

2009 NAIOP GREEN SERIES

“GOING GREEN TO FIND GOLD IN YOUR EXISTING BUILDING”

THE LEGALITIES: THE REGULATORY ENVIRONMENT

Presented by: Carolynne C. White,
Brownstein Hyatt Farber Schreck, LLP

I. FEDERAL.

The federal role is principally to provide education and funding. Because land use and development issues are typically regulated at the state or local level, the federal government normally doesn't play a significant regulatory role in green building. Some of the federal legislation that has been passed, or is under consideration, maintains this separation and acknowledges the state and local role; however, the Waxman-Markey Act, currently under consideration is a striking departure from this historical separation, and is a major federal preemption of state and local control over building codes. This section summarizes two types of federal legislation affecting green building, including Waxman-Markey.

A. Energy Efficiency and Conservation Block Grants (EECBG).

The principal purpose of these grants is to provide funding for cities and counties to construct energy efficient demonstration projects, to adopt plans for climate change and sustainability, and to amend or adopt building and zoning codes for energy efficiency and sustainability.

These grants were part of comprehensive energy legislation enacted in 2007 (the Energy Independence and Security Act of 2007, a.k.a. "EISA), but were not funded until the American Recovery and Reinvestment Act ("ARRA" a.k.a. "Stimulus Bill") was passed in February, 2009. The ARRA provided \$3.2B in funding for EECBG grants. These grants are distributed to local governments (cities and counties) according to the same formula as Community Development Block Grants (CDBG) distributed by the Department of Housing and Urban Development (HUD). That is, cities above a certain population threshold, or "formula cities" automatically receive a distribution. Non-formula cities can compete for grant funds.

Twenty Colorado cities are formula cities and will automatically receive an allocation of these funds; some have already received funding. The state of Colorado's Governor's Energy Office (GEO) also received slightly less than \$10 million from this legislation.

Name	Government Level	Allocation
Colorado	State Energy Office	\$9,593,500
Arvada	City	\$951,900
Aurora	City	\$2,851,300
Boulder	City	\$1,017,800
Broomfield	City	\$516,600
Castle Rock	City	\$174,800

Centennial	City	\$922,900
Colorado Springs	City	\$3,666,100
Commerce City	City	\$185,200
Denver	City	\$6,079,500
Fort Collins	City	\$1,307,900
Gr Junction	City	\$229,800
Greeley	City	\$869,100
Lakewood	City	\$1,326,100
Littleton	City	\$182,500
Longmont	City	\$785,100
Loveland	City	\$606,400
Parker	City	\$172,400
Pueblo	City	\$1,007,000
Thornton	City	\$965,500
Westminster	City	\$952,800

In order to receive the funds, these cities were required to provide the Department of Energy with a plan for how to spend the funds by June 25, 2009 (this deadline has been extended to August 10, 2009). If they haven't already, these 20 cities are likely to be enacting new plans and regulations for green building as a result of this legislation.

B. American Clean Energy and Security Act (Waxman-Markey Climate Change Bill)

Most discussion and analysis of this bill has focused on the cap and trade provisions. However, the bill makes sweeping changes in how building codes are applied and enforced, by essentially creating a federal preemption of state and building codes.

The bill contains four sections: "Clean Energy," "Energy Efficiency," "Global Warming," and "Transitioning." The Energy Efficiency section has the most relevance for our industry and contains the federal building code preemption provisions.

The most significant provision, representing the most dramatic departure from the prior federal role, the Waxman-Markey Act establishes national energy efficiency targets, and directs the Secretary of Energy to develop a National Energy Efficiency Building Code to achieve these targets.

For commercial buildings, the Act establishes the following targets, shown as a percent reduction required over and above a "baseline" building, which is stated in the Act to be a building that complies with the ASHRAE 90.1-2004, for commercial buildings.

- 30% reduction as of effective date of Act (2009?)
- 50% reduction as of January 1, 2015
- +5% additional as of January 1, 2018

- +5% every three years thereafter through January 1, 2030

By one year after the target date for each target, the Secretary must designate a National Energy Code to meet each target. For example, assuming the Act passes in 2009, by the anniversary date of the Act in 2010, the Secretary must promulgate or establish a National Energy Code designed to meet the 30% reduction target. The Secretary may select an existing code as the national code, or may conduct a rulemaking to create an entirely new code.

Within one year after each national code is established, each state must either adopt the national code, adopt a state code designed to meet or beat the same target, or, in states where there is no statewide code, like Colorado, must document that at least 80% of local governments representing urban population have adopted the national code, or codes that meet or exceed the target. A state or local government may demonstrate compliance with this requirement by adopting a California state statute Title 24-2009.

States and local governments which do not comply lose eligibility to receive funds known in the legislation as SEED (State Energy and Environment Development) and emission allowances under the cap and trade sections of the bill, as well as reductions in other federal energy funding.

The Act also creates a retrofit program for existing buildings, called the Retrofit for Energy and Environmental Performance (REEP) Program. This program requires the Secretary of Energy to develop standards (in conjunction with the “Director of Commercial High Performance Green Buildings”) for measuring the energy efficiency of various types of buildings. This is one of the few places where the Act does require a specific energy efficiency measure: all retrofit buildings under this program must add or have reflective or green roofs. The Secretary is also directed to work with state and local governments to create resources and materials for retrofit programs. States may use their SEED funds to create revolving loan funds, incentives, or other programs for building retrofits.

But, the Act limits the amount of funds available for commercial building retrofits from SEED Funds as follows:

- actual cost of audit, up to \$500
- \$0.15/SF for energy reductions from 20 - 30%
- \$0.75/SF for energy reductions from 30 - 40%
- \$1.60/SF for energy reductions from 40 - 50%
- \$2.50/SF for energy reductions > 50%
- Overall cap – 50% actual cost of retrofit

Additional specific awards are available for reductions in water usage, and other specific environmental improvements. The Act also states that eligible building retrofits must meet a minimum indoor air quality standard of ASHRAE 62.1 for ventilation.

Finally, the Act directs the Secretary to establish a Building Energy Performance Labeling Program, through which the Secretary must develop standards for each building type, and then "encourage" the use of this labeling program by states and local governments, for example, by requiring disclosure of building energy efficiency ratings in tax, title, and other types of records.

II. STATE.

Colorado's longstanding tradition of local control ensures that matters related to land use and building are largely left to the local governments to regulate. Thus state efforts to regulate sustainability, climate change, and green building are largely "nibbling around the edges." However, a handful of recently enacted bills address some areas of development.

A. SB 08-117 - Prohibits municipalities and counties from charging a fee to install a solar panel that is more than actual costs for reviewing the application, or \$500 residential/\$1,000 commercial, whichever is less

B. HB 08-1350 - Allows counties to use Local Improvement Districts (LIDs) and cities to use special improvement districts (SIDs) to provide for energy efficiency retrofits and installation of renewable energy fixtures in new construction

C. HB 09-1350 - Would have created "New Energy Improvement Districts" - Killed in House

D. HB07-1146 - Any county or municipality that adopts a building code must also adopt an energy code. The energy code adopted by the municipality or county must be at least as stringent as the most recent version of the International Energy Conservation Code (IECC)

1. The 2006 IECC. Colorado is a home rule state; therefore there is no statewide energy code. The state of Colorado has adopted the 2006 IECC for all state buildings. Three counties (Adams, Arapahoe, and Larimer) have adopted the 2006 IECC; and several cities have adopted it (Arvada, Aurora, Basalt, Castle Rock, Centennial, Collbran, Colorado State Buildings, Cortez, Craig, DeBeque, Denver, Durango, Edgewater, Englewood, Fort Lupton, Frisco, Fruita, Golden, Grand Junction, Greeley, Greenwood Village, Hotchkiss, Lakewood, Longmont, Louisville, Mesa County Regional, Palisade, Parker, Salida, Thornton, Westminster).

2. The 2009 IECC. However, the 2009 IECC is now available. Although supporters of changes requiring greater energy efficiency were disappointed that the entire package of changes were not adopted, the general consensus among code professionals is that the 2009 International Energy Conservation Code (IECC) will produce a significant boost in new home energy efficiency significantly over its 2006 counterpart. Although it won't reach the 30% improvement sought by the Energy Efficient Codes Coalition, an ICF analysis estimates that homes built to the 2009 IECC standards will save 12.2% under the simple "prescriptive" method and could save 14.7% or more using the more complicated "performance-based" method.

The State of Colorado Governor's Energy Office (GEO) has taken the position that, now that the 2009 IECC is available, the HB 1146 requires that all jurisdictions subject to the Act must now adopt the 2009 IECC.

3. **Why is this significant for developers and building owners?** Pursuant to HB 07-1146, all cities and counties that have adopted a building code must now adopt the new 2009 IECC. Although it doesn't achieve the 30% efficiency some advocates hoped for, it does incorporate more stringent requirements for energy efficiency. Thus the more stringent code will apply to new construction and major building upgrades in most jurisdictions in Colorado. Between HB 07-1146 and the EECBG funds, it is predicted that large numbers of Colorado cities and counties will begin adopting upgraded energy efficiency codes in the near future.

III. LOCAL.

Local government is where the real action is in green building regulation. An analysis of local government action in this arena reveals a spectrum of regulation that begins with modest steps, such as setting behavioral and development goals for the local government entity itself, then slowly attempts to influence private sector behavior, beginning with education and outreach, identifying and removing barriers, and finally ends with regulation and mandates.

This presentation focuses on the regulation and mandate end of the spectrum, and provides examples of several Front Range cities that are adjusting their building and land development codes to address sustainability and climate change. While the first wave focuses primarily on new construction, some of these changes also impact existing buildings, and the trend will continue to move in that direction in the future.

- A. **Aurora**
- B. **Denver**
- C. **Westminster**
- D. **Lakewood**
- E. **Wheat Ridge**

IV. CONCLUSION. Market demand, increasing regulatory environment, combined with increased federal funding for cities and counties, will require more green buildings to be built, and more existing buildings to be "greened" in the next several years.