



Green Building Newsletter

MAY 2011

To our clients and friends:

We are pleased to present you with our May issue of Mintz Levin's Green Building Newsletter.

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David M. Alin
(212) 692-6294
DAlin@mintz.com

Frederick S. Armstrong
(617) 348-4497
FSArmstrong@mintz.com

Dean Atkins
(617) 348-1853
DATkins@mintz.com

Brady Berg
(650) 251-7758
BBerg@mintz.com

Scott Biel
(858) 314-1555
SBiel@mintz.com

Joel R. Bloom
(617) 348-1608
JRBloom@mintz.com

Thomas R. Burton, III
(617) 348-3097
TRBurton@mintz.com

Allan Caggiano
(617) 348-1705
ACaggiano@mintz.com

Susan E. Carlson
(617) 348-4438
SCarlson@mintz.com

Ralph A. Child
(617) 348-3021
RChild@mintz.com

Jonathan M. Cosco
(617) 348-4727
JMCosco@mintz.com

Andrew A. Dean
(617) 348-3081
AADean@mintz.com

Meryl J. Epstein
(617) 348-1635
MJEpstein@mintz.com

Law and Policy Updates

Compliance with Local Law 84, Phase One of a Greener, Greater New York City

BY PETER B. ZLOTNICK AND KRISHNA D. PATEL

By May 1, 2011, New Yorkers had to embrace a new term in their collective lexicon: *benchmarking*.

Benchmarking refers to the New York City Local Law 84 (LL84) mandate under which certain public and private buildings, both commercial and residential, must submit annual energy and water use data using the EPA online tool Portfolio Manager.

Energy and water use by buildings in New York City accounts for approximately 75% of the City's total emission of green house gases. LL84 is the first phase in managing and addressing this inefficiency by collecting information and creating awareness. The next step will be using the information to locate and address inefficiencies in building systems and therein create opportunities to save money that is currently being lost. LL 84 is an annual reporting requirement that is complemented by Local Law 87 (LL87). LL87 requires energy audits and retro-commissioning of buildings every 10 years. The

implementation period for LL87 is also fast approaching as well, with the first set of energy audits due in 2013 for buildings whose tax block number ends in 3.

Who needs to benchmark?

LL84 applies to:

- Building(s) owned by New York City or for which the city pays part of its annual energy bill over 10,000 gross square feet and which do not participate in a program administered by the New York City Department of Housing Preservation and Development
- Building(s) not owned by New York City over 50,000 gross square feet
- Two or more buildings totaling 100,000 square feet or more on the same lot
- Buildings totaling 100,000 square feet under the same condo board

New York City has identified approximately [16,000 buildings that fall within LL84's benchmarking requirement](#) and has sent them [this letter](#).

Complying with LL84

Although the prospect of yet another regulatory directive seems overwhelming, compliance may be easier than one would expect. Technical and financial assistance is available through the New York State Energy and Research Development Authority (NYSERDA). NYSERDA's Flextech program offers a 50% cost share for benchmarking, energy audit, and retro-commissioning studies. Flextech is available to commercial, industrial, business, and institutional entities that pay into the Electrical System Benefits Charge through their utilities. Contact Assistant Project Manager [ClaraRose Voigt](#) at (212) 971-5342 ext. 3007 or e-mail flextechbenchmarking@nyserda.org to find out how you can get started.

For residential buildings, NYSERDA offers a Multifamily Performance Program which includes benchmarking service and [financial assistance](#). [Click here to get started](#) or contact MultifamilyPrograms@nyserda.org if you have questions. [Live benchmarking trainings](#) are also available through the nonprofit organization Association for Energy Affordability, Inc.

While the wealth of assistance and financial incentives available make compliance a no-brainer, it is also fair to note that failure to comply with LL84 is a "lesser violation" under the Construction Code. For every quarter that building owners do not submit the requisite benchmarking information, they will incur a fine of \$500. The City has allowed a grace period of three months for observance of LL84 and will begin to assess penalties after August 1, 2011.

Gathering Information

Eric J. Freeman
(617) 348-3072
EFreeman@mintz.com

Stephen E. Friedberg
(212) 692-6875
SEFriedberg@mintz.com

Daniel O. Gaquin
(617) 348-1874
DOGaquin@mintz.com

Jason W. Georgitis
(617) 348-1644
JWGeorgitis@mintz.com

David A. Gilbert
(617) 348-1645
DAGilbert@mintz.com

Jeremy D. Glaser
(858) 314-1515
JDGlaser@mintz.com

William M. Hill
(617) 348-1794
WHill@mintz.com

Kevin M. Kappel
(202) 434-7467
KMKappel@mlstrategies.com

Jennifer M. Kiely
(617) 348-4417
JMKiely@mintz.com

Phillip H. Lee
(650) 251-7757
PHLee@mintz.com

Peter D. McCarthy
(617) 348-1719
PMcCarthy@mintz.com

Mary-Beth McCormack
(617) 348-1680
MBMcCormack@mintz.com

Jeffrey J. McCourt
(617) 348-1833
JMcCourt@mintz.com

Jeffrey A. Moerdler
(212) 692-6700
JAMoerdler@mintz.com

Mary Lee Moore
(617) 348-1697
MLMoore@mintz.com

Marilyn Newman
(617) 348-1774
MNewman@mintz.com

David L. O'Connor
(617) 348-4418
DOConnor@mlstrategies.com

Susan P. Phillips
(617) 348-1713
SPhillips@mintz.com

Jennifer Sacco Smith
(617) 348-1678

Many commercial and residential building owners, including co-ops and condo associations, will delegate compliance with LL84 to their property manager or a consultant. Once a benchmarking administrator has been appointed, he or she will need to compile data on the building's 2010 energy use. The administrator may do so by contacting the building's utility company. For example, with Con Edison, the administrator may email a request, including the building's account number, the name on the account, and the service address, to citybenchmarking@coned.com. If the administrator is not the named person on the account, he or she must also submit a letter of authorization. The fee for aggregated energy use data for up to 24 months is \$102.50 per building. Con Ed can be expected to provide the data by e-mail within 15 days after payment. For separately metered non-residential tenants, information must be requested using the [Non-Residential Tenant Data Collection Form](#). Property owners are required to send the form but will not be penalized if tenants do not provide the information.

Portfolio Manager

Once the energy and water use data is collected from the utility company and tenants, the information will need to be entered online through the Environmental Protection Agency's (EPA) Portfolio Manager. The Notes section of Portfolio Manager should include an entry of the building's Borough Block Lot (BBL) number. [Click here to register and log into Portfolio Manager to create a New York City LL84 Compliance Report](#). Accessing Portfolio Manager using this New York City specific link (rather than the EPA's home site link) is imperative to linking the account to the New York City electronic reporting structure so that a compliance report may be submitted. The EPA will send a confirmation e-mail upon receipt of the report. This e-mail, along with proof of sending the data collection forms, energy data, calculations, and other related documents, should be maintained for three years. The Department of Buildings maintains the right to inspect and audit these records during that time. Maintenance of these records should be treated in the same light as tax records; in the event of mistake or misstatements (not recommended) in benchmarking, supporting documents will prove invaluable in avoiding penalties.

Individual information submitted for 2010 by non-city buildings will not be made public. It will be used by the Office of Long-Term Planning and Sustainability to conduct an analysis of the city's energy and water usage and the implementation of LL84. The analysis will be submitted to the Mayor and Speaker of the City Council, and made publicly available online.

The Department of Finance will publish benchmarking information online by September 2011 for city buildings, September 2012 for non-city buildings whose primary use is not residential, and September 2013 for buildings whose primary use is residential. This publicly available information will include an energy utilization index, water use per gross square foot, a rating comparing energy/water use of the building to that of similar buildings (where available), and a comparison of data across calendar years for any year the building

JSaccoSmith@mintz.com

Gabriel Schnitzler
(650) 251-7720
GSchnitzler@mintz.com

Leslie Slater
(617) 348-1847
LESlater@mintz.com

Samuel M. Starr
(617) 348-4467
TStarr@mintz.com

Bryan M. Stockton
(202) 434-7480
BStockton@mlstrategies.com

Jennifer Sulla
(617) 348-3092
JSulla@mintz.com

Sahir Surmeli
(617) 348-3013
SSurmeli@mintz.com

Colin G. Van Dyke
(617) 348-1655
CGVanDyke@mintz.com

Maureen J. Walsh
(202) 434-7388
MJWalsh@mlstrategies.com

Peter B. Zlotnick
(212) 692-6887
PBZlotnick@mintz.com

was benchmarked. An exception exists for buildings containing data centers, television studios, and/or trading floors that exceed 10% of the gross square footage of the building. The information for such buildings will not be disclosed until the Office of Long Term Planning and Sustainability has found a way for the benchmarking tool to make adequate adjustments for those facilities.

Follow Up

After the initial implementation phase of LL84 occurs and the law's requirements become familiar to owners, benchmarking will become less of a regulatory burden and more a regular part of operations. Once benchmarking has been completed for multiple years, property owners can use the different Current Ratings to see if there is a need to seek overhauls of their systems. Over time, this process should prove to be a great step to begin improving a building's performance that is less resource intensive than capital improvements or compulsory regulations that require building owners to send supervisors or management staff to energy efficiency trainings. Improvements in energy performance are valuable not only for their operational savings but also for marketing a building covered by LL84. If owners take full advantage of all the resources available to leverage the information provided by *benchmarking*, this program has the potential to ultimately provide appeal to eco- and economically conscious tenants too, helping buildings to stay competitive in an ever-challenging occupancy market.

Resources

[Step by Step Checklist for Compliance with Local Law 84](#)

[More information about Portfolio Manager](#)

[Online Energy Star training](#)

[More information about Energy Audits and Retro-Commissioning under Local Law 87](#)

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Mayor Bloomberg Announces New Green Lease Initiative

BY GABRIEL SCHNITZLER

Mayor Michael Bloomberg has announced the signing of a new "green" lease for Silverstein Properties' 7 World Trade Center property with law firm WilmerHale (yes, dear readers, occasionally we must acknowledge the existence of other law firms). [Press release here](#). The lease "is the first to incorporate groundbreaking language crafted by industry leaders working with the Mayor's Office of Long-Term Planning and Sustainability to promote enhanced energy efficiency and sustainability. Under traditional leases, building owners are responsible for the upfront cost of energy efficiency improvements. Tenants, however, are the immediate beneficiaries of those upgrades, in the form of reduced energy costs. Because owners do not share in the benefit, they have little incentive to invest

in energy upgrades.” Among other things, the City’s green lease language allows property owners to amortize energy saving capital improvements over their payback period. Most leases amortize such costs over their useful life, which may be much longer than the payback period and therefore may not give landlords sufficient incentive to implement energy saving improvements.

New York City’s green lease language will be used by the City in future leases negotiated by the Department of Citywide Administrative Services.

This green lease initiative perhaps overstates its pathbreaking nature, but is nonetheless welcome. Like Local Law 84 (discussed above) and municipal ordinances requiring varying levels of LEED certification for new construction in places like San Francisco, Boston, and Los Angeles, this initiative is part of a consistent dynamic where green building movements in the private sector eventually lead to supporting legislation at the local level.

New York City’s green lease initiative is based in part on [recommendations](#) from the Natural Resource Defense Council’s Green Lease Forum. Many of these recommendations will be hard to negotiate and implement on a cost-effective basis for smaller leases and for buildings that are not already configured towards green operations. However, they do provide a general framework for approaching energy efficiency in leases.

In upcoming issues of the Green Building Newsletter, stay tuned for a more detailed look at some of the common green leasing issues we are encountering in our lease negotiations.

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Questions or Comments?

Please contact these professionals for questions or comments regarding this edition:

Krishna Patel
(212) 692-6821
KDPatel@mintz.com

Gabriel Schnitzler
(650) 251-7720
GSchnitzler@mintz.com

Peter B. Zlotnick
(212) 692-6887
PBZlotnick@mintz.com

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