

# The Ultimate Green Playbook for Condos and Coops

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When a condominium or cooperative decides to incorporate sustainability modifications into its buildings, it is usually the result of some basic fundamentals. Some of these include a desire to reduce operating expenses, including a reduction in energy and water use. Other factors could be to improve resident health and safety, increase value, or comply with a law that requires that the property become greener. Whatever the reasons, if the entity controlling the property is a cooperative or condominium, it generally has some typical and otherwise condo- or coop-specific protocols that need to be followed so that the buildings reach the sought-after sustainability goal. This article will show how a condominium or cooperative can achieve whatever the desired result with as little liability as possible. Although most of this article focuses on New York properties, they merely exemplify how many other cities and states are affecting the homeowner associations.

## The Decision to Go Green

At the most basic level, sustainability efforts that result in cost savings make sense. The low-hanging fruit of swapping out fluorescent bulbs with LED bulbs is only the tip of the iceberg in making incremental green changes. Installing light sensors and water-reducing shower heads and faucets provides other examples of this concept. Replacing equipment that has reached, or will soon reach, the end of its useful life with energy-efficient equipment is yet another. There are even some condominiums and cooperatives that have chosen to go green for the greater good. With the enactment of the Climate Mobilization Act of 2019 (the CMA), many properties must now go down the sustainability road. One thing is constant in anything being done under any green regime, however, which is that the condominium board of managers or cooperative board of directors needs to decide what gets done, how to do it, and, most importantly, how to pay for it.

## The Power of the Board

A board is typically made up of owner-volunteers who devote their time to running the property. For larger, non-self-managed buildings, a paid managing agent typically takes care of the day-to-day issues, usually in conjunction with a resident manager. For issues requiring a material expenditure (as set forth by the board) or a major change in the property or its staff, however, the board often makes the decisions to do or not to do certain things. In some

cases, when an assessment needs to be imposed on shareholders or unit owners, a supermajority is required. Regardless of where the board obtains the authorization to have something done, whether from itself under the condo or coop organizational documents or from the shareholders or unit owners themselves, the board carries out or directs the action.

## **Authorization and Initial Planning**

**The Board's Authority to Commence and Manage the Project.** Coop boards have statutory authority, without shareholder approval, to perform retrofits to comply with law under New York Business Corporation Law (NY BCL) § 702. Condo boards, however, lack authority to undertake a similar renovation project, unless the condominium organizational documents provide for it. See generally N.Y. Real Prop. Law §§ 339-d-339-kk (the Condominium Act). The default rule under the Condominium Act is that, if not specified otherwise in the condo's bylaws, the condo board is barred from undertaking building improvements without unit owner approval. See *Gennis v. Pomona Park Bd. of Managers*, 828 N.Y.S.2d 472 (N.Y. App. Div., 2d Dep't 2007). Nonetheless, condo boards that have certain renovations performed to comply with CMA (in particular, Local Law 97) without unit owner approval could assert that their decisions are protected by the business judgment rule, which "prohibits judicial inquiry into actions of [both coop and condo board] directors [which are] taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." See *Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530, 537-38 (1990) (holding that the business judgment rule shielded the board's decision).

**Initial Planning of the Project.** Once the project is authorized by the board, the initial planning stage begins, which would usually require an energy audit, a retrofit plan, an assessment of capital need, and a financing plan.

- **The Energy Audit and Retrofit Plan.** Initially, a consultant of sufficient expertise will need to be engaged. The consultant should be an engineer or environmental consultant, certified to conduct energy audits and determine current emissions and energy usage of the following: equipment, appliances, and lighting; windows; window air conditioners; hot water systems; any solar panels the building may have; the building's ventilation; and the roof.
- **The Cost Estimate and Financing Plan.** Once the energy audit is complete with a list of recommended retrofits, the board should develop a financing plan for the project. Funding methods are numerous and discussed below.

**Project Management and Post-Completion Risks: Mitigating and Managing Cost Overruns**

and Other Project Liabilities. See Bill Henley, Planning and Managing a Construction/Renovation Project (PowerPoint), Nat'l Ass'n of Hous. Coops. Annual Conf. (2021). There are two primary types of legal risks that can arise from a cooperative or condominium's green retrofit project: (a) common, traditional construction contractual claims; and (b) issues based on the cooperative or condominium's failure to operate the enhanced project successfully. The first set of claims could arise from the contractor or subcontractor breaching the construction contract by failing to complete aspects of the project on time or as specified. These could be mitigated with simple provisions such as completion guarantees. See Completion Guaranties in Construction Financing, West Practical Law, Practice Note w-027-4065, <https://bit.ly/3jcT44P>, and provisions specifying with particularity the work to be done.

A common construction contractual pitfall arises from inevitable changes to the work during the course of the project. Because changes in scope and design are almost always inevitable, it is crucial for cooperatives and condominiums to ensure that the construction contract include provisions that (1) authorize changes to be made to the work (specifically authorizing either increasing or decreasing the scope of the project) without voiding the contract; (2) obligate the contractor to perform the permitted changes, even if an agreement cannot be made about whether the change does or does not arise from the original scope, and entitle the contractor to an increase in compensation due to the change order; (3) allow for any decrease or increase in the monetary amount given in the contract; and (4) determine whether the contractor is entitled to extensions of the contract schedule, and if so, for how long. Changes in the Work in Construction Contracts: Drafting Strategies, West Practical Law, Practice Note 5-573-5705, <https://bit.ly/3BWpkQt>

Making the retrofit itself only gets the condominium or cooperative part of the way to satisfying legal compliance-the results from the retrofit are what matter.

Another set of legal issues relating to green retrofit projects involves ongoing compliance with law in the operation of the buildings. In this regard, making the retrofit itself only gets the condominium or cooperative part of the way to satisfying legal compliance-i.e., the results from the retrofit are what matter. A prudent method for managing this type of liability is for the parties to allocate the risk. Although a design professional or contractor may have designed and constructed a retrofit with a specific local law's requirements in mind, a party should be liable if the project's goals are not realized. In this case, a provision for risk allocation may take the form of an indemnity from the architect or contractor but will probably have a requirement that the retrofit be operated under any manufacturer's specifications. Furthermore, there will probably be a time limitation on such indemnification.

The prudent condominium or cooperative should have the installed equipment commissioned before taking over operation of it. Accordingly, while there is currently no New York judicial precedent on failure of compliance with CMA, boards should consider contractual options for limiting liability.

## **Payment of the Work**

Once a board decides which of the myriad things it desires to (or is required to) implement, the real work begins, both procedurally and physically. Typically, an architect or engineer will be engaged to determine what needs to be done, and then a contractor or contractors will bid on the job. Once the total cost is ascertained, the second item of business is how the condominium or cooperative will pay for it. There are many routes that can be followed in that regard, and, in each case, there could be long-term effects on the shareholders and unit owners.

For some condominiums and cooperatives, there may be a reserve fund that is set aside already for major capital improvements. It could be that this account was created by forward-thinking boards and may satisfy the cost of the work. But the amount of the reserve fund may be insufficient to pay for everything planned. In that case, the shareholders and unit owners are the ones who may need to foot the bill or any resulting deficiency in funding, either upfront or through financing. Keep in mind that these funds need to be in place, or at least programmed to be in place, when needed. Some of the ways to pay for the work are discussed below.

## **Increasing Maintenance, Common Charges, or Assessments**

**Raising Monthly Fees.** One way to plan to pay for a sustainability upgrade is by raising the monthly fees charged to shareholders or unit owners so that, over time, the increases will pay for the work. Although this is a viable methodology, it lacks practicality in two respects. First, any increase, except a material one that would produce undue hardship among those having to pay them, will need a long lead time before there are enough funds available for the work. Second, increases in maintenance or common charges are not tax-beneficial to the owner of the property, except in the case of investment property. One advantage of increasing monthly maintenance or common charges, however, is that shareholder and unit owner approval is not required. See NY BCL § 702, which states that a corporate board of directors has the sole authority to manage the business of the corporation. Condominium boards are usually granted the same broad authority.

Special Assessments. See Gary A. Poliakoff, 1 Law of Condominium Operations § 5:03 (Sept. 2021) ("Assessments Used to Pay Common Expenses"). If the board implements an assessment, the total of any payments made can usually be deducted from a sale price when the apartment or unit is eventually sold, as this is payment for a capital improvement. See Benefits for Property Owners, N.Y.C. Dep't of Fin. (2022), <https://on.nyc.gov/3jofMqV>. In other words, every dollar contributed toward an assessment is a dollar that can be reduced from the eventual selling price, in the same way any capital expenditure for the apartment or unit individually would be. Yet the assessments route is not without its own pitfalls. For example, the board will need to determine whether the assessment will be paid in a lump sum or during a set period of time. If taking place during a period of months or years, some boards even offer a discount if the assessment is paid up front, in full. One disadvantage of imposing an assessment, however, is that shareholder or unit owner approval is typically required. That, in and of itself, has its own logistical issues. If an annual meeting is not taking place soon after the board's decision to make a green enhancement to the property, a special meeting will have to be called for which a quorum needs to be present, as it does for an annual meeting, and receiving the required number of votes approving the assessment is mandatory. *Id.*

## **Financing the Work**

**Payment Plan.** One way to help fund a green project that boards might and should consider is to ask the contractor performing the work to provide for a payment plan, with or without interest. Although not typical, attorneys representing boards should recommend that they find out if the contractor is willing to do this. If the contractor is so willing, it may be more financially beneficial to the cooperative or condominium than any other form of financing, especially if no interest is imposed on balances due.

**Institutional Financing.** Another method to pay for the work is through traditional institutional financing, i.e., a bank loan, which could be a mortgage or a line of credit. Each has its own advantages and disadvantages.

**Coop Financing.** Many cooperatives already have a historical mechanism for borrowing money. Most of them have underlying mortgages already. Because the cooperative corporation is the entity owning the real property, the coop has the ability to borrow against that collateral. See Richard J. Kane, *The Financing of Cooperatives and Condominiums: A Retrospective*, 73 St. John's L. Rev. 101, 115-16 (1999).

**Condo Financing.** Condominiums have a different set of rules. Until the late 1990s, New York

condominiums were unable, as entities, to borrow funds, except in limited circumstances in which they were able to borrow with a mortgage on a super's (now called "resident manager's") apartment. In 1997 this limitation was removed, and there is a mechanism for condominiums to borrow against "future income and common charges." See N.Y. Real Prop. Law § 339-JJ.

**Green Financing Mechanisms.** There are various financing resources available for green property enhancements. See Michael A. Bedke, *Owning and Leasing Green Real Estate*, Westlaw: Practical Law: Real Estate (2022), <https://tmsnrt.rs/3vcqiE9>. These typically-discounted borrowing opportunities are uniquely beneficial because they can offset the costs of green retrofits, thereby lessening the burden that would otherwise need to be satisfied through assessments or, in the case of coops, increased mortgage borrowing. The following is a list of common financing mechanisms that are applicable to green property enhancements in New York:

- **Property Assessed Clean Energy (PACE) Financing.** The Basics of PACE. PACE "pays for 100% of the hard and soft costs of completing an energy efficiency, renewable energy or resiliency project." See *What Is PACE Financing?*, PACENation (2019), <https://bit.ly/3Vl1IMb>. PACE is "a financing mechanism that enables low-cost, long-term funding for energy efficiency, renewable energy and water conservation projects. . . . [It] is repaid as an assessment on the property's regular tax bill, and is processed the same way as other local public benefit assessments (sidewalks, sewers) have been for decades . . . [and] [d]epending on local legislation, PACE can be used for commercial, nonprofit and residential properties." See *PACE Basics*, PACENation (2016), <https://bit.ly/3BWtKH3>.
- **NYC Accelerator PACE Financing.** The CMA authorized a New York City PACE program called the "NYC Accelerator PACE Financing," which [nyc.gov](https://www.nyc.gov) describes as "an innovative financing tool to benefit all commercial and multifamily building owners . . . offer[ing] building owners a new way to fund energy efficiency and renewable energy projects that can dramatically decrease their utility bills." See *NYC Accelerator PACE Financing*, NYC Accelerator (2022), <https://on.nyc.gov/3HRpNai>. Property owners can connect with qualified PACE lenders and apply for PACE financing on the NYC Accelerator PACE website. See NYC Mayor's Off. of Sustainability & NYC Energy Efficiency Corp., *NYC Accelerator PACE Financing: Program Guidelines 2* (Apr. 22, 2021), <https://on.nyc.gov/3VkcqSX>.
- **NYC Accelerator PACE Financing Eligibility Requirements.** To be eligible for NYC Accelerator PACE financing, applicants must meet the requirements set forth in the Rules of the City of New York (City Rules) and the corresponding guidelines published by the NYC Mayor's Office of Sustainability and the NYC Energy Efficiency Corporation (NYC PACE

Mayor's Office of Sustainability and the NYC Energy Efficiency Corporation (NYC PACE Guidelines). *Id.* The City Rules require applicants to meet three factors: (1) be the property owner, (2) enter into the program with a qualified lender, and (3) comply with other project requirements and the NYC PACE Guidelines. See Rules of the City of New York, tit. 19, ch. 58, § 58-03(b).s. The City Rules also specify that the NYC Accelerator PACE Financing funds may be provided to finance the following types of projects: (1) energy efficiency improvements likely to result in energy savings or otherwise deemed appropriate by an energy audit; (2) installation of renewable energy systems that are practicable, or otherwise feasible, as determined by a Renewable Energy System Feasibility Study; (3) an energy audit; (4) a Renewable Energy System Feasibility Study; or (5) the verification of the installation of an energy efficiency improvement and renewable energy system. *Id.* § 58-03(d); see also NYC Accelerator PACE Financing: Program Guidelines, *supra*, at 3.

- **The Benefits of NYC Accelerator PACE Financing.** NYC Accelerator PACE Financing can pay for not only 100 percent of the hard costs of green retrofits, but also a broad array of green projects required in the retrofit process, such as energy audits and renewable energy system feasibility studies. Moreover, the NYC PACE Guidelines help to protect the interests of condo unit owners and cooperative shareholders by requiring applicants' projects to meet various financial integrity standards, including that projects must have a Savings-to-Investment Ratio (SIR) of 1.0 or greater and that all holders of mortgages on the subject property must provide consent to the NYC Accelerator PACE Financing loan and its terms. Finally, the NYC Accelerator PACE Financing has no monetary limit: If the elements listed in the City Rules and NYC PACE Guidelines are satisfied, then the property owners receive whatever amount is necessary for the covered project. The NYC Accelerator PACE Financing loan also does not require applicants to meet a specific amount of potential emissions reductions for their project to receive approval; rather, projects must merely be considered feasible.

- **Green Bonds.** See Bedke, *Owning and Leasing Green Real Estate*, *supra*. Green bonds are liquid, fixed-income financial instruments sold to raise capital exclusively for environmentally friendly projects and activities. New York State's Green Jobs Green New York Program issues bonds to fund sustainable community development projects, generate green jobs, and create a revolving loan fund to finance energy audits and green retrofits for the owners or occupants of residential, multifamily, small business, and not-for-profit structures. Private entities, including real estate investment trusts (REITs), also issue green bonds. *Id.* (highlighting bonds issued by Bank of America, Vornado Realty, Boston Properties, Kimco Realty Group, Digital Realty Trust, and Equity Residential). As the green bond market continues to develop in the United States, opportunities for developers and owners of coops and condos to fund their green projects with green bonds should proliferate. See Jake

Mooney & Chris Hudgins, Green Bonds Growing as a Share of REIT Debt Issuance, S&P Glob.: Mkt. Intel. (Sept. 13, 2021), <https://bit.ly/3YMjhHK>.

- **New York City's Green Housing Preservation Program (GHPP).** See Home Repair and Preservation Financing: Green Housing Preservation Program, N.Y.C. Dep't of Hous. Pres. & Dev. (2022), <https://on.nyc.gov/3WCMhQI>. GHPP provides low, or no-interest, loans for energy efficiency and water conservation enhancements, lead remediation, and moderate rehabilitation work for small and midsize building owners. Eligible buildings must have "at least 3 units and less than 50,000 square feet (approximately 50 units) that require energy efficiency and water conservation improvements . . . [and] [p]roject scopes of work must reduce a building's energy usage by at least 20%." NYC's Department of Housing Preservation and Development (HPD) is permitted to lend up to \$50,000 per residential unit for buildings needing moderate rehabilitation work and up to \$80,000 per residential unit for 3-15-unit buildings requiring more substantial work. If an applicant needs additional funds to complete the project, HPD will work with the applicant to find private funding with favorable terms. For owners requiring assistance with pre-development costs arising from the loan closing (for example, building assessment or IPNA, architect or engineer, environmental reports, legal fees, etc.), HPD, in partnership with the New York City Energy Efficiency Corporation (NYCEEC), has established a pre-development loan fund for owners working with HPD. The loan application is a three-page form and funds, if approved, will be deposited within one to three weeks of loan application submission. Notably, "[i]n exchange for our assistance, participants enter into an affordability agreement with HPD."

- **Green Tax Incentives.** See Bedke, *Owning and Leasing Green Real Estate*, supra; Michael Scorrano, *Preparing for the Climate Mobilization Act (PowerPoint)*, 20210210P NYCBAR 8, <https://bit.ly/3jtkzHm>. At the federal level, tax benefits for green improvements include the Internal Revenue Code's energy-efficient commercial building tax deduction, which is available for a variety of green construction expenditures. The tax deduction is for an amount equal to the cost of the energy-efficient building placed into service during the taxable year, subject to a cap. The US Department of Energy (DOE) maintains a directory of tax savings available both nationally and on a state-by-state basis.

## **Local Law Compliance-New York City**

On April 18, 2019, the New York City Council passed the CMA. See *Climate Mobilization Act: The New York City Council Passed #GreenNewDeal4NY to Mitigate the Significant Effects of Greenhouse Gas Emissions from Buildings*, N.Y.C. Council, <https://on.nyc.gov/3Ga26sp> (last visited Feb. 11, 2021) [hereinafter NYC Council Passed CMA]. The CMA's primary purpose is to



reduce the greenhouse gas emissions (GGE) produced by buildings in New York City. See Press release, NYC Mayor's Off., Mayor de Blasio Signs Executive Order to Adopt Goals of Paris Climate Agreement for New York City (June 2, 2017), <https://on.nyc.gov/3FRQ4m4>; Greenhouse Gas Emission Reporting, N.Y.C. Dep't of Bldgs., NYC Codes (2022), <https://on.nyc.gov/3GaB1FA>. By restricting large buildings' GGE, the CMA is intended to further the city's goal to "achieve carbon neutrality and 100 percent clean electricity." See N.Y.C. Mayor's Off., Executive Summary to OneNYC 2050: Building a Strong and Fair City 15 (Apr. 2019), <https://bit.ly/3WzoiBG>. The CMA regulates not only office buildings, but also residential buildings, which contribute a large share of the city's carbon emissions. NYC Council data show that residential use accounts for 36 percent of New York City's GGE from buildings over 50,000 square feet-the largest share of GGE of all uses identified in the dataset. NYC Council Passed CMA, supra. The centerpiece of the CMA is Local Law 97 of 2019 (LL 97), which limits GGE for "Covered Buildings," including (i) buildings that are greater than 25,000 square feet (see N.Y.C. Local Law 97 (2019), <https://on.nyc.gov/3FjkBm6>); (ii) tax lots containing more than one building and that in the aggregate exceed 50,000 square feet; and (iii) more than one building held in condominium form that are governed by the same board of managers and that in the aggregate exceed 50,000 square feet. See N.Y.C. Admin. § 28-320.1 (noting exceptions to the definition of covered buildings). Once the limits begin in 2024, a covered building must show, in mandatory annual emissions reports, that the building's emissions are under the applicable limits. See id. § 28-320.3.7 (detailing when reports must be filed with the department). Noncompliant buildings face a fine of \$268.00 multiplied by the difference between the emissions limit for a given year and the emissions that the building reported. See id. § 28-320.6. For many buildings, compliance during the 2024-2030 period will not be an issue, as it is estimated that only 20 percent of covered buildings will be out of compliance during that time. See Justin Gerdes, *After Pandemic, New York's Buildings Face Daunting Decarbonization Mandate*, Green Tech Media (Apr. 23, 2020), <https://bit.ly/3VkePcf>. This figure is estimated to exceed 75 percent by 2030, when compliance targets are set to increase dramatically. Id. Because compliance with the CMA could be a costly endeavor, cooperatives and condominiums should begin planning to ensure retrofits are affordable. The silver lining to the CMA is that carbon emissions limits will make many residential buildings greener-and, usually, more energy efficient. See, e.g., *Energy Star Impacts: Energy Star for the Residential Sector*, US Env't Prot. Agency (EPA) & DOE: About Energy Star (2020), <https://bit.ly/3v9bypE>.

## **Local Law 97: An Example of NYC Municipality Local Law**

Limiting Carbon Emissions. LL 97's emissions limits vary depending on the "occupancy group"

Limiting Carbon Emissions. LL 97's emissions limits vary depending on the occupancy group of the particular property. Occupancy groups are "groups and sub-groups . . . established for classifying buildings and spaces" in accordance with use. See N.Y.C. Admin. §§ 27-234-27-287 ("Occupancy and Construction Classification"), <https://on.nyc.gov/3WFqbN4>. Because cooperatives and condominiums are multifamily residential properties, they are covered buildings and must comply with the emissions limits applicable to their occupancy group. If cooperatives and condominiums have nonresidential portions of their property, however, they must also review the limits for the particular nonresidential use and ensure the emissions released by those portions are within the applicable limits. See N.Y.C. Bldg. § 508.1 (for mixed use buildings, "[e]ach portion of a building shall be individually classified . . . [and] [w]here a building contains more than one occupancy group, the building or portion thereof shall comply with the applicable provisions"). The occupancy groups and their respective emissions limits are given in the above table. See N.Y.C. Admin. §§ 28-320.3.1- 28-320.3.5 (stating the GGE limits for each period until 2050); N.Y.C. Bldg. §§ 301-312 (stating the occupancy group classifications).

## Local Law 97-Occupancy Group Emissions Limits

How to Comply with the CMA Potential Retrofits. There are several ways a condominium or cooperative can comply with LL 97 and the other CMA requirements without having to face any penalties. The most obvious way is to reduce carbon emissions. The following is a list of things that can be done to achieve this. Although the list is not exclusive, it provides some concrete retrofit suggestions.

**Equipment, Appliance, and Lighting Upgrades.** See, e.g., Ask the Experts: How-To, US EPA & DOE: Energy Star: Ask the Experts, <https://bit.ly/3BUpCak> (last visited Sept. 18, 2022); Energy Saver: Lighting Choices to Save You Money, US DOE: Energy Saver, <https://bit.ly/3Vqzn6V> (last visited Sept. 18, 2022).

- Replacement of appliances with highly rated ENERGY STAR appliances and, when possible, gas ranges with electric ones. See Energy Efficiency Products for Consumers, US EPA & DOE: Energy Star, <https://bit.ly/3Gb7jPJ> (last visited Apr. 7, 2022).
- Replacement of existing bulbs and lamps with LED bulbs. See US DOE, Electricity & Fuel: LED Lighting, US DOE: Energy Saver, <https://bit.ly/3ve89pF>.
- Installation of smart plugs for remote control of equipment and appliances. Smart plugs and smart thermostats that offer energy monitoring are even better to help with data reporting. See Emily Kemper & Dane Christensen, Adopting Energy Efficiency in

Connected Homes, 11th Rocky Mountain Util. Efficiency Exch. (Sept. 27-29, 2017), <https://bit.ly/3YMFcPi>.

- Installation of occupancy sensors, timers, or daylight detectors for all common areas, equipment rooms, and fire stairwells (all subject to compliance with local laws). Id.
- Installation of motion sensors in common areas such as hallways, laundry rooms, and health clubs. See Electricity & Fuel: Lighting Controls, US DOE: Energy Saver, <https://bit.ly/3PQQPjP> (last visited Sept. 18, 2022).
- Insulation of hot water and heating pipes. See Services: Do-It-Yourself Savings Project: Insulate Hot Water Pipes, US DOE: Energy Saver, <https://bit.ly/3FS6Txb> (last visited Sept. 18, 2022).
- Installation of a separate hot water heater as opposed to having hot water heated by the boiler. See Heat & Cool: Tankless or Demand-Type Water Heaters, US DOE: Energy Saver, <https://bit.ly/3I0Gjoq>.

**Window Replacements.** See Design: Windows, Doors, & Skylights, US DOE: Energy Saver, <https://bit.ly/3HYN9Lh> (last visited Sept. 18, 2022). Older windows can often be energy inefficient as they may have merely single or double glazing or leak air, either where the pane sits or from the window frame. See NYC Landmarks Pres. Comm'n, Fact Sheet: Repairing, Retrofitting and Replacing Windows at 1 (Jan. 30, 2017), <https://on.nyc.gov/3FO4iEx>. Buildings can improve energy efficiency by replacing windows with those that are:

- High performance-see High-Performance Window System, US DOE, Off. of Energy Efficiency & Renewable Energy, Bldg. Am. Sol. Ctr., <https://bit.ly/3HTwSqS> (last visited Sept. 18, 2022);
- Triple glazed-see Bldg. Energy Exch. & NYC Retrofit Accelerator, Tech Primer: High Performance Windows: State-of-the-Art Windows Significantly Improve Comfort, Reduce Operating Costs, and Save Energy (Jan. 2020), <https://on.nyc.gov/3I2NWdZ>; or
- Airtight. Id.

**Window Air Conditioner Replacements.** See Why You Should Switch to a New Energy-Efficient AC System, PETRO Home Servs.: Res. Ctr. (2022), <https://bit.ly/2VRdu6i>.

- High ENERGY STAR ratings. See US EPA, About ENERGY STAR®- 2020, (Apr. 2021), <https://bit.ly/3Vg3Q7X>.

• Air sealing around windows. See Bldg. Energy Exch. & NYC Retrofit Accelerator, Tech

- Air sealing around windows. See Bldg. Energy Exchn. & NYC Retrofit Accelerator, Tech Primer: Air Sealing at Room Air Conditioners: Low-Cost Measures to Increase Cooling Efficiency and Improve the Building Envelope (June 2021), <https://bit.ly/3hONi9o>.

**Domestic Hot Water Systems.** See Heat & Cool: Selecting a New Water Heater, US DOE: Energy Saver, <https://bit.ly/3HVf5Q9> (last visited Sept. 18, 2022).

**Going Electric.** See Urban Green Council, Going Electric: Retrofitting NYC's Multifamily Buildings 30-31 (Apr. 22, 2020), <https://bit.ly/3FUbXBp>.

- Installation of non-fossil fuel systems to electric systems. See id.
- Installation of heat pumps. Id. at 6-12, 28.

**Solar Panels.** See Planning a Home Solar Electric System, US DOE: Energy Saver, <https://bit.ly/3hOQQZa> (last visited Sept. 18, 2022).

**Building Ventilation.** See Weatherize: Ventilation, US DOE: Energy Saver, <https://bit.ly/3WnUija> (last visited Sept. 18, 2022).

- Replacement of older exhaustonly ventilation systems with balanced systems. See Weatherize: Whole-House Ventilation, US DOE: Energy Saver, <https://bit.ly/3jJf4J> (last visited Sept. 18, 2022).
- Addition of an energy recovery ventilation system.
- Increased airtightness throughout the ventilation system.

**Roof Repairs.** See Jack Wisniewski, 7 Energy-Efficient Roofing Options That Save You Money, Fixr (Apr. 13, 2021), <https://bit.ly/3PTJ4dg>.

- Green Roofs. See US EPA, Heat Islands: Using Green Roofs to Reduce Heat Islands, US EPA, <https://bit.ly/3WI3kqv> (last visited Sept. 18, 2022).
- Cool Roofs. See NYC CoolRoofs NYC Bus. (2022), <https://on.nyc.gov/3YIQ5S2>.

Alternative Methods for Compliance. There are also alternative methods for compliance authorized by LL 97. These include carbon offsets-specifically, a deduction of up to 10 percent of a building's emissions limit with no geographical restriction, but the offset must be generated in the same year that it is used. Further, such offsets are currently not authorized beyond 2024- 2029. See William D. McCracken, Big Questions (and Some Answers) About the Climate Mobilization Act (PowerPoint), Hot Topics Affecting Cooperatives & Condominiums 2020: Climate Mobilization Act 20200423P NYC Bar 44 2020 WL 6591734 (Apr. 23, 2020):

2020: Climate Mobilization Act, 20200129. N.Y.C. Bar 11, 2020 WL 6551751 (Apr. 29, 2020), N.Y.C. Admin. § 28-320.3.6. Cooperatives and condominiums may also deduct from emissions limits by means of renewable energy credits (RECs), which must be generated in NYC in the same year used. Unlike with carbon offsets, REC deductions under LL 97 are not limited to 2024-2029. Finally, LL 97 also allows deductions for purchase of greenhouse gas offsets and for on-site generation of clean energy resources distributed by the building. See N.Y.C. Admin. §§ 28-320.3.6.2-28-320.3.6.3.

Energy Use Reduction Measures for Certain Buildings. LL 97 also requires certain buildings to follow 13 new energy conservation measures. These measures include, without limitation, maintenance of heating systems, repair of leaks, adjustment of temperature thermostat settings for hot water and heat, weatherization, air sealing, lighting upgrades, and insulation of pipes. See id. § 28-321.2.2. Although many cooperatives and condominiums fall outside the separate definition of covered buildings that applies to these provisions, cooperatives and condominiums can nonetheless improve their energy efficiency, help ensure compliance with other green laws, and potentially earn green financial and tax incentives, if they adopt the energy conservation measures voluntarily.

## Other NYC Green Laws

Before building owners decide on a retrofit plan to comply with LL 97, they should familiarize themselves with the other local laws included in the CMA to ensure that the chosen retrofit plan addresses all applicable local green building laws.

- Local Law 96 (LL 96)-NYC Accelerator PACE. See NYC Mayor's Off. of Climate & Sustainability, Local Law 96: PACE Financing, <https://on.nyc.gov/3Gdjcpq> (last visited Sept. 18, 2022).

Although many green building laws are regulatory, LL 96 provides a green building incentive: With the enactment of LL 96, NYC Council established PACE financing. See *supra*.

- Local Law 95 (LL 95)-Building Energy Efficiency Grade. See NYC Mayor's Off. of Climate & Sustainability, The Climate Mobilization Act, 2019: Local Laws 92, 94, 96, 97, Legislation (2022). LL 95 amended how building energy efficiency grades are calculated pursuant to Local Law 33 of 2018 (LL 33). LL33 mandated that NYC building owners display their buildings' energy efficiency scores and grades for buildings that are required under Local Law 84 of 2009 (LL 84) to benchmark their energy and water consumption annually. The energy labels include both a letter grade and the energy efficiency score and must be displayed near a public entrance on covered buildings.

- Local Laws 92 and 94 (LL 92 and LL 94)-Green Roofs and Solar PV. See Ray Ramos, Local

Laws 92 and 94 of 2019: A Practical Guide, Nearby Eng'rs (Nov. 19, 2019), <https://bit.ly/3I2SfG4>; NYC Dep't of Bldgs., Service Notice: Local Law 92 of 2019 and Local Law 94 of 2019: Green and Solar Roof Requirements for New Buildings and Complete Roof Replacements (Oct. 2019), <https://on.nyc.gov/3Vffv0l>. LL 92 and LL 94 generally mandate that all building owners reduce their buildings' urban heat hazards and require all new buildings and buildings that undergo major roof renovations to be covered with solar panels (a minimum of 4 kW) or green roofs (a minimum of 200 square feet). If the project is merely replacing the roof membrane or adding/ replacing insulation, however, these are typically not a trigger for compliance. The measuring stick is typically if the work requires a building permit, and if PV installation is not practical, the green roof must be the alternative. Although there are certain exemptions that apply, the condominium or cooperative should have its architect or attorney confirm whether an exception is warranted and how to provide for it. In addition, New York City provides the Green Roof Tax Abatement program to incentivize green roofs. See Green Roof Tax Abatement, NYC Dep't of Finance: Property (2022), <https://on.nyc.gov/3Gk7dq3>.

- The Greener Greater Buildings Plan (GGBP), 2009: Local Laws 84, 85, 87, 88. See supra.

**Local Law 84 of 2009.** See N.Y.C. Local Law 84 of 2009, <https://on.nyc.gov/3VjceU8> (codified at N.Y.C. Admin. §§ 28-309.1-28-309.10). Local Law 84 requires owners of buildings with more than 50,000 square feet to submit annual benchmarking data for public disclosure by May 1, with the goal of increasing the transparency of energy and water usage and informing both building owners and occupants about how to improve their buildings' energy efficiency.

## **NYC Energy Conservation Code.**

See 2020 Energy Conservation Code, NYC Dep't of Bldgs. (2022), <https://on.nyc.gov/3YTxRxs>. Although the original GGBP exempted renovations affecting less than half of the building system from certain energy conservation code requirements, Local Law 85 of 2009 (LL 85) (see N.Y.C. Local Law 85 of 2009, <https://on.nyc.gov/3Z17qpA>) amended GGBP to require buildings to meet the most current energy code for any renovation or alteration project. This requirement is premised on a collection of local energy laws called the New York City Energy Conservation Code (NYCECC). Currently, NYCECC comprises the 2010 Energy Conservation Construction Code of New York State (ECCCNYS) (see N.Y. State Dep't of State & Int'l Code Council, 2020 Energy Conservation Construction Code of New York State (Nov. 2019), <https://on.ny.gov/3I1sPsw>), LL 85, Local Law 48 of 2010, and Local Law 1 of 2011.

## **Local Law 87 of 2009-Energy Audits and Retro-Commissioning.**

Under Local Law 87 of 2009, large buildings must audit, retro-commission, and submit certain information to the NYC government. Such information includes basic building information, an inventory of existing equipment, an energy end-use breakdown, energy conservation measures identified from the audit, and retro-commissioning measures.

## Conclusion

The decision to go green is no longer a matter of nice-to-have. Rather, a property becoming more sustainable is quite often mandated by law. This not only affects large commercial buildings but also cooperatives and condominiums. If property owners merely focus on compliance with existing green building laws, however, they may be missing out on what may be required in the not-too-distant future. Similarly, satisfying current regulation may be the impetus to dive a little deeper into the sustainability world than what local law mandates. Attorneys representing condominiums and cooperatives should be focusing the respective board's attention on the bigger picture. It is incumbent upon practitioners to guide their clients to not just energy and water efficiency, but also the overall operation of their buildings and individual apartments or units. The clients will reduce their carbon emissions and, by doing so, may avail themselves of the many available green financial and tax incentives. Becoming green is sometimes a scary prospect for many coops and condos, but it should not have to be.

Furthermore, although New York is highlighted in this article, it is merely an example of what some local municipalities and states are enacting regarding climate change and sustainable buildings. Some examples of this are the following: (i) California Governor Gavin Newsom signed into law A.B. 2446, "The Carbon Intensity of Construction and Buildings Materials Act" (Sept. 16, 2022), which lays out the framework for the state to reduce by 40 percent its carbon footprint by 2035; (ii) Massachusetts Governor Charlie Baker signed into law Senate Bill 9, "An Act Creating a Next Generation Roadmap for Massachusetts Climate Policy," which set CHG emission limits of 50 percent for 2030 and 75 percent for 2040 (see Press release, Off. of Gov. Charlie Baker, Governor Baker Signs Climate Legislation to Reduce Greenhouse Gas Emissions, Protect Environmental Justice Communities (Mar. 26, 2021), <https://bit.ly/3YHQ8xo>); (iii) the State of Maryland legislature passed the Climate Solutions Now Act of 2022, which, in part, requires buildings greater than 35,000 square feet to achieve a 20 percent carbon emission reduction no later than 2030 and netzero by 2040 (see Sierra Club Celebrates "Climate Solutions Now Act," a Major Climate Victory in Maryland, Sierra Club, Md. Chapter (Apr. 20, 2022), <https://bit.ly/3WLIXT0>); and (iv) the Washington State Building Code Council updated the energy code to prohibit fossil fuel used in new commercial and

multifamily residential buildings greater than four stories (see Leah LaCivita, New Legislation, Guidance Targets a Green Energy Future in Washington, MRSC Insight Blog (Aug. 22, 2022), <https://bit.ly/3GjYbJH>). The payment for sustainable endeavors is also not a concern limited to New York. Tax incentives for sustainability efforts are available from federal and state programs.

The Inflation Reduction Act provides many such benefits. See Maximizing the Inflation Reduction Act Benefits for Affordable Housing, Enter. Cmty. Partners Blog (Oct. 18, 2022), <https://bit.ly/3I338YL>. Finally, PACE financing, at the state level, is available in a majority of the states in the United States. See PACE Programs, PACENation, <https://bit.ly/3C3Q15I> (last visited 12/2/2022).

Clearly there are many legal and practical issues that can arise in each major aspect of a renovation project: the stages of authorization and initial planning, financing, project management, and ongoing compliance, all of which require meticulous due diligence, planning, and drafting. This requires boards to work actively with counsel, contractors, and other necessary stakeholders to proactively prepare for these potential issues and mitigate the risks they pose.

Occupancy Group	2024-2029 Emissions Limit	2030-2034 Emissions Limit	2035-2050 Emissions Limit	2050 Emissions Limit
Assembly	0.01740	0.00420	TBD	0.0014
Offices	0.00846	0.00453	TBD	0.0014
Educational	0.00758	0.00344	TBD	0.0014
Factory/ Industrial	0.00574	0.00167	TBD	0.0014
Institutional	0.01138	0.00598	TBD	0.0014
Mercantile	0.01181	0.00403	TBD	0.0014
Hotels/Dorms	0.00987	0.00526	TBD	0.0014
Multifamily Residential	0.00675	0.00407	TBD	0.0014
Storage	0.00426	0.00110	TBD	0.0014

Source: Brendan Schmitt with David Katzenstein, It's Coming: The Climate Mobilization Act- What Building Owners Need to Know Now, Herrick Insights (Nov. 2019), <https://bit.ly/3Ghkpfw>.



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