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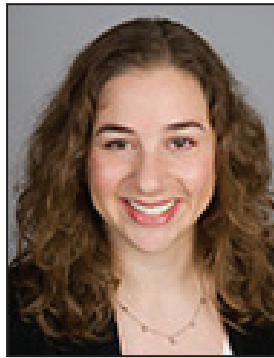
ENVIRONMENTAL

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Green buildings: A voluntary movement could become mandatory

The green building movement, like hybrid cars and organic produce, has gone mainstream. LEED-certified buildings may not occupy every corner - according to the U.S. Green Building Council's August 2008 statistics, roughly 15,000 buildings have become LEED-certified or LEED-registered since the LEED rating system was released in 2000 -- but there is growing recognition that we reap environmental, economic, and other benefits when we make buildings green (or, in the case of existing buildings, greener), whether they have LEED certification or not.

While a number of states, counties, and municipalities have created green building mandates that require private developers to comply with green building codes if their buildings exceed a certain square footage threshold, most of the surge in green building (10% of new commercial



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construction is expected to be green by 2010) has been a voluntary response motivated by "carrots," not "sticks." In addition to the environmental and economic benefits intrinsic to green buildings themselves (e.g., lower operating and energy costs, less waste, higher employee productivity), federal, state, and local governments have developed hundreds of policies, programs, and incentives designed to encourage green building. These include direct monetary payments in the forms of grants and

rebates, expedited permit processing, publicity and awards, income tax credits, property tax abatements, technical and design assistance, fee reduction, and access to loans.

The global threat posed by climate change could end the voluntary, incentive-based nature of the green building movement. The scientific community has determined that carbon dioxide and other greenhouse gas ("GHG") emissions related to human activity are very likely the cause of an observed increase in average global temperatures since the mid-20th century. Because buildings are a major source of carbon dioxide and represent 70% of U.S. energy consumption, questions are now being raised about whether green building strategies should be a mandatory part of any program to regulate climate change issues on a local, state, regional or federal level.

The U.S. Environmen-

tal Protection Agency ("EPA") is currently seeking answers to these questions at the federal level, where some form of legislative or regulatory response to climate change is likely regardless of who wins the presidential election in November. In April 2007, the U.S. Supreme Court held in *Massachusetts v. EPA* that GHGs meet the definition of "air pollutant" under the Clean Air Act ("CAA") and could therefore be regulated by the EPA under the CAA. In response to the Court's decision, on July 30, 2008 EPA issued an Advance Notice of Proposed Rulemaking ("ANPR") to solicit public comment on EPA's overall policy for GHG regulation. In the ANPR, EPA states that regulation of GHGs under the current provisions of the Clean Air Act could require owners of new or modified buildings to take steps to significantly reduce their buildings' carbon footprints. Green

building mandates could become the centerpiece of such a regulatory program.

It remains to be seen if, when, or how EPA will regulate GHGs under the CAA (or perhaps some as-yet-unwritten statute). State and local governments could follow suit or enact their own mandatory green building initiatives if the federal government fails to act decisively to reduce GHG emissions and halt climate change. In any event, those who have not yet embraced the green building movement in a voluntary capacity may be compelled to do so pursuant to governmental mandate in the coming years.

Bridget Dorfman has been an associate with Manko, Gold, Katcher & Fox, LLP since 2004. She focuses her practice on regulatory compliance matters and real estate development transactions. ■