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ENVIRONMENTAL LAW

Climate Change for New Jersey's Real Estate Industry?

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Special to the Legal

New Jersey's Global Warming Response Act, N.J.S.A. 26:2C-37 et seq., requires the New Jersey Department of Environmental Protection, or NJDEP, and other appropriate state agencies to prepare a report recommending measures necessary to reduce statewide greenhouse gas, or GHG, emissions to 1990 levels by 2020, including specific regulatory and legislative actions. The state released its draft recommendation report on Dec. 15, 2008, and held stakeholder meetings throughout January to receive public input. The final report is expected in March. Up until now, much of the GHG spotlight has focused on limiting carbon dioxide emissions (the principal GHG by tonnage emitted) from fossil fuel fired power plants, however, the report makes clear that efforts to limit GHG could have significant effects on real estate development and the ownership and operation of buildings. This article examines those effects.

BACKGROUND

The report contains a series of three core and multiple supporting recommendations to meet the 2020 limits. It also contains a framework for meeting the act's 2050 objective, which requires that the level of GHG emissions be at least 80 percent less than the 2006 statewide levels. (The act requires a separate report by 2010 containing recommendations to achieve the 2050 goals). Finally, the report contains a discussion of adaptation considerations, i.e., measures to respond to the impact on the state's environment and economy resulting from changes in climate conditions and rising seas.

The first of the report's core recommendations is implementation of the state's Energy Master Plan, or EMP, which was updated and issued on Oct. 22, 2008. The EMP focuses on



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maximization of energy conservation and efficiency, reduction of peak electricity demand, expansion of renewable energy, development of an improved energy infrastructure and investment in innovative clean energy technologies and businesses. The other two core recommendations of the report include implementation of the California Low Emission Vehicle, or LEV, program and the Regional Greenhouse Gas Initiative, or RGGI, the mandatory regional cap and trade program adopted by 10 northeast states, including New Jersey, to limit carbon dioxide emissions from large electric generating units. While the report notes that the state may be able to meet or exceed the 2020 limits by fully implementing the core recommendations, the supporting recommendations are included in furtherance of Gov. Jon Corzine's Executive Order No. 54, which called for "any additional steps that will be required if New Jersey is to exceed" the 2020 limit. The report notes that the implementation of additional steps is critical to stay on track with meeting the 2050 limit and to provide a cushion should estimates of reductions from the core recommendations prove overly optimistic. Additional measures deal with issues like transportation, land use planning, carbon sequestration and regulation of GHG emitting industries other than electric utilities.

REPORT RECOMMENDATIONS AFFECTING REAL ESTATE

Among the recommendations, there are several relating to green building and natural resource preservation that may directly affect real estate development and building construction, operation and maintenance.

Green building. First, there will be a major effort to develop green building guidelines for new construction, which is already ongoing pursuant to the EMP. The guidelines will initially be in the form of guidance, but ultimately are planned to be included in the statewide uniform building code, or UBC. These guidelines will include more stringent energy requirements, sustainable site planning standards, water efficiency, material and resource conservation and indoor environmental quality. The energy element is likely to address energy efficiency, conservation and the use of renewable energy. Legislative authority to incorporate the guidance into the UBC will be sought — a bill is presently pending in the Legislature (S702/A1629) to accomplish this. Legislative expansion of water conservation retrofit requirements is also possible.

To advance energy goals, the EMP contemplates that the energy sub-code of the UBC would require new construction to be at least 30 percent more energy efficient than the current code by July 2009. For existing buildings, the EMP contemplates a combination of voluntary upgrades (e.g., through utility-run energy audit and conservation programs) and required upgrades to be implemented through enactment of legislation such as a time-of-sale retrofit requirement. The EMP also contemplates the development of a strategy by the end of 2009 to achieve net zero carbon emissions for all new and existing buildings (residential, commercial and industrial).

All of the foregoing will be extremely costly

to implement. Much of the cost is expected to be privately funded from projected energy cost savings, although financing plans also include new tax and other financial incentives to promote green buildings (e.g., tax abatements for green roofs, expansion of sales tax exemptions for the installation of solar and wind equipment), use of funding from the Board of Public Utility's Clean Energy Program, the sale of solar renewable energy certifications, the Global Warming Solutions Fund, which contains the proceeds of the auction of carbon dioxide allowances under the RGGI cap and trade program (N.J.S.A. 26:2C-51) and other sources.

The report also contemplates that legislation will be pursued to allow municipalities to establish their own green building standards which may be more stringent than the state standard. Although the report indicates that the municipal standards would be "in accordance with uniform guidelines," the authority to implement more strict standards could add to the municipal toolbox used to control local development. As a preview of this authority, the Legislature already authorized municipalities to include a green building and environmental sustainability element in their master plans via an amendment to the Municipal Land Use Law enacted in 2008 (N.J.S.A. 40:55D-28). This legislation authorizes local planning to promote the efficient use of natural resources, installation of renewable energy systems, water conservation and reuse, consideration of the effect of buildings on the environment and optimization of climate conditions through site orientation and design.

Natural Resource and Open Space Preservation Second, the report contemplates a major effort to preserve, expand and restore New Jersey's "green infrastructure," including forests, meadows, watershed and wildlife habitats, fresh water wetlands, tidal marshes, farms and agricultural landscapes, because of the role that this infrastructure plays in providing climate regulation and carbon storage and sequestration. This means that such measures as open space, wetlands (especially wooded wetlands and tidal marshes) and forest and tree preservation will take on added importance and could be supported via new statutory or regulatory authority.

For example, the report references the No Net Loss Act, which imposes compensatory reforestation on state entities that deforest more than one-half acre of property that they own or maintain, and posits its extension to any project receiving state funding. Also, legislation will be sought and policies and regulations developed to impose significant tree preservation requirements in connection with all new development with the goal being a 40 percent average tree cover for

developed areas (50 percent in suburban, 25 percent in urban residential and 15 percent in central business districts). A similar program already applies in the state's coastal area under the Coastal Area Facility Review Act.

Over the past decade, the NJDEP has been steadily adopting a regime of environmental regulations that imposes severe limitations on development in undeveloped areas through measures such as expanded stream buffers under stormwater and flood hazard management regulations, the liberal inclusion of additional streams under Category One (non-degradation) water quality standards and the expansive use of landscape project mappings to restrict development implicating wetlands and environmentally sensitive upland areas. The additional impetus for preservation of these areas based on their value for carbon sequestration will likely further restrict their development and force development to occur in already developed urban and suburban areas.

Other Real Estate-Related 2020 Recommendations. In addition to the elements of the report pertaining to green building and natural resource and open space preservation, there are several aspects of the transportation and land use component of the report that implicate changes to real estate development and use.

First, a number of recommendations are designed to promote the use of Zero Emission Vehicles, or ZEVs, the sale of which in New Jersey is required under the LEV legislation mentioned above. In order to promote ZEV use (e.g., electric vehicles), the report recommends modifying the UBC to require vehicle charging stations for ZEV batteries at newly constructed detached residential units and 50 percent of the parking spaces at parking facilities at multifamily residences and new or rehabbed commercial uses.

Other transportation-related recommendations would be designed to reduce vehicle miles traveled, including promoting development designed for residents who work near home or live near mass transit. To this end, planning assistance would be provided to local governments to integrate transportation and land use, broaden the existing transit village program to encourage business development, not only residential and mixed use, and generally promote transit-oriented development through the use of building codes, model ordinances, the state plan endorsement process and the water quality management plan update process. The goal would be to promote higher density transit-oriented development, infill, compact and mixed use development and transit villages and would include state legislative initiatives. In addition, a carbon footprint analysis may be required for new transportation capital programs in order to ensure any such

projects are consistent with GHG emission targets. This would lead to such analyses being required for all planned development along affected transportation corridors.

MEETING THE 2050 GOALS

In the section of the report dealing with the general framework for meeting the 2050 limit, there is a major focus on land use planning and transportation, which includes an emphasis on limiting sprawl development and fostering "smart growth." The report projects that 90 percent of development in New Jersey will have to occur in areas already served by public infrastructure and 99 percent of that development will be in the form of redevelopment in order to meet the 2050 limits. The report recommends the development of a GHG reduction target for the transportation sector and adjustment of transportation planning to account for meeting this target with modifications in state law to incorporate the target and consideration of target attainment in implementing other laws and regulations affecting funding decisions, project design and infrastructure. Larger development and transportation projects would have to meet project specific carbon footprint standards. More specific measures will be contained in the 2050 report forthcoming in 2010.

ADAPTATION ISSUES

The final section of the report addresses adaptation strategies, such as retrofitting existing buildings to address the potential for increased flooding and higher temperatures, the promotion of urban reforestation and the use of light surfaces and green roofs to reduce the urban heat island effect, more intensive water conservation and reuse strategies and more extreme measures to address the potential for sea level rise along the coastline. Many of these effects are only poorly understood at this time, and the report indicates that the state intends to engage a multidisciplinary group of experts to assist in developing policy recommendations.

CONCLUSION

The implications of the report for the real estate industry are significant and can be expected to begin soon — the report emphasizes the importance of beginning implementation of the recommendations within the next 18 months and many of the energy-related recommendations are already being implemented under the EMP, which was finalized in October. Given the significant upfront cost implications for a real estate industry already facing the huge impediments of a historic recession, unless significant financial assistance is available from the federal government's economic stimulus program to meet the challenges of the report, the final version, which is supposed to be issued in March, might not be eagerly received in the real estate community.