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*presents*

# **Green Leases: Evolving Legal Issues for Commercial Landlords and Tenants**

## **Negotiating and Crafting Environmentally Friendly Lease Terms**

**A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

**Today's panel features:**

Louise C. Adamson, LEED-AP ID&C, Partner, **K&L Gates**, San Francisco

Ronald B. Grais, Partner, **Jenner & Block**, Chicago

Jacob Bart, Partner, **Stroock & Stroock & Lavan**, New York

**Thursday, March 4, 2010**

The conference begins at:

**1 pm Eastern**

**12 pm Central**

**11 am Mountain**

**10 am Pacific**

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# STROOCK

## SPECIAL BULLETIN

### NYC's Green Building Law: A Comprehensive Mandate for Energy Efficiency and Emissions Reduction from Existing Buildings

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February 22, 2010

New York City's green building legislative package (the "Legislation"), touted to be the "most significant action to date to meet the City's PlaNYC commitment of 30% emissions reductions by 2030," should be of great interest to all building owners and managers in the City.<sup>1</sup> The Legislation, which consists of four separate bills and is designed to reduce energy costs and carbon emissions from existing buildings and to create new jobs in New York City, requires:

1. compliance with the New York City Energy Conservation Code ("Energy Code") for new construction and significant renovations;
2. energy audits and retro-commissioning of Covered Buildings (defined below) once every ten years;
3. benchmarking standards for certain Covered Buildings and certain City-owned buildings; and

4. lighting system upgrades in Covered Buildings to meet the requirements of the Energy Code.

In addition, New York City has adopted the FRESH zoning incentive program to provide certain zoning and financial incentives for the establishment and upgrade of new and/or existing grocery stores in underserved areas.<sup>2</sup>

This **Stroock Real Estate Practice Group Special Bulletin** provides a brief overview of the Legislation and the FRESH program and their potential implications to building owners and managers in New York City.

#### New York City Energy Code

The Energy Conservation Construction Code of New York State applies only when alterations to existing buildings lead to the replacement of at least

50% of a building system. Any alterations that are below this threshold are not required to comply with the State's energy standards. The Energy Code is designed to address alterations that fall below the State threshold.

The Energy Code provides that any and all additions, alterations, renovations and repairs to an existing building or building system must comply with the Energy Code, but only to the extent of such addition, alteration, renovation and/or repair.<sup>3</sup> Certain historic buildings are exempt from this requirement: buildings or structures on the State or National Register of Historic Districts; buildings or structures designated by or calendared for designation by the New York City Landmarks Preservation Commission ("LPC") (exempt from the envelope and exterior lighting requirements); and all interior landmarks designated by or calendared for designation by LPC.

Among other requirements for compliance, building owners must submit certain documents, including a certification from a registered design or energy professional that "[t]o the best of [his/her] knowledge, belief and professional judgment, [the] plans and specifications are in compliance with the New York City Energy Conservation Code."<sup>4</sup>

### Energy Audits/Retro-Commissioning

The energy audit required by the Legislation is a "systematic process of identifying and developing modifications and improvements to the base building systems," which can include alteration of the system and the installation of new equipment, insulation or other energy efficiency technologies.<sup>5</sup> Any such audit must identify, at a minimum:

1. all reasonable measures that would reduce energy use;

2. the associated energy savings and cost;
3. the building's benchmarking output;
4. a breakdown of energy usage and predicted energy savings; and
5. a general assessment of how tenant equipment impacts the energy consumption of the base system.

The retro-commissioning requirement mandates the optimization of base building systems of Covered Buildings, which would include repairs, adjustment of systems, and/or changes in operational practices.

The energy audit and retro-commissioning bill applies to existing buildings over 50,000 gross square feet ("GSF"); two or more buildings on the same tax lot that together exceed 100,000 GSF; and two or more buildings held in the condominium form of ownership that are governed by the same board of managers and that together exceed 100,000 GSF (collectively, "Covered Buildings"<sup>6</sup>). Certain Covered Buildings are exempt from the energy audit requirement, including, those that have received:

1. an Energy Star Label,<sup>7</sup> or if no rating is available, have performed 25 points or more better than the average performance of buildings of the same type in or over the past two out of three years, consistent with the methodology of LEED<sup>8</sup> 2009 rating system; or
2. a LEED 2009 rating.

Additionally, Covered Buildings that have received LEED 2009 certification are exempt from the retro-commissioning requirement.

Owners of Covered Buildings are required to prepare and file an energy efficiency report, which is due as early as 2013 (depending on the last digit

of the tax block number in which the Covered Buildings are located) and every tenth calendar year thereafter. Both the audit report and the retro-commissioning report must be filed no earlier than four years prior to the filing of the energy efficiency report.

As originally proposed, the Legislation would have required a building owner to implement the changes recommended by the audit by retrofitting the building. This requirement, which would have mandated capital alterations of building systems, including the installation of new equipment, insulation or other proven energy efficiency technologies that reduce energy consumption and improve the efficiency of such systems, faced significant opposition from building owners and managers, and was dropped from the Legislation prior to passage. Nonetheless, it is anticipated that even without the legal mandate, many buildings will undertake retrofitting of some systems in order to derive the cost savings associated with energy efficiency opportunities.

### Benchmarking

Benchmarking is a process designed to track and assess energy and water use of buildings by submitting total energy and water usage and other required information to a database developed by the U.S. Environmental Protection Agency.<sup>9</sup> The benchmarking bill applies to all Covered Buildings, City-owned buildings in excess of 10,000 GSF, and all buildings for which the City regularly pays all or part of the annual energy bills (excluding any building owned by the City that participates in the tenant interim lease apartment purchase program or any building owned by the City that is 50,000 GSF or less and participates in a program administered by the Department of Housing Preservation and Development). Each Covered Building is required

to be benchmarked no later than May 1, 2011, and no later than every May 1st thereafter. City-owned buildings must be benchmarked no later than May 1, 2010, and no later than every May 1st thereafter.

### Lighting System Upgrades

The Legislation requires the upgrade of lighting systems in all Covered Buildings on or prior to January 1, 2025. Additionally, one or more sub-meters must be installed on or before January 1, 2025 for each covered tenant space.<sup>10</sup> After January 1, 2025, the owners of Covered Buildings must measure the electrical consumption of each tenant space.

### FRESH Zoning Program

The Food Retail Expansion to Support Health (“FRESH”) program provides incentives for, and removes impediments to, the development of grocery stores that sell fresh foods in New York City. This program applies only to certain commercial and manufacturing districts in the City, most of which are in underserved areas of Northern Manhattan, Southern Bronx, Central Brooklyn, and Queens.

Some of the zoning benefits include:

1. allowing FRESH stores up to 30,000 square feet as-of-right in M1 districts (this represents an increase from 10,000 square feet);
2. increasing the permitted residential floor area (for FRESH stores that are in mixed and mixed-use buildings), by one square foot for every square foot in the FRESH store;
3. modifying the height and setback requirements; and
4. reducing parking requirements.

Additionally, the FRESH program provides certain financial incentives, administered by the NYC Industrial Development Agency (“IDA”). These can include real estate tax reductions, sales tax exemption, and mortgage recording tax waivers. Recently, IDA approved two tax incentive packages under this program for the development of two new supermarkets in the Bronx: approximately \$3 million in tax benefits for a Foodtown store and nearly \$5.6 million for a Western Beef location.

### Potential Impacts and Implications

The Legislation is expected to reduce energy usage dramatically, saving over \$700 million annually in energy costs and creating over 17,880 jobs.<sup>11</sup> Even without the retrofit requirement, the Legislation imposes significant obligations on many building owners, including compliance with the Energy Code (when alterations are made to their buildings), certain equipment upgrades, and the monitoring of and reporting on energy usage. All building owners and managers should become acquainted with the Legislation to ensure compliance. In addition, the incentives provided by the FRESH program can serve as a catalyst for the development of new, and the expansion of existing, grocery stores in underserved areas of the City.

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By E. Gail Suchman (gsuchman@stroock.com), a Special Counsel in the Real Estate and Environmental Law Practice Groups of Stroock & Stroock & Lavan LLP, and Joon H. Kim, an associate in Stroock’s Real Estate and the Environmental Law Practice Groups.

1. New York City, Office of the Mayor, December 9, 2009 Press Release: “Mayor Bloomberg and Council Speaker Quinn Announce Passage of Landmark Package of Legislation to Create Greener, Greater Buildings in New York City, PR-532-09; Local Laws 84, 85, 87 and 88 of 2009.”
2. Application No. N090412ZRY for an amendment of the NYC Zoning Resolution relating to Article IV, Chapter 3, concerning provisions regarding the establishment of FRESH Food Stores.
3. NYC Administrative Code, Section 28-1001; the following are exempt: except (i) the installation of storm windows over existing fenestration; (ii) glass only replacements in an existing sash and frame; (iii) exposure of existing ceiling, wall or floor, provided that those cavities are filled with insulation; and (iv) construction where existing roof, wall or floor cavity is not exposed.
4. Energy Code, Section 101.5.1.1.
5. NYC Administrative Code, Section 28-308.1.
6. Class one (1) buildings, as defined in Section 1802 of the New York State Real Property Tax Law, are excluded from the definition of a Covered Building. Class one buildings include, without limitation, all one, two and three family residential properties, residential properties not more than three (3) stories in height and held in condominium form of ownership and residential properties consisting of one family structures on land held in cooperative ownership.
7. U.S. Environmental Protection Agency’s Energy Star Program, [http://www.energystar.gov/index.cfm?c=green\\_buildings.green\\_buildings\\_index](http://www.energystar.gov/index.cfm?c=green_buildings.green_buildings_index).
8. U.S. Green Building Council’s Leadership in Energy and Environmental Design Green Building Rating System, <http://www.usgbc.org/DisplayPage.aspx?CategoryID=19>.
9. NYC Administrative Code, Section 28-309.2.
10. “Covered tenant space” is defined as tenant space that is larger than 10,000 GSF let to one person or floor of a Covered Building larger than 10,000 GSF let to two (2) or more persons. NYC Administrative Code, Section 28-311.2.
11. New jobs would come from auditing, benchmarking, lighting installation, retro-commissioning and retro-fitting of buildings. PlaNYC Green Buildings Plan: “The New York City Greener, Greater Buildings Plan,” December 2009, available at <http://www.nyc.gov/html/planyc2030/html/downloads/download.shtml>.

New York

180 Maiden Lane  
New York, NY 10038-4982  
Tel: 212.806.5400  
Fax: 212.806.6006

Los Angeles

2029 Century Park East  
Los Angeles, CA 90067-3086  
Tel: 310.556.5800  
Fax: 310.556.5959

Miami

Wachovia Financial Center  
200 South Biscayne Boulevard, Suite 3100  
Miami, FL 33131-5323  
Tel: 305.358.9900  
Fax: 305.789.9302

[www.stroock.com](http://www.stroock.com)

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