
 - Certificate of Correction
- ◆ Building “DOB” Violation-
 - order in BIS
 - must be corrected before new or amended CO

Don't Greenwash Buildings

- ◆ Application of FTC Green Guides
 - Building Branding?
 - Green in Eye of Beholder
 - Recyclable
 - Free-of/Non-Toxic
 - Renewable Energy/Materials-not addressed
 - Carbon Offsets-not addressed
- ◆ LEED EB-OM Recertification
- ◆ LEED Compliant vs. LEED Certified
- ◆ Performance Slippage