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The Real Estate Roundtable

THE REAL ESTATE ROUNDTABLE

COMMENTS ON THE MODEL BUILDING PERFORMANCE STANDARDS (“BPS”) ORDINANCE

DEVELOPED BY THE INSTITUTE FOR MARKET TRANSFORMATION

APRIL 6, 2021

The Real Estate Roundtable (www.rer.org) provides these comments on the Model Building Performance Standards (“BPS”) Ordinance (the “Model Ordinance” or “the Model”),¹ developed by the Institute for Market Transformation (“IMT”).

The Roundtable agrees with IMT that “owners know their buildings best.” We concur that our members and [partner associations](#) must have a “seat at the table” in crafting any law that regulates buildings to help achieve government-set climate and energy goals.² Real estate developers, owners, managers, and financiers – along with building tenants and occupants, public buildings, and government and private participants in the power supply, transportation, and manufacturing sectors – all have shared obligations to address climate change. A whole-of-economy approach must drive businesses to take bolder actions within their control that minimize their carbon footprints while operating profitably, meeting investors’ demands, and equitably creating jobs in their communities. These tenets guided a task force of The Roundtable’s Sustainability Policy Advisory Committee (SPAC) that directed these comments.

¹ Available at <https://www.imt.org/resources/model-ordinance-for-building-performance-standards/> (version as provided by IMT to The Roundtable on Feb. 1, 2021).

² Cliff Majersik, Senior Advisor, IMT, [Creating Real-Estate Friendly Building Performance Standards](#) (Jan 21, 2021).



IMT intends for the Model Ordinance “to provide the structural foundation for a strong BPS ordinance in any jurisdiction,”³ and it has “worked in varying capacities with over a dozen jurisdictions on building performance standards.”⁴ City, county, and state agencies are potentially interested in the Model as the next regulatory step beyond “benchmarking” laws that have proliferated across the U.S. over the last decade.⁵ IMT “assumes the adopting jurisdiction has [a] benchmarking ordinance in place with high compliance rates and data available to the jurisdiction,” and if it does not, then benchmarking should be included “in *this* ordinance.”⁶ It is critical to get the regulatory sequence right. The Roundtable emphasizes that – *before* a jurisdiction entertains performance standards on buildings – it must *first* have enacted an energy and water benchmarking law with overwhelming compliance rates. Several years’ worth of building energy and water usage data is prerequisite for any jurisdiction to develop the informational and technical expertise it will need to measure compliance with an interim or final performance target. Moreover, owners must establish their own performance baseline with benchmarking data so they can assess what investments their assets might need to eventually reach a BPS metric.

We appreciate that the Model is a “living document” to be “updated and amended based on the input of expert stakeholders.”⁷ We request revisions based on our input and look forward to providing recommendations for additional improvements as new issues come to light. Whether or not a state or locality consults IMT’s Model Ordinance, The Roundtable anticipates that the issues raised here will be pertinent in any jurisdiction considering energy or GHG emissions targets on buildings. Our comments address five overarching themes:

SUMMARY

- 1. BPS ordinances must rely on consistent standards, methods, and data that reflect the best available government and industry practices. Uniformity is critical to avoid a divergent “patchwork” of state and local laws that unduly complicate building owners’ compliance and regulators’ enforcement.**
 - a. US-EPA’s Portfolio Manager should be the *only* tool a jurisdiction uses to benchmark and measure buildings’ energy consumption and carbon emissions.
 - b. Data collected through US-EPA’s Portfolio Manager should be the *only* informational source used to set buildings’ energy or emissions targets.
 - c. US-EPA’s ENERGY STAR building typologies are designed to level-set energy efficiency and GHG metrics nationwide, across myriad asset classes. A jurisdiction

³ Model Ordinance at 1.

⁴ *Id.*

⁵ IMT, *U.S. Building Benchmarking Policy Landscape* (May 2020).

⁶ Model Ordinance at 1 (emphasis supplied).

⁷ *Id.*



should use EPA’s real estate categories for any potential BPS mandates, not classifications it may have developed for local purposes such as fire or zoning codes.

- d. The Model Ordinance should offer more standards to guide landlord-tenant collaborations, particularly EPA’s “ENERGY STAR Tenant Space” criteria.
 - e. The global Greenhouse Gas Protocol should guide BPS laws to encourage market-based methods that credit building owners for off-site renewable energy generation.
 - f. US-EPA’s eGRID data accounts for flows of electricity on the grid and should be the *only* data source for any jurisdiction that seeks to convert the grid’s fuel sources to GHG emissions.
- 2. No BPS law should mandate building owners to reduce emissions from sources beyond their control. The Model Ordinance should thus eliminate calculations of a property’s *onsite* emissions attributable to *off-site emissions* from third-party “district thermal energy systems.”**
- a. The Model Ordinance conflates a building *efficiency* target with a building *emissions* target. Jurisdictions need to know the difference – and the greater complexities for both owners and regulators in collecting data, measuring progress, marshalling resources, and tracking metrics for an *emissions* target.
 - b. The Model Ordinance’s bias *against* district thermal energy and *for* widespread building electrification is not backed by any cost-benefit analysis.
 - c. The Model Ordinance ignores federal government research that district thermal systems can be made more efficient, conserve more energy, reduce grid loads, and create new metrics for emissions.
 - d. While an energy efficiency metric can be quantified and controlled by building owners, US-EPA’s view as to whether that metric should be “source EUI” or “site EUI” is critical. The Model Ordinance should hold-off on definitively using “site EUI” as its performance standard until EPA makes a recommendation.
 - e. Utilities do not give building owners interval data on the precise moments when a grid is operating at peak capacity. Consequently, the Model Ordinance should drop the performance standards for “coincident peak electric demand.”
- 3. Any BPS law should be joined with financial assistance to help all regulated owners defray the capital expenses needed to bring their buildings into compliance.**



4. **The Model Ordinance should strive for robust compliance, encourage investments in existing buildings, and its provisions should allocate compliance burdens based on occupants' energy usage.**
 - a. The goal of any BPS law should be to encourage, not discourage, investments in existing buildings as the best and lowest-cost source of efficiency and emissions improvements. Accordingly, owners should have the option to invest in their buildings in lieu of “interim” payments, toward the ultimate goal of “final” compliance.
 - b. Attaching an optional “Building Performance Action Plan” to a property’s deed raises significant financing and transactional questions – and could cause owners to simply pay fines and avoid building improvements rather than place a cloud on title.
 - c. Non-compliance payments should follow energy consumption. Building occupants – be they owners or tenants – should be responsible for *their* respective contributions to energy use and GHG emissions.

5. **The *least* efficient buildings and communities are frequently the *most* distressed buildings and communities – and added regulatory costs from BPS mandates could disproportionately affect housing affordability and neighborhoods on the “frontlines” of climate change. But with respect, IMT is not an expert on issues related to economic development and it should refrain from proposing specific definitions on these complex matters.**

These issues are addressed in detail below. For more information, please contact Duane J. Desiderio (ddesiderio@rer.org), Senior Vice President and Counsel with The Real Estate Roundtable.



THE REAL ESTATE ROUNDTABLE

COMMENTS ON THE INSTITUTE FOR MARKET TRANSFORMATION'S MODEL BUILDING PERFORMANCE STANDARDS ("BPS") ORDINANCE

- 1. BPS ordinances must rely on consistent standards, methods, and data that reflect the best available government and industry practices. Uniformity is critical to avoid a divergent "patchwork" of state and local laws that unduly complicate building owners' compliance and regulators' enforcement.**

If 50 states and scores of local jurisdictions are left to craft their own approaches for energy and/or carbon emissions targets on buildings, havoc would ensue upon the U.S. real estate sector – not to mention upon our business tenants, utilities, grid operators, owners of district energy systems, and regulators across all levels of government. We all share the paramount goal to address and resolve the climate crisis. That goal will not be furthered if BPS laws emerge in a hodgepodge that obfuscates building owners' compliance responsibilities (or render compliance altogether impossible). Consistency, predictability, and practicability are critical to this exercise.

The Roundtable submits that the Model Ordinance must go further to encourage jurisdictions to more heavily rely upon tested and well-accepted practices, methods, and data to measure, manage, and offset buildings' energy consumption and GHG emissions. Jurisdictions need to clearly understand for themselves – and define for regulated stakeholders – what data they need to collect, how it will be collected, how it will be "normalized," and how building owners should report any data to measure progress and reach compliance. We agree that each locality, to some extent, would need to tailor "targets" as appropriate to reflect their unique market conditions (*e.g.*, geography, weather, fuel mix, socioeconomic, and other variables). However, IMT can help chart a straighter path to avoid a byzantine maze of laws.

Any BPS law should at least clarify that:

- a. US-EPA's Portfolio Manager should be the only tool a jurisdiction uses to benchmark and measure buildings' energy consumption and carbon emissions.*

The Model Ordinance defines "ENERGY AND WATER BENCHMARKING TOOL" as EPA's ENERGY STAR Portfolio Manager tool – *or*, "any alternative system or tool approved by" a state or locality.⁸ IMT should delete what follows the disjunctive. EPA's tool should be the *only* web-based protocol for purposes of benchmarking and measuring energy and water consumption, and building emissions. A jurisdiction should not consider inventing something else.

⁸ Model Ordinance at 6.



“Nearly 25% of U.S. commercial building space ... actively benchmarks in Portfolio Manager — making it the industry-leading benchmarking tool.”⁹ By our count, 100% of state and local benchmarking laws enacted to date give EPA’s tool regulatory effect.¹⁰ The agency has a library of recent “Technical Reference” documents to assist regulators and stakeholders dealing with building standards. These guides explain how Portfolio Manager incorporates metrics to:

- Evaluate a building’s energy performance in terms of “source energy” or “site energy”¹¹;
- Quantify “total GHG emissions” (direct and indirect) by multiplying site energy values by emissions factors;¹²
- Understand the emissions benefits from onsite green power generation and offsite green power purchases;¹³
- Set building performance standards by estimating how much energy an existing property or property design would need to consume annually to reach a target;¹⁴ and
- Adjust for an existing building’s “weather-normalized” energy usage if the asset’s geographic location has experienced annual conditions hotter or colder than normal.¹⁵

If some minor gap exists in Portfolio Manager’s present functionality,¹⁶ then the jurisdiction should draw upon EPA’s expertise, coordinate with the ENERGY STAR staff, collaborate on any appropriate fix, and devote R&D resources to try and improve the tool that already provides a nationwide standard. A city or state should not re-invent the wheel and create some new software – raising the specter that owners might need to use Portfolio Manager in certain markets, and some other benchmarking “player to be named later” in other markets.

b. Data collected through US-EPA’s Portfolio Manager should be the only informational source used to set buildings’ energy or emissions targets.

Just as Portfolio Manager should provide the sole measurement tool for BPS compliance, the asset-level information collected through owners’ use of Portfolio Manager should be the *sole* data source to set any efficiency or GHG targets on buildings.

Section 4 of the Model Ordinance addresses “Performance Metrics, Final Performance Standards and Interim Standards.”¹⁷ IMT recommends that the jurisdiction should “set[] a final standard – a minimum level of performance – that each property [by type] must meet by the date

⁹ See <https://www.energystar.gov/buildings/facility-owners-and-managers/existing-buildings/use-portfolio-manager>.

¹⁰ See <https://www.buildingrating.org/graphic/us-building-benchmarking-policy-landscape>.

¹¹ Portfolio Manager Technical Reference, *Source Energy* (Oct. 2020).

¹² Portfolio Manager Technical Reference, *Greenhouse Gas Emissions* (Oct. 2020).

¹³ Portfolio Manager Technical Reference, *Green Power* (Oct. 2020).

¹⁴ Portfolio Manager Technical Reference, *Estimating Fuel Mix and Energy Cost* (Feb. 2021).

¹⁵ Portfolio Manager Technical Reference, *Climate and Weather* (Feb. 2021).

¹⁶ For example, Portfolio Manager does not currently “normalize” for site EUI based on characteristics such as hours of operation and number of workers. IMT recognizes as much. See Model Ordinance at 10. The Roundtable’s comments further discuss this issue, *infra* at 17-18.

¹⁷ Model Ordinance at 9.



specified.”¹⁸ However, IMT provides no direction as to the data or process to determine “maximum allowable” metrics for site EUI, onsite GHG emissions, or water use intensity.

Underlying reference data is essential to set any such “maximum allowable” target. The *only* appropriate reference data for these purposes is the asset-level data submitted through Portfolio Manager – as collected within the jurisdiction at issue. EPA already offers technical reference on national median EUI (both site and source) for all categories of Portfolio Manager “property types.”¹⁹ Following EPA’s methods, any state or city can take the same approach. Local bodies can derive median EUI figures for building types using Portfolio Manager data collected in their geographies. Indeed, the Model Ordinance “assumes the adopting jurisdiction has an energy and water benchmarking law in place with high compliance rates *and data available to the jurisdiction.*”²⁰

- c. US-EPA’s ENERGY STAR building typologies are designed to level-set energy efficiency and GHG metrics nationwide, across myriad asset classes. A jurisdiction should use EPA’s real estate categories for any potential BPS mandates, not classifications it may have developed for local purposes such as fire or zoning codes.*

EPA has categorized more than 80 different property types that can benchmark energy and water use in the Portfolio Manager tool, of which 21 are eligible to receive a 1-100 “score,” and 17 are eligible for ENERGY STAR “certification.”²¹ These asset classes are built into Portfolio Manager precisely to quantify energy efficiency and GHG metrics for real estate, and have become the nationwide standard to compare the environmental performance of like-kind properties.

A jurisdiction should use ENERGY STAR’s classifications in any effort to set performance standards applicable for specific building categories. EPA has already done the work to curate property types. A city should not resort to using its own classifications developed for local purposes (such as fire codes or land-use regulations) that do not correlate to emissions target-setting.

- d. The Model Ordinance should offer more standards to guide landlord-tenant collaborations, particularly EPA’s “ENERGY STAR Tenant Space” criteria.*

The Model “is structured to encourage landlords and tenants to work together to improve building performance.”²² It casually recommends “green leasing” “as part of a broader educational and technical assistance initiative to complement a building performance

¹⁸ *Id.*

¹⁹ Portfolio Manager Technical Reference, [U.S. Energy Use Intensity by Property Type](#) (Aug. 2018).

²⁰ Model Ordinance at 1 (emphasis supplied).

²¹ EPA, ENERGY STAR Portfolio Manager, [U.S. Property Types, Definitions and Use Details](#) (May 2020).

²² Model Ordinance at 1.



standard.”²³ More tools should be offered to guide potential BPS jurisdictions on landlord-tenant collaboration.

In particular, the Model Ordinance should encourage tenants to coordinate with their landlords to achieve “ENERGY STAR Tenant Space” criteria. Among other goals, the program drives tenant fit-outs to estimate and meter energy use in the space and meet a lighting energy use target.²⁴ EPA offers technical guidance on how lessees can use Portfolio Manager and run reports with key metrics such as EUI in their spaces.²⁵

Any model law addressing whole-building performance must include guidance on how to benchmark, manage, and improve energy efficiency in the property’s leased areas. “ENERGY STAR Tenant Space” provides the best tools currently available to measure leased-space efficiency and should be reflected in IMT’s model.

e. The global Greenhouse Gas Protocol should guide BPS laws to encourage market-based methods that credit building owners for off-site renewable energy generation.

The Greenhouse Gas Protocol (“GHG Protocol”), developed by the World Resources Institute (“WRI”) and the World Business Council for Sustainable Development (“WBCSD”), “is designed to set the standard” globally for emissions accounting, verification, and reporting.²⁶ It is based on the “experience and knowledge of over 350 leading experts drawn from businesses, NGOs, governments and accounting associations.”²⁷ Furthermore, the GHG Protocol’s “Scope 2 Guidance”²⁸ provides the paradigm for a building owner to calculate and report indirect emissions from their purchases of off-site generation of electricity, heat, cooling, or steam²⁹

The Scope 2 Guidance should be a requisite source for any jurisdiction that may “set” building emissions targets; provide emissions “offsets”; and authorize emissions “credits” through off-site measures like Renewable Energy Certificates (RECs) that allow owners to claim the environmental attributes of clean energy generated elsewhere.³⁰ Notably, EPA endorses the GHG Protocol’s body of work. The agency’s recent recommendations for “Indirect Emissions

²³ *Id.*

²⁴ See https://www.energystar.gov/buildings/tenants/about_tenant_space.

²⁵ US-EPA, *How To Enter and Manage Tenant Spaces in ENERGY STAR Portfolio Manager* (Oct. 2020).

²⁶ WRI and WBCSD, *The GHG Protocol – A Corporate Accounting and Reporting Standard*.

²⁷ *Id.*

²⁸ See WRI, *GHG Protocol Scope 2 Guidance – An Amendment to the GHG Protocol Corporate Standard*

²⁹ *Id.* at 34-35.

³⁰ These comments follow the GHG Protocol’s definitions – also used by EPA – for “offsets and “RECs.” “Offsets” *reduce* a building’s overall GHG emissions (such as through activities like energy efficiency retrofits, offsite tree planting, or carbon sequestration projects). “RECs” are more specific “legal instruments” used in electricity markets. One REC accounts for one megawatt-hour (MWh) of clean electricity *generation* by onsite or off-site renewable sources that “reduc[e] ... market-based scope 2 emissions.” EPA, Green Power Partnership, *Offsets and RECs – What’s the Difference?* (Feb. 2018).



from Purchased Electricity” expressly “align[] with the principles and methodologies defined in the GHG Protocol Scope 2 Guidance.”³¹

Unfortunately, the Model Ordinance does not align with the Scope 2 Guidance.³² This statement by IMT is troubling:

“Regarding giving credit for off-site renewable energy, *IMT urges jurisdictions to exercise extreme caution*. Some jurisdictions may lack the legal authority to credit purchases of renewable energy generated outside their jurisdiction Some studies have also questioned whether certain purchases of off-site renewable energy result in the construction of additional generation.”³³

The Model has the premise backwards. Rather than signal “extreme caution,” IMT should *encourage* jurisdictions to develop off-site compliance and emissions mitigation pathways consistent with the GHG Protocol. The Scope 2 Guidance “codifies” a “market-based method”³⁴ that reflects indirect emissions from purchased electricity generated away from the building’s location. A “hierarchy” of contractual instruments – including RECs and power purchase agreements (“PPAs”) – must satisfy certain “quality criteria.”³⁵

³¹ EPA, Center for Corporate Climate Leadership, [GHG Inventory Guidance – Indirect Emissions from Purchased Electricity](#) (Dec. 2020) at 1. EPA further states that RECs and PPAs “shall,” at a minimum, adhere to the “quality criteria” developed by the GHG Protocol for “[a]ll contractual instruments used in the market-based method for scope 2 accounting.” *Id.* at 12.

³² For purposes of these comments:

- “Scope 2” indirect emissions derive from the power purchased by a building owner. These emissions are indirect from a building owner’s perspective, but are direct emissions from an electric power plant, district energy system, or other energy infrastructure physically located outside the building’s footprint and beyond the owner’s immediate control.
- “Scope 3” indirect emissions are even further beyond a building owner’s ability to control and even harder to measure and quantify. For example, Scope 3 emissions might be attributed to a tenant under a “triple net lease” (where the tenant assumes utility bills and other operating expenses for the leased space), or emissions attributable to transportation by employees.

The Roundtable believes that no BPS law should *mandate* a building owner to control either Scope 2 or 3 emissions through a *regulatory* performance target. However, as explained in these comments, a jurisdiction should *encourage* owners to *mitigate* their Scope 2 emissions from electricity they purchase, such as through RECs and PPAs that support off-site clean power sources.

³³ Model Ordinance at 10 (emphasis supplied).

³⁴ Scope 2 Guidance at 7.

³⁵ *Id.* at 48, 54-55. The “Scope 2 Quality Criteria” provide that “[a]ll contractual instruments used in the market for scope 2 accounting shall (*id.* at 60):

- “Convey the direct GHG emissions rate attribute associated with the unit of electricity produced
- “Be the only instrument that carry the GHG emission rate attribute claim associated with that quantity of electricity generation
- “Be tracked and redeemed, retired, or canceled by or on behalf of the reporting entity
- “Be issued and redeemed as close as possible to the period of energy consumption to which the instrument is applied
- “Be sourced from the same market in which the reporting entity’s electricity consuming operations are located.”



Any BPS should empower building owners to earn credit for off-site clean power that is quantifiable, verifiable, and otherwise meets the GHG Protocol’s quality criteria. RECs should be available as credits for both new renewable energy generation and to maximize the contributions of existing clean power resources. For example, the New York State Energy Research and Development Authority (“NYSERDA”) has developed a market for “Tier 1” RECs that derive from new generation, and “Tier 2” RECs to maintain and continue operations of existing clean power facilities.³⁶

Furthermore, to determine the geographic reach for qualifying RECs and other off-site market-based techniques, state/local regulators should turn to the boundaries of competitive wholesale electricity markets established by the Federal Energy Regulatory Commission (“FERC”). As a matter of regulatory compliance with any BPS law, building owners should at least get credit for clean energy they purchase and generate within the territory of the Independent System Operator or Regional Transmission Organization (ISO/RTO)³⁷ in which their real estate assets are located. In markets where electricity generation, transmission, and distribution are still a vertically integrated monopoly, an owner should be credited for creating and purchasing clean power within the service territory of the building’s utility provider. Following the physical boundaries of RTO/ISO/utility markets furthers the Scope 2 Guidance’s criteria that off-site clean energy should “[b]e sourced from *the same market* in which the [building owner’s] electricity consuming operations are located.”³⁸

To be clear, The Roundtable supports a national goal to develop clean energy *wherever* renewables can be generated and distributed with optimum efficiency and cost effectiveness. Such a location might not be in a dense, urban location contemplating a BPS law, where land is scarce and large-scale solar or wind farms cannot be sited. Real estate owners in these markets should be *encouraged* to purchase power to help achieve nationwide climate goals and add to our country’s renewable energy supplies, particularly for purposes of voluntary corporate programs and ESG reporting efforts.

In sum, the Model Ordinance should urge jurisdictions to create appropriate GHG credits – based on the Scope 2 Guidance – that support building owners’ efforts to contract for clean power and support off-site renewable energy generation.

f. US-EPA’s eGRID data accounts for flows of electricity on the grid and should be the only data source for any jurisdiction that seeks to convert the grid’s fuel sources to GHG emissions.

The Roundtable appreciates that the Model Ordinance “does not set a standard for greenhouse gas emissions attributable for electricity purchased from the grid.”³⁹ Yet, some cities have improperly stretched building owners’ mandatory emissions compliance burdens outside

³⁶ See NYSERDA website, [Tier 1 – New Renewables](#) and [Tier 2 – Maintenance Resources](#).

³⁷ FERC, [Electric Power Markets – National Overview](#) (map of ISO/RTO regions established by FERC).

³⁸ Scope 2 Guidance, Table 7.1 at 60 (emphasis supplied).

³⁹ Model Ordinance at 10.



the boundaries of their real estate assets (or are considering this approach). These localities would “pass-through” to buildings the burden to limit carbon emissions attributable to the fuel sources that power the electric grid – a matter plainly beyond owners’ immediate control.

The Roundtable firmly believes that such an approach is inappropriate (*see point #2, immediately below*).⁴⁰ However, in the event that a jurisdiction wrongly complicates matters and wanders down this route, at the very least it must enable consistent methods that convert myriad electricity fuel sources to carbon emissions. Any regulatory coefficients that convert energy use to GHGs, when calculating a building’s emissions from grid-supplied electricity, should *only* be based on EPA’s Emissions and Generation Resource Integrated Database (“eGRID”).⁴¹ This is the “pre-eminent source of air emissions data for the electric power sector.”⁴² It integrates EPA’s own data on emissions with national data on electric generation provided by power plants to the U.S. Energy Information Administration (EIA). Again, while we disagree that regulators should saddle building owners with regulatory targets premised on how clean the grid is, at least greater national uniformity in carbon measurement can be promoted by urging state and local reliance on EPA’s latest vintage of eGRID data.

Hopefully, widespread adoption of eGRID can spur EPA to more frequently update data on grid-derived emissions. Presently, there is a 2+ year lag in calculations by EPA to estimate GHGs emitted from the electric grid which trails behind the new renewable sources that continually come on line. More refreshed and on-going vintages of eGRID data can help state and local regulators update and refine their own clean energy targets insofar as they are linked to emissions from purchased electricity. Localities should encourage plants that report to the federal government⁴³ to partner with eGRID and provide more frequent data (quarterly, for example) to determine current emissions factors attuned to the grid’s present state.

2. No BPS law should mandate building owners to reduce emissions from sources beyond their control. The Model Ordinance should thus eliminate calculations of a property’s onsite emissions attributable to off-site emissions from third-party “district thermal energy systems.”

The Model Ordinance’s proposed performance standard for “Maximum ONSITE AND DISTRICT THERMAL GREENHOUSE GAS EMISSIONS” is highly problematic. It improperly conflates onsite emissions and off-site emissions, and creates confusion with standards for “energy efficiency” and “GHG emissions.”

⁴⁰ *Infra* at 11-14.

⁴¹ E.g., Urban Green, *NYC Building Emissions Law: Frequently Asked Questions* ## 13, 14 (in “[t]rying to make sense of Local Law 97 of 2019,” emissions limits for 2024-2029 compliance period “align with the coefficients used in the EPA’s Portfolio Manager and the EPA eGRID 2016 coefficients.”)

⁴² See <https://www.epa.gov/egrid/egrid-questions-and-answers>.

⁴³ eGRID is based on plant-specific data provided to the U.S. Energy Information Administration (EIA) through forms [EIA-860](#) and [EIA-923](#).



IMT should remove any BPS emissions requirements that depend on the environmental performance of “district thermal energy systems” or other off-site assets that building owners themselves do not control. Jurisdictions establishing carbon mandates (with fines and penalties) ideally want workable and reachable standards for the businesses they regulate. GHG reduction targets become infeasible where compliance depends – not on shaping the conduct of regulated stakeholders – but instead on making regulated stakeholders responsible for the behaviors of *third-parties* that the law itself does not regulate. Unfortunately, the Model Ordinance takes this route.

IMT admits that it “effectively extends the building boundary”⁴⁴ by regulating owners for their “share ... [of] site energy and GHG emissions” from district energy systems – that is, off-site infrastructure owned by someone else and over which a building owner has no direct ability to manage or operate. Yet on the other hand (as discussed above),⁴⁵ the Model “urges jurisdictions to exercise extreme caution” when giving credit for off-site renewable energy creation.⁴⁶ Thus, IMT would *regulate* owners for some portion of emissions from off-site sources they *cannot* control, while undercutting offsets and *credits* they *can* control to support off-site clean energy deployment.

That dichotomy sets up a recipe for failure. A BPS model law should instead suggest appropriate and workable: (1) energy efficiency and/or emissions targets within the confines of a building’s footprint, while allowing for (2) offsets for onsite efficiency improvements and renewable energy measures; as well as (3) verifiable market-based credits for off-site renewable energy purchases through instruments like PPAs and RECs.⁴⁷ The thread that connects these elements is that they are all within the purview of regulated building owners to control.

- a. *The Model Ordinance improperly conflates a building efficiency target with a building emissions target. Jurisdiction need to know the difference – and the greater complexities for both owners and regulators in collecting data, measuring progress, marshalling resources, and tracking metrics for an emissions target.*

Any jurisdiction assessing building performance targets should at least start by proposing an onsite “energy efficiency” metric. Reducing energy consumption – and the coincidental declines in GHG emissions that heightened efficiency brings – can be controlled by an owner through equipment and operational investments in an asset (within reason of what is technologically feasible and cost practicable). Furthermore, measuring and quantifying energy use reductions are relatively straightforward for regulators. Data collected from EPA’s Portfolio Manager can help agencies set efficiency targets and measure progress toward those goals.

In contrast to an *efficiency* target, an *emissions* target is a much more complicated affair – for both building owners intent on compliance, and agencies aiming to establish regulatory

⁴⁴ Model Ordinance at 6.

⁴⁵ *Supra* notes 32-33 and accompanying text.

⁴⁶ Model Ordinance at 10.

⁴⁷ *Supra* notes 34-36 and accompanying text.



metrics. An *emissions* target compels buildings to eliminate onsite combustion while *also* holding property owners responsible to “clean-up” off-site energy assets they do not own or control. The alternatives for an owner to de-commission a gas- or oil-fired boiler in a building are to shift to heat pumps that require more grid-purchased electricity, or switch to thermal heating and cooling if available from a district thermal system. (The trade-offs between building electrification and its cost implications, the impacts on grid capacity, and the benefits from district-wide systems, are discussed below.⁴⁸) As a result, an emissions-based target ultimately holds the owner who retires an onsite boiler responsible for GHGs from external energy sources (*i.e.*, district thermal or the electric grid) outside the building’s immediate sphere of influence.

Moreover, from the perspective of regulators, an onsite *emissions* target is more complicated to establish because it must measure building performance based on “coefficients” that convert myriad fuel sources to emissions.⁴⁹ A simpler efficiency-based target requires no legislature to codify controversial or complex conversion factors to calculate the amount of GHGs released when various fuels are burned, or when electricity or district steam is generated. The Roundtable believes that IMT should make the distinctions between “efficiency” targets and “emissions” targets, and the complexities associated with “emissions” targets, crystal clear for local regulators that may not have the resources or expertise to implement a law that mimics the Model Ordinance.

We welcome that the Model Ordinance “does not set a standard for greenhouse gas emissions attributable to electricity purchased from the grid,” and that “*owners have more control* over site energy than source energy.”⁵⁰ But we are confounded as to why IMT would then set a standard for onsite building emissions indirectly attributed to district-provided heat and cooling – which are likewise beyond a property owner’s immediate control. IMT claims that its approach “will provide *motivation to a critical mass of building owners to come together* to demand decarbonized energy from the owners of the district thermal energy system and *may drive the investments needed to make this happen.*”⁵¹ Should the wishful thinking that building owners might successfully lobby third-parties justify regulatory standards on those owners? The Roundtable does not think so. The remote chance that building energy customers might band together and successfully influence district systems to decarbonize is a slender reed upon which to rest the regulatory weight of climate mandates on those ratepayers.

The Roundtable agrees that a dominant policy goal of our times is to make district energy systems (and the electric grid) more efficient and “clean.” We aim to promote policies that drive onsite building efficiency – *and* achieve a more reliable, affordable and resilient grid. As a question of which parties should bear the onus of *regulations*, building owners should be responsible for their piece while district energy and grid operators should be responsible for their

⁴⁸ See *infra* notes 55-68 and accompanying text.

⁴⁹ *E.g.*, [New York City Local Law 97](#) § 28-320.3.1.1 (2019) (for 2024-2029 compliance period, establishing coefficients to convert grid-supplied electricity, onsite combustion of natural gas and fuel oil, and onsite consumption of district steam, to GHG emissions).

⁵⁰ Model Ordinance at 10.

⁵¹ *Id.* at 6 (emphasis supplied)



own pieces. States and cities must coordinate with the owners of energy supply assets on measures within *their* control to improve efficiencies, switch fuels, and lower direct GHG emissions from community-wide infrastructure.

Indeed, *indirect* building emissions are *direct* emissions from district energy and electric grid infrastructure. Even the Model Ordinance itself states that “the most effective way of reducing GHGs associated with a DISTRICT ENERGY SYSTEM is *for the jurisdiction ... to directly negotiate with the system owner to make changes to the system or to pass legislation requiring action.*”⁵² We agree. IMT might propose some other model law focused on district owners to meet clean energy standards for *their* systems. IMT could develop such a project with reference to the existing laws noted by the Federal Energy Regulatory Commission (“FERC”) where 13 states “have adopted clean energy or renewable portfolio standards,” 19 states and D.C. “have adopted economy-wide decarbonization goals or targets,” and 11 states “impose some version of carbon pricing.”⁵³ Localities contemplating a BPS – but that do not have authority to enact renewable or clean energy portfolio standards – should work in tandem with their state legislatures that might appropriately establish direct requirements on grid and district thermal owners to decarbonize their infrastructure.

In short: We urge that the Model Ordinance should drop the “and” in its suggested standard for “Maximum Onsite and District Thermal Greenhouse Gas Emissions.”

b. The Model Ordinance’s bias against district thermal energy and for widespread building electrification is not backed by any cost-benefit analysis.

The Model Ordinance assumes that, in encumbering building owners to account for their proportionate share of district-wide emissions, it will “drive beneficial electrification” and “encourage building operators to shift their electric load so as to reduce [GHG] emissions from the grid.”⁵⁴ IMT’s assumptions require firmer grounding in current building sciences, the present state of grid capacity, and questions of practicability and cost. The ability of aging and over-taxed electricity infrastructure to support widespread building electrification – without massive investments of taxpayer dollars and private sector capital to modernize the grid – is completely unknown. IMT should be transparent about these matters before urging a potential BPS jurisdiction to pursue “beneficial electrification” without reference to what is technologically practicable and economically feasible.

A recent letter from BOMA San Francisco (BOMASF) submitted in response to San Francisco’s Draft Climate Action Plan is instructive.⁵⁵ According to BOMASF, electrifying office space heating designs (which typically rely on a boiler system that feeds a hot water loop

⁵² *Id.* (emphasis supplied)

⁵³ [Notice of Proposed Policy Statement](#), 173 FERC ¶ 61,062, at pp. 2-3.

⁵⁴ Model Ordinance at 7, 9.

⁵⁵ Letter to Barry Hooper, Senior Green Building Coordinator, City of San Francisco, from John R. Bryant, CEO, BOMA San Francisco (March 5, 2021) (hereafter, “BOMASF Letter”) (on file with RER).



to deliver space heating throughout a building)⁵⁶ “might not decrease but actually increase carbon emissions” – and further pose “serious concerns about the grid capacity to handle increased load” that can lead to events such as the recent Texas grid failure.⁵⁷ In terms of *capital expenditures*, electrifying buildings would require multi-million dollar investments in larger properties. Bay Area owners “examining electrification” could face service fees from Pacific Gas & Electric (PG&E) “of \$100,000 or more to bring 3,000 amp service to a commercial building” as well as air distribution costs for electric boilers exceeding \$1 per square foot.⁵⁸ In terms of *operational expenses*, BOMASF estimates that onsite boiler electrification could result in a 20% increase in owners’ and tenants’ utility bills. Moreover, the following statement is resonant considering the breadth of issues within IMT’s scope:

As large commercial users electrify, that will cause price increases to smaller users still on the gas infrastructure, which will disproportionately negatively affect mid and lower income communities. Social equity is somewhat included in the plan, but without specific accounting of these costs, as well as upstream emissions impacts and leakage it is hard to see the full spectrum of the results of a widespread [move toward onsite electrification].⁵⁹

Ripping out thousands of miles of steam pipes to replace them with (potentially unreliable) heat pumps in a building would be far more carbon intensive than maintaining a functioning district thermal system and improving its efficiency. Equipment and transportation emissions to dismantle a district energy system, plus the embodied carbon to manufacture any building components to replace off-site heating and cooling sources, should be factored by any jurisdiction to holistically weigh the relative “pros” and “cons” of building electrification.

c. The Model Ordinance ignores federal government research that district thermal systems can be made more efficient, conserve more energy, reduce grid loads, and create new metrics for emissions.

The Model’s bias *for* onsite electrification and *against* district energy is at odds with federal government research. Studies by US-DOE and US-EIA extol the environmental, security, economic and other benefits from centralized district systems that use a network of pipes to pump steam, hot water, and/or chilled water to multiple buildings. EIA reports there are 660 existing district energy systems operating in the U.S. that service about 5.5 billion square feet of heating floorspace and 1.9 billion square feet of cooling floorspace.⁶⁰ “By aggregating the

⁵⁶ BOMASF’s market research reports that two options are being quoted to building owners considering boiler electrification in the San Francisco market: (1) replacing hot water terminal units with electric reheat; and (2) replacing gas boilers with electric resistance boilers. A third option – installing high temperature heat pumps (that can include waste heat from a data center as a heating source) – has not been deployed in the U.S. but has seen a few applications in Europe. BOMASF Letter at 4.

⁵⁷ *Id.* at 4.

⁵⁸ *Id.* at 5.

⁵⁹ *Id.*

⁶⁰ ICF L.L.C. and the International District Energy Association, prepared for the US-EIA, [U.S. District Energy Services Market Characterization](#) (February 14, 2018).



thermal loads of dozens, hundreds, or even thousands of buildings, district energy systems facilitate investment in lower-carbon resources and enable enhanced economic resiliency through microgrids.”⁶¹ District energy also supports high-density, compact development to help avoid the adverse impacts from sprawl, traffic congestion, and transportation emissions.⁶²

Notably, US-DOE has reported to Congress that district-wide energy systems:

- ***Serve a variety of end-use markets:*** “[I]ncluding downtowns (central business districts), college and university campuses, hospitals and healthcare campuses, military bases, industrial complexes, and others.”⁶³
- ***Are efficient:*** “A central energy plant that serves the aggregated heating or cooling demand of many buildings is generally more efficient than on-site heating and cooling systems that have to ramp up and down to meet the daily and hourly needs of individual buildings.”⁶⁴
- ***Achieve economies of scale for clean energy deployment beyond the reach of individual buildings:*** “Aggregating heating and cooling loads also allows district energy systems to incorporate technologies and fuels not generally feasible for individual buildings” – such as combined heat and power (CHP), transitioning to biomass, geothermal, and integrating large-scale local renewable deployment.”⁶⁵
- ***Drive economic growth:*** “The efficiency savings from district energy systems can be a drive for local economic growth. Heating, cooling and electricity services can be provided to building owners and tenants at lower cost rates due to the efficiency and economies of scale that district energy systems bring.”⁶⁶
- ***Increase energy security and resilience:*** District systems “(1) allow energy infrastructure and critical facilities to maintain operations during expected outages, and (2) improve the ability to recover from natural disasters when they occur.”⁶⁷

The Roundtable further notes that one reason for climate policy makers to support investments in district thermal (as opposed to onsite electrification) is that district systems can ***operate at higher load factors to manage peak demand.*** As US-DOE finds, district energy:

Serves a more stable, predictable combined load that not only promotes higher load factors, but also reduced the need for excess peak heating or cooling

⁶¹ *Id.* at 4.

⁶² *Id.* at 17-19.

⁶³ US-DOE, Report to Congress, [Energy Efficiency and Energy Security Benefits of District Energy](#) (July 2019) at 9.

⁶⁴ *Id.* at 10.

⁶⁵ *Id.* at 10-11.

⁶⁶ *Id.* at 13.

⁶⁷ *Id.* at 17.



capacity. The design for stand-alone chiller plants at individual buildings typically calls for installation of between 30% to 100% more cooling capacity than what is required from a district cooling provider.⁶⁸

The Model Ordinance should do a better job to educate potential BPS jurisdictions on the benefits associated with district energy and the costs associated with onsite electrification. Local laws that pursue widespread building electrification to the detriment of greater investments in district heating and cooling can undermine the environmental, resilience, and economic advantages underscored by US-DOE and US-EIA.

d. While an energy efficiency metric may be quantified and controlled by building owners, US-EPA’s view as to whether that metric should be “source EUI” or “site EUI” is critical. The Model Ordinance should not definitively use “site EUI” as its performance standard until EPA makes a recommendation.

Consistent with The Roundtable’s position that a BPS should only impose regulatory requirements that a building owner can control, we agree that a measurable, quantifiable, and well-accepted onsite energy efficiency metric may be considered. The best choices are energy usage intensity (“EUI,” or kBtu per square foot) – expressed as either “site EUI” or “source EUI.” Both metrics are generated using Portfolio Manager and included on a building’s “ENERGY STAR Statement of Energy Performance.”⁶⁹ Each metric also has its pros and cons, as discussed in a recent EPA technical reference document.⁷⁰

To date, for purposes of the ENERGY STAR building rating program, EPA has concluded that “**source energy** is the most equitable unit of evaluation” because it accounts for all of the different mixes of energy that might power a given building (electricity, natural gas, fuel oil, district steam, etc.).⁷¹ Yet, the Model Ordinance definitively lands upon “Maximum NORMALIZED **SITE EUI**” as *the* onsite efficiency standard that jurisdictions should consider.⁷² But as the Model Ordinance plainly states, Portfolio Manager only has present capability to “normalize” site EUI for weather for all properties; it does *not* currently have the function to “normalize” for key variables such as a building’s hours of operations and number of workers. Treating like-kind properties equally must be a *sine qua non* for any BPS law if it is to be viewed fairly by the real estate community. Normalizing efficiency metrics, for as many variables as possible, is critical.

⁶⁸ *Id.* at 10.

⁶⁹ See https://www.energystar.gov/sites/default/files/tools/SEP%20Sample_0.pdf.

⁷⁰ ENERGY STAR Portfolio Manager, Technical Reference, *Source Energy* (Oct. 2020). Site energy is “the amount of heat and electricity consumed by a building as reflected in utility bills.” Source energy “traces the heat and electricity requirements of the building back to the raw fuel input, thereby accounting for any losses and enabling a complete thermodynamic assessment.”

⁷¹ *Id.* at 1, 3 (emphasis supplied).

⁷² Model Ordinance at 10.



IMT states it is “collaborating with building owners, state and local governments, trade organizations, and the EPA” specifically to “determine the feasibility” of fully normalizing site EUI for operating hours and workforce.⁷³ The Roundtable understands that EPA intends to convene stakeholders to explore such questions as whether site EUI can be fully normalized, and whether source EUI might be a better metric for purposes of a possible building performance law. The Roundtable looks forward to partnering in these discussions.

At this juncture, we do not believe the Model Ordinance should endorse site EUI as *the* efficiency metric until EPA fully considers the issue, obtains input from relevant stakeholders, and makes a recommendation.

e. Utilities do not give building owners interval data on the precise moments when a grid is operating at peak capacity. Consequently, the Model Ordinance should drop performance standards for “coincident peak electric demand.”

The Model Ordinance suggests two metrics designed to curtail buildings’ electricity use during times of peak demand (such as hot summer and cold winter days). “Coincident Peak Electric Demand” would occur at the highest annual point for electricity demanded from *all sources* on the utility. “Coincident Peak *Local* Electric Demand” would occur at the highest annual point for electricity demanded from all sources *on the electric substation* that serves the building at issue. For both metrics, the building’s demand is “expressed in kW at the [15-minute] interval” when the utility’s overall demand is highest.⁷⁴

We are not aware of situations where utilities provide such granular data at 15-minute intervals for a specific property to determine when, exactly, the highest point of electric demand occurs for a given year. How could a property owner meet this standard if it does not even have the time-sensitive data that would allow it to know when to comply? Indeed, IMT recognizes the inherent limitations of this recommendation. The Model Ordinance advises jurisdictions to “work with their local electric utility to maintain interval consumption data for up to 10 years for the purpose of measuring properties’ compliance with this standard,” and the electric utility must be “committed to providing both the necessary data and advance warning of anticipated peak demand times.”⁷⁵ Aspirations that jurisdictions and utilities *might* develop protocols to supply this data *someday* cannot justify a model law *now* that recommends building owners strive for a standard they cannot ascertain.

The Model does not set a standard for GHG emissions attributable to grid-purchased electricity, because “to accurately measure buildings’ GHG emissions from grid electricity requires data on the grid’s carbon content by time of day as well as property owners having data on the time of use of their energy consumption. *These conditions are currently present in very few jurisdictions.*”⁷⁶ The same reasoning argues against the Model’s “coincident peak load”

⁷³ *Id.*

⁷⁴ *Id.* at 4.

⁷⁵ *Id.*

⁷⁶ *Id.* at 11 (emphasis supplied).



standards. Furthermore, it warrants re-emphasis that, by combining loads for multiple buildings, a key benefit of district thermal systems is to more efficiently manage peak electric demand than an individual asset on a one-off basis.⁷⁷

Until science, research and technology support a plan to collect, share and manage 15-minute interval grid data – that is normalized for building occupancy – the “coincident peak load” standards are premature. The Roundtable recommends that the Model Ordinance drop these performance criteria.

3. Any BPS law should be joined with financial assistance to help all regulated owners defray the capital expenses needed to bring their buildings into compliance.

In its assessment of the ten (10) U.S. and international jurisdictions that had (to date) enacted building performance standards, the American Council for an Energy-Efficient Economy (ACEEE) explains:

In these jurisdictions, proponents of building performance standards are arguing that the standards *would not have been adopted but for the expectation of future utility incentives*, and thus continued utility incentives are important for making sure the standards are successful and not either ignored or repealed Complementary activities can include building benchmarking, education and technical assistance on ways to reach required performance levels, *and financial incentives and financing to help cover costs to building owners*.⁷⁸

The Roundtable concurs. Any holistic legislative or regulatory BPS package must be complemented with tax, lending, or other financial assistance programs to defray building expenditures needed to meet energy and climate targets.

A “deep renovation task force” envisioned by IMT, that is “charged with creating a combined funding and technical assistance package,”⁷⁹ will likely need to re-imagine a jurisdiction’s existing incentive programs such as those reflected in the Database of State Incentives for Renewables and Efficiency (“DSIRE”).⁸⁰ What *was* an “incentive” to *encourage* buildings to reach higher performance will likely become “assistance” to help regulated owners meet new regulatory *mandates*. In this regard, we think the Model Ordinance is wrong in characterizing the amount of an Alternative Compliance Payment (“ACP”) to be set as a “sufficient ... incentive” for owners to meet interim or final targets.⁸¹ As envisioned, the ACP is

⁷⁷ *Supra* note 68.

⁷⁸ Steven Nadel and Adam Hinge, ACEEE, [Mandatory Building Performance Standards: A Key Policy for Achieving Climate Goals](#) (June 22, 2020) at 41 (emphasis supplied).

⁷⁹ Model Ordinance at 17.

⁸⁰ See <https://www.dsireusa.org/>.

⁸¹ Model Ordinance at 19.



a “stick,” not an incentive; the owner *must* make the payment if the building fails to reach a target.

Consequently, the traditional metrics to measure a building’s *investment* performance should shape the targets for a building’s *climate* performance. The typical analyses used by an owner to undertake any capital investment project – such as simple payback, return on investment, and annual growth rate calculated as internal rate of return – are critical factors for policy makers to assess whether their BPS climate targets are even feasible to reach in the first place. If compliance *costs* are too excessive – and exceed the sum of compliance *payments* – then any economically rational building owner will simply write a check to the jurisdiction as opposed to investing in the asset to meet an unreachable performance target. This cannot be the goal of a potential BPS jurisdiction. It must either set reasonable and cost-effective performance targets that drive owners to invest in their assets with the goal to achieve compliance. Or, the jurisdiction must provide ample taxpayer-funded sources to assist owners in reaching aggressive “stretch” goals that require capital expenditures beyond what a building’s projected cash-flows from rent or other income can sustain.

Furthermore, financial assistance should be available to any owner regulated within the scope of a BPS law. That is, if a BPS regulates “COVERED PROPERTY” with “[25,000] square feet of gross floor area,”⁸² then any owner of such a building should be able to access monetary support. Perhaps heightened forms of assistance might be made available for a “combined funding and technical assistance package” for small business owners who show they lack the “financial or technical capability” to meet the standards.⁸³ However, we caution against some restrictive set of “eligibility guidelines”⁸⁴ that generally limit availability of tax, loan or other support to the full universe of building owners that must pay the costs of BPS regulations.

4. The Model Ordinance should strive for robust compliance, encourage investments in existing buildings, and its provisions should allocate compliance burdens based on building occupants’ energy usage.

As a general matter, The Roundtable agrees with the Model Ordinance’s “trajectory” approach for a building to make progress at regular intervals before reaching a “final” metric.⁸⁵ We also agree that compliance pathways and payments need to “better align” landlords and tenants.⁸⁶ Whether compliance obligations are proportionate to a regulated owner’s energy usage will be essential to attract support that a BPS ordinance fairly achieves its environmental design without unnecessarily punitive enforcement.

⁸² *Id.* at 5.

⁸³ *Id.* at 17.

⁸⁴ *Id.*

⁸⁵ *Id.* at 9.

⁸⁶ *Id.* at 3.



- a. ***The goal of any BPS law should be to encourage, not discourage, investments in existing buildings as the best and lowest-cost source of efficiency and emissions improvements. Accordingly, owners should have the option to invest in their buildings in lieu of “interim” payments, toward the ultimate goal of “final” compliance.***

Saving energy is always cheaper than creating new clean energy. Energy efficiency investments cost about 3.1 cents per kilowatt-hour nationally, which is less than the levelized costs of investments in wind and utility-scale solar generation.⁸⁷ In this regard, a key change should be made to the Model’s compliance payment provisions to motivate affected real estate stakeholders to invest in their buildings as the most cost-effective plan to meet climate targets.

The Model Ordinance states that an owner whose building fails to meet either an “interim” or “final” performance standard shall be required to make a “compliance payment.”⁸⁸ Sums from such fines are to be deposited in “trust fund accounts” established by the jurisdiction, with a recommended 50% of payments “used to support performance improvements” *generally* to “privately-owned properties within the jurisdiction.”⁸⁹

The Roundtable recommends as follows: If an owner fails to meet an “interim standard,” then in lieu of the payment it should have an option to invest those sums ***back in the building*** and install retrofit measures projected to move the asset toward its ultimate “final” target. Such an approach may enhance a BPS law’s acceptance by the very industry it would regulate, help avoid characterizing interim payments as punitive, and reflect a public-private partnership that encourages greater cooperation between real estate owners and state/local regulators to achieve climate objectives.

- b. ***Attaching an optional “Building Performance Action Plan” to a property’s deed raises significant financing and transactional questions – and could cause owners to simply pay fines and avoid building improvements rather than place a cloud on title.***

The Model proposes that, where a building “cannot reasonably meet” an interim or final performance standard, then the owner can agree to a Building Performance Action Plan (“BPAP”) with timelines to make improvements to the property.⁹⁰ As phrased in the Model, BPAPs are not mandatory. They are an option *if* the owner “believes” its asset cannot reach an interim or final standard, and then the owner “*may*” propose an action plan.⁹¹ If a jurisdiction approves a BPAP, then the owner is deemed to come into compliance so long as the plan is

⁸⁷ ACEEE, [Renewables Are Getting Cheaper but Energy Efficiency, on Average, Still Costs Utilities Less](#) (Dec. 18, 2018).

⁸⁸ Model Ordinance at 19.

⁸⁹ *Id.* at 20.

⁹⁰ *Id.* at 15.

⁹¹ *Id.* at 15-16 (emphasis supplied).



fulfilled.⁹² The Ordinance goes on to state that the BPAP is a “binding agreement” between the owner and the jurisdiction – and ***“shall be referenced in an attachment to the deed to the [property] at the office of the Recorder of Deeds.”***⁹³

The deed-filing aspect of this provision could undermine an otherwise worthy BPAP option. Clouding a property’s title with a BPAP could cause friction during the process to finance, refinance, or sell an asset. Requiring a deed attachment will likely induce an owner to avoid entering into a BPAP at all, write the check for a compliance payment, and forego investing in building improvements with beneficial environmental and community impacts. Certainly, that is not IMT’s goal.

Of course, an owner who voluntarily agrees to an action plan should be bound by its commitments. As opposed to muddling with property title, we can envision alternatives to ensure that an optional BPAP has effect and is made available to tenants, prospective purchasers, and other audiences. For example, a better approach might be to attach a BPAP to a “benchmarking report” that the owner has a legal obligation to file with the jurisdiction. Indeed, IMT “assumes the adopting jurisdiction [already] has an energy and water benchmarking law in place with high compliance rates.”⁹⁴ The goal of transparency that attends to building benchmarking laws can likewise drive concurrent filings for voluntary BPAP commitments.

c. Non-compliance payments should follow energy consumption. Building occupants – be they owners or tenants – should be responsible for their respective contributions to energy use and GHG emissions.

A common feature of benchmarking ordinances – upon which a theoretical BPS law would be based – is that tenants have the compliance burden to provide to their landlords with energy consumption information covering the spaces they lease.⁹⁵ This is especially pertinent where the space is separately-metered and utility bills are paid by tenants under a “triple net” lease.

Tenants’ compliance obligations for purposes of benchmarking laws should carry-over to any performance standard laws. Lessees should be responsible for their own energy consumption, their own contributions to emissions, and exposed to fines accordingly if targets are not reached. We recognize that IMT encourages jurisdictions to use the term “alternative compliance payment” instead of “fine” or “penalty” to “facilitate owners passing through some or all of the costs to commercial tenants” in achieving performance standards.⁹⁶ But how legislative or regulatory bodies might “style” a payment obligation ***on building owners*** must not

⁹² *Id.* at 16.

⁹³ *Id.* (emphasis supplied)

⁹⁴ *Id.* at 1.

⁹⁵ E.g., [Boston](#) Code Ch VII, § 7.2.2(g) (2013); [Chicago](#) Municipal § Code 18-14-101.4 (2013); [New York City](#) Local Law No. 133 (2016) amending Local Law No. 84 (2009), § 28-309.4.1; [Seattle](#) Municipal Code 22.2920.050101; [Washington, D.C.](#) 20 DCMR § 3513.6 (2013).

⁹⁶ Model Ordinance at 3.



replace direct language creating a mutual responsibility *on tenants* to meet performance targets based on the energy usage and emissions they cause themselves. Following benchmarking laws as a guide, the Model Ordinance should expressly allocate shared efficiency and emissions compliance obligations on commercial tenants.

5. The *least* efficient buildings and communities are frequently the *most* distressed buildings and communities – and added regulatory costs from BPS mandates could disproportionately affect housing affordability and neighborhoods on the “frontlines” of climate change. But with respect, IMT is not an expert on issues related to economic development and it should refrain from proposing specific definitions on these complex matters.

“People earning low incomes and communities of color are the most vulnerable to the worst of climate change’s effects.”⁹⁷ The Roundtable firmly agrees with IMT’s “recognition that building performance intersects with a variety of other social priorities such as health, economic development, resiliency, housing affordability, and racial equity.”⁹⁸ All of these issues are critically important. The Model Ordinance is right to remind potential BPS officials to fully and fairly assess the costs and benefits of their regulatory programs, so that objectives related to climate policies do not sacrifice other paramount social and economic goals.

However, we understand that IMT has not cultivated its expertise and relationships with state and local *energy* regulators on matters of “affordable multifamily housing” and development in “disinvested communities.” The Roundtable does not believe the Model Ordinance should counsel on these matters and furnish advisory legal definitions on these topics.

For example, the Model states that “jurisdictions should work with local affordable housing experts, including owners, operators, tenant advocates, and affordable housing advocates to create a locally appropriate definition of affordable housing.”⁹⁹ The Model should stop there. IMT nonetheless pegs the definition of “affordability” to “households with incomes less than or equal to **[80] percent of the area median income.**”¹⁰⁰ The U.S Department of Housing and Urban Development’s well-accepted benchmark for housing “affordability” is not based on AMI, but whether the occupant is paying no more than 30% of gross income on housing costs, including utilities.¹⁰¹ Turning to pertinent federal regulatory definitions, the “middle-income” range of **80%-119% AMI** as defined under Community Reinvestment Act (CRA) rules would be a much more appropriate reference. IMT’s suggested “one-size fit-all” definition of households

⁹⁷ NRDC, [A Roadmap for Frontline Communities](#) (Dec. 15, 2019).

⁹⁸ Model Ordinance at 1.

⁹⁹ *Id.* at 3.

¹⁰⁰ *Id.* (emphasis supplied).

¹⁰¹ E.g., HUD User, [Rental Burdens: Rethinking Affordability Measures](#)



at 80% AMI does not reflect affordability concerns in high housing-cost markets.¹⁰² Greater attentiveness should be shown to the rental needs of teachers, first responders, and other essential middle-class workers who are “priced-out” of housing in major downtown and suburban locations. America’s larger metro areas – where the dearth of workforce housing is a serious problem – are also many of the same jurisdictions that have already adopted benchmarking laws and would likely consider BPS targets.¹⁰³

Similarly, the Model Ordinance’s “disinvested communities” definition refers (in part) to “census tracts with either a concentration of low income (the median income is *less than 80% of the area median income*) or minority residents.”¹⁰⁴ Again, tracking established regulatory definitions is critical. Pertinent CRA regulations define “low-income” *not* as “less than 80% AMI” – but as “less than **50% AMI**.”¹⁰⁵ A number of federal programs already use a census-tract approach to delineate struggling communities through some combination of criteria based on median income, poverty, and/or unemployment rates using U.S. Census Bureau data from the American Community Survey (“ACS”).¹⁰⁶ A few examples are found in the census tracts that qualify under the programs for Low-Income Housing Tax Credits (“LIHTCs”),¹⁰⁷ New Markets Tax Credits (“NMTCs”),¹⁰⁸ Opportunity Zones,¹⁰⁹ and Small Business Administration (“SBA”) Historically Under-Utilized Business (“HUB”) Zones.¹¹⁰ Jurisdictions would be better served with references to these and similar programs as illustrative of “disinvested community” criteria – as opposed to suggesting an across-the-board “80% AMI” standard.

* * *

The Real Estate Roundtable appreciates this opportunity to provide comments on IMT’s Model Building Performance Standards Ordinance. For more information, please contact Duane Desiderio (d-desiderio@rer.org), Senior Vice President and Counsel.

¹⁰² [12 C.F.R. § 25.03](#) (Office of the Comptroller of the Currency regulations defining distinct “Income Levels” as: “low-income” (less than 50% area median income [AMI]); “moderate income” (50% - 79% of AMI); “middle income” (80%-119% of AMI); and “upper income” (120% or more of AMI)).

¹⁰³ E.g., Samuel Stebbins *Priced out of the market? Cities where the middle class can no longer afford a home*, *USA Today* (Aug. 15, 2018) (citing Harvard University Joint Center for Housing Studies’ 2018 report that middle-class families are priced-out of housing markets in metro areas of Stockton, CA; Austin, TX; Baltimore, MD; Portland, OR; Sacramento, CA; New Haven, CT; Denver, CO; Miami, FL; Seattle, WA; Riverside, CA; Boston, MA; Washington, DC; New York-Newark-Jersey City, NY, NJ, and PA; Los Angeles, CA; Bridgeport, CT; Honolulu, HI; San Diego, CA; Oxnard, CA; San Jose, CA; San Francisco, CA).

¹⁰⁴ Model Ordinance at 5.

¹⁰⁵ *Supra* note 102. “Moderate income” is defined under CRA regulations as “50% - 79% AMI.”

¹⁰⁶ See <https://www.census.gov/programs-surveys/acs>.

¹⁰⁷ HUD User website at <https://www.huduser.gov/portal/datasets/qct.html>.

¹⁰⁸ U.S. Department of the Treasury, Community Development Financial Institutions Fund, [NMTC application for CY 2020](#) at 27 (targeting eligible census tracts for NMTC awards as part of desired “Community Outcomes”)

¹⁰⁹ As per the 2017 *Tax Cuts and Jobs Act*, the IRS has designated 8,760 census tracts across the country as “Qualified Opportunity Zones.” See IRS list at <https://www.irs.gov/pub/irs-drop/n-18-48.pdf>.

¹¹⁰ SBA’s “HUB Zones” are distressed areas census tracts that follow federal tax code criteria. See <https://www.sba.gov/offices/headquarters/ohp/spotlight>.



About The Real Estate Roundtable

The Real Estate Roundtable (www.rer.org) brings together leaders of the nation’s top publicly-held and privately-owned real estate ownership, development, lending and management firms with the leaders of major [national real estate trade associations](#) to jointly address key national policy issues relating to real estate and the overall economy.

By identifying, analyzing and coordinating policy positions, The Roundtable’s business and trade association leaders seek to ensure a cohesive industry voice is heard by government officials and the public about real estate and its important role in the global economy. Collectively, Roundtable members’ portfolios contain over 12 billion square feet of office, retail and industrial properties valued at more than \$3 trillion; over 2 million apartment units; and in excess of 3 million hotel rooms. Participating trade associations represent more than 2 million people involved in virtually every aspect of the real estate business.

Who We Are

