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It's official: Local Law 97 Has Been Challenged in Court. Will it Hold Up to Judicial Scrutiny?

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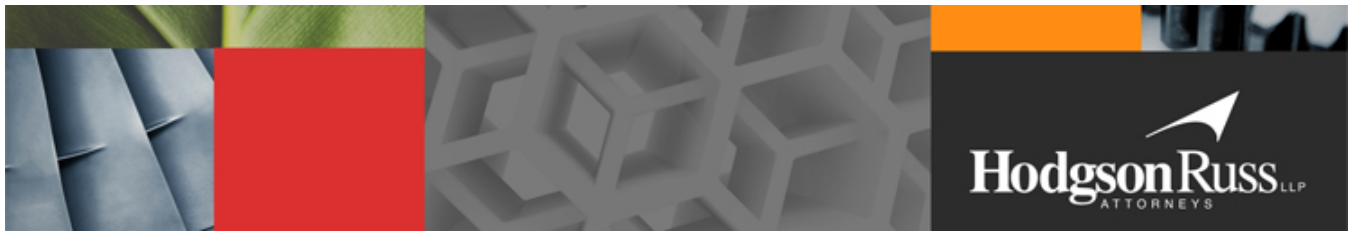

On May 18, 2022, a group of cooperative corporations, mixed-use building owners, and residents filed a lawsuit against New York City ("City" or "NYC"), the Department of Buildings ("DOB"), and the DOB Commissioner in New York County Supreme Court seeking to annual Local Law 97 of 2019 ("Local Law 97").[1] The Plaintiffs argue Local Law 97—the centerpiece of the City's building decarbonization efforts—is (1) preempted by the Climate Leadership and Community Protection Act ("CLCPA"); (2) violates building owners' rights to Due Process; and (3) levies an unauthorized tax on emissions. Although Plaintiffs' preemption argument is not particularly persuasive, their Due Process argument is strong and there is concerning precedent out there to support their unauthorized tax claim. A number of the claims parrot recent concerns with the City's Local Law 97 implementation efforts aired April 13, 2022, at a joint meeting of the City Council's Committee on Environmental Protection and the Committee on Housing and Buildings.

Plaintiffs argue that Local Law 97 is preempted by the CLCPA as the State's intention was to "occupy the field" with a comprehensive regulatory scheme to address the climate crisis through greenhouse gas emissions reductions. As proof, they point to the law's legislative findings, public statements of State Legislators and then-Governor Cuomo, and specifi provisions of the CLCPA that authorize only *State* agencies to act. But Plaintiffs miss a few points on this score. Firstly,

the CLCPA was enacted by the State Legislature and signed into law on July 18, 2019—roughly three months *after* Local Law 97 was passed by the City Council. There is no language in the CLCPA suggesting existing municipal regulations must give way to the state effort. Secondly, Plaintiffs make no mention of the provisions in the Executive Law and Energy Law directly creating municipal authority for enacting stricter rules than those of the State. Section 11-109 of the New York State Energy Law authorizes counties, cities, towns, villages, school districts, and district corporations to enact local energy conservation codes more stringent than the Uniform Fire Prevention and Building Code ("Uniform Code") and State Energy Conservation Construction Code ("Energy Code"). Similarly, Section 379 of the Executive Law authorizes municipalities to enact local laws imposing more restrictive standards than the Uniform Code and Energy Code.[2] Given the ability of a City law to be stricter than the CLCPA, this argument may not go far.

On the other hand, Plaintiffs' remaining arguments could hold some weight. Plaintiff's first Due Process argument—arguably their strongest—regards the excessive, disproportionate penalties building owners may face if they cannot meet the annual building emissions limits. The penalty for exceedances under Local Law 97 will be calculated as the difference between the limit and the actual reported emissions, multiplied by $268. So, for example, if a building exceeds its limit by 1,000 tons, that's an annual penalty of $268,000. It's estimated that noncompliance will likely be widespread and potentially so expensive as to be patently unreasonable and disproportionate to the offense of exceeding the building emissions limit. And this alone may not be the problem. Valid due process claims arise where penalties are unavoidable and unclear and when tribunals have unlimited discretion and limited guidance in imposing the penalties. Local Law 97 seems to hit both marks.

As Plaintiffs point out, there are buildings all over the City that were designed and built with top of the line energy efficiency technology that will be *unable* to meet the annual building emissions limits imposed by Local Law 97. This is because the law only measures raw emissions—not energy efficiency. A grossly energy inefficient building with few occupants and limited hours of operation could have a significantly lower penalty, if any, compared to a super-efficient, high-density building with 24-7 operations. Meaning, excessive penalties will simply be unavoidable for certain buildings, regardless of their efforts to build, design, and operate sustainably. And they will be imposed year after year. This could have the unintended result of pushing important businesses like small mom-and-pop grocery stores, bakeries, restaurants, and laundromats—all naturally high raw energy users—out of the City simply because they cannot afford to comply with Local Law 97.

Plaintiffs also argue the law is unconstitutionally vague and ambiguous in violation of Due Process. Firstly, there are no clear guidelines for DOB to follow in imposing these penalties, other than the simple calculation provided in the law. There are no mitigating factors for DOB to evaluate when calculating the penalty—either in the law or in any guidance—such as energy efficiency performance, density of occupancy, or hours of operation. Second, a building currently cannot determine what its emissions level will be for the 2030 to 2034 compliance period since DOB has not yet promulgated the relevant greenhouse gas coefficients (used to calculate a building's annual emissions).[3] Similarly, the emissions limits for the 2030 to 2034 compliance period are technically unknown since the law gives DOB discretion to establish different annual building emissions limits for that compliance period.[4] And finally, it remains a mystery when or if DOB will grant the adjustments to the annual building emissions limits that certain buildings are eligible for.

Plaintiffs' last Due Process claim is that Local Law 97 is impermissibly retroactive. "A statute has retroactive effect if 'it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed,' thus impacting 'substantive' rights." *Regina Metro. Co., LLC v. New York State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 365 (2020) (*quoting Landgraf v. USI Film Prods.*, 511 U.S. 244, 278-280 (1994)). Although laws with retroactive application are not per se unconstitutional, they raise Fifth Amendment Takings concerns, as well as Due Process issues, when they are effectively confiscatory. Plaintiffs argue that building owners who were in full compliance with all applicable environmental laws prior to the enactment of Local Law 97 are now being required to retrofit their building systems at exorbitant costs, or face shockingly steep fines for exceeding the annual building emissions limit, with no reasonable expectation of serving a public purpose. Although the severity of the current climate crisis arguably presents a rational public purpose for retroactive application of the law, if compliance is not reasonably possible, the severity and ambiguity of the penalties, discussed above, combined with retroactive application, may strengthen the Due Process argument.

Finally, Plaintiffs argue that Local Law 97 imposes an unauthorized tax on building owners in violation of the New York State Constitution and Municipal Home Rule Law. Municipalities in New York do not have any inherent power to tax. The only taxing authority a municipality has is that which is explicitly delegated to it by the State via enabling legislation. Plaintiffs argue that the City is attempting to tax greenhouse gas emissions without any express authority from the State particularly since there is no indication in Local Law 97 as to how the City will use the revenue from the annual penalties. The Plaintiffs allege that since there is no indication at this point that the revenues will be put toward emissions

reductions efforts, it will likely be folded into a general fund. And although municipalities have the implicit right to impose fees and penalties to fund and enforce programs, if the Local Law 97 penalties are unavoidable, and receipts just go to the City's general fund, opponents are going to argue this is just a tax. And they may be right.

This is not the first time the unauthorized tax argument has been used to challenge a major environmental initiative. In 2005, New York entered into a Memorandum of Understanding to implement the Regional Greenhouse Gas Initiative ("RGGI")—a regional carbon cap and trade program. In 2008, the Department of Environmental Conservation ("DEC") and the New York State Energy Research and Development Authority ("NYSERDA") promulgated regulations to implement the program. The Legislature didn't act until 2011 when it passed the Power Act of 2011 regarding compliance for major electric generating facilities (generating 25 MW or more of electricity) with DEC's air quality requirements for offsetting carbon emissions. A group of New York residents and ratepayers—backed by Americans for Prosperity[5]—sued the Governor, the DEC, and NYSERDA in Albany County Supreme Court in June of 2011 for their actions in entering into RGGI.[6] They argued, among other things, that the cap and trade program imposed an unauthorized tax on ratepayers since the State Legislature did not enact it. Neither the Supreme Court nor the Third Department addressed this substantive claim as the Defendants' Motion to Dismiss was granted on standing grounds, and upheld on other grounds. [7]

Although New York's participation in RGGI survived this legal challenge, it became highly vulnerable to attack in 2015 when, as a result of the budget crisis, then-Governor Cuomo pulled about $41 million out of the RGGI revenues and deposited it into the general fund.[8] Environmental advocates were worried, not so much about the loss of revenues for climate-related initiatives, but for the potential of RGGI to be challenged as an illegal tax by groups against climate action. Experts warned that using those funds for any other purpose would open RGGI up to legal action because the collection of proceeds under RGGI was not passed by the Legislature.[9] It seems the City did not learn a lesson from the State's almost fatal missteps with RGGI funds because this is exactly the same challenge the Plaintiffs in this case are making against Local Law 97. And because the courts never got to this issue in the RGGI case, it remains to be seen how it will play out here.

Hodgson Russ Takeaways. Throughout their Complaint, Plaintiffs challenge the wisdom of the methodology chosen by the City to address what they admit is the laudable goal of reducing emissions from buildings. But as a general rule,

courts do not act as super-legislatures second guessing municipal legislation. *See e.g., A. E. Nettleton Co. v. Diamond*, 27 N.Y.2d 182, 194 (1970) ("The wisdom of a particular statute is beyond the scope of judicial review ... and we should not substitute our judgment for that employed by the Legislature in enacting the statute in question.") (internal citations omitted).

Where the suit most likely hits home is how Local Law 97 affects specific properties. If the statute as a whole is not struck down, numerous suits alleging specific unavoidable harms are likely to follow. The City may be able to untangle itself from some of the due process claims by stepping up its efforts to create the regulatory framework for waivers and adjustments; but the pace of implementing Local Law 97, so far, has not been encouraging.

The recently adopted City budget may address some of the concerns, as funding for additional staff and other tasks was included (although environmentalists called the increase a "minimal" step). Progress on implementation may dull some of the lawsuit's claims, while others may not be ripe because the implementation milestones were not required until 2023. When the regulations finally emerge, the City Administration will likely offer both paths to compliance and relief from unavoidable fines. As Chief Climate Officer and Commissioner of the Department of Environmental Protection Rohit Aggarwala testified at the April 13, 2022 hearing, "We have no intention of giving anyone a free pass or letting anyone off the hook. But we also see no benefit to the environment in punishing someone who is actually doing everything possible."[10]

[1] *Glen Oaks Village Owners, Inc., et al. v. City of New York, et al.*, Index No. 154327/2022 (May 18, 2022).

[2] *See* NY Exec. Law § 379 (McKinney 2020); NY Energy Law § 11-109 (McKinney 2004).

[3] N.Y.C. Admin. Code § 28-320.3.2.1 ("... the amount of greenhouse gas emissions attributed to particular energy sources shall be determined by the commissioner and promulgated into rules of the department by no later than January 1, 2023."

[4] *Id.* at § 28-320.3.2 ("[DOB] may establish different limits, set forth in the rules of the [DOB], where [it] determines that different limits are feasible and in the public interest.").

[5] Americans for Prosperity is a conservative political action group backed by leaders of the petrochemical industry, such as the Koch brothers. *See Group linked to billionaire Koch brothers seeks end to New York role in greenhouse gas curb*, Times Union (June 29, 2011) (https://www.timesunion.com/local/article/Group-linked-to-billionaire-Koch-brothers-seeks-1445005.php).

[6] *Thrun v. Cuomo*, Index No. 4358-11 (June 27, 2011).

[7] *Thurn v. Cuomo*, 112 A.D.3d 1038 (3d Dep't 2013).

[8] Derek Hawkins, *Cuomo's $41 Million Funding Raid Could Have Big Consequences for State Climate Program*, Public News Service (Apr. 9, 2015) (https://www.publicnewsservice.org/2015-04-09/energy-policy/cuomos-41-million-funding-raid-could-have-big-consequences-for-state-climate-program/a45583-2).

[9] Emily Atkin, *New York Just Quietly Raided Its Climate Program For Cash. It Might Destroy The Entire Effort.*, Think Progress (Apr. 7, 2015) (https://archive.thinkprogress.org/new-york-just-quietly-raided-its-climate-program-for-cash-it-might-destroy-the-entire-effort-3e6b5a4f6f50/).

[10] Testimony is quoted in Samar Khurshid, *New City Budget Includes Some Added Funding to Implement Landmark Building Emissions Law*, Gotham Gazette (June 17, 2022) (https://www.gothamgazette.com/city/11387-nyc-city-budget-climate-mobilization-act).

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