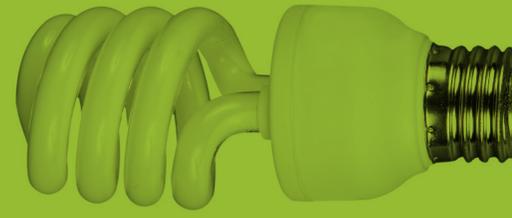


Green Leasing GOES MAINSTREAM



The Green Lease is becoming more common as energy and sustainability issues affect both the cost of operating a commercial property and a landlord's ability to attract tenants seeking energy efficient properties.

A Green Lease isn't a new document replacing existing lease forms. Instead, it is a negotiating framework which landlords and tenants can use to address energy costs and sustainability issues as part of the leasehold relationship which typically lasts many years.

Among the forces behind the Green Lease are anticipated increases in energy prices driven, in part, by expected costs associated with CO2 emission cap-and-trade regulatory schemes which will add a premium to energy costs for buildings with carbon-laden energy generation sources.

The competitiveness of a property, as benchmarked against its peers, is based on fully-loaded occupancy cost—of which energy is an increasingly important component. Tenants such as the U.S. General Services Administration (GSA) and many major corporations now require industry certifications such as the USGBC-Leadership in Energy and Environmental Design (LEED)[®] moniker or operating performance tied to the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) or USEPA ENERGY STAR energy benchmarking standards in buildings considered for leasing.

Landlords and tenants should discuss:

- How will operating expense reductions from energy efficiency investments be allocated?
- Who is responsible for expenses associated with maintaining a LEED type certification? Are such expenses part of a common area maintenance (CAM) allocation or considered a capital investment in the building which cannot be passed through to tenants?
- Who has rights to economic incentives associated with installation of energy efficient technology and the related energy consumption reduction which can be monetized as a renewable energy credit in several states?
- Who has rights to install and benefit from renewable energy systems associated with the property, including roof top solar, geothermal, and wind power generation?



- Who is responsible for maintaining compliance with green building codes at the state and local level?
- Does the tenant have the right to sub-meter its space so that it has a precise measurement of its actual energy consumption?

Most of these issues can be incorporated into provisions contained in typical lease forms. Many are influenced by whether the lease is structured as a gross lease (energy costs built into the tenant's overall rent obligation) or a net lease (tenant pays for energy costs on a direct basis in addition to base rent). The primary goal is to align incentives to reduce energy consumption for both the landlord and the tenant.

Green Lease provisions are also motivated by transactional energy disclosure laws in states such as California and Washington which require a landlord to disclose energy consumption history prior to lease execution. Tenants in such states increasingly are requiring annual green representations by the landlord to confirm ongoing compliance with LEED certification which becomes a material provision in the lease.

Building labeling statutes are expected to expand beyond those adopted in Washington D.C. and numerous local jurisdictions such as Austin, Texas, which require landlords to publicly display a property's energy consumption history and routinely update such information. Transparency associated with these laws will further drive this issue to the forefront of landlord tenant negotiations.

Proactive landlords are turning to the American Society of Testing and Materials (ASTM) which is expected to finalize in mid-2010 the Building Energy Performance Assessment (BEPA) as part of its new standard (ASTM WK24707) that can be used by landlords to gain an understanding of their property's green condition. The BEPA can assist landlords in competitively positioning their properties for tenants interested in energy performance disclosures.

The bottom line is that both landlords and tenants are increasingly focused on how energy consumption affects the occupancy cost of a building. The Green Lease negotiating framework is a good tool to arrive at a win-win outcome for all involved.

Real Estate + Climate Change
Mark J. Bennett 248.267.3269