



Environmental Due Diligence Guide

REPORT

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An Insider's Perspective

Energy Efficiency Benchmarking, Due Diligence Moving into the Mainstream

A body of regulatory and legal drivers is bringing energy disclosure more into the mainstream, resulting in evolving environmental due diligence protocols, a Michigan climate change attorney told BNA July 8.

Such drivers no longer are in their infancy as more and more jurisdictions are incorporating mandatory energy efficiency and sustainability disclosure requirements into their regulations, according to Mark J. Bennett, senior counsel and climate change practice leader with Detroit, Mich.-based Miller Canfield, an international law firm.

Four Drivers for Disclosure

Essentially, there are four different vehicles through which parties are on the hook for disclosures related to energy efficiency, Bennett explained. First is a requirement under a transactional disclosure regulation. Such requirements exist in California and New York City, among many other jurisdictions, and now are in effect or will become effective on a rolling basis in the near future. These provisions require that before a party can sell, lease, or finance a property, they must disclose the energy consumption of the building. "If you don't do

this, you cannot go forward with the transaction," Bennett said. One of the most comprehensive resources tracking these developments at the state and local level is the Institute for Market Transformation.

"Policy makers see the real estate transaction as an ideal time to fulfill policy objectives as the regulatory obligation becomes a closing requirement," he added.

This transactional driver is similar to the impetus for conducting traditional environmental due diligence. However, the difference with energy efficiency disclosure is that it is not a uniform federal requirement but instead is highly jurisdiction-sensitive. It can vary by city and state, and potential conflicts can arise from overlapping requirements.

Another vehicle through which such disclosure may be required is building labeling, which requires a landlord to display publicly the building's energy consumption. "Equipped with fully transparent and accurate energy consumption information, buyer and seller or landlord and tenant can negotiate the relative energy efficiency of a property into the transaction's economics," Bennett explained.

Mandatory auditing is another method by which such information may have to be disclosed. In this scenario, before transferring a property, an energy audit needs to be conducted.

The emergence of green building code upgrades is another strong driver for such disclosures, driven

in part by states' receipt of federal stimulus. Funding also is a driving factor, Bennett explained.

As such, he continued, the opportunities presented by green building due diligence/energy efficiency disclosure is a departure from traditional due diligence that typically is focused on risk avoidance. Instead, under this paradigm, the opportunity exists to enhance a building's net operating income and thus its overall value through energy efficiency investments, often funded with financial incentives from different government or utility sources.

ASTM Standard Forthcoming

Given the acceleration of energy disclosure trends, ASTM International is in the final stages of balloting on a standard being developed to assist the commercial real estate industry with gathering information for such disclosures, Bennett said.

The standard, *Building Energy Performance Assessment for a Building Involved in a Real Estate Transaction* (ASTM Wk24707) (BEPA), is expected to be adopted this fall. Essentially, the BEPA standard addresses how to gather information on building energy performance so the user can make the best use of available benchmarking or green building standards, including Energy Star, the Capital Markets Partnership Green Value Score, and Leadership in Environmental and Energy Design, among others, to fulfill disclosure obligations (18 EDDG 35, 5/21/09).

“The BEPA standard brings everyone to a common starting point. It is not creating a new benchmarking standard but instead facilitating broader utilization of the various existing benchmarking standards. The environmental due diligence industry now is bundling the BEPA as an integrated scope of work into traditional Phase I environmental site assessment or property condition assessment reports,” Bennett said. He stressed that the BEPA standard itself does not create any new legal obligations. However, it can assist with ful-

filling a disclosure obligation if one is required in a particular transaction.

Key Legal Issues

Bennett stressed the importance of emerging legal issues that might arise as a result of energy efficiency disclosure. One such issue is confidentiality, he said. “Energy consumption information generally runs with the customer, not the physical building,” he said. This is especially important in a landlord-tenant situation. “Tenants don’t often want their energy consumption publicly disclosed.” Buyers and landlords routinely

should request from sellers and tenants permission to obtain and disclose energy consumption information for any trailing three-year period as required under the ASTM standard.

In fulfilling disclosure obligations, Bennett also cautioned that parties must allow for various benchmarking systems referenced in applicable statutes and ensure they are using the system most suitable to a particular transaction. The legal appendix of the BEPA standard addresses this issue as well as confidentiality considerations in greater detail, Bennett said.

BY MARY ANN GRENA MANLEY