

## **New ASTM BEPA Standard May Serve as Safe Harbor for Emerging Building Energy Labeling, Transactional Disclosure and Benchmarking Regulations**

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Renewable energy policy in the United States has been on an erratic path in recent years, reflective of intermittent bouts of federal government stimulus and favorable regulatory policy. This article reviews the increasing role of energy efficiency in commercial real estate, driven primarily by emerging energy disclosure and labeling laws. The role of the new ASTM E2797-11 Building Energy Performance Assessment (BEPA) standard, designed to facilitate and standardize the way building energy-use information is gathered and analyzed in the regulatory compliance process, will also be addressed. Finally, potential legal implications for buyers and sellers, as well as evolving green building due diligence requirements resulting from this trend, are reviewed.

Commercial real estate (CRE), consumes approximately 36% of all electricity produced in the US. Accordingly, policy makers have begun to focus on the promotion of building-based energy efficiency as a policy area that can yield short-term results, is highly capital-efficient and, in light of the labor intensity often associated with energy efficiency projects, can drive economic development and job creation.

Various policy approaches are being implemented in the form of building energy performance labeling, benchmarking, and disclosure law and regulation. Typically, these laws require a building owner to disclose the building's energy use and benchmark it against a relevant peer group on a periodic basis (typically annually) or at the time of a sale, lease, or financing. California, Washington, Austin, Texas, District of Columbia, New York City, Seattle, Wash., and most recently San Francisco have all adopted such laws. Numerous other cities and states are actively considering similar approaches.

Disclosing the energy consumption of a building and benchmarking it against its relevant peer buildings at both the national and local market level requires the collection of accurate and representative building energy-use data. Until the adoption of the new ASTM BEPA Standard, no standardized methodology appropriate for CRE existed to collect and analyze building energy-use data.

While it may seem relatively straightforward to simply collect utility data, the devil is in the details. For example, there is no standard period of time over which energy-use information should be collected, nor have occupancy, weather or building upgrades entered into the equation. Such issues have generated considerable marketplace confusion and contributed to the pressure for standardization.

In view of this clear need to standardize the methodology for building energy-use data collection and analysis, ASTM in February 2011 published its Standard Practice for Building Energy Performance Assessment (E 2797-11) ("BEPA" or "the standard"). The BEPA standard was promulgated after more than two years of effort by a dedicated ASTM task group of more than 220 professionals, including architects, attorneys, bankers, educators, energy-efficient equipment and software providers, engineers, owners and managers, professional associations, and real estate investors. The methodology developed allows for data to be collected and analyzed on a technically sound, consistent, transparent, practical, and reasonable basis.

The BEPA standard has significant implications for building owners and tenants in the many cities that are beginning to enact green building requirements. For example, the New York law requires owners to input their buildings' water and energy usage into an online benchmarking tool. That information will be

posted on the Internet by the Department of Finance and will include the building's energy use per sq. ft., shows how it compares with the energy use of similar buildings, and provides a comparison of data across calendar years for any year the building was evaluated.

The collection and dissemination of such data and its subsequent use will raise a number of legal issues of great interest to building owners and their tenants, not to mention parties to transactions involving buildings. Among these issues are (1) access to relevant data from tenant spaces, (2) the privacy and confidentiality of the data collected, and (3) the implications of false or misleading disclosures of energy performance in the context of commercial real estate transactions.

Purchasers of real property are likely to have many hurdles to overcome in seeking damages, or rescission, due to alleged false or misleading representations about building energy performance. Such hurdles include the need to prove reasonable reliance, the doctrine of caveat emptor, and "as is" clauses typical in contracts for the sale of real property. That said, to the extent there is any risk at all, the use of the standard, which reflects a consensus of experts on how to measure and analyze the energy performance of buildings, should represent a safe harbor for any such disclosures in this context.

Given the compelling economic and regulatory pressure to incorporate energy consumption history into the due diligence process associated with the sale, leasing, and financing of commercial real estate, it appears likely that routine use of the BEPA standard is certain to accelerate. Moreover the typical transaction's participants, including the attorney, consultant, and lender, will play vitally important roles in advising their clients (buyer or seller) of the risks uncovered during this task, often referred to as Green Building Due Diligence (GBDD).

Already, lending institutions have begun to look at GBDD, as a means of identifying energy risk in terms of its impact on both property valuation and regulatory compliance. Seller attorneys especially need to be informed about the fundamentals of applicable local and even multiple and overlapping ones. For instance, San Francisco transactions will be subject both to the city's building labeling law as well as California's transactional disclosure law.

Given the current political and economic environment, it is likely that energy efficiency, given its relatively low subsidy requirements, will continue to be a favorite of policy makers charged with addressing our nation's energy challenges. As energy disclosure, labeling, and benchmarking laws continue to be promulgated, the ASTM BEPA standard provides all transactional stakeholders with a reliable starting point and a safe harbor against disclosure-related liability.

**View full article at:** <http://www.bepinfo.com/images/pdf/ASTMBEPABennett.pdf>

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