



“GREEN” YOUR LEASE: LANDLORD AND TENANT PERSPECTIVES ON LEASE PROVISIONS FOR GREEN BUILDINGS

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Landlords and commercial tenants are finding “green” buildings – such as those achieving a sustainability certification pursuant to the U.S. Green Building Council (“USGBC”) [Leadership in Energy and Environmental Design \(“LEED”\)](#) program – increasingly attractive for a variety of reasons. By incorporating features that, among other goals, reduce energy and water consumption, promote renewable energy, maximize sustainable and minimize toxic building materials, and encourage waste recycling, green building can reduce operating costs, proactively manage future “carbon tax” or other climate change requirements, improve work environments and productivity, capture financial or land development incentives, enhance corporate reputation, and satisfy internal sustainability mandates.

To achieve and maintain these benefits, landlords and tenants must align their activities in ways that traditional lease forms do not contemplate. Therefore, when negotiating a lease for a green building, inside counsel for both landlords and tenants must consider provisions that address this special context. The following highlights some key “green lease” drafting considerations from landlord and tenant perspectives.

Building and Improvements Design and Construction: Each party may require the other to achieve and/or not violate a particular sustainable building certification, such as LEED Certified, Silver, Gold or Platinum. Moreover, the lease may specify particular green design and construction elements in both the overall building and tenant improvements, such as energy-efficient HVAC systems; on-site renewable energy sources; stormwater reuse; motion sensors, daylighting and energy-efficient lighting; low-flow plumbing fixtures; recycled materials; bicycle storage and shower facilities; and low-emitting adhesives, paints and flooring. For tenant-led buildouts and alterations, the landlord should require that the work conform to the applicable green certification, and that contractors recycle construction waste.

Allocation of Green Capital and Operating Costs: Green construction currently requires a larger upfront capital investment than standard construction. [Some studies](#) estimate this green premium at 1 to 2 percent to achieve a moderate sustainability level (e.g., LEED Silver), and more for higher levels. Conversely, green building should reduce operating costs over time, such as energy consumption ([estimated](#) at 25 to 30 percent less in LEED-certified buildings). Landlords and tenants must evaluate how a given rent structure allocates these costs and benefits and incentivizes green behavior.

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“GREEN” YOUR LEASE (cont’d)

There is no clear consensus on which rent structure works best for a green building. Many landlords prefer a “gross” lease, which imposes rent without separately passing through a proportional share of operating costs. This allows the landlord to offset green capital expenditures by capturing operating cost savings. However, while gross leases incentivize landlords to improve energy and water efficiency, they do not motivate tenants to do so. Conversely, tenants may prefer “net” leases, which allow them to benefit by reducing energy and water consumption, although the base rent may be higher than in a standard building to offset the landlord’s increased capital costs. A “modified gross” lease may assist both parties by including a base amount of operating costs in the rent (allowing the landlord to capture some efficiency cost savings) and by passing to the tenant any annual increases above base operating costs (motivating the tenant to conserve resources). As always, counsel must evaluate the details that dictate which structure is most advantageous to each party in a given deal.

Operation and Maintenance Requirements: To ensure that green systems run at maximum efficiency, and minimize the risk of losing green certification, landlords and tenants should be required to follow applicable green practices in operating and maintaining the building and tenant spaces. Some of these standards might be included in an incorporated O&M manual. Landlords, for instance, could agree to replace degraded building systems as needed to maintain certification (while passing through amortized costs), provide low-toxic custodial services, and allow bicycles in tenant spaces. Tenants might agree to comply with a mandatory recycling program, accept particular power and lighting specifications, use energy-efficient light bulbs and appliances, and accept limited HVAC service during off-hours. Sub-metering may be useful to monitor compliance with standards and provide tenants with economic incentives to conserve resources.

Additional Concerns: Green leases can implicate other thorny issues. For instance, if a green building generates “carbon offsets” or tax credits with value under current or future regulatory programs, the parties should determine who may claim them. They may also choose to require the landlord to purchase energy from renewable sources, or allow the tenant to do so. In addition, counsel should ensure that remedies for breaches of green obligations are appropriate to the type of breach. Remedies may include, e.g., cure periods, rent reduction, removal of noncomplying improvements, mandatory carbon offset purchases, liquidated damages, and termination.

Looking ahead, green leasing is an evolving field. Landlords and tenants alike will gain as provisions are refined in the coming years. Importantly, rather than adopt these provisions blindly, inside counsel must carefully and creatively apply them to align landlord and tenant behaviors toward green objectives while maximizing their own companies’ economic and sustainability benefits.