

WHAT EVERY LAWYER SHOULD KNOW ABOUT THE DEPARTMENT OF
BUILDINGS
Spring 2014

I. Overview

A. The Department of Buildings is the mayoral agency charged by the New York City Charter with enforcing

“with respect to buildings and structures, such provisions of the building code, zoning resolution, multiple dwelling law, labor law, and other laws, rules and regulations as may govern the construction, alteration, maintenance, use, occupancy, safety, sanitary conditions, mechanical equipment and inspection of buildings or structures in the city....”

New York City Charter (“Charter”) §643. See generally Charter §643 - §649; Administrative Code of the City of New York (“Ad. Code”) §28-103.1; Zoning Resolution of the City of New York (“ZR”) §71-00. It discharges these duties with respect to 975,000 buildings in the City with a staff of over 1,000 working in five borough offices and a central headquarters at 280 Broadway in Manhattan.¹

B. The Department exercises its authority in four settings. First, it issues approvals and permits for building construction. Ad. Code, Title 28, Chapter 1, Articles 104 and 105. Second, it issues certificates of occupancy. Ad. Code, Title 28, Chapter 1, Article 118. Third, it issues violations and other orders attesting to and directing the correction of illegal conditions. Ad. Code, Title 28, Chapter 2. Finally, it licenses most of the building construction trades. Ad. Code, Title 28, Chapter 4.

C. The Department generally issues permits for **as-of-right** construction. That means that the construction or alteration work is allowed under zoning without resort to variance or special permit from the City Planning Commission or the Board of Standards and Appeals (“BSA”).² The Department’s permitting activities are ministerial in nature: if a code-and zoning-compliant application is filed, the Department must approve it. Ad. Code §28-104.2.8 and §28-104.2.9. See Filmways Communications of Syracuse v. Douglas, 106 AD2d 185 (4th Dep’t. 1985). Because one has a legal right to obtain a permit upon compliance with prescribed requirements, the issuance of a permit is

¹ The Department of Small Business Services exercises authority with respect to buildings under its jurisdiction and the Fire Department shares with Buildings the authority to enforce certain Building Code provisions relating to fire safety. Ad. Code §28-103.1.

² Even projects that require and secure discretionary approvals from the City Planning Commission or the BSA must have a building permit from the Department before starting construction.

subject to mandamus. Gimprich v. Board of Education, 306 NY 401 (1954); Small v. Moss, 277 NY 501 (1938).

D. In a related vein, the Department's issuance of permits is ministerial for purposes of State and local environmental review. Citizens for the Preservation of Windsor Terrace v. Smith, 122 AD2d 827 (2d Dep't. 1986); 6 NYCRR §617.5(c)(19). Any adverse impacts generated by as-of-right development are a function of the underlying zoning, which received environmental review at the time of its enactment, rather than of the issuance of the building permit that allows that development to go forward on a particular site.³

E. Finally, the ministerial nature of the Department's permitting activities has consequences for instances in which the Department issues an approval and permit in error. The Codes authorize the revocation of an approval and permit issued in error when circumstances are such that they should not have been issued. Ad. Code §28-104.2.10; §28-105.10. The Department generally cannot be estopped from correcting its error through revocation regardless of the fact that an applicant has relied on the improperly issued permit. Parkview Associates v. City of New York, 71 N.Y.2d 274 (1988). The rationale for the no-estoppel rule is based on a reluctance to frustrate the legislative will by allowing a permit to stand notwithstanding its failure to comply with code or zoning. This oft-times harsh result protects the integrity of the regulatory scheme.

F. Those aggrieved by final determinations of the Department, including the issuance or revocation of permits, have recourse to the BSA. The Charter vests BSA with authority to review these determinations and that review is *de novo*. Charter §666(6)(a); ZR §72-11. Resort to administrative review at BSA is required prior to challenging the action in an Article 78 proceeding pursuant to Ad. Code § 25-207, except in case of emergency or when such review would be futile.

G. Generally, the Department's enforcement of zoning is strict; any tolerance of a departure from the text arguably amounts to a variance that is within the jurisdiction of BSA. See Charter §666(5) and §668. By contrast, with respect to the Construction Codes, the Department has limited authority to vary their provisions in cases of practical difficulty as to methods of construction, use of prescribed materials, or installation or alteration of service equipment when alternative methods, materials, or techniques can nonetheless protect public safety. Charter §645(b)(2); Ad. Code §28-103.3. The Department might be asked to exercise this authority when, for example, an existing structure is made of wood, prohibited by the Code, but in a legalization application can be made safe by the addition of certain fire protection devices, materials, or equipment.

³ Projects receiving building permits pursuant to City Planning Commission or BSA discretionary approvals receive environmental review at those agencies.

H. The Department’s powers are exercised by its Commissioner and by its five Borough Commissioners, historically know as “Borough Superintendents.” Charter §645(c). In addition, there is limited technical and legal review available centrally.

I. Effective in 2008, the **Construction Codes**⁴ largely replaced the **1968 Building Code**. Before then, Title 26 of the Administrative Code governed licensing of the construction trades as well as certain of the Department’s processes, including enforcement. The Building Code was formally known as Chapter 1 of Title 27 of the Administrative Code and contained procedural provisions governing issuance of approvals and permits and certificates of occupancy. It also contained substantive provisions governing construction as well as certain periodic maintenance and reporting requirements (elevators, boilers, and facades). Embedded in the Building Code was §27-131.1, governing Reference Standards, which are technical specifications most of which could be adopted and changed upon public notice by the Department in consultation with the Fire Department.

J. The Construction Codes are contained in Title 28 of the Administrative Code; their 2008 enactment repealed all of Title 26 and the administrative provisions of Chapter 1 of Title 27. The remaining substantive provisions of Chapter 1 of Title 27 are in place for alterations to existing buildings. See Section I, Subsection N below. Local laws enacted since 2008 have generally amended both the Construction Codes and the remaining effective provisions of the 1968 Building Code. The Construction Codes are on a periodic revision cycle. A thorough treatment of a building code issue requires an understanding of which code applies followed by a careful search of amendments subsequent to the 2008 enactment of the codes. The Department posts such amendments on its website.

K. The structure and applicability of the Construction Codes can be confusing. Title 28 of the Administrative Code contains five chapters that govern all of the codes; these chapters cover administration, enforcement, maintenance obligations, licensing, and miscellaneous provisions, including outdoor signs. These provisions are followed by four additional chapters containing the Plumbing Code, the Building Code, the Mechanical Code, and the Fuel Gas Code. Each of the individual codes, in turn, contains a chapter 1 with additional administrative provisions applicable to the precise matters covered by the particular code.

L. Generally, all work on new construction filed on or after July 1, 2008 must comply with the Construction Codes. The 2008 enactment provided a grace period of twelve months after July 1, 2008 during which owners could elect to use the 1968 Building Code for new buildings except for administration, enforcement, and

⁴ Unless the context suggests otherwise, all references to “the code” or “the codes” refer to Title 28 of the Administrative Code and to all of the codes comprising the New York City Construction Codes. The 2008 Construction Codes were amended comprehensively by Local Laws 41 of 2012 and 141 of 2013, effective generally October 1, 2014. In addition, the NYC Council has enacted several stand-alone local laws amending the Construction Codes as part of the City’s green building and building resiliency efforts.

construction operations. With certain exception, the recent updates will become effective with respect to applications filed on and after October 1, 2014.⁵

M. The 2014 Codes introduce the term “prior code building” to mean (i) a building or structure in existence prior to July 1, 2008 or one for which a lawful permit was issued for the erection of such building or structure prior to July 1, 2008; or (ii) a building or structure erected in accordance with the 1968 Building Code under a lawful permit issued for the erection of such building or structure on or after July 1, 2008 in accordance with the grace period option. “Prior code buildings” are thus, effectively, buildings erected pursuant to the 1968 and earlier Building Codes. By contrast, an “existing building or structure” is defined as simply a completed building or structure that is in existence at the time of an applicable code reference. Ad. Code §28-101.5.

N. Alterations to prior code buildings, at the option of the owner, may comply with either the Construction Codes⁶ or the 1968 Building Code (including, where authorized by the 1968 Building Code, the code in effect prior to 1968), subject to certain exceptions, which must comply with the provisions governing new construction or installations (Ad. Code §28-101.4.3)⁷:

1. Fuel gas, plumbing, and mechanical installations
2. Fire protection systems
3. Elevator, conveyors, and amusement rides
4. Construction operations

⁵ The 2014 Codes will go into effect on October 1, 2014 except (i) that this local law [Local Law 141 of 2013] shall not apply to construction work related to applications for construction document approval filed prior to such effective date (ii) sections 28-304.6.4, 28-304.6.5 and 28-304.6.6 of the administrative code of the city of New York as amended by section 61 of part A of this local law [elevator inspections] and sections 2 through 9 of this local law [amending 28-101 through 28-103] shall take effect immediately and (iii) section 403.5.2 of the New York city building code as added by section 1 of subpart 4 of part C of this local law shall take effect the later of 18 months after the date of enactment of this local law [June 30, 2015] or the date of an amendment of the definition of floor area in the New York city zoning resolution providing for the exclusion of the floor area of the additional exit stairway and additional exit stairway width from the calculation of floor area for purposes of the New York city zoning resolution. See Buildings Bulletin 2014-006 at http://www.nyc.gov/html/dob/downloads/bldgs_bulletins/bb_2014-006.pdf.

⁶ The provisions of the 2014 Construction Codes governing alterations will govern with respect to applications for construction document approval submitted on and after October 1, 2014. Such applications submitted before that date are governed by the alteration provisions of the 2008 Construction Codes. See Buildings Bulletin 2014-006 at http://www.nyc.gov/html/dob/downloads/bldgs_bulletins/bb_2014-006.pdf.

⁷ Generally, the substantive provisions governing prior code buildings are found in the separate chapters of the code relating to the item listed in Ad. Code §28-101.4.3. So, for example, the provisions governing alterations to fire protection systems in prior code buildings are set forth in Chapter 9 of the Building Code and those governing fuel gas and mechanical installations in prior code buildings are set forth in §102.4 of the Mechanical and Fuel Gas Codes, respectively.

5. Accessibility
6. Encroachments into the public right of way
7. Administration and enforcement
8. Special inspections
9. Materials
10. Security grilles
11. Energy efficiency
12. Roof coverings and replacements
13. Handrails
14. Guards
15. Special flood hazards
16. Structural
17. Emergency and standby power systems
18. Electric vehicle charging stations in parking garages and open parking lots.

In addition, one must use the 2014 Construction Codes when work increases the existing floor surface area of a prior code building by more than 110%. Ad. Code §28-101.4.5. Such applications must be filed as new buildings.

O. Provisions of Title 28 that apply to all codes should be cited as “28-section number.” The technical codes may be cited separately; provisions of each should be cited as “BC section number,” “PC section number,” “MC section number,” and “FGC section number.” Section 28-101.3 governs the interpretation of the various codes, sections, and subsections of the law by providing:

28-101.3 Codes. Any reference in this title to “this code” or “the code” shall be deemed to be a reference to this title and all of the codes comprising the New York city construction codes unless the context or subject matter requires otherwise. Whenever a section or subsection of this code is cited or referred to, subordinate consecutively numbered sections and subsections of the cited provision are deemed to be included in such reference unless the context or subject matter requires otherwise.

P. The Department has implemented the Codes in stages; it continues to promulgate and amend implementing rules. However, existing rules are continued:

Rules promulgated by the department in accordance with the law in effect prior to July 1, 2008 shall remain in effect for the matters covered to the extent that such rules are not inconsistent with this code unless and until such rules are amended or repealed by the department. Ad. Code §28-103.20.

Q. Apart from the Construction Codes, the laws enforced by the Department include:

1. The Energy Code, formally known as the New York City Energy Conservation Code. See Section VII, Subsection A below.

2. The Electrical Code, formally known as Chapter 3 of Title 27.⁸ The Electrical Code was historically administered by the Department's Bureau of Electrical Control, a somewhat autonomous arm of the agency that was incorporated into the Department in the early 1980's from its prior home in what was then known as the Department of General Services. Today, these functions have been absorbed by the Department's Electrical Unit.

3. The Zoning Resolution. The City Planning Commission and the City Council enact the City's zoning law. It is up to the Department to enforce it. The Zoning Resolution's key regulatory unit is the zoning lot, a legal fiction that generates never-ending definitional issues whose resolution frequently requires consultation between the Departments of Buildings and City Planning.

4. There are other statutory provisions that the Department considers in its approval of plans and enforcement in the field. These include the Multiple Dwelling Law and the Labor Law. In addition, the Department works closely with other agencies to enforce Code provisions that reflect their interests, such as the Department of Housing Preservation and Development ("HPD"), with respect to Certificates of No Harassment for Single Room Occupancy Dwellings (Ad. Code, Title 28, Article 107) and the Mayor's Office for People with Disabilities regarding accessibility provisions (BC Chapter 11; formerly Ad. Code §27-292.1 *et seq.* [Local Law 58/1987]).

R. Standards are technical specifications. In general, national standards-setting organizations write reference standards and they may be incorporated into the codes either "as is" or in modified form. In the Construction Codes, they are called

⁸ Like the Construction Codes, the Electrical Code is on a periodic revision cycle. The latest revision is reflected in Local Law 39 of 2011, which enacted the 2008 edition of the National Fire Protection Association NFPA 70 National Electrical Code with New York City amendments.

“Referenced Standards” and, with the exception of those contained in the Plumbing Code, may be modified by local law or by Department rule. See §28-103.19.

S. Apart from the laws it enforces, the Department also promulgates and enforces rules under the City Administrative Procedure Act. Charter §§1041 *et seq.* In addition, the Department has **Policy and Procedure Notices** (formerly **Directives and Memoranda**) and **Buildings Bulletins**. These documents are interpretive or explanatory vehicles that may deal with technical, operational, or legal issues. They are available on the Department’s website. Thoroughly researching a Buildings issue requires that one consult not just codes and rules, but also these PPNs or Directives, to get a full picture of the issue’s treatment by the Department over time.

T. The Department’s database is the Building Information System (“**BIS**”). It is available on the Department’s website and can be used to ascertain the recent filing and violations history of a property.

II. Approvals and Permits

A. There are various types or classifications of building permits. Construction permits include new building, alteration, foundation and earthwork, earthwork only, and full demolition permits. There are also plumbing, sign, and fire protection and suppression system permits as well as temporary construction equipment permits. Service equipment permits cover installation or modification of air conditioning and ventilating systems, boilers, elevators, and escalators, mobile boilers, and mobile oil tanks. Ad. Code §28-105.2. Electrical and crane permits are issued separately. Depending on the type of work the client needs to do, it will apply for one or more of these permits.

B Alteration permits have operational sub-classes: Alt-1, Alt-2, and Alt-3, depending on the scope of the work. Construction that involves a change in use, egress, or occupancy is filed as an Alt-1. Alt-2s are smaller in scope and may include different work types. Alt-3s are intended for minor alterations that involve only one work type such as a curb cut or construction fencing. Certain Alt-3s do not require detailed plans and can be filed by someone other than a registered design professional.

C. Permits are required for most types of building or alteration work. Ad. Code §28-105.1. However, certain types of work are exempt. Ad. Code §28-105.4. These include emergency work, minor alterations and ordinary repairs, certain public utility company work, ordinary plumbing work, installation of certain signs, and geotechnical investigations. Exempt work of this type typically involves replacements in kind and other de minimus changes that do not affect safety or egress. It is important to carefully read the governing sections of law, as they include their own definitions, in addition to Department rules and bulletins.

D. There are two types of demolition permits: full and partial. The partial demolition captures less than full demolitions *as demolitions* rather than as alterations and requires the same safety precautions as full demolition. A **Full Demolition** is the

dismantling, razing, or removal of all of a building or structure, and all operations incidental thereto. A **Partial Demolition** is the dismantling, razing, or removal of structural members, floors, interior bearing walls, and/or exterior walls or portions thereof, including all operations incidental thereto. See Ad. Code §28-101.5; BC §3302.1.

E. The permitting process has two steps: one must first secure an approval of the filed application and then one's contractor can "pull" or secure the permit. Ad. Code §28-104.1; §28-105.1.

F. Highlights of the Application Process - Ad. Code, Title 28, Article 104; BC §§106 et seq.

1. An applicant for a construction project generally is a registered design professional, either a licensed professional engineer or a registered architect. Applications must be made on behalf of the owner and, if a coop or condominium, must be accompanied by consent of the cooperative board of directors or the condominium board of managers. Ad. Code §28-104.6; §28-104.8.2. Demolition, certain oil burner, boiler, plumbing, elevator, and landscape architecture applications are subject to somewhat special rules and may generally be filed by the respective licensee. Ad. Code §28-104.6.

2. A filing typically includes an application and a set of plans or "**construction documents.**" BC §§107.2 – 107.15.

3. Although a licensed professional prepares the filing, much of the Department's filings are made by "**filing representatives**" or "**expeditors.**" These individuals are required to be registered with the agency (Ad. Code, Title 28, Article 416) and, as a practical matter today, are among the principal players in the conduct of the Department's day-to-day business. There are two types: Class 1 and Class 2 representatives. Class 1 representatives may handle the paper, but may not appear before Department staff regarding construction document approvals. Class 2 representatives may so appear. For certain appearances, the Class 2 filing representative must be employed and supervised by the registered design professional of record. In the absence of that relationship, the registered design professional of record must appear as well. 1 RCNY §104-24. The rule imposes certain training requirements on filing representatives.

4. The Fire Department must review construction documents for facilities and systems for which the Fire Code provides design and installation requirements. These include fire alarm systems and combustible material storage. Ad. Code §28-104.1.1.

5. Construction documents must identify all materials proposed to be used and must state whether such materials are subject to special inspection. Ad. Code §28-104.7.8.

6. The code generally requires engineered calculations, including a description of the sequence of demolition, and Department approval before a building can be demolished. BC §3306.5.

7. The application for construction document approval must indicate whether the building contains occupied housing units subject to rent control or rent stabilization. If so, there are special requirements. Ad. Code §28-104.8.1.2. Construction on any building proposed to contain occupied dwelling units during construction requires the filing of a tenant protection plan covering such items as egress, fire safety, structural safety, housing standards, noise, and health. Ad. Code §28-104.8.4.

8. An application is considered abandoned if, within a year of its submission, it is not diligently prosecuted or there is no permit issued. This period may be extended for good cause. Ad. Code §28-104.2.3.

9. An application must call out all necessary elements and separately attest to its compliance with the New York City Energy Code. Ad. Code §28-104.7.9; §28-104.8.1.4.

G. Applications are reviewed in two ways:

1. If filed for **full review**, Department plan examiners do just that – examine the filing for compliance with code and zoning. Deficient filings are issued objections within 40 days; filing representatives make appointments to resolve the objections; new plans are submitted and reviewed within 20 days; and the process continues until the plans are approved. After approval, a permit can be issued. Ad. Code §28-104.2.7 - §28-104.2.9.

2. If filed under the agency’s **Directive 14** or **professional certification** program, the Department performs less than full review. Ad. Code §28-104.2.1; Directive 14 of 1975; OPPN 01/04. Instead, the licensed professional takes responsibility for certifying compliance with the law and the Department “**accepts**” the job and issues a permit. Pursuant to Ad. Code §28-104.2.1.1, an acceptance has the effect of an approval. Generally, Directive 14 jobs represent less significant work that does not affect use, egress or occupancy and the Department does a limited review. Professional certification may be used for any sort of construction or alteration work, including new buildings, and the licensed professional is entirely responsible for the review. The Department audits these filings and, if errors are found, may take action to revoke permits and/or refer offending professionals to the State Department of Education.

H. Demolition and alteration of buildings constructed on or before April 1, 1987 must satisfy filing requirements regarding **asbestos abatement**. Ad. Code, Title 28, Article 106. The 2007 Deutsch Bank building fire resulted in significant changes to the City’s permitting and reporting requirements for construction activities involving

asbestos containing materials, including the creation of new responsibility and permitting authority for the Department of Environmental Protection. The new requirements are complicated, involving Buildings, the Department of Environmental Protection, the Fire Department, and the required coordination among those agencies. See 15 RCNY Chapter 1; and FDNY Guidance Document at http://www.nyc.gov/html/fdny/pdf/cda/atru_guidance_document_final.pdf. Building owners or contractors working on buildings with asbestos containing material must consult not only design professionals, but asbestos professionals as well to ensure compliance with governing law.

I. Demolition applications must be filed by a registered design professional and must be accompanied by submittal documents showing the sequence of demolition. BC §3306.5.

J. Special filing requirements attach to new construction, horizontal enlargements, and excavation and fill activities in **coastal zones and water-sensitive inland areas**. The State must have issued required permits before the Department may approve construction documents. Ad. Code §28-104.9. Similar treatment is given to buildings containing **single room occupancy** (“**SRO**”) units. Ad. Code, Title 28, Article 107. Only certain types of work are covered – for example, demolition or removal or addition of kitchens or bathrooms. Ad. Code §28-107.3. In order to process an application for covered work, the application must be accompanied by a certification of no harassment or a waiver from HPD and by a tenant protection plan. It is important to check HPD’s rules on this subject as well.

K. Construction of new buildings and major alterations generally requires a new sidewalk. Ad. Code, Title 28, Article 108 specifies the **pavement plan** requirements for that work.

L. Construction of new buildings and major alterations to certain types of buildings with high, vulnerable, or hazardous occupancies must file a **fire protection plan**. Ad. Code, Title 28, Article 109. The plan must set out details of safety systems such as communication and alarm systems, sprinklers, emergency power systems, etc. Ad. Code §28-109.3.

M. In certain instances, a **site safety plan** must be filed with the Department and be in place during construction, rendering the construction site a “site safety job.” *Whether* a site is a site safety job requiring a site safety plan, among other things, is governed by Sections 3302 and 3310 of the Building Code, which also address the site safety manager’s responsibilities regarding monitoring and record-keeping and training and orientation obligations for the site. *What* the site safety plan must cover is governed by Ad. Code, Title 28, Article 110. A site safety plan must cover such items as the location of all fencing, walkways, sheds, street and sidewalk closings, loading areas for hoists and cranes, standpipes, and temporary elevators, netting programs, and evidence of the qualifications of site safety personnel.

N. A filing for a project that requires approval from another agency, such as the Landmarks Preservation Commission or the Loft Board, must be accompanied by the approval.

O. A permit must be obtained within 12 months following approval. Ad. Code §28-105.5. This period may be extended for good cause. Ad. Code §28-105.7.

P. Insurance is required for issuance and renewal of new building, certain major alteration, foundation and earthwork, and demolition permits. Ad. Code §28-105.12.7; 1 RCNY §101-08. In addition to proof of workers' compensation and disability benefits insurance coverage, the contractor must show proof of general liability insurance whose amount will depend on the nature of the construction being undertaken, the depth of its excavation, the proximity to and height of adjacent buildings, and the use of a tower crane.

Q. Projects requiring a Department interpretation of code or zoning or a variation of code may request such a determination. Instructions for doing so are on the Department's website.

R. Permit **fees** are set forth in Ad. Code, Title 28, Article 112 and in Department rules. In general, new building permit fees are based on building size and alteration permit fees are based on projected cost. City-sponsored emergency work and work performed on property owned by religious, charitable, or educational organizations is fee-exempt. Ad. Code §28-112.1.

S. A permit is typically issued for one year and **expires** by operation of law if work is not begun within 12 months or, if begun, is suspended or abandoned after the initial 12-month period for 12 months. A permit **lapses** as well upon expiration of required insurance or expiration or revocation of an applicant's license, if one was required. Ad. Code §28-105.9. An application for reinstatement may be sought within two years of the date of the permit's issuance and must generally comply with the law in effect at the time of reinstatement. Ad. Code §28-105.9.1. An important exception to these requirements, known now for historical purposes only, was the "**Stalled Sites**" program, pursuant to which an owner could create and adhere to an enhanced maintenance plan and satisfy additional prescribed requirements in exchange for having the site's permit renewed for up to four years. Participating sites were thus spared the need to comply with the new code once they sought reinstatement and were thus grandfathered under the code under which the permit was issued. The Stalled Sites authorization sunset in 2013.

T. The code authorizes the **revocation** of an approval and permit for failure to comply with its provisions or with other applicable laws, when there has been a misrepresentation of material fact, or when a permit has been issued in error and conditions are such that the permit should not have been issued. Ad. Code §28-104.2.10; §28-105.10. Absent an immediately perilous condition, the Department provides notice and an opportunity to demonstrate why the permit should not be revoked. Should there

be an immediately perilous condition, the Department may provide the opportunity to be heard post-suspension.

U. The issuance of a permit is conditioned upon compliance with code, construction documents, safety requirements, and the Noise Control Code. The latter requires that certain types of construction prepare, submit, and adhere to a Noise Mitigation Plan. Ad. Code §§24-219 - 24-224. See 15 RCNY, Chapter 28.

V. The Department's Hub is a centralized, electronic plan review – and soon-to-be inspections - operation designed to save time by bringing Department examiners and staff from other affected agencies together to resolve issues raised in the construction document review process. The other agencies are the Fire Department, the Landmarks Preservation Commission, and the Departments of Environmental Protection, Transportation, City Planning, and Parks and Recreation. The Hub Self-Service program provides expedited approvals for professionally certified Alt-2 and Alt-3 applications.

W. The code authorizes the erection of certain **temporary structures and uses** for up to 90 days. Ad. Code, Title 28, Article 111. These installations are required to conform to the code's essential safety provisions covering structural strength, fire safety, egress, accessibility, lighting, ventilation, and sanitary. Ad. Code §28-111.2.

III. Construction

A. The Department's position with respect to the construction process has historically been to let it proceed under the eyes of third party inspectors. There have never been and will never be enough Building Department staff to monitor the progress of all the construction sites around the City. Before the new codes were adopted, required inspections, other than the final inspection for a new certificate of occupancy, were authorized to be performed by architects and engineers; certain of these inspections were termed "controlled inspections" and others "semi-controlled inspections." Documentation certifying the performance of required inspections was and still is required to be filed before a job can be signed off.

B. The new codes introduced the concept of **approved agencies**. These are private entities providing third party inspection and testing services; their operation and qualifications are regulated by Department rule. See Ad. Code, Title 28, Article 114; 1 RCNY 101-07. There are different types of approved agencies depending on the nature of the service they are authorized to perform: approved progress inspection agency, approved boiler inspection agency, approved product certification agency, approved testing agency, etc. A particular type of approved agency may perform *only* those services it is authorized to perform by law. It must maintain insurance and conform to prescribed standards of operation or risk revocation of its approval. The approved agency rule also sets forth qualifications of those employed by approved agencies allowed to perform the authorized services.

C. The codes distinguish between **progress inspections** and **special inspections**. Examples of progress inspections include footing and foundation, framing, fire resistance rated construction, and energy code compliance. Special inspections are mandated throughout the codes at critical stages of construction and assembly affecting public safety, including assembly of structural components, life safety systems, and certain means and methods of construction. See BC Chapter 1704. Special inspections must be performed by **special inspectors** whose qualifications are separately set forth in Department rule. 1 RCNY §101-06. See also Ad. Code, Title 28, Article 115. Special inspection agencies are one type of approved inspection agency and a special inspection program must be filed before a permit will issue. BC §1704.1.1.

D. The code provisions governing **safety during construction operations** are important to watch, as they undergo frequent change in response to lessons from the field. They appear in Chapter 33 of the Building Code and cover such matters as safeguards and maintenance of construction sites, soil and foundation work, demolition, protection of pedestrians, unenclosed perimeters, and adjoining property, sheds, and scaffolds.

1. The Chapter 33 provisions of the 2014 update will apply to major buildings requiring a site safety plan if the site safety plan is approved on or after October 1, 2014. For major buildings with site safety plans approved before that date, the Chapter 33 provisions of the 2008 Codes apply. For construction work on non-site safety jobs, the 2014 provisions will apply to applications for construction document approval submitted on or after October 1, 2014. Such applications submitted before that date are subject to the Chapter 33 provisions of the 2008 Codes. For demolitions, the date of issuance of the permit is the relevant marker: demolition permits issued on or after October 1, 2014 will be subject to the Chapter 33 provisions of the 2014 Codes; those issued before that date are subject to the Chapter 33 provisions of the 2008 Codes. See Buildings Bulletin 2014-006 at http://www.nyc.gov/html/dob/downloads/bldgs_bulletins/bb_2014-006.pdf.

2. The provisions governing **protection of adjoining property** generate frequent questions. A developer causing soil and foundation work to be performed is responsible for protection of adjoining property. BC §1814. Other duties to protect adjoining property, including roofs, trees, chimneys, equipment, and windows, are spelled out in Section 3309 of the Building Code. The developer must give notice to the adjoining owner if access is required; if the adjoining property owner refuses to permit the developer to protect the property, the adjoining owner is made responsible for doing so and can be issued violations for failing to do so. BC §3309.1.1 and .4. In addition, **pre-condition surveys** of adjoining properties are required for excavations between 5 and 10 feet deep within 10 feet of an adjacent building and all excavations more than 10 feet deep anywhere on the site. BC §3309.4.3. **Historic structures** contiguous to or within a lateral distance of 90 feet from the edge of a lot where excavation is occurring must be monitored. BC §3309.4.4.2. **Demolition operations** are subject

to special inspection to ensure site safety procedures and approved documents are adhered to. BC §3306.6.

3. New in the 2014 revisions are provisions requiring that all equipment be used in accordance with manufacturer specifications (BC §3301.1.3) and that construction or demolition in occupied buildings be accompanied by an occupant protection plan reflecting protections for the occupants (BC §330.10).

E. In addition to the assortment of inspections required to be performed by third parties, the Department performs several types of its own inspections. Certain inspections are keyed to code provisions; others are purely discretionary, performed in accordance with Department safety initiatives and programs.

1. For example, the Department must be notified within 24 to 48 hours prior to the beginning of **demolition** (BC §3306.3.1) at which point the Department's Building Enforcement Safety Team ("BEST") inspects those sites. The Department must also be notified within 24 to 48 hours of the start of **soil and foundation** work. BC §3304.3.1. That notice enables Department inspectors to perform spot check inspections and thus audit compliance with safety provisions at those sites.

2. The BEST inspectors monitor **Site Safety** jobs through periodic inspection. Whether a construction site is a site safety job is a function of its classification as a "**major building**." Major buildings are defined by §3302 of the Building Code as those existing or proposed buildings

- 10 or more stories in height;
- 125 feet or more in height;
- having a building footprint of 100,000 square feet or more regardless of height; or
- as designated by the commissioner.

Major buildings generally are required to be constructed with a site safety plan and program under the oversight of either a **site safety manager** or a **site safety coordinator**, depending on the number of stories or the size of the building footprint. The Code prescribes the duties and responsibilities of these safety personnel as well as the qualifications of others working on major buildings. BC §3310.

3. Several Department safety programs are supported by routine, periodic city-wide inspection: the **Stalled Sites** program, the **Scaffold Safety Team**, and the **Concrete Unit**, all of which rely on field audits to monitor construction safety. The Department is continually innovating in this area, piloting new programs for major buildings and construction safety materials and techniques.

F. The **final inspection** of a construction job is that coveted end point towards which the entire process is directed. For jobs that require a new or amended certificate of occupancy, the Department must perform the inspection. Ad. Code §28-116.2.4.1. For all others, an approved agency may do it. Ad. Code §28-116.2.4.2. The approved agency must report observed defects and discrepancies with construction documents to the contractor and, where applicable, to the superintendent of construction for correction; it must report in writing uncorrected defects and discrepancies to the registered design professional of record and to the owner. The approved agency must report to the Department any hazardous conditions that are not immediately corrected. Ad. Code §28-116.1.1; §28-116.1.2; §28-116.2.4.2.

G. In addition to regulating the design and performance of construction work, the codes regulate most of those who perform the work. Sometimes termed a “**license**,” sometimes a “**registration**,”⁹ virtually anyone involved in the construction process is required to undergo training or satisfy some other qualification requirement. At one end of the spectrum, all people working on a supported scaffold must take a training course. At the other end, hoisting machine (crane) operators must pass a national exam.¹⁰ In between, plumbers, electricians, riggers, welders and others must pass exams and must establish and maintain character and fitness requirements. See Ad. Code, Title 28, Chapter 4.

H. The Department uses a number of tools to define and differentiate the responsibilities of **contractors**. A **general contractor** registration allows the holder to undertake construction of one, two, and three family buildings. A **safety registration** is required for work exceeding prescribed thresholds, such as constructing a new (other than a one, two, and three family) or demolishing an existing building, adding or removing a certain number of stories, adding or removing a certain percentage of floor area, or placing a minimum amount of concrete. It is issued with one of three endorsements: construction, demolition, or concrete, and allows the holder to perform work falling within the scope of the endorsement. See Ad. Code §28-401.3 (definition of safety registration recipient) and Article 420. An **insurance tracking** number must be obtained by one performing any work other than that requiring a general contractor or safety registration.

I. Various types of safety personnel are required to supervise work on construction sites. A **site safety manager** is necessary for construction or demolition of buildings 15 stories and above or with a building footprint of 100,000 square feet or greater. A **site safety coordinator** is required for construction or demolition of buildings 10 to 14 stories. BC §3310.5. A **construction superintendent** must supervise jobs on buildings 9 stories and below. 1 RCNY Chapter 48. Finally, a **concrete safety manager** is required on major building construction projects that involve the placement of 2,000 cubic yards or more of concrete. BC §3310.9.1. The Commissioner has authority to

⁹ The codes make no distinction between a license, a registration, and a certification. Ad. Code §28-401.3 (definition of “license”).

¹⁰ Although litigation and proposed legislation are pending addressed to the current crane operator exams.

require the presence for up to 90 days of a **Safety Compliance Officer (“SCO”)** at any permitted construction site that has received immediately hazardous violations determined to adversely affect public safety. The site owner is responsible for the cost of the SCO and for the Department’s related administrative expenses, which must be paid before a certificate of occupancy is issued. Ad. Code, Title 28, Article 218. Newly enacted is a provision requiring at least one **watchperson** to be on duty at the site during non-working hours for buildings being constructed or demolished and having a footprint of at least 5,000 square feet. The requirement applies from the time the foundation is poured until all work has concluded and a temporary or final certificate of occupancy is issued. BC §3303.3.

J. One of the most significant actions the Department can take during the course of construction is issuing a **stop work order**. Stop work orders are issued when construction is being performed in violation of law or in a dangerous or unsafe manner. See Ad. Code §28-207.2. They can be full or partial and cannot be lifted until the offending condition is corrected, the issuing unit re-inspects, and the contractor or owner pays all applicable penalties.

K. The Department oversees the operations of cranes and derricks. It both regulates their assembly and operation and licenses crane operators. The courts have recently turned back a challenge to the City’s crane regulations on preemption grounds, rejecting the argument that the Occupational Safety and Health Act’s crane provisions controlled. Steel Institute of New York v. City, 832 F. Supp.2d 310 (SDNY 2011), *aff’d*, 716 F3d 31 (2d Cir.), *cert. denied*, __ US __ (2013).

IV. Certificates of Occupancy and Related Requirements

A. A **certificate of occupancy** (“C of O”) is required for buildings erected or altered after January 1, 1938. Ad. Code §28-118.1. It comes in two forms: a **temporary** (Ad. Code §28-118.15) which may be issued for all or part of a building when it can be safely occupied; and a **final** - the holy grail of development in the City – which certifies that a building complies substantially with approved construction documents and applicable laws. Ad. Code §28-118.6. They both require Department inspections.

B. A certificate of occupancy is prima facie evidence of the lawfulness of the use described. See Charter §645(b)(3)(e). It can be set aside only by the BSA or a court.

C. A building **built before 1938** that was lawfully occupied without a C of O may continue to be occupied without a C of O so long as there is no change in its existing use or occupancy classification. Ad. Code §28-118.3.4. Should a pre-1938 building seek a C of O, it may obtain one by demonstrating that it complies with all applicable retroactive requirements of the 1968 Building Code and that there are no outstanding violations. The Department must determine that the existing use is and has been lawful. Ad. Code §28-118.3.4.1. A pre-1938 building may also seek a *partial* C of O for specific floors that do not constitute more than 50 percent of the building’s gross floor area so long as the building is noncombustible and protected by an automatic sprinkler system.

There must be adequate means of egress from all floors and the Department must find that the building is safe for occupancy. Ad. Code §28-118.20.

D. A **change to a building's use or occupancy classification** requires an application for a new C of O. Generally, a building's use is a function of the zoning use group into which the activity in the building falls, for example a Use Group 6 retail use, a Use Group 4 community facility use, etc. A building's occupancy classification is determined with reference to the classification scheme set forth in Section 302 of the Building Code, which defines such uses as Business, Educational, and Mercantile.

E. The process of applying for a new C of O is set forth in Section 28-118.4 of the Administrative Code. The registered design professional applicant or the superintendent of construction must attest that he or she has examined the approved construction documents, that, to the best of his or her knowledge, the construction conforms to the approved construction documents, and that the building as erected or altered complies with the provisions of the code and other applicable laws. A new C of O requires that all sidewalks and sanitary/storm water drainage systems be completed, that the electrical system comply with the electrical code, that all outstanding penalties be paid, and that all service equipment have certificates of compliance. Ad. Code §28-118.7 - §28-118.11; §28-118.14. Recall that the Department performs an inspection prior to issuing a C of O.

F. An **amended** C of O is authorized – as opposed to having to apply for a new one - where a building is greater than three stories and the alteration does not exceed 20 percent of its total floor area. Ad. Code §28-118.16.1. In addition, the recent code revision requires a new or amended C of O within one year of changing the building's address, block and lot numbers, or the metes and bonds of the zoning lot. Ad. Code §28-118.3.2.1. For this latter type of change, so long as there is no other change inconsistent with the last issued C of O, it is not necessary to clear all violations or to pay all outstanding penalties. Ad. Code §28-118.16.2.

G. Pursuant to Multiple Dwelling Law ("MDL") §301(4), **temporary** C of O's issued to multiple dwellings are good for up to 90 days, subject to renewal for up to two years. Section 301(5) of the MDL protects a good faith purchaser of or lender to a multiple dwelling who relies on a C of O from any claim that the building failed to conform to the MDL prior to the C of O's issuance. Because the standards for issuance of a temporary C of O are less stringent than those for issuance of a permanent C of O, and because a temporary C of O expires, a lawyer takes a chance in allowing a client to close on a building purchase on the strength of a temporary C of O.

H. The Department has authority to seek modification or revocation of a C of O by bringing a proceeding at the BSA or in court. Ad. Code §28-118.17. Such a claim might lie when the C of O was issued in error or on the basis of erroneous information.

I. A **Letter of Completion** is comparable to a C of O and is issued following inspection of construction work that does **not** trigger the requirements for a C of O. It

indicates that permitted work has been completed, including a satisfactory final inspection, in accordance with the law. At the owner's option, the final inspection may be performed by either the Department or by an approved agency, but may be subject to a fee when the Department does it. The applicant must take all reasonable and necessary steps to secure performance of a final inspection within one year after the expiration of the last permit. As is the case with a C of O inspection, observed defects must be reported by the approved agency and corrected before the job can be signed off and the approved agency must report to the Department any hazardous conditions that are not immediately corrected. Ad. Code §28-116.1.1; §28-116.1.2; §28-116.2.4.2.

J. **Places of Assembly.** As "assembly" is a type of occupancy, defined broadly in Chapter 3 of the Building Code to include

"the use of a building or structure or a portion thereof, excluding a dwelling unit, for the gathering of any number of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption, awaiting transportation, or similar group activities; or when occupied by 75 persons or more for educational or instructional purposes."

Section 303.1 of the Building Code defines five types of Assembly Group A, from theaters to restaurants to religious houses of worship to stadia. The differentiation makes it possible for the Code to fine tune safety provisions to address conditions in certain types of occupancies, such as the presence of fixed seating or alcohol. In addition to a C of O, a place of assembly requires a **certificate of operation** pursuant to Ad. Code §28-117.1 and BC §303.2 when certain thresholds are reached: for indoor spaces used or intended for use by 75 persons or more, including open spaces at 20 feet or more above or below grade (such as roofs or roof terraces) and for outdoor spaces used or intended for use by 200 persons or more. BC §303.2. The certificate must be renewed every year following inspection by the Fire Department. Ad. Code §28-117.3. Seating plans must be approved by the Department and must be maintained in accordance with the approval. Ad. Code §28-117.

K. A **Letter of No Objection** is a document issued by the Department regarding buildings that are not required to and thus have no C of O. An LNO confirms that the continued use of a building for a particular purpose is not objectionable. Such a document may be sought, for example, in connection with an application to a regulatory body, such as the State Liquor Authority, wanting to confirm the legality of a use before issuing a related license or permit. A request for an LNO should be directed to the borough office where the property is located and should be supported by evidence of the lawfulness of the use, such as old Department or other agency records, property surveys, deeds, water bills, tax assessments, photographs, etc.

V. **Occupancy**

A. The owner of a building is the one on whom responsibility for its condition is placed.

All buildings and all parts thereof and all other structures shall be maintained in a safe condition.

Ad. Code §28-301.1. However, the statutory definition of “owner” is broad enough to include a tenant exercising control of premises:

OWNER. Any person, agent, firm, partnership, corporation or other legal entity having a legal or equitable interest in, or control of the premises.

Ad. Code §28-101.5. The breadth of the Code’s definition of “owner” enables the Department to distinguish conditions that inhere in the building, such as the state of its façade, from those attaching to its occupancy, such as an illegal use in a portion of a building. The distinction may be relevant in the enforcement context.

B. The Department’s ability to hold a building owner responsible for conditions in a building is **not** affected by privately negotiated terms of an occupancy re-assigning this responsibility, such as one might find in a lease. If a building owner is held accountable to the Department for a condition whose responsibility has been allocated to a tenant by lease, the owner must seek relief from the tenant privately.

C. Building owners have certain **periodic maintenance and inspection obligations**. Chapter 3 of Title 28 of the Administrative Code sets them out. They include inspection and reporting requirements for façades (Article 302), boilers (Article 303), elevators (Article 304), and retaining walls (Article 305). In addition, Article 217 of Title 28 of the Administrative Code imposes inspection and reporting obligations on owners of “potentially compromised” buildings and structures, defined by Ad. Code §28-217.1 to include a building or structure

that has had an open roof for sixty days or longer, that has been shored and braced or otherwise temporarily safeguarded pursuant to an emergency declaration issued by the commissioner, that has been subject to a precept as a compromised structure under section 216.1.1 of this code or that may have suffered structural damage by fire or any other cause as determined by the commissioner.”

VI. Enforcement

A. The 2008 Construction Codes re-wrote the enforcement provisions of the 1968 Building Code. They created a flexible scheme that is designed to enable the Department to vary the way it responds to illegal conditions administratively based on their severity and on the history of compliance at the building.

B. In general, the Department may take enforcement action through civil or criminal judicial proceedings, on the one hand, or administratively, on the other. In either case, subject to certain **violations** whose classification is specified by code, the

underlying scheme generally calls for the commissioner to classify by rule a violating condition as immediately hazardous, major, or lesser based on the effect of the violation on life, health, safety, the public interest, or the need for economic disincentive. Ad. Code §28-201.2. In conjunction with the Environmental Control Board (ECB), where Department administrative violations are returnable, the Department has specified in rules the violation classifications and the penalty ranges and has denominated the classes of violations as Class 1, Class 2, and Class 3, respectively. 1 RCNY §102-01(b). The Department's rule, 1 RCNY §102-01, can be found in the rules chart on its website at http://www.nyc.gov/html/dob/downloads/rules/1_RCNY_102-01.pdf. The ECB rule, containing the penalty schedule, 48 RCNY §3-103, can be found at <http://lidaclinic.law.columbia.edu/ecb/?q=node/22>.

C. The new codes eliminate second offense violations in favor of a scheme of penalties that does not rely on the inspector's need to know the history of the building at the time of inspection. Thus, they create **penalty ranges** for the three types of violations and allow consideration both before and at the hearing of **aggravating and mitigating circumstances**. Ad. Code §28-201.4. See also 1 RCNY §102-01(f).

D. ECB violations are required to be **certified corrected**. Ad. Code §28-204.2; 1 RCNY §102-01(c). The failure to certify a violation's correction gives rise to additional penalties. Ad. Code §28-204.4.

E. The Department has several options available for issuing violations:

1. Most Department violations are administrative, returnable at the **Environmental Control Board**. Ad. Code §28-204.1. The Department issues some 50,000 ECB violations per year and prosecutes them itself. The sanctions are monetary only.

2. The Department is also authorized to issue summonses returnable in **Criminal Court**. Conviction of an immediately hazardous or Class 1 violation is a misdemeanor. Ad. Code §28-203.1.1. Conviction of major/Class 2 or lesser/Class 3 violations is a violation. Ad. Code §28-203.1.2 and .3. The Law Department prosecutes these cases and these, too, generally result in monetary sanctions only. However, to the extent the defendant pleads out, the City can often obtain compliance prior to the disposition.

3. Finally, the Department issues certain violations, called "**DOB violations**" that are not returnable anywhere and that have no sanction directly flowing from their issuance. Rather, DOB violations reflect violating conditions at the property and contain orders to correct those conditions.

F. Certain enforcement mechanisms are available in particular cases. The Department makes use of them routinely.

1. The Department issues **emergency declarations** when conditions in a building require the immediate exercise of the police power to protect public safety from an imminent hazard. See Ad. Code §28-215.1. Such conditions include the aftermath of fire, a building collapse, or a deterioration that has so progressed that it presents an imminent hazard. The Department directs such orders to the owner of a premises; should it fail to respond by taking immediate corrective action or should time not permit, HPD executes the order and may take appropriate action including installation of a shed, shoring, or demolition. In certain cases, HPD can file a lien for its expenses.

2. **Stop work orders** are issued when Department inspectors observe illegal work or work that is being performed in a dangerous or unsafe manner. Ad. Code §28-207.2.

3. The **Padlock Law**, Administrative Code, Title 28, Article 212, is among the Department's most effective enforcement tools. It is an administrative proceeding available for use against illegal commercial and manufacturing uses in residential and certain low density commercial zoning districts. The Department prosecutes these cases at the Office of Administrative Trials and Hearings, whose ALJ will make a recommendation to the Commissioner following a hearing. The law authorizes the Commissioner to direct the closure of the illegal occupancy – a singularly effective sanction for unlawful conditions. Ad. Code §28-212.2.

4. When buildings are structurally compromised, though not in imminent danger, or are abandoned and are found open and unguarded, the Department may prosecute **unsafe building** proceedings in court. See Ad. Code, Title 28, Article 216. The case proceeds on notice to the owner and to virtually anyone with a recorded interest in the property and is designed to secure a court order called a “precept” authorizing the City to do the work necessary to eliminate the public safety hazard the building poses. Again, HPD executes the precept, which might result in its sealing, shoring, or demolishing the premises.

5. **Nuisance abatement** proceedings, begun in court by the Law Department under authority of §7-701 et seq. of the Administrative Code, are available for statutorily defined “nuisances,” including certain Code and zoning violations. These proceedings authorize the issuance of injunctions and closing orders and are generally reserved for programmatic enforcement programs or particularly recalcitrant property owners with serious non-compliances.

VII. Green Building and Building Resiliency

A. The NYC Energy Conservation Code (NYCECC or Energy Code)

1. Composed of **2010 NYS Energy Conservation Construction Code (NYSECCC)** with NYC amendments. The NYC amendments are reflected in Ad. Code §28-1001.1 (enacted by **Local Law 1 of 2011**) and **Local Law 48 of 2010**.

2. The NYCECC was expressly adopted to encourage the use of new technologies that minimize energy consumption and maximize the use of renewable energy resources. Where there is conflict between the state and city codes, the more stringent applies.

3. Broadly speaking, the Energy Code regulates design and construction features of a building's envelope, its mechanical systems, and its electrical systems. It does this by requiring that an energy analysis be filed with the application and by prescribing a series of progress inspections to be performed on each of the affected building systems. The requirements are highly technical, intended as they are for use by the registered design professionals filing the supporting documents and performing the required inspections.

4. All new building and alteration applications filed on or after December 28, 2010 must comply with the NYCECC. Except as specified, the law is not retroactive: it does not require any change to the lawfully existing status quo. It *does* apply, however, to new buildings and to "additions, alterations, renovations or repairs" to existing buildings, building systems, and equipment or portions thereof other than repairs of equipment. NYCECC §101.4.3. "Additions," "alterations," and "repairs" are defined terms. NYCECC §202. This aspect of the City code is arguably the reason we have a city code at all. As first enacted in 2009, it closed a loophole in the state law that required compliance of only those alterations that affected more than 50% of a building system or subsystem. It was easy for building owners to phase work so that no one job was required to comply.

5. Importantly, the law does not require the *unaltered* portion(s) of the existing building, building system, or equipment to comply. And an *addition* is deemed to comply if it alone complies or if the existing *building* and *addition* comply with the code as a single building. NYCECC §101.4.3.

6. The Department's rules provide information necessary to comply with the filing and inspection requirements of the Energy Code. See **1 RCNY §5000-01** (prescribing filing and inspection requirements); **1 RCNY §101-07** (requiring, inter alia, that owner retain progress inspector and specifying his or her qualifications and responsibilities).

7. Finally, the Department has issued relevant **Buildings Bulletins 2010-031 and 2010-032** to clarify conditions under which additions, alterations, renovations, or repairs to HVAC or service hot water systems and lighting or electrical power systems or control equipment, respectively, may not be required to comply with the Energy Code. **Buildings Bulletin 2011-015** outlines similar conditions for the building envelope.

8. Certain building types are **exempt** from the Energy Code:

a. Historic buildings listed on the National or State Register of Historic Places;

- b. Buildings certified as contributing buildings within a National or State historic district; and
- c. Buildings certified as eligible for either of the above.
- d. **Importantly, neither locally designated landmarks nor buildings within locally designated landmark districts are exempt.**
- e. Unconditioned buildings or buildings with a low-energy envelope.
- f. Certain categories of work that do not affect energy use:
 - (1) Temporary structures (as described in sections Ad. Code §28-111 and BC §3103);
 - (2) The following work types:
 - (A) FA (fire alarm)
 - (B) FP (fire suppression in a range hood)
 - (C) SD (standpipe)
 - (D) SP (sprinklers)
 - (E) FS (fuel storage)
 - (F) EQ (construction equipment)
 - (G) CC (curb cut)
 - (H) OT/BPP (builder’s pavement plan)
 - (I) OT/FPP (fire protection plan).

See NYCECC §101.4.2; §101.5.2; 1 RCNY §5000-01(e)(2).

9. The Department distinguishes between these exemptions and statutorily prescribed **exceptions**. The latter reflect certain alterations that do not require compliance with the Energy Code, provided the energy use of the building is not increased. NYCECC §101.4.3 Exceptions.

B. Greener, Greater Buildings Plan

1. **Benchmarking.** Local Law 84 of 2009 is one of three other laws (apart from the original NYC Energy Code) that made up the “Greener, Greater Buildings Plan.” All three apply only to buildings over 50,000 square feet, known as “**covered buildings**.” This includes two or more buildings on the same tax lot or in condominium ownership over 100,000 square feet. See, e.g., Ad. Code §28-309.2. The Department’s benchmarking rule is set out in 1 RCNY §103-06.

a. Covered buildings must annually complete a benchmarking report of energy and water use and must upload the results electronically to EPA's Portfolio Manager and report them to the Department of Finance. Owners with non-residential metered tenants must request information from them. Ad. Code §28-309.4 and .8; 1 RCNY §103-06(g).

b. Owners of new buildings must report in the first full calendar year following the year the building receives its first Temporary Certificate of Occupancy. 1 RCNY §103-06(i)(4).

c. When a building changes ownership, the new building owner must benchmark for the first full calendar year following transfer of ownership and must submit the report by May 1 of the following year and each year thereafter. 1 RCNY §103-06(i)(5).

d. Buildings for which a full demolition permit has been issued are not required to benchmark for the prior calendar year, provided that demolition work has begun, some energy-related systems have been compromised, and legal occupancy is no longer possible before May 1. 1 RCNY §103-06(i)(6).

e. An owner is subject to a \$500 violation for every quarter of non-compliance for failing to submit a report. Ad. Code §28-309.4.3; 1 RCNY §106-03(1).

2. **Audits and retro-commissioning.** Local Law 87 of 2009 enacted law requiring covered buildings to periodically perform energy audits and retro-commissioning. Ad. Code §28-308.2 and .3.

a. Applies to base building systems: envelope, HVAC, domestic hot water, lighting and electrical, and elevators and escalators. Ad. Code §28-308.1.

b. Audits analyze potential energy efficiency upgrades, including costs and savings; owners must prepare an audit report with costs and paybacks.

c. Retro commissioning is essentially a tune-up of the base building systems, such as changing filters, calibrating lighting sensors, or ensuring that pipes are insulated. The law requires that owners prepare a retro-commissioning report.

d. Every 10 years starting in 2013 owners must complete an Energy Efficiency Report. The deadlines are staggered based on block and lot numbers. There is a first deadline exemption for buildings less than 10 years old and those renovated in compliance with the Energy Code. Ad. Code §28-308.4.

e. There are exemptions for each part - the audit and the retro-commissioning – based on evidence of a building's having achieved relatively high energy performance in recent years or having certain energy efficiency features. Ad. Code §28-308.2 and .3 Exceptions.

3. **Sub-metering.** The final piece of the Greener Greater package was Local Law 88 of 2009, covering lighting and sub-metering.

a. Lighting systems of covered buildings must upgrade to existing standards by January 1, 2025. Ad. Code §28-310.3. Dwelling units and assembly spaces in houses of worship are exempt.

b. Also by January 1, 2025, electrical sub-meters must be installed in tenant spaces larger than 10,000 square feet. Ad. Code §28-311.2 and .3. Dwelling units are again excepted.

c. Owners must provide sub-metered tenants a monthly statement of electricity usage. Ad. Code §28-311.4.

C. **Green roofs and solar panels.** Pursuant to State law, installation of a green roof or solar panels may qualify a building owner for a property tax rebate. The installation, maintenance, and filing requirements are quite detailed and must be carefully examined. The Department's sustainability page and its rules are good places to start. http://www.nyc.gov/html/dob/html/sustainability/sustainability_main.shtml; 1 RCNY §105-01; §105-02.

D. **Ongoing green building and building resiliency actions.** The Construction Codes are the subject of rolling legislative assessment in the area of green building and, following Superstorm Sandy, building resiliency. The US Green Building Council's local chapter, Urban Green Council, has been tapped as a partner in both efforts. Its report of the **NYC Green Codes Task Force** was released in February 2010. Its **Building Resiliency Task Force** report was released in June 2013. Each Task Force was convened at the request of then-Mayor Michael Bloomberg and then-City Council Speaker Christine Quinn to review and propose amendments to the Administrative Code responsive to the circumstances giving rise to the effort, whether to "green" the codes or to recommend changes to produce more robust building construction, capable of withstanding extreme weather events. For further discussion, see <http://www.urbangreencouncil.org/GreenCodes> and <http://www.urbangreencouncil.org/BuildingResiliency>.