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Energy Benchmarking Ordinances: Coping With the New Mandate on Retail Owners and Tenants

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In May 2013, the City of Boston enacted the Building Energy Reporting and Disclosure Ordinance ("BERDO"), joining a growing number of major U.S. cities that require certain building owners to monitor, report and disclose energy and water usage data for their properties. At least nine other U.S. cities (Austin, Texas; Cambridge, Massachusetts; Chicago; Minneapolis; New York City; Philadelphia; San Francisco; Seattle and Washington, D.C.) and two states (California and Washington) have enacted similar mandates, which are commonly referred to as "energy benchmarking" ordinances or laws. In 2014, Montgomery County, Maryland, became the first county to pass an energy benchmarking ordinance.

This article discusses the underlying rationale for energy benchmarking and the competing perspectives of proponents and opponents of government-mandated energy benchmarking programs. It also discusses several common elements of energy benchmarking ordinances and offers practice tips for retail owners and tenants when their local government is contemplating adopting an energy benchmarking ordinance.

"You Can't Manage What You Don't Measure"

The underlying rationale for energy benchmarking is best summarized by the management adage: "You can't manage what you don't measure." The U.S. Environmental Protection Agency (EPA) notes that benchmarking informs building owners and tenants about how they use energy, where they use it, and what drives their energy use. Benchmarking enables participants to identify opportunities for effective energy management and improvements and to compare the performance of their properties against industry peers and provides reference points necessary for tracking energy-related improvement projects and assessing their effectiveness. According to the EPA, between 2008 and 2011 organizations that consistently tracked their energy usage in its ENERGY STAR® Portfolio Manager® tool ("Portfolio Manager") experienced "annual energy savings of 2.4 percent on average, with total savings reaching an average of 7 percent over the period of analysis" (U.S. EPA, "How Will ENERGY STAR® Benefit My Shopping Center?").

ICSC has created an alternative benchmarking tool—the ICSC Property Efficiency Scorecard—that is specifically tailored to the shopping center industry. The ICSC Property Efficiency Scorecard is a Web-based application that allows retailers to track energy and water usage, recycling and waste, and green operations practices and to compare performance against other buildings and industry peers (www.icscscorecard.org).

In addition to increased energy efficiency, local governments view energy benchmarking ordinances as a means of reducing greenhouse gas (GHG) emissions and affecting climate change. The "whereas" clauses of BERDO, for example, state that "energy use in buildings accounts for approximately three-quarters of Boston's emissions of gases that cause climate change." They also note that BERDO is one component of the Boston Climate Action Plan, which calls for reducing GHG emissions in Boston by 25 percent by 2020, and by 80 percent by 2050. Cambridge likewise views its Building Energy Use Disclosure Ordinance as a "key step in the effort" to reduce the city's GHG emissions.

Opponents of government-mandated energy benchmarking question whether such mandates are an effective means of reducing GHG emissions and affecting climate change. Moreover, at least one study of energy benchmarking ordinances has even questioned their effectiveness at improving energy efficiency, concluding that "there currently is no real evidence that these mandatory programs lead to any changes whatsoever in energy use." (Stavins, Robert N., Todd Schatzki and Jonathan Borck. "An Economic Perspective on Building Labeling Policies." Analysis Group, March 28, 2013) Energy benchmarking ordinances can also have a disproportionate impact on small retailers, given the administrative and financial expense of complying with the reporting, disclosure and potential audit requirements.

Common Elements of Energy Benchmarking Ordinances

Energy benchmarking ordinances differ from one city to another, but generally contain several common elements, including reporting requirements, building type and size thresholds, disclosure requirements and additional requirements such as mandatory audits and efficiency upgrades. Each of these common elements is discussed further below.

Reporting Requirements
A key component of any energy benchmarking ordinance is the requirement that the owner of each building report energy usage data (and in some cases, water usage data) to the city on an annual basis. Energy benchmarking ordinances typically require that the reporting be done using Portfolio Manager, an online tool developed and maintained by the EPA for measuring and tracking energy and water consumption, as well as GHG emissions nationwide, (http://www.energystar.gov/buildings/index.cfm). Some benchmarking ordinances, including BERDO, permit the use of benchmarking tools other than Portfolio Manager, provided that the alternative is first approved by the city.

For affected shopping center owners, the challenge presented by these reporting requirements is in obtaining energy and water use data from tenants, particularly in multi-tenant buildings where each space is separately metered and each tenant is direct-billed by the energy provider. To address this problem, energy benchmarking ordinances typically require that tenants respond to an owner's request for energy information within a certain time period. In Seattle, for example, a tenant that fails to provide energy information within thirty days of an owner's request is subject to a fine of $150 for a first violation and $500 for the second and subsequent violations (Seattle Municipal Code § 22.920.120).

Another way that some cities also address the data collection issue is by working with utility companies to make "whole-building" energy use data available to building owners, thereby eliminating the need to collect information from individual tenants. Both Boston and Chicago, for example, allow building owners to obtain aggregate energy usage data for multi-tenant buildings directly from the utility companies. This approach can be problematic under reporting deadlines when utility companies do not respond in a timely way to owners' requests.

Building Type and Size Thresholds
Energy benchmarking ordinances generally apply to retail and other types of commercial buildings, as well as buildings owned by the municipality. Most ordinances also apply to multifamily residential buildings. Of the ten U.S. cities with known energy benchmarking ordinances, only the Minneapolis, Philadelphia, and San Francisco ordinances do not cover multifamily buildings.

Energy benchmarking ordinances generally also include a building size threshold that exempts smaller buildings. The most common size threshold for commercial buildings is 50,000 square feet (Chicago, Minneapolis, New York City, Philadelphia and Washington, D.C.). The Austin and San Francisco ordinances have commercial building thresholds of 10,000 square feet, while the Boston, Cambridge and Seattle ordinances have thresholds of 35,000 square feet, 25,000 square feet and 20,000 square feet respectively. In some cases, the reporting requirements are phased in over a period of time, with larger buildings required to report first, followed by smaller ones in later years. BERDO is one example of this approach, with commercial buildings equal to or greater than 50,000 square feet required to report energy and water usage in 2014, followed by residential buildings equal to or greater than 50,000 square feet in 2015, then commercial buildings between 35,000 and 50,000 square feet in 2016, and residential buildings between 35,000 and 50,000 square feet in 2017 (City of Boston Code § 7-2.2[d]).

Disclosure Requirements
Once energy use data have been reported to the city, nearly all energy benchmarking ordinances require that the information be published on a public Web site (Seattle is the lone exception among U.S. cities). BERDO, for example, requires that the Air Pollution Control Commission publish energy- and water-use information for non-City buildings on the City of Boston Web site no later than October first of every year. The ordinance further specifies that the disclosure "shall include, at a minimum, building identification, energy intensity, greenhouse gas emissions per square foot, Energy Star rating, where available, and water consumption per square foot."

The Philadelphia, San Francisco and Seattle ordinances also require that building owners disclose energy-use data to prospective buyers or lessees. Philadelphia's Benchmarking Energy and Water Use ordinance, for example, states: "The seller or lessor of any Covered Building shall, upon request, provide prospective purchasers or prospective lessees with a copy of the building's most recent Statement of Energy Performance." In addition, San Francisco and Seattle also require that building owners disclose the benchmarking data, upon request, to current tenants and potential lenders considering an application for financing or refinancing of the property.

For affected building owners and retailers, these disclosure requirements raise the concern that some buildings, particularly historic buildings and buildings that house a high-energy-use tenant, may be stigmatized unfairly by the public disclosure. To the extent that historic preservation laws make it more difficult or costly for the owners of historic or older buildings to make energy-efficiency improvements, the age of a building may be a significant factor in its energy intensity and ENERGY STAR® ratings. The ENERGY STAR® Portfolio Manager program allows a user to adjust for variables attributed to tenant uses as part of the building characteristics input into the building's profile. More specifically, Portfolio Manager allows a user to input both multiple space types (e.g., office, data center, retail) and operational "variables" (e.g. hours of operation) as part of a building's profile (EPA, ENERGY STAR® Performance

Ratings Technical Methodology, March 2011, available at: http://www.energystar.gov/ia/business/evaluate_performance/General_Overview_tech_methodology.pdf?ada4-4789). If these tenancy variables are not included in the public disclosure, visitors to the Web site—including retailers researching available spaces for lease—may be misled by the published data, which, in turn, may negatively affect the marketability of affected buildings.

Mandatory Audits and Upgrades
In addition to the reporting and disclosure requirements, some energy benchmarking ordinances require that affected buildings undergo periodic energy audits and/or energy-efficiency upgrades. For example, BERDO generally requires that each non-exempt building complete an "energy assessment" or an "energy action" within five years of its first reporting date and every five years thereafter. An "energy assessment" generally means an ASHRAE (American Society of Heating, Refrigerating and Air-Conditioning Engineers) Level 2 Audit or alternative assessment procedure approved by the city. An ASHRAE Level 2 Audit is a detailed building survey and energy analysis that is done for the purpose of benchmarking a building and gauging its overall energy performance (see http://aea.us.org/3143-2.html).

An "energy action" is defined as an "energy efficiency project, including building upgrades or changes in operations, maintenance and behavior" that meets at least one of the following criteria: (1) reduces annual energy use intensity by at least 15% over a five-year period; (2) improves the building's Energy Star rating by at least 15 points over a five-year period; (3) results in a 15% reduction in the building's annual GHG emissions; or (4) increases the supply of renewable energy by at least 15% of annual consumption. Buildings that achieve certain energy-efficiency standards are exempt from the BERDO energy assessment or action requirements. Exempt buildings include those that have earned an EPA Energy Star certification for three of the preceding five years and those that have received a Silver-level certification or recertification under the Leadership in Energy and Environmental Design (LEED) rating system for Existing Buildings Operation and Maintenance, with at least 15 points achieved in the rating category Energy and Atmosphere.

New York's Local Law 87 (Energy Audits and Retro-Commissioning of Based Building Systems) and San Francisco's Existing Commercial Buildings Energy Performance Ordinance also require that covered buildings undergo periodic ASHRAE Level 2 Audits. Chicago's Building Energy Use Benchmarking ordinance does not require periodic audits, but does require that the reported benchmarking information be verified by a licensed professional prior to the first benchmarking deadline and every three years thereafter.

While energy benchmarking ordinances ordinarily only require periodic energy audits, retailers should be aware that these audit requirements could be a precursor to mandatory energy-efficiency improvements and potential penalties for failure to increase energy efficiency. For example, New York City, shortly after adopting its energy benchmarking ordinance, adopted an additional ordinance to impose requirements for upgrading lighting in certain buildings (New York Local Law 88, amending Ch. 3 of title 28 of the Administrative Code of New York). Mandatory upgrades and potential penalties could be a significant cost issue for small businesses owners and owners of older buildings in particular.

Practice Tips
A growing number of businesses and building owners already use energy benchmarking tools to monitor energy consumption—according to the EPA, the number of commercial, institutional and industrial facilities being benchmarked with Portfolio Manager has increased by about 50 percent in the past two years alone (U.S. EPA, "Benchmarking to Save Energy: To Protect Our Environment Through Energy Efficiency"). For shopping center owners and retailers already using Portfolio Manager, the adoption of an energy benchmarking ordinance is likely to have little or no impact on their operations. For those that are new to energy benchmarking, here are some practice tips to consider if an energy benchmarking ordinance is proposed or adopted by your community.

- *Participate in the Legislative and Regulatory Process.* Once aware of an energy benchmarking ordinance being proposed, building owners and retailers should arrange to meet with local government officials and staff before the public hearing process begins. Retailers may wish to suggest that government leaders organize informal stakeholder meetings through which affected owners and retailers and other community interests can express their comments and concerns regarding the proposed ordinance. Participating in the legislative process gives owners and retailers an opportunity to shape the substantive and procedural requirements of the ordinance with which they ultimately will have to comply.
- *Become Familiar With Benchmarking Tools.* Retailers who have never used Portfolio Manager but will be required to do so under an energy benchmarking ordinance should take advantage of available technical assistance and training programs. Most communities that have adopted an energy benchmarking ordinance have created Web sites with links to written materials such as "how-to" guides, compliance checklists and training programs that can assist building owners and tenants in understanding and complying with the requirements of the ordinance. Boston, for example, has a BERDO Web site that contains copies of the ordinance and implementing regulations, as well as a "How to Comply—User Guide" and links to online training

programs and Portfolio Manager (http://www.cityofboston.gov/eeos/reporting/default.asp). The EPA's Portfolio Manager Web site likewise contains extensive information and training opportunities for new users (http://www.energystar.gov/buildings/index.cfm).

- *Make Appropriate Changes to Lease Structure and Provisions.* Leases often create a "split-incentive barrier" to improving energy efficiency in existing buildings. In a gross lease where the taxes, insurance and operating costs are included as part of the base rent, the tenant has no financial incentive to change its operation to be more energy efficient, potentially frustrating the landlord's efforts to conserve. Conversely, in a triple net lease, where a tenant is responsible for taxes, insurance and operating expenses separately from the base rent, a landlord has little financial incentive to pay for energy efficiency improvements as the tenant, rather than the landlord, would realize the potential savings. One way to overcome this split-incentive barrier is to include in the leases a pass-through provision that would enable the owner to recover all or a portion of its capital costs for energy-efficiency improvements from the tenants. Another potential approach would be to utilize a gross lease structure with an allocated allowance for tenant utilities. Under this approach, the tenant would be responsible for utility costs that exceed an allowed amount, usually set at a relatively low baseline.

Shopping center owners who are subject to an energy benchmarking ordinance should also consider revising their leases to include provisions that clearly establish the rights and responsibilities of each party in complying with the requirements of the energy benchmarking ordinance, such as access to submeters or the release of energy- and water-use information upon request by the owner.

Conclusion

It is difficult to dispute the importance of determining building energy usage and identifying ways to make energy-related improvements to buildings as a means of helping to improve energy efficiency and reduce greenhouse gas (GHG) emissions. ICSC has shown leadership on this issue by developing the ICSC Property Efficiency Scorecard, specifically tailored to the shopping center industry. The municipal energy benchmarking ordinances that have been adopted to date do not differentiate between commercial buildings generally, and retail buildings and projects. More cities are likely to consider adopting such ordinances. To ensure that the provisions of these energy benchmarking ordinances take into account retail industry concerns, retail owners and tenants should be active early in the legislative process and work to shape their substantive and procedural requirements.

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