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# ‘Green’ Buildings

## *State Renews Environment-Friendly Incentive*

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Many of New York’s most prominent commercial and residential buildings developed over the last decade incorporate “green” technologies. The new headquarters buildings for The New York Times, the Hearst Corporation, Conde Nast at 4 Times Square, Bank of America at One Bryant Park, Goldman Sachs and 7 World Trade Center, combine magnificent architecture with state-of-the-art building systems which conserve energy and water resources, and utilize environmentally-friendly building materials and construction techniques. State and local government policies have encouraged, and indeed mandated, development of green buildings. The Battery Park City Authority, a pioneer in this field, requires that all new buildings be constructed to meet its green building guidelines. New York City and New York State require all new and rehabilitated government buildings to be green buildings.[1]

With the recent re-enactment by the New York State Legislature of the Green Building Tax Credit,[2] New York State provides a financial incentive to developers of green buildings as well. The credit, which is worth up to an aggregate of $2 million against a developer’s New York State tax bill in return for the incorporation of green elements into an office or residential building, adds a financial incentive to offset the up-front cost of investment in green technology. Coupled with the long-term operating cost savings generally associated with green technology, and its concomitant effect of increasing building valuations, the tax credit provides an additional incentive to encourage environmentally-friendly development in New York.

### Background

Initiated in 2000 as a $25 million limited-life tax incentive, the recent legislative renewal of the Green Building Tax Credit Program makes an additional $25 million worth of tax credit certificates available to qualified developers during years 2005 through 2009 (extendable through 2010). The program is administered by the New York State Department of Environmental Conservation (DEC), which promulgates regulations governing the eligibility standards for green development and the application process for the tax credits. DEC is currently updating the existing program regulations to reflect current state-of-the-art building eligibility standards. DEC plans to accept applications for current round of tax credit certificates once the revised regulations are promulgated.

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**TAX CREDITS**

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### Initial Eligibility

Developers interested in applying for the Green Building Tax Credit should be aware that the credit only applies to large commercial[3] or residential multi-tenant buildings. If residential multi-tenant, the building must be either a single building with at least twelve dwelling units, or one or more buildings with at least two dwelling units that are part of a single or phased construction project, with at least 10,000 square feet of interior space during any single phase of the project. An eligible building may also be any combination of the above. Only buildings which have a final certificate of occupancy issued after Jan. 1, 2005 are eligible for the second round of credits.

A building which meets the threshold eligibility standards must then meet the green construction and performance standards. While DEC is currently updating the performance standards a building must meet in order to be “green,” a review of the prior standards indicates the general nature of the requirements. The original regulations required that (a) all appliances installed be Energy Star models; (b) the heating, cooling and service water heating equipment meet the performance standards set forth in the New York State energy code (9 NYCRR 7813 or 7814, as applicable); (c) the energy use of the building be less than or equal to 65 percent of the standard set forth in the energy code for new buildings or less than or equal to 75 percent of the standard set forth in the energy code for rehabilitated buildings; and (d) the levels of carbon dioxide, carbon monoxide, formaldehyde, particulate matter, radon and total volatile organic compounds in the building be not more than the levels set forth in the regulations.

### Calculating Credit Allocation

The program provides for six different components of the tax credit: a green base building credit, a green tenant space credit, a green whole-building credit, a fuel cell credit, a photovoltaic module credit, and a green refrigerant credit. The total credit available to a taxpayer is the sum of the individual tax credit components for which the taxpayer qualifies. In contrast to the initial program, which had no cap on the total credit which could be awarded per eligible building (or tenant space), the total aggregate credit a taxpayer can receive under the renewed program is $2 million over a five-year credit period. The credit can be taken during any five consecutive years from 2006 through 2014.

The Green Building Tax Credit program allows both the building owner and the building tenant to apply for the credit, either alone or in conjunction with each other. In general, the program allows the building owner or tenant to claim a certain percentage of the “allowable costs” for each applicable component, and provides an individual cap on the amount of credit that can be claimed for each credit component. “Allowable costs” include amounts properly chargeable to a capital account that were paid or incurred after June 1, 1999, excluding the costs of land, telephone systems and computers, fuel cells or photovoltaic modules and installation of either, and new air conditioning equipment using green refrigerant (installation costs for air conditioning equipment is allowed). Allowable costs must have been incurred for the new construction of a green building, or the rehabilitation of an existing non-green building into a green building. No allowable cost item can be counted more than once in calculating the aggregate credit available.

#### 1. Base Building

The “base building” component covers those portions of a building that are not intended for occupancy by a tenant or owner, including structural components, exterior walls, floors, windows, roofs and common lobby. To qualify as "green," the base building must meet energy efficiency requirements and indoor air quality standards, and use appliances and heating, cooling, and water heating equipment specified in the regulations. In addition, all tenant space occupied by the owner must be "green" tenant space (defined below). The annual credit to the owner is equal to 1 percent of allowable base building costs. If the building is located in an economic development area,[4] the annual credit increases to 1.2 percent. Allowable base building costs are capped at $150 per square foot. Thus, the annual base building credit for a building not located in an economic development area is capped at $1.50 per square foot, or $7.50 per square foot aggregate over the five-year credit period.

## 2. Tenant Space

Tenant space is that part of a building intended for occupancy by a tenant or the owner. To qualify for the credit, the tenant space must be part of an eligible green building and must meet substantially the same environmental standards as are required for the Green Base Building Component. The annual credit to the tenant equals 1 percent of allowable tenant space costs, or 1.2 percent if the building is located in an economic development area. The allowable tenant space costs are capped at $75 per square foot. Thus, the annual tenant space credit for a building not located in an economic development area is capped at $0.75 per square foot, or $3.75 per square foot aggregate over the five-year credit period.

## 3. Green Whole-Building

A green whole-building is a building where the base building is a green base building and all tenant space is green tenant space. The annual credit to the taxpayer (which may include both the owner and tenant) is equal to 1.4 percent of allowable costs, or 1.6 percent if the building is located in an economic development area. The allowable costs are capped at $150 per square foot for base building, and $75 per square foot for tenant space. Thus, the annual base building credit available to the owner of a wholly-green building not located in an economic development area is capped at $2.10 per square foot, or $10.50 per square foot aggregate over the five-year credit period, and the annual tenant space credit is capped at $1.05 per square foot, or $5.25 per square foot aggregate over the five-year credit period.

## 4. Fuel Cell Credit

To qualify for this component, the fuel cell(s) must serve either a green building, a green base building, or a green tenant space. The annual fuel cell credit is equal to 6 percent of the capitalized cost of each fuel cell installed in a building, or 30 percent over the five-year credit period. Capitalized costs may not exceed $1,000 per kilowatt of installed DC rated capacity. Federal, state, or local grant funds used for the purchase or installation of the fuel cell must be deducted from the amount of the capitalized costs.

## 5. Photovoltaic Module

To qualify for this component, the photovoltaic module(s) must serve either a green building, a green base building, or a green tenant space. For building-integrated photovoltaic modules, the annual credit is equal to 20 percent of the incremental cost of installing the building-integrated photovoltaic modules, in excess of the cost that would have been incurred without the building-integrated modules. For non-building-integrated photovoltaic modules, the annual credit is equal to 5 percent of the capitalized cost of the modules, or 20 percent over the five-year credit period. In both cases, the costs are capped at $3 times the number of watts included in the DC-rated capacity of the modules. As with the fuel cell credit component, any federal, state, or local grant funds used for the purchase or installation of the photovoltaic module must be deducted from the amount of the capitalized costs.

## 6. Green Refrigerant

A green refrigerant credit is allowed for new air conditioning equipment that uses an EPA-approved non-ozone depleting refrigerant and serves a green building, a green base building, or a green tenant space. The annual credit is equal to 2 percent of the cost of the air conditioning equipment, or 10 percent over the five-year credit period.

## Commissioning, Monitoring

The Green Building Tax Credit program also requires the eligible building or tenant space to be commissioned and monitored. The commissioning requirement is intended to ensure that the building (or tenant space) as-built meets the green building (or green tenant space) requirements. The monitoring requirement is intended to ensure that the building (or tenant space) continues to meet the applicable green building requirements throughout the period during which the tax credit is allowed. Costs incurred by the taxpayer for commissioning are considered allowable costs for the determination of the credit.

## Applying for Tax Credits

DEC established a "first-come, first-serve" process for awarding the tax credits in the initial funding round, and has informed the authors that this process is not likely to change in the new round. The first stage of review is a determination of whether the application conforms to the requirements of 6 NYCRR Part 638.6(d)(3). To conform, the application must include a letter showing that funding has been secured for the building, a list of allowable costs, a written statement by the architect or engineer of record that the plans and specifications for the building meet the green building standards, have been certified, and have been approved by the municipal government in whose jurisdiction the building is located, and a written statement by the owner that all required permits have been obtained.

If an application is in conformance, an initial credit component certificate will be issued, up to the cap of $2 million. This initial credit component certificate will state the maximum dollar amount of each credit component allowable for each of the five taxable years for which the credit is allowed, the first taxable year in which the credit may be claimed and the expiration date. The eligible building must be placed in service before the expiration date on the initial credit component certificate, but this date may be extended at the discretion of the DEC.

The statewide limit on credits allocated for all six components in aggregate is capped at $1 million for 2006, $2 million for 2007, $3 million for 2008, $4 million for 2009, $5 million for 2010, $4 million for 2011, $3 million for 2012, $2 million for 2013, and $1 million for 2014. Credits unused in any calendar year may be carried over and allocated in subsequent calendar years.

To claim the credit, the taxpayer must maintain certain records and file a copy of both the initial credit component certificate and the annual eligibility certificate with both the DEC and the New York State Department of Taxation and Finance. The first year in which the credit is allowed is the later of the first taxable year in which the building is placed in service or receives a certificate of occupancy, or the first taxable year in which the credit may be claimed pursuant to the initial credit component certificate. In the application for the initial credit component certificate, an eligible taxpayer may specify a year later than the year in which the building is put into service as the first taxable year, but may claim the credit only if the building remains in service during that later year.

For each taxable year in which a credit is claimed, the taxpayer must obtain from an architect or a professional engineer licensed in the State of New York an annual eligibility certificate indicating that the building (or tenant space) meets all the applicable green building requirements in effect at the time the building was first placed into service.

The credit is non-refundable, but unused credits may be carried forward indefinitely. Subsequent owners or tenants of an eligible building are allowed to use the credit for the remaining part of the five-year period, provided that the base building or tenant space continues to meet the required standards and an annual eligibility certificate is filed.

1. For New York State, see Executive Order 111. For New York City, see the Green City Buildings Act.

2. Part G of Chapter 61 of the Laws of 2005.

3. Under the initial regulations, an eligible commercial building was required to contain at least 20,000 square feet of interior space and either be classified as B2, B3, B4, C1, C5, or C6 for the purposes of the New York state uniform fire prevention and building code. Following promulgation of the initial regulations, New York State adopted a new Uniform Fire Protection and Building Code. DEC has indicated that part of its updating of the regulations will be to make them consistent with the new code.

4. "[A]n area which is designated (A) an empire zone pursuant to article eighteen-B of the general municipal law or (B) an empowerment zone or enterprise community pursuant to section 1391 of the Internal Revenue Code." N.Y. Tax Law §19(b)(5) (McKinney 2006)