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Green Is Not Just The Color Of Climate Conscience

Law360, New York (August 27, 2008) -- With the enactment of the Green Building Act of 2006, the District of Columbia placed itself at the forefront of jurisdictions mandating energy efficient, sustainable standards for new construction or substantial improvement of non-residential buildings.

The Clean and Affordable Energy Act of 2008 (the "Clean Energy Act"),[1] recently enacted by the D.C. Council and signed by the mayor on Aug. 4, raises the bar again by creating a powerful incentive for owners of all commercial buildings – existing, as well as new – to make their buildings more energy efficient.

Energy Benchmarking

The Clean Energy Act will require all privately-owned, commercial buildings with over 50,000 square feet of gross floor area to be evaluated and benchmarked annually, using the Energy Star® Portfolio Manager benchmarking tool.[2]

Benchmark scores must be submitted annually to the District Department of the Environment, which will be required to publish such information on an online database.[3]

The benchmarking requirements will be phased in over a period of four years, commencing in 2010,[4] but building owners and managers should begin now to implement steps to increase energy efficiency before the requirements come into effect.

The Energy Star, a familiar symbol for energy efficiency commonly seen on household appliances, was first introduced for commercial buildings in 1999. Buildings that achieve a score of 75 or greater, on a scale of 1 to 100, may qualify for the Energy Star label.

Energy Star benchmarking can be influenced significantly by responsible property management; higher scores can be achieved by use of energy efficient lighting and equipment and more sophisticated monitoring of HVAC. Since 1999, thousands of

buildings have earned the Energy Star; 36 Energy Star buildings are located in the District of Columbia.[5]

Energy Star As Marketing Asset

Public disclosure of energy efficiency benchmarks will become an important tool in the marketing and valuation of buildings in the District of Columbia. Commercial properties in suburban markets will also feel the impact of benchmarks as they try to compete in the greater Washington, D.C. metropolitan area.

Buildings that earn the coveted Energy Star label will be attractive not only to those who are drawn to green buildings for moral or political reasons, but also to lenders, investors, buyers, tenants and other users who want to minimize operating costs and increase profits.

On average, Energy Star buildings use 35 percent less energy than similar buildings.[6] Energy efficient buildings may also qualify for lower property insurance premiums and for tax rebates and other governmental incentives.

Aside from the reduced costs associated with energy efficiency, there is also growing evidence of increased value. A recent study conducted by CoStar Group found that green properties significantly outperformed their non-green counterparts in such key areas as occupancy, rental rates and sales prices.

Nationally, Energy Star buildings have occupancy rates 3.6 percent higher, and command rental rates $2.40 per square foot higher, than buildings that have not earned the Energy Star.

In D.C., Energy Star buildings perform even better – with occupancy rates that are 6.3 percent higher, and rental rates that are $2.98 per square foot higher, than non-Energy Star buildings. Nationally, Energy Star buildings are selling for an average of $61 per square foot more than non-Energy Star buildings.[7]

Green Contracts For Green Buildings

The increased value of energy efficiency, sustainability and renewability in the commercial real estate market will have wide-ranging implications on transactions. As the commercial real estate industry focuses on the greening of buildings, it should not neglect the greening of legal documents.

If an owner, investor, lender or tenant values any particular aspect of a building's "greenness," it will have to obligate the appropriate party to design, construct, implement and maintain such aspect.

For instance, a major tenant may want to obligate its landlord to maintain a building's Energy Star rating and to pass through to the tenant any rebates earned by the building.

Lenders may want to obligate borrowers, and owners may want to obligate property managers, to maintain Energy Star ratings.

Landlords should consider imposing energy efficient requirements in tenant improvement standards. Buyers of commercial real property should consider specifically requesting a building's historical energy benchmarking information.

Interested parties should also consider "green" insurance. Most policies of property insurance do not cover the additional costs of replacing sustainable features, although some insurance companies are beginning to provide specific green building replacement coverage and "upgrade" coverage that will cover the costs of upgrading damaged non-green products with green products. Lenders and investors should review insurance coverage and consider requiring specific green insurance.

As in all aspects of commercial real estate, the legal implications of green buildings are endless. The rewards are evident. The risks are just beginning to come into view. In every instance, across the board, legal documents should begin to be viewed with a "green" eye.

--By Thomas R. Petty, Anderson Kill & Olick LLP

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[1] Act 17-0497.

[2] Act 17-0497, Title V, Section 501(b).

[3] Id.

[4] All buildings over 200,000 square feet of gross floor area must be benchmarked commencing in 2010 and thereafter; benchmarking commences in 2011 for all buildings over 150,000 square feet, in 2012 for all buildings over 100,000 square feet, and in 2013 for all buildings over 50,000 square feet. Id.

[5] As of Dec. 31, 2007, based on the www.energystar.gov website.

[6] www.energystar.gov.

[7] "CoStar Study Finds Energy Star, LEED Bldgs. Outperform Peers," by Andrew C. Burr, March 26, 2008, www.CoStar.com/Partners/CoStar-Green-Study.pdf.