New York Law Journal

ESG and Legislative Impacts on NYC Buildings

Over the past several years, real estate investors, owners and developers have looked to incorporate environmental, social & governance (ESG) criteria into their evaluation of real estate buildings and projects. This article examines the ways New York City real estate market participants are impacted by this increased focus on advancing societal goals.

By **Hillel E. Sussman and Tyler F. Starr** | April 08, 2021

New York skyline (Photo: Shutterstock)

As investor interest and invested capital in the Environmental, Social & Governance (ESG) space has increased over the past several years, real estate investors, owners, developers and other stakeholders have looked to incorporate ESG criteria into their evaluation of new and existing real estate buildings and projects. Here we discuss several ways in which the New York City real estate market participants have been and will continue to be impacted by this increased focus on advancing societal goals while at the same time achieving positive economic returns. Such impacts include the passage of the New York City Climate Mobilization Act and the resulting transition toward green retrofitting, green building certifications, and contractual and risk management protections for building owners.

New York City Climate Mobilization Act

ESG-focused companies will continue to proliferate as local governments enact laws aimed at curing social harms. One example is New York City's Climate Mobilization Act (the Act), which was passed in May 2019. Included among the legislation is Local Law 97, which will materially impact construction and building operations. The goal of Local Law 97 is to reduce greenhouse gas emissions from New York City buildings by 40% by 2030 and 80% by 2050, using 2005 emissions as a baseline. The goal will be accomplished through emissions limitations, which are scheduled to take effect in 2024, 2030, and 2035. "covered buildings" (buildings that exceed 25,000 gross square feet, two or more buildings on the same tax lot that collectively exceed 50,000 gross square feet, and two or more buildings held in a condominium form of ownership that collectively exceed 50,000 gross square feet) will be required to make energy-efficient improvements to lower overall energy usage.

A building's annual emissions limit is calculated by using emissions intensity factors applicable to various categories of building code occupancy groups. The building emission intensity factor is multiplied by the building's square footage to calculate the emissions limit, which is expressed as metric tons of carbon dioxide equivalents per year. For example: A building has 40,000 square feet of business (office) and 10,000 square feet of mercantile stores. The tons of carbon dioxide equivalent per square foot (TCO2E/SF) for the business (office) occupancy group is 8.46 and the TCO2E/SF for the mercantile group is 11.81. 8.46 TCO2E/SF x 40,000 square feet = 338,400 TCO2E, and 11.81 TCO2E/SF x 10,000 square feet = 11,810,000 TCO2E; the building's total annual emissions limit is 12,148,400 TCO2E.

To calculate a building's annual emissions, the legislation provides factors based on the manner in which a building obtains its energy (i.e., electricity delivered through the grid, natural gas combusted on the premises, fuel oil combusted on the premises, and district steam consumed on the premises).

Beginning in 2024, covered buildings may not have permitted annual emissions in excess of those allowed pursuant to the act. More stringent compliance requirements will take effect in the 2030-2034 period. These requirements are expected to cover approximately 75% of the city's buildings. By Jan. 1, 2023, even more stringent factors will be established for the compliance period beginning in 2035.

Green Retrofitting

Post-2009, our firm published a NYLJ article entitled, "City's Greener, Greater Buildings Plan May Spur Retrofitting," which discussed four bills signed into law by then-Mayor Michael Bloomberg, compelling New York City building owners to perform benchmarking of water and energy use performance, upgrading of lighting during major renovations, and energy auditing/retro-commissioning (adjustments to mechanical systems to enhance energy efficiency). The goal of these bills was to compel an examination of the energy usage of large buildings in New York City and, in turn, spur building owners to perform "retrofitting" to improve the energy efficiency.

While the energy audits brought much-needed data and attention to the importance of improving energy efficiency, the bills did not mandate building owners to actually perform retrofitting. As a result, it did not spur the retrofitting that was envisioned, primarily because building owners were not incentivized enough to invest in the capital improvements and energy efficiency upgrades needed to achieve meaningful results.

Fast forward to the 2019 Act, the incentives, both positively and negatively, are now clear. covered buildings are mandated to achieve compliance with the carbon-reduction milestones discussed above, and building owners are faced with increasing financial penalties, which could result in millions of dollars in fines for owners that disregard the Act or fail to ensure compliance.

Alternatively, building owners opting to retrofit buildings and tenant spaces are seeing dramatic energy savings. Such retrofitting measures include installing equipment or components into a building or on existing systems that were not present when the building was first built, such as occupancy sensors and bi-level lighting, roof and terrace landscaping, indoor air quality (IAQ) systems, dual fuel, natural gas or renewable energy conversions, insulation and other material to fill penetrations in the building envelope, low-flow water fixtures, high efficiency boilers and heat controls, automated building and energy management systems or software, and replacing appliances with Energy Star appliances.

Additionally, active building owners are engaging demand response providers to assess the electric grid and reduce or shift their electricity usage during peak periods in response to time-based rates or other forms of financial incentives.

Environmental, Health and Wellness Certifications

In addition to the incentives discussed above, building owners are simultaneously participating in green building, health and wellness certifications, to enhance the health, wellness, and overall sustainability of their buildings. In the case of retrofitting, there are several available "green" certifications, including the notable LEED rating system. LEED differentiates itself from the rest of the industry in the retrofitting space through its "LEED for Existing Buildings: Operations & Maintenance," referred to as LEED-EBOM. LEED-EBOM primarily focuses on building operations, preventative maintenance and systems performance. However, to meet the prerequisites and earn a sufficient number of credits to become certified under LEED-EBOM, most buildings must perform the necessary retrofits and other capital improvements described above.

In addition to LEED-EBOM, agencies such as the Green Business Certification Inc. (GBCI), use rating systems to certify that buildings have achieved various levels of energy efficiency or use, and in the case of Fitwel Certification (New Construction Pathway or Existing Building Pathway-Built Certification) or the Well Building Standard, the agencies also certify results based on health and wellness in addition to sustainability.

Contractual Protections for Building Owners

In order to protect itself contractually, a building owner should include certain provisions whether contracting with energy consultants, design professionals, or contractors during "green" retrofitting or new sustainable construction projects. Energy consulting agreements should first address the cost structure for any shared revenue or savings achieved by the building owners. The owner must also protect against the unauthorized use and access to building utility data systems, and software, in addition to maintaining confidentiality of the owner's data and returning or destroying same upon expiration of the agreement. Lastly, owners should include provisions addressing data security, data protocols and breaches, and cyber liability insurance to protect against data breaches that occur when consultants access owners' data or systems.

Design professionals engaged in retrofitting or "green" construction projects must incorporate the use of sustainable equipment, material or systems into their drawings or specifications. The design professionals must also review manufacturer test results, and guarantees and warranties of such equipment, materials or systems for compatibility with and impact on the project, and recommend if and when additional testing is needed. When an owner seeks to attain green building, health or wellness certifications, the design professionals must ensure timely and complete registration, submission and responses to the appropriate certifying agencies. The design professionals must also coordinate bidding with prospective contractors and review and advise on submittals for compliance with certification goals.

Once contractors are engaged to perform the retrofitting or green construction projects, they must coordinate with the owner's design professionals to attain certification goals for the projects. Contractors must also affirm that they are familiar with green building requirements, principles and practices applicable

to the project. Throughout the project, contractors maintain responsibility to replace, remove or correct materials and equipment that do not meet the building owner's certification requirements.

Conclusion

In addition to compliance with the Act, there are certainly investment opportunities, operational savings and tax credits over the life-cycle of buildings that are increasingly important to ESG-investors. Many building owners, whether the buildings are "covered buildings" or not, are increasingly implementing green building and other energy efficient systems focused on sustainability, health and wellness. Many of these systems go well beyond the required compliance, which contributes to the overall advancement of ESG-related initiatives in the real estate industry. It will be interesting to see which New York City buildings distinguish themselves in the ESG era and emerge as true industry leaders.

Hillel E. Sussman *and* **Tyler F. Starr** *are attorneys at Tannenbaum Helpern Syracuse & Hirschtritt.*