

# Greenhouse Gases And Commercial Real Estate

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**The legal landscape surrounding greenhouse gases is rapidly changing. For the real estate attorney, it is critical to understand these new developments.**

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**CLIMATE CHANGE** has been defined as statistically identifiable changes in the state of the climate that persists for an extended period, typically decades or longer. Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report 30* (2007). Increases in greenhouse gases (GHGs) in the atmosphere have a climate warming effect because they trap heat. *See generally* U.S. Environmental Protection Agency, Basic Information, <http://www.epa.gov/climatechange/basicinfo.html>. Increases in the atmospheric concentrations of GHGs therefore contribute to climate change. The principal greenhouse gases that enter the atmosphere because of human activity are carbon dioxide, methane, nitrous oxide, and fluorinated gases. *See generally* U.S. Environmental Protection Agency, Greenhouse Gas Emissions, <http://www.epa.gov/climatechange/emissions/index.html#ggo>. The principal GHG emitted as a result of human activity in the United States is carbon dioxide (CO<sub>2</sub>), which represents about 85 percent of total GHG emissions. Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44354, 44402 (July 30, 2008). CO<sub>2</sub> enters the atmosphere primarily from the burning of fossil fuels (oil, natural gas, and coal) to generate electricity, heat buildings, power ve-

hicles, and operate factories. Global emissions of CO<sub>2</sub> grew by 80 percent between 1970 and 2004. Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report* 36 (2007). The energy used to heat and power buildings in the U.S. currently makes up about 38 percent of the nation's total CO<sub>2</sub> emissions. U.S. Department of Energy, 2008 Buildings Energy Data Book ch. 1, p. 20 (Nov. 2008). Building emissions are projected to increase and are expected to contribute approximately 43 percent of the U.S. total of CO<sub>2</sub> emissions by 2030. *Id.* U.S. building emissions nearly equal the aggregate carbon emissions from the countries of Japan, France, and the United Kingdom. *Id.* Residential and commercial buildings in the United States use more energy and emit more GHGs than the U.S. transportation sector. Energy Information Administration, U.S. Department of Energy, *Energy Consumption by Sector Overview* (2008).

These and similar facts have propelled the “green building” movement in the United States. This movement is a subset of the larger climate change debate. The green building movement seeks to lessen anthropogenic climate change that may be caused by the built environment through the development of advanced building design and maintenance technologies and the use of sustainable products in the construction and rehabilitation of residential and commercial properties. The components of a “green building” and how green buildings reduce GHG emissions are described in a number of varied publications. *See generally* Mark J. Bennett et al., *Critical Issues in Environmental Law: Green Buildings and Sustainable Development* (Matthew Bender 2008); *see also* Margaret McInerney, *Overview of LEED and Green Globes Rating System*, <http://greenlaw.blogspot.com/2008/06/guest-column-overview-of-leed-and-green.html>.

As a companion to the technological advancements taking place in building design and maintenance, there is also a rapidly changing legal en-

vironment in which the green building movement is progressing. Notwithstanding the current pause in the residential and commercial real estate markets, these legal issues are expected to accelerate at a rapid rate in the immediate future. The climate change debate has sparked initiatives to address GHGs emissions at all levels (local, state, and federal) and branches (legislative, executive, and judicial) of government. It is imperative that current and future investors in, and lenders to, the built environment anticipate these legal changes as they will have a significant, although not necessarily intended, impact on investment value. This article will highlight some of these legal changes and provide advance warning regarding the need to “green” real estate investment decisions and loan underwriting.

**FEDERAL LANDSCAPE** • In 1999, the State of Massachusetts, along with numerous other states and environmental organizations (the “Petitioners”), petitioned the Environmental Protection Agency (EPA) to regulate GHG emissions from new motor vehicles. The Petitioners argued that the EPA had a mandatory duty to regulate GHGs under Section 202(a)(1) of the Clean Air Act (CAA or Act). After receiving extensive comments, the EPA denied the petition and refused to proceed with any rulemaking. *Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52,922 (Sept. 8, 2003). The EPA reasoned that it lacked authority under the CAA to issue mandatory regulations to address global climate change. Moreover, even if such authority did exist, the EPA could utilize its discretion to not exercise that authority arguing that it would be “unwise” to do so at the time, and any such regulation would be an unsatisfactory piecemeal approach. *Id.*

Following the EPA's denial, Petitioners brought suit in the United States Court of Appeals for the District of Columbia Circuit. *See Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005). In 2005, a split

panel sided with the EPA and rejected Petitioner's suit, finding "that the EPA Administrator properly exercised his discretion under §202(a)(1) in denying the petition for rule making." *Id.* at 58. This decision was based, in part, on the Court's finding that both scientific evidence and policy considerations may influence the EPA Administrator's judgment in deciding whether to regulate greenhouse gas emissions. *Id.* at 57-58.

On April 2, 2007 the Supreme Court reversed the lower court's holding with a five-justice majority. After dealing with certain procedural aspects of the case, the Supreme Court addressed two specific issues: "[W]hether EPA has the statutory authority [under the Clean Air Act] to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute." *Massachusetts v. EPA*, 594 U.S. 497, 505 (2007). The Court had "little trouble" concluding that the EPA has statutory authority to regulate greenhouse gas emissions under the Clean Air Act. *Id.* at 528. Section 202(a)(1) of the Clean Air Act provides:

"The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."

42 U.S.C. §7251(a)(1). Importantly, for purposes of the commercial real estate community, under the Clean Air Act the term "air pollutant" is broadly defined to include "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive substance or matter which is emitted into or otherwise enters

the ambient air." 42 U.S.C. §7602(g). The Court held that greenhouse gas emissions are, "without a doubt," physical and chemical substances emitted into the ambient air that fall within the Act's "sweeping definition of air pollutant." *Massachusetts v. EPA*, *supra*, at 528-29.

Having determined that the EPA is charged with the statutory authority to regulate greenhouse gas emissions, the Court addressed the EPA's use of its discretion when exercising this authority. In particular, the Court held that although the EPA Administrator may exercise "its judgment" under Section 202(a)(1), that judgment must relate to whether an air pollutant causes or contributes to air pollution and whether such pollutant would endanger public health or welfare. *Id.* at 532-33. Such judgment cannot be based on the EPA's policy preferences, and the exercise of that judgment must relate to whether it is reasonable to anticipate that the air pollutant endangers public health or welfare. Explicitly, the Court held that "[u]nder the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do." *Id.* at 533. It is important to note that the Court did not hold that the EPA must regulate greenhouse gas emissions, but instead held that the EPA must make an "endangerment finding" or explain why an endangerment finding is not appropriate. The EPA Administrator's policy preference should not be a part of the analysis in making this finding. It was the EPA's failure to offer a reasoned explanation for its refusal to make an endangerment finding that ultimately led the Court to hold that the Agency's action was "arbitrary, capricious, ... or otherwise not in accordance with law." *Id.* at 534. Consequently, the Court reversed the judgment of the lower court and remanded the case back to the EPA.

In response to the Supreme Court's decision, on July 17, 2008 the EPA issued a "non-consensus" Advance Notice of Proposed Rulemaking (ANPR) seeking public comment, primarily regarding the EPA's regulation of greenhouse gas emissions under the Clean Air Act. The ANPR requested comments not only with respect to new motor vehicles but from other sources as well, including stationary sources such as buildings.

The ANPR contained an interesting preamble by the EPA and memoranda from eight federal agencies and executive offices. In the preamble, the then EPA Administrator stressed that the Clean Air Act is "an outdated law...[that] is ill-suited for the task of regulating global greenhouse gases" and that attempting to regulate GHG emissions under the CCA "would inevitably result in a very complicated, time-consuming and, likely, convoluted set of regulations." *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. at 44355 (July 30, 2008). Additionally, the EPA Administrator noted the far-reaching implications that would result if the EPA regulates GHGs under the Act, stating:

"[I]t has become clear that if EPA were to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act, then regulation of smaller stationary sources that also emit GHGs—such as apartment buildings, large homes, schools, and hospitals—could also be triggered. One point is clear: The potential regulation of greenhouse gases under any portion of the Clean Air Act could result in an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land."

*Id.* at 44,355. Similarly, the Secretaries of the Departments of Agriculture, Commerce, Transportation and Energy stressed that "the Clean Air Act is

fundamentally ill-suited to the effective regulation of GHG emissions." *Id.* at 44,359. It is predicted that the "regulation of GHG emissions under the Clean Air Act would likely extend permitting requirements and emissions controls to many sources not previously subject to Clean Air Act regulation, such as large buildings heated by natural gas." *Id.* at 44,360. Moreover, this could mean that the EPA exercises de facto zoning authority "over thousands of what formerly were local or private decisions, impacting the construction of schools, hospitals, and commercial and residential development." *Id.* The Office of Management and Budget, in its comments, illustrates this point stating that "regulation under almost any section of the [Clean Air] Act would trigger [regulatory programs], which could require case-by-case EPA permitting covering building design for large office and residential buildings, hotels, retail stores and other similarly-sized projects." *Id.* at 44,357.

Although the most interesting developments at the Federal level to date have occurred in the judicial and executive branches of government, it is worth noting that several recent legislative proposals have been introduced that deal with various aspects of climate change, including: Investing in Climate Action and Protection Act (H.R. 6186); Save Our Climate Act of 2007 (H.R. 2069); Safe Climate Act of 2007 (H.R. 1590); Global Warming Pollution Reduction Act (S. 309); Clean Power Act (S. 1201); and the Low Carbon Economy Act of 2007 (S. 1766). Some of these proposals are sector-specific, such as the Clean Power Act, while others, such as the Lieberman-Warner Climate Security Act of 2007, seek economy-wide action. The Lieberman-Warner proposal, which was the first comprehensive global warming bill to get the approval of the Senate Environmental and Public Work Committee, calls for a "cap-and-trade" approach to reduce greenhouse gas emissions. Under the proposed bill, large-scale emitters of greenhouse gases, such as manufacturers and utilities, must an-

nually submit emissions allowances to EPA. The allowance amounts will correspond with the level of emissions produced by each entity. The allowances will be auctioned by the federal government and distributed to recipients who will then sell the allowances. Overall, the bill proposes a reduction in greenhouse gas emissions to 1990 levels by 2020. Thereafter, emissions will be reduced approximately 65 percent below 1990 levels by 2050.

While many of these proposals offer some version of a Lieberman-Warner cap and trade scheme for GHG allowances, others impose taxes on GHG emissions, and still others seek amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934 to require climate risk disclosure by public companies in their securities filings. For example, both the Global Warming Pollution Reduction Act (S. 309) and the Global Warming Reduction Act of 2007 (S. 485) direct the Securities and Exchange Commission (SEC) to promulgate regulations that require public-filing companies to disclose any financial risk resulting from the company's net global warming pollution emissions. In addition, the Greenhouse Gas Accountability Act of 2007 (H.R. 2651) requires certain filers to disclose their greenhouse gas emissions in their annual reports. Even the recently enacted Emergency Economic Stabilization Act of 2008 (Title I of the 2008 Act is the Troubled Assets Relief Program (TARP)) contained, among other things, numerous tax incentives for energy efficient buildings. For example, TARP revised the Energy Policy Act of 2005, giving building owners a tax deduction through 2013 of as much as \$1.80 per square foot if they "green" new or existing commercial buildings. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008).

The Obama administration is likely to propose a number of initiatives with respect to the built environment. The Administration's goal is to make all new buildings carbon neutral (no emissions) by 2030, with a national goal of making new build-

ings 50 percent, and existing buildings 25 percent, more efficient by 2020. [BarackObama.com](http://www.barackobama.com), Barack Obama and Joe Biden: Promoting a Healthy Environment available at <http://www.barackobama.com/pdf/issues/EnvironmentFactSheet.pdf>. To promote this carbon neutrality, President Obama supports developing a grant program for early adopting localities and states that implement new building codes that promote greater energy efficiency. *Id.*

President Obama's initiatives were evidenced in the American Recovery and Reinvestment Act of 2009 ("Stimulus Package"), which committed approximately \$106 billion for climate change-related programs including \$85 billion for direct spending measures and \$21 billion for renewable energy tax breaks. See generally Committee on Appropriations, Senate Finance, House Ways & Means Committee, 2009. The Stimulus Package primarily seeks to increase research regarding renewable energy and climate change, promote energy efficient products and services, and to deploy renewable energy technologies.

**REGIONAL, STATE AND LOCAL INITIATIVES** • Many states and municipalities have not waited for federal legislation and have chosen to address GHGs emissions on their own. Several key regional initiatives have been formed to reduce greenhouse gas emissions including the Regional Greenhouse Gas Initiative (RGGI), the Western Climate Initiative (WCI), the New England Governors/Eastern Canadian Premiers Climate Change Auction Plan (NEG-ECP), and the Midwestern Greenhouse Gas Reduction Accord. Of these initiatives, the RGGI and WCI arguably have the greatest ability to reduce greenhouse gas emissions through well coordinated cap and trade programs. The RGGI is comprised of 10 Northeastern and Mid-Atlantic states (Connecticut, Delaware, Maine, Maryland, Massachusetts, New

Hampshire, New Jersey, New York, Rhode Island, and Vermont), which have collectively agreed to adopt a regional cap and trade program to reduce carbon dioxide emissions from power plants beginning in 2009. Similarly, the WCI is composed of seven Western states (Arizona, California, Montana, New Mexico, Oregon, Utah, and Washington) and four Canadian provinces (British Columbia, Manitoba, Ontario, and Quebec), which have agreed to reduce their aggregate greenhouse gas emissions 15 percent below 2005 levels by 2020 using a market-based cap and trade program. This initiative is broader than the RGGI because it calls for action in all sectors of the economy, including, stationary sources, energy supply, residential, commercial, industrial, transportation, waste management, agriculture, and forestry.

### **California**

The state of California has been at the forefront of these local and state initiatives. In 2004, Governor Schwarzenegger issued executive order S-20-04 (the "Order"), otherwise known as his Green Building Initiative. Exec. Order No. S-20-04 (July 27, 2004). This Order acknowledges that commercial buildings in California account for 36 percent of the state's electricity usage and produce a large proportion of greenhouse gas emissions. In addition, the Order notes that state-owned buildings use more than \$500 million worth of electricity every year. Consequently, the Order requires a reduction in electricity usage for all state-owned, funded or leased facilities, and orders state agencies and departments to, among other measures, reduce energy purchases for state-owned facilities by 20 percent by 2015. To accomplish this task the Governor directed agencies to design, construct, and operate all new and renovated state-owned buildings to achieve Leadership in Energy and Environmental Design (LEED) Silver or higher certification. (LEED was developed and is maintained by

the United States Green Building Council. Under the LEED rating system projects accrue "points" to meet the minimum requirements of certification, and those projects that accrue additional points are rated "Bronze," "Silver," "Gold," or "Platinum.")

In 2006, California passed AB 32, also known as the Global Warming Solutions Act (the Act). The Global Warming Solutions Act is codified at Cal. Health & Safety Code §38,500. Under this Act, the California Air Resource Board (CARB) is required to adopt regulations by 2012 that reduce GHG emissions to 1990 levels by 2020. By January 1, 2012 the greenhouse gas rules adopted by the CARB will take effect and be legally enforceable. In response to this mandate, CARB developed the Climate Change Proposed Scoping Plan in October 2008 (the "Scoping Plan"), which outlines the main strategies that will be used to reduce greenhouse gas emissions in the State of California. California Air Resources Board, Climate Change Proposed Scoping Plan (Oct. 2008). Acknowledging that approximately 25 percent of California's greenhouse gas emissions come from buildings, the Scoping Plan outlines a lengthy Green Building Strategy that seeks to "[e]xpand the use of green building practices to reduce the carbon footprint of California's new and existing inventory of buildings." *Id.* at 57. The Scoping Plan also calls for an expansion of the goals laid out in July 2008 by the California Building Standards Commission (CBSC) in its Green Building Standards Code (Code). The CBSC is the agency responsible for administering California's building codes, and the Green Building Standards Code will be codified in Title 24, Part 11 of the California Code of Regulations, effective Aug. 1, 2009. It is currently available at [www.documents.dgs.ca.gov/bsc/2009/part11\\_2008\\_calgreen\\_code.pdf](http://www.documents.dgs.ca.gov/bsc/2009/part11_2008_calgreen_code.pdf). The Code applies to "the planning, design, operation, construction, replacement, use and occupancy, location, maintenance, removal and demolition of every building or structure or any appurtenances connected or attached

to such building structures throughout the State of California.” *Id.* at §101.3. The Code contains both mandatory and voluntary provisions that seek to “improve public health, safety, and general welfare by enhancing the design and construction of buildings through the use of building concepts having a positive environmental impact and encouraging sustainable construction practices [with respect to] planning and design, energy efficiency, water efficiency and conservation, material conservation and resource efficiency, [and] environmental air quality.” *Id.* at §101.2.

The Scoping Plan recommends that local governments adopt “beyond-code” green building mandates, and by 2011 a “target should be established such that a quarter of all new buildings reduce energy and water consumption by at least 25 percent beyond code.” Climate Change Proposed Scoping Plan 57-58. The Scoping Plan also calls for reductions in greenhouse gas emissions for new and existing buildings. With respect to new State buildings, the Scoping Plan highlights that “[t]he State of California will set an example by requiring all new State buildings to exceed existing Green Building Initiative energy goals and achieve nationally-recognized building sustainability standards such as LEED-New Construction (LEED-NC) “Gold” certification.” *Id.* at 58. In addition, existing State buildings must be retrofitted to achieve LEED-Existing Buildings “Silver” certification. *Id.*

Rather than waiting for CARB to develop and implement statewide regulations to reduce greenhouse gas emission, many counties and municipalities in California have developed their own strategies to achieve GHG reductions. For example, approximately 27 local governments in California have enacted some form of mandatory “green” building ordinances, including Los Angeles (Los Angeles, Cal., Ordinance No. 179820), and San Francisco (San Francisco, Cal., Ordinance No. 180-08). *See* Office of the California Attorney General, Local Government Green Building Ordinances in Cali-

fornia, at 1-2 (2008), *available at* [http://ag.ca.gov/globalwarming/pdf/green\\_building.pdf](http://ag.ca.gov/globalwarming/pdf/green_building.pdf). These local ordinances typically are formulated around an independent rating systems, such as LEED. Los Angeles mandates that new nonresidential buildings over 50,000 square feet and certain larger mixed use and residential buildings must achieve LEED certification. Other smaller localities require more stringent levels of certification. The City of Albany, for instance, requires city sponsored new construction and renovations over 5000 square feet and commercial construction and renovation projects over 5000 square feet to obtain LEED Gold certification. Albany, Cal., Ordinance No. 06-016; *see also* City of Albany, City of Albany Green Building Standards of Compliance (July 3, 2007). In addition, a number of cities in California “have chosen to prescribe specific green building measures in lieu of or in addition to required ratings” which typically seek to “address the particular resource needs of a community.” Local Government Green Building Ordinances in California, 4. For example, the City of Pasadena requires that virtually all new construction achieve LEED 3.1 credit for Water Efficiency, which requires a 20 percent reduction in water usage. City of Pasadena, Pasadena Green Building Program, *available at* [http://www.ci.pasadena.ca.us/permitcenter/greencity/building/gbprogram.asp#Green\\_Building\\_Ordinance](http://www.ci.pasadena.ca.us/permitcenter/greencity/building/gbprogram.asp#Green_Building_Ordinance).

Most cities in California have adopted a carrot-and-stick approach to promote green building initiatives, simultaneously promoting strict enforcement while providing incentives for developers to exceed existing standards. Cities utilize various enforcement mechanisms to ensure compliance with green building requirements. Some cities require a development plan checked before the issuance of a building permit. Local Government Green Building Ordinances in California 7-8. Other cities require verification before the issuance of an occupancy permit or final inspection. *Id.* Common incentives include rebates and expedited permit review or in-

spections. For instance, Los Angeles provides expedited permit processing for those projects meeting LEED Silver certification or higher. *Id.* at 8.

On August 4, 2008, San Francisco mayor Gavin Newsom signed into law stringent new green building codes, which will be phased in by 2012. Mayor's Office Press Room, Mayor Newsom Signs Groundbreaking Green Building Ordinance to Reduce Greenhouse Gas Emissions, *available at* [http://www.sfgov.org/site/mayor\\_index.asp?id=85918](http://www.sfgov.org/site/mayor_index.asp?id=85918). The new enactment applies to newly constructed commercial buildings of more than 5,000 square feet, new residential buildings over 75 feet tall, and renovations of buildings with more than 25,000 square feet. *Id.* In particular, the city requires LEED Gold certification for new large commercial buildings over 25,000 square feet after 2012. These new requirements seek to respond to San Francisco's 2004 Climate Action Plan that "found that energy use in buildings and facilities is responsible for approximately 50 percent of San Francisco's greenhouse gas emission," and also to contribute to San Francisco's commitment to reduce GHG emissions 20 percent below 1990 levels by 2012. *Id.*

### **Other States And Municipalities**

Although California has been instrumental in promoting climate change regulations at the state and local level, other notable statutes and ordinances have been adopted in many states and cities around the country. Some examples of noteworthy initiatives include Boston, New York City, New York State, and Washington, D.C.

On January 10, 2007, additions were made to the Boston Zoning Code which require that all private and public development projects over 50,000 square feet are LEED certifiable. Boston Zoning Code and Enabling Act, Vol. 1, Art. 37 (2007). *See also* City of Boston, The City of Boston's Climate Action Plan 10 (December 2007). In addition, projects can secure "Boston Green Building Credits" if

they address transportation, the electrical grid, historical preservation, or groundwater. *Id.* The Boston Redevelopment Authority (BRA) determines whether a proposed project complies with the applicable zoning requirements, with assistance from Boston's Interagency Green Building Committee. If a project fails to comply with the necessary requirements, then a building permit or use permit will not be issued. *Id.*

With respect to New York City, Local Law 86, signed by Mayor Michael Bloomberg on October 3, 2005, requires all municipal construction of new buildings and additions and renovations of existing buildings exceeding \$2 million to earn LEED Silver certification. New York, N.Y., Local Law 86. LEED Silver certification is also required for all non-residential, capital projects funded no less than 50 percent or \$10 million by the City and costing at least \$2 million. *Id.*

In legislation adopted in 2000, New York State established the Green Building Tax Credit Program, which "provides for tax credits to owners and tenants of eligible buildings and tenant spaces which meet certain 'green' standards" that can be used against various business and personal income taxes. New York State Department of Environmental Conservation, New York State Green Building Tax Credit Legislation Overview 1. Those buildings that are eligible for tax credits include:

- Hotels and office buildings with at least 20,000 square feet of interior space;
- Residential buildings with at least 12 units and 20,000 square feet of interior space;
- Residential buildings having at least two units that are part of single or phased construction with at least 20,000 square feet of interior space, provided that more than 10,000 square feet is under construction or rehabilitation during any particular phase; and
- Any combination of the first three categories above.



*Id.* at 2. (Note that the New York State Green Building Tax Credit Legislation Overview is available at [www.dec.ny/energy/1540.html](http://www.dec.ny/energy/1540.html), while the actual law can be found at N.Y. Tax Law section 19.)

On June 10, 2001, then Governor George Pataki signed Executive Order No. 111 entitled “Green and Clean: State Buildings and Vehicles.” Exec. Order No. 111 (June 10, 2001). Executive Order No. 111 encourages state projects to incorporate LEED standards where possible and to seek LEED certification. *Id.* New York State Energy Research and Development Authority (NYSERDA) offers incentives and technical assistance to state agencies seeking to meet the goals of this Executive Order. *Id.* NYSERDA assumed additional responsibility on September 29, 2008 when Governor Paterson signed A. 10684, which authorizes the agency “to create and administer a green residential building program.” See N.Y. Pub. Auth. Law §1872.

On December 5, 2006, the Washington, D.C. City Council adopted Bill #B16-0515 entitled the “Green Building Act.” See D.C. Code §6-1451.01. Beginning in 2009 mandatory requirements for new construction and improvements of private, commercial buildings will be imposed. *Id.* Specifically, private, non-residential buildings of at least 50,000 square feet must prepare a green building checklist to submit along with the building permit application. *Id.*

**LITIGATION RISK** • Another notable development in the climate change legal landscape for commercial real property is the number of lawsuits popping up all over the country regarding the need and requirement for greenhouse gas analysis in development decisions. Nowhere better is this demonstrated than in a string of cases in California’s superior courts. See generally Amanda Bronstad, *Global Warming As A Factor In Construction*, 31 Nat’l Law Journal 6 (Sept. 22, 2008). A few court cases held that climate change analysis is not required for an Environmental Impact Report (EIR) under the

California Environmental Quality Act (CEQA). CEQA is codified at Cal. Pub. Res. Code §21000, et seq. In particular, *Highland Springs v. City of Banning*, Case No. RIC 460950, Riverside Co., Cal. Super. Ct. (January 29, 2008), was the first California case to affirmatively state that a development project was not required to assess GHG emissions. The court held that respondent, City of Banning, had not abused its discretion under CEQA for failing to consider the GHG impact of a project involving the construction of 1,453 residential units, a school site, a neighborhood park, and related roadways and utilities at an area at the southern base of the San Bernardino Mountains. The court was asked to determine whether the City of Banning abused its discretion because the final EIR, among other things, did not address the project’s impact on climate change. The court stated it “understands the importance of greenhouse gas emissions,” but that “no law required the Banning City Council to consider global warming at the time it approved [the] project.” *Id.* at 19.

In *Center for Biological Diversity v. City of Perris*, Case No. RIC 477632, Riverside Co., Cal. Super. Ct. (May 9, 2008), the Center for Biological Diversity (CBD) challenged an EIR alleging that it improperly failed to consider a project’s GHG impact, to quantify its projected energy use, or analyze energy conservation possibilities. The proposed project involved a 520,000 square foot commercial development. The court, upholding the City’s determination, concluded that analysis of the shopping center’s impact on GHG emissions was unnecessary, as such analysis would be speculative. According to the CEQA Guidelines, “[i]f after thorough investigation, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact.” 14 Cal. Code Regs. tit. 14, §15145.

The last superior court case to hold that a climate change assessment is not required is *Westfield*

*LLC v. City of Arcadia*, Case No. BS 108937, Los Angeles Co., Cal. Super. Ct. (July 23, 2008). Westfield, LLC owns and operates the Westfield Santa Anita Mall (the “Westfield Mall”). The proposed development, an 800,000 square foot shopping mall, would be placed adjacent to the Westfield Mall in the parking lot of the Santa Anita racetrack. Westfield maintained that the close proximity of the development would cause it unique environmental harm, including negative traffic, parking, sewer, and air quality impacts. Petitioners alleged, among other things, that the final EIR failed to sufficiently analyze the project’s impact on global warming.

According to the *Westfield* court, quantification of carbon dioxide emissions from the project was adequate for a climate change analysis under CEQA. The court reasoned that “it is impossible for an agency to analyze or make any determination on its own whether there will be a significant climate change impact from greenhouse gas emissions associated with a project.” *Id.* at 24. The judge identified several other reasons why additional analysis was not required. Most notably, that “[t]he issue of global warming is a matter of hot political debate, and there is no currently accepted national wisdom on its validity.” *Id.* The court also noted the lack of regional guidance from either the Air Resources Board or the South Coast Air Quality Management District (SCAQMD). *Id.* Besides the lack of national consensus and regional guidance, the court highlighted that the climate change impact from any one project “necessarily will be insignificant.” *Id.* In discussing the de minimis nature of greenhouse gas emissions from one project, the court said, “[T]he greenhouse gases emitted by any development project simply are not a significant contributor to [the] climate change problem.” *Id.* at 24-25, note 20.

Another string of cases, however, has reached the opposite conclusion. In *Environmental Council of Sacramento v. California Dep’t of Transp.*, Case No. 07-CS00967, Sacramento Co., Cal. Super. Ct. (July

15, 2008), petitioners, Environmental Council of Sacramento and Neighbors Advocating Sustainable Transportation, challenged respondent, the California Department of Transportation (“Caltrans”) regarding the inadequacy of a final EIR for a proposed addition of high-occupancy vehicle lanes to a busy California highway. Petitioners alleged that the final EIR was insufficient, primarily because it did not provide regulatory and scientific background regarding global warming or consider the project’s climate change impact. Caltrans argued that it was impossible to quantify the project’s GHG emissions “because there is no accepted federal, state, or regional methodology for GHG emission and climate change impact analysis,” and that “any analysis of the Project’s impact on global warming is too speculative for evaluation under CEQA.” *Id.* at 10.

The court rejected these arguments noting that “nothing in the administrative record supports Caltrans’ conclusion that it is not possible to quantify the Project’s GHG emissions.” *Id.* at 11. CEQA requires an agency to use its “best efforts,” meaning that “[o]nly after thorough investigation may an agency find that a particular impact is too speculative for evaluation and terminate its discussion of the impact.” *Id.* In this case Caltrans failed to perform an investigation. Recognizing this failure, the court held that “Caltrans must meaningfully attempt to quantify the Project’s potential impacts on GHG emissions and determine their significance, or at the very least explain what steps it has taken that show such impacts are too speculative for evaluation.” *Id.*

In *Center for Biological Diversity v. City of Desert Hot Springs*, Case No. RIC 464585, Riverside Co., Cal. Super. Ct. (August 6, 2008), petitioners, CBD and Sierra Club, sought to invalidate an EIR for a luxury resort covering 1,766 acres of residential and commercial development. The proposal called for the development of roughly 2,700 homes, one million square feet of commercial space, a 400-room

hotel, an amphitheater, and two golf courses in the Coachella Valley. Petitioners challenged the insufficiency of the EIR on numerous grounds, including its failure to analyze the development's impact on global warming. The court held in this recent case that respondent, City of Desert Hot Springs, "failed to make a meaningful attempt to determine the project's effect upon global warming before determining that any such analysis would be speculative." *Id.* at 1. Respondent argued that analysis was not necessary because "it would be entirely speculative." *Id.* at 2. The court acknowledged that no regulatory agency has provided direction or developed analytical tools that could be used to conduct the required GHG analysis. *Id.* Notwithstanding this lack of help, however, the court noted that the city was still required to make a "meaningful attempt" to analyze the project's greenhouse gas emissions before terminating discussion of the impact. *Id.* at 1.

In another 2008 case, *Natural Resources Defense Council v. South Coast Air Quality Management District*, Case No. BS 110792, Los Angeles Co., Cal. Super. Ct. (July 29, 2008), petitioners, Natural Resources Defense Council, Inc. (NRDC), Communities for a Better Environment, Coalition for a Safe Environment, and California Communities against Toxics sought to set aside the SCAQMD's decision to certify a Program Environmental Assessment (PEA). Petitioners argued that the PEA inadequately failed to disclose or analyze the greenhouse gas emissions that would result from SCAQMD's decision to sell pollution credits, originally set aside for public projects, to private developers and utilities. Specifically, the SCAQMD approved the sale of pollution credits for the construction of eleven natural gas-fired power plants.

The court noted that the construction of gas-fired power plants would "contribute directly and cumulatively to the addition of new greenhouse gases into the Basin" *id.* at 21, and that such knowledge was neither "speculative nor uncertain." *Id.* at 21-22. The court stated that CEQA "requires that the PEA include analyses of any significant environmental effects of a proposed project," which means "a substantial or potentially substantial adverse change in the environment." *Id.* at 15. The court recognized the greenhouse gas emissions from the power plants would constitute a significant environmental effect, and held that "[d]espite these known substantial environmental consequences, the PEA fails to identify fully these effects, fails to adequately analyze or quantify them and, as a result, fails to consider mitigation measures, in violation of CEQA." *Id.* at 21.

**CONCLUSION** • Supreme Court cases; federal regulation; local ordinances; environmental litigation. GHG analysis is now a driving force in commercial real estate development and over time is sure to have a significant impact on investment value. Premiums are likely to be paid for "green buildings and projects" and discounts applied to "brown buildings and projects." Investors and lenders must understand the issues and risks in their existing portfolios, and incorporate climate change analysis in their future investment and underwriting decisions. The reduction of GHG emissions from the built environment has become a national, state and local priority. The legal regimes needed to accomplish this goal are upon us and rapidly being implemented.