

Decarbonizing Buildings & Challenges to Decarbonization Laws

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Alicia R. Legland, Esq.

Hodgson Russ LLP

alegland@hodgsonruss.com

(518) 433-2416

Introduction to Hodgson Russ



Broad-Ranged, Full-Service Firm with Deep Roots and Capabilities

- More than 200 attorneys practicing in all major areas of U.S. law
- Offices in New York City, Albany, Buffalo, Saratoga Springs, Palm Beach, Hackensack, Rochester, Greensboro, and Toronto
- Founded in 1817, with two former U.S. Presidents in its partnership alumni, Hodgson Russ has experience in markets across Europe, North America and Asia
- Deep New York State history – instrumental in completion of the Erie Canal, Peace Bridge, Robert Moses Niagara Power Plant, drafting of Buffalo's City Charter, the founding of University of Buffalo, and development of many major industrial, health care, educational and cultural organizations

Frequently Recognized for Excellence

- *The National Law Journal's "NLJ 500"*
- *Chambers USA: America's Leading Lawyers for Business*
- *Best Lawyers, "Best Law Firms" and "Best Lawyers in America"*
- *"Best-Branded Law Firm", 2019 BTI Brand Elite: Client Perceptions of the Best-Branded Law Firms Report*
- *American Lawyer's "2019 AmLaw 200" and ranked 10th in the "A-List for Female Equity Partnership"*
- *Super Lawyers*



*Hodgson Russ Headquarters
The Guaranty Building, Buffalo, NY*

Introduction to Hodgson Russ



Practice Areas

- Multidisciplinary team guides clients through virtually every aspect of a project's lifecycle:

- Strategic Planning
- Zoning and State Permitting
- State and Federal Regulatory
- Environmental Review
- Financing
- Lease and Easement Agreements
- Title Insurance and Curatives
- Contracts and Agreements
- Taxation
- Litigation
- Insurance
- Corporate Structuring and Collaborations



- **Projects:** Experienced in wind, solar, energy storage, landfill gas-to-energy, bioenergy projects, electric vehicle infrastructure, energy efficiency and decarbonization strategies
- **Clients:** Developers, lenders, acquirers, landowners, permitting agencies, development agencies, parts and service suppliers, manufacturers, contractors and investors
- **International Expertise:** Counsel foreign entities participating in United States projects involving cross-border finance, CFIUS, FACTA Compliance, immigration issues, licensing and technology transfer, protection of foreign patents, international taxation and Tax Treaty compliance, multinational mergers and acquisitions, NAFTA and other trade issues



Understanding the Problem

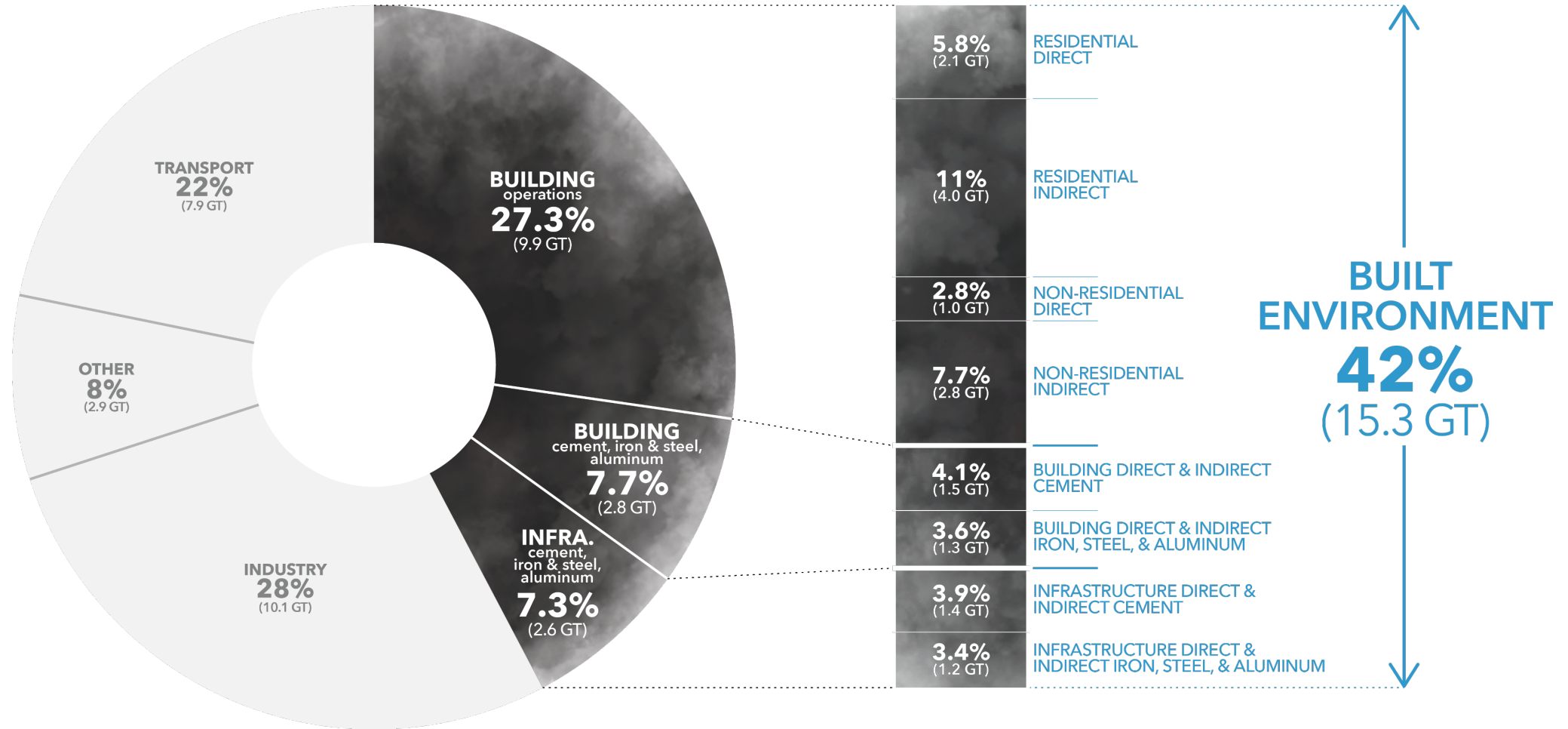
Building Emissions



- Roughly 42% of global carbon emissions come from buildings
 - Building operations account for almost 28% of that figure
 - Embodied carbon in cement, iron, steel, and aluminum are responsible for 15% of that figure, annually
- All carbon emissions from the built environment must be eliminated by 2040 to meet 1.5° climate targets

TOTAL ANNUAL GLOBAL CO₂ EMISSIONS

Direct & Indirect Energy & Process Emissions (36.3 GT)

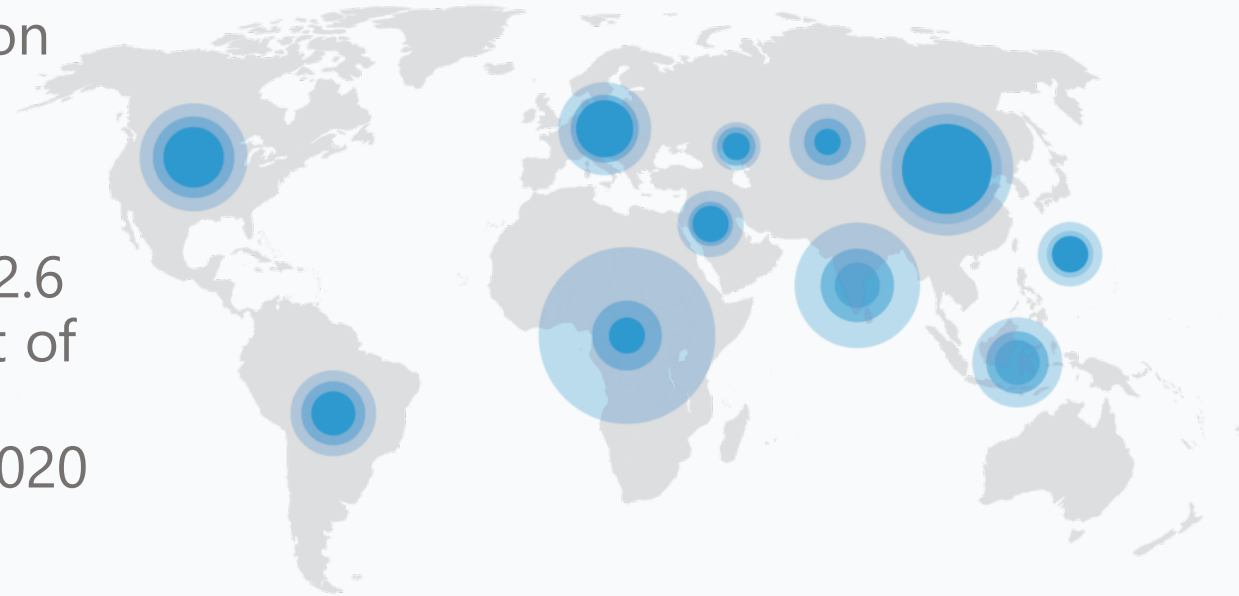


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 Analysis & Aggregation by Architecture 2030 using data sources from IEA & Statista.

Increased Development

- Largest wave of urban growth we've seen in human history is on its way
- Expecting to add 2.6 trillion square feet of floor area every month between 2020 and 2060 to accommodate it
 - *i.e.*, New York City

Global building floor area is expected to **double** by 2060.



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Data Sources: Global ABC, Global Status Report 2017



How are Cities and States Responding?

Building Decarbonization Laws

Building Decarbonization Laws



- U.S. 2023 legislative session:
 - 27 states introduced 157 building decarbonization bills
 - 16 bills were enacted in 10 states
- Trends: limiting expansion of the gas system; new or improved building performance standards; building code modifications; indoor air pollution and emissions in school buildings
- *E.g.*, NY All-Electric Buildings Act – Adopted with the 2024 state budget, requires new buildings under 7 stories to be built all-electric by 2026, and larger buildings by 2029



Examples + Legal Challenges

City of Berkeley, CA

- Ordinance No. 7,672-N.S. – prohibits natural gas infrastructure in newly constructed buildings
- Natural gas infrastructure:
- “fuel gas piping, other than service pipe, in or in connection with a building, structure or within the property lines of premises, extending from the point of delivery at the gas meter”



City of Berkeley, CA

- Challenged by CA Restaurant Assoc., claiming federal preemption by the U.S. Energy Policy and Conservation Act (“EPCA”) and that the Ordinance effectively bans installation of new natural gas appliances



CA Restaurant Assoc. v. City of Berkeley, 89 F.4th 1094 (9th Cir. 2024)

- N.D. Cal. reversed
- 9th Cir. held that the EPCA expressly preempts state and local laws regulating energy use of natural gas appliances
- City could not get around this by prohibiting natural gas piping – it renders the gas appliances useless
- EPCA's preemption provision extends to regulations that address the products themselves and to building codes regulating use of natural gas
- EPCA ensures that States and localities cannot prevent consumers from using covered products in their homes, kitchens, and businesses

Washington State

- Washington State Energy Code
- Required installation of heat pump heating, ventilation, and air conditioning (HVAC) appliances and heat pump water heaters in new commercial and residential buildings



Rivera v. WA. State Building Code Council, Dckt. No. 1:23-cv-03070 (E.D. Wash 2023)



- Same EPCA preemption claims as the Berkeley case
- Given the 9th Circuit decision in *CA Restaurant Association v. City of Berkeley*, WA Building Code Council delayed the effective date of the code and began a process to potentially amend it to comply with the EPCA
- Plaintiffs voluntarily dismissed the case without prejudice

New York City – Local Law 97 (2019)

- Requires certain large, privately-owned buildings meet energy efficiency and greenhouse gas emission limits by 2024, and to meet stricter limits in subsequent years
- Covered buildings
 - >25,000 square feet
 - 2+ buildings on same tax lot that together is >50,000 square feet
 - 2+ buildings owned by a condo assoc. that together is >50,000 square feet



Local Law 97



Covered buildings must either:

- By December 31, 2024, demonstrate that annual building emissions did not exceed the applicable annual building emissions limit
 - OR
- By December 31, 2024, ensure that certain energy conservation measures have been implemented where applicable
 - *E.g., insulate all pipes for heating/hot water*
 - *Note: prescriptive energy conservation measures require experienced and certified personnel*

Local Law 97

- The penalty for emissions above the limit is the difference between the annual building emissions limit and the reported building emissions, in tons, multiplied by \$268
- Example: A building exceeds its annual emissions limit by 100 tons, owner faces a penalty of up to \$26,800



Local Law 97 – Rules + Amendments

- NYC DOB issued rules and amendments in Dec. 2023
- LL 97 allows DOB to consider “good faith effort” to reduce emissions – now defines that term for 2024-2029
 - *E.g.*, submitting the annual building emissions report and complying with any adjustment DOB has granted
 - May result in mitigated penalty
- Rules concerning filing of annual report
- Beneficial Electrification – credit to incentivize buildings to electrify early
 - “Owners who have qualifying equipment ... in the covered building, may apply GHG emissions savings or accrue savings for future use in reporting emissions for such building[.]”

Glen Oaks Vill. Owners Inc., et al. v. N.Y.C. et al., Index No. 154327/2022 (Sup. Ct. N.Y. Cty. 2022)



Challenges Local Law 97 on several grounds:

- Preemption by NY Climate Leadership and Community Protection Act (“CLCPA”)
- Violates N.Y. Municipal Home Rule Law
- Due Process violations under U.S. and NY Constitutions – excessive and unavoidable penalties, vague, retroactive
- Penalties are an illegal tax

Glen Oaks Vill. Owners Inc., et al. v. N.Y.C. et al., Index No. 154327/2022 (Sup. Ct. N.Y. Cty. 2022)



- City's motion to dismiss granted (Oct. 2023)
 - Plaintiffs' notice of appeal filed (Nov. 2023)
- CLCPA does not preempt Local Law 97
 - No conflict between the laws on GHG emissions – the "State has repeatedly expressed its desire and intent to collaborate with the City and other local governments to abate GHG emissions under the CLCPA."
 - No violation of Home Rule – not preempted
- Not an illegal tax
 - Valid exercise of police power to exact payment as a penalty

Glen Oaks Vill. Owners Inc., et al. v. N.Y.C. et al., Index No. 154327/2022 (Sup. Ct. N.Y. Cty. 2022)



- No Due Process violation
 - Penalties/compliance costs not “so severe and oppressive as to be wholly disproportionate to the offense ...and obviously unreasonable.”
 - Not impermissibly retroactive - “owner ... who has constructed or maintained his property in compliance with laws then in existence acquires no vested right or immunity against an exercise of police power which imposes additional or new requirements[.]”
 - Not vague – Plaintiffs calculated their potential penalties in the complaint

Local Law 97

- Turns out, buildings are complying faster than expected
- The City initially expected the rate to be 20% for the initial compliance period (2024 to 2029)
- NYC DEP expected noncompliance rate: 11% of NYC buildings



NYC Local Law 154 (2021)

- NYC "Gas Ban"
- Prohibits combustion of any substance that emits 25 kilograms or more of carbon dioxide per BTU of energy in NYC buildings (with some exceptions)



Assoc. of Contracting Plumbers of N.Y.C. v. N.Y.C., Dckt. No. 1:23-cv- 11292 (S.D.N.Y. 2023)



- Plaintiffs claim federal preemption under EPCA, similar to the Berkeley and Washington State cases
- Plaintiffs argue the emissions cutoff is less than that of most fuel sources for homes and businesses, and functions as an effective prohibition on gas appliances
- Complaint filed in Dec. 2023, Answer due soon
- Outcome TBD

New York All-Electric Buildings Act

- State "Gas Ban"
- Adopted in the NYS 2023-2024 budget
- Prohibits installation of fossil fuel equipment and building systems in new buildings up to 7 stories starting in 2026
- Exempts new commercial and industrial buildings > 100,000 sf
- All new buildings starting in 2029



New York All-Electric Buildings Act

- Fossil-fuel equipment and building systems:
 - “equipment ... that uses fossil-fuel ... for combustion or systems associated with a building that will be used for or to support the supply, distribution or delivery of fossil-fuel for any purpose, other than for use by motor vehicles.”
- Equipment:
 - “[p]lumbing, heating, electrical, lighting, insulating, ventilating, air conditioning, and refrigerating equipment, elevators, escalators, and other mechanical additions or installations.”
- Prohibiting installation of “fossil-fuel equipment and building systems” in most new buildings, prohibiting installation of gas appliances, equipment, and infrastructure

Mulhern Gas Co., et al. v. Rodriguez, **Dckt. No. 1:23-cv-01267 (N.D.N.Y** **2023)**



- Same EPCA preemption claims as the Berkeley, Washington State, and NYC Gas Ban cases
- Plaintiffs argue the NYS Gas Ban goes even further than the Berkeley ban on gas piping – this bans gas appliances covered under EPCA
- Argue a ban on gas infrastructure is preempted by EPCA
- Fully briefed in Jan. 2024, outcome TBD



THANK YOU!

Questions?

Alicia R. Legland, Esq.
alegland@hodgsonruss.com
(518) 433-2416