Understanding the Requirements of the Climate Mobilization Act

A Lexis Practice Advisor® Practice Note by YuhTyng (Tyng) Patka and David Miller, Duval & Stachenfeld LLP

YuhTyng (Tyng) Patka
Duval & Stachenfeld LLP

David Miller
Duval & Stachenfeld LLP

This article briefly summarizes how owners can comply with the emissions limits set forth in the Climate Mobilization Act. The New York City Council recently passed a series of bills, together known as the "Climate Mobilization Act," with the laudable goal to reduce citywide greenhouse gas emissions by 40% by 2030 and 80% by 2050. See https://council.nyc.gov/press/2019/04/18/1730/ for details of the bills that comprise the Climate Mobilization Act.

To reach this lofty goal, the centerpiece of the Climate Mobilization Act is Local Law 97 of 2019, which sets forth new limits on permissible greenhouse gas emissions that covered buildings may emit. The annual building emissions limit of a covered building is based upon such building's occupancy group(s) and the corresponding square footage and energy source(s) of such occupancy group(s). The first of these caps on carbon emissions goes into place in 2024, with subsequent stricter caps going into place in 2030, 2035, and then 2050. The caps for 2035 and 2050 are not yet established within the Climate Mobilization Act and will be determined by the commissioner of the NYC Department of Buildings no later than January 1, 2023.

What Types of Buildings Must Comply?

The annual building emissions limits are applicable to most privately owned buildings 25,000 gross square feet or larger. Additionally, two or more buildings on the same tax lot that together exceed 50,000 gross square feet, and two or more buildings held in condominium form governed by the same board of managers that together exceed 50,000 gross square feet, are also subject to the annual building emissions limits. Notable exceptions to the law are buildings owned by New York City, the New York City Housing Authority (NYCHA), houses of worship owned by religious organizations, properties owned by a housing development fund company organized pursuant to the New York State Business Corporation Law and Article XI of the New York State Private Housing Finance Law, and buildings containing at least one rent-regulated dwelling unit. Additionally, affordable housing buildings are exempt from the law until 2035.

How Can Owners Comply with the Climate Mobilization Act's Emissions Limits?

Compliance with the emissions limits of the Climate Mobilization Act is required by 2024, with the first compliance report due by May 1, 2025 (and subsequent filings being due on May 1 of every year thereafter). Such

compliance report must be certified by a registered design professional and state that either (1) the building was in compliance for the previous calendar year or (2) the building was not in compliance for the previous calendar year, listing the amount by which the building exceeds such limit.

It is crucial that owners begin understanding the requirements of the Climate Mobilization Act and their options for compliance. Compliance can be achieved using a variety of mechanisms provided to the owner within the Climate Mobilization Act. In addition to traditional retrofits to a building, an owner may reduce their emissions by (1) purchasing greenhouse gas offsets (generated in the same year), although an owner may only deduct up to 10% of their emissions with this option; (2) purchasing renewable energy credits (generated in the same year); or (3) using clean distributed energy resources (i.e., generating or storing clean energy) located at, on, in, or directly connected to the building, where the amount of credit generated is based on the calculated output of the clean distributed energy resource.

The maximum penalty for noncompliance is the difference between the actual annual building emissions and the annual building emissions limit, multiplied by $268. The civil penalty imposed will take into account good faith efforts to comply with the Climate Mobilization Act, the history of compliance of the owner, and the owner's access to financial resources. The penalty is, however, designed to be dramatically high enough to incentivize an owner to comply—rather than merely choose to pay the penalty. Given the discretionary factors involved in the penalty, owners need to seriously consider the actions taken with respect to their buildings and whether such actions will constitute "good faith efforts."

If it becomes clear to an owner that compliance may be difficult, the owner may be eligible to apply for an adjustment (increase) to the annual building emissions limits. The application for an adjustment must be submitted to the NYC Department of Buildings by July 1, 2021. Thus, owners are advised to quickly understand the requirements they are facing as a result of the Climate Mobilization Act and engage professionals to determine if they are able to comply; the cost of such compliance; and, if not, seek an adjustment based on such analysis.

When Would an Adjustment Be Warranted?

The Climate Mobilization Act contemplates multiple scenarios where an adjustment may be warranted.

The first scenario is if the owner is physically or legally constrained from complying. Examples of legal constraints include a building's designation as a landmark, landmark site, interior landmark, or within a historic district. Physical constraints could be space constraints or lack of access due to infrastructure or an existing lease preventing access. In these types of cases, an owner must first make good faith efforts to first purchase offsets. The owner must also avail itself of all available local, state, and federal incentive programs and show that the request for an adjustment is one of last resort. An adjustment due to a physical or legal constraint may be effective for up to three years. This adjustment is available to owners of buildings in existence on the effective date of the Climate Mobilization Act, which is on or about November 15, 2019 (the Effective Date), or for which a permit for the construction of such building was issued prior to the Effective Date.

The second scenario is if the cost of compliance would be too costly for the owner. In addition to the requirements stated above, an owner seeking an adjustment due to financial reasons must also show that the cost of financing the capital improvements necessary for strict compliance would prevent the owner from earning a "reasonable financial return" or that the building is in "financial hardship." An owner making any such application must also provide proof that it has availed itself of all programs funded by New York City or enabled by a local law that provide financing for the purpose of energy reduction or sustainability measures, such as a Property Assessed Clean Energy (PACE) loan, discussed briefly below. Owners should note that although it is good that the Climate Mobilization Act provides for adjustments based on financial burden, an adjustment granted for purposes of alleviating the owner's financial burden is only effective for one year. Owners should consider the limited duration of any adjustment when determining their compliance options. This adjustment is available to owners of buildings in existence on the Effective Date or for which a permit for the construction of such building was issued prior to the Effective Date.

The third scenario is based on whether there is some special circumstance for the building in question. Local Law 97 is not blind to the fact that not all buildings are equal in terms of occupancy density or usage. Local Law 97 does take into consideration special circumstances that may cause excess building emissions, such as 24-hour buildings, high density occupation, or high-energy tenant operations. Under these special circumstances, buildings may qualify for an adjustment if the owner can demonstrate (1) the building's emissions in 2018 exceed the emissions limit prescribed by Local Law 97 by more than 40%, (2) that the energy performance of the covered building is equivalent to a building in compliance with the New York City energy conservation code in effect on January 1, 2015, and (3) a plan is submitted to get the building in compliance with the annual building emissions limits for calendar years 2030

through 2034. This adjustment is available to owners of buildings in existence on the Effective Date, and will result in a required building emissions limit from 2024 to 2029 that is 70% of the calendar year 2018 building emissions for the covered building. There is also the possibility that this may be extended until 2035, provided that the owner submits a schedule of alterations to the covered building to sufficiently show that by 2035 the covered building will comply with a required building emissions limit that is 50% of the reported 2018 building emissions for the covered building.

What Is PACE Financing?

PACE financing, which was enabled in New York City for the first time as part of the Climate Mobilization Act as Local Law 96, will likely become extremely important in New York City. In brief, PACE financing is a way for owners to obtain fixed rate, competitive rates to finance up to 100% of the cost of the improvements that will be needed to meet the requisite carbon reduction targets. The financing is paid back through real estate tax assessments on the property which fully amortize over the expected useful life of the improvements that were financed (typically 20–30 years). As PACE payments prime mortgage debt, PACE has been generally resisted by the lending community. However, more and more lenders have been getting comfortable with PACE. With the passage of Local Law 96, this trend is very likely to continue. Lenders that permit PACE financing may gain a competitive advantage in the commercial real estate financing industry as PACE financing was implemented to go hand in hand with the implementation of the Climate Mobilization Act. Indeed, PACE financing may an owner's best method of achieving compliance with the Climate Mobilization Act. The prevalence of lenders adapting to this change remains to be seen.

Recommendations Moving Forward

Owners of buildings larger than 25,000 gross square feet are urged to begin taking steps now to ensure compliance with Local Law 97 even though compliance is not mandated until 2024 because capital improvements that might need to be undertaken in order to retrofit existing buildings will take time to complete. Owners should start with analyzing their building's current emissions to assess whether they currently would be facing a penalty under the 2024 or 2030 emissions limit standards. Local Law 97 will also affect owners seeking to obtain financing or refinancing their current debt, as lenders will likely add Local Law 97 compliance to their diligence of the property, possibly even demanding reserves in order to account for possible penalties in the future. Finally, moving forward, those looking to purchase a property in New York City should be mindful of whether Local Law 97 is applicable to the property and if so, whether such property will be or can be in compliance by 2024. Accordingly, those looking to sell a building that would most likely not be in compliance with Local Law 97 by 2024 should expect a more difficult time selling their building at a premium

YuhTyng (Tyng) Patka, Partner, Duval & Stachenfeld LLP

YuhTyng ("Tyng") Patka joined Duval & Stachenfeld LLP in 2019 as chair of the NYC Real Estate Tax and Incentives Practice Group. Ms. Patka represents NYC real estate owners and developers on all aspects relating to real estate taxes. She represents owners in challenging their property taxes (certiorari), developers in NYC tax incentive programs (421-a, ICAP, FRESH), and not-for-profits in obtaining real estate tax exemptions.

Ms. Patka's practice also includes representing developers in the acquisition/disposition of Inclusionary Air Rights and handles Voluntary and Mandatory Inclusionary Housing applications. Additionally, Ms. Patka works closely with Duval & Stachenfeld's industry leading Opportunity Zone Practice Group and NYC Climate Mobilization Task Force.

Ms. Patka's representative matters include:

- Representing a developer in the acquisition of 23,000 square feet of inclusionary air rights for a mixed use project
- Performing due diligence on behalf of a private equity lender on a project participating in the Voluntary Inclusionary Housing program
- Representing a not-for-profit charter school in obtaining a not-for-profit real estate tax exemption
- Providing an opinion letter in the sale of a $150M project on the project's eligibility under the Affordable New York (421-a) program

Prior to joining D&S, Ms. Patka was an associate at Tuchman Korngold Weiss Liebman & Lindemann, LLP as well as a large Long Island law firm where she was responsible for overseeing that firm's residential tax certiorari practice.

Ms. Patka is fluent in Mandarin Chinese.

David Miller, Associate, Duval & Stachenfeld LLP

David Miller joined Duval & Stachenfeld LLP in 2017 as a member of the Real Estate Practice Group. He is also a member of the Finance, PACE and Opportunity Zones Practice Groups and serves on the NYC Climate Mobilization Task Force. Mr. Miller graduated from Columbia University Law School and is not yet admitted.