

Legal Analysis of Model Municipal Green Building Ordinance

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This companion to the model municipal green building ordinance written by CCCL¹ (hereinafter “the ordinance” or “the model ordinance”) discusses legal issues that may arise with respect to the ordinance under federal and New York state law. The issues of non-delegation, incorporation by reference, antitrust, preemption, and intergovernmental immunity doctrines will be discussed. The following discussion will show how the model ordinance has been structured in an effort to avoid legal impediments while effecting green building practices to the fullest extent possible. The purpose of this memorandum is to provide legal analysis and background. It does not constitute legal advice; municipalities should consult with their own counsel.

I. Sources of Authority

It is within the power of a municipality in New York state to enact the model ordinance. New York state law authorizes municipalities to impose green building requirements “regarding the sustainability of sites, water efficiency, renewable energy, and indoor environmental quality – to name a few”² – through zoning³ and site plan regulations.⁴ In particular, zoning and site plan statutes that delegate authority from the state to municipalities authorize adoption of “various provisions classifying and regulating the use of land within its borders in the interest of public health, safety, and general welfare,” including environmental purposes.⁵ New York state law allows local governments to adopt energy efficiency standards more restrictive than the state Energy Conservation Construction Code.⁶

¹ Columbia Law School Center for Climate Change Law, Model Municipal Green Building Ordinance (2010) (hereinafter *Ordinance*), available at <http://www.law.columbia.edu/centers/climatechange/resources/municipal>.

² John Nolon & Jennie Nolon, *Local Green Building Laws in New York: Issues and Opportunities*, N.Y. L.J., April 15, 2009 (arguing that state law provides authority to local governments to adopt green building laws). See also John Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365 (2002) and John Nolon, *Local Authority to Adopt Environmental Laws*, N.Y. L.J., June 20, 2001.

³ E.g., N.Y. TOWN LAW §§ 261–263 (2010) (authorizing towns to zone).

⁴ E.g., N.Y. GEN. CITY LAW § 27-a(2) (authorizing city site plan regulation).

⁵ Nolon, *Local Authority to Adopt Environmental Laws*, N.Y. L.J. (June 20, 2001).

⁶ John Nolon, *The Land Use Stabilization Wedge Strategy: Shifting Ground to Mitigate Climate Change*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 1 (2009) (citing N.Y. ENERGY LAW § 11-109 (2009)).

Furthermore, municipalities may draw additional authority to regulate from the Municipal Home Rule Law,⁷ which has been construed to authorize local environmental laws.⁸

II. Non-Delegation

The model ordinance does not delegate discretion to a third party entity to execute or create law. The ordinance gives the municipality control over the green building regulation process, and U.S. Green Building Council (USGBC), the U.S. Environmental Protection Agency (EPA), and U.S. Department of Energy (DOE) do not execute or independently create the law's content. The ordinance empowers third-party home energy raters, such as those certified by the Residential Energy Services Network (RESNET), to conduct home energy rating tests, but this delegation is narrow and legitimate.

Under New York state law, a local legislative body does not have the "right to relinquish legislative functions to private individuals or to a private association or corporation."⁹ However, municipalities may delegate authority to private entities in a manner "closely circumscribed and regulated so that no one could seriously entertain a fear that the government had yielded any real sovereign power."¹⁰

LEED standards are promulgated by USGBC and Energy Star standards are promulgated by EPA and DOE, but incorporating these standards by reference into law does not constitute a delegation, as no power to create law is delegated.¹¹ Nor is any power to execute the law delegated to these entities. The model ordinance stipulates that the Green Building Compliance Official (GBCO), not USGBC, EPA, DOE, or any other private entity, shall execute the law.¹² By contrast, a green building ordinance that requires USGBC certification essentially gives USGBC the power to determine property rights and could illegitimately delegate authority.

Though an Energy Star home report must be conducted by a third party Home Energy Rating System (HERS) rater or equivalently competent rater,¹³ this is not a delegation of the power to execute law. Instead, the requirement that a rater be certified by HERS or be equivalently competent merely

⁷ N.Y. MUN. HOME RULE LAW § 10.

⁸ *E.g.*, Ardizzone v. Elliot, 75 N.Y.2d 150 (1989).

⁹ People v. Mobil Oil Corp., 422 N.Y.S.2d 589, 591 (N.Y. Dist. Ct. 1979).

¹⁰ *Id.* at 591.

¹¹ *See infra* Part III (discussing the legality of incorporation by reference in detail).

¹² *Ordinance*, *supra* note 1, § 6.

¹³ *Ordinance*, *supra* note 1, § 6(A)(1)(a).

specifies technical qualifications to ensure a rater's competency even if this were a delegation. Under New York law, "[t]he legislature may delegate powers of execution and administration of its laws, but it must provide for limits of administrative discretion."¹⁴ The rater's discretion is limited. In preparing the Energy Star home report, the home energy rater conducts technical tests to determine a home's energy efficiency, represented by a numerical score.¹⁵ Home energy raters do not use discretion in deriving this score; conducting physical determinations is the full extent of their authority. In addition, the model ordinance includes procedures, such as the right to appeal, which serve as a further limitation on the rater's authority.¹⁶

In conclusion, the model ordinance does not delegate municipal power to third parties. The municipality adopts certain standards that have been formulated by USGBC, EPA, and DOE, but does not give these or other third parties the power to change those standards. Instead, an affirmative act of the municipality is required to adopt any revisions to the LEED standards. Technical qualifications are set forth for persons to perform certain functions. Even if these provisions were somehow deemed to be delegation, such delegation is appropriately circumscribed by the model ordinance's exemptions, waivers, and appeal procedures.

III. Incorporation by Reference

The model ordinance incorporates standards created by third-party organizations.¹⁷ The New York State Constitution bars incorporation by reference of outside laws.¹⁸ However, courts have limited this provision's scope to incorporation of actual laws, not incorporation of standards created by third-party organizations.¹⁹ For example, a municipal ordinance could not incorporate the law of a neighboring municipality by reference. Yet, industrial codes are not laws and therefore there is no constitutional bar on the incorporation of industrial codes.²⁰

¹⁴ *Mobil Oil*, 422 N.Y.S.2d at 591.

¹⁵ Residential Energy Services Network, What Is A Home Energy Rating?, <http://www.resnet.us/home-energy-ratings>.

¹⁶ *Mobil Oil*, 422 N.Y.S.2d at 591. Cf. *Fink v. Cole*, 97 N.E.2d 873 (N.Y. 1951) (Authority to use discretion in awarding licenses and collect fees delegated to jockey club held illegitimate).

¹⁷ *Ordinance*, *supra* note 1, § 4 (describing the green building rating systems incorporated).

¹⁸ N.Y. Constitution, article III, § 16.

¹⁹ *Town of Islip v. Cuomo*, 541 N.Y.S.2d 829, 831 (N.Y. App. Div. 1989).

²⁰ See *People v. Halpern*, 361 N.Y.S.2d 578 (N.Y. City Ct. 1974).

New York City incorporated by reference the bat rules of Major League Baseball into an ordinance regulating bats used in high school baseball games. It was held that the ordinance “merely incorporates by reference a set of rules adopted by a private organization with considerable expertise in evaluating the specifications of baseball bats.”²¹ New York courts have distinguished the incorporation of professional standards from impermissible delegations of legislative functions.²² Incorporating LEED and Energy Star is akin to incorporating third-party baseball bat standards and is likewise permissible.

However, incorporation of industrial codes by reference is subject to limitations. The constitutional provision against incorporation by reference is meant to prevent “practical difficulties in determining the content of the law.”²³ To address this concern, the model ordinance stipulates that copies of all incorporated professional standards must be maintained by the municipal clerk.²⁴ This provides the requisite “adequate notice of the conduct proscribed,” because any uncertainty with respect to the law’s content may be relieved by requesting a copy of the standards from the municipality.²⁵ The LEED standards are also available from the USGBC and the Energy Star standards are also available from EPA and DOE.

Incorporation by reference and non-delegation both require certainty in the text of the incorporated standard and bar change of the underlying standard without legislative action. Problems arise when an ordinance purports to incorporate “the most recent version of LEED standards.” Under this arrangement, any updates to the standard made by USGBC become law without any governmental action. By automatically incorporating by reference the most recent version of a green building standard, such an ordinance impermissibly delegates sovereign power to make law.²⁶

Third parties do not control the model ordinance’s content. Instead, the model ordinance empowers the Green Building Compliance Official to update standards through an administrative process.²⁷ An unbounded delegation to an administrative official is illegitimate, but the ordinance’s delegation of authority to update the standards to the GBCO is legitimate for several reasons. The

²¹ USA Baseball v. City of New York, 509 F.Supp.2d 285, 299 (S.D.N.Y. 2007) (internal citation and quotation omitted).

²² *Id.*

²³ Town of Islip, 541 N.Y.S.2d at 832.

²⁴ Ordinance, *supra* note 1, § 4(A).

²⁵ People v. Shore Realty Corp., 486 N.Y.S.2d 124, 127 (N.Y. Dist. Ct. 1984). *See also* Syracuse v. Penny, 300 N.Y.S.2d 679, 683 (N.Y. Sup. Ct. 1969).

²⁶ Mobil Oil, at 887.

²⁷ Ordinance, *supra* note 1, § 4(B).

delegation is bounded by specific factors and provides guidance on how to evaluate them.²⁸ The decision to update standards is specific, objective, and within the technical expertise of the GBCO.²⁹ Furthermore, the delegation does not empower the GBCO to change the basic enabling legislation; it merely allows him or her to fill in the details of the legislative mandate.³⁰ The GBCO's decisions are also restrained by general standards for promulgating regulations.³¹

IV. Antitrust³²

We have considered whether the model ordinance raises antitrust issues.³³ The Sherman Antitrust Act,³⁴ the Clayton Antitrust Act,³⁵ and the Donnelly Act³⁶ make unreasonably anticompetitive business practices illegal under federal and New York state law.³⁷ Acts of municipalities that allegedly suppress competition have been the object of antitrust scrutiny.³⁸ However, the model ordinance should not be vulnerable to antitrust liability because it is a unilateral government act, does not unreasonably suppress competition, and qualifies for state action immunity from federal antitrust law.

Two parts of the model ordinance should be considered for possible anticompetitive impact. First, §§ 5(A)(1) and (2) of the model ordinance regulate some buildings under LEED. The LEED-NC

²⁸ *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987).

²⁹ See *Multiple Intervenors v. Pub. Serv. Com'n of State of N.Y.*, 557 N.Y.S.2d 250 (N.Y. Sup. Ct. 1990).

³⁰ *Rent Stabilization Ass'n of New York City, Inc. v. Higgins*, 83 N.Y.2d 156, 170 (1993).

³¹ See *Festa v. Leshen*, 537 N.Y.S.2d 147 (N.Y. App. Div. 1989).

³² Note that an individual has filed a class action suit against USGBC, among other causes of action, under the Sherman Act for USGBC's allegedly fraudulent claims that LEED buildings are 25-30% more energy efficient than other buildings. Complaint, *Henry Gifford v. U.S. Green Bldg. Council*, No. 10 Civ. 7747 (S.D.N.Y. Oct. 7, 2010), available at http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=541472. However, this suit does not directly affect municipalities seeking to implement green building laws. At the time of this writing, litigation in this case is ongoing. See also J. Cullen Howe, *Class Action Filed Against USGBC in Southern District of New York*, GREEN BUILDING LAW UPDATE SERVICE (Oct. 12, 2010) available at <http://blogs.law.columbia.edu/greenbuildinglaw/2010/10/12/class-action-filed-against-usgbc-in-southern-district-of-new-york/>.

³³ See Lester D. Steinman, *Mandating Compliance With Third-Party Green Building Standards: Red Flags for Local Governments*, MUNICIPAL LAWYER, Summer 2009, at 15.

³⁴ 15 U.S.C. §§ 1-7 (2006).

³⁵ 15 U.S.C. §§ 12-27 (2006).

³⁶ N.Y. GEN. BUS. LAW § 340 (2010).

³⁷ The analyses under these statutes are parallel for the purposes of the model ordinance. Federal courts have held that certain activities are per se unreasonable while New York courts have not, but this distinction is irrelevant to the model ordinance. See *Atkin v. Union Processing Corp.*, 457 N.Y.S.2d 152 (N.Y. App. Div. 1982). The Donnelly Act also does not account for a state action exemption. See *infra* Part IV.B.

³⁸ *E.g., Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1035 (2nd Cir. 1986).

Materials and Resources Credit 7 (MR-7) is attained when at least 50% of wood used in construction has been certified by the Forest Stewardship Council (FSC), a forest certification program that promotes responsible logging.³⁹ This may advantage FSC certified wood producers over non-FSC certified wood producers.⁴⁰ USGBC has implicitly acknowledged these anticompetitive concerns through proposed revisions to MR-7.⁴¹ FSC's competitors have alleged antitrust violations in a complaint with the Federal Trade Commission.⁴²

Second, buildings regulated under § 5(A)(3) must be inspected by a home energy rater, such as a HERS rater. This requirement arguably excludes other types of raters from the market. Each of these alleged restraints on competition will be analyzed in turn.

The analysis below will show that the model ordinance should not be vulnerable under antitrust law. Moreover, § 6(A)(1)(e) of the model ordinance contains a "safety valve" that further obviates antitrust concerns. Should an applicant show that any LEED points as implemented by the ordinance are illegally anticompetitive, this provision awards the applicant those points as though the applicant had complied with the standard. Therefore, the model ordinance does not compel any anticompetitive behavior.

A. Stating a facial claim against the model ordinance under antitrust law

To state a claim under § 1 of the Sherman Act or the Donnelly Act, a claimant must allege "unreasonable restraints of trade effected by a contract, combination..., or conspiracy between *separate* entities."⁴³ Unilateral actions of a single actor to regulate trade are not a violation of antitrust law. The model ordinance is an act of a local government and is not in concert with any other party. The mere relationship between a government and the subjects of its laws does not establish a conspiracy.⁴⁴

³⁹ U.S. Green Building Council, LEED for New Construction Rating System (2009), *available at* <http://www.usgbc.org/ShowFile.aspx?DocumentID=5546>.

⁴⁰ See Stephen Del Percio, *Revisiting Allied Tube and Noerr: The Antitrust Implications of Green Building Legislation & Case Law Considerations for Policymakers*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 239 (2009).

⁴¹ *Id.* at 243.

⁴² Letter from the Coalition for Fair Forest Certification to Federal Trade Commission (Oct. 20, 2009) *available at* http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=541470. FTC has not acted on the petition as of this writing. See also Monte Paulsen, *LEED Accused of 'Conspiracy to Monopolize'*, THE TYEE, Mar. 18, 2010.

⁴³ *Fisher v. City of Berkeley, Cal.*, 475 U.S. 260, 266 (1986) (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (internal quotation omitted, emphasis and ellipsis in original); *Thome v. Alexander & Louisa Calder Found.*, 890 N.Y.S.2d 16 (N.Y. App. Div. 2009) (stating equivalent proposition for New York state antitrust law).

⁴⁴ *Fisher*, 475 U.S. at 267.

However, some government acts can be characterized as hybrid schemes. In a hybrid scheme, private actors are granted a degree of regulatory power by governments.⁴⁵

The dichotomy between unilateral and concerted action recalls the analysis of delegation and incorporation by reference.⁴⁶ Because the model ordinance places full control of green building regulation in the hands of the municipality, it is a unilateral scheme. Hybrid schemes grant certain entities the power to exert the municipality's authority. Because the model ordinance does not distribute municipal authority to private entities, it is unilateral and the concerted act requirement cannot be met. Furthermore, the opportunity for appeal before an independent, quasi-judicial board that could provide relief to any anticompetitive impacts bolsters the characterization of the model ordinance as unilateral.⁴⁷ For these reasons, no facial claim against the model ordinance under antitrust law can likely be stated.

B. State action immunity from federal antitrust law

Even if an antitrust claim can be stated, the model ordinance is likely immune from federal antitrust liability. The Local Government Antitrust Act of 1984 prohibits monetary damages against municipalities pursuant to antitrust suits, but it does not limit the remedies of declaratory or injunctive relief. However, in *Parker v. Brown*, the Supreme Court held that the federal antitrust statutes lack the express intent to bind states and because states retain all legal authority not expressly taken from them by Congress, such restrictions cannot be inferred.⁴⁸ Therefore, states are immune from federal antitrust liability.⁴⁹ Municipalities can qualify for this immunity to the extent that they are carrying out state policy. As we will see, the model ordinance qualifies for this state action immunity to federal antitrust liability.⁵⁰

1. Extending *Parker* immunity to municipalities

Though *Parker* did not explicitly extend this immunity to localities, the Supreme Court held in *City of Columbia v. Omni Outdoor Advertising, Inc.* that an anticompetitive municipal act that is an

⁴⁵ Government schemes that are mere fronts for private conspiracies may also incur antitrust liability. *Id.* at 268-270. However, the model ordinance is not a front for a private scheme.

⁴⁶ See *supra* Parts II, III.

⁴⁷ *Hertz Corp. v. City of New York*, 1 F.3d 121 (2nd Cir. 1993) (analyzing *Fisher*).

⁴⁸ *Parker v. Brown*, 317 U.S. 341, 350 (1943).

⁴⁹ *Id.*

⁵⁰ The Donnelly Act offers no state action immunity. *Elec. Inspectors, Inc. v. Village of Lynbrook*, 740 N.Y.S.2d 412, 413 (N.Y. App. Div. 2002).

authorized implementation of state policy is accorded *Parker* immunity.⁵¹ That is, municipalities inherit *Parker* immunity from states to the extent that municipalities are the instrumentalities of state policy. The municipal act must be authorized by the state in two ways to obtain *Parker* immunity: the state must authorize the municipality to regulate and it must authorize the municipality to suppress competition.

In *Omni Outdoor*, the Supreme Court applied this test to ordinances enacted by the City of Columbia, South Carolina restricting billboard construction. Columbia Outdoor Advertising (COA) controlled 95% of the billboard market in Columbia and enjoyed close relations with city leaders.⁵² The ordinances at issue severely hindered Omni Outdoor, a Georgia-based billboard company, from competing with COA. The Court analyzed whether the anticompetitive billboard ordinances were authorized implementation of state policy and whether the ordinances were therefore accorded *Parker* immunity.

2. State authorization to regulate

The Court first examined whether the state had authorized the municipality to regulate. This analysis is “broader than what is applied to determine the legality of the municipality’s action under state law” and not exacting.⁵³ To prevent the *Parker* immunity doctrine “from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality’s action under state law.”⁵⁴ That is, a court’s federal antitrust analysis should be broad and general, not a duplicate of a state administrative court’s more detailed and scrutinizing analysis. The Court found that the South Carolina statutes authorizing local building and zoning regulation authorized Columbia to regulate billboards. The Court explicitly declined to ask whether the regulation as implemented in Columbia was legal as a matter of South Carolina law.

The model ordinance satisfies the lenient state authorization requirement. New York State law authorizes municipalities to control land uses through zoning and site plan regulations.⁵⁵ The State Energy Conservation Code authorizes local regulation of energy efficiency.⁵⁶ The model ordinance is

⁵¹ *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 370 (1991).

⁵² *Id.* at 367.

⁵³ *Id.* at 371–372.

⁵⁴ *Id.* at 372.

⁵⁵ See discussion *supra* Part I. However, the Supreme Court has held that home rule laws do not authorize localities to promulgate anticompetitive ordinances. *Cnty. Communications Co. v. City of Boulder*, 455 U.S. 40, 56 (1982).

⁵⁶ See *supra* text accompanying note 6.

implemented pursuant to the powers granted in these statutes, and therefore it should be deemed to be within the broad grant of state authority for the liberal purposes *Parker* immunity.

3. State authorization to suppress competition

For a municipality to receive *Parker* immunity, a delegating state statute must also clearly articulate a state policy to authorize anticompetitive conduct on the part of the municipality. However, clear articulation of a policy to authorize anticompetitive conduct does not equate to explicitly permitting displacement of competition.⁵⁷ To be clearly articulated, it is sufficient to show that the suppression of competition is the foreseeable result of the activity authorized by the statute.⁵⁸ In *Omni Outdoor*, the Court noted that, despite a lack of explicit language in the South Carolina statutes permitting displacement of competition, the statutes still “amply” meet this requirement.⁵⁹ According to the Court, displacement of competition is the essence of zoning regulation in the sense that permitting some uses and restricting others is inherently anticompetitive.

Similarly, New York state statutes authorize municipalities to regulate zoning, buildings, and energy use.⁶⁰ For the same reason that the Court found that displacement of competition was the foreseeable result of authorizing Columbia to enact building ordinances, restrictions on building materials and inspectors, as in credit MR-7 and home energy rater requirements, are the foreseeable result of authorizing a municipality to enact the model ordinance. As in *Omni Outdoor*, the model ordinance satisfies this element. Therefore, because both elements necessary for state action immunity—authorization to regulate and authorization to suppress competition—are satisfied by the model ordinance, municipalities enacting it are likely immune from federal antitrust liability.

4. The open question of “active supervision”

Dicta in the 2003 case *Electrical Inspectors, Inc. v. Village of East Hills* discusses the “open question” of whether municipalities are also required to closely supervise regulated private parties to receive state action immunity.⁶¹ In the case, the Village of East Hills conferred on the New York Board of Fire Underwriters the exclusive right to conduct government-required electrical inspections, justifying

⁵⁷ *Omni Outdoor*, 499 U.S. at 372 (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985)).

⁵⁸ *Omni Outdoor*, 499 U.S. at 373.

⁵⁹ *Id.*

⁶⁰ See *supra* text accompanying notes 54-55.

⁶¹ *Elec. Inspectors, Inc. v. Village of East Hills*, 320 F.3d 110, 122, 129 (2nd Cir. 2003). Active supervision originated as an element of state action immunity when extended to private parties. *LaFaro v. New York Cardiothoracic Group, PLLC*, 570 F.3d 471 (2nd Cir. 2009) (quoting *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980)).

this action under *Parker* immunity. The Second Circuit, applying *Omni Outdoor*, held that East Hills' ordinance satisfied the two elements required for state action immunity—authorization to regulate and authorization to suppress competition. However, the plaintiff in the case argued that for a municipality to receive *Parker* immunity, it must additionally show “that government officials actively supervise those private parties whom the municipality regulates.”⁶²

The court noted that no decision addresses the issue of “whether a failure to show active supervision of a private party can defeat...the municipality’s claim of immunity” and declined to decide the issue, determining that resolution of this issue was unnecessary at the time.⁶³ The court referenced *Federal Trade Commission v. Ticor Tile Ins. Co.*,⁶⁴ however, in which the Supreme Court held that to show active supervision, private parties must show that state officials “have undertaken the necessary steps to determine the specifics of the regulatory regime...The mere potential for state supervision is not an adequate substitute for a decision by the State.”⁶⁵

Although no court has held that municipalities must actively supervise private parties to receive state action immunity, it is worth noting that even if active supervision were a requirement for state action immunity, the model ordinance ensures that private parties are actively supervised. The GBCO is an instrumentality of the municipality whose authority is properly constrained.⁶⁶ The findings of home energy raters are similarly constrained and the extent of the rater’s authority is limited by the ordinance.⁶⁷ In addition to these limitations, all acts of the GBCO and home energy raters are appealable to the municipality.

C. Applying the rule of reason to the model ordinance

Antitrust law does not prohibit all restrictions on competition; only unreasonably anticompetitive ordinances are prohibited.⁶⁸ If a complainant can make a facial claim and state action immunity is unavailable, the complainant must also show that the action is unreasonably anticompetitive to prevail in an antitrust suit.

In the narrow circumstance where “courts have sufficient experience with the activity to recognize that it is plainly anticompetitive and lacks any redeeming virtue,” the per se rule is used to

⁶² *Village of East Hills*, 320 F.3d at 122, 129.

⁶³ *Id.* The court again declined to answer this question in the 2009 case *LaFaro*, 570 F.3d at 478 n. 5.

⁶⁴ *Fed. Trade Comm’n v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992).

⁶⁵ *Village of East Hills*, 320 F.3d at 125 (quoting *Ticor Tile*, 504 U.S. at 638-39).

⁶⁶ See *supra* Part II.

⁶⁷ *Id.*

⁶⁸ *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 333 (1988). See also *Texaco, Inc. v. Dagher*, 547 U.S. 1, 3 (2006)

determine whether the action is unreasonably anticompetitive.⁶⁹ However, the Supreme Court has been reluctant to apply the per se rule to municipal antitrust cases, noting that “certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by local government.”⁷⁰

To prevail under the rule of reason, complainants must show that “under the circumstances there is an unreasonable restraint of trade.”⁷¹ Courts consider “facts peculiar to the business in which the restraint is applied, the nature of the restraint and the reasons for its adoption, and its impact upon competitive conditions in the relevant market” to determine whether the act is unreasonably anticompetitive.⁷² We now show that the MR-7 point and the home rater requirement are analyzed under the rule of reason, not the per se rule, and also that each alleged restriction is reasonable.

1. The LEED MR-7 Credit

The Supreme Court expressed concern for “serious potential for anticompetitive harm” posed by private standard-setting organizations in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*⁷³ Allied Tube, a producer of steel conduit, engaged in anticompetitive activity by packing the meeting of the National Fire Protection Association in order to vote against adoption of a plastic conduit, demonstrating the type of anticompetitive harm that the economic incentives of members of standard-setting organizations could potentially cause. The court acknowledged the benefits of standards based on objective judgments and with procedural safeguards that mitigate the economic biases of individual members, however. This has led most standard-setting organizations’ actions to be analyzed under the rule of reason.⁷⁴

Under *Allied Tube*, the Court acknowledged that product standard-setting by private organizations serves many legitimate purposes and is therefore not per se unreasonable. That the model ordinance is a municipally set standard and not a privately set standard only strengthens the argument in favor of applying the rule of reason because municipalities lack the economic biases of private actors, absent a showing of corruption.

⁶⁹ *Hertz Corp.*, 1 F.3d at 129 (citing *Broad. Music Inc. v. Columbia Broad. Sys. Inc.*, 441 U.S. 1, 8 (1979)).

⁷⁰ *Id.* at 129 (quoting *City of Lafayette, La. v. La. Power & Light Co.*, 435 U.S. 389, 417 (1978)).

⁷¹ *People v. Rattenni*, 81 N.Y.2d 166, 171-172 (1993).

⁷² *Id.*

⁷³ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). Defendant argued that it was immune from antitrust liability under grounds not relevant to this discussion.

⁷⁴ *Id.* at 501.

In light of the factors considered in applying the rule of reason,⁷⁵ the model ordinance's implementation of MR-7 is reasonable. The model ordinance effectuates the policy goal of increased use of responsibly harvested wood without being unreasonably anticompetitive. Several procedural safeguards in the model ordinance reasonably justify the potentially anticompetitive means, including the flexible structure of LEED, local control of enforcement, and lack of economic bias in a local government.

To comply with §§ 5(A)(1) and (2) of the model ordinance, a building need only attain 50 of 100 possible LEED points. A building can meet the model ordinance's requirements without attaining the MR-7 point by simply attaining 50 of the 99 other possible LEED points. At most, the ordinance encourages use of FSC wood. This is distinct from *Allied Tube*, where the standard-setting organization completely barred the use of a particular material.

Furthermore, the model ordinance mandates LEED certifiability instead of official USGBC certification and obviates antitrust issues an additional way through the safety valve provision in § 6(A)(1)(e). Unlike application of LEED standards through USGBC procedures, application of LEED standards through municipal procedures provides substantial flexibility in determining compliance. If a builder could demonstrate to the GBCO that the MR-7 point is illegal under antitrust law, the builder would be awarded that point.⁷⁶ If denied, the GBCO's decision could be appealed.⁷⁷

In *Allied Tube*, the possible economic incentive of members of the standard-setting organization to suppress competition was deemed suspect. However, the municipality has no similar economic incentive to suppress competition in favor of a certain type of wood. Indeed, the policy goal of encouraging use of responsibly harvested wood is "based on the merits of objective expert judgments."⁷⁸ This end is achieved by the ordinance by the moderate means described above and without mandating use of FSC wood.

By allowing for flexibility in attaining the MR-7 credit, the model ordinance allows for use of other types of responsibly harvested wood and separates the municipality from the potential biases of USGBC members. The restraint is moderate, the reasons for its adoption are sound, and the impact on competitive conditions is unlikely to be large. The inclusion of the MR-7 credit in the model ordinance is therefore reasonable and should be considered legal under antitrust law.

⁷⁵ See *supra* text accompanying note 71.

⁷⁶ *Ordinance, supra* note 1, § 6(A)(1)(e).

⁷⁷ *Ordinance, supra* note 1, § 10.

⁷⁸ *Allied Tube*, 486 U.S. at 501.

2. Requiring § 5(A)(3) buildings to be inspected by a home energy rater

Requiring a building regulated under § 5(A)(3) to be inspected by a HERS rater or other home energy rater does not have an anticompetitive effect on the market of home inspectors. This provision is not intended to exclude a certain group of raters from the market to the benefit of another group of raters, but to ensure that all raters meet a basic level of competence. While the ordinance does explicitly mention HERS raters as a qualifying type of home energy rater, it allows for other raters deemed competent by the GBCO to conduct home energy ratings, mitigating any possible anticompetitive effect.⁷⁹ Given the very minimal effect on competition, this requirement is analyzed under the rule of reason.

Granting a particular group of inspectors the exclusive right to inspect buildings has been subject to antitrust scrutiny under the rule of reason in *Atlantic-Inland, Inc. v. Town of Union*.⁸⁰ In this case, the Town of Union conferred on the New York Board of Fire Underwriters (“Board”), a nonprofit corporation, the exclusive right to conduct government-required electrical inspections. This exclusive grant was challenged by a for-profit electrical inspector corporation, Atlantic, who was functionally identical to the Board. The court concluded that the ordinance was anticompetitive in the way it improperly excluded Atlantic from the business of electrical inspection.⁸¹

However, the model ordinance’s structure is substantially different than Union’s ordinance and therefore should not be deemed unreasonably anticompetitive. The model ordinance does not grant a particular corporation the exclusive right to inspect buildings regulated under § 5(A)(3), it simply ensures that those inspectors achieve a certain level of competence.⁸² *Atlantic-Inland* explicitly acknowledges the authority of municipalities to “prescribe conditions which will ensure adequate inspections and responsible certifications are had.”⁸³ HERS raters, for example, are certified by RESNET. The ordinance’s requirement exerts the legitimate authority to ensure competency and does not exclude competent raters from the marketplace. Furthermore, HERS raters are not employed by RESNET. The only barrier to entry for a competent home energy inspector is certification by RESNET or an equivalent level of

⁷⁹ *Ordinance, supra* note 1, § 6(A)(1)(a).

⁸⁰ *Atlantic-Inland, Inc. v. Town of Union*, 483 N.Y.S.2d 612 (N.Y. Sup. Ct. 1984).

⁸¹ *Id.* at 619.

⁸² Competent inspectors are necessary not only to properly enforce the ordinance, but also to ensure that home owners will realize the financial benefits generated by energy efficient homes.

⁸³ *Id.* at 618.

knowledge as deemed appropriate by the GBCO.⁸⁴ Therefore, this requirement does not unreasonably suppress competition and is not illegal under antitrust law.

V. Preemption

A. Federal Preemption – Energy Policy and Conservation Act

1. *Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque*

In 2008, the Air Conditioning, Heating and Refrigeration Institute (AHRI), a trade association, and other related plaintiffs challenged the City of Albuquerque’s recently established green building code before the U.S. District Court for the District of New Mexico in *Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque (AHRI)*.⁸⁵ AHRI argued that the code is preempted by federal law. Though the court initially granted a preliminary injunction,⁸⁶ it subsequently denied plaintiffs’ motion for a summary judgment with respect to the code’s LEED-based provisions.⁸⁷ At the time of this writing, litigation is continuing and further developments are expected in this and other cases.⁸⁸ Regardless of the final outcome, for the reasons discussed below, federal preemption concerns should not prevent municipalities from moving forward in adopting the model ordinance.

Albuquerque’s code mandated greater energy efficiency, among other goals, for many new constructions and renovations of commercial and multi-family buildings and one- and two-family detached dwellings and townhouses.⁸⁹ Regulated entities can choose among several prescriptive and

⁸⁴ *Ordinance, supra* note 1, § 6(A)(1)(a).

⁸⁵ *Air Conditioning, Heating and Refrigeration Inst. v. City of Albuquerque*, 2008 WL 5586316 (D.N.M., 2008), *abrogated by* No. 08-633 (D.N.M. 2010), *available at* <http://www.nmcourt.fed.us/Drs-Web/view-file?full-path-file-name=%2Fdata%2Fdrs-new%2Fdm%2Fdocuments%2F2010%2F09%2F30%2F0003347820-000000000-08cv00633.pdf> (hereinafter *AHRI*) (As of this writing, the more recent decision is not available in Westlaw).

⁸⁶ *AHRI* (2008).

⁸⁷ *AHRI* (2010).

⁸⁸ Building industry groups have filed suit challenging the energy code in the state of Washington on grounds similar to those in *AHRI*. See *Complaint, Bldg. Indus. Ass’n of Wash. v. Wash. State Bldg. Code Council*, (W.D. Wash. May 25, 2010), *available at* http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=541471. See also J. Cullen Howe, *Building Industry Association Files Lawsuit in Washington State to Block State Energy Code*, GREEN BUILDING LAW UPDATE SERVICE, August 25, 2010, <http://blogs.law.columbia.edu/greenbuildinglaw/2010/08/25/building-industry-association-files-lawsuit-in-washington-state-to-block-state-energy-code/>.

⁸⁹ City of Albuquerque, N.M., *Energy Conservation Code Volume I* (2007), *available at* <http://www.cabq.gov/albuquerquegreen/pdf/volumel.pdf> (regulating commercial and multi-family buildings); City of Albuquerque, N.M., *Energy Conservation Code Volume II* (2007), *available at* <http://www.cabq.gov/albuquerquegreen/pdf/volumell.pdf> (regulating one- and two-family detached dwellings and townhouses).

performance-based paths to compliance. The prescriptive compliance paths offer specific rules for compliance, such as specifying minimum HVAC efficiency. By contrast, the performance-based paths establish an end goal, for example 30% efficiency improvements to the structure as a whole, but do not specify the exact methods a builder must use to achieve that goal. One of the code's performance-based paths incorporates LEED, closely resembling one of the approaches taken in the model ordinance. Because the model ordinance contains only performance-based standards, not prescriptive standards, the following discussion addresses only the court's analysis of performance-based paths to compliance in Albuquerque's ordinance.

Plaintiffs argued that Albuquerque's code was preempted by the Energy Policy and Conservation Act ("EPCA")⁹⁰, as amended by the National Appliance Energy Conservation Act ("NAECA")⁹¹ and the Energy Policy Act of 1992 ("EPACT").⁹² EPCA contains a preemption provision that prohibits state regulations "concerning the energy efficiency, energy use, or water use" of covered products.⁹³ AHRI was granted a preliminary injunction against the entire code under this cause of action.

Plaintiffs subsequently filed a motion for summary judgment, seeking to make the preliminary injunction permanent. In a September 2010 ruling, the district court held that the code's prescriptive provisions are preempted as a matter of law. However, it denied the motion with respect to the code's performance-based provisions because AHRI did not meet its prima facie burden to show an absence of genuine issues of material fact. The court criticized AHRI's " cursory" argument that presented "very few material facts" and held that those facts AHRI did present did not demonstrate that the code's performance-based provisions are within EPCA's preemptive scope.⁹⁴ AHRI did not identify particular provisions within LEED that concern the energy efficiency of products covered by EPCA. Instead, AHRI supported its argument by relying on the court's earlier preliminary injunction against the code's performance-based provisions. The court rejected this reasoning because the legal standard for a preliminary injunction is distinct from that for summary judgment; reciting the court's prior decision under a different legal standard is not relevant. The motion was denied without prejudice, leaving the opportunity for a renewed motion at a later date.

⁹⁰ 42 U.S.C. § 6201, *et seq.*

⁹¹ Pub. L. No. 100-102 (1987).

⁹² 42 U.S.C. §§ 6311-17.

⁹³ 42 U.S.C. § 6297(c). *See* Alexandra B. Klass, *State Standards for Nationwide Products Revisited: Federalism, Green Building Codes, and Appliance Efficiency Standards*, 34 HARV. ENVTL. L. REV. 335, 355 (2010).

⁹⁴ AHRI (2010).

Because the plaintiffs did not meet their prima facie burden, the court did not reach the question of whether LEED or other performance-based standards are in fact preempted by EPCA. The motion was denied because the plaintiffs produced a shallow factual record; the court did not explicitly hold that LEED is not preempted by EPCA. Thus, these or other plaintiffs may yet renew a more detailed preemption argument against LEED-based ordinances. Therefore, municipalities should be aware of these issues.

2. Potential federal preemption arguments

The court did not determine whether or not performance-based ordinances are preempted by federal law. However, while the court did not rule on the merits of the issue at any point, it closely examined them in the preliminary injunction ruling. Therefore, the legal arguments in that ruling should be viewed as potential arguments against any performance-based ordinance, as these arguments may be raised if a plaintiff can meet the prima facie factual burden that AHRI failed to meet.

As previously stated, EPCA preempts state regulations that concern energy efficiency of covered products. When both granting the preliminary injunction and ruling on the motion for summary judgment, the court found Congressional intent to “express a broad preemptive purpose”⁹⁵ and to “prevent state building codes from being used as a means of setting mandatory state appliance standards in excess of the Federal Standards.”⁹⁶

While this is settled, what has yet to be determined is whether LEED concerns the energy efficiency of covered products. LEED is a performance-based standard and does not require the use of any particular appliance. Indeed, LEED simply mandates a baseline level of energy efficiency, which can be attained in ways other than utilizing more efficient appliances. LEED offers points for efficiency gains above a minimum requirement, these points are optional – both Albuquerque’s code and the model ordinance could be satisfied without acquiring a single LEED point related to energy efficiency.

However, plaintiffs could argue, as AHRI argued, that even though LEED does not explicitly regulate covered products, it “imposes additional expenses if federally-compliant products are used [and therefore] ‘concerns’ the energy efficiency of covered products.”⁹⁷ For example, a builder using federally-compliant products may be forced by the code to purchase additional insulation. While the

⁹⁵ *AHRI*, at *7 (2008).

⁹⁶ *Id.* (quoting H.R. Rep. 100-11 at 26).

⁹⁷ *Id.* at *8.

summary judgment ruling did not address this argument, the court found it compelling when ruling on the preliminary injunction.

If a court finds that a LEED-based ordinance is preempted by EPCA, the inquiry does not end there; there are several exceptions to preemption under EPCA. In particular, EPCA does not supersede local building codes for new construction that meet seven requirements, identified at 42 U.S.C. § 6297(f)(3)(A)-(G).⁹⁸ However, when ruling on the preliminary injunction, the court concluded that “every performance-based option” in the Albuquerque code “fails to meet at least one of the seven requirements for an exemption from preemption.”⁹⁹

Crucially, under the second of the seven requirements, § 6297(f)(3)(B), a building code must not “require that the covered product have an energy efficiency exceeding the applicable [federal] energy

⁹⁸ 42 U.S.C. § 6297(f)(3) states: “**(3)** ...[a] local building code for new construction concerning the energy efficiency or energy use of such covered product is not superseded by this part if...

(A) The code permits a builder to meet an energy consumption or conservation objective for a building by selecting items whose combined energy efficiencies meet the objective.

(B) The code does not require that the covered product have an energy efficiency exceeding the applicable energy conservation standard established in or prescribed under section 6295 of this title, except that the required efficiency may exceed such standard up to the level required by a regulation of that State for which the Secretary has issued a rule granting a waiver under subsection (d) of this section.

(C) The credit to the energy consumption or conservation objective allowed by the code for installing covered products having energy efficiencies exceeding such energy conservation standard...is on a one-for-one equivalent energy use or equivalent cost basis.

(D) If the code uses one or more baseline building designs against which all submitted building designs are to be evaluated and such baseline building designs contain a covered product subject to an energy conservation standard..., the baseline building designs are based on the efficiency level for such covered product which meets but does not exceed such standard...

(E) If the code sets forth one or more optional combinations of items which meet the energy consumption or conservation objective, for every combination which includes a covered product the efficiency of which exceeds either standard or level referred to in subparagraph (D), there also shall be at least one combination which includes such covered product the efficiency of which does not exceed such standard or level by more than 5 percent, except that at least one combination shall include such covered product the efficiency of which meets but does not exceed such standard.

(F) The energy consumption or conservation objective is specified in terms of an estimated total consumption of energy (which may be calculated from energy loss- or gain-based codes) utilizing an equivalent amount of energy (which may be specified in units of energy or its equivalent cost).

(G) The estimated energy use of any covered product permitted or required in the code, or used in calculating the objective, is determined using the applicable test procedures prescribed under section 6293 of this title, except that the State may permit the estimated energy use calculation to be adjusted to reflect the conditions of the areas where the code is being applied if such adjustment is based on the use of the applicable test procedures prescribed under section 6293 of this title or other technically accurate documented procedure.”

⁹⁹ *AHRI*, at *11 (2008).

conservation standard.”¹⁰⁰ In the preliminary injunction, the court dismissed the contention that performance-based standards do not require the use of any particular product. Instead, it noted that the use of products meeting, but not exceeding, federal efficiency standards would require a homeowner to make other modifications to increase energy efficiency in order to comply with the Albuquerque ordinance. Finding that this “in effect” imposed a “penalty” for using products that meet, but do not exceed, federal energy efficiency standards, and therefore effectively required use of products exceeding federal standards, the court determined that § 6297(f)(3)(B) was not met. Therefore, according to the court, the ordinance’s performance-based options could not claim an exemption from preemption. It bears repeating that this finding was made based on a limited factual record and under the lower standard for preliminary injunctions of “substantial likelihood” of success, not actual success.

However, CCCL’s model ordinance differs from Albuquerque’s ordinance in ways that would preclude against federal preemption claims, even in the case that a court determines on the merits that federal law preempts LEED-based ordinances.

3. Responding to potential federal preemption

Though a renewed federal preemption claim will likely resemble the claims that prevailed in the preliminary injunction ruling, the merits of the issues have not yet been raised in any court.¹⁰¹ The court acknowledged in the preliminary injunction ruling that plaintiffs had merely raised serious and difficult questions with regard to the performance-based paths to compliance – questions that have not yet been answered by any court, including the District Court in New Mexico.

Legal uncertainty, however, need not prevent or stall important local actions on green building. Section 6297(f)(3)’s explicit exception from preemption under EPCA, as described above, permits localities to enact a building code that concerns the efficiency of covered appliances as long as it, among other requirements, does not effectively require buildings to use appliances that are in excess of federal efficiency standards. Though in its preliminary injunction ruling the court did not except Albuquerque’s ordinance, the model ordinance’s distinct features qualify it for exception from preemption.

¹⁰⁰ *Id.* at *9.

¹⁰¹ In response to the injunction, Albuquerque has implemented an interim green building ordinance that can achieve a 30% reduction in energy use by regulating building features unrelated to products covered by federal standards. Patrick Bello, *Update on AHRI v. City of Albuquerque*, GREEN BUILDING LAW, May 24, 2010, <http://www.greenbuildinglawblog.com/2010/05/articles/litigation/update-on-ahri-v-city-of-albuquerque/>. It is unknown at the time of this writing how the renewed legal viability of parts of the original code will impact the efficacy of the interim code.

To address the possibility of preemption, the model ordinance inserts a “safety valve.” Section 6(A)(1)(e) of the model ordinance allows the GBCO, in consultation with municipal legal counsel, to award points to an applicant if a clear and specific inconsistency between a legal requirement, such as preemption under EPCA, and attainment of a LEED point is shown to exist. To the extent an applicant can show that EPCA preempts particular provisions of the green building standard required by the model ordinance, the applicant is deemed to have achieved the applicable points. The model ordinance goes beyond the Albuquerque ordinance by crediting the applicant for preempted points. In this way, it clearly does not imposing an additional financial burden on applicants for buildings that use appliances that meet but do not exceed federal efficiency standards. That is, instead of “penalizing” applicants who build using only federally complaint appliances by forcing them to achieve other LEED points, the ordinance reduces the overall burden of LEED points required.¹⁰² Neither by its text nor by its effect does the model ordinance require use of appliances in excess of federal standards and therefore it satisfies § 6297(f)(3)(B) of EPCA. This arrangement may slightly reduce the efficacy of the model ordinance, but it preserves the ordinance’s impact to the maximum extent possible under federal preemption standards if these standards are interpreted in an onerous manner.

B. State Preemption – Energy Code, Building Code, and Intergovernmental Immunity

The New York State Energy Conservation Construction Code Act (“Energy Code”) regulates energy efficiency.¹⁰³ The New York State Uniform Fire Prevention and Building Code Act (“Building Code”) regulates building safety.¹⁰⁴ The Energy Code does not present a strong impediment to municipal green building ordinances in New York State. With respect to the Building Code, in the case that inconsistencies with the model ordinance are acknowledged by the authorities that enforce the Building Code, municipalities may seek a waiver. Also, the model ordinance includes a safety value provision to address any potential preemption concerns. Finally, with respect to intergovernmental immunity, the model ordinance exempts buildings in the custody of outside units of local government because these buildings may have limited immunity to the building laws of the host jurisdiction.

¹⁰² The safety valve provision, of course, would only come into effect upon a clear and final determination in the municipality’s jurisdiction that EPCA preempts the model ordinance and not at any time before. For instance, if an applicant were subject to the model ordinance today in a New York state municipality, the applicant would not be deemed to have achieved the preempted points because no court in the country or, in particular, in New York State, has found green building ordinances preempted under federal law.

¹⁰³ N.Y. COMP. CODES R. & REGS. tit. 19, § 1219–1228 (2010).

¹⁰⁴ N.Y. ENERGY LAW § 103(2) (2010).

i. New York State Energy Conservation Code

The Energy Code authorizes municipalities to enforce the state code and does not preempt stricter regulations enacted by municipalities, stating that nothing shall “be construed as abrogating or impairing the power of any municipality to promulgate a local energy conservation construction code more stringent than the code.”¹⁰⁵ When a statute disclaims any intent to preclude enactment of a municipal ordinance, there is no preemption.¹⁰⁶ Though the Energy Code requires that stricter regulations be filed with the council, this requirement is administrative. Failure to file “shall not impair or otherwise affect the validity” of an energy regulation.¹⁰⁷

The Energy Code is the floor, but not the ceiling for energy efficiency regulations.¹⁰⁸ Many municipalities have energy efficiency ordinances stricter than the Energy Code, but they may not enact laws that are less strict.¹⁰⁹ This authorization for local authority to regulate energy efficiency is bolstered when juxtaposed with the local regulation proscribed by the Building Code, analyzed below. While the Energy Code intends to remain “cost effective,”¹¹⁰ this limitation only applies to code amendments by the state council¹¹¹ and provisions for local regulation do not contain language relating to cost-effectiveness.

ii. New York Uniform Fire Prevention and Building Code

In the case that a specific inconsistency between the Building Code and LEED standards is identified by the state Code Council, a waiver from the Building Code can be sought. In any event, the model ordinance includes the safety valve provision of § 6(A)(1)(e) that addresses any potential preemption concerns.

The Building Code consists of several different sections, including a residential code, building code, plumbing code, mechanical code, fuel gas code, and fire code. Each of these codes is published by the International Code Council and contains detailed technical standards. Their intent is to “provide a

¹⁰⁵ N.Y. ENERGY LAW § 11-109(1) (2010).

¹⁰⁶ *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 51 N.Y.2d 679, 683 (1980).

¹⁰⁷ N.Y. ENERGY LAW § 11-109(2) (2010) *cf.* N.Y. EXEC. LAW § 379(2) (2010) (Building Code provision outlining broad state authority over more restrictive local building standards).

¹⁰⁸ *See People v. Oceanside Institutional Indus., Inc.*, 833 N.Y.S.2d 350, 352 (N.Y. App. Term 2007) (when a local ordinance is silent on a matter addressed by its state equivalent, the state provision remains valid despite grant of authority to a municipality).

¹⁰⁹ *E.g.*, *Town of Greenburgh, N.Y.*, Code § 100.15 (2009). *See also* John R. Nolon & Jennie C. Nolon, *Local Green Building Laws in New York: Issues and Opportunities*, N.Y. L.J., April 2009.

¹¹⁰ N.Y. ENERGY LAW § 11-103(2).

¹¹¹ *N.Y. State Builders Ass’n v. State*, 414 N.Y.S.2d 956, 960 (N.Y. Sup. Ct. 1979).

basic minimum level of protection...from hazards of fire and inadequate building construction.”¹¹² Local building regulations that are inconsistent or in conflict with provisions of the Building Code are generally preempted.¹¹³ Building regulations relating to matters not addressed by the Building Code are explicitly permitted.¹¹⁴ Because Energy Star only relates to energy efficiency, the Building Code does not present any issues for the Energy Star provisions of the model ordinance.

The model ordinance and the Building Code regulate distinct aspects of buildings. The Building Code regulates building safety, while the model ordinance regulates building sustainability and efficiency. Compliance with the model ordinance does not negatively impact the safety of a building. More importantly, no clear conflict between any individual LEED point and a Building Code provision has yet been explicitly identified. Aside from several basic prerequisites, the model ordinance does not require any building to implement any particular LEED provision. Instead, a builder may choose 50 of 100 achievable points toward LEED Silver certifiability. Therefore, even if some conflict were identified, the model ordinance would not require buildings to adhere to the conflicting provision.

If an actual inconsistency were found by the Code Council, a municipality may seek a waiver to enact more restrictive local standards.¹¹⁵ In order to implement a more restrictive local standard, the municipality must report the standards to the Code Council within 30 days of enactment and petition for a determination on whether the local standard is stricter than the state regulation.¹¹⁶ If the Council determines that the more restrictive standards are “reasonably necessary because of special conditions prevailing within the local government”¹¹⁷ and that such standards are safe, the council shall adopt the standards. The Council retains the power to terminate the more restrictive local standards and to impose conditions on their duration.

Section 6(A)(1)(e) in the model ordinance obviates preemption issues even where a municipality is unwilling or unable to pursue a waiver from the Building Code. According to this provision, if any conflict between a LEED credit and the Building Code can be identified, the points associated with the

¹¹² N.Y. EXEC. LAW § 371(2)(B) (2010).

¹¹³ N.Y. EXEC. LAW § 383(1) (2010). Exceptions exist for grandfathered ordinances and other special cases immaterial to this discussion.

¹¹⁴ N.Y. EXEC. LAW § 379(3) (2010).

¹¹⁵ N.Y. EXEC. LAW § 379(1) (2010).

¹¹⁶ N.Y. EXEC. LAW § 379(1) (2010).

¹¹⁷ See *Schuylkill Twp. v. Pa. Builders Ass’n*, 935 A.2d 575 (Pa. Commw. Ct. 2007) (holding that Pennsylvania townships wishing to enact a green building regulation must prove that local conditions are different from statewide conditions in order to qualify for an exception from the Pennsylvania construction code). See also Shari Shapiro, *Who Should Regulate? Federalism and Conflict in Regulation of Green Buildings*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 257, 269 (2009).

conflicting LEED credit are awarded to the applicant as though they have been achieved. This provision ensures that the model ordinance is fully consistent with the provisions of the Building Code and will not be preempted.

iii. Intergovernmental Immunity

Federal¹¹⁸ or state¹¹⁹ instrumentalities are immune from regulation by local authorities. The model ordinance therefore excludes buildings leased or owned by the federal or state government from its provisions.¹²⁰ In New York state, buildings owned or leased by units of local government¹²¹ receive a limited immunity from the local building regulations of the venue jurisdiction.

Whether a building owned or leased by a unit of local government receives immunity is based primarily on legislative intent. In the absence of legislative intent, an administrative body must conduct a “balancing of public interests” test to determine whether the building is immune from local building regulations.¹²² For example, in *Volunteer Fire Association of Tappan, Inc. v. Town of Orangetown*, a New York state court approved of conducting the balancing test on a building in the custody of an agent of the Tappan fire district, a special purpose unit of local government.¹²³ Due to a balancing test’s inherent indeterminacy, and to encourage simplicity and intergovernmental comity, buildings owned or leased by other units of local government are not regulated under the model ordinance.¹²⁴

¹¹⁸ *Breeze v. Town of Bethlehem*, 573 N.Y.S.2d 122 (N.Y. Sup. Ct. 1991).

¹¹⁹ *Nowack v. Dep’t of Audit and Control*, 338 N.Y.S.2d 52 (N.Y. Sup. Ct. 1973).

¹²⁰ *Ordinance*, *supra* note 1, § 9.

¹²¹ There are two types of units of local government in New York state: general purpose units of local government such as villages, towns, cities, and counties and special purpose units such as school districts, fire districts, and other public benefit corporations. This distinction is immaterial for this analysis. *See generally* New York Department of State, *Local Government Handbook 6th Edition (2009) available at <http://www.dos.state.ny.us/lgss/pdfs/Handbook.pdf>*.

¹²² *Matter of City of Rochester*, 72 N.Y.2d 338 (1988). The balancing test replaced a “governmental versus proprietary” test. *See, e.g., Westchester County v. Village of Mamaroneck*, 255 N.Y.S.2d 290 (N.Y. App. Div. 1964).

¹²³ *Volunteer Fire Ass’n of Tappan, Inc. v. Town of Orangetown*, 863 N.Y.S.2d 502 (N.Y. App. Div. 2008).

¹²⁴ *Ordinance*, *supra* note 1, § 9.