In the Zone

Fox Rothschild LLP
ATTORNEYS AT LAW

Presented by the Zoning and Land Use Practice Group

NOVEMBER 2008

Real Estate Community Intervention In Energy Efficiency Initiatives

By Steven S. Goldenberg

New Jersey is in the process of crafting its Energy Master Plan (EMP), which will be the blueprint for the state's energy initiatives through 2020. A major focus of the EMP concerns energy conservation and efficiency initiatives, including prospective building and appliance regulations and codes. There is a pressing need for the real estate community to organize to preserve the value of its assets and assure that the energy policies adopted by the state are reality-based and will not cause serious economic harm to companies.

The policies now being considered will have a tremendous affect on the real estate community, which has been virtually absent from the ongoing processes. Fox Rothschild encourages stakeholders to join the debate to assure that the policies that are ultimately fashioned will be responsible, cost-justified and consistent with the interests of the real estate community and the state. At present, there is a real danger that this will not occur absent such participation.

The Board of Public Utilities (BPU) is responsible for most energy policy initiatives and is being assisted by an energy efficiency "think tank" of "experts" that will recommend the adoption of very aggressive, largely untested policies and standards that, if adopted, would inflict tremendous economic harm on real estate interests. A recent presentation by the experts indicated they will recommend to the BPU, among other things:

1. Implementation of mandatory, aggressive energy efficiency standards for existing and new buildings (30-50 percent greater efficiency is being debated)
2. Time of sale restrictions (targeted for implementation beginning in 2012) that would require compliance with certain energy standards as a condition precedent to the sale of residential, commercial and industrial properties
3. A goal that by 2030 all new buildings be "net zero energy" and "carbon neutral"

To put the enhanced energy efficiency standard in perspective, a NAIOP member (who prefers anonymity) has determined that for a 1980s vintage, 180,000 s.f. office building to become 30 percent more energy efficient (the minimum standard being discussed), an investment of $2 million would be required, most of which could not be recovered from tenants. This cost would be equivalent to $11+ per square foot and have a 17+ year payback period. This would represent an approximate seven percent decrease in the company's portfolio value, and would require it to borrow literally hundreds of millions of dollars to upgrade all of its New Jersey facilities.

"Net zero energy/carbon-neutral" buildings are self-sustaining, meaning that they are designed and constructed in a manner that would not require energy purchases for the building, and would not emit greenhouse gases. They are developed through the use of renewable (solar and thermal) energy, advanced building HVAC and operating systems, and aggressive building designs that eclipse LEED

certification levels. There is currently one building in the state that is considered net zero, a warehouse built at considerable cost with significant state rebates that are no longer available. There are only a handful of carbon neutral buildings in the world, many of which are deemed experimental in nature. It is questionable whether they can be readily developed in the Northeast where there is only limited solar potential.

Despite the significant, adverse impact these programs will have, the real estate community has not been represented in these proceedings. Representation, both legal and lobbying, is necessary because a variety of such proposals will be considered over the coming year. The BPU views these proposals favorably and appears ready to recommend their adoption. In addition, the Legislature has begun to weigh in.

For example, a bill (S702) is currently pending that would allow the Department of Community Affairs and BPU to amend the energy sub code "at any time" to incorporate "enhanced energy saving construction requirements" that would be based on 10-year projections provided by the BPU regarding the future cost of energy. The bill assumes a seven-year payback (as contrasted with the 17-year payback calculated in the previous example). The ability of the BPU (or anyone else) to make a sound 10-year projection is a matter of serious doubt given the volatility and continuing evolution of the energy markets. Most experts would shy away from such "guesstimates." Similar bills are anticipated.

Although these proposals will be viewed properly by industry professionals as ill-advised and excessively costly, absent effective opposition they will be seriously considered and likely adopted by ivory tower regulators who do not comprehend the economic impact these policies will have in the marketplace. Unfortunately, this is not a new phenomenon.

For more information about this topic, please contact Steven Goldenberg at 609.896.4586 or sgoldenberg@foxrothschild.com.

Fox Rothschild LLP
ATTORNEYS AT LAW