Green Building Newsletter

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To our clients and friends:

We are pleased to present the inaugural installment of Mintz Levin's *Green Building Newsletter*, which will provide periodic updates and analyses of legal developments and issues related to green building. We draw on the expertise of Mintz Levin's real estate, environmental, litigation, and clean tech attorneys, as well as ML Strategies' knowledge of the latest breaking legislative developments, to bring you a comprehensive, multidisciplinary view of the legal landscape for green building.

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Law and Policy Updates

HomeStar Overcomes Controversy in the House, Faces Uncertain Future in the Senate

BY KEVIN KAPPEL AND SARAH LITKE

The six-billion-dollar HomeStar program, formally known as the HomeStar Energy Retrofit Act of 2010 (H.R. 5019), which provides incentives for home energy retrofits, cleared a major political hurdle on Thursday, May 6th, passing the House by a vote of 246-161. Despite broad support for the encouragement

of home energy retrofits and bipartisan co-sponsors, the bill faced a bruising battle in the House as well as a barrage of amendments designed to make political statements. In the end, the retrofit program emerged victorious from the House, but not without with certain modifications that alter the bill from what the drafters originally envisioned. The bill must now head to the Senate where, although committees have held hearings on the concept, no plans have been finalized to move the language through the Chamber this Congress.

The legislation, often referred to as “Cash for Caulkers,” would establish a two-tiered rebate program to hire contractors to purchase and install energy efficient products in homes. The Silver Star program would provide up-front rebates of up to $3,000 for specific energy-saving investments, including insulation, duct sealing, windows and doors, air sealing, and water heaters. The Gold Star program provides homeowners with up to $8,000 for conducting a comprehensive energy audit and substantially reducing their energy use at home. The legislation makes the rebates to consumers for energy-efficient home modifications exempt from income taxes, but specifies that homeowners can either take the rebate or existing energy-related tax incentives but not both, one of the last-minute modifications that upset some of the bill’s supporters.

However, while the HomeStar or Cash for Caulkers concept has been trumpeted by the administration and certain lawmakers since late 2009, the original legislative push began during the beginning of the 111th Congress following the passage of the American Recovery & Reinvestment Act (ARRA). Rep. Peter Welch (D-VT), a lead proponent of the HomeStar legislation, introduced the Retrofit for Energy & Environmental Performance (REEP) Program Act with one underlying motivation: to change the way we think about energy performance in the built community. Too often in the U.S., the Congressman and his supporters argued, American homeowners focus on the energy performance of individual components of their homes rather than complete home performance. For example, a homeowner might be persuaded to purchase an “energy-efficient” cooling unit that has a capacity far above that required for the home, simply because the home did not have its ducts properly sealed or still had leaky windows, thereby requiring a larger system. REEP supporters contended that it makes more sense to examine the overall energy performance of a home as a unit. As opposed to the government funding incentives for Americans to buy bigger, higher-capacity “efficient” equipment, the REEP Program would require an energy audit before and after the retrofit and then provide incentives for homeowners to achieve a minimum 20% improvement in energy efficiency with additional incentives for increased efficiency after that. This, those same supporters insisted, prevents the government from favoring certain technologies over others and preserves the freedoms of individual homeowners to choose which improvements make sense for their homes and budgets, so long as their approaches meet designated performance standards.

Despite support for the concept across party lines, the REEP Program ultimately fell victim to partisan politics following its incorporation into the politically contentious Waxman-Markey comprehensive climate and energy legislation, which created a domestic carbon cap-and-trade program. Even though comprehensive climate legislation has not yet moved forward in the Senate, REEP’s affiliation with climate legislation made its passage during this

Congress more difficult. Seeking a way to revive the concept, REEP supporters regrouped and brought together a new coalition to promote the broader HomeStar program, incorporating more energy efficiency measures besides the comprehensive approach.

Having now passed the House, the Senate must now pass HomeStar legislation as well. The Senate Energy and Natural Resources Committee held a hearing on HomeStar legislation in March 2010, and the six-billion-dollar Senate bill is led by Energy Committee Chairman Jeff Bingaman (D-NM) and Senators Mark Warner (D-VA), Bernie Sanders (I-VT), and Jeff Merkley (D-OR). There is discussion of including it, as well as the Building Star initiative, in green jobs legislation or even an energy bill if that goes forward this summer. With a full Senate calendar and an increasing hesitation to pass climate or energy legislation this Congress, it is unclear whether or how HomeStar legislation might move forward in the near future.

If HomeStar legislation does pass the Senate, it will face additional hurdles when conference negotiations to resolve differences between the two versions begins. For example, House members voted in favor to uphold an amendment offered by Congressman Joe Barton (R-TX), the Ranking Member of the House Energy and Commerce Committee, that limited the rebates to homeowners with a gross annual household income of up to $250,000 and incorporated a suspension of the entire program if it proves to have a negative effect on the national deficit. HomeStar's original supporters, including Congressman Welch, have vowed to push back on those modifications, but lawmakers would have to vote again on the legislation, which could cause some supporters to back away in this tough political environment when national debt remains at the top of voter concerns.

Therefore, despite the progress made so far in the House, the fate of the legislation is still clouded with uncertainty. Senate Majority Leader Harry Reid (D-NV) started a discussion with Committee Chairs from the six committees of jurisdiction on pending climate and energy legislation in early June, but the formal meetings that were expected over the fate of energy and climate change legislation have fallen victim to a crowded legislative agenda. While more formal proceedings may be possible in the next couple of weeks, the senate has its attention focused squarely on the BP oli spill and passage of a tax extenders package. Following that meeting, stakeholders in the built community will have a better sense of how HomeStar legislation might move forward in the Senate, and, eventually, whether it will have enough political support to survive the demands of Congress during a difficult election year.

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New York City Passes the Greener, Greater Buildings Plan

BY PETER ZLOTNICK

On Earth Day 2009, New York City Mayor Michael Bloomberg and City Council Speaker Christine Quinn jointly announced the Greener, Greater Buildings Plan, as part of PlaNYC. In December 2009, the New York City Council and the Mayor enacted this comprehensive, six-point legislation into law, creating the single-most comprehensive green building regulatory

initiative in the United States to date. The goal of the Greener, Greater Buildings Plan is to reduce the carbon footprint from New York City's greenhouse gas emissions caused by existing residential, commercial, and governmental buildings by at least 30% to a floor that is below the levels that existed in 2005. The initiative seeks to accomplish this aggressive objective by 2030.

According to a study entitled *Inventory of New York City's Greenhouse Gas Emissions 2007*, approximately 80% of New York City's greenhouse gases emanate from its existing building stock. This report also found that buildings in and around New York City account for at least 95% of its electrical consumption, 85% of its water consumption, and a significant amount of its rainwater catch basins. In short, New York City's building inventory and environment significantly impact the energy efficiency and resource preservation for the entire urban environment in which New Yorkers live, work, and learn.

As a result of studies like these, Mayor Bloomberg and Council Speaker Quinn developed the Greener, Greater Buildings Plan to ensure that our existing buildings become more efficient over time, because they recognize that we cannot simply rely solely on the construction of new, more energy efficient buildings to combat the existing greenhouse gas inefficiencies that exist throughout New York City's urban landscape. Thus, the Greener, Greater Buildings Plan seeks to ensure that the existing buildings in the City undergo a far-reaching upgrade that will both reduce the City's appetite for energy consumption, while simultaneously saving consumers millions of dollars and creating thousands of skilled "green" construction and design jobs for its citizens.

According to Mayor Bloomberg, the Plan could reduce New York City's energy costs by as much as three-quarters of a billion dollars and improving the City's economic competitiveness by renovating the City's existing buildings with new, energy efficient technology.

The city will reduce its energy requirements, as well as its carbon footprint, by means of a six-point green building program that includes the following:

1. legislation, creating a New York City Energy Code that all existing buildings throughout the City will have to comply with whenever their owners undertake substantial renovations;
2. legislation, requiring owners of buildings that are greater than 50,000 square feet to undertake an energy audit once every 10 years and, where necessary make improvements that pay for themselves within five years;
3. legislation, requiring owners of commercial buildings that are 50,000 square feet or more to upgrade their lighting systems to more energy efficient systems that pay for themselves through energy savings;
4. legislation, requiring owners of buildings of 50,000 square feet or more to make annual benchmark analyses of the building's energy consumption so that building owners can better comprehend what measures they may make to increase the building's efficiency;
5. legislation, enacting a jobs program that will interact with the construction and real estate industries to train the existing workforce and create an estimated 19,000 new jobs; and

6. legislation, creating an innovative financing program that uses Federal stimulus funds to provide loans for property owners to pay the upfront costs for the efficiency upgrades that eventually will pay for themselves and, potentially, result in a positive return on capital by the investor.

The prospective impact of this new legislation is far-reaching. Already, the Greener, Greater Buildings Plan is changing the face of New York City. As a principal example of this energy renaissance, the Empire State Building, which was built in 1931 at the height of the Great Depression and which is currently owned by the Empire State Building Company, is undergoing a planned renovation, which seeks not only to reduce its energy consumption by 40%, but also to recoup its incremental capital improvement costs within three years. The Empire State Building stands as a model for green retrofits and will offer other building owners the tools and methodologies for achieving the capital returns and energy efficiencies that the Greener, Greater Buildings Plan was intended to accomplish. For example, the scope of the project's redesign program includes upgrading the building's window, mechanical, ventilation, lighting and control systems, and it is designed to improve air quality and thermal comfort for its inhabitants. The building's design model demonstrates that, if a retrofit of this magnitude can succeed, then other retrofits can also succeed with equal or better efficiencies and resource preservation.

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Massachusetts Approves Utilities' Energy Efficiency Plans

BY JENNIFER SULLA

In January 2010, the Massachusetts Department of Public Utilities (DPU) approved the three-year plans proposed by the state's electric and natural gas utilities pursuant to the Massachusetts Green Communities Act (the Act). The Act, signed into law by Governor Deval Patrick in July 2008, required the state's investor-owned electric and natural gas utilities and municipal aggregators to prepare three-year efficiency investment plans that would provide for the acquisition of all available energy efficiency and demand reduction resources that are cost effective or less expensive than supply. In other words, the utilities must use energy efficiency to meet their resource needs before purchasing new energy sources.

The utilities' energy targets are ambitious. The electric utilities' three-year plan sets a statewide energy savings target of 2.4% of sales in 2012, reversing the current trend of yearly energy growth, with savings of approximately 2.600 GWh. Likewise, the gas utilities' plan sets a statewide energy savings target of 1.15% of sales in 2012, with savings of over 57 million therms. Together, the plans are said to be comparable in terms of reducing greenhouse gas emissions to taking approximately 2.5 million cars off the road. Almost 4,000 new jobs are projected.

To achieve these targets, the plans require the utilities to ramp up their outreach and incentive programs. Services offered to customers include improved energy assessments of both residential and commercial buildings

and incentives to purchase and install items such as high-efficiency lighting, appliances, HVAC systems, and insulation. For qualifying low-income renters and homeowners, free energy efficiency services will be available. An initiative called Mass Save, sponsored by the utilities in conjunction with the Massachusetts Department of Energy Resources, provides a one-stop shop for all utility customers—commercial and residential—and building industry professionals for services, incentives, training and information promoting energy efficiency.

The utilities are expected to invest a total of approximately $2.2 billion in efficiency measures over the next three-year period. Funding sources include charges on customers' bills and auction proceeds from the Regional Greenhouse Gas Initiative. Even with the additional charges on their bills, customers are expected to save a total of more than $6 billion.

The Act also requires the utilities to submit quarterly reports on the implementation of the plans to the Energy Efficiency Advisory Council (EEAC), a group set up by the Act of 11 members representing various stakeholders. The EEAC's consultants' review of the first quarter reports was presented in mid-May. The review concluded that to some extent there was an incomplete picture, but that the first quarter was a "good first effort."

If all goes according to these plans, state officials predict that by 2012, Massachusetts will surpass California to be first in the nation in terms of per capita investment in energy efficiency, as ranked by the non-profit American Council for an Energy Efficient Economy.

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California Adopts Green Building Code

BY GABRIEL SCHNITZLER

In January, the California Building Standards Commission, a California state regulatory body, adopted the first statewide mandatory green building code. The code becomes effective on January 1, 2011, and will apply to most new construction in California.

While the California green building code establishes mandatory minimum standards, the code is in fact a hybrid which combines a mandatory minimum with two levels of stricter, voluntary standards that builders can opt into, labeled "CalGreen Tier One" and "CalGreen Tier Two." So in addition to establishing a floor, the state of California has also created competition for existing voluntary green building certification programs such as the U.S. Green Building Council's (USGBC) LEED rating system, Build it Green, and Green Globes standards. The USGBC supported the code's adoption. However, some commenters from the USGBC's Northern California chapter and environmental groups raised concerns that the CalGreen label could create market confusion. In response, Governor Schwarzenegger's office circulated a memo, which can be seen here, outlining the advantages of the code over private, voluntary point-based systems, which argued that (among other things) the code provided a uniform standard without the expense of third-party certification, and provided better enforcement, since voluntary point-based systems such as LEED do not require field inspections.

In fact, the code largely tracks the green building point categories established by the USGBC LEED rating system (*i.e.*, Sustainable Sites, Energy and Atmosphere, Water Efficiency, Materials and Resources, and Indoor Environmental Quality), and creates standards in the following areas: planning and design, energy efficiency, water efficiency, material conservation and resource efficiency, and environmental quality. Among other things, the code mandates recycling or reuse of 50% of nonhazardous construction waste, a 20% reduction in potable water use over the current Building Standards Code, and use of moisture sensing or weather based controllers for automatic irrigation systems. However, the mandatory provisions of the code do not require that new construction exceed the energy efficiency standards established by the California Energy Code (which is updated and revised separately from the green building code), and many of the more ambitious code provisions are included in the voluntary portions of the code. The initial mandatory code provisions are fairly modest, and it remains to be seen whether the more stringent voluntary standards will migrate into the mandatory portions of the code over time as state and local officials become more comfortable with the code's concepts.

The chief advantage of the new code, despite its modest initial scope, is its statewide scale and uniformity. While LEED's market penetration has grown rapidly in recent years, no private voluntary program could achieve the scale of resource savings that a well-designed uniform statewide code will. As an example of the scale achievable by a statewide code, the California Air Resources Board, charged with implementing California's Global Warming Solutions Act, has estimated that the new green building code will reduce greenhouse gas emissions by three million metric tons (CO2 equivalent) in 2020. Still, there will continue to be a vital role for voluntary certification systems such as LEED in raising public consciousness, increasing green building expertise, and bringing to market new green building innovations. Importantly, the new green building code does not preclude municipalities from adopting more stringent green building standards, nor does it prevent builders from opting into voluntary certification programs such as LEED.

To view the green building code, click here.

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In the Spotlight—Sustainability Roundtable Inc

Sustainability Roundtable Inc (SR Inc) (www.sustainround.com) is a research and consulting firm whose mission is to accelerate the development and adoption of best practices in sustainability. SR Inc provides top-industry firms with shared-cost research and consulting on management best practices for greater sustainability and energy efficiency.

SR Inc's current focus is on corporate real estate through the Sustainable Corporate Real Estate Roundtable (SCRER) service. The SCRER service aggregates learning from Members—leading real estate owners, corporate real estate officers and technical experts—to define, refine, validate and

disseminate management best practices in optimizing corporate real estate portfolios for greater sustainability. The SCRER service provides Member companies with a host of services including year-round, unmetered consulting.

In 2009, SR Inc partnered with Mintz Levin to launch the SCRER Regulatory Reporting Service, which captures and, twice annually, updates regulatory change in major municipalities across the United States. This Service is bundled with other SCRER services such as the Rebates & Incentives Reporting Service, educational webinars, quarterly in-person meetings and unmetered consulting. The full-service package provides Members with a cost-effective, time-efficient, manner of remaining at the forefront of an ever-changing industry in an ever-changing economy.

For more information, contact Steven Byler at info@sustainround.com

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