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By John R. Nolon and Jennie C. Nolon[1]

Abstract: Through New York state legislation, localities are afforded broad authority adopt green building standards that reach beyond those imposed by state law. As localities begin to undertake the challenge of implementing green building initiatives, many legal questions arise. This article examines several instances of green local action and provides examples of successful local projects, as well as local mistakes. The municipalities mentioned include a broad spectrum of communities, from small municipalities such as Mount Kisko, to some of the larger cities in the state such as New York City and Syracuse.

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In recent months, there has been a surge of interest, action, and controversy regarding the adoption of green building standards at the local level in New York. State law provides authority to local governments to adopt energy conservation standards of their own and to impose other green development requirements regarding the sustainability of sites, water efficiency, renewable energy, and indoor environmental quality - to name a few. As local legislatures, planning boards, affected developers, citizens groups, and their attorneys probe the extent of this authority and the many methods of exercising it, numerous questions arise about how to take advantage of the opportunity to advance green development without causing unintended negative consequences.

Village of Mount Kisco: Mandatory Project Approval Conditions

At a recent planning board meeting in the Village of Mount Kisco, a developer reported that its 129-unit residential project would be constructed and operated to qualify for LEED certification at the Silver level. A member of the board questioned whether the village could guarantee that result by making LEED certification a condition of the approval of the project. Consultants for the village pointed out that while imposing such a condition under the State Environmental Quality Review Act[2] might be legal, it would not be wise to do so for reasons explained below.

The Leadership in Energy and Environmental Design (LEED) Green Building Rating System program was developed by the United States Green Building Council (USGBC) almost a decade ago to encourage developers to adopt sustainable green building and development practices through the implementation of widely accepted tools and performance criteria. LEED promotes a range of sustainability objectives by awarding points toward certification for performance in five key areas: Sustainable Sites, Water Efficiency, Energy and Atmosphere, Materials and Resources, and Indoor Environmental Quality. LEED projects are designed to earn points toward four levels of certification – Certified, Silver, Gold, and Platinum.

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[2] State Environmental Quality Review Act, 6 NYCRR Part 617 (2009).

Projects may submit for LEED certification at the completion of construction, which requires verification that the building is built according to the USGBC's standards. The certification review process can be lengthy, taking months to work through the preliminary review, final review, and acceptance or appeal phases. Following construction, buildings must receive a Certificate of Occupancy (CO) from the local building official or department before they may be occupied and operated. This creates a worrisome Catch-22 situation: How can a CO be granted if a condition of approval (the awarding of LEED certification) has not been met? If a Temporary CO is granted, pending certification, what happens if certification is not obtained?

Other legal issues are raised when a municipality imposes green development standards on private development. In the Mount Kisco illustration, for example, what impact would such a condition have on the eligibility of a project for construction lending? Will residential purchasers be willing to commit down payments to purchase without knowing whether a permanent CO will be obtained or whether the promised benefits of LEED certification will be realized? If a building that is legally required to meet LEED standards fails to do so, are the professional consultants and contractors liable to the developer or are any of them liable to the purchasers of the homes for misrepresentation or negligence - even negligence per se? Do those purchasers have any action against the municipality for failure to ensure compliance with requirements contained in its legal regime? Can the municipality incorporate the standards of an independent third party, such as the USGBC, particularly future changes in those standards, without violating illegal delegation rules or anti-trust prescriptions?[3] If a local government decides to include standards regarding the energy use of building equipment, or even appliances, is it preempted by federal or state law from doing so?[4]

New Rochelle: Adopting Review Protocols for Energy Conservation

Because of such issues, the City of New Rochelle is taking a cautious approach to green building development. Initially, New Rochelle was encouraged by approaches such as that taken by Boston when it adopted the Boston Zoning Code Green Building Amendments in 2007. [5] The Boston legislation incorporates by reference the LEED green building rating systems and requires affected buildings to be LEED "Certifiable" - meaning, a developer is required to design and construct a building to meet the minimum level of LEED certification requirements but is not required to apply for actual certification from the USGBC.[6]

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[3] Additional green buildings standards have been promulgated under the EPA's Energy Star Program, by the National Home Builders for all residential buildings, and by the Green Building Initiative, which owns the U.S. license for Green Globes, a green commercial building rating system.

[4] A federal district court granted a preliminary injunction regarding the enforcement of certain provisions of the City of Albuquerque's Energy Conservation Code. AHRI v. City of Albuquerque, 2008 U.S. Dist. LEXIS 106706 (D.N.M. Oct. 3, 2008).The offending provisions required the installation of high performance heating, air conditioning, and ventilation equipment in certain buildings. The court found that regulatory authority over HVAC equipment was preempted by the federal Energy Policy and Conservation Act of 1975 (42 U.S.C. §§ 620 *et seq.*) as amended by the National Appliance Energy Conservation Act (Pub. L. No. 100-102 (1987)) and the Energy Policy Act of 1992 (42 U.S.C. §§ 6311-17).

[5] City of Boston, MA, Zoning Code, § 37-1 (2007), *available at* http://www.bostonredevelopmentauthority.org/pdf/ZoningCode/Article37.pdf.

[6] *Id.* § 37-4. *See* U.S. Green Building Council: About USGBC, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=124.

Compliance with the local law is required, but developers are allowed to choose voluntarily which LEED standards to meet and to demonstrate to the city that the building is able to achieve certification, rather than to submit evidence of actual certification prior to the issuance of the CO. Without certification by the USGBC as a form of compliance verification, there are several verification methods available that are currently being tested.

New Rochelle is now considering a more modest approach, applicable to one- and two-family residential construction and renovation. It is drafting checklists that must be completed by building professionals to certify that plans submitted conform to the provisions of the New York Energy Conservation Construction Code. Under state law, this code must be enforced by all local building enforcement officials. By having licensed professionals who represent applicants certify code compliance, the city enlists their expertise and supplements the capacity of its local codes staff to ensure that the state energy code standards are met. The state code contains extensive provisions, requires significant training and experience to interpret and enforce, and contains different standards for small residential buildings than for commercial and other larger structures. The state energy code contains extensive energy conservation standards but, unlike LEED, it does not focus on other environmental objectives, such as a project's water efficiency or the sustainability of materials used and potential health impacts for occupants. The residential provisions of the code apply to one- and two-family homes and to multi-family buildings of three stories or less in height, while a separate set of commercial provisions apply to all other buildings.

While modest in scope, the approach New Rochelle is considering builds on the existing legal structure of the state Energy Conservation Construction Code, which localities are obliged to enforce. It allows the city to develop expertise, build professional relationships, establish baseline protocols, and test the adequacy of the state energy code before adopting more stringent energy standards or other environmental provisions.

Greenburgh: Adopting More Stringent Energy Standards

Local legislative bodies may adopt local ordinances imposing more restrictive standards for construction to ensure energy efficiency than the state Energy Conservation Construction Code.[7] There is no requirement that these more restrictive standards be preapproved, but such local enactments must be filed with the New York State Codes Council within 30 days of adoption.[8]

The Town of Greenburgh amended its local code to add new energy conservation requirements more restrictive than the adopted statewide mandatory energy construction code.[9] Greenburgh's local law requires that all new homes constructed in the town comply with the New York State "Energy Star-Labeled Homes" requirement. The Energy Star program was introduced by EPA in 1992.[10] The New York State Energy Star Program provides several methods of making a home

[7] *See* NY Energy Law § 11-109 (2009).
[8] *See id.* For further information, see: New York State Department Of State Building Energy Code Page, http://www.dos.state.ny.us/code/energycode/nyenergycode.htm.
[9] Code of the Town of Greenburgh, NY, §100.15 (2009), *available at* http://www.ecode360.com/?custId=GR0237.
[10] *See* EPA, Energy Star: History, http://www.energystar.gov/index.cfm?c=about.ab_history.

at least 15 percent more energy efficient than required by the state energy code. These include more effective insulation, higher performance windows, more efficient heating and cooling equipment, tightening the building envelope to reduce air infiltration, and the use of various energy efficiency products.

The Greenburgh approach is a strategic one since it applies only to one and two-family dwellings and multi-family buildings of three stores or less - the same buildings covered by the residential provisions of the state code. It carries the unintended consequence, however, that regulated developers do not qualify for incentives available through the New York State Energy Research and Development Authority (NYSERDA Tier 1 Incentives Program, which applies to the same technology for energy efficiency as the Energy Star-Labeled Home Program.). Since small homebuilders in Greenburgh are now required to meet these Energy Star standards, they are deemed ineligible for NYSERDA's Tier 1 benefits, which are intended to be incentives. These regulated developers, however, can comply with Tier 2 and Tier 3 Energy Star standards and qualify for the NYSERDA incentives available under those programs.

What happens in the event that a residential purchaser in Greenburgh discovers that her newly constructed home does not, in fact, comply either with the state Energy Conservation Construction Code or the more stringent Energy Star standards? Is the developer, offending contractor, architect, or engineer liable? Is the architect liable to the owner for failure to design a project that complies with these unique local energy standards? Is this risk covered by standard insurance contract provisions in the building trade? Is the municipality liable for failing to enforce its legislated standards? *Bell v. Village of Stamford*[11] discusses an exception to the general rule that municipalities are not liable for failure to enforce regulations. If a party can show a "special relationship" to the regulation involved, liability may exist. A special relationship can arise when a statutory duty is enacted for the benefit of a particular class of persons. This raises the question of whether home purchasers are a special class protected by the statutory duty to comply with Greenburgh's more stringent energy code provisions.

Babylon: Requiring LEED Compliance

In 2006, the Town of Babylon, New York adopted a law requiring all newly constructed commercial buildings, office buildings, industrial buildings, multiple residences, and some senior citizen residences to obtain LEED certification.[12] The law specifies that the town adopts the LEED for New Construction and Major Renovations (LEED-NC) Version 2.2 standards and "further automatically adopts any future versions promulgated by the U.S. Green Building Council." Some worry that this reliance on third party standard-setting in the future violates the "no delegation" principle applicable to legislative bodies. In addition to the complications of coordinating certification with the issuance of a CO, the imposition of LEED standards raises additional concerns. Certification is expensive to obtain; it takes time; and LEED is undergoing constant review and alteration, which can complicate local enforcement and compliance and befuddle the professionals involved in the private sector.

[11] 857 N.Y.S.2d 804 (2008).
[12] Code of the Town of Babylon, NY, Chapter 89, Article VIII.

In response to these complications, the USGBC has decided to develop Standard 189.1 as a national green building code, created specifically for adoption by states and municipalities. This new standard, however, will apply only to commercial and high rise residential buildings.

The Babylon law deals with the CO and LEED certification difficulties in two ways. First, it allows a "temporary Certificate of Occupancy…until proof of Certification is achieved." Second, it requires developers to pay a fee to ensure certification and then refunds the fee when certification is secured. Other local governments require that the developer post a performance bond as a certification performance guarantee. These techniques still, however, do not address the issues presented if certification is rejected by the USGBC.

Syracuse: Property Tax Incentives/Other Incentives

Under special legislation adopted by the state legislature in 2008, the City of Syracuse is authorized to exempt LEED certified buildings from local property taxes according to a schedule in the law that tracks the level of LEED certification and the type of building involved.[13] New residential structures are eligible for property tax exemptions over a 15 year period, starting with 100% exemptions for all levels of LEED certification; exemptions decline in later years to lesser degrees for the more stringent levels of certification.

Federal law provides energy tax credits to businesses that incorporate solar or geothermal energy technology, combined heat and power, small wind, and fuel cells in building projects.[14] New York offers a tax credit to owners of green buildings. [15] NYSERDA offers a wide variety of grants and loans to homeowners, developers, and municipalities throughout the state.[16] Developers, under New York land use law, can be offered density bonuses in exchange for providing building and neighborhood amenities such as energy-conserving construction and providing vegetated roofs or street-level landscapes.[17] Some argue that impact fees can be charged on new developments that are not "green" and award the proceeds to those that are.

Incentives of these types can be combined with local legal requirements or used independently to achieve energy savings and environmental benefits that exceed otherwise applicable building and land use law.

New York City: Greening City Owned and Financed Buildings

Among a number of techniques that the City of New York has adopted to promote green development is the requirement that city-owned and certain city-funded buildings be LEED

[13] NY RP Tax § 485-m (effective July 21, 2008).
[14] 26 U.S.C.A. § 48 (West Supp. 2008).
[15] N.Y. Tax Law § 19 (2008).
[16] See NYSERDA, Local Government Sustainability Initiatives in NYS, http://www.nyserda.org/programs/Municipal/default.asp?i=8.
[17] Town Law § 261-b and Village Law § 7-703, adopted in 1991, and General City Law § 81-d, adopted in 1992, grant parallel authority to towns, villages, and cities to adopt incentive zoning systems and set forth the specific provisions that must be followed.

certified.[18] The city estimates that it owns approximately 1,300 buildings and leases over 12.8 million square feet of office space, and that over $12 billion of construction will be affected by this legislation in its ten-year capital plan. Imposing these requirements on itself "will substantially reduce New York City's electricity consumption, air pollution and water use, as well as improve occupant health and worker productivity…. [W]ithout taking any other savings or social benefits into account, savings in water and energy cost will offset debt service payments on any increase in capital expenditures resulting from this legislation."

Conclusion

Local governments routinely act as laboratories for experimentation when challenged. The local experiments tracked in this article create a menu of options for other municipalities to consider, raise a host of legal issues begging for resolution, and challenge the state to provide guidance and assistance.

It is unlikely that the legal issues raised in this article will hinder local experimentation. The history of state land use law provides a strong basis for local action.[19] There is little evidence that most of the standards contained in local green development legislation are preempted by existing state or federal energy efficiency statutes. Anti-trust actions for adopting third party standards are notoriously difficult to win, and cases brought to impose liability on municipalities for lax code enforcement are seldom successful.

The state seems poised to help. State policy documents note that approximately 42% of all greenhouse gas emissions in New York State result from energy use in residential and commercial buildings. As part of a broad state effort to fight fossil fuel dependence, stimulate jobs, and reduce energy consumption, local governments are encouraged to exceed minimum requirements for energy efficiency, and the local laws adopted by Babylon and Greenburgh are mentioned with favor.[20] The new Climate Smart Communities program of the state provides local governments with a ten-step approach to fight climate change and a tool kit is under development for local governments to consider. This encouragement from the state, combined with the prospect of funding from the stimulus bill and the proceeds of the Regional Greenhouse Gas Initiative, provide hope that New York towns, villages, and cities will have the support they need to engage successfully in this important initiative, to avoid obvious pitfalls, and to create a positive track record that other localities can emulate.

[18] City of New York, NY, Local Law No. 86 (2005), *available at* http://www.nyc.gov/html/dob/downloads/pdfII_86of2005.pdf.

[19] *See, e.g.*, Section 10(1)(ii)(a)(11) of the Municipal Home Rule Statute which states that any city, town, or village may adopt local laws for the "protection and enhancement of its physical and visual environment." This law states that its provisions shall be broadly construed in conferring authority to act on localities.

[20] *See* Climate Smart Communities: A Guide for Local Officials, Feb. 2008, http://www.dec.ny.gov/docs/administration_pdf/cscguide.pdf (last visited Apr. 8, 2009).