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Following the Money

The role of penalties in encouraging compliance with building performance standards

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on Environmental, Energy
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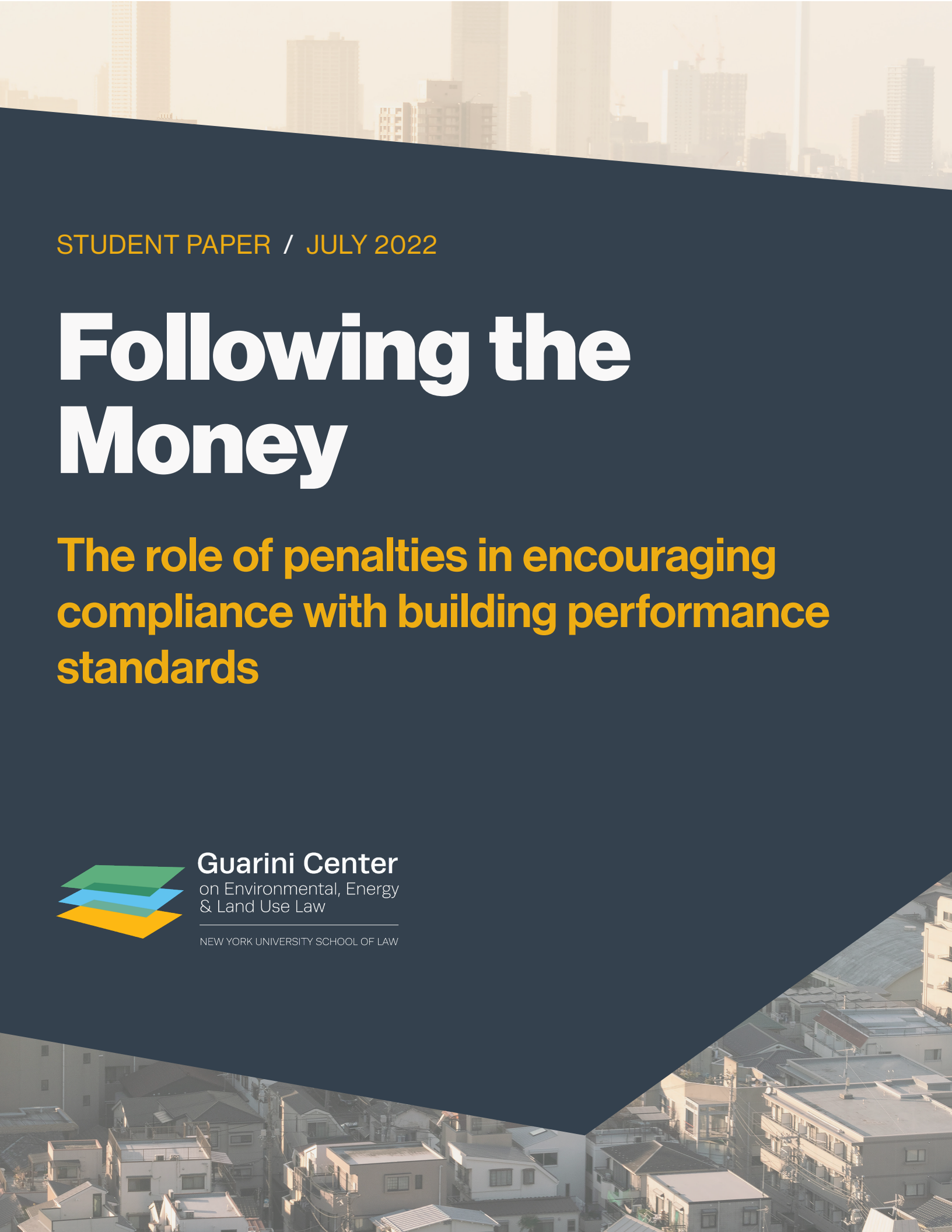
NEW YORK UNIVERSITY SCHOOL OF LAW



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Following the Money: The role of penalties in encouraging compliance with building performance standards

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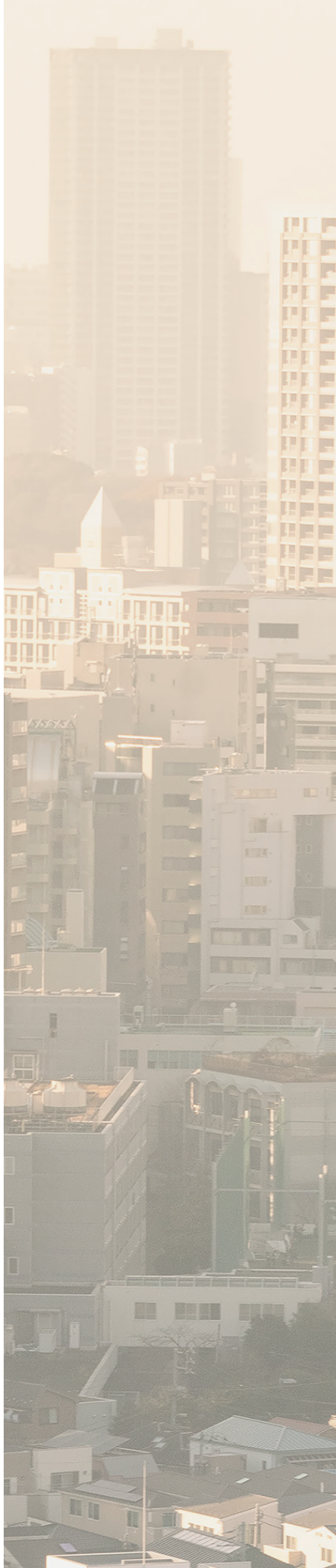

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I. Introduction

In response to growing public concerns about climate change, many American cities have begun to set goals for reducing energy usage, decreasing reliance on non-renewable energy sources, and helping building owners upgrade inefficient properties. To aid in this transition, several jurisdictions have created Building Performance Standards (BPSs). BPSs regulate either greenhouse gas (GHG) emissions or energy efficiency for certain building types. This paper surveys the field of existing BPSs, focusing on the different ways that jurisdictions have chosen to penalize non-compliance.

We argue that penalties designed to make building owners internalize the costs of non-compliance with BPS targets are more likely to be effective than penalties based on a flat fee approach. Cost-internalizing penalties include those calculated to be reflective of—or greater than—a building's cost of compliance. These penalties appear to provide a stronger deterrent effect against non-compliance than flat fee ones, and we anticipate they will be better protected from legal challenges because they are structured around a clear policy rationale.

II. The Policy Mandates

As noted above, there are two main types of BPSs that have been adopted thus far. The first type limits the GHG emissions attributable to energy use in buildings. The second type limits the total amount of energy that can be used per square foot of built area.

Both Boston and New York City have adopted laws that take the GHG approach. New York City's BPS—Local Law 97—sets GHG emissions limits for buildings based upon the type of building.[1] Buildings are expected to meet the relevant GHG emissions standards, but may also reach compliance by using renewable energy credits (RECs) and other forms of compensation if they exceed their emissions limits.[2] Similarly, Boston has enacted a GHG standard that sets emissions caps for buildings based upon type.[3] Building owners who cannot meet the standard for their building type may develop individual compliance schedules or request hardship compliance plans.[4] Building owners may also comply by purchasing renewable energy certificates, entering into power purchase agreements, or using Boston's municipal electricity aggregation program.[5]

While New York City and Boston have pursued GHG emissions-based approaches to BPS target setting, BPSs based upon overall energy efficiency gains are more common in the United States.

Some jurisdictions have created BPS targets using buildings' energy use intensity (EUI). For example, St. Louis, Missouri requires a building to be in at least the 65th percentile of site EUI performance for buildings of its type.[6] Building owners can also comply by demonstrating early compliance under a relaxed standard, implementing significant reductions (at least 50%) in energy usage relative to their baselines, or by applying for custom plans.[7] EUI-based stan-

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1 *Greenhouse Gas Emission Reporting*, New York City Department of Buildings, **https://www1.nyc.gov/site/buildings/codes/greenhouse-gas-emission-reporting.page** (last visited June 27, 2022).

2 N.Y.C. Local Law No. 97, §28-320.3.6 (2019).

3 Boston, Mass., Ordinance Amending City of Boston Code, Ordinances Ch. VII, §7-2.2(i) (2021).

4 Boston, Mass., Ordinance Amending City of Boston Code, Ordinances Ch. VII, §§7-2.2(k) and 7-2.2(l) (2021).

5 Boston, Mass., Ordinance Amending City of Boston Code, Ordinances Ch. VII, §7-2.2(m) (2021).

6 St. Louis, Mo., Ordinance 71132, §4 (2020).

7 *St. Louis Building Energy Performance Standard (BEPS) BEPS Compliance Pathways Fact Sheet*, St. Louis Office of Building Performance (Feb. 18, 2022), **https://www.stlbenchmarking.com/Content/STL_BEPS_Fact_**

dards also are being implemented in Washington State;[8] Denver, Colorado;[9] and Montgomery County, Maryland.[10]

Other jurisdictions set energy efficiency BPS targets for buildings by reference to ENERGY STAR performance metrics or LEED certification standards. For example, Washington, D.C.'s BPS requires buildings to have an ENERGY STAR efficiency score that is no lower than the median score established for similar property types.[11] ENERGY STAR scores compare a building's energy consumption to similar buildings nationwide, on a scale from 1-100.[12] Median energy performance is marked by a score of 50, and more efficient performance is indicated by a higher ENERGY STAR score.[13] D.C. buildings that do not meet the standard are provided with alternative pathways for compliance, such as achieving a 20% reduction in energy usage or implementing cost-effective energy efficiency measures.[14] ENERGY STAR or LEED-based standards have been adopted in Chula Vista, California and Boulder, Colorado as well.[15] Furthermore, Reno, Nevada and San José, California have developed BPSs that allow buildings to comply by reaching either ENERGY STAR or EUI targets, or by showing certain improvements above buildings' past performance.[16]

The State of Colorado passed a statute in 2021 authorizing the creation of a BPS, so the state has yet to promulgate a standard or specify how Boulder and Denver's BPSs will be affected.[17] However, the Colorado Building Performance Standards Task Force has indicated that the jurisdiction will be using an EUI-based standard, after evaluating the approaches utilized in other jurisdictions like New York, Washington D.C., and St. Louis.[18] The task force preferred EUI standards for a number of reasons including simplicity of measurement, greater flexibility for building owners to comply, and because Denver's BPS uses EUI.[19]

See Appendix A for a table summarizing the laws adopted by each of the jurisdictions mentioned in this paper.

III. The Penalties

When developing a BPS, a jurisdiction must decide, among other variables, the amount by which to penalize non-compliant buildings, how frequently penalties should be assessed, and whether there should be caps on the penalties building can accrue. A jurisdiction may be limited in its decisionmaking by the performance standard it has chosen, state laws constraining its ability to assess penalties, as well as administrative concerns. Accordingly, penalties for non-compliance vary significantly among BPSs.

Sheet_2.18.22.pdf.

8 Wash. Rev. Code §19.27A.210(1)(b) (2021).

9 Denver, Colo., Council Bill No. 21-1310, §10-404(a) (2021).

10 Montgomery County, Md., Bill No. 16-21 (2022).

11 Washington, D.C., CleanEnergy DC Omnibus Amendment Act of 2018, D.C. Law 22-257 §301(b)(1)(C)(ii) (2019).

12 *Benchmark Your Building Using ENERGY STAR Portfolio Manager*, ENERGY STAR, **https://www.energystar.gov/buildings/benchmark** (last visited June 27, 2022).

13 *Id.*

14 *Building Energy Performance Standards*, District Of Columbia Department of Energy and Environment (June 2020), https://doee.dc.gov/sites/default/files/dc/sites/ddoe/service_content/attachments/BEPS-one-pager-June2020.pdf.

15 Chula Vista, Cal., Ordinance No. 3498, §§15.26.050(C) and 15.26.050(F) (2021); Boulder, Colo., Code ch. 7.7 §10-7.7-3 (2022).

16 Reno, Nev., Code ch. 14.30 §14.30.011 (2022); San José, Cal., Code ch. 17.85 §17.85.410 (2022).

17 House Bill 21-1286, 73rd Gen. Assemb., 1st Reg. Sess. (Colo. 2021).

18 Colorado Building Performance Standards Task Force, BPS Task Force Meeting #4 (Dec. 15, 2021), **https://drive.google.com/file/d/1a4A_tufKnIZq3alyPgb60ytYC-Sp8iF5Z/view**.

19 *Id.*

The jurisdictions surveyed in this paper take three main approaches to establishing penalties for non-compliance with their BPSs:

- Some jurisdictions impose penalties that are intended to be greater than buildings' average costs of compliance. Denver and Boston are examples of cities that use this strategy.

- Other jurisdictions have established fees that are proportionate to buildings' sizes, charging a fixed amount per square foot assessed. Boulder and Washington State are examples of the building size approach.

- Still other jurisdictions charge flat fees for non-compliance, where a pre-set fine amount is assessed against a building when that building violates the BPS target. This approach has been adopted by a number of jurisdictions, including San José and Reno.

Notably, many jurisdictions take a facilitative approach towards building owners whose properties fail to meet BPS goals, either in lieu of a punitive approach or in addition to it. This often includes time extensions to meet standards and opportunities for owners to develop individualized compliance plans. The more lenient approach taken by many jurisdictions likely serves to ease building owners into new changes and allow time for large infrastructure improvements.

Cost of Compliance

Several jurisdictions have adopted penalties intended to be greater than the average cost of bringing a building into compliance. These penalties are intended to provide a clear economic rationale for building owners to take necessary steps to reduce emissions or energy usage. Jurisdictions enact cost-of-compliance penalties in a variety of ways, depending on the performance standard being used.

Jurisdictions that use a GHG standard have utilized a simple method for determining penalties: scaling the fee to match the amount by which a building exceeds its emissions limit. Boston's BPS takes this approach. A building can make an alternative compliance payment (ACP) of $234 per metric ton of CO2e, an amount set by the city's ordinance to reflect the projected average cost of building decarbonization in Boston and that will be reviewed every five years.[20] Separately, if a Boston building fails to comply with the relevant BPS target at all, it will be assessed a daily fine of either $300 or $1,000, depending on the size of the building.[21] Unlike for the ACP, Boston's ordinance does not explain why these fines have been set at these amounts.

New York City follows a similar approach. Specifically, Local Law 97 states that the penalty for exceeding the GHG emissions limit will be calculated by subtracting the allowed GHG emission level from the reported emission level, and then multiplying the difference by a maximum of $268 per ton of excess emissions, imposed annually.[22] New York City has not publicly explained the choice to assess penalties at that amount, generating frustration in the stakeholder community.[23] However, some local experts have suggested that the figure was based on the projected cost of retrofitting properties to comply with the emissions limits.[24] Notably, some stakeholders have expressed concerns about the severity of the potential fines.[25] A group consisting of cooperative

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20 Boston, Mass., Ordinance Amending City of Boston Code, Ordinances Ch. VII, §7-2.2(m) (2021).

21 Boston, Mass., Ordinance Amending City of Boston Code, Ordinances Ch. VII, §7-2.2(r)(ii) (2021).

22 N.Y.C. Local Law No. 97, §28-320.6 (2019).

23 Kristopher Stephen Steele, *New York City Local Law 97: An Analysis of Institutional Response & Decision Making Towards Groundbreaking Carbon Emissions Legislation*, 75, 79 (2020).

24 Citizens Budget Commission, Balancing Incentives to Maximize Emission Reduction Recommendations on Local Law 97 Implementation (Aug. 2021).

25 Michael Lomtevas, *The Big Apple's Big Squeeze on*

owners recently filed a complaint against New York City, alleging in part that the city's penalties are excessive and violate due process for owners.[26]

Denver's penalty structure is similar to the proportionate penalties used by jurisdictions with GHG standards, because although the BPS is based on energy efficiency, the penalty for non-compliance is up to $0.70 per year for each required kBtu reduction that the owner's covered building fails to achieve in that year.[27] The Energize Denver Task Force, which provided the draft bill containing that penalty amount, previously recommended that "[f]ines should be somewhat more than the cost of compliance," indicating what calculations likely informed their selection of that penalty amount.[28]

Proportionate to Building Size

Some jurisdictions with BPSs based on energy efficiency have chosen a penalty system proportional to building size. In some cases, the reasoning behind these penalties includes cost of compliance, as discussed above. Washington D.C. is one example. Other jurisdictions like Boulder and Washington State have penalties that are not clearly related to the cost of compliance, but that nonetheless vary in severity based on building size.

In Washington D.C., if a building is still not compliant at the end of the five-year compliance period, it can be required to make an ACP with a maximum of $10 per square foot of gross floor area.[29] That number is adjustable to reflect any progress the building made in attempting to comply with the standard, and the total penalty cannot exceed $7,500,000.[30] In the rulemaking process, the D.C. Department of Energy and Environment stated that they chose the $10 per square foot amount because "the cost of non-compliance imposed by the penalty must be greater than the cost of compliance," and $10 per square foot reflects the cost of compliance, per their analysis.[31]

Boulder's BPS, which uses an energy efficiency standard, also assesses penalties based on square footage, at a rate of $0.0025 per square foot per day, not to exceed $1,000 per day.[32] The City's justification for that formula was to avoid disproportionately penalizing small buildings, and still be able to hold large buildings accountable for compliance.[33]

Washington State's BPS statute uses a combination of flat fee and building size proportionality by authorizing a penalty of up to $5,000 plus an amount based on the duration of a continuing violation, which cannot exceed a daily amount of $1 per year per gross square foot of floor area.[34] The promulgated standard under that statute adjusts the continuing violation amount based on how compliant the building was in the process, and also enables a building to just pay the maximum amount for non-compliance if they choose.[35] We have not

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Pollution and Landlords, The Regulatory Review (July 8, 2021), **https://www.theregreview.org/2021/07/08/lom-tevas-big-apples-big-squeeze-pollution-landlords/**.

26 *Glen Oaks Village Owners, Inc. v. City of New York*, Index No. 154327/2022 (Sup. Ct., NY Cnty.) (hereinafter Complaint).

27 Denver, Colo., Council Bill No. 21-1310, §10-407(d) (2021).

28 Energize Denver Task Force, Energize Denver Task Force Recommendations, § 3.7 (2021), **https://denver.legistar.com/View.ashx-?M=F&ID=9916099&GUID=96362734-411D-4E49-90DC-8A776EF55934**.

29 District of Columbia Office of Energy and Environment, *BEPS Compliance and Enforcement Guidebook for Compliance Cycle* 1, §6.1, **https://dc.beam-portal.org/helpdesk/kb/BEPS_Guidebook/75/** (last visited June 28, 2022).

30 *Id.*

31 68 D.C. Reg. 011790.

32 Boulder, Colo., Code ch. 7.7 § 10-7.7-10 (2022).

33 City Council Meeting, Boulder, Colo., Code ch. 7.7 § 10-7.7-10, (Sept. 1, 2015) **https://documents.boulder-colorado.gov/WebLink/DocView.aspx?id=130246&d-bid=0&repo=LF8PROD2&cr=1** p. 14.

34 Wash. Rev. Code §19.27A.210(10) (2021).

35 American Society of Heating, Refrigerating and Air-

found an explanation for how these penalty amounts were chosen. An amendment to the statute was proposed that would have capped the total penalty amount that may be assessed for non-compliance at $25,000 in any calendar year, but it was rejected by the Legislature.[36]

Flat Fees

Other energy efficiency BPS penalties rely on just flat fees, or flat fees combined with non-monetary penalties.

In Chula Vista, non-compliant buildings can face a fine of either $750, $1,500, or $2,250 per incident, depending on their size, and can also have their failure to comply with the BPS publicly disclosed.[37] Chula Vista did not provide justification for why they selected those penalty amounts in the statutory language authorizing the ordinance.[38] A previous draft version of the ordinance would have also granted the City the ability to "take actions against the Property that could potentially impede financing, leasing or sale transactions for the Covered Property."[39] The city council member that made the successful motion to strike that language said it was vague and suggestive of liening and other types of actions, which he asserted was not the intent of the ordinance.[40] He argued that the language was not actually intended to be an enforcement mechanism in itself, and the intent may just have been notice, which he said is covered elsewhere in the ordinance, so the language was removed.[41]

The St. Louis BPS authorizes an ACP option for non-compliant buildings, but does not clarify what the amount would be.[42] A City FAQ website states that "[b]uildings and owners that fail to comply [with the BPS] will face violations in the forms of fines and/or loss of occupancy permits for future tenants."[43] The ordinance and FAQs specify flat fee penalty amounts for a failure to report benchmarking data or a misrepresentation of the data, but not for a building that submits an accurate and timely report but does not meet the BPS threshold.[44]

San José's BPS penalizes non-compliant buildings under 50,000 square feet at a rate of $25 per day, up to $2,500 per year, and buildings over 50,000 square feet at a rate of $50 per day, up to $5,000 per year.[45] The city has explained that these penalties were designed to incentivize compliance, and that "the cost of non-compliance is only slightly lower than compliance estimates, but still substantial enough to encourage compliance."[46] Reno's BPS issues fines of $100, $250, and $500

Conditioning Engineers, Washington State Clean Buildings Performance Standard (2021).

36 Sen. Warnick, proposal E3SHB 1257 (April 4, 2019) **https://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Amendments/Senate/1257-S3.E%20AMS%20WARN%20MOOR%20067.pdf**.

37 Chula Vista, Cal., Ordinance No. 3498, §15.26.050(I)(2) (2021).

38 Chula Vista, Cal., Ordinance No. 3498 (2021).

39 Draft Multifamily and Commercial Benchmarking and Conservation Ordinance V2, 15.26.050(I)(2)(b) **https://chulavista.legistar.com/View.ashx?M=F&ID=9178784&GUID=2A25FA19-485A-4C88-B009-BA7779B19ACC**.

40 City of Chula Vista, City Council Meeting, at 2:38:56 (Feb. 16, 2021), **https://pub-chulavista.escribemeetings.com/Players/ISIStandAlonePlayer.aspx?Id=ddac2cce-98e1-4c95-9b82-f2ab5aee49fe**.

41 *Id.*

42 St. Louis, Mo., Ordinance 71132, §4 (2020).

43 Building Energy Exchange St. Louis, *BEPS Pathways*, **https://www.be-exstl.org/beps** (last visited June 28, 2022).

44 St. Louis, Mo., Ordinance 71132, §12 (2020); STL Benchmarking Ordinance, FAQs, **https://www.stlbenchmarking.com/FAQs/#violations-enforcement**, (last visited June 28, 2022).

45 San José Energy and Water Building Performance Ordinance, FAQs, (Apr. 22, 2021), **https://www.sanjoseca.gov/home/showpublisheddocument/38167/637564951072770000**.

46 Kerrie Romanov, *Memorandum on Energy and Water Building Performance Ordinance*, (Nov. 29, 2018), **https://sanjose.legistar.com/View.ashx?M=F&ID=6809301&GUID=55EDF8E8-E52F-4748-ACC8-3B4B392D0499**.

successively as a building fails to comply and receives notice.[47] The city has indicated that these fees were set to give multiple opportunities to comply and to increase in severity based on the lateness of submission.[48]

Montgomery County, Maryland is restricted in how it can assess penalties because Maryland state law currently caps civil penalties for local laws at $1,000 per offense.[49] The county has warned that because of that cap and the administrative burden of assessing multiple penalties, the final penalty for violating the BPS under current statute would likely be less than the cost of compliance.[50] The Montgomery County Commissioner has stated that the goal "would be to establish a penalty for noncompliance such that compliance is preferred."[51] To remove these constraints, legislation has been introduced in the state legislature to allow counties to increase the penalty amount to up to $10 per square foot of gross floor area to enforce local building energy performance laws, a penalty that would be similar to jurisdictions that use a building size formula for penalties, like Washington D.C.[52]

In Colorado's statute authorizing a statewide BPS, the legislature established that penalties under the standard will be assessed as a flat fee of $2,000 for a first violation and $5,000 for subsequent violations.[53] We have been unable to find a clear explanation for why the legislature selected those amounts. Notably, the initial draft of the bill also subjected violations to a penalty of $.02 per square foot of gross floor area of the covered building for each day that the violations continue.[54] However, that language was struck in an amendment that passed without objection, leaving just the flat fees as the penalty for non-compliance.[55]

IV. Assessing Penalty Approaches

Questions remain about which penalty formulas will best incentivize compliance and further the goal of reducing emissions. There are two main dimensions against which a penalty may be assessed: its ability to deter non-compliance and its vulnerability to legal challenge. We also briefly consider the importance of how collected penalty funds are used by different jurisdictions.

Deterrent Effect

The threat of a fine must be enough to encourage compliance. As described by the New York City Department of Environmental Protection Chief Climate Officer and Commissioner Rohit Aggarwala, "every fine… represents an abject

47 Reno, Nev., Code ch. 14.30 §14.30.014 (2022).

48 City of Reno, *Staff Report (For Possible Action) Ordinance 10146*, (Dec. 12, 2018 10:00am), **http://renocitynv.iqm2.com/Citizens/Detail_LegiFile.aspx?ID=10146&highlightTerms=energy%20benchmarking**.

49 Montgomery County Department of Environmental Protection, Building Energy Performance Standards in Montgomery County, Md, 101 (Sept. 2020), **https://www.montgomerycountymd.gov/council/Resources/Files/agenda/cm/2022/20220328/20220328_TE2.pdf**.

50 *Id.*

51 Marc Elrich, *Re: Senate Bill 81 – Charter Counties - Enforcement of Local Building Performance Laws (Building Energy Performance Standards Act of 2022) – Support*, (Feb. 2, 2022), **https://mgaleg.maryland.gov/cmte_testimony/2022/ehe/15IB6f2_qFy6MjAj2ecLPWdTygH-7foLFc.pdf**.

52 H.B. 0061, 2022 Leg., 444th Sess. (Md. 2022); S.B. 0081, 2022 Leg., 444th Sess. (Md. 2022).

53 House Bill 21-1286, 73rd Gen. Assemb., 1st Reg. Sess. §4 25-7-122(1)(i) (Colo. 2021).

54 House Bill 21-1286, 73rd Gen. Assemb., 1st Reg. Sess. §3 25-7-122(1)(i) (Colo. 2021), **https://leg.colorado.gov/sites/default/files/documents/2021A/bills/2021a_1286_01.pdf** (an initial draft of House Bill 21-1286)

55 Colorado Committee on Energy & Environment, H.B. 1286 Amendment L.0004, **https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2021A/amendments/HB1286_L.004.pdf**. Passed without objection, see h**ttps://leg.colorado.gov/content/6c71904f7ff76441872586cd-006b84a1-hb21-1286-3-activity-vote-summary**.

failure of [the BPS's] intentions."[56] Because none of the jurisdictions have yet completed a compliance cycle and assessed penalties, it is unclear which types will be most effective. Numerous jurisdictions explicitly stated in determining their formulations that the cost of non-compliance should be greater than the cost of compliance, otherwise buildings may choose to pay the fine, making no further progress towards the goal of reducing emissions. Proportional penalties specifically calculated to reflect the cost of compliance, such as in Boston, Denver, and Washington D.C., appear on their face to be created with the goal of incentivizing compliance. Montgomery County's efforts to amend state law also indicate that goal.

It is less clear how flat fees, such as those used in Chula Vista, Colorado, and Reno, will be perceived by building owners when compared to the cost of compliance. San José specifically has stated that its flat fees were designed to be substantial enough to encourage compliance, even if still less than the actual cost of compliance; however, with yearly caps much lower than in other jurisdictions, it is yet to be seen how effective those penalty amounts will be. We predict that BPSs with penalties greater than the cost of compliance will have the most success in incentivizing building owners to rethink energy usage. A flat fee penalty, although simpler, may provide an easy and cost-effective way for owners to avoid compliance.

Case Study: Colorado

The implementation of the newly authorized BPS in Colorado provides an interesting case study regarding penalties and how they may affect behavior. The Colorado Building Performance Standards Task Force, which has been assigned to develop the state's BPS, has recently discussed the challenges associated with implementing a BPS that is statutorily bound to penalize non-compliance using a pre-set flat fee of $2,000 for a first violation and $5,000 for subsequent violations.[57] One of the Task Force's goals is to "[s]hape non-compliance penalties in ways that support the business case for improvements."[58] However, as discussed in a Task Force session focused on compliance, the fact that the fines are "written in statute and cannot be changed" is concerning because they "may not be much of an incentive as compared to major renovation costs."[59] The Task Force noted that they need to "ensure the carrot is more tempting than the stick" or else buildings may just choose to pay the fine.[60] Right now, it is not clear how they will be able to make the carrot more tempting. For example, one building owner remarked to a Task Force member that they "can't imagine any of these [required improvements under the BPS] will cost less than that fine."[61] Because of the constraints outlined in statute, the Task Force noted that the Colorado Air Quality Control Commission "will have to grapple with issues of the fees for non-compliance to ensure that folks don't simply pay the fine for non-compliance."[62]

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56 New York City Council, *Committee on Environmental Protection Jointly With Committee On Housing and Building*, (Apr. 13, 2022), **https://legistar.council.nyc.gov/View.ashx?M=F&ID=11001552&GUID=3C4B6260-7DB8-4204-A08D-CA31EF3A1FE8**.

57 Colorado Energy Office, *Building Performance Standards*, **https://energyoffice.colorado.gov/climate-energy/energy-policy/building-performance-standards** (last visited Jun. 28, 2022); House Bill 21-1286, 73rd Gen. Assemb., 1st Reg. Sess. §4 25-7-122(1)(i) (Colo. 2021).

58 Colorado Energy Office, *BPS Task Force Meeting #2*, **https://drive.google.com/file/d/1oyWzi_s2reCnDRkYE-ZI-Xp4T2rYjkVKT/view** (last visited Jun. 28, 2022).

59 Colorado Energy Office, *BPS Task Force Meeting #9: Adjusted Compliance and Programs for Support*, (May 25, 2022), **https://www.youtube.com/watch?v=Hb4uPSU-4Zzg** at 1:20:41. *Also documented at* **https://drive.google.com/file/d/1BRHOP5IOeljfyzSJUMP9Kij39wI2NeOc/view**.

60 *Id.*

61 *Id.*

62 *Id.* at 8.

This example demonstrates the concerns that accompany fines set by statute that may not necessarily be reflective of the circumstances of a specific building or violation. Colorado's fee for non-compliance is relatively small compared to other standards discussed in this memo: Washington State, for example, rejected an effort to cap its fines at $25,000, which would still have been five times higher than Colorado's highest penalty, and instead will penalize without a cap.[63] The flat fee structure is also unable to scale upwards to respond to more egregious violations or violations by larger buildings that are more likely able to pay the fine without issue. If bringing a building into compliance with an energy efficiency standard is more costly than paying a flat fee, individual owners can hardly be blamed for choosing not to comply.

Penalty Collection

Although compliance with building standards may be preferable to penalty collection, some jurisdictions have chosen to funnel penalties collected towards the goal of reducing emissions and encouraging compliance. For example, Boston,[64] Washington D.C.,[65] Colorado,[66] Washington State,[67] and Reno[68] all explicitly direct that the penalties they collect be used towards goals such as supporting sustainable energy, reducing GHG emissions, and combating climate change. The Chief Climate Officer at the New York City Comptroller's Office has similarly recommended in testimony that penalties collected under the City's BPS should be used to support retrofits for affordable housing.[69] These policies help alleviate the harms of non-compliance, as collected funds would still be used to reach the goal of reducing building emissions overall. Directing penalty fees towards government goals of climate change and environmental justice may also help to ward off legal challenges.

Legal Concerns for Penalties

In addition to considering the efficacy of different types of penalties to deter non-compliance, policymakers also need to consider the extent to which different types of penalties may be vulnerable to legal challenge. We see four main legal risks that policymakers should contemplate, which feature in a recent legal challenge to New York City's Local Law 97, *Glen Oaks Village Owners v. City of New York*. However, as noted above, some jurisdictions have indicated that they will take a facilitative approach to compliance, seeking to help building owners comply rather than merely punish non-compliance with penalties. Such jurisdictions may be less likely to face legal challenges because of the inherent flexibility their approach offers.

Arbitrary and capricious

To the extent that performance standards with unclear penalty structures or flat fees delegate authority to administrative agencies to set penalties via implementing rules, these rules may be vulnerable to the challenge of arbitrary and capricious rulemaking. While courts have a fairly generous standard for evaluating agency decisions, penalties that lack any publicly available rationales might be found to lack an understandable and fact-based rational basis.

63 Sen. Warnick, proposal E3SHB 1257 (April 15, 2019), **https://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Amendments/Senate/1257-S3.E%20AMS%20WARN%20MOOR%20067.pdf**.

64 Boston, Mass., Ordinance Amending City of Boston Code, Ordinances Ch. VII, §7-2.2(g) (2021).

65 66 D.C.R 1344 III § 301(g) (2019).

66 House Bill 21-1286, 73rd Gen. Assemb., 1st Reg. Sess. §3 24-38.5-102/6 (Colo. 2021).

67 Wash. Rev. Code §19.27A.210(11) (2021).

68 Reno, Nev., Code ch. 14.30. §14.30.014(b) (2022).

69 Climate Mobilization Act, Hearing on Oversight – Local Law 97 Before the New York City Council Comm. on Env. Protection, (Apr. 14, 2022) (statement of Louise Yeung, Chief Climate Officer).

In New York State, Article 78 of the CPLR allows a court to hold an agency accountable for decision making that lacks substantial evidence, is arbitrary and capricious, or is an abuse of discretion.[70] Critically, however, the courts have interpreted this requirement such that an agency only needs to show that it possessed a rational basis for its decision.[71] Further, a reviewing court does not examine the facts de novo when considering the basis for a decision.[72] Other states discussed in this article have deferential standards for arbitrary and capricious rulemaking as well.[73]

Unauthorized tax

Plaintiffs in *Glen Oaks* also argue that LL97 functions as an unauthorized and improper tax, meant to "fill [the City's] coffers."[74] If the penalties from LL97 are found to be a disguised tax, the penalties could be struck down because New York City can only impose taxes that New York State explicitly authorizes, and New York State has not explicitly authorized the city to place a tax on greenhouse gas emissions. Looking beyond New York City, courts have struggled to clearly and consistently delineate when a policy should be considered a penalty or fee rather than a tax. However, penalties seem to differ from taxes in several important ways. The jurisprudence regarding the distinction between taxes and fees varies in each state is often muddled. In many states, however, one of the factors that is used to distinguish penalties from taxes is how the revenue generated by each is put to use. It is acceptable for taxes to support a general government desire to raise revenue, but penalty revenue should generally be tied to non-compliance.[75] Issues may arise if the usage of penalty revenue, once collected, is unspecified. For example, Local Law 97 in New York does not indicate where the funds collected from penalties will be used. Unlike in other jurisdictions, New York does not redirect these funds into environmental justice or climate resilience initiatives.

Other BPS requirements could also encounter claims of being an unauthorized and improper tax depending on how penalties are classified by the local standards. Some cities and states have combatted this by making clear that money collected through fees, fines, and penalties will be reinvested towards energy efficiency improvements and environmental justice initiatives. These municipalities are less likely to face accusations of imposing an improper tax than those cities and states who simply collect fees into a general government fund. Cities with home rule requirements that mandate state-level authorization for new taxes may also face similar concerns as New York City. The success of legal challenges will depend on whether the penalties are considered to be a tax and if the state legislature has grated permission to tax.

Due Process

The property interest protected by the Due Process Clause of the 14th Amendment may be invoked to challenge building performance standards. Possible due process violations might arise from applying a BPS "retroactively" to all buildings rather than only new construction, from vagueness in the statutory language, and if non-compliance penalties are found to be excessively costly. These due process arguments have been raised by plaintiffs in *Glen Oaks*.

However, generally speaking, "substantive due process claims against local governments applying land use restrictions are 'most unlikely

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70 N.Y. CPLR 78

71 *See Heintz v. Brown*, 80 N.Y.2d 998, 1001 (N.Y. 1992) citing *Pell v. Board of Education*, 34 N.Y.2d 222, 230-31 (N.Y. 1974).

72 *Marsh v. Hanley*, 50 A.D.2d 687, (N.Y. App. Div. 1975).

73 *See, e.g., Sikorski's Case*, 455 Mass. 477 (Mass. 2009); Pitts v. Perluss, 58 Cal.2d 824, 846 (Cal. 1962).

74 Complaint at 15.

75 *Id.*

to succeed.'"[76] For example, courts have been fairly deferential to legislators regarding purported retroactive application of the law.[77] Additionally, laws with retroactive application are not per se unconstitutional. Concerning due process claims related to vagueness, "the [Supreme] Court has proven itself to be even less inclined to invalidate governmental deprivation"[78] for cases that involve monetary harms. Due process concerns for potentially excessive penalty fees have also been largely unsuccessful in the court system.[79]

Preemption

Broadly, building performance standards passed by local governments may face preemption challenges at the state or federal level. For example, the plaintiffs in *Glen Oaks* argue that Local Law 97 is preempted by existing New York State regulations like the Climate Leadership and Community Protection Act. While not the focus of this paper, preemption challenges may prove a formidable obstacle to local climate laws and local officials should conduct a careful review of existing state laws to ensure that a local BPS would not be preempted.[80]

V. Conclusion

Many of the building performance standards discussed herein have yet to be rigorously evaluated, as the deadlines for compliance have not yet arrived. However, it appears that one of the most important factors in the relative success and failure of a BPS is likely to be its penalty scheme. The most promising penalties appear to be those that are specifically tailored to encourage compliance. Penalties that are established based on specific, energy-based principles may appear less arbitrary to the general public and to building owners. Such penalties may also be more effective in encouraging compliance because many flat fees are set at quite low values, reflecting the standard cost of general administrative fees. Finally, penalty programs that direct revenues towards investment in building improvements may be better protected from legal challenges.

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76 Joseph D. Richards and Alyssa A. Ruge, *Most Unlikely to Succeed: Substantive Due Process Claims Against Local Governments Applying Land Use Restrictions*, 78 Fla. B.J. 34 (2004).

77 Andrew C. Weiler, *Has Due Process Struck Out? The Judicial Rubberstamping of Retroactive Economic Laws*, 42 Duke L.J. 1069 (1993).

78 Fifth Amendment-Due Process-Void for Vagueness Doctrine-*Sessions v Damaya*, 132 Harv. L. Rev. 367 (2018).

79 Glenn Harlan Reynolds and Penny J.White, *The New Due Process: Fairness in a Fee-Driven State*, 88 Tenn. L. Rev. 1025 (2021).

80 Richard Schragger, *The Attack on American Cities*, UVA Law (2020), **https://www.law.virginia.edu/uvalawyer/article/attack-american-cities**.

Appendix 1

Performance Standard	Target in Standard	Alternative Compliance Pathways	Penalty for Non-Compliance
		BOSTON[1]	
GHG	Emissions caps are set by building type.	Individual compliance schedules and hardship compliance plans are available. Buildings may also use the municipal electricity aggregation program, purchase renewable energy certificates, or enter power purchase agreements towards compliance. Buildings can also make an ACP of $234 per metric ton of CO2e.	If a building owner fails to comply with the performance standards, they are assessed a daily fine of either $300 or $1,000, based on the size of their building.
		BOULDER[2]	
Energy Efficiency or alternative compliance metrics	Achieving ENERGY STAR certification, LEED Building Operations and Maintenance certification, "a pattern of significant and consistent improvements in energy efficiency or greenhouse gas emissions," or other exceptions.	Conducting an energy assessment, lighting upgrades, and retrocommissioning.	After providing warning to the building owner and 14 days to correct the violation and an opportunity for a hearing, the City may: 1. Impose a penalty of $0.0025 per square foot per day, not to exceed $1,000 per day; 2. Issue any order reasonably calculated to ensure compliance.

1 Boston, Mass., Ordinance Amending City of Boston Code, Ordinances Ch. VII, §§7-2.1 and 7-2.2 (2021).

2 Boulder, Colo., Code ch. 7.7 (2022).

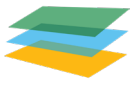
Performance Standard	Target in Standard	Alternative Compliance Pathways	Penalty for Non-Compliance
		CHULA VISTA[3]	
Energy Efficiency	Achieving ENERGY STAR score of 80, ENERGY STAR certification, or LEED Existing Building Certification for three of preceding five years.	Conservation requirements available with variances by building type, requiring actions such as decreasing site EUI and conducting an energy audit and retrocommissioning.	Non-compliant buildings are given notice, then 60 days later, fines of up to $750, $1,500, or $2,250 may be levied on a per incident basis based on size of building, as well as public disclosure of non-compliance.
		COLORADO[4]	
Energy Efficiency	Specific standards not yet set, but likely based on EUI.	Specific standards not yet set.	Violations of the standard will be penalized with a fine not to exceed $2,000 for a first violation and $5,000 for a subsequent violation.
		DENVER[5]	
Energy Efficiency	Maximum EUI set by building type.	An alternate compliance rule will be promulgated with available adjustments for aspects such as timing and end goal. Solar power generation is credited towards energy use.	Violations will be subject to a penalty amount of up to $0.70 per year for each required kBtu reduction that the building fails to achieve in that year.

3 Chula Vista, Cal., Ordinance No. 3498 (2021).
4 House Bill 21-1286, 73rd Gen. Assemb., 1st Reg. Sess. (Colo. 2021).
5 Denver, Colo., Council Bill No. 21-1310 (2021).

Performance Standard	Target in Standard	Alternative Compliance Pathways	Penalty for Non-Compliance
		MONTGOMERY COUNTY, MD[6]	
Energy Efficiency	Maximum EUI set by building type.	Non-compliant building owners can submit a building performance improvement plan, which will include an explanation of the economic infeasibility or other reasons for non-compliance, a list of potential improvement measures for the building, a plan and timeline for achieving energy improvements, and procedures for correcting non-compliance with the plan.	Non-compliant buildings will be cited with a Class A violation under Method 2 regulations.
		NEW YORK CITY[7]	
GHG	Emissions caps are set by building type.	Renewable energy credits (RECs) and offsets, credit for installing distributed generation on-site, and specific adjustments are available. Alternatively, a building can make an ACP calculated as the difference between the building's emissions limit and their reported emissions, multiplied by $268, imposed annually.	–

6 Montgomery County, Md., Bill No. 16-21 (2022).

7 N.Y.C. Local Law No. 97 (2019).



Performance Standard	Target in Standard	Alternative Compliance Pathways	Penalty for Non-Compliance
		RENO[8]	
Energy Efficiency	Must meet one of these twice in seven years: • The property received an ENERGY STAR score of 50 or higher. • The property's energy use intensity (EUI) was equivalent to or better than the performance of 50 percent of all covered properties of its type. • The property achieved an ENERGY STAR score at least 15 points higher than the score it received during its baseline year. • The property's weather normalized source EUI was reduced by at least 10 percent relative to its performance in the baseline year.	Performance pathway alternative available with a variety of options, such as completing retuning or an energy audit, performing on-going commissioning of its electrical and mechanical systems, or receiving specific LEED certifications.	Fines are assessed based on frequency and time. A written notice may be issued for the violation; and • If the required information is not reported within 30 days of notice, the building may be penalized up to $100.00 • If the required information is not reported within 30 days of the first fine, the building may be penalized up to $250.00 • If the required information is not reported within 30 days of the second fine, the building may be penalized up to $500.00

8 Reno, Nev., Code ch. 14.30 (2022).

Performance Standard	Target in Standard	Alternative Compliance Pathways	Penalty for Non-Compliance
		SAN JOSÉ[9]	
Energy Efficiency	Must meet one of these for two of three years: • ENERGY STAR Score of 75. • Improve ENERGY STAR Score by 15 points or more relative to performance during the baseline year. • Weather normalized EUI 25% below calculated mean for that property type. • Reduce weather normalized EUI by at least 15% relative to performance during the baseline year.	Buildings can choose among three improvement pathways: conducting an audit, performing retro-commissioning, or adopting efficiency improvement measures.	Buildings under 50,000 square feet may be fined $25 for each day of non-compliance, up to $2,500 per calendar year. Buildings 50,000 square feet and above may be fined $50 for each day of non-compliance, up to $5,000 per calendar year.
		ST. LOUIS[10]	
Energy Efficiency	Maximum EUI set no lower than the 65th percentile for each building type.	The alternative compliance path option allows buildings to reduce their EUI by 50% of the difference between their 2018 baseline EUI performance and the EUI standard for their property type, and buildings with unique circumstances can pursue a custom alternative compliance path. An Early Adopter program with compliance options for multiple cycles is available as well. The BPS statute authorizes an ACP option for non-compliant buildings but does not specify the amount.	Non-compliant buildings will be penalized with fines and/or loss of occupancy permits for future tenants. The City has specified flat fee penalty amounts for a failure to report benchmarking data or a misrepresentation of the data, but not for a building that reports accurately but does not meet the BPS threshold.

9 San José, Cal., Code ch. 17.85 (2022).

10 St. Louis, Mo., Ordinance 71132 (2020).

Performance Standard	Target in Standard	Alternative Compliance Pathways	Penalty for Non-Compliance
		WASHINGTON, D.C.[11]	
Energy Efficiency	Minimum ENERGY STAR score or maximum EUI are set by building type.	Four compliance pathways available: • Performance Path: Reduce energy usage 20% • Prescriptive Path: Implement cost-effective energy efficiency measures • Standard Target Path: For property types above the national median, reach the standard • Alternative Compliance Paths: Allows an owner to apply to follow a path with special criteria	If building is still non-compliant at the end of the 5-year compliance period, it can be fined an ACP with maximum penalty of $10/sf of gross floor area, and not greater than $7,500,000, adjusted by progress towards pathway. Can also be assessed civil infraction penalties, fines, or fees, and face civil enforcement action.
		WASHINGTON STATE[12]	
Energy Efficiency	Maximum EUI set by building type.	A conditional compliance method is available, which requires implementation of specific energy efficiency standards. A non-compliance mitigation plan is also available for covered commercial buildings that are out of compliance by the scheduled compliance date and have not corrected the violation by the date noted in a Notice.	After notice, non-compliant buildings can be fined $5,000 plus an amount based on the duration of a continuing violation, which cannot exceed a daily amount of $1 per year per gross square foot of floor area. The daily amount is adjusted to reflect the building's work towards compliance.

11 Washington, D.C., CleanEnergy DC Omnibus Amendment Act of 2018, D.C. Law 22-257 (2019); see also District Of Columbia Office of Energy and Environment, *Building Energy Performance Standard*, https://dc.beam-portal.org/helpdesk/kb/BEPS/ (last visited June 28, 2022).

12 American Society of Heating, Refrigerating and Air-Conditioning Engineers, Washington State Clean Buildings Performance Standard (2021); see also Wash. Rev. Code §19.27A.210 (2021).

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