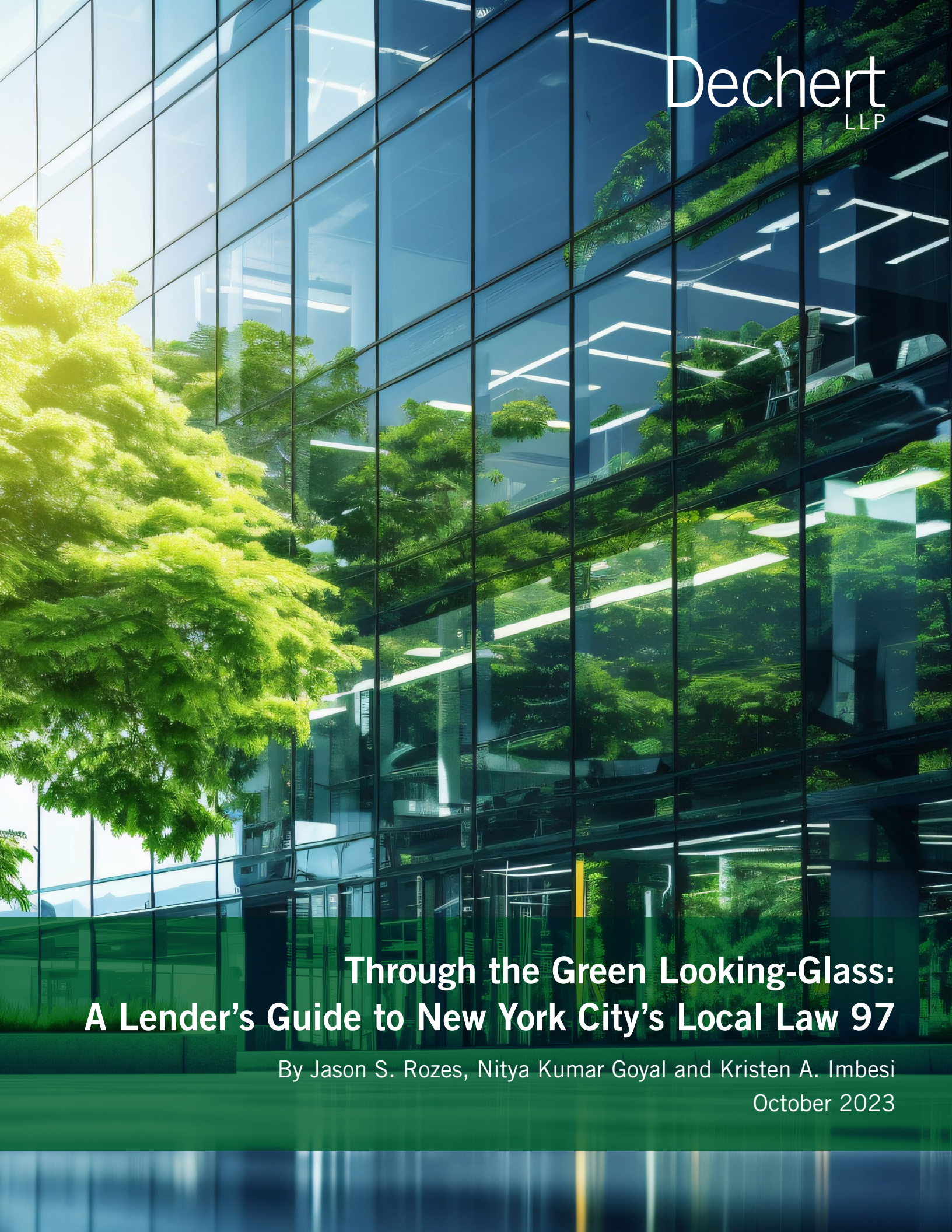

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Through the Green Looking-Glass: A Lender's Guide to New York City's Local Law 97

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Introduction

In just three short months from now, the ground-breaking Local Law 97 will become the law of the land in New York City and change the way commercial real estate finance business is done in the most populous metropolitan area in the United States. New York City is home to over eight million people living and working in approximately one million buildings. In the same way Alice, the protagonist of Lewis Carroll's 1871 classic novel *Through the Looking Glass*, pondered life on the other side of the mirror, so too are lenders who finance billions of dollars of commercial real estate each year analyzing how their deals will change under Local Law 97. Indeed, much has been written about the law since it was first passed in 2019 with several other less publicized laws, as part of New York City's Climate Mobilization Act – from media outlets, real estate brokers, trade and research groups, owners and developers, and of course, law firms (including this one[1], back in 2020). However, these previous summaries have focused largely on the building owners and operators and how they must comply with the new law and meet the annual reporting deadline beginning in May 2025, or face material fines and possible jail time. Very little has been written to date about the lender perspective and how Local Law 97 might impact the issuance of term sheets, the evolution of underwriting requirements and due diligence processes, and lead to changes in commercial real estate loan documents.

This paper takes the reader on that very journey in three parts. **Part I** provides an overview of Local Law 97, including its original guiding principles from 2019 and the law's amendment in December 2022. **Part II** explores the different Local Law 97 issues lenders should consider as part of originating, syndicating and securitizing commercial real estate deals in New York City, from underwriting, to due diligence to legal documentation. **Part III** identifies several notable issues related to Local Law 97 which are still unclear at this time and subject to change. These issues include the implementation of renewable energy credits, proposed amendments to the law, ongoing legal and political challenges, the role of Commercial Property Assessed Clean Energy ("CPACE") financing and the impact of technological advances, such as direct air carbon capture. Each one of these items has the potential to shape how lenders and borrowers structure and negotiate loan transactions to meet their financing needs while providing much needed liquidity to the commercial real estate market through the looking-glass of Local Law 97.

[1] "Climate Change in the Big Apple: New York City's Climate Mobilization Act," Dechert LLP, December 2020, https://www.dechert.com/knowledge/publication/2020/12/climate-change-in-the-big-apple.html.

Part I

The purpose of Local Law 97 is to reduce greenhouse gas (GHG) emissions from New York City buildings. Real estate is the law's target because of the well-documented assertion that buildings account for over two-thirds of the total amount of greenhouse gases. Local Law 97 aims to cut emissions in New York City by 40 percent by 2030 and by 80 percent by 2050, using 2005 levels as the baseline. To achieve this goal, both new and existing buildings larger than 25,000 square feet in size must meet annual GHG emission caps depending on the building's particular use. These requirements will impact roughly 50,000 residential and commercial buildings. The emissions caps are designed on a sliding scale depending on the year, becoming stricter over time. The first set of emission caps take effect in January 2024 and continue until 2029, and the second set of caps applies from 2030 to 2034. The initial 2024 set of emissions caps are the most lenient, anticipated to impact only the most carbon-intensive 20 percent of buildings, while the 2030 limits are estimated to affect the most carbon-intensive 75 percent of buildings. The caps become more aggressive over time continuing until the year 2050, with the intent to drive emissions at that point to the stated 80 percent reduction goal.

Beginning with the initial May 1, 2025 deadline, each owner of a covered building must annually deliver a Local Law 97 building emissions compliance report for the prior year to a new city office, named the Office of Building Energy and Emissions Performance. The report must be prepared by an approved third-party consultant and show (1) the occupancy group, property type and floor area of the building, (2) whether or not the building is in compliance with the applicable GHG limit and (3) the amount by which the building exceeds the limit if not in compliance. There are various fines for non-compliance which can become material. For exceeding a GHG cap, the maximum annual penalty is the metric ton delta between the applicable emissions limit under the law and a building's actual emissions, multiplied by US$268. Building owners who commit reporting violations are subject to a maximum fine of US$0.50 per gross floor area for each month. The penalty for filing a false report is up to a US$500,000 fine and a maximum sentence of 30 days imprisonment.

To provide context on the possible magnitude of the fines, the Real Estate Board of New York reported that over 3,000 buildings could face collectively over US$200 million in annual fines due to GHG emissions in excess of the law's limits. However, Local Law 97 does provide certain adjustment tools and flexibility measures that building owners can seek to use. Examples include deductions from annual emissions by purchasing either (1) renewable energy credits ("RECs") that are connected to New York City's power grid or (2) GHG offsets up to 10 percent of the law's limit (i.e., buying and planting trees). There are also possible adjustments for buildings expected to breach the initial 2024-2029 caps in excess of 40 percent and variances for financial hardship and practical restraints, such as 24-7 health and safety operations or tenant leases preventing a landlord from gaining access to building infrastructure.

After digesting the commentary produced by a spirited virtual public hearing on November 14, 2022, the New York City's Department of Buildings ("DOB") made several key changes to Local Law 97 that were issued on December 7, 2022. The first noteworthy change

addressed the way the law categorized buildings in setting the various emission caps. Originally, there were only 10 building categories based on the city's long-standing building code, ranging from "business" (which included both office and data centers), "factory" (i.e., industrial), "mercantile" (i.e., retail), "storage" and "hotels". Recognizing that using only 10 categories for all covered buildings was too rigid and could result in some unintended consequences (e.g., electricity-heavy data centers and trading floors have a different energy usage profile than a professional services firm office building), the law will now use more than 60 different property types created under the Energy Star Portfolio Manager System, a federal program administered by the Environmental Protection Agency. The Energy Star system is currently used by the city to collect energy benchmarking data and by building owners to self-report energy usage, and so these more numerous and more specific categories will be more familiar to commercial real estate industry participants. The second key amendment from December 2022 concerned how property owners can apply RECs in complying with the law. A REC represents the purchase of electricity from a renewable energy source. Local Law 97 now limits the use of RECs as a deduction from the annual GHG cap to only those emissions from a building generated by electricity. Emissions from burning fossil fuels for the purposes of heat or hot water are ineligible for REC offsets. This limitation will be a challenge for many developers, especially those in the multi-family sector. It has been reported that nearly 70 percent of New York City's large buildings have steam boilers that run on natural gas or oil, and that boilers, furnaces and water heaters alone make up 40 percent of New York's carbon emissions.

Finally, for both the annual filing requirement and the penalties for exceeding the GHG caps, the original text of the law allowed property owners to seek extensions, reduced fines and compliance adjustments based on their "good faith efforts". What this standard practically meant was unclear until September 2023 when DOB released new additional regulations to Local Law 97 for public review and comment. These new rules seek to create an objective checklist of what a property owner's "good faith efforts" mean under the law, how they can gain more time to meet the various requirements, and pay mitigated penalty amounts for lack of compliance. **Part III** of this paper discusses these new proposals in more detail.

Part II

Before Local Law 97 takes effect, commercial real estate lenders should consider the practical implications the law will have on financings secured by New York City buildings. Issues worth careful consideration are due diligence before closing, loan document provisions reflecting a property's compliance with the law at closing and language governing a borrower's ongoing compliance during the loan term, as well as the consequences for breaching covenants related to the law.

For any new loan that will be outstanding while Local Law 97 is effective, lenders should conduct special carbon emissions due diligence as part of their underwriting of any New York City building. The first question is whether the law applies to the building that will serve as collateral for the loan. The lender can first look to the building type and square footage requirements discussed above in **Part I** of this paper. In addition, DOB will issue an annual "covered buildings" list where lenders can search by property address to determine not only whether the building is required to comply with the law, but also the applicable building type and corresponding carbon emissions factor used to determine the corresponding carbon emissions limit. After confirming the building is subject to Local Law 97, lenders should next determine whether the building is in compliance with the law at closing and if it is likely to continue to be in the future. For this calculation, lenders might consider requiring as a condition to closing the delivery of an additional third-party report covering the subject property's GHG emissions and compliance with the law prepared by an approved third-party consultant. If so, this new report will appear on closing checklists along with the customary appraisal, property condition report and the Phase I environmental report (all of which are standard requirements of any commercial real estate deal). Carbon emissions reports are currently available in the market from different consultants, and we expect this market to expand and standardize as Local Law 97's compliance start date approaches. It is reasonable to anticipate that a lender's list of approved providers of this GHG emissions report will overlap with the registered design professionals who prepare the annual Local Law 97 compliance report that building owners must submit to the Office of Building Energy Emissions Performance by May 1 of each year, starting in 2025.

Once it is determined that the subject collateral must meet Local Law 97's requirements and the lender has analyzed a third-party report outlining the impact of the law on the building, lenders must consider the economic and structural impacts to the financing. For example, any anticipated fines or penalties for non-compliance with the law, both at closing and during the loan term, will need to be factored into the lender's underwriting of the property. The capital necessary to bring the building into compliance with Local Law 97 will also need to be discussed as part of structuring any loan and what combination of debt and equity will be used to pay for such work. If the parties agree that the loan will not address any such capital improvement work to make the building less carbon-intensive, then the documents will need to address what the consequences are to the borrower for any violations that are incurred.

Accordingly, Local Law 97 will have a significant impact on a number of different loan document provisions. Borrowers agree to standard representations and covenants in loan documents, stating that both the owner and the property are and will be in compliance with applicable laws. Local Law 97 will be an "applicable law" for covered New York City properties. If a building is not in compliance with the law at the loan closing, then the borrower will want an exception to such compliance with law representation to avoid a breach under the documents on the closing day. This exception is likely to appear on a schedule to the loan agreement, disclosing the extent of the non-compliance and the resultant fines. Similarly, if it is determined that the building either breaches Local Law 97's emissions limits at closing or will breach the law during the loan term, then the parties need to carefully negotiate the applicable covenants in the loan documents. To address these issues, lenders are likely to consider changing the economic structure of the deal and adding additional covenants requiring the borrower to take remedial action to address the non-compliance. Lenders do not want their borrowers to breach, or remain in breach under, Local Law 97 during the loan term, and so one can expect loan documents to include specific ongoing obligations to address the law, including the following menu of possible new provisions, which are sure to be the subject of careful negotiation.

1. Reserve Accounts

One possible outcome is the inclusion of new reserve accounts to ensure there are funds to pay for the estimated amount of the fines and penalties that will be incurred during the loan term for the property's non-compliance with the emissions limits. These fines will have a negative impact on cash flow, making certain economic hurdles in the documents based on debt yield or debt service coverage ratios more difficult for borrowers to meet. The amount of this reserve should be quantifiable because, as noted in **Part I**, the fines and penalties can be calculated objectively based on a published sliding scale. One might also see additional reserve accounts structured to accumulate sufficient funds to perform the capital expenditure work necessary to bring the building into compliance with the law, together with lender approval rights over the scope of work, project schedule, project budget and other inspection and oversight rights and remedies in favor of lender. These reserve accounts could be required to be funded upfront at closing, or on a monthly basis throughout the term of the loan. To be less onerous on the borrower, these reserves might be drafted to "spring" into effect on certain triggers, such as when the building first breaches the applicable GHG caps or when the Local Law 97 penalties reach a certain amount or percentage of net operating income.

2. Ongoing Compliance

As part of the typical compliance with law covenant, we expect new language specifically requiring the borrower either to maintain compliance with Local Law 97 or to bring its property into good standing under the law by a certain date in the future. The latter covenant could be met in one of two ways. The borrower can agree to perform the remedial capital expenditure work necessary to cause the property to meet the applicable GHG cap, or can seek relief through the pursuit of variances, credits or adjustments with the NYC Office of Building Energy Emissions Performance. A lender might seek rights to participate in the administrative process and/or receive regular reporting on progress of discussions with the city. This issue bears watching when the law takes effect next year as it has been reported in the media that certain real estate owners have argued that paying the fines is cheaper than the retrofit costs to comply with Local Law 97. Based on the applicable math, they may pay the fines as an ordinary course of business expense and not make any energy efficiency improvements to lower the amount of GHG emissions produced by the building. This possible outcome would not serve the law's intended purpose of lowering the GHG emissions of commercial real estate, but it may be the practical reality for many property owners and their lenders given the material cost of the necessary retrofits. Furthermore, paying the fines does not cure the breach of the law's emissions caps and so the borrower will technically remain in violation of applicable law unless and until the building is brought into compliance.

3. Reporting

To keep track of a borrower's ongoing compliance with Local Law 97, the reporting requirements found in loan documents could be expanded to include several new items. These deliveries may include the periodic reporting of GHG data for the property (which could include an annual update of the third-party energy audit delivered at closing or copies of Energy Star submissions), copies of tenant reporting on energy usage and GHG emissions data, copies of all notices with the local city authorities concerning fines, borrower's relief attempts under the law and an annual compliance certificate from an authorized officer from the borrower regarding compliance (or the lack thereof) with the law. It is also likely that the borrower will be required to deliver to the lender a certified copy of the annual GHG compliance report, which the borrower is required to deliver the city's Office of Building Energy Emissions Performance. The first deadline for this is May 2025. Lenders may require that borrowers update their form of lease agreement to require reporting on tenant energy usage and GHG emissions. Adding new reporting items to loan documents can be a difficult negotiation for both borrower cost and day-to-day administration reasons, but in the Local Law 97 context, these specific reporting requirements will prove both necessary and valuable for any lender's servicing department trying to monitor the ongoing performance of the loan.

4. Events of Default and Recourse Liability

Loan documents typically include, in the list of events of default under the loan, the breach by the borrower of any covenant. This would include the covenant that the borrower comply with all applicable laws. Often times, these events of defaults are qualified through negotiation or subject to notice and cure periods. We expect Local Law 97 to receive particular attention in this regard. If breach of Local Law 97 would be an event of default, then lenders must give careful consideration to what curative actions a borrower has, if any, to avoid the lender calling a default, accelerating the loan and pursing remedies such as foreclosure. If the borrower is in breach of the law at closing, then it will be hard to see the parties closing into an event of default. Rather, the parties will turn to various structural elements outlined above. It is more likely that if a borrower breaches Local Law 97, then these reserve, retrofit work or reporting covenants that were carefully negotiated into the documents will govern, rather than the loan going into default. To strengthen the lender's position, it can also be expected that loan documents will include a new non-recourse carve-out to the borrower and guarantor for any losses incurred by lender in connection with any breach of Local Law 97, including any fines or penalties. As with any non-recourse carve-out guaranty, significant negotiation between lenders and borrowers can be expected on this point.

All of these loan document provisions discussed above will impact the closing of any loan on a property subject to Local Law 97. Moreover, the lender's anticipated exit strategy for the loan will be tested, whether it be securitization and syndication. Rating agencies and mezzanine loan and bond buyers in the CMBS market, and syndication lenders in the balance sheet market, alike, will ask many questions about Local Law 97 and how the loan documents address them. Insufficient structure, inadequate due diligence and weak mitigants all may negatively impact the bond tranching and pricing of the securitization, or the syndication efforts of any deal being sold off to multiple lenders. Offering documents and marketing materials for these sale efforts by lenders will contain risk factors and disclosure of these specific issues. In fact, Local Law 97 risk factors are becoming more commonly found in offering memoranda as the January 1, 2024 effective date approaches. Part of this disclosure and analysis by the secondary market will not only be from the perspective of a lender or investor holding a debt instrument and seeking a return on its investment, but also as a possible owner of the real estate should the lender have to foreclose and become responsible itself for compliance under Local Law 97.

Part III

As with any new law, there are questions concerning how Local Law 97 will be practically applied to the commercial real estate finance market beginning in 2024. There are a number of key issues the resolution of which is unknown as of the date of this paper. Each is likely to impact how real estate loans are negotiated, underwritten, closed and either sold or securitized. Below is a summary of these questions – and potential game changers – that are worth tracking in the months and years ahead.

1. REC Market

One strategy lenders can expect borrowers will use to comply with Local Law 97 is the purchase of RECs. Originating from a renewable energy source, and used as deductions against the required annual emissions limits, these credits will allow property owners to comply with the law without retrofitting their buildings. Although there has been widespread criticism of RECs in the law as cutting against the overall purpose of decarbonizing New York City buildings, the practical limitation lenders need to be aware of is that, as of the date of this paper, no eligible RECs are available for anyone to purchase. No city agency has released any pricing rules or guidelines on how the REC system will work, and so both lenders and borrowers need to wait and see. Part of the issue is that there are no renewable energy sources hooked into the New York City electrical grid. Two nuclear power plants, which had powered roughly a quarter of the city's electricity, were closed in 2021. Several renewable energy projects are in various stages of development – including wind projects in Long Island Sound, and both hydro and wind powered plants in upstate New York – but none are expected to be completed until 2025-2026. When the REC system is activated under the law, we expect it to become part of the conversation between lenders and borrowers structuring loans and negotiating loan documents, particularly with respect to lender participation and reporting and/or lender consent to such trades.

2. Proposed Amendments and New Regulations

In April of this year, the New York City Council introduced a bill to amend Local Law 97. The amendment (entitled Int. No. 994) is designed to help property owners and city officials communicate more effectively about a building's compliance with the law. The bill would require DOB to send to the owner of each covered property a notice containing information regarding the property's GHG emissions and an explanation and range of potential penalties under the law. In the notice sent by the city, the covered building's estimated GHG emissions would be based on the most recent year of data available and would include the amount of GHG emissions that must be reduced by the years 2024 through 2050 in order to meet the emissions cap in each such year. The first notice would be sent to covered building owners no later than June 1, 2024, and every two years thereafter. This notice would be beneficial to both lenders and borrowers.

As mentioned above, new regulations were proposed in September 2023, setting forth an objective meaning of a property owner's "good faith efforts". However, such guidance is only applicable to the 2024-2029 compliance period. A building owner can now demonstrate its good faith efforts, and in so doing, gain certain relief under the law, by (1) submitting its annual emissions report by the May 1 deadline, (2) uploading certain required energy benchmarking information for the prior year, (3) upgrading the building's lighting system and installing electrical tenant sub-meters and (4) choosing one of six different options showing a demonstrated commitment to decarbonizing the covered building. Among the six different options a property owner can choose are (a) submitting a decarbonization plan that meets several itemized requirements and is completed within 24 months, (b) providing a DOB-approved alteration plan and timeline showing the work necessary to comply with the 2024-2029 GHG limit and (c) delivering certain evidence that the building is already undergoing an electrical readiness upgrade. Relief from compliance also

exists for owners of "critical facilities" dedicated to life and safety, such as hospitals and vaccine manufacturing sites. Note, however, that any owner relying on the decarbonization exception may not claim any RECs as part of the 2024-2029 period. The new regulations include other changes such as granting building owners relief on account of an unexpected or unforeseeable event, such as a hurricane or fire, and creating a new electrification savings option where owners can apply certain GHG savings for future use in reporting emissions for the building. A public hearing covering the new proposed regulations is scheduled for October 24, 2023, following which DOB will look to incorporate whatever changes they deem appropriate in time for the January 1, 2024 effective date.

3. Legal and Political Challenges

As with any new law, Local Law 97 has faced its fair share of both political and legal debate. While many support the law, certain groups hold a different view. For example, a Queens councilwoman, Vickie Paladino of District 19, introduced a bill on February 2, 2023, that seeks to delay all Local Law 97 emissions requirements by seven years in order to afford property owners and affected tenants more time to find ways to follow the law. This bill remains pending in committee review.
On May 18, 2022, a group of cooperative corporations, building owners and residents filed suit against New York City seeking to annul Local Law 97. In this suit, *Glen Oaks Village Owners, Inc., et al. v. City of New York, et al.,* the plaintiffs argue the following regarding Local Law 97: (i) it is preempted by the Climate Leadership and Community Protection Act, (ii) it violates building owners' due process rights and (iii) it levies an unauthorized tax on emissions. As of the date of this paper, the case is still pending, and the parties await the court's response to motions filed in late 2022.

4. Lien Priority of Penalties and Title Insurance

Many experts at this time are asking whether the penalties under Local Law 97 will prime first mortgages if not paid. It is possible the failure to pay these penalties will be treated in the same way as sidewalk or elevator violations which appear on the title or zoning reports for buildings in the city. With this treatment, it would mean that as a municipal violation, it will not disturb the first lien priority of a secured mortgage on the property, so long as they are not transferred to NYC's Department of Finance. If such violation is so transferred, the solution would be to work with the title company and the borrower to ensure that such violations are satisfied or bonded over prior to closing of the financing and do not become judgments or tax liens. However, the DOB may elect to treat Local Law 97 penalties as a special assessment in the same category as an environmental lien. Under local law, certain environmental liens regarding "brownfield sites" and waste abatement matters do enjoy priority over all other liens and encumbrances, except for real estate taxes. If treated in this manner, which is possible given the overall importance of Local Law 97 as part of the city's groundbreaking climate legislation, the penalties under Local Law 97, if not paid, could ripen into a lien that would prime a first mortgage. Lenders and their counsel will want to consult with title companies to explore this issue as part of any new loan origination, including whether or not title insurance might be able to provide any protection against this risk.

5. CPACE

Another tool lenders can expect borrowers to consider using in complying with Local Law 97 is CPACE. CPACE was created in New York City in 2019 with the passage of the Climate Mobilization Act in the form of Local Law 96. Through a public-private partnership between the city and the capital provider, a property owner can use low interest rate, long-term financing to retrofit their buildings with various energy efficiency improvements and renewable energy systems. As we have written about before[2], there are several headwinds which have slowed the widespread adoption of the city's CPACE program. These include the fact that only two deals have closed since the program was opened, the release of multiple rounds of revised criteria and revised documentation, a long queue of both deals and potential lenders waiting

[2] "The ESG Climate Change Evolution of Commercial Real Estate Finance: Turning Over New (Green) Leaves," Dechert LLP, 2022, https://www.dechert.com/knowledge/onpoint/2022/the-esg-climate-change-evolution-of-commercial-real-estate-finan.html.

to be approved by the program's administrator and other legal and administrative challenges. And with the super-priority lien status that CPACE enjoys over first mortgage debt and the historical reticence that various market participants have exhibited toward CPACE in the capital stack, it is clear why CPACE remains an underdog in the race towards Local Law 97 compliance. However, there has been momentum towards wider acceptance of CPACE among lenders, borrowers and other commercial real estate finance stakeholders. This momentum is evidenced by more institutional capital providers joining the CPACE market, closing more deals in more jurisdictions with larger financing amounts. This is cause for optimism of "when" – not "if" – that CPACE will be a valuable part of the solution to Local Law 97.

6. Technological Innovation

It is no secret that technology moves faster than the law. Local Law 97 is no exception. Lenders should be aware that certain advances in technology may become part of the law and the conversation with borrowers attempting to decarbonize their properties. Two examples are carbon capture and green hydrogen. Carbon capture refers to the technology of removing carbon dioxide (1) from power plants and other machinery before it is released into the environment (i.e., "point capture") or (2) from the air after being released into the atmosphere (i.e., "direct air capture" or "DAC") and then, in either case, storing the captured gas in another place or converting it into another form such as concrete. There is at least one private company offering point carbon capture to the New York City real estate market. Green hydrogen refers the energy created when hydrogen is burned by a renewable power source like solar, wind, hydro or even nuclear power. Hydrogen is the most abundant element on the planet. It releases no greenhouse gases, as the only by-product from the heat produced from burning hydrogen is water. Green hydrogen technology, however, is very expensive. Hydrogen is also invisible, odorless and highly flammable and so there are material safety concerns with this clean source of power. Local Law 97 is silent on both and makes no mention of either technology. Lenders and their counsel should watch the development of the law in practice as it is possible borrowers will one day be able to rely on either carbon capture or green hydrogen as a way to comply with Local Law 97.

Conclusion

In *Alice in Wonderland*, Lewis Carroll famously uses playing cards as the metaphorical game the characters represent in the classic novel. In the English author's follow-up novel, *Through the Looking-Glass,* a different game serves as the landscape for the story: a chess board. Much like Alice, the Red Queen and the other characters interact as different chess pieces moving about their fantasy world, the various players in the commercial real estate finance market are engaging in a real high-stakes game of chess of their own with Local Law 97 as its game board. Who is playing the roles of the King and the Queen remains to be determined but one thing is certain: the lenders who bring careful strategy to their real estate deals in 2024 in terms of how the law works have the best chance of keeping their borrowers out of check-mate.

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