

### Real Estate Trends

#### CONSTRUCTION LAW

## Notable Code and Legal Developments in 2023

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In 2023, there was an array of new laws and amendments to existing laws passed which will impact developers and owners of real estate in New York this year and beyond. These important legal developments were largely aimed at achieving sustainable construction and building infrastructure; reducing the impacts of scaffolding and enhancing construction safety; and expediting prompt payment to contractors and subcontractors during construction projects. This article will examine the most significant developments and identify certain potential penalties for failure to comply.

#### Sustainability Goals

Both New York State and New York City enacted new laws in furtherance of the goals of reducing greenhouse gas emissions and achieving net-zero emissions; increasing renewable energy usage; and ensuring climate justice. While some of the new laws will not take effect for some time, it is imperative that real estate owners bear



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them in mind when constructing new projects or renovating existing buildings.

First, policy updates were issued by the New York City Department of Buildings (DOB) regarding New York City Local Law 88 (lighting upgrades and sub-metering) and Local Law 97 (sustainable buildings). The most widely publicized updates concerned the implementation of the foregoing laws, and specifically, penalties and enforcement. Before the updates, owners were of the strong opinion that compliance was not commercially feasible and the resultant penalties for noncompliance were draconian.

The most recent rules issued by the DOB allow an owner facing penalties in the compliance

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period from 2024 through 2029 to seek relief by demonstrating that it is making a “good faith effort” to comply by completing the mandatory steps of filing an emissions report, benchmarking, and also creating and beginning to implement a building decarbonization plan. In furtherance of the foregoing, an owner may be able to enter into an agreement with the DOB under which penalties could be avoided if the owner meets agreed upon benchmarks.

On the state level, pursuant to New York State’s Climate Leadership and Community Protection Act (CLCPA), new construction must eliminate fossil fuels on site (including equipment) starting Dec. 31, 2025 for low-rise residential projects

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and Dec. 31, 2028 for multi-family and commercial construction.

The CLCPA also prohibits the installation of fossil fuel space and water heating equipment and related building systems when retrofitting residential and multi-family buildings up to three stories on Jan. 1, 2030, and all multi-family and commercial buildings starting Jan. 1, 2035.

Under the CLCPA, the New York Cap and Invest (NYCI) Program was also established, allowing New York’s Department of Environmental Conservation (DEC) to determine the appropriate

cap on overall emissions and ensure that emissions decline each year on track to New York’s climate targets: a 40% reduction in greenhouse gas emissions from 1990 levels by 2030, and at least 85% by 2050. Major polluters under New York’s cap will pay for excessive emissions through the purchase of emissions “allowances,” which in the aggregate will add up to the total cap.

The New York State Public Service Commission (PSC) adopted a new framework for utility and New York State Energy Research and Development Authority (NYSERDA) incentive programs for energy efficiency and building electrification, including a total investment of a \$6 billion Clean Energy Fund to be administered by NYSERDA for the years 2026 to 2030.

**Construction Codes**

Changes were also made to the New York City Construction Codes, which affect, among other things, scaffolding, permitting and construction safety.

Under New York City’s “Get Sheds Down” initiative, which provides a plan to overhaul current rules governing the design, use and permitting for sheds and scaffolding systems on public sidewalks, owners are incentivized to use containment netting or more aesthetic, less intrusive sheds and to expedite façade work.

At the same time, the DOB enacted additional construction oversight and site safety regulations to maintain jobsite safety. The initiative also includes reforms to Local Law 11 (Façade Inspection & Safety Program), including the possibility of less frequent and/or onerous inspections.

In furtherance of the “Get Sheds Down” initiative, owners may be required to subdivide or

phase permitting for different façade elevations to reduce scaffolding impacts; provided, however, that permits must be renewed every ninety days, as opposed to once a year, with increased fees and fines related to shed permitting.

### **Prompt Payment Act Amendments**

The Prompt Payment Act (General Business Law [GBL] Article 35-E) is designed to ensure prompt payment to contractors and subcontractors on private projects costing in excess of \$150,000. On Nov. 17, 2023, the Prompt Payment Act was amended to allow contractors and subcontractors to submit a final invoice upon reaching substantial completion of the project, and limit the right of owners and general contractors to withhold retainage in excess of 5% of the contract sum. Previously, a final invoice could only be submitted upon complete performance and retainage in a “reasonable amount” could be withheld.

While the amendments created much concern and comment in the construction industry and bar, the Prompt Payment Act itself contains a broad savings clause which, we believe, permits parties to contract around the amendments. Specifically, GBL §756-a states:

Except as otherwise provided in this article, the terms and conditions of a construction contract

shall supersede the provisions of this article and govern the conduct of the parties thereto.

The exceptions to the supremacy of the “terms and conditions of a construction contract” are found in GBL §757, entitled “Void Provisions,” and deal with applicable law, the suspension of work, expedited arbitration, the timing of payments, and the imposition of interest. Contract provisions dealing with the submission of a final invoice and the amount of retainage are not included in the Void Provisions.

Thus, in our view, the submission of a final invoice on substantial completion and the limitation on retainage can be superseded by contract. Moreover, as to final invoices, there is no prohibition in the Prompt Payment Act against provisions requiring final completion of the work prior to final payment.

### **Conclusion**

Developing, owning and operating real estate in New York, both within and outside New York City, presents a multitude of challenges to owners and the parties with whom they contract. Accordingly, these parties need to stay apprised of all laws, including new laws and amendments to existing laws. Hopefully, this article will serve as a primer for such parties as they look forward to a successful 2024.