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'Green' Buildings

City Takes 'LEED' in Requiring Technologies

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As we noted in our Feb. 15, 2006 New York Law Journal article,¹ many of New York's most prominent commercial and residential buildings developed over the last decade, including 4 Times Square, One Bryant Park, 7 World Trade Center, the Solaire, the Helena and the new headquarters buildings for The New York Times and Goldman Sachs, incorporate "green," or environmentally-friendly, technologies. Our prior article focused on the New York State Green Building Tax Credit, one of the many incentives provided in New York to encourage the development of green buildings.²

New York City has since made an extraordinary commitment to requiring use of green building technologies throughout its capital budget construction activities, through Local Law of the City of New York for the Year 2005 No. 86, also known as the "LEED Law." The sheer size of New York City's capital budget—nearly \$12 billion in fiscal year 2007 alone—ensures that this initiative will have a major impact in promoting green design and building techniques throughout New York's construction industry. The potential application of the law to private construction projects funded in whole or in part with public funds means that the impact of this law will be multiplied many times beyond the direct expenditures of city capital funds.

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Background

Local Law 86, which was passed unanimously by the New York City Council on Sept. 15, 2005 and signed by Mayor Michael Bloomberg on Oct. 3, 2005, requires a vast majority of New York city's capital projects, as well as certain private capital projects which receive city funding, to meet environmentally-friendly building standards keyed to the green building standards contained in the United States Green Building Council's Leadership in Energy and Environmental Design ("LEED") standards.³ The LEED standards, which represent the "state of the art" in environmental design and construction techniques, require installation of building technologies designed to promote energy conservation, use of renewable energy sources, recycling of waste water and solid waste, and conservation in building materials.

Local Law 86, which takes effect on Jan. 1, 2007, will be implemented by rules being prepared by the Office of the Deputy Mayor for Economic Development and Rebuilding and the New York City Office of Environmental Coordination. A draft of the proposed rules is anticipated to be published in The City Record for public comment early this fall.

City Capital Projects

Local Law 86 applies to major capital projects undertaken through New York City's capital budget, including new construction and substantial building renovations, and to minor capital projects, including the installation or replacement of building utilities such as boilers and lighting, HVAC, and plumbing systems. The term "capital project" as used in Local Law 86 means the construction of an improvement "which would be classified as a capital asset under generally accepted accounting principles and which is paid for, in whole or in part, from New York City's treasury." The types of buildings to which Local Law 86 applies include nearly all building classifications which make up the bulk of the city's capital construction activities, including occupancy groups B-1 and B-2 (low- and moderate-hazard storage); C (retail); E (office); F-1a, F-1b, F-3 and F-4 (theaters, churches, concert halls, museums, restaurants, etc.); G (educational); and H-1 and H-2 (hospitals, jails, etc.). Notably, Local Law 86 does not apply to hotel or multifamily residential uses (occupancy groups J-1 and J-2), perhaps reflecting a political compromise not to burden the production of affordable housing using city capital budget funds with the extra capital costs of green compliance. Ironically, however, some of the most advanced green building in the private sector has been in multifamily housing, where the operating cost savings of green technologies is expected to increase housing affordability over the long term.

Local Law 86 sets minimum construction cost thresholds for applicability: \$2 million for capital projects involving construction of a new building, additions to an existing building, substantial reconstruction of an existing building or installation or replacement of a boiler or HVAC system; \$1 million for installation or replacement

of lighting systems and \$500,000 for installation or replacement of plumbing systems. In addition, the mayor is given discretion to exempt capital projects accounting for up to 20 percent of New York City's annual capital budget.

Design and Construction Requirements

Local Law 86 defines the phrase "green building standards" as "design guidelines, a rating system or rules for constructing buildings that ensure site planning, water efficiency, energy efficiency and renewable energy, conservation of materials and resources and indoor air quality." The requirements of Local Law 86 are based on LEED standards, but the mayor is given discretion to use different green building standards not less stringent than the LEED standards.

There are four rating levels under the LEED standards (in order of increasing stringency): Certified, Silver, Gold, and Platinum. The rating level is determined by the number of points the project receives under a green building checklist which covers items such as brownfield redevelopment, water and energy efficiency, construction waste management and building reuse, and indoor environmental air quality. In order to achieve a Certified rating, a project must score between 26-32 points; for a Silver rating, 33-38 points; for a Gold rating, 39-51 points; and for a Platinum rating, 52-69 points.

The level of green building standard to which Local Law 86 requires a capital project to be constructed increases in stringency as the construction cost increases. Perhaps again reflecting a political compromise for affordability, schools and hospitals (occupancy groups G and H-2) are held to a less-stringent standard than other uses, and schools are specifically exempted from the most stringent standards.

New construction, additions to existing buildings, or substantial reconstructions of existing buildings other than schools or hospitals are required to achieve a LEED Silver or higher rating. Schools and hospitals, by contrast, are required only to achieve a LEED Certified or higher rating. The green standards increase with the size and scope of the project. For projects with construction cost exceeding \$12 million, the project must be designed to reduce energy costs by a minimum of 20 percent; for projects with construction cost exceeding \$30 million, except for schools, energy cost reduction must be a minimum of 25 percent. For projects constituting

installation or replacement of a boiler or lighting system, energy costs must be reduced by a minimum of 10 percent; for installation or replacement of HVAC comfort controls, a minimum of 5 percent and for installation or replacement of a plumbing system, reduction of potable water consumption must be a minimum of 20-30 percent.

Private Projects With City Funds

While Local Law 86 is largely designed to cover construction projects undertaken by city agencies with which are included in the city's capital program, it also by its terms covers private sector projects where the project receives a minimum of \$10 million, or 50 percent of the estimated project cost, "out of the City treasury."

New York City has made an extraordinary commitment to requiring use of green building technologies throughout its capital budget construction activities.

Local Law 86 defines the term "City agency" consistently with the New York City Charter (§1150.2), as "a city, county, borough, or other office, position, administration, department, division, bureau, board or commission, or a corporation, institution or agency of government, the expenses of which are paid in whole or in part from the city treasury." The New York City Web site⁴ lists over 97 city agencies, including such major capital construction agencies as the Department of Design and Construction, the School Construction Authority, the Department of Environmental Protection, the Department of Citywide Administrative Services and the Department of Correction. In addition to the large quantity of capital construction undertaken by City agencies (in its statements of findings and purposes, the New York City Council estimated that the enactment of Local Law 86 would affect "approximately \$12 billion in construction over the City's ten-year capital plan"), an even broader impact of the law could occur in its application to private development projects undertaken with the requisite threshold of public funds.

Just how far the impact of Local Law 86 extends to private development projects hinges

on the interpretation of the phrase "out of the City treasury." Clearly, projects directly funded with city capital budget funds would be covered. These include a large number of cultural projects undertaken by the city's not-for-profit cultural organizations for which the city has dedicated substantial capital budget funding.

With the proliferation of creative public financing and mixed public-private development projects, however, the impact of the law could go well beyond its literal meaning. For example, would the law apply to the recently-announced stadium projects, which are financed in large part through tax-free bonds issued by local development corporations and serviced by payments in lieu of real estate taxes? Would it apply to a mixed-use building containing private office or other commercial space and a publicly-funded school at the base of the building? Would it apply to projects that receive City tax benefits and incentives through the New York City Industrial Development Agency, or as-of-right exemption programs? Would it apply to projects constructed on land acquired from a City agency, where the land cost was originally borne by the City? Any of these types of tax expenditures or direct expenditures financing a project could be interpreted as being "out of the City treasury."

An exhaustive review of code and case law (including over 291 cases dating back to the mid-1800s) did not provide any clarification of the meaning of such phrase. The scope of the city's interpretation of the phrase will be a key issue for the real estate community and real estate bar to focus on when the draft rules for Local Law 86 are issued in the fall. Clearly, however, it is within the discretion of the city lawmakers to extend a law such as Local Law 86 expressly to projects receiving city benefits of this type if the lawmakers determine that promoting green construction by this method is a desirable public goal.

1. Meredith J. Kane and Nicholas A. Kujawa, "Green Buildings: State Renews Environment-Friendly Incentive," *New York Law Journal*, Feb. 15, 2006.

2. Part G of Chapter 61 of the Laws of 2005.

3. Available at <http://www.usgbc.org/LEED>.

4. See <http://home.nyc.gov/mayor>.