

APPLYING OLD METHODS TO NEW VALUES: CONSIDERATIONS FOR GREEN LEASES

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Commercial leasing firms and agents are becoming more adept at using the green building movement as a business strategy and marketing tool. Many companies report that their shareholders and customers are pressuring them to green their portfolios. By 2009, 82% of large American corporations were expected to have “greened” 16% or more of their real estate portfolios, and 18% were expected to have greened 60% or more of their real estate portfolios. Susan Coleman, *Green Leasing*, 569 PLI/Real 539, 541 (2009)(Citations omitted).

Even in these slow economic times, the green building movement is still relevant because it can help landlords and tenants reduce building operating costs. Yet, even today, when advertisers call everything from coal to Barbie green, the green lease may seem like unfamiliar territory. Green leases, which are simply leases of space in green buildings, are after all based on new (and constantly changing) green rating systems. See Geoffrey White, Joshua Nichols, & Jeff York, *Green Building Rating Systems and Green Leases*, 41 *Envtl. Rep. News & Analysis* 10049, 10057 (2011). Upon closer examination, however, we see that, while the systems may be new, the methods are not. Green leases are actually surprisingly familiar: the position of the landlord vis-à-vis the tenant is the same as ever.

Do green buildings and green leases lead to new or unsuspected liability on the part of landlords, builders, and others? A recent panel of knowledgeable attorneys convened by the U.S. Green Building Council was skeptical. Instead, the panel called green building liability “new wine in old bottles.” Liability could be limited through a combination of experiential knowledge and contracts – distinctly old-fashioned methods. Brendan Owens, *Building Green: The Legal Risk in “Building Green”: New Wine in Old Bottles?*, 565 PLI/Real 41 (2009).

I. Green Certification & Credentialing Systems

Green leases are usually intended to function alongside a current or future green certification of a building. Consequently, it is worth briefly considering those certification systems. Because construction methods, building materials, and architectural design are constantly evolving, green building is best understood as a malleable concept, rather than as a strict theme. These systems measure performance by using benchmarks to evaluate the environmental impacts of development. The six most common benchmarks are site location, energy conservation, water conservation, material selection, indoor air quality, and building operations and maintenance.

In some cases, state and local governments mandate these performance standards in order to increase construction and operation of green buildings. For example, in 2008, Dallas adopted a green building ordinance that incorporates Leadership in Energy and Design (LEED), Energy Star, and American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) standards.

By far, the most well-known system in the United States is the U.S. Green Building Council’s (USGBC) LEED program. LEED was developed in 1993 and updated in 2009 to version 3.0. It is a voluntary point-based system used internationally as a third-party green building verification system. It evaluates all six of the standards mentioned above by awarding

points for various performance levels. LEED certification is achieved at different levels depending on points accumulated.

LEED now encompasses a wide universe of services and procedures, including an appeals process for certification decisions, numerous professional certifications, and multiple issue-specific rating systems. LEED evaluates commercial and residential buildings, and it can be used through a building's lifecycle—design, construction, tenant buildout, operation, and renovation. Recently, it has even been extended to neighborhood design by evaluating community planning & design.

Other important green building rating systems include:

- BREEAM, established in 1990 by the Building Research Establishment in the United Kingdom, which is similar to LEED but is more widely used outside the United States;
- Green Globes, an online building assessment tool used for new and existing residential and commercial structures developed in the United Kingdom and Canada, which is supported as a standard by the American National Standards Institute (ANSI);
- Energy Star, a system originally for rating appliances and electrical devices developed by the U.S. Environmental Protection Agency and the Department of Energy, which has been expanded to include whole-home and commercial building efficiency;
- GGHC, the leading green building initiative in the health care industry, created by the American Society for Healthcare Engineering in 2002, which is a self-certifying system that borrows from LEED; and
- Standard 90.1, a building energy-rating system, developed by the ASHRAE and other industrial organizations.

See White et al., at 10053-56. Another aspect of the green industry that may be relevant to a green lease is whether the professionals involved in the project have green credentials. Not only are buildings becoming greener, but lawyers, accountants, and other professionals are doing so, too. Although there is still a good deal of debate on the value of these credentials, by 2009 there were more than 100,000 LEED-certified professionals (by far the most important credentialing program). Real Life Leed, <http://www.reallifeleed.com/2009/04/its-official-100000-leed-aps-worldwide.html> (April 22, 2009).

The LEED professional credentialing program has recently been overhauled. The most significant update is a membership system, where each tier has specific eligibility requirements and continuing education requirements. The new program is catching on quickly: within one year of its release, LEED certified more than 10,000 Green Associates. Green Bldg. Certification Institute, “GBCI Celebrates 10,000 LEED Green Associates,” http://www.gbci.org/org-nav/announcements/10-08-18/GBCI_Celebrates_10_000_LEED_Green_Associates.aspx (Aug. 18). There are three tiers:

- A LEED Green Associate demonstrates competence in understanding and supporting green design, construction, and operations.

- A LEED AP+ demonstrates depth of knowledge and experience in one of several particular fields, including commercial building design & construction, commercial operations & maintenance, commercial interiors, residential design & construction, and neighborhood development.
- A LEED AP Fellow demonstrates special leadership and longtime service in the green building and design field.

II. Green Leases

Because most corporate space in the United States is leased, green leases are a natural consequence of the green building movement. Recall that a green lease is a lease of space in a green building. There is no legal definition of a green lease. Generally, a successful green lease encourages green goals or objectives through cooperation. Leases can be as simple as a boilerplate lease with a few sustainability concepts added, or they can be much more complex, adding measurable performance standards, allocating costs depending on which party acts to conserve energy costs, and providing the parties with specific remedies if the other fails to perform its green obligations. *See, e.g.,* Jonathan Cohen & Theodore I. Yi, *Green Leasing from the Tenant's Perspective: What to Look for and What to Avoid*, 571 PLI/Real 315, 317 (2009).

Landlords are interested in implementing green leases for a number of reasons, including marketing efforts, increased rental income, claiming tax or carbon credits, receiving government subsidies, or complying with state and local energy conservation laws. Because of these interests, landlords will want build out (i.e., completion) standards that ensure the building's eligibility for green certification, maintenance and repair obligations that comply with certification standards, and cost-sharing for green certification or conversion to alternative energy sources and other conservation measures.

Green lease tenants face a number of issues that could put them at odds with a landlord. Generally, tenants want the lease to give standards for how the building or space will be delivered, to explain how the tenants' actions affect green ratings or credentialing, to require cost-sharing for installation and operation of any special monitoring equipment, and to allow for self-help remedies if the landlord fails to achieve or maintain specified sustainability standards. On the other hand, tenants usually will want to avoid the disproportionate pass through of building-wide sustainability costs, requirements to obtain utilities from the landlord, and allowing the landlord to limit its obligation to ensure that the building and its systems meet sustainability standards. *See* Cohen & Yi, *supra*, at 318-20.

As these different interests make clear, the biggest challenge to both parties in implementing a green lease is to align incentives properly. For example, the pure (or triple) net lease, which is especially common in commercial real estate and passes on the costs of real estate taxes, building insurance, and maintenance to the tenant, does not encourage the landlord to invest in conservation measures because the landlord will not share in the savings. On the other hand, a pure gross lease encourages the landlord to lower operating costs because the landlord pays all those costs, but the tenant is not encouraged to moderate or conserve use. To solve this

problem, many green leases use a modified gross lease that sets a base cost, which the landlord pays, and the tenant pays the increment above that base cost.

Enforcement of green leases may also be problematic. Some leases are accused of being “greenwashed,” where they simply provide a tenant with a green how-to handbook, with no performance standards or enforcement mechanisms. But how can a green lease have enough teeth to correct a wayward party? Consider that, although a tenant’s breach could result in the loss of green certification, a green tax credit, or business goodwill, traditional legal remedies would have to suffice for the landlord because courts seem unlikely to consider many green lease provisions as serious enough to warrant an eviction remedy. *See* Ronald W. Ruth, *In the Spotlight: Enforcing the Green Lease*, 22(5) Comm. Leasing L. & Strategy 1, 1 (2009). As a solution, a lease might prescribe its own dispute resolution mechanisms to correct the tenant’s actions. A simple lobby wallboard showing, tracking, or ranking various utilities or other statistics may be effective. For some disputes, liquidated damages or “additional rent” could be assessed against a green security deposit. For more serious disputes, a pre-determined, impartial third party sharing green values could be used to review disputes and facilitate compliance.

Like any lease contract, landlord and tenant wish lists may not prove practicable because they are oftentimes not in the interests of both parties. There are, however, some practices that both parties will probably want to include in a robust green lease:

- Use of sustainable materials, cleaning products, and maintenance procedures
- Recycling requirements, where the landlord must provide a system and the tenant must participate
- Specify who pays for green building insurance, or for the increment above standard property insurance
- Flexibility to account for the seemingly ever-changing certification standards
- Milestones for re-evaluation of conservation goals and achievements

See generally Ellen Sinreich, *The Greening of the Retail Lease: 10 Tips for Landlords and Tenants*, 573 PLI/Real 143 (2009).

III. Conclusion

This brief article has introduced the risks, rewards, incentives, and costs of green leases. The normal tensions in the landlord-tenant relationship mean that green lease provisions can be written best by applying old methods to society’s new green values. Clarity of forethought still reduces the frequency and consequences of problems. In the end, a successful green lease must give both the landlord and tenant incentives to conserve energy, reduce waste, increase recycling, and use environmentally friendly products and materials.

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