

CLIENT ADVISORY

PROPOSED DON GUIDELINES FOR ENVIRONMENTAL IMPACT

On June 4, 2008, the Massachusetts Bureau of Health Care Safety and Quality and the Massachusetts Determination of Need (“DON”) Program issued an informational briefing in the form of a memorandum to the Commissioner of the Massachusetts Department of Public Health (“DPH”) and Members of the Massachusetts Public Health Council (“PHC”) informing the PHC of DPH’s intent to release for public comment Determination of Need Guidelines for Environmental Health Impact (“proposed Guidelines”). The proposed Guidelines incorporate new requirements for healthcare organizations undertaking construction of and renovation to healthcare facilities.

The current DON application requires an applicant to provide appropriate and adequate written assurances to satisfy the Massachusetts Environmental Protection Act that all feasible measures will be taken in the construction of and/or renovation to the applicant’s healthcare facility to avoid or minimize damage to the environment. Completion of the application checklist includes thresholds for Land, Rare Species, Wetlands, Waterways and Tidelands, Water, Transportation and Historical or Archaeological resources.

The proposed Guidelines would require hospitals, and later, nursing homes, to use the Leadership in Energy and Environmental Design-Health Care (LEED-HC) and Green Guide for Health Care (GGHC) V2.2 as a condition of approval for renovation and replacement projects. GGHC and LEED-HC are new, nationally accepted best practice standards on health care facility design. LEED-HC is a certification rating tool developed and administered by the United States Green Building Council, to respond to the unique set of opportunities and challenges presented by the healthcare sector. GGHC is a voluntary, self-certifying tool of best practices that designers, owners, and operators can use to guide and evaluate their progress towards high performance healing environments. GGHC standards have already been voluntarily adopted by a dozen acute care hospitals in Massachusetts, and the City of Boston adopted revisions to its zoning code for construction projects in excess of 50,000 square feet based on GGHC standards in January of 2007. If the proposed Guidelines are adopted, Massachusetts would be first state in nation to require Green Guidelines for use in DON applications.

The proposed Guidelines will be utilized in determining whether applicants presenting applications for DON meet the Environmental Impact requirements under the DON regulations. Specifically, 105 CMR 100.533(8) requires that an applicant document that the application provides appropriate and adequate written assurances, as necessary to satisfy M.G.L. c. 30, §§ 61 to 62H and the regulations promulgated thereunder through the submission of a building strategy assessment and a credit point assessment that is part of the plan review, and that all feasible measures will be taken in the execution of the project to avoid or minimize damage to the environment. The proposed Guidelines outline seven (7) factors that are used to evaluate each application under 105 CMR 100.533(8). Each factor mandates that the applicant describe the specific process and/or key rationale employed to meet each measure outlined in GGHC V2.2 and LEED-HC, highlighting the environmental and/or human health improvements achieved. For any

measures that cannot be met, the applicant must provide project specific information and an explanation of the process and criteria used in the decision not to implement the measure. The factors are as follows:

1. Integrated Design;
2. Sustainable Sites;
3. Water Efficiency;
4. Energy and Atmosphere;
5. Materials and Resources;
6. Environmental Quality; and
7. Innovation and Design Process.

The proposed Guidelines require all DON applications regarding construction or renovation projects filed after October 1, 2008 to achieve a minimum score of 38% compliance with LEED-HC and GGHC V2.2 in order to be recognized as a “certified” green building. The proposed Guidelines further state that 38% is a “modest” requirement, and that all health facilities should aim at exceeding this score, as the minimum percentage needed will likely increase over time. The Members of the PHC have indicated that the 38% threshold is too modest, and have called for facilities to achieve a minimum score of 50% compliance with LEED-HC and GGHC V2.2 measures. It is anticipated that DPH will resubmit the proposed Guidelines to PHC requiring DON applicants to achieve a minimum 50% compliance score.

The public comment period for the proposed Guidelines lasts until July 9, 2008. A copy of the proposed Guidelines is attached hereto. The Rogers Law Firm will continue to monitor the proposed Guidelines and will provide updates accordingly. Meanwhile, if you should have any questions regarding the proposed Guidelines, please do not hesitate to contact any of the attorneys at The Rogers Law Firm.

This Newsletter is published by The Rogers Law Firm to keep its clients informed of developments in health law. The Newsletter should not be construed or relied upon as legal advice or legal opinion on any specific facts or circumstances. If you have any questions or concerns regarding the articles contained in the Newsletter or would like legal advice or legal opinion concerning a specific matter, please do not hesitate to contact any of the attorneys at The Rogers Law Firm, at 617.723.1100.