SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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GLEN OAKS VILLAGE OWNERS, INC., ROBERT FRIEDRICH, 9-11 MAIDEN, LLC, BAY TERRACE COOPERATIVE SECTION I, INC., and WARREN SCHREIBER,

Index No. 154327/2022

Plaintiffs,

-against-

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF BUILDINGS, and ERIC A. ULRICH, in his official capacity as Commissioner of the New York City Department of Buildings,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF CITY DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

With the serious threat of climate change looming and New York City ("the City") already experiencing the impacts through coastal flooding, intense storms, and extreme heat, Plaintiffs seek to permanently prevent the City from implementing or enforcing its program to address greenhouse gas ("GHG") emissions from buildings, a sector that produces approximately two-thirds of the City's GHG emissions. Plaintiffs complain that Local Law 97 of 2019 is not fair, inflammatorily they fail to state a cause of action and bring their claims too early before the Law has been applied. Their Complaint must be dismissed in its entirety.

After encouraging and supporting GHG emissions reductions from buildings for years, the City could no longer rely solely on voluntary programs—LL97 is simply the next step in the City's efforts to reduce these emissions. And these efforts are recognized and lauded by the State in numerous ways, including through the State's recent Climate Leadership and Community Protection Act ("CLCPA"). Contrary to Plaintiffs' claims, the CLCPA sets emissions reduction commitments for New York State and plainly does not occupy the entire field of regulation of GHG emissions; rather, the CLCPA anticipates aligning with New York City's LL97.

Plaintiffs next allege that LL97's mechanics are unclear and are facially "unconstitutionally vague," but their Complaint betrays both the clarity of the Law and Plaintiffs' own understanding of exactly how it applies to them, and that their true objection is that LL97 mandates ambitious phased reductions in GHG emissions from covered buildings will result in penalties without compliance. Plaintiffs attack entire sections of LL97 as vague, but the only phrases they deem "unconstitutionally vague" have plain meanings that are commonly understood, are widely used in legislation and regulation, and have been upheld by New York Courts as sufficiently clear.

Further demonstrating the Complaint's deficiency is its premature nature. Plaintiffs allege that the penalties assessed are excessive—however, no one, including Plaintiffs, has been assessed any penalty yet. As LL97 regulates only future conduct, it is plainly not retroactive.

Since the Complaint is brought so prematurely, Plaintiffs can only plausibly attempt to facially challenge LL97's penalties as "excessive." But here, again, they fall well short of establishing that no set of circumstances exists under which the Law would be valid.

Finally, Plaintiffs simply misunderstand the law of penalties as distinct from taxes. They apply an incorrect legal test and ignore the compliance driving purpose behind the penalties that LL97 authorizes for building owners in violation of the Law, which seeks the reduction of GHG emissions for the benefit of New Yorkers. Plaintiffs similarly ignore that the City is obligated by the City Charter to direct penalties to its General Fund and that the absence of an earmarked environmental use for the penalties does not somehow convert the penalties into a tax.

As a result, Plaintiffs criticize LL97, but fail to state a cause of action as a matter of law. Accordingly, their Complaint must be dismissed.

FACTS

This case involves New York City Local Law 97 of 2019, enacted as part of the Climate Mobilization Act by the City Council on April 19, 2019, and as later amended by Local Law 147 of 2019, Local Laws 95, 116, and 117 of 2020 (collectively "LL97" or the "Law"). LL97 amends the New York City Charter ("Charter") and the Administrative Code of the City of New York ("Ad. Code") regarding the City's commitment to reduce GHG emissions by 40% by 2030 and 80% by 2050. *See* Ad. Code § 24-803(a)(1). In order to control and reduce air pollution, LL97 covers, with some exceptions, buildings over 25,000 gross square feet, two or more buildings on the same tax lot that together exceed 50,000 square feet, or two or more buildings held in the condominium form of ownership that are governed by the same board of managers and that

together exceed 50,000 gross square feet, and limits their GHG emissions to achieve those purposes. *See* Ad. Code § 28-320.1. LL97 gives the Department of Buildings ("DOB") the authority to implement and enforce the Law. *See id.* § 28-320.6.4, Charter § 26-651. The Law establishes an advisory board dedicated to advising on efforts to effectively reduce GHG emissions from buildings. Ad. Code § 28-320.2. For the 2024-2029 compliance period, LL97 provides a formula for calculating a building's GHG emissions limit based on the building's gross square footage, a specified GHG coefficient keyed to a building's occupancy group, and the energy source for the building. *Id.* § 28-320.3. Buildings that exceed the emissions limits will be subject to civil penalties, with mitigating and aggravating factors set forth in the Law. *Id.* § 28-320.6. In certain instances, in accordance with criteria set forth in the Law, a building owner may be eligible for adjustments to the building's emissions limit. *Id.* §§ 28-320.7, 28-320.8.

LL97's purpose is to reduce GHG emissions associated with energy use in large buildings, which are responsible for approximately two-thirds of New York City's emissions. *See* Ex. A, Transcript of Hearing Before the Committee on Environmental Protection at 10 (Dec 4, 2018). These GHG emissions contribute to global warming; it is critical for buildings in New York City to reduce their GHG emissions to combat the accelerating climate crisis. Climate change is occurring at an unprecedented rate, and the current trend of Earth's warming over the last several decades is clear – the atmosphere and ocean have warmed, sea level has risen, and snow and ice levels have decreased. *See* Ex. B, Committee Report of the Infrastructure Division at 3 (Dec 4, 2018). New York City, as the largest city in the United States, can act as a global leader by organizing an ecologically, socially, and economically regenerative transition to renewable energy. *See* Ex. D, Committee Report of the Infrastructure Division at 24 (June 26, 2019).

LL97 builds on several recent efforts by the City to reduce GHG emissions and combat climate change. *See* Ex. F, Committee Report of the Infrastructure Division at 2-3 (Sept 22, 2020). Reducing emissions from buildings has been recognized as the most significant action the City can take to meet its goal of reducing citywide GHG emissions to 80% lower than its 2005 level by 2050. *Id.* at 3. Further, actions such as those set forth in the 2014 *One City: Built to Last – Transforming New York City's Buildings for a Low-Carbon Future* and the 2015 *OneNYC: The Plan for a Strong and Just City* have repeatedly been taken to reduce emissions from buildings in New York City. *Id.* LL97 expanded upon the existing requirements to take the next step necessary to reach the 80x50 goal. Ex. A at 5.

It is estimated that more than 90% of New York City's current buildings will still be standing in 2050. New York City's Roadmap to 80x50 at 54.[1] It is thereby imperative to reduce GHG emissions for both existing buildings and new construction in order to meet the 80x50 goal of reduction of GHG emissions. Furthermore, LL97 is designed so that any efficiency investments that building owners choose to undertake are likely to be recouped over time through reduced energy costs. Proper implementation of LL97 will not only put the City well on track to meet its climate commitments, but will also significantly reduce local emissions to benefit public health. *See* Ex. E, Hearing Before the Committee on Environmental Protection at 14 (Sept 22, 2020).

Finally, building owners are not on their own in complying with LL97's emissions limits. LL97 does not prescribe a particular method of compliance, and building owners can reduce their GHG emissions in a variety of ways that include building retrofits, implementing

[1]New York City's Roadmap to 80x50 is available at https://www1.nyc.gov/assets/sustainability/downloads/pdf/publications/New%20York%20City's%20Roadmap%20to%2080%20x%2050_Final.pdf. The Court can take judicial notice of the Roadmap to 80x50 on a motion to dismiss. *Affronti v. Crosson*, 95 N.Y.2d 713, 720 (2001) (a record is "a proper subject of judicial notice because it is taken from public records.")

operational procedures, purchasing GHG offsets or renewable energy credits, and using clean distributed energy resources. *See* LL97; *see also* Ex. G, Briefing Paper and Committee Report of the Human Services Division and the Infrastructure Division, at 5 (Jun 27, 2022). The NYC Accelerator assists building stakeholders with energy improvement projects and offers free training resources for City residents. *See* NYC Accelerator.[2] The Accelerator also assists building owners explore financing options, such as the U.S. Department of Energy's Property Assessed Clean Energy ("PACE") loans. *See* Department of Energy, PACE Programs.[3]

ARGUMENT

STANDARD OF REVIEW

Pursuant to New York Civil Practice Law and Rules § 3211, a party may move for dismissal on the grounds that the court does not have jurisdiction of the subject matter of the cause of action or the pleading fails to state a cause of action. N.Y. CPLR §§ 3211(a)(2), 3211(a)(7). "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction"; the court will "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

Nevertheless, "bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action." *Sweeney v. Sweeney*, 71 A.D.3d 989, 991 (2d Dep't 2010) (internal citation and quotation marks omitted). Similarly, the "allegations of the pleading cannot be vague and conclusory, but must contain sufficiently particularized allegations from which a cognizable cause

[2] *See* accelerator.nyc.

[3] *See* https://www.energy.gov/eere/slsc/property-assessed-clean-energy-programs.

of action reasonably could be found." *V. Groppa Pools, Inc. v. Massello*, 106 A.D.3d 722, 723 (2d Dep't 2013) (citation omitted); *see also Scarfone v. Village of Ossining*, 23 A.D.3d 540, 541 (2d Dep't 2005) (finding that "the plaintiff's vague, conclusory assertions, unsupported by factual allegations, were insufficient to sustain a cause of action").

A court should not shrink from the responsibility of dismissing the complaint when no legal wrongdoing is set forth. *Kamin v. American Express Co.*, 86 Misc. 2d 809, 815 (Sup. Ct. N.Y. Cty. 1976). Therefore, a motion to dismiss should be granted where a determination on the merits involves only an issue of law and where the plaintiffs do not identify or demonstrate the existence of any material factual issues. *See O'Hara v. Del Bello*, 418 N.Y.S.2d 334, 336 (1979). Thus, the question for the Court becomes whether the plaintiff actually has a cause of action, and not merely whether or not a cause of action has been stated. *O'Donnel, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154 (1st Dep't 1993), *citing Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977).

POINT I

LL97 IS NOT PREEMPTED BY STATE LAW AND PLAINTIFFS' FIRST CAUSE OF ACTION SHOULD BE DISMISSED AS A MATTER OF LAW

Plaintiffs allege that LL97 is preempted by state law. Compl. ¶¶ 193-202. Specifically, Plaintiffs claim that the New York State Legislature intended to occupy the field "with respect to regulating greenhouse gas emissions" when they passed the Climate Leadership and Community Protection Act ("CLCPA"), enacted as Chapter 106 of 2019. *See* Compl. ¶ 199. Plaintiffs' claims should be dismissed as a matter of law.

In general, the power of local governments to enact laws is derived from the State Legislature. *See DJL Rest. Corp. v. City of N.Y.*, 96 N.Y.2d 91, 94 (2001); *People v. DeJesus*, 54

N.Y.2d 465, 468 (1981). N.Y. Const. Art. IX, § 2(c)(i) provides local governments with the "power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government…." In addition, the N.Y. Constitution grants local governments the authority "to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to" ten enumerated subject matter areas, including "government, protection, order, conduct, safety, health and well-being of persons or property therein…." *Id.* Art. IX, § 2(c)(ii)(10). This latter clause amounts to a broad conveyance of police powers. To implement Article IX, the Legislature enacted the Municipal Home Rule Law ("MHRL"), which gives local governments power to adopt and amend local laws – to the extent they are not inconsistent with provisions of the N.Y. Constitution or any general law – for "[t]he government, protection, order, conduct, safety, health and well-being of persons or property therein.…." MHRL § 10(1)(ii)(a)(12); *DJL Rest. Corp.*, 96 N.Y.2d at 94.

Generally, local laws enjoy a strong presumption of constitutionality. *Lighthouse Shores, Inc. v. Town of Islip*, 41 N.Y. 2d 7 (1976). A local law enacted pursuant to the broad police powers granted by the N.Y. Constitution and MHRL may be invalidated as preempted by State law *only if* the local law expressly conflicts with the State law or the State has "clearly evinced a desire to preempt an entire field thereby precluding any further local regulation." *Metro. Funeral Dirs. Ass'n. v. City of N.Y.*, 702 N.Y.S.2d 526, 530 (Sup. Ct. N.Y. Cty. 1999) (quoting *Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91 (1987)).

1. The Legislature Did Not Preempt the Field of GHG Regulation

"In order for the preemption doctrine to prohibit local legislation in a particular area there must be an intent on the part of the State to occupy the entire field." *Ba Mar v. County of Rockland*, 164 A.D.2d 605, 612 (2d Dep't 1991). Such intent may be express or implied. *Id.* "A

desire to preempt may be implied from a declaration of state policy by the Legislature or from the fact that the legislature has enacted a comprehensive and detailed regulatory scheme in a particular area." *Consol. Edison Co. v. Town of Red Hook*, 468 N.Y.S.2d 596, 599 (1983); *see also Ba Mar*, 164 A.D.2d at 612.

Plaintiffs allege that the CLCPA preempts LL97. Compl. ¶¶ 193-202. The CLCPA does not expressly preempt LL97 and Plaintiffs do not claim that it does. As such, to succeed on their preemption claim, Plaintiffs must establish that the CLCPA preempts LL97 by implication. The Legislature's intent "may be inferred from a declaration of State policy or from the legislative enactment of a comprehensive and detailed regulatory scheme in a particular area." *N.Y. State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 217 (1987). Neither are the case here.

A. The Legislature Did Not Declare an Intention That the CLCPA Preempt Local Laws

On July 18, 2019, the CLCPA was signed into law, three months after the City Council passed LL97. The CLCPA sets ambitious economy-wide GHG emissions limits, requiring reductions of 40% by 2030 and 85% by 2050 from 1990 levels. The CLCPA creates a Climate Action Council that is charged with developing a scoping plan of recommendations to meet these targets.[4]

Section one of the CLCPA includes legislative findings and declarations that evince a legislative intent not to preempt more stringent local legislation. In fact, the Legislature's first finding in section one acknowledges that the adverse impacts of climate change, the impetus for the CLCPA, are felt both in areas that are of local concern, such as health and property damage, and across the State, such as air pollution and impacts on the State's primary industries. The findings similarly note that combating climate change will require action by "New York and other

[4] For more, see https://climate.ny.gov/.

jurisdictions," and that the CLCPA is intended to encourage "action by other jurisdictions," references that plainly include other states, as well as federal and local governments. *Compare* CLCPA § 1(12)(a) (noting the State's past "collaboration with other States" as opposed to the broader use of "jurisdictions").

Even beyond these clear statements demonstrating the State Legislature's intent not to preempt local legislation, the substantive text of the CLCPA demonstrates that the CLCPA does not occupy the entire field. In *People v. DeJesus*, the Court assessed the Legislature's preemptive intent based on language in the State law itself, which indicated the broad scope of the Alcoholic Beverage Control Law and the Legislature's clear intent to preempt the entire field. 54 N.Y.2d at 470. That is plainly not the case here.

To show the intent of the Legislature, Plaintiffs cite only to the use of the word "comprehensive" in both the legislative findings of the CLCPA, *see* Compl. ¶ 139, and press statements by various State legislators and executive branch officials. *See id*. ¶¶ 140-144. These statements by individuals, however, show no intent by the Legislature to preempt local action in the field of climate regulation, and in fact the text of the CLCPA itself demonstrates that local regulation was anticipated and even *desired* by the Legislature in order to achieve the goals of the Act.

Contrary to Plaintiffs' allegations (*see* Compl. ¶ 149), the CLCPA mentions local laws several times. The CLCPA section entitled "Promulgation of regulations to achieve statewide greenhouse gas emissions reductions" prevents the State from approving a GHG emission offset project where the project "is required pursuant to any local, state or federal law, regulation...." New York Environmental Conservation Law ("ECL") § 75-0109(4)(i)(I). Clearly this part of the CLCPA anticipates localities continuing to regulate in the field of GHG emissions. Section 11 of

the CLCPA states, "Nothing in this act shall relieve any person, entity, or public agency of compliance with other applicable federal, state, or *local laws or regulations*, including state air and water quality requirements, and other requirements for protecting public health or the environment." CLCPA § 11 (emphasis added). Plaintiffs' attempt to undermine this section's clear meaning is unavailing – the section does not need to specifically mention "emissions reductions measures" for it to apply to emissions reductions measures regulated as part of local public health or building codes. Moreover, "other requirements for protecting public health or the environment" clearly encompasses "emissions reductions measures," as reducing emissions protects both public health and the environment. *See Oriental Boulevard Co. v. Heller*, 27 N.Y.2d 212, 221 (1970) (finding no state preemption where provisions of the law "explicitly recognize that local units of government are intended to function in the" field).

The State Legislature has already given municipalities the authority for enacting stricter building regulations than the State. The New York State Energy Act, Section 11-109 states, "Nothing in this article shall be construed as abrogating or impairing the power of any municipality…to enforce the provisions of any local building regulations…provided that such local building regulations are not inconsistent with the code."[5] Section 379 of the Executive Law likewise states "the legislative body of any local government may duly enact or adopt local laws or ordinances imposing higher or more restrictive standards for construction within the jurisdiction of such local government than are applicable generally to such local government in the uniform code." Nothing in the CLCPA purports to disturb this preexisting power. *See, e.g, Garcia v. New York City Dept. of Health & Mental Hygiene*, 31 N.Y.3d 601, 621 (2018) (noting it would be

[5] "The code" refers to the Uniform Fire Prevention and Building Code and State Energy Conservation Construction Code.

difficult to reconcile the State Legislature's repeated recognition of the New York City Board of Health's independent vaccination requirements with an intent to implicitly repeal the Board's authority); *Natural Resources Defense Council v. New York City Dept. of Sanitation*, 83 N.Y.2d 215, 222 (1994) (holding that repeal by implication will only be resorted to in the clearest of cases).

Moreover, the CLCPA encourages the Climate Action Council to learn from the policies made at local levels and to incorporate them into its future recommendations. When establishing the New York State Climate Action Council, the CLCPA specified that "[t]he Council shall identify existing climate change mitigation and adaption efforts at the federal, state, and *local levels* and may make recommendations regarding how such policies may improve the State's efforts." ECL § 75-0103(16) (emphasis added). The CLCPA also stated that when creating the Scoping Plan, "the Council shall: consider all relevant information pertaining to GHG emissions reduction programs in states in the United States Climate Alliance, as well as other states, regions, *localities*, and nations." ECL § 75-0103(14)(A). Clearly then, rather than trying to preempt local efforts, the CLCPA actively anticipated that local regulatory efforts would continue, and it instructed the Climate Action Council to learn from these efforts and incorporate them into its Scoping Plan. Accordingly, the Climate Action Council did just that with respect to LL97 – the Draft Scoping Plan,[6] published on December 30, 2021, recommended that NYSERDA "should set energy efficiency standards for buildings, in coordination with [Department of State] and local code officials for development and enforcement." Draft Scoping Plan at 128. The Draft Scoping Plan further recommended that by 2030, the State should "adopt an energy efficiency performance standard for existing commercial and multifamily properties larger than 25,000 sq. ft." and that

[6] The Draft Scoping Plan is available at https://climate.ny.gov/Our-Climate-Act/Draft-Scoping-Plan. The Court can take judicial notice of the Draft Scoping Plan on a motion to dismiss, *see* fn.1.

"[c]ompliance standards will be informed by statewide benchmarking data and *align with New York City's Local Law 97* and across State and local government requirements where appropriate." *Id.* (emphasis added). The Draft Scoping Plan explicitly mentions LL97 a second time, citing it approvingly and implying the acceptability of its coexistence with the CLCPA, when discussing data availability from state agencies, needed in part to "facilitate cost-effective implementation of…Local Law 97." *Id.* at 175. NYSERDA even includes advice for buildings to adhere to LL97 on its website.[7] Therefore rather than preempting LL97, the CLCPA acknowledges LL97's complementary regulatory scheme and, in implementing the CLCPA, the Draft Scoping Plan suggests LL97 as a model for a statewide standard.

B. The CLCPA Does Not Create a Comprehensive and Detailed Regulatory Scheme That Evinces a Desire by the Legislature to Preempt Any Local Legislation

The CLCPA is not "a comprehensive and detailed regulatory scheme in a particular area" such that field preemption can be found. *Consol. Edison*, 468 N.Y.S.2d at 599. In assessing the comprehensiveness of a state regulatory regime, courts examine the extent to which a state statute establishes extensive direct controls at the local level or the extent to which there is a need for statewide uniformity. *Dougal v. County of Suffolk*, 102 A.D.2d 531, 533 (2d Dep't 1984); *DeJesus*, 54 N.Y.2d at 470. For instance, in *Ba Mar*, the Second Department determined the legislative intent to preempt the field of mobile home ownership based on the State's enactment of a "comprehensive and detailed regulatory scheme" for such. 164 A.D.2d at 613. The Court emphasized the scope of the state law at issue as "extremely broad, covering nearly every aspect of mobile home park life," including eviction grounds, guidelines for owners/operators, provisions relating to fees, charges, security deposits, requiring permits submitted to the state, and much more.

[7] https://www.nyserda.ny.gov/All-Programs/Multifamily-Building-Programs/Planning-Ahead-for-Local-Law-97

Id. at 610-12. *See also Dougal*, 102 A.D.2d at 533 (finding the Legislature enacted a comprehensive regulatory scheme where a State law banned the sale of drug related paraphernalia and prescribed criminal and civil penalties for the possession or sale of certain items).

Here, the CLCPA does not set forth a comprehensive and detailed regulatory scheme regulating GHG emissions. Indeed, the CLCPA does not regulate GHG emissions at all – the details of how New York State would meet the GHG emissions reductions established in the law were not included in the text of the CLCPA. Rather, the CLCPA established the Climate Action Council, which works alongside various advisory groups to prepare a scoping plan that "shall identify and make recommendations on regulatory measures and other state actions that will ensure the attainment of the statewide [GHG] emission limits." ECL § 75-0103(13). While the CLCPA intends to *lead* to regulations that that control GHG emissions, that has not yet occurred. Moreover, as discussed above, the framers intended the CLCPA to *learn* from existing local regulations, not to preempt them.

No local controls are imposed in the CLCPA, and as discussed above, the text of the statute explicitly anticipates localities establishing their own laws for reducing GHG emissions, and the Draft Scoping Plan explicitly recognizes LL97 as a model for the State. *See* Draft Scoping Plan at 128. In fact, the goals of the CLCPA *require* local laws in order to achieve the GHG emission limits. The CLCPA could not achieve its own goals by preempting all local legislation on GHG emissions, and the State legislature understood this. Statewide uniformity is not necessary and in the case of areas of law traditionally reserved for municipalities, not possible. Moreover, as discussed above, the State Legislature has already recognized the power of municipalities to enact stricter building codes than those enacted by the State. N.Y. Energy Law § 11-109; N.Y. Exec. Law § 379; *see, e.g.*, NYC Energy Conserv. Code (2020). As such, absent

clear unambiguous statutory language, clear statements of legislative intent, or a comprehensive and detailed State regulatory scheme that evinces the legislature's intent to exclusively regulate greenhouse gas emissions, Plaintiffs cannot demonstrate that field preemption invalidates LL97.

2. There is No Direct Conflict Between LL97 and the CLCPA

Absent any intent by the State Legislature to occupy the field of regulating GHG emissions, Plaintiffs must demonstrate that there is a direct conflict between the CLCPA and LL97. This they cannot do. "The mere fact that a local law may touch upon some of the same matters treated by the State law does not render the local law invalid automatically." *Council for Owner Occupied Hous., Inc. v. Koch*, 462 N.Y.S.2d 762, 764 (Sup. Ct., N.Y. Cty. 1983). In order for conflict preemption to apply, Plaintiffs must establish that there is "a head-on collision between the … ordinance as it is applied" and a state statute. *Lansdown Ent. Corp. v N.Y. City Dep't of Consumer Affairs*, 74 N.Y.2d 761, 764 (1989). To that end, "a local law is inconsistent [with state law] where local laws prohibit what would be permissible under [s]tate law, or impose prerequisite additional restrictions on rights under [s]tate law, so as to inhibit the operation of the State's general laws." *Garcia*, 31 N.Y.3d at 617 (internal quotes omitted).

In cases where conflict preemption has been found, the State leaves no room for speculation as to the role of local government and explicitly defines the bounds of local regulation in those areas. For instance, in *Highway Supt. Ass'n of Rockland, Inc. v. Town of Clarkstown*, 150 A.D.3d 731 (2d Dep't 2017), the Court held that a local law transferring authority over highway maintenance from the Town Highway Superintendent to the Town Board conflicted with a State law specifically vesting authority over highway maintenance with the Town Highway Superintendent. *Id.* at 733-34; *see also Sunrise Check Cashing & Payroll Svcs., Inc. v. Town of Hempstead*, 91 A.D.3d 126, 139 (2d Dep't 2011), *aff'd on other grounds*, 20 N.Y.3d 481 (2013)

(regulation limiting siting of check-cashing establishments preempted state banking law which gave the state authority to choose locations for check-cashing businesses).

Plaintiffs do not even argue that LL97 conflicts with the CLCPA, relying entirely on their field preemption argument, which does not meet the tests in New York case law. However, it is worth noting that the CLCPA does not present a single conflict with Local Law 97. As there is no way for building owners at this moment to comply with the CLCPA, since it has created no legal obligations for them, LL97 does not create any additional restrictions on state law. Neither does LL97 prohibit conduct that is allowable under the CLCPA. Moreover, both the state Energy Law and the Executive Law make clear that the State Legislature has already approved of municipal building codes being stricter than State code. N.Y. Energy Law § 11-109; N.Y. Exec. Law § 379.

As neither field nor conflict preemption apply, Plaintiffs' first cause of action should be dismissed as a matter of law.

POINT II

PLAINTIFFS FAIL TO STATE A CAUSE OF ACTION BECAUSE LL97 IS NOT UNCONSTITUTIONALLY VAGUE.

The Court should dismiss Plaintiffs' fourth claim – that LL97 is unconstitutionally vague – because the Complaint fails to state a cause of action. Plaintiffs claim, without specificity, that broad swaths of LL97 including Ad. Code §§ 28-320.3 (building emissions limits), 28-320.6 (penalties), 28-320.7 and 28-320.8 (adjustments to limits) are "impermissibly vague and ambiguous" in contravention of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and Article I § 6 of the New York State Constitution. *See* Compl. ¶¶ 231, 234. Plaintiffs have failed to set forth any basis for their claim that LL97 is unconstitutionally vague,

much less met the heavy and well-established burden for overturning a statute protecting public health. Accordingly, Plaintiffs' fourth cause of action should be dismissed as a matter of law.

The void-for-vagueness doctrine is embodied in the Fourteenth Amendment's Due Process Clause. *See NYC C.L.A.S.H. v. City of New York*, 315 F. Supp. 2d 461, 484 (S.D.N.Y. 2004). To show that a statute is unconstitutionally vague on its face, a plaintiff must show that a law is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. Such a provision simply has no core." *U.S. v. Schneiderman*, 968 F.2d 1564 (2d Cir. 1992) (citing *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 497 n.7 (1982) and *Smith v. Goguen*, 415 U.S. 566, 578 (1974) (quotation marks omitted)). With respect to a whether a statute is unconstitutionally vague as applied, the U.S. Supreme Court in *Grayned v. City of Rockford*, 408 U.S. 104 (1972) articulated a two-part test. First, laws must give a "person of ordinary intelligence a reasonable opportunity to know what [conduct] is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Grayned*, 408 U.S. at 108. The Court of Appeals has further held that "'[d]ue process requires only a reasonable degree of certainty so that individuals of ordinary intelligence are not forced to guess at the meaning of the statutory terms.'" *41 Kew Gardens Rd. Assocs. v. Tyburski*, 70 N.Y.2d 325, 336 (1987) (quoting *Foss v. City of Rochester*, 65 N.Y.2d 247, 253 (1985)).

The Constitution does not demand "mathematical certainty" from statutory language. *See Grayned*, 408 U.S. at 110; *see also People v. Cruz*, 48 N.Y.2d 419, 424 (1979) (stating that the "Constitution only requires reasonable precision"); *Five Borough Bicycle Club v.*

City of New York, 483 F. Supp. 2d 351, 380 (S.D.N.Y. 2007) ("perfect clarity" or "precise guidance" is not required). In meeting the requirements of the Due Process Clause, "the degree of linguistic precision . . . varies with the nature – and in particular, with the consequences of enforcement – of the statutory provision." *NYC C.L.A.S.H.*, 315 F. Supp. 2d at 484. The standards "governing the vagueness doctrine are relaxed when . . . the challenged laws impose only civil penalties," as LL97 does. *Id.* (citations omitted).

Statutes are not vague if they contain terms that have acquired a meaning through general usage or have an ordinary, common sense meaning. *See United States v. Vuitch*, 402 U.S. 62 (1971). "A statute which employs terms having an accepted meaning long recognized in law and life cannot be said to be so vague and indefinite as to afford the defendant insufficient notice of what is prohibited or inadequate guidance for adjudication . . . even though there may be an element of degree in the definition as to which estimates might differ." *Cruz*, 48 N.Y.2d at 428 (internal citations and quotations omitted).

Municipal statutes are presumed to be valid and it is the obligation of courts to construe statutes, if possible, to preserve their constitutionality. *See New Amber Auto Serv. V. NYC Envtl. Control Bd.*, 163 Misc. 2d 113, 116 (Sup. Ct. N.Y. Cty. 1994) (citing *People v. Bright*, 71 N.Y.2d 376, 382 (1988); *People v. Epton*, 19 N.Y.2d 496, 505 (1967), *cert denied* 390 U.S. 29). This is especially the case where, like here, the challenged law is aimed at fostering public health. *See Marcus Assocs., Inc. v. Town of Huntington*, 45 N.Y.2d 501, 505 (1978); *see also Lighthouse Shores*, 41 N.Y.2d at 11; *Nicholson v. Incorporated Vill. of Garden City*, 112 A.D.3d 893, 894 (2d Dep't 2013); *New York City Friends of Ferrets v. City of New York*, 876 F. Supp. 529, 534 (S.D.N.Y. 1995). Moreover, in order for the Court to find that LL97 is facially unconstitutional, a defendant must demonstrate that the law, "in every conceivable application[,] .

. . suffers wholesale constitutional impairment." *Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003).

Plaintiffs have not met this heavy and well-established burden. First, Plaintiffs claim that Ad. Code § 28-320.3, which sets emissions limits, is unconstitutionally vague. *See* Compl. ¶¶ 234, 240. However, Plaintiffs' puzzling claim must fail, as Section 28-320.3 provides precise formulas for calculating the emissions limits for 10 building categories. For example, as Plaintiffs acknowledge in the Complaint (*see* ¶ 70), for the compliance period from 2024-2029, a building owner can easily calculate their emissions limit using the building's occupancy group (such as R-1, multi-family buildings), the numeric emissions intensity limits (measured in tonnage of CO_2 equivalent per square foot) set forth in Section 28-320.3.1, and the gross floor area of the building. Section 28-320.3.1.1 also specifies numeric CO_2 equivalents for a variety of fuel sources, for consistent use of CO_2 emissions as a unit of measurement, that a building owner must use to calculate their emissions based on the type of fuel or electricity used to power the building. Similarly, Section 28-320.3.2 provides more stringent numeric building emissions limit formulas for the compliance period from 2030-2034, and requires the DOB to update, by January 1, 2023, GHG coefficients (measured as CO_2 equivalents) for use in that period using updated efficiency data. Given that LL97 sets forth emissions limits with mathematical formulas that can readily be calculated using information known to each building owner (such as square footage and how the building is powered), it cannot be seriously argued that the Law does not contain a knowable standard. *See Grayned*, 408 U.S. at 110.

To the extent Plaintiffs claim that Section 28-320.3 is impermissibly vague because the Council delegated authority to DOB to promulgate by rule emissions limits for the compliance periods from 2035 through 2050 (*see* Compl. ¶¶ 72-73, 240), this claim also must fail. It is a valid

exercise of the Council's legislative authority to delegate to DOB the authority to establish building emissions limits applicable to future compliance periods. *See, e.g.*, *Pet Professionals v. City of N.Y.*, 215 A.D.2d 742 (2d Dep't 1995) ("[T]he Department of Health had the power under the New York City Charter to adopt the amendments in order to carry out its duties . . . . The agency was merely filling in the details of broad legislation describing the over-all policy to be implemented") (citing *Boreali v. Axelrod*, 71 N.Y.2d 1, 13 (1987)). Indeed, it is extremely common for legislatures to delegate to expert agencies the authority to establish limits on a variety of environmental emissions or discharges, including limits that become more stringent over time. *See, e.g.* ECL § 17-0301 (State authorization for the N.Y.S. Department of Environmental Conservation to establish water quality standards); City Administrative Procedure Act ("CAPA"), Charter § 1043(a)(1) ("Each agency is empowered to adopt rules necessary to carry out the powers and duties delegated to it by or pursuant to federal, state or local law"). Section 28-320.3's delegation of authority for DOB to promulgate a rule establishing a stricter regulatory limit applicable more than a decade from now is consistent with agency rulemaking authority under CAPA and does not render Ad. Code § 28-320.3 unconstitutionally vague.[8]

Second, Plaintiffs claim that Ad. Code § 28-320.6, which establishes a maximum penalty for exceedances of a building emissions limit and lists aggravating and mitigating factors for determining a penalty, must be stricken as unconstitutionally vague under the Due Process Clause. *See* Compl. ¶¶ 234, 237, 239, 241. Again here, Plaintiffs' claim must be dismissed, because LL97's provision of a mathematical formula for the maximum available penalty is a concrete, knowable standard. *See Grayned*, 408 U.S. at 110. Section 28-320.6 clearly states that

[8] Additionally, such a claim is not ripe, as GHG emissions limits for the compliance period 2030-2034 have not been enforced against anyone, including Plaintiffs. *See* Point IV, *infra*.

a building owner may be liable for "not more than an amount equal to the difference between the building emissions limit for such year and the reported building emissions for such year, multiplied by $268."[9] LL97 thus establishes a maximum penalty in a manner similar to many other environmental laws and public health codes. *See, e.g.*, ECL Title 71 (providing penalties for violation of various environmental laws and regulations, including up to $37,500 per day, *e.g.* ECL § 71-1929); Ad. Code § 28-214.3 (City's Construction Code allowing penalties up to $1 million for violating an order to seal, secure, and close that results in injury); NYC Health Code § 3.11(e) (setting $10,000 maximum penalty for a violation that results in serious physical harm to any person).

Plaintiffs next attack the inclusion of "inherently subjective criteria" including the language "good faith efforts" as a mitigating factor that a tribunal or court may consider in assessing a penalty lower than the statutory maximum. *See* Compl. ¶ 237. However, statutes are not vague if they use common sense terms that have acquired meaning through general usage. *See Vuitch*, 402 U.S. at 72; *Cruz*, 48 N.Y.2d at 428 ("a statute which employs terms having an accepted meaning long recognized in law and life cannot be said to be so vague and indefinite as to afford . . . inadequate guidance for adjudication"). "Good faith" efforts is a commonly understood term with a plain meaning: a building owner must earnestly try to meet its emissions limit. *See* Merriam-Webster, defining "good faith" as "honesty or lawfulness of purpose." In addition, Ad. Code § 28-320.6.1 does not use the term "good faith efforts" in isolation, but rather provides examples of what such efforts may include: a building owner's "good faith efforts to comply with

[9] Plaintiffs also argue that the maximum penalty available under Ad. Code § 28-320.6 is excessive and therefore violates the Due Process Clause of the U.S. Constitution and its New York State counterpart. *See* Compl. ¶¶ 203-216. As amply explained in Point IV, below, the maximum penalties available under LL97 are not excessive, and penalties may be adjusted based on various factors enumerated in Section 28-320.6.1.

the requirements of [Article 320], including investments in energy efficiency and GHG emissions reductions before the effective date of this article." While each statute's meaning must be derived from its unique terms, it is significant that New York courts have previously found that the phrase "good faith" has an ordinary meaning that is not unconstitutionally vague. *See People v. Flickinger*, 88 Misc. 2d 64, 69 (Sup. Ct. Kings Cty. 1976) (finding Public Health Law §§ 3331 and 3335's use of "good faith" was not vague when requiring that a doctor write prescriptions only in "good faith"); *People v. Kass*, 32 N.Y.2d 856 (1973) (same). As stated by the *Grayned* Court, a statute need only give a "person of ordinary intelligence a reasonable opportunity to know what [conduct] is prohibited" and provide "explicit standards for those who apply them." 408 U.S. at 108. It is clear that Ad. Code § 28-320.6, LL97's penalties provision, meets and exceeds this test.

Third, Plaintiffs claim that Ad. Code Sections 28-320.7 and 28-320.8, which establish criteria for a building owner to seek an adjustment to their building emissions limit, are unconstitutionally vague. Once again, the Complaint does not provide any valid basis for striking down the reasonably knowable provisions of LL97.

Plaintiffs' Complaint in fact demonstrates that they have understood LL97's provisions about adjustments to emissions limits in Ad. Code § 28-320.7, undercutting their vagueness claim. *See* Compl. ¶¶ 98-103. Section 28-320.7 sets forth two types of adjustments that DOB has authority to grant if a building owner is otherwise in compliance with Article 320 to the maximum extent practicable. First, as Plaintiffs ably describe in paragraph 99 of the Complaint, DOB may grant an adjustment under Section 28-320.7.1 if: 1) capital improvements would be necessary to meet the emissions limit, but it is not reasonably possible to make such improvements because of physical constraints (landmarked status, access to energy infrastructure, space constraints), 2) the owner has made a "good faith effort" to purchase greenhouse gas offsets

but a sufficient quantity are not available at a reasonable costs, and 3) the owner has taken advantage of all available energy reduction incentive programs for which it reasonably could participate. Similarly, Section 28-320.7 allows DOB to adjust an emissions limit if 1) the cost of financing a capital improvement would prevent an owner from realizing a reasonable financial return on the building or if the building is subject to financial hardship (as further defined), 2) the owner is not eligible for City programs providing financing for energy reduction, 3) the owner has made a "good faith effort" to purchase greenhouse gas offsets but a sufficient quantity are not available at a reasonable costs, and 4) the owner has taken advantage of all available energy reduction incentive programs for which it reasonably could participate. *See also* Compl. ¶ 101.

LL97 provides a third type of adjustment for the 2024-2029 compliance period for certain high-emitting buildings. If a building's emissions in calendar year 2018 exceed the building's emissions limit by more than 40%, the building may obtain an adjustment that sets its emissions limit at 70% of its 2018 emissions. Section 28-320.8 sets forth three additional criteria for this exemption: 1) the owner demonstrates that the excess emissions are attributable to "special circumstances related to the use of the building," including for instance 24-hour operations, critical human health and safety operations, high density occupancy, and energy-intensive technological or industrial processes; 2) the building's energy performance is equivalent to a building in compliance with the City's 2015 energy conservation code; and 3) the owner has submitted a plan to ensure compliance with the emission limits for compliance period 2030-2034.

Plaintiffs' chief quibble is with a handful of qualifying phrases used in Sections 28-320.7 and 28-320.8 that they deem to be too vague. *See* Compl. ¶¶ 100, 102. Plaintiffs again object to the term "good faith effort" (§§ 28-320.7.1.2, 28-320.7.2.3) as a requirement for making an earnest attempt to purchase greenhouse gas offsets or renewable energy credits to comply with

their emissions limits. As explained above, "good faith" effort is not unconstitutionally vague. *See*, *e.g.*, *Kass*, 32 N.Y.2d 856 (1973). Plaintiffs further take issue with LL97's use of the word "reasonable" or "reasonably." *See* Compl. ¶¶ 99-102. However, LL97 uses "reasonable" to make clear that its requirements that building owners make capital improvements (§§ 28-320.7.1.1 and 28-320.7.2.1), purchase greenhouse gas offsets (§ 28-320.7.1.2) or renewable energy credits (§ 28-320.7.2.3), or participate in incentive programs (§§ 28-320.7.1.3 and 28-320.7.2.4) are not without limit. "Reasonable" also has a common meaning, in this case moderating certain requirements so that they are "not extreme or excessive." *See* Merriam-Webster Dictionary, "Reasonable."[10] Indeed, "reasonable" is an extraordinarily common word used in statutes, appearing ubiquitously throughout New York State and New York City laws.[11] In addition, "maximum extent practicable" has a common meaning and has been regularly used and implemented in legislation. *See, e.g.*, ECL § 8-0109 (requiring environmental review findings to determine that significant adverse impacts have been avoided or minimized to the "maximum extent practicable"); ECL § 17-0808 (requiring stormwater pollution control to the "maximum extent practicable"); N.Y. Finance L. § 165 (requiring reduction of state purchases of tropical hardwoods to the "maximum extent practicable"). Especially in the context of the specific criteria set forth in LL97 for adjustments, "good faith," "reasonable," and "maximum extent practicable" are not unconstitutionally vague and Plaintiffs have certainly not demonstrated that LL97 is inscrutable in "in every conceivable application," as would be required for them to succeed in their facial challenge. *Moran Towing Corp.*, 99 N.Y.2d at 448 (2003).

[10] *See* https://www.merriam-webster.com/dictionary/reasonable

[11] A Lexis.com search of New York Consolidated Laws for the word "reasonable" alone yields 7,342 text results.

Plaintiffs' real objection again seems to be that certain details of how adjustments will be granted are delegated to DOB for further issuance of rules or guidance. *See* Compl. ¶¶ 97-98, 101, 109-114. They speculate that DOB will not meet timeframes and that compliance with LL97 will become impossible. *Id.* ¶¶ 14, 97. But this mere speculation is unfounded and cannot sustain a vagueness challenge. *See, e.g.*, *V. Groppa Pools*, 106 A.D.3d at 723. LL97 appropriately delegates to DOB the authority to conduct further rulemaking and to implement the various application, adjustment, and penalty procedures set forth in the statute. *See* CAPA; *Pet Professionals*, 215 A.D.2d 742.

Accordingly, because the Complaint fails to demonstrate that LL97 "in every conceivable application[,] . . . suffers wholesale constitutional impairment," *Moran Towing Corp.*, 99 N.Y.2d at 448, the Court must dismiss Plaintiffs' fourth cause of action as a matter of law.

POINT III

PLAINTIFFS FAIL TO STATE A CAUSE OF ACTION BECAUSE LL97 IS NOT RETROACTIVE.

Plaintiffs claim that LL97 "is unconstitutionally retroactive in violation of owners', landlords', and shareholders' due process rights." Compl. ¶ 10. This is not the case. LL97 is not retroactive because it does not increase liability for past conduct, impose new duties on completed transactions, or take away or impair plaintiffs' vested rights. LL97 solely regulates prospective conduct—the *future* CO_2 emissions of covered buildings. Ad. Code § 28-320.3. Even if LL97 were retroactive, which it is not, it is not unconstitutionally so. Accordingly, Plaintiffs' claims that LL97 is unconstitutionally retroactive must be dismissed.

A retroactive law is "one which takes away or impairs vested rights; it is a law which looks backward affecting acts occurring or rights accruing before it came into force." N.Y.

Stat. Law § 51(a). "A statute does not operate 'retrospectively'[12] merely because it is applied in a case arising from conduct antedating the statute's enactment…or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches *new legal consequences to events completed before its enactment*." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 269-70 (1994) (emphasis added). A statute is retroactive if it: (1) "increase[s]…liability for past conduct," (2) "impos[es] new duties with respect to transactions already completed," or (3) "impair[s] rights owners possessed in the past." *Regina Metro. Co., LLC v. New York State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 369 (2020). "A statute is not retroactive…when made to apply to future transactions merely because such transactions relate to and are founded upon antecedent events." *Forti v. New York State Ethics Comm'n*, 75 N.Y.2d 596, 609-10 (1990) (quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 51, at 87). Thus, when a statute regulates prospective conduct, even if that conduct relates to prior actions, but the statute does not increase liability for past conduct, impose new duties to completed transactions, or impair vested rights, it cannot be said to operate in an improperly retroactive manner. LL97 does not meet any of the criteria for retroactivity.

First, LL97 does not increase building owners' "liability for past conduct." *Regina Metro.*, 35 N.Y.3d at 369. It does not impose liability for past emissions, nor does it levy a fine for one's choice of boiler or heat source in years past. Instead, it operates prospectively and attaches potential liability to *future* emissions above a set limit. LL97 can be contrasted against a statute which does increase liability for past actions, such as the law in *Regina Metro.*, which attempted to increase the legal liability landlords were subject to for actions occurring *prior to*

[12] "The terms 'retroactive' and 'retrospective' are synonymous in judicial usage." *Landgraf*, 511 U.S. at 269 (quoting 2 N. Singer, Sutherland on Statutory Construction § 41.01, p. 337 [5th rev. ed. 1993)].

enactment by extending the statute of limitations for claims that had already become time-barred, and by increasing the damages for past tenant overcharges. *Id*. at 349. LL97 does not expose Plaintiffs to any new liability for past actions; rather, it regulates future conduct – capping future GHG emissions.

To the extent Plaintiffs attempt to describe LL97 as indirectly imposing liability for their past conduct in designing their building, they misunderstand the formal analysis of retroactivity. Laws may regulate future action related to past choices and are only retroactive when liability is imposed for the past action itself. *Forti*, 75 N.Y.2d at 609-10. Appropriately then, LL97 "merely prohibits a class of [buildings] from engaging in certain specified…activities *after* the statute's effective date," namely: excessive GHG emissions. *See id.* Past choices or transactions, such as a prior installation of an HVAC system or boiler, may impact the level of emissions building owners must limit, but that does not make them retroactively liable for past choices. *See Acevedo v. New York State Dep't of Motor Vehicles*, 29 N.Y.3d 202, 229 (2017) (law was not retroactive where plaintiffs' drivers licenses were rescinded based on driving violations before *and after* the law as "consideration of 'antecedent events'…does not, by itself, render the Regulations 'retroactive' in nature.") (citations omitted).[13]

Second, LL97 does not "impos[e] new duties with respect to transactions already completed." *Regina Metro.*, 35 N.Y.3d at 369. In cases where this is an issue, they most commonly involve increasing a party's monetary burden or obligations for past transactions or contracts. *See generally United States v. Darusmont,* 449 U.S. 292 (1981) (statute increasing tax liability for transactions that occurred up to three months *prior* to enactment was retroactive);

[13] As discussed above, Local Law 97 does not mandate any particular changes to buildings aside from their aggregate GHG emissions, so buildings are free to meet the Local Law in the way that is most cost-effective for them.

Pension Ben. Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) (statute requiring an employer to increase its *past* payments to a pension plan was retroactive); *Am. Econ. Ins. Co. v. State*, 30 N.Y.3d 136, 140 (2017) (statute imposing unfunded costs upon insurance company for policies finalized before enactment was retroactive). No past transactions are formally implicated by LL97. For instance, if someone bought a building or a unit in a building, there are no new duties attached to those completed transactions or contracts. LL97 is exclusively concerned with future conduct, not past transactions.

Finally, LL97 does not impair rights that Plaintiffs "possessed in the past." *Regina Metro.*, 35 N.Y.3d at 369; N.Y. Stat. Law § 51(a).[14] Plaintiffs have no vested right that has been impaired by the law. The most that can be said is that enactment of LL97 has interfered with Plaintiffs' expectation that building regulations perpetually would remain the same, but expectancies cannot constitute a vested right. *Landgraf*, 511 U.S. at 269-270 ("[a] statute does not operate 'retrospectively' merely because it…upsets expectations based in prior law"). No one has a "vested interest in any rule of law entitling him to have the rule remain unaltered." *J. B. Preston Co. v. Funkhouser*, 261 N.Y. 140, 144, *aff'd*, 290 U.S. 163 (1933).

[14] It is not clear from the Complaint whether Plaintiffs' intended to allege that LL97 constitutes a taking, but in any event, it does not. In considering a facial takings challenge, "the only question before [a] court is whether the mere enactment of the statutes and regulations constitutes a taking." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987). A statute regulating the use of private property is only a taking in its "mere enactment" if it "'denies an owner economically viable use of his land." *Id*. (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). If that is not the case, then a takings claim is not ripe until "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue and has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Ward v. Bennett*, 79 N.Y.2d 394, 400 (1992) (citations omitted). LL97 by its enactment does not deny landowners any economically viable use of the land and literally allows an adjustment if, among other factors, the cost of compliance "would prevent the owner of a building from earning a reasonable financial return on the use of such building or the building is subject to financial hardship." Ad. Code § 28-320.7.

Moreover, it is well-settled in New York courts that a law requiring changes to existing buildings is not retroactive and does not impair vested property rights. *City of New York v. Foster*, 148 A.D. 258 (1st Dep't 1911), *aff'd*, 205 N.Y. 593 (1912) (requiring dumbwaiter shafts and elevator shafts to be fireproofed); *Tenement House Dep't v. Moeschen*, 179 N.Y. 325, 336 (1904) (requiring certain sanitary receptables to be replaced by appliances connected to the sewer); *see also Heller*, 27 N.Y.2d 212 (1970) (requiring buildings to upgrade their refuse burners to comply with new emission standards).

Like the requirement for fireproofed dumbwaiter shafts in *Foster,* LL97 "makes no building then existing an illegal structure and imposes no obligation upon the owner of the building to reconstruct it," and it "neither takes away nor impairs vested rights acquired under existing laws." 148 A.D. at 261-62. Moreover, establishing impairment of a *vested* right is a high bar: "[n]either the issuance of a permit…nor the landowner's substantial improvements and expenditures, standing alone, will establish the [vested] right. The landowner's actions relying on a valid permit must be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless." *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 47-48 (1996). By allowing for variances in caps and penalties in consideration of ensuring Plaintiffs maintain "a reasonable financial return" on their buildings, LL97 prevents such an outcome. Ad. Code § 28-320.7.

For these reasons, LL97 is not unconstitutionally retroactive, and Plaintiffs' third cause of action should be dismissed.[15]

[15] Even if the Court finds LL97 retroactive–which it is not–that does not render it unconstitutional. The fact that a law is applied retroactively does not mean it violates either the New York or U.S. Constitution. *J. B. Preston Co. v. Funkhouser*, 261 N.Y. 140, 144, *aff'd,* 290 U.S. 163 (1933); *SNL Cap. Partners, LLC v. City of New York*, 68 Misc. 3d 597, 602 (Sup. Ct. N.Y. Cty. 2020). The due process burden for retroactive legislation "is satisfied when the retroactive application of the

POINT IV

PLAINTIFFS' CHALLENGE TO LL97 BASED ON EXCESSIVE PENALTIES MUST BE DISMISSED.

Plaintiffs allege that the penalties authorized by LL97 are excessive thereby violating Plaintiffs' due process rights. Compl. ¶¶ 203-216. This is simply not the case. The penalty provision of LL97 is reasonable and proportionate with the offense. In fact, the penalty amount was set to drive compliance with the Law to achieve emission reductions—an important public interest, and the Law provides a myriad of opportunities to reduce, mitigate, or ameliorate the potential penalty amount assessed. Furthermore, Plaintiffs' claim is premature as they bring it before they, or anyone else, has been assessed any penalty under LL97. Plaintiffs' second cause of action must be dismissed.

1. LL97's Penalties Are Not Excessive on Their Face

The U.S. Supreme Court held long ago that statutory penalties violate due process only when they are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, I. M. & S. R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); *see also Hyde Park Assoc. v. Higgins*, 149 Misc. 2d 682, 685 (Sup. Ct. Queens Cty. 1990). "So long

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legislation is itself justified by a rational legislative purpose." *Regina Metro.*, 35 N.Y.3d at 375 (quoting *Pension Ben. Guar. Corp.*, 467 U.S. at 730). Given such a deferential standard, LL97 is eminently rational, and the retroactivity (if any) is "central to the statute['s] purpose." *Regina Metro*, 35 N.Y.3d at 377. Approximately two-thirds of New York City's GHG emissions come from buildings. New York City Mayor's Office of Climate & Environmental Justice, *Energy Benchmarking*, www1.nyc.gov/site/sustainability/codes/energy-benchmarking.page (last visited June 30, 2022). To meet this target, building emissions must be lowered. Exempting already existing buildings from LL97's requirements would fatally undermine its goal by negating much of the anticipated reduction in total building emissions and incentivizing owners to maintain high-emitting, inefficient buildings far longer than normal to avoid compliance with restrictions on new buildings. Reducing building emissions to address climate change by regulating existing buildings is "a legitimate legislative purpose furthered by rational means," thereby justifying any supposed "retroactive application." *Regina Metro.*, 35 N.Y.3d at 375 (quoting *Am. Econ. Ins. Co.*, 30 N.Y.3d at 157–58).

as there is reasonable basis and rationality in the legislative or executive chosen courses of conduct to alleviate an accepted evil, there is no constitutional infirmity." *Heller*, 27 N.Y.2d at 219. The balance to be struck is a legislative and not a judicial one. *Id.* at 221. As such, "courts should be wary of substituting their economic and business judgment for that of legislative bodies." *McCallin v. Walsh*, 64 A.D.2d 46, 59 (1st Dep't 1978) (noting that though experts may differ on the appropriate way to cope with a hazard, it is for the legislature to decide what regulations are needed). To assess the severity of a statutory penalty, due regard should be given to the interests of the public, the opportunities for committing the offense, and the need for securing adherence to the law. *Williams*, 251 U.S. at 67.

Here, New York City has a legitimate public interest in reducing GHG emissions to address the accelerating climate crisis. Climate change is occurring at an unprecedented rate, and the current trend of warming in Earth's climate system over the last several decades is clear—the atmosphere and ocean have warmed, sea level has risen, and snow and ice levels have decreased. *See* Ex. B at 3. Numerous reports reinforce the urgency of action to drastically reduce our GHG emissions to mitigate such devastating impacts of climate change. Local Law 66 of 2014 requires the reduction of citywide GHG emissions to 80% lower than its 2005 level by 2050. Ad. Code § 24-803(a)(1). Reducing emissions from the City's buildings, a sector that produces approximately two-thirds of the City's GHG emissions, is a significant action the City can take to reach CO_2 reduction goal. *See* Ex. F at 2-3.

In addition to the public interest, the number of times the penalty can be assessed is an important factor. *See Williams*, 251 U.S. at 64. In *Williams*, the railroad company could be assessed a penalty for every offense of collecting a ticket fee higher than that statutorily prescribed. *Id.* But a constitutional penalty for a single violation does not become unconstitutional simply

because a defendant commits the violation enough times. *See United States v. Dish Network L.L.C.*, 954 F.3d 970, 980 (7th Cir. 2020) ("Someone whose maximum penalty reaches the mesosphere only because the number of violations reaches the stratosphere can't complain about the consequences of its own extensive misconduct."); *see also Heller*, 27 N.Y.2d at 220 ("New York courts have long sustained a pyramiding of penalties as valid means of control." (citing *People v. Spencer*, 201 N.Y. 105, 111 (1911) and *Suydam v. Smith*, 52 N.Y. 383, 388-389 (1873)).

Unlike the "numberless opportunities for the committing of the offense" in *Williams,* LL97 authorizes the assessment of one penalty amount to a building exceeding its GHG emission limit annually. *See* Ad. Code § 28-320.6. However, the amount of that penalty is determined by the degree to which the building exceeds its emissions limit. *Id.* A building exceeding its limits "shall be liable for a civil penalty of not more than an amount equal to the difference between the building emissions limit for such year and the reported building emissions for such year, multiplied by $268." *Id*. Thus, the penalty amount assessed is related to the severity of the offense–the more a building exceeds its limit, the higher the penalty assessed to it will be. Every action a building takes to reduce its GHG emissions will reduce the amount it might exceed its limit and thus the penalty assessed will be smaller, making the penalty responsive to the degree to which a covered building violates LL97.

The statutory penalties authorized by LL97 further align with the principle that the penalty not be wholly disproportionate to the offense by including flexibility and discretion in the penalty assessment. *See Williams*, 251 U.S. at 67. The Law establishes a *maximum* penalty amount – "*not more than* an amount equal to the difference between the building emissions limit . . . multiplied by $268." Ad. Code § 28-320.6 (emphasis added). It goes on to describe factors that "shall [be given] due regard," including a building owner's "good faith efforts" to comply

with their building emissions limit, history of compliance, and whether non-compliance was related to unexpected or unforeseen events, among other factors. *Id.* § 28-320.6.1. In this way, LL97 provides flexibility applicable to an individual building owner's circumstances and assures that the penalties are reasonable and in line with the offense of a building's failure to comply with the Law.

Notably, less than 20% of covered buildings are expected to exceed their emission limits at all for the 2024-29 compliance period. *See* Ex. G at 4. Plaintiffs complain that they may face high penalties in compliance years 2030-34, but this is speculative at this time as no penalties have been assessed. Penalties may also be adjusted through the flexibilities provided in LL97, and, if high penalties are assessed to Plaintiffs in the future, it would be a reflection of their violations of the Law being significant. They should not now complain about the consequences of their own potentially extensive noncompliance. *See Dish Network L.L.C.*, 954 F.3d at 980.

Plaintiffs allege that the absence of inclusion of density of use of a building as a consideration in LL97 results in an unfair burden. *See* Compl. ¶¶ 208-209. However, this is their improper attempt to have the court substitute their preference of emission reduction approaches over the City Council's. *See McCallin*, 64 A.D.2d at 59 ("Courts should be wary of substituting their [] judgment for that of legislative bodies . . . ."). This does not affect the constitutionality of LL97. *See Heller,* 27 N.Y.2d at 219 (dismissing questions as to the wisdom of the rigorous measures required by the ordinance as the conclusion of such question are in the domain of the legislative and executive). Efforts towards addressing serious problems, like climate change, need not wait on perfect knowledge or optimal methods of alleviation. *Id.* So long as there is reasonable basis and rationality in chosen courses of conduct to alleviate an accepted ill, as there is here, there is no constitutional infirmity. *See Id.*

The urgent need to secure adherence to LL97 was a driving factor in how the statutory penalty was set. It is well recognized that civil penalties have some deterrent effect. *See Hudson v. United States*, 522 U.S. 93, 102 (1997); *see also Friends of the Earth, Inc. v. Laidlaw Env'l Svcs. Inc.*, 528 U.S. 167, 185-86 (2000) (penalties help to deter future violations, prevent recurrence of violations, and provide a form of redress). LL97 seeks to further the goals of the City to reduce GHG emissions. The penalty amount authorized in the Law was set to ensure that the cost of inaction would be higher than the cost of compliance. *See* Ex. A at 22 ("Simply put, the cost of inaction will be higher than the cost of compliance.").

2. Plaintiffs' Excessive Penalties Claim Is Premature

Notably, many of the cases discussing excessive statutory penalties are in the context of the application of those penalties for specific acts. This makes sense because facial challenges to a statute's constitutionality are disfavored. *Amazon.com LLC v. New York State Dept. of Taxation & Fin.*, 81 A.D.3d 183, 194 (1st Dep't 2010). A plaintiff can only succeed in such a challenge by "establish[ing] that no set of circumstances exists under which the Act would be valid." *Id.* (citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) and *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Yet, that is what Plaintiffs seemingly attempt to do. No penalties have been applied to Plaintiffs or, for that matter, anyone else. Thus, Plaintiffs cannot allege that the penalties are excessive as to them, but rather must attempt to establish that there is no set of circumstances in which Local Law 97's penalties are *not* excessive. As discussed above, this is plainly not the case as LL97 authorizes penalties in relation to the degree of non-compliance, is set to achieve the purpose of LL97—namely reduction of GHG emissions, and incorporates flexibility and opportunities for adjustments.

Further, alleviating due process concerns and demonstrating the premature nature of their claims, Plaintiffs will have ample opportunity to challenge, in an appropriate judicial proceeding, the validity of a penalty accessed to them. *Williams*, 251 U.S. at 64-65; *see also Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115, 1119 (2d Cir. 1975) ("The constitutional requirement is satisfied by a statutory scheme which provides an opportunity for testing the validity of statutes or administrative orders without incurring the prospect of debilitating or confiscatory penalties."). LL97 provides ample opportunity for a plaintiff to challenge the validity of penalties assessed as "a court or administrative tribunal shall give due regard to aggravating or mitigating factors . . . ." Ad. Code § 28-320.6.1. Since LL97's penalty provision is not excessive on its face and Plaintiffs will have opportunities to challenge the validity of penalties applied to them, their claims related to the potential amount of a penalty assessed are premature.

POINT V

PLAINTIFFS FAIL TO STATE A CAUSE OF ACTION ALLEGING THAT LL97 IMPOSES A TAX.

Plaintiffs allege that LL97 violates the N.Y. Constitution Art. IX, § 2(c)(ii)(8) and the MHRL nearly identical provisions regarding the power of local governments to levy taxes because the Law's penalty provision was not authorized by the legislature. Compl. ¶¶ 245-58. However, as LL97 authorizes a penalty for violations of emissions limits, and does not establish a tax, neither the N.Y. Constitution nor the MHRL are implicated in anyway and Plaintiffs utterly fail to state a claim. LL97's penalty is a penalty, plain and simple. DOB has clear Charter authority to assess penalties for violations of law and regularly does so. And LL97's penalty is utilized to drive compliance and reduce GHG emissions, not to generate revenue. Finally, the collected penalty assessments are properly directed to the City's General Fund in compliance with the Charter. Accordingly, Plaintiffs' fifth cause of action should be dismissed.

The penalties authorized in LL97 are a valid use of both City Council and DOB's police power, and are in no way akin to a tax. Plaintiffs attempt to confuse the issue by using an incorrect legal test – determining whether a fee is really a tax – when the penalties at issue are neither fees nor taxes but just that – civil penalties.[16] *See* Compl. ¶¶ 250-56.

The MHRL, the General City Law, and the Charter authorize City Council and DOB to use penalties to enforce local law. *See* MHRL § 10(1)(ii)(a)(9-a) (allowing "the fixing, levy, collection and administration of local government….penalties and rates of interest thereon"); *id.* § 10(4) (empowering local governments to "provide for the punishment of violations" of local laws "by civil penalty, fine, forfeiture, community service,… or imprisonment, or by two mor more of such punishments…"); General City Law § 20(22) (setting forth the power of every city, subject to the State Constitution and general law, to "regulate by ordinance or local law any matter within the powers of the city, and to provide penalties, forfeitures and imprisonment to punish violations thereof…"); Charter § 643 ("The department [of buildings] shall enforce, 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"); *id.* § 28(a) ("The council in addition to all enumerated powers shall have power to adopt local laws...for the preservation of

[16] The legal test Plaintiffs allege LL97 fails is used by New York courts to ascertain the difference between a fee and a tax – not between a penalty and a tax. *Fees* must be "reasonably necessary to the accomplishment of the Law's regulatory purpose," Compl. ¶¶ 15, 251-52, and must be "[]tethered to a[] benefit…receive[d] from the government." *Id.*; *see American Sugar Refining Co. v. Waterfront Com. Of New York Harbor*, 55 N.Y.2d 11, 26-27 (1982) ("A license fee has for its primary purpose the regulation or restriction of a business deemed in need of public control, the cost of such regulation being imposed upon the business benefited or controlled, whereas the primary purpose of a tax is to raise money for the government generally.") This test is irrelevant to distinguishing between a *civil penalty*, which is used by governments to enforce laws, and a tax. *City of Buffalo v. Neubeck*, 209 A.D. 386, 388 (4th Dep't 1924) ("[A] penalty is a sum of money for which the law exacts payment by way of punishment for doing some act which is prohibited, or omitting to do some act which is required to be done.").

the public health, comfort, peace and prosperity of the city and its inhabitants…); *id.* § 28(b) ("The council shall have the power to provide for the enforcement of local laws by legal or equitable proceedings… and to provide for the punishment of violations thereof by civil penalty, fine, forfeiture or imprisonment, or by two or more of such punishments.") The imposition of penalties is a basic enforcement tool of a municipality's police power.

The distinction between the police power and the tax power is "in the purpose for which the particular power is exercised." *Buffalo v. Stevenson*, 207 N.Y. 258, 263 (1913). The function of a penalty concerns the punishment for infraction of the law. *People ex rel. Lemon v. Elmore*, 230 A.D. 543, 545 (2d Dep't 1930), *aff'd* 256 N.Y. 489 (1931) (citing *Lipke v. Lederer*, 259 U.S. 557, 562 (1922)). Here, the penalties authorized by LL97 are intended to discipline covered building stakeholders for exceedances of LL97's GHG emission limits. *See* Ex. A at 21-22 (Statement of Mark Chambers, Director of the Mayor's Office of Sustainability) ("I do want to emphasize that there will be consequences to anyone who ignores this new policy. The Administration . . . intends to . . . ensure there are reasonable, but consequential penalties . . . .").

Penalties can also help to "deter future violations" and such a penalty "prevents recurrence and provides a form of redress." *Friends of the Earth*, 528 U.S. at 186; *see also Hudson*, 522 U.S. at 102 ("all civil penalties have some deterrent effect."). The penalties authorized by LL97 are intended to drive compliance with the emission limits established under the Law to achieve the important public interest goals of addressing climate change. *See* Ex. A at 22(Statement of Director of the Mayor's Office of Sustainability noting LL97 is "[s]tructuring penalties in a manner consistent with the costs associated with compliance."). The penalizing of noncompliance and encouragement of compliance are the purposes LL97, specifically § 28-320.6, seeks to achieve.

Taxes differ from penalties in that they are usually motivated by the purpose of raising revenue to provide for the support of the government, rather than punishment of unlawful acts. *See State v. Wallkill*, 170 A.D.2d 8, 11 (3d Dep't 1991) (a penalty "is punitive in nature, serving the purposes of both retribution and deterrence, in addition to restitution" not revenue generating); *see also Elmore*, 230 A.D. at 545. LL97 penalties do not seek to generate revenue for the City. As expressed during the hearings before the New York City Council, the City seeks to obtain compliance with the law, and the penalties are a method of encouraging compliance. *See* Ex. E at 22 (Chairperson Constantinides emphasizing that "we don't want your money, we want your carbon."). Tellingly, the City's fiscal impact statement for the proposed bill indicates that the City anticipated that the Law would have no impact on the City's revenue, instead would require $450,000 in expenditures and need to incur additional capital costs to retrofit city-owned buildings. *See* Ex. C, City Council's Financial Division's Fiscal Impact Statement for Proposed Intro. No. 1253-C, dated April 10, 2019. Despite the confusion Plaintiffs attempt to create by using an incorrect legal test – that of determining whether a fee is really a tax – LL97's penalties are indeed penalties and not a tax. They are not intended to create revenue but rather to punish infractions of the law and ensure compliance. And such penalties are fully authorized by the MHRL and the Charter.[17]

[17] Plaintiffs' claim that the penalties "effectively amount to a use or occupancy tax" fail to state a claim. If an owner or other party changed the use or occupancy of their building and that caused the building to fall under a different category of emissions limits, that would be not transform the penalty to a use or occupancy tax. The categories of buildings have been disaggregated *because* they have different uses and therefore different expected emissions. It is wholly rational then that a new emissions limit should apply. Moreover, changes in use or occupancy often mean that a new set of building regulations will apply – regulations which are enforced using penalties. LL97 is no different.

For these reasons, the penalties properly authorized by LL97 are penalties and not a tax.[18] Accordingly, Plaintiffs' fifth cause of action must be dismissed.

CONCLUSION

For the foregoing reasons, the City respectfully requests that the Complaint be dismissed with prejudice and that such other and further relief as this Court deems just and proper be granted.

Dated: New York, NY
July 28, 2022

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[18] LL97's direction of penalties to the General Fund is lawful under the Charter. Charter § 109 ("all revenue of the city. . . from whatsoever source except taxes on real estate . . . shall be paid into a fund to be termed the 'general fund.'").

CERTIFICATION UNDER UNIFORM CIVIL RULE 202.8(B)

In accordance with Rule 17 of the Uniform Civil Rules for the Supreme Court and County Court, 22 NYCRR § 202.8-b, the undersigned certifies that the word count in this Memorandum of Law (not including the caption, signature block, table of authorities, table of contents, and this certification), as established using the word count on the word-processing system used to prepare it, is 12,399 words.

As further articulated in City Defendants' letter to the Court, dated July 28, 2022, Defendants respectfully request the court accept this Memorandum of Law which exceeds the limit set in § 202.8-b.

Date: July 28, 2022
New York, New York

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