Mandating Compliance With Third-Party Green Building Standards: Red Flags for Local Governments

By Lester D. Steinman

Introduction

To combat global warming, many local governments in New York and elsewhere have considered adopting green building standards to promote sustainable development practices in their communities. In many instances, the discussion has focused on the incorporation into the zoning or building code of a requirement that new construction be certified under the Leadership in Energy and Environmental Design (LEED) Green Building Rating System[1] developed by the U.S. Green Building Council (USGBC).[2]

Municipalities that incorporate LEED certification requirements into their zoning or building codes delegate to the USGBC, a private non-profit organization, the power to determine whether its private standards have sufficiently been met so as to entitle the property owner to obtain the LEED certification.[3] The certification process is conducted without participation or oversight by municipal officials. Yet, municipal officials may be predicating their decision-making upon the results and judgment of the USGBC as to whether the USGBC's standards have been met. A property owner's entitlement to a municipally issued certificate of occupancy, or the retention or loss of other significant property rights, may be based upon the independent third-party's determination.

Against this background, a variety of legal issues should be examined prior to a municipality's decision to mandate that private construction comply with LEED or any other green building rating system. Those issues include antitrust considerations, the non-delegation of authority doctrine, incorporation by reference, preemption and options and liability relating to enforcement.

I. Antitrust Considerations

The USGBC's LEED rating system is not the only green building rating system. The Green Building Initiative ("Green Globes Rating System"); the National Association of Home Builders ("Model Green Home Building Guidelines") and Collaboration for High Performance Schools ("CHPS Criteria") have all adopted their own standards for green buildings. Also, Energy Star, the outgrowth of a joint program of the U.S. Department of Energy and Environmental Protection Agency, provides an energy efficiency rating system for commercial buildings, appliances and equipment.

Legislating compliance with a specific building rating system may raise antitrust issues for local governments. The good news is that municipalities are generally immune from damages, indeed potentially treble damages, for violations of the federal antitrust laws, based upon the Local Government Antitrust Act of 1984. However, municipalities remain liable for declaratory and injunctive relief based upon antitrust law violations, unless they can claim protection under the "state action" immunity doctrine.

The "state action" immunity doctrine, established by the U.S. Supreme Court in *Parker v. Brown*,[4] provides that states, as sovereign entities, are not liable under the federal antitrust laws for their anti-competitive activities. Municipalities, however, are not sovereign and are not automatically immune from the reach of the federal antitrust laws.

Rather, to obtain exemption, municipalities must demonstrate that their anti-competitive activities are authorized by the state pursuant to state policy to displace competition with regulation or monopoly public service. Such state policy must be clearly articulated and affirmatively expressed.[5]

The case of *Electrical Inspectors Inc. v. Village of East Hills*[6] provides an interesting perspective on this issue. There, several Long Island municipalities adopted regulations designating the New York Board of Fire Underwriters[7] as the exclusive entity to provide government-required electrical inspection services. The Board's certification of compliance with the National Electric Code[8] was a prerequisite to the issuance of a certificate of occupancy. Thus, a municipal property owner who wanted to use or occupy a building had to submit to and pay the Board of Fire Underwriters for the Board's inspection.

Plaintiff, a for-profit corporation that also provided electrical inspection services in New York State, challenged these exclusive arrangements as a violation of the antitrust laws. Alleging that these arrangements excluded the plaintiff from the local market for electrical inspection services, plaintiff sought monetary damages against the Board and injunctive relief against the municipalities.

Both the District Court and the Second Circuit agreed that for purposes of state action immunity, New

York State, through the Uniform Fire Prevention and Building Code and its implementing regulations, had given the municipalities authority both to regulate electrical inspection services and to suppress competition by designating the Board as their exclusive agent to conduct those inspections.

Nevertheless, the Circuit Court refused to dismiss Plaintiff's antitrust claims for equitable relief against the municipalities and for damages against the Board in the absence of a finding that government officials actively supervised the Board's conduct. Whether a municipality, to obtain State action immunity, must also show that its government officials actively supervised those private parties given monopoly power by the municipality's regulations, the court opined, was an open question.[9]

The Second Circuit did not decide this issue and it remains an open issue. Rather, the court focused on the potential antitrust liability of the Board of Fire Underwriters for actively seeking and abusing monopoly powers insofar as the legislation allowed the Board to exercise exclusivity in determining price, terms and quality of services.

Accordingly, it remanded the case to the District Court to determine if the municipal supervision was lacking, whether antitrust violations by the Board of Fire Underwriters had occurred and, if so, whether a damage award against the Board would be adequate to deter future violations. If not, the District Court would have to determine whether the state action immunity doctrine would permit an injunction to issue against the municipalities for lack of supervision even though the municipalities' activities were authorized by the State.

Similar legislation enacted by the Town of Union in Broome County, mandating electrical inspections by inspectors of the New York Board of Fire Underwriters, also was held to be anti-competitive in violation of New York State's Donnelly Act, the State's counterpart to the federal Sherman Antitrust Act.[10] No "state action" exception applies under the Donnelly Act.

That court also found the Town of Union's law to be constitutionally infirm insofar as it purported:

> to designate and delegate to unnamed agents of a private entity the exercise of the police power of the Town and the right to establish and collect fees for the exercise of such power; and in failing to fix standards of reasonableness, or any standards, for the fees to be paid.[11]

Notably, standard setting organizations, such as the USGBC, have often been the subject of antitrust scrutiny. The U.S. Supreme Court has cautioned that "members of such associations often have economic incentives to restrain competition and the products standards set by such associations have a serious potential for anti-competitive harm."[12]

In sum, antitrust considerations are implicated when a municipality (1) legislates compliance with private third-party standards; (2) delegates unsupervised approval authority over compliance with those standards to that private third-party; and (3) requires such compliance as an essential prerequisite to the exercise of the police power (i.e., issuance of a certificate of occupancy).

II. Non-Delegation of Authority

Independent of antitrust considerations, requiring LEED certification by a private third-party as a prerequisite to the issuance of a certificate of occupancy, or the forfeiture of or return of funds paid to the municipality conditioned upon LEED certification, raises issues of improper delegation of the police power.

The non-delegation doctrine has multiple facets. From a due process perspective, a legislative body may not constitutionally delegate to private parties the power to determine the nature of rights to property without supplying standards to guide the private parties' discretion. Such delegations, to be valid, must also be closely circumscribed and regulated so that no one could conclude that the government has yielded any sovereign power.[13]

Instructive, in this regard, is *Fink v. Cole*.[14] There, the Court of Appeals struck down, as an unlawful delegation of legislative powers, a broad statutory delegation to the Jockey Club, a private corporation, of the discretionary power (1) to license owners, trainers and jockeys for racing in New York State, and (2) to make those licenses subject to the Jockey Club's rules and regulations. In essence, the legislation ceded regulatory control over the horse racing industry to the Jockey Club. Even if the Legislature had delegated its licensing power to a government agency, the Court noted, the statute would have been struck down for lack of any proper standards.

Additionally, it is well settled that the statutory duties and responsibilities of public officials which involve the exercise of discretion or judgment cannot be discharged by contracting with, or otherwise delegating such authority to private parties, unless authorized by state legislation.[15] Generally, the duties of a building inspector involve the exercise of the police power and the performance of discretionary functions.

For example, the State Comptroller has opined that "the decision of local officials whether to enforce a zoning or building code in a given instance, or to issue a building permit, is discretionary in nature." Accordingly, a village may not contract with a private party

to perform those functions.[16] However, a municipality may contract with a private party to provide advice and assistance relative to zoning and building matters so long as the municipal officials retain ultimate responsibility for the performance of their police powers and discretionary functions.

The difference between discretionary and ministerial functions has been described by the Court of Appeals as follows:

> Discretionary . . . acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or statute with a compulsory result.[17]

The parallel here is that unless you take the position that the LEED certification process involves no discretion, incorporating LEED into the municipal building code and providing for certification of compliance by a private third-party without municipal supervision would appear to present a case of impermissible delegation of authority. Moreover, the absence of a governmental appeals process, or other procedures to petition the municipality for relief from the LEED certification requirement, strengthens the improper delegation argument.[18]

III. Incorporation by Reference

Article 3, Section 16 of the New York State Constitution prohibits incorporation by reference of existing laws into a subsequently enacted law.[19] The constitutional provision has been judicially construed, however, as limited to state statutes, but not necessarily to all state statutes, and not to apply to rules or regulations or standards prepared by private associations.[20]

Indeed, building codes have long incorporated standards of private organizations,[21] such as those promulgated by the American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) and the National Fire Protection Association.[22] However, these associations, unlike the USGBC with LEED, have not themselves been required to certify compliance with those standards.

Ultimately, whether incorporation by reference is permissible may depend on whether such incorporation in the legislative scheme also constitutes an impermissible delegation of authority.

In *USA Baseball v. City of New York,*[23] the Federal Court rejected a non-delegation claim in a lawsuit to overturn New York City's ban on the use of metal bats for public and private high school competitive baseball games. The City's bat ordinance incorporated by reference rules adopted by Major League Baseball (MLB) regarding permissible types of bats.

In reaching this result, the court ruled that the ordinance did not delegate to Major League Baseball the responsibility to establish regulations for the City. Rather, the City legislation adopted "a very limited existing set of standards to a specific type of product that the City has determined to regulate in specific situations."[24]

Nor did the bat ordinance rely solely on MLB's guidance. Further, it limited bats allowed under the MLB rules by requiring that they be wood laminated or wood composite and that they contain no metal. If in the future MLB decided to approve bats containing metal, the City's ordinance would, nevertheless, prohibit the use of such bats.

The court distinguished the carefully circumscribed limits of the City's reliance on MLB rules from cases such as *Fink v. Cole* involving the standardless delegation of broad discretion and decision-making to a private entity. Also, the court noted that the incorporation by reference of MLB's bat regulations did not raise anti-competitive issues such as those raised in the electrical inspection cases.

Assuming you can surmount this legal hurdle, the question arises as to how the law incorporating LEED compliance will be affected by subsequent amendments made to the LEED standards. Will newer versions of LEED (LEED 2009) automatically be incorporated without further local legislative review? According to the Court of Appeals, the question is one of legislative intent and purpose.[25]

Yet, this precise question, the effect of a local law incorporating by reference subsequently adopted amendments to standards of a private association, led the court in *People v. Mobil Oil Corp.*[26] to strike down the local law as an impermissible delegation of authority. There, Nassau County adopted a fire prevention ordinance which incorporated by reference various standards for foam extinguishing systems, flammable and combustible liquids and the installation of oil burning equipment promulgated by the National Fire Protection Association "currently in effect or as may be amended." Invalidating the legislation, the court opined that:

> By enacting the Association's amendments, prior to their adoption, the County of Nassau has delegated to the National Fire Protection Association sovereign and legislative powers. . . The County has relinquished all control over the ordinance in question pertaining to flammable and combustible liquids to the National Fire Protection Association, and whatever standards

might be adopted by that Association in the future are automatically the law of the County, subjecting its citizens to criminal penalties . . . Such a procedure is an improper delegation of legislative authority, and therefore unconstitutional.[27]

Regardless of whether criminal penalties may pertain to LEED non-compliance, substantial property rights and monetary considerations will be involved. Once Nassau County deleted the "or as may be amended" language, the constitutionality of incorporating the existing standards of the National Fire Protection Association into the Nassau County Fire Prevention Ordinance was upheld.[28]

IV. Preemption

A. Federal Preemption

A New Mexico federal district court has enjoined the City of Albuquerque's enforcement of certain provisions of its building code imposing energy efficiency standards for major residential and commercial appliances and equipment, including heating, ventilating and air conditioning (HVAC) products and water heaters, that exceeded federal standards for these products.[29]

Here, the City had adopted energy conservation code provisions that set forth

- Performance-based options to increase energy efficiency in residential and commercial buildings—certification at the LEED silver standard or thirty (30%) efficiency improvements over a baseline building that would utilize HVAC and water-heating products that do not exceed federal efficiency levels for these products.
- Additional compliance options for small commercial and residential buildings, also requiring the use of HVAC and water-heating products with energy efficiencies in excess of federal standards for those products.

Suit was brought by the distributors of HVAC and water-heating products and three national trade associations representing manufacturers, contractors and distributors of those products, claiming that the City of Albuquerque ordinances impose energy efficiency standards for commercial and residential buildings that are preempted by federal law. The District Court agreed.

The court held that the Federal Emergency Policy and Conservation Act (EPCA) as amended by the National Appliance Energy Conservation Act (NAECA) and the Energy Policy Act of 1992 (EPACT) established "nationwide standards for the energy efficiency and energy use of major residential and commercial appliances and equipment."[30] To the extent that the City's enactment of performance-based building codes expressly or effectively required the installation of covered products whose energy efficiency exceeded the applicable federal standards, they are preempted by those federal statutes.

Here, the court found that the City code required building owners to either

- install products that exceed federal energy efficiency standards, or
- incur additional expenses to make other revisions to the building to make up for the energy differential between a federally compliant product and a product that meets the enhanced energy efficiency requirements of the code.

B. State Preemption

1. N.Y.S. Uniform Fire Prevention and Building Code Act[31]

Article 18 of the Executive Law sets forth the N.Y.S. Uniform Fire Prevention and Building Code Act (the "ACT"). The purpose of the Act is to provide a uniform code setting forth a minimum level of protection in building construction and fire prevention.[32] The Legislature, in creating the Act, sought to "reconcile the myriad existing and potentially conflicting regulations which apply to different types of buildings and occupancies."[33] The provisions of Article 18 and of the Uniform Fire Prevention and Building Code (the "Uniform Code") supersede any other provision of a general, special or local law, ordinance, administrative code, rule or regulation inconsistent or in conflict therewith.[34]

The State Fire Prevention and Building Code Council (the "Building Code Council")[35] is responsible for reviewing local laws and ordinances that may be more or less stringent than the Uniform Code.[36] Where a municipality enacts a local law or ordinance imposing "higher or more restrictive standards for construction," the Building Code Council must be notified within 30 days.[37] Also, the municipality must petition the Building Code Council to make a determination of whether the local standard is higher or more restrictive, and if it is found to be so, to adopt the standard.[38]

The question then arises when a municipality enacts an ordinance requiring new buildings to be certified to a green building standard such as LEED, does the requirement impose more restrictive building standards than are required by the minimums set forth in the Uniform Code? Adding to the difficulty of determining which elements of LEED certification conflict with the Uniform Code is the fact that LEED certification may be achieved at several levels ranging from certified to platinum. While certain features required

at higher levels of certification may be more restrictive than the Uniform Code, at lower levels of certification the required features may not exceed the Uniform Code's standards.

Notwithstanding numerous inquiries to officials at various levels in the Department of State (DOS), a definitive answer to these questions has not been received. Nor do the regulations themselves provide that answer.

Recently, a member of the Codes Division of the DOS, who did not want to be identified, stated that the Uniform Code and LEED were "apples and oranges." In the same breath, however, he acknowledged that compliance with certain LEED standards could be more restrictive than the requirements of the Uniform Code.

The DOS representative did not recommend that municipalities incorporate LEED certification into their building codes. Rather, he emphasized municipal enforcement of a soon-to-be-updated Energy Conservation Construction Code.

2. N.Y.S. Energy Conservation Construction Code Act

The Building Code Council is also charged with reviewing and amending the Energy Conservation Construction Code (the "Energy Code").[39] Among the objectives considered in designing and amending the Energy Code is to promote "to the fullest extent feasible, the use of modern technical methods, devices and improvements which tend to minimize consumption of energy and utilize to the greatest extent practical solar and other renewable sources of energy."[40]

To this end, the Energy Code Act provides that nothing in the Act "shall be construed as abrogating or impairing the power of any municipality to promulgate a local energy conservation code more stringent than the code."[41] The Act does not contain similar language or provisions as the Uniform Fire Prevention and Building Code Act requiring adoption of more stringent local standards by the Building Code Council.

V. Enforcement and Liability

Assume that municipal regulations or land use approvals require a building to meet a specific level of LEED certification (certified, silver, gold or platinum). The building is constructed, the issuance of the LEED certification has been delegated to a private third-party, and the certification will not be issued until well after the building is ready for occupancy.

- Do you withhold the certificate of occupancy until the required certification is received?
- Do you issue a temporary certificate of occupancy to allow building occupancy pending receipt of the LEED certification?
- Do you require a performance bond to be posted which will be forfeited if LEED certification is not obtained?
- Will retention of building permit fees to be refunded upon LEED certification be a sole and adequate remedy?
- What if incentives, such as density bonuses or increased floor area ratios, have been granted but the LEED certification for which the bonuses were granted is ultimately not obtained?

What if the certificate of occupancy is issued and LEED certification is not obtained? What recourse does the local government have? Revocation of the certificate of occupancy for failure to comply with the LEED requirements? Is that feasible or practicable? Perhaps legislation providing for the payment of an additional fee or civil penalty for failure to comply with the LEED requirement?

Finally, what if the municipality allowed occupancy without LEED certification? Would it be liable for failure to enforce its regulations? On the latter question, the recent case of *Bell v. Village of Stamford*[42] is instructive.

There, a neighboring property owner sued the village for negligence and breach of contract for allowing the construction of a building and a parking lot across the street from her building without a building permit and for failing to take action to stop the construction once informed of the unauthorized activity.

Dismissing the complaint, the Appellate Division, citing well-settled Court of Appeals case law, ruled that absent a special relationship[43] creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for the injurious consequences of a failure to enforce a statute or regulation.[44]

Equally well settled is that the adoption of a zoning ordinance and building code by a municipality does not create a special relationship with its residents.[45] The code and ordinance are enacted for the benefit of the general public and do not, without more, give rise to a special relationship between a municipality and an individual resident or property owner. Additionally, in the absence of such a special relationship, a municipality's failure to act, even after being informed of alleged unauthorized conduct on numerous occasions, does not give rise to municipal liability.

Conclusion

There is an admirable desire among public officials in this region to "green" their communities. However, attorneys advising these municipal officials must be cognizant of the various legal considerations and consequences attendant to that decision.

Strategies must be developed to minimize or eliminate these legal risks. Alternatives to be considered include (1) rigorous enforcement of the State's Energy Code, as urged by the Department of State; or (2) incorporating discrete green building practices derived from LEED or other rating systems into the municipal building code. In both instances, municipal officials would be responsible for compliance with these standards.

Endnotes

1. In the context of new construction and major renovation, LEED evaluates buildings in six key areas: site selection, water efficiency, energy and atmosphere, materials and resources, environmental quality and innovative design. By meeting the standards and requirements in these areas, buildings may obtain LEED certification based upon a point system with a minimum number of points being required for each of the four certification levels—certified, silver, gold and platinum. *See generally* http://www.usgbc.org.
2. The USGBC is a non-profit organization consisting of individuals and organizations within the building industry.
3. In 2009, the Green Building Certification Institute (GBCI), an affiliated entity, assumed responsibility for administering the LEED certification program for commercial projects. Appeals of LEED certification determinations are also heard by the GBCI.
4. 317 U.S. 341 (1943).
5. *City of Lafayette v. La. Power and Light Co.*, 435 U.S. 389, 410-413 (1978); *see also City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991) and *Town of Hallie v. City of Eau Clair*, 471 U.S. 34, 38-40 (1985).
6. 320 F.3d 110 (2nd Cir. 2003).
7. The Board of Fire Underwriters is a not-for-profit corporation comprising insurance companies authorized to write fire insurance policies in New York State.
8. The National Electric Code is a model code promulgated by the National Fire Protection Association.
9. The Supreme Court held in *Town of Hallie v. City of Eau Clair*, 471 U.S. 34 (1985) that a municipality need not show that it is supervised by state officials when engaging in anti-competitive activities to qualify for state action immunity. But the Supreme Court, in the context of private party liability, also indicated that "[w]here state or municipal regulation by a private party is involved . . . active supervision must be shown even where a clearly articulated state policy exists." According to the circuit court, this raises the question of whether a failure to show active supervision of a private party can defeat *both* the municipality's claim of immunity and the private party's or only the private party's. 320 F.3d at 122. *See LaFaro v. New York CardioThoracic Group*, 570 F.3d 471 (2nd Cir. 2009).
10. *Atlantic Inland, Inc. v. Town of Union*, 126 Misc.2d 509, 483 N.Y.S.2d 612 (Sup. Ct., Broome Co. 1984).
11. *Id.* at 516.
12. *Allied Tube and Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).
13. *USA Baseball v. City Of New York*, 509 F. Supp. 2d 285 (S.D.N.Y. 2007); *People v. Mobil Oil Corp.*, 101 Misc.2d 882, 422 N.Y.S.2d 589 (Dist. Ct., Nassau Co. 1979).
14. 302 N.Y. 216 (1951).
15. 1987 Op. St. Comp. 14; *Hartford Insurance Group v. Town of North Hempstead*, 118 A.D.2d 542 (2d Dep't 1986) (the statutory power granted to towns to settle claims may not be delegated by a town to an insurance company); 1990 Op. St. Comp. 53 (a village may not contract with a private party to perform the function of assessing real property for the village).
16. 1990 Op. St. Comp. 53.
17. *Tango v. Tulevech*, 61 N.Y.2d 34 (1983).
18. The existence of an appeals process to a state commission to challenge the Jockey Club's horse racing licensing decisions did not save the legislation in *Fink v. Cole.*
19. The intent of the constitutional provision is (1) to prevent laws pertaining to one subject from being made applicable to laws enacted on another subject "through ignorance or misapprehension by the legislature"; and (2) to require that all acts should contain within their four corners the information necessary for the Legislature to act upon them "intelligently and discreetly." *People ex rel. New York Electric Lines Co. v. Squire*, 107 N.Y. 593, 602 (1888).
20. *People v. Kavanaugh*, 133 Misc. 2d 689, 507 N.Y.S.2d 952 (Dist. Ct. 1986); *Town of Islip v. Cuomo*, 147 A.D.2d 56, 541 N.Y.S.2d 829 (2d Dep't 1989); *People v. Halpern*, 79 Misc. 2d 790, 361 N.Y.S.2d 578 (Long Beach City Ct. 1974) (an industrial code which was not a "law" could properly be incorporated by reference into a statute); 1980 Op. Atty. Gen. 47.
21. *But see* older opinions of the Attorney General concluding that Article III, Section 16 precludes a City from incorporating by reference the National Electrical Code, a set of rules promulgated by a body of private individuals and organizations, unless that Code is fully set forth in the City's law. 1963 Op. Atty. Gen. 187; 1964 Op. Atty. Gen. 72. In one of those opinions, the Attorney General also concluded that a law requiring all electrical wiring to be in accordance with the National Electrical Code would constitute an unconstitutional attempt to delegate legislative authority. This opinion relied upon a Kansas case which was cited with approval by the New York Court of Appeals in *Fink v. Cole*, *supra* note 18.
22. *See People v. Shore Realty Corp.*, 127 Misc. 2d 419, 486 N.Y.S.2d 124 (Dist. Ct., Nassau Co. 1984); *City of Syracuse v. Penny*, 59 Misc. 2d 818 (Sup. Ct., Onondaga Co. 1969) upholding the incorporation by reference of National Fire Protection Association standards and National Electrical Code standards, respectively, into municipal codes.
23. 509 F. Supp.2d 285 (S.D.N.Y. 2007).
24. *Id.* at 300.
25. *See O'Flynn v. Village of East Rochester*, 292 N.Y. 156 (1944).
26. 101 Misc. 2d 882, 422 N.Y.S.2d 589 (Dist. Ct., Nassau Co. 1979).
27. *Id.* at 887.
28. *People v. Shore Realty Corp.*, 127 Misc. 2d 419, 486 N.Y.S.2d 124 (Dist. Ct., Nassau Co. 1984).
29. *Air Conditioning, Heating And Refrigeration Institute v. City of Albuquerque*, 2008 WI 5586316 (D.N.M.).
30. *Id.*
31. The Uniform Code consists of several codes: the residential code, building code, plumbing code, mechanical code, fuel gas code, fire code, property maintenance code and existing building code. N.Y. Comp. Codes R. & Regs. Tit. 19, Parts 1219-1228. The actual codes are published by the International Code Council (ICC) and may be purchased from the publisher. The regulations for each code specify that standards used in the published code are incorporated by reference, and may be

obtained from the other publishers as identified in the ICC code. Further, the regulations provide for incorporation of other specific standards and corrections to the ICC code. On the face of the regulations, there is no mention of incorporation of LEED or other green building standards. The ICC building and residential codes do not contain any reference to LEED or other green building standards.

32. Exec. L. § 371(2)(B).
33. *Id.*
34. Exec. L. § 383.
35. Members of the Council include: the secretary of state (as chairman), the state fire administrator, as well as fifteen other members appointed by the governor, consisting of two commissioners of state departments, six representatives of municipal government and seven individuals representing professional classifications that the code will affect (architects, engineers, labor unions, builders, and individuals with disabilities). *Id.*
36. Exec. L. § 379.
37. *Id.*
38. The Act provides that the council shall adopt the more restrictive standard if it finds that the standard is "reasonably necessary because of special conditions prevailing within the local government and that such standards conform with accepted engineering and fire prevention practices and the purposes of [The Act]." Exec. L. § 379(2). The Council may accept the standard in whole or in part and may set conditions on the adoption of the standard, including its term or duration. *Id.*
39. Energy L. § 11-103(2).
40. Energy L. § 11-104(2).
41. Energy L. § 11-109(1). Although a municipality may adopt an energy code more stringent than the state Energy Code, it should be noted that the standard cannot conflict with the Uniform Fire Prevention and Building Code. Exec. L. § 383. Additionally, a copy of such code must be filed with the Building Code Council. Energy L. § 11-109(2). According to guidance from the Department of State, Codes Division, the Energy Code provides for the use of "above code programs," such as Energy Star, to demonstrate compliance with the Energy Code. That is, a code enforcement officer is permitted to accept national, state or local energy efficiency programs that exceed the energy efficiency required by the Energy Code; specifically named programs include Energy Star and LEED. However, compliance with Energy Star, by itself, does not automatically equate to compliance with the Energy Code.
42. 51 A.D. 3d 1263, 857 N.Y.S.2d 804 (3d Dep't 2008).
43. A special relationship may arise in the following ways: "(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when a municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation." *Id.* at 1264, quoting *Pelaez v. Seide*, 2 N.Y.3d 186 (2004).
44. *O'Connor v. City of New York*, 58 N.Y.2d 184 (1983); *Sanchez v. Village of Liberty*, 42 N.Y.2d 876 (1977).
45. *O'Connor, supra* note 44.

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