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New era of energy efficiency: The impacts of Boston's BERDO and NYC's Local Law 97 on commercial lease transactions - by Steven Altmann

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As the effects of climate change become more urgent, municipalities across the United States are enacting laws attempting to reduce carbon emissions and improve energy performance. These initiatives present both landlords and tenants with new challenges as they work to adapt to laws designed to enhance sustainability efforts and penalize noncompliance. Presently, there are two key pieces of legislation that are reshaping the commercial real estate landscape: Boston's Building Emissions Reduction and Disclosure Ordinance (BERDO) and New York City's Local Law 97 (Local Law 97). These laws aim to make buildings more energy-efficient and sustainable. They also have important implications for parties to commercial leases.

BERDO and Local Law 97

BERDO is a law in Boston that requires large buildings to reduce greenhouse gas emissions and report water and energy consumption to the city annually. The ultimate goal of the law is to reach net-zero emissions (i.e. the amount of greenhouse gases emitted is equal to the amount removed from the atmosphere) by 2050. Buildings that fail to comply with the emission standards established by BERDO could face a fine of \$1,000 per day for each day of non-compliance, and building owners who fail to report their water and energy consumption statistics could be fined up to \$300 per day for each day of non-reporting. Some of the structures BERDO applies to include:

- Residential buildings that have 15 or more units;
- Non-residential buildings that are 20,000 s/f or larger; and
- Any tax parcel with multiple buildings that equal at least 20,000 s/f or 15 units.

Local Law 97 is a New York City law that requires building owners to report their annual greenhouse gas emissions to the New York City Department of Buildings. The law also limits the amount of greenhouse gas emissions from buildings over 25,000 s/f. The immediate goal of the law is to achieve a 40% reduction in greenhouse gas emissions by the year 2030, and the ultimate goal is to achieve net zero carbon emissions by 2050. Buildings that do not comply with the emissions limits could face fines of \$268 per metric ton of CO₂ emitted over the individual building's cap in any given year, and \$0.50 per building square foot per month for failure to file a report. Some of the structures Local Law 97 applies to include:

- Hospitals;
- Commercial buildings; and
- Affordable housing and large multifamily dwellings.

Commercial Lease Considerations

Laws such as BERDO and Local Law 97 create new challenges and considerations for both landlords and tenants in commercial lease transactions. To comply with carbon emissions reduction requirements, landlords may need to complete certain upgrades or improvements (i.e. upgrades to HVAC systems, replacement of inefficient windows and/or installation of solar panels or other renewable energy sources) and seek to pass the cost of building retrofitting efforts through to tenants in the form of higher base rent or operating expenses. It's essential to negotiate how these costs will be handled. As landlords and tenants negotiate responsibilities regarding these specific improvements, here are a few key considerations:

Tenants should negotiate guardrails against rent increases or pass-through expenses associated with retrofitting, and complete due diligence prior to executing a lease to determine whether there are plans to complete retrofitting projects to comply with these laws.

Tenants may request the right to audit energy performance data to ensure compliance with BERDO or Local Law 97 and understand how their use of the building impacts overall energy consumption.

Landlords should explore local, state, and federal incentives for energy efficiency upgrades and determine if these savings can be shared with tenants.

Since both BERDO and Local Law 97 carry the risk of penalties for non-compliance, landlords may face hefty fines if they fail to meet emissions targets or report energy data accurately. Commercial leases should contain clear provisions about how non-compliance fines are handled.

Landlords may want to include indemnification provisions that protect them from tenant-related penalties or damages caused by the tenant's operations (e.g., excessive energy consumption), or consider incorporating provisions that make tenants responsible for any fines arising from their own energy inefficiency or excessive carbon emissions.

Tenants should negotiate to ensure they are not held responsible for landlord-imposed fines that arise from building-wide issues such as energy inefficiency, failure to meet emissions reduction targets, or excessive energy consumption by other tenants or occupants. Tenants with sustainability goals may also want to include clauses that incentivize or require landlords to meet specific energy efficiency or carbon reduction targets within a defined timeframe.

As climate change regulations like BERDO and Local Law 97 reshape the commercial real estate market, landlords and tenants must carefully consider how these laws impact their financial obligations and operational strategies. In lease negotiations, clarity around responsibility for compliance costs, fines, and retrofits is critical to minimizing risks and fostering a cooperative relationship. By proactively addressing these issues, both landlords and tenants can ensure they are well-positioned to meet sustainability goals, comply with evolving regulations, and manage costs effectively in an increasingly green-conscious market.

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