

Real Estate Trends

CONSTRUCTION LAW

Sustainable Construction: An Owner's Guide for Compliance

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Wednesday, June 14, 2023

New York City's Climate Mobilization Act (the "Act"), which most notably includes Local Law 97 of 2019 ("LL97"), is at the forefront of the many climate laws sweeping the nation. LL97 sets specific carbon emissions limits (based on property type classification in the Energy Star Portfolio Manager) for energy usage in NYC's largest buildings as part of the City's goal of developing a sustainable, energy-efficient and electric building stock.

On a broader scale, NYC also recently unveiled its *PlaNYC: Getting Sustainability Done* (the "Plan"), which bolsters the Act through a long-term strategic climate plan.

In addition to addressing building operations, the Plan includes certain standards that will change the way construction is performed, including the use of electric equipment and carbon-reduced construction materials.

Practically, in order to achieve the mandated energy standards of LL97 and ensure compliance with NYC's expansive long-term Plan, building owners and developers are advised to develop a site-specific sustainability program.



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This article will provide a guide for developing a sample sustainability program, including the assembly of a sustainability team comprised of energy consultants, design professionals, contractors and property managers.

Once a sustainability team is assembled and the sustainability program is established, owners and developers can then turn their focus on compliance with the Act and shifting or offsetting potential liability which may arise from noncompliance.

Developing an Owner's Sustainability Program

An owner's engagement of energy (or "sustainability") consultants is an important first step in

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developing a sustainability program. Such consultants are tasked with assessing, benchmarking and auditing the building or project site (as applicable).

A written report is then produced indicating their findings and establishing a path forward towards compliance with the Act. Once the assessment phase is complete, owners are ready to engage licensed design professionals for LL97 reporting, submittal of green certification and funding applications, and design development.

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opportunities, as well as apply for potential green building certifications and governmental financial programs for funding sustainable capital improvements.

The remaining members of the design team, including the architect, collectively develop energy modeling tools and assess new performance technologies and systems as part of the overall project plans, including for retrofits and retro-commissioning for existing buildings.

Once the plans are fully developed for construction or building upgrades (as applicable), contractors are engaged to perform the work necessary to carry out owner's sustainability program and project designs. Once the construction work is complete, building owners should prepare

a building operations and maintenance plan to monitor base building system performance and allocate tenant energy usage, which may also lead to the engagement of property managers and administration of a leasing plan.

Sustainability Consultants

Sustainability consultants are engaged to perform an initial assessment of the building from an energy consumption standpoint, which often includes compliance with the NYC Benchmarking Law (Local Law 84 of 2009, as amended by Local Law 133 of 2016) ("LL84") and Local Law 87 ("LL87") for existing buildings.

LL84 requires certain building owners to annually measure their energy and water consumption through a process called benchmarking. LL87 requires an Energy Efficiency Report every ten years to report energy audit results and retro-commissioning measures that validate the operating conditions of building systems.

From a contract standpoint, owners must protect against unauthorized use and access to building utility data, systems and software. Also, consultants must maintain the confidentiality of the owner's data, including returning or destroying the data upon expiration of the applicable contract or project.

Owners should include provisions in their consulting agreements addressing data security, data protocols and data breaches, together with cyber liability insurance to protect against data breach exposure.

Consultants must contractually be responsible for submitting written reports (including for filing or funding purposes, if needed) on audits, feasibility studies, findings, predictions and models. Owners should secure ownership of all related work product in order to ultimately use such

findings for compliance with the Act, applicable funding and the further development of the plans for construction.

Architects and Engineers

A new standard of care has emerged in the NYC landscape for architectural and engineering (“A/E”) firms that accounts for a certain level of expected fluency in building energy and sustainability.

Owners now have an obligation to hire a registered design professional to report and certify annual compliance with LL97 starting May 1, 2025, which covers carbon emissions from 2024. The report must include a breakdown within each building by occupancy group. Additionally, as the second and most important member of the sustainability team, A/E professionals must be contractually required to design for decarbonization and electrification based on the findings and reports issued by the sustainability consultants.

The A/E team’s primary role during the design phase is to identify the owner’s sustainability, energy and environmental goals for the project and incorporate all such requirements into the relevant design elements and construction documents.

A/E professionals are also now tasked with applying for green building certifications and other financial programs (such as those provided by NYSERDA or Con Ed) identified by the owner’s sustainability consultants.

The A/E team is then responsible for performing construction administration services (including responding to requests for information and submittals) to ensure that *both* the construction documents and owner’s sustainability goals for the project are met.

Given the expanded role of the A/E team defined above, there has been a wave of proposed liability disclaimers from A/E firms surrounding LL97 and the Plan. Many A/E firms now expressly disclaim all “warranties or guarantees” that the project will achieve a precise level of energy usage under LL97, or that it will obtain any specific green building certification or governmental grant.

A/E firms have also attempted to affirmatively shift liability to the owner to timely complete retrofits, retro-commissioning upgrades and energy performance standards through the owner’s building systems.

Owners are cautioned to review carefully any proposed disclaimers that may invalidate the A/E team’s obligation to perform their respective services in accordance with the new standard of care.

Architect and engineering contracts should first clearly reflect the scope of sustainability services intended to be included within the basic services. Once the scope is clearly defined, owners may offer a contractual compromise by allowing the A/E team to disclaim any warranties or guarantees that the project will achieve any specific level of energy usage or green certification level, *provided* all basic services are performed in accordance with the scope of the contract and the newly defined standard of care.

Contractors

Contractors (including subcontractors) do not have direct legal obligations or liability under LL97; however, in most construction contracts and subcontracts, each contractor is required to replace, remove and/or correct work that is non-conforming with applicable legal requirements, as same pertain to means and methods.

The legal requirements may now include limitations on the use of fossil-fuel fired equipment and certain high-carbon construction materials, such as certain types steel, concrete, insulation and glass.

Additionally, contactors are required to perform the work per the drawings and specifications from the design team and in accordance with the owner's sustainability program, including its green certification and grant requirements.

We have advised owners that construction contracts should include provisions that require contactors to affirm that they accept the sustainability requirements as suitable to perform the work. Without such affirmation, contractors may not be fully grasp whether or not the newly developed sustainable equipment, materials or systems shown in the plans can actually be implemented.

Once construction is complete for a given project, owners should also engage building maintenance vendors that are familiar with the building's certification and emissions requirements when performing annual maintenance and service of base building systems.

Shifting and Offsetting Liability

Building owners are faced with increasing liability for failing to comply with LL97,

including (a) fines at a rate of \$268 per metric ton CO₂ of the amount that exceeds a building's maximum annual carbon emissions limit; (b) fines of \$0.50 per gross square footage per month for failing to file an annual report; and (c) a misdemeanor for submitting a false statement, with a fine up to \$500,000 and prison up to 30 days. Non-compliant buildings may also be subject to NYC Department of Building violations.

Although liability ultimately rests with building owners, they can shift their obligations through a comprehensive sustainability program that includes a matrix of responsibilities among the team members discussed above. Owners are also encouraged to assess potential credits, offsets and other governmental incentive programs that are being offered through government resources.

Conclusion

Although New York City's climate laws are daunting to most building owners at the moment, engaging the right sustainability team and mapping out a comprehensive and clear sustainability program will provide owners with a set path towards achieving compliance pursuant to the Act and investing in a sustainable infrastructure for New York.