The Importance of 'Greening' Your Commercial Lease

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WHAT IS A "GREEN" LEASE?

With demand increasing for leasable space in green buildings, it may be surprising that there is no widely accepted definition of a "green" lease. There is, however, general agreement that the purpose of a green lease is to encourage the building owner and the tenants to adopt and maintain environmentally friendly, sustainable business practices in an effort to reduce energy and water use, reduce waste, and create a more comfortable and healthy environment for the building occupants.

Green buildings offer benefits for owners and tenants. The benefits of owning a green building can include the ability to attract and retain high-quality tenants who are willing to pay a premium for green space; realizing cost savings through lower energy use; minimizing the ongoing risk of dealing with ever-tightening environmental restrictions and regulations; and higher real estate values as a result of the foregoing factors. The benefits for tenants leasing space in a green building can include lower utility costs, improved employee health and increased productivity.[1] In addition, some tenants may want to send a message of corporate social and environmental responsibility to their investors, clients or customers by leasing green space. To those tenants, the benefits of enhancing their reputations may be more difficult to quantify than, for example, utility cost savings, but those benefits may be just as important, if not more so.

GREEN STANDARDS

There are numerous green building standards that are now being used in the commercial building industry, but the three most widely used and recognized in the U.S. are LEED®, Green Globes and ENERGY STAR®.

Of those, LEED, which stands for Leadership in Energy and Environmental Design (LEED) Green Building Rating System™, is the most prominent standard for leased space. LEED is an internationally recognized green building certification program that provides third-party verification that a commercial or residential building has been designed and built in a sustainable manner.[2] LEED was developed by the U.S. Green Building Council

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(USGBC),[3] a nonprofit organization, and is a voluntary, points-based program that measures the sustainability of a building by reviewing performance in key areas. Those areas include water efficiency, sustainability of the site, energy efficiency, reduction of waste, use of materials and resources in a manner that reduces environmental impacts, and improvement of indoor environmental quality. Points are awarded based on the type of building and the satisfaction of various sustainable construction and operations benchmarks, enabling a building to earn one of the four levels of certifications: Certified, Silver, Gold or Platinum.

Canada-based Green Globes is another points-based sustainable development rating system used in the U.S. and Canada. In the U.S., Green Globes is owned and operated by the Green Building Initiative,[4] a nonprofit organization whose mission is "to accelerate the adoption of building practices that result in energy efficient, healthier and environmentally sustainable buildings by promoting credible and practical green building approaches for residential and building construction."[5] Green Globes is an online assessment system that uses third-party verification and rates the environmental performance of new and existing buildings by reviewing certain factors including the project site, use of energy, water and other resources, emissions and indoor environmental quality. While Green Globes and LEED have similar goals, they offer different advantages and disadvantages. For example, Green Globes emphasizes its simpler methodology and user-friendly interactive guide as compared to the LEED certification process, which is more complex. In addition, the Green Globes certification process is usually less expensive than LEED's certification process.[6] However, LEED is far more widely acknowledged and used in the U.S. than Green Globes. For example, as discussed in more detail below, some jurisdictions have adopted LEED certification levels as minimum standards for certain types of development.[7] Further, as of January 2010 only 100 buildings in the U.S. had been certified by Green Globes[8] while more than 2,400 projects in the U.S. have been certified by LEED.[9]

ENERGY STAR is a joint program of the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Energy that aims to protect the environment by promoting energy efficient products and practices.[10] While meeting ENERGY STAR standards can contribute to earning other certifications, such as LEED certification, ENERGY STAR also offers its own certification system. Commercial buildings may earn the ENERGY STAR label by meeting strict energy performance standards set by the EPA.[11] The first step in obtaining the ENERGY STAR label is to obtain the "Designed to Earn the ENERGY STAR" certification, which is awarded to building design projects that achieve a rating of 75 or higher on EPA's energy performance rating system and are designed to perform among the top 25 percent of buildings in the U.S.[12] The second step is to measure and verify that the building's actual performance meets the ENERGY STAR requirements.[13] Because ENERGY STAR focuses solely on energy conservation, its certification system differs from the LEED and Green Globes certification systems, which use more comprehensive sustainable building approaches by assessing other factors such as indoor environmental quality, efficient use of water, reduction of waste and sustainability of the site.

GREEN LEASING IS ON THE RISE

Despite the recent downturn in the commercial real estate market, the demand for green building space in office, retail and mixed-use projects continues to increase throughout the U.S. According to information compiled by USGBC, in the U.S. the green market was two percent of nonresidential construction starts in 2005; 10–12 percent in 2008; and will grow to 20–25 percent by 2013.[14] This is evidenced by the growing number of LEED-certified buildings over the past five years: in 2005 only 404 buildings were LEED certified, but by 2008 more than 2,000 buildings were LEED certified.[15] This trend is consistent with the increase in ENERGY STAR-rated buildings. According to a study performed by the U.S. EPA, during the first six months of 2009 alone, the number of ENERGY STAR-rated buildings rose 17 percent.[16]

In the U.S., buildings account for 72 percent of electricity consumption, 39 percent of energy use, 38 percent of carbon dioxide emissions, 40 percent of raw materials use, 30 percent of waste output and 14 percent of potable water consumption.[17] The impact on the environment and the depletion of precious resources caused by traditional construction practices account for some of the increasing interest in buildings that have been sustainably designed and constructed. However, there are many other benefits associated with owning or leasing green space.

The most obvious benefits associated with sustainably designed and constructed buildings are environmental benefits. Such environmental benefits include the improvement of indoor air quality, reduction of waste, conservation

of water and other natural resources, and protection of our ecosystems. According to a study of sustainably designed buildings conducted by the U.S. General Services Administration (GSA), green buildings consume 26 percent less energy and have 33 percent less greenhouse emissions than traditionally built commercial buildings.[18]

There are also numerous direct and indirect economic benefits associated with green building including lower operational costs. The GSA study revealed that its sustainably designed buildings had 13 percent lower maintenance costs compared to traditionally constructed buildings.[19] Another direct economic benefit is the availability of federal and state incentives for sustainable construction and operation practices that an owner might be able to obtain. For example, there is a federal tax deduction for the cost of installing certain qualifying energy-efficient improvements such as lighting, heating, cooling, ventilation or hot water systems that reduce a building's total energy power cost by 50 percent or more compared to a building meeting only the minimum requirements set by Standard 90.1–2001 of the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE).[20] This deduction is available primarily to building owners, although tenants may be eligible if they make qualifying construction expenditures. An example of a California state incentive is a property tax exclusion for certain types of solar energy systems installed in industrial, commercial and residential buildings.[21] Qualifying active solar energy systems are defined as those that "are thermally isolated from living space or any other area where the energy is used, to provide for the collection, storage or distribution of solar energy."[22] This includes solar space conditioning systems, solar water heating systems, active solar energy systems, solar process heating systems, photovoltaic systems and solar thermal electric systems.

There is a wide variety of indirect economic benefits as well. One such benefit is the improvement of occupant satisfaction which, in turn, increases employee productivity and helps to attract high-quality tenants. The GSA study revealed that its sustainably designed buildings had 27 percent higher occupant satisfaction rates compared to traditionally constructed buildings.[23] Also, a November 2009 report entitled "Why Do Companies Rent Green?" published by RICS Research found a less obvious reason for some tenants' interest in leasing space in green buildings: enhancement of the tenant's reputation as an environmentally and socially responsible company.[24]

Certain tenants, the report found, strive for a "green" reputation to help attract investors as well as customers who are increasingly judging companies by their actions as well as their products. Other companies appear to be motivated more by the opportunity to avoid risk. They recognize that with the trend toward increasing environmental regulations, they can avoid the necessity of sharing in the cost of expensive modifications required to comply with such regulations, including stricter controls on energy use and waste emissions, by occupying buildings that are likely to conform with environmental regulations for some time.[25]

Incentives offered by many local jurisdictions for constructing or remodeling buildings in conformance with a particular green standard such as LEED also provide motivation for building sustainably. For example, Marin County, California, has a green building incentive program that offers fast-track permit processing, free green building technical assistance and waivers of certain fees for projects that meet certain sustainable-development requirements.[26] Some jurisdictions have gone beyond providing incentives to encourage green building, and have adopted ordinances that require that projects achieve certain minimum environmental standards. The City of San Francisco, for example, requires that all projects of more than 5,000 square feet must obtain a LEED rating of Silver or higher.[27] Additionally, the State of California has recently become the first state in the nation to adopt a mandatory green building standards code.[28] California's building standards code, known as CALGreen, previously only included voluntary standards. However, as of Jan. 1, 2011, certain components of those standards, including the following, will become mandatory for all new buildings: reduction of water consumption by 20 percent, diversion of 50 percent of construction waste from landfills and the installation of low pollutant-emitting materials, such as paints, carpet, vinyl and particle board.[29]

With the environmental benefits, marketing advantages, financial incentives and mandatory requirements associated with green building, the approach known as green building is no longer just a trend or an ideal to achieve. Rather, it is a necessary and inevitable evolution in our building processes. Since green building is the reality for future development, it is imperative that provisions within commercial leases related to the construction, operation, management and use of commercial buildings be revisited and revised accordingly.

THE NEED FOR SPECIFIC GREEN LEASING PROVISIONS

Typical commercial leases do a good job of allocating various obligations between the building owner and the tenants, but they seldom address environmental considerations beyond the basics of specifying which party is responsible for payment of utilities. Worse, typical commercial leases can even be a deterrent to adoption of sustainable practices and procedures. For example, if a lease requires the tenants to pay all utility costs, there is little incentive for the building owner to add environmentally friendly improvements such as low-flow water fixtures, lighting timers and climate controls because none of the energy cost savings would accrue to the building owner's benefit. A green lease, however, is likely to go into detail about water and energy conservation targets and methods, the use of alternative sources of energy such as solar or wind, the use of environmentally friendly products and maintenance of indoor air quality standards; and to allocate the costs and benefits of those practices and improvements between the building owner and the tenants in accordance with their negotiations. The lease should define and incorporate the applicable green standards with enough specificity that the landlord and tenant will know what is required of each party, but with enough flexibility that the lease can accommodate necessary or desired updates. An owner constructing a building with sustainability in mind should include the appropriate green provisions in its lease form. Obviously, owners of existing buildings seeking to adopt sustainability standards will have a more difficult time, at least with their existing tenants, in incorporating green provisions into leases. While leases for new tenants of the existing building should include green provisions, the owner would need to seek modifications of leases for existing tenants, which may not be possible unless those tenants are motivated by the advantages that the green building features might offer, such as lower operational costs passed on to them. Otherwise, as those existing tenants' lease terms expire, new leases would need to include the green provisions.

The absence of lease provisions drafted specifically for green buildings (including those that address the expectations and sustainability goals of the parties, the allocation of responsibilities and expenses for maintaining sustainability standards, and the penalties for failing to satisfy sustainability standards) will lead to ambiguity in the lease, resulting in disputes between the parties. If such a dispute is litigated, the court will have difficulty in assessing the parties' intent as to allocation of the responsibilities for paying for and maintaining the sustainability of the building because the lease is silent on such issues. In addition to the time and money spent on litigating such issues, the court will be left with no other option but to speculate as to the parties' intentions and to decide for the parties what the lease will provide regarding those absent provisions. To avoid these problems, parties to leases for new green buildings should specifically address sustainability issues in their leases, and landlords who are adopting sustainability practices for existing buildings should incorporate sustainability provisions in leases for new tenants and should seek to amend leases for existing tenants. Noted below are examples of some of these provisions that are, for the most part, unique to green leases.

USE OF AN ENVIRONMENTAL MANAGEMENT PLAN

An environmental management plan (EMP) is a document that describes the environmental standards, pollution control measures, performance criteria and practices that a building owner and its tenants will follow to reduce negative impact on the environment. The EMP may also set forth future sustainability goals. The EMP would include, for example, the specific requirements related to recycling and waste management, use of energy efficient equipment, use of lighting controls and implementation of water reduction measures. An owner of a building that has earned an environmental certification may be required to, or may desire to, adopt and implement an EMP to ensure that the building operations and maintenance practices remain consistent with that certification. If a building owner establishes an EMP, the lease should require the tenant to comply with the EMP, and a copy of it should be attached as an exhibit to the lease. From the owner's perspective, the lease would ideally include a provision that allows the owner to modify the EMP from time to time as new sustainability practices become available, since changes in green technologies continue to evolve and improve, and as certification requirements may be updated. The EMP should also specify how the costs of compliance will be allocated between the building owner and the tenant. Some of the types of items that should be addressed in an EMP include:

- **Utilities (Lighting and Climate Control).** An EMP would set forth the standard for operation of the building's heating, ventilation and air conditioning systems (specific ASHRAE standards, for example).

Either the EMP or the rules and regulations for the building that are incorporated into the lease should prohibit the tenant from using energy-intensive equipment (such as space heaters) without the prior written approval of the landlord, and the tenant should be required to keep window blinds closed during exceptionally warm or cold weather and during non-business hours. The tenant and landlord should both be required to use compact fluorescent lamps, high-intensity discharge lamps, light-emitting diodes and other devices that produce more visible light but use less energy than standard incandescent lamps.

- **Furnishings.** The use of low- or no-VOC paints, solvents, adhesives, furniture, carpeting and fabrics should be required in order to reduce emissions from the materials used in the construction and furnishing of the building. These emissions can substantially reduce the indoor air quality within a building.
- **Cleaning Products and Practices.** Cleaning and maintenance practices that reduce the impact on the environment and indoor air quality should be required. Such practices include the use of: 1) sustainable cleaning chemicals and carpet care products that meet the Green Seal GS-37 standard;[30] 2) micro-fiber wipes or dust cloths or paper products that contain a large percentage of recycled material; and 3) hand soaps that do not contain antimicrobial agents, except as required by health codes. The EMP should set forth the standard, such as Green Seal, that the cleaning products must adhere to, and tenants should be required to train their maintenance personnel about the proper use, maintenance and disposal of cleaning materials. The landlord and tenants should be required to maintain documentation, subject to audit rights of the other party, providing proof that the cleaning products and practices used by them are in conformance with the criteria specified in the EMP.

ENVIRONMENTAL REPRESENTATIONS AND WARRANTIES

A tenant who has specifically bargained for the lease of green premises should try to include in the lease a representation and warranty from the building owner that the building is, and will continue to be, certified by the applicable environmental standard, if any. If the building has not earned any particular certification, the representation and warranty should be for a certain minimum green standard. For example, if there is an EMP, the representation and warranty would provide that the landlord will, at minimum, satisfy the sustainability requirements set forth in the EMP. The building owner, on the other hand, will likely prefer to include a general statement of the intent to operate the building in compliance with the EMP, rather than including a specific representation or warranty to that effect.

RECYCLING AND DISPOSAL ACTIVITY

A typical commercial lease will require tenants to remove all of their personal property and certain tenant improvements and/or alterations at the end of the lease term. Green leases should further require tenants to dispose of such improvements in an environmentally sensitive manner in accordance with the landlord's sustainability practices as set forth in the EMP, and to reuse and/or recycle to the extent possible. The same should apply to any obsolete personal property, equipment and furnishings the tenants want to dispose of during or at the end of the lease term. Tenants should also be required to report their recycling/disposal activity to the landlord at reasonable intervals, such as quarterly or annually. Requiring these practices assists the building owner in verifying that the building's sustainability practices for the building are being followed. Some building owners have started scheduling regular recycling days to make it convenient for tenants to recycle or dispose of unwanted materials—from used batteries to computer components—in one place and at one time.

ALTERNATIVE TRANSPORTATION INCENTIVES

A standard commercial lease would not address issues related to transportation. However, depending on the project, a green lease may include provisions related to incentives for reducing automobile use and increasing the use of alternative transportation. For example, to encourage bicycle use, a building owner may include bike racks and shower facilities within the building to provide occupants the option of biking to work. If so, the tenant might want to include lease provisions that require the building owner to provide a minimum number of bike racks, shower facilities and lockers. Also, the owner of a sustainably built and operated building might want to encourage carpooling or the use of low-emission or alternative fuel vehicles by providing incentives such as preferred parking. If so, the details of such incentive programs should be clearly defined either in the body of the lease or in the rules and regulations attached to the lease.

STANDARD LEASE PROVISIONS

The lease of space within a green building, whether certified by any particular standard or not, requires incorpo-

rating certain green provisions. The following are examples of provisions found in virtually all commercial leases. These should be modified to address the sustainability practices applicable to the building.

PERMITTED USE

A standard commercial lease will include a permitted use provision that will specify the type of use allowed for the leased space and will prohibit the tenant from using the space in any manner that would be unlawful or would constitute waste or nuisance. In a green lease, that provision should be expanded to include a prohibition against using or operating the premises in any manner that would be inconsistent with the building owner's sustainability practices or the certification of the building, if applicable. From the tenant's perspective, the lease should include a representation and warranty from the building owner that no space within the building will be leased to any tenant whose use would be in violation of the building owner's sustainability practices or the building's green certification standards. Of course, the ability to obtain such representations and warranties depends on the parties' respective bargaining power in the transaction. However, it would not be an unusual request from a tenant who has specifically bargained for space in a green building or from a landlord who wants to be able to continue representing and marketing the building space as being green or meeting a particular standard.

OPERATING COSTS

A standard triple-net commercial lease will require the tenant to pay a proportional share of the operating costs of the building and any common areas of the project. For a full-service lease, the tenant will be required to pay a proportionate share of any increases in operating costs over a base year. In both cases, a well drafted lease will specify in detail which types of costs will be included and which will be excluded from those operating costs to be shared by the tenant. In a green lease, it is important to include an allocation of the following costs as well:

- The cost of insurance endorsements to repair, replace and recommission the building for recertification in accordance with the applicable certification system, if any, that the building has earned;
- Costs of applying, reporting and commissioning and recommissioning of the building to conform with certification, to the extent such costs are not covered by insurance;
- Costs associated with the building owner's sustainable operations policies for the property including the maintenance, repair and replacement of specific systems that are unique to the sustainability practices that the owner has adopted, such as particular types of water or energy reducing mechanical systems, and compliance with the EMP.

INSURANCE

Several commercial property insurers are now offering green coverage endorsements to enhance their standard all-risk property policies. The endorsements are intended to protect a building's green certification. These endorsements provide flexible coverage for the additional costs of repair or replacement of the energy-efficient materials and systems necessary to restore the LEED certification level (or other green rating standard) of the building or premises. The additional coverage should include the cost of retaining an accredited green consultant to assist in the green design and reconstruction, as well as the costs of removing, recycling, disposing of and replacing the damaged property using environmentally responsible methods and materials. Building owners should verify that their leases are structured to pass any additional green insurance costs on to their tenants (generally as part of the operating costs), and tenants may want their leases to require the owner to maintain green insurance necessary to restore the building's green rating after any rebuilding.

In addition, some insurers offer reduced property insurance rates for LEED-certified buildings based on the building systems being designed, installed and operated in conformance with LEED requirements and the ongoing monitoring generally required. Allocation of the savings in insurance premiums should be addressed in a green lease, as well as how any increased costs will be allocated if the building does not retain its certification.

MAINTENANCE AND REPAIRS

Typical maintenance and repair provisions in a commercial lease will specify which portions of the building the landlord and the tenant will each be required to maintain. The tenant is normally required to maintain the leased space, including the fixtures and equipment located within and serving the space. The landlord is typically required to maintain those areas of the building and portions of the property that are not used exclusively by a tenant, including mechanical systems serving the building. The costs of such maintenance, repair and replacement are charged back to the tenants in the form

of operating costs. From the landlord's perspective, the maintenance and repair provision in a green lease should specify that the tenant must satisfy maintenance and repair obligations in a manner that is consistent with the building's sustainability practices as set forth in the EMP, and the environmental certification earned by the building, as applicable. For example, the tenant should be prohibited from replacing a dishwasher with one that does not meet the water reduction and energy reduction measures of the building. Similarly, the tenant should negotiate a provision within the lease requiring that the landlord's maintenance, repair and replacement obligations will be satisfied in a manner that is in conformance with the certification earned by the building.

COMPLIANCE WITH LAWS

Typical commercial leases require the tenant to comply with all present and future applicable laws, statutes, ordinances, codes, rules and regulations applicable to the property. The allocation of the responsibilities and costs of compliance, of course, depends on the respective bargaining power of the landlord and tenant. In a green lease, this provision should be expanded to require the tenant to comply with the landlord's sustainable building practices (which may be specified in an EMP) including the applicable requirements for any green certification earned (or sought to be earned). From the tenant's perspective, the green lease should also require the landlord to continue to comply with all certification requirements and the EMP, and should require the landlord to include in other tenants' lease agreements the obligation to comply with the certification requirements and sustainability practices of the building and EMP.

ASSIGNMENT/SUBLETTING

The assignment and subletting provision in a standard commercial lease will contain various terms permitting or prohibiting the tenant's ability to assign or sublet the leased premises, which terms may vary greatly depending on the bargaining strength of the parties. While some leases will allow the tenant to assign the lease or sublet the premises without the landlord's consent under certain, limited circumstances, most commercial leases require the landlord's reasonable consent before assignment or subletting. The assignment and subletting provision of a green lease should provide that it will be reasonable for the landlord to disapprove any assignment or sublease if, in the landlord's reasonable opinion, the proposed assignee's or sublessee's use would cause the premises or the building to be in violation of the building's sustainability practices or the requirements of the certification earned (or sought to be earned).

RIGHT TO RELOCATE

Many leases will include the right of the landlord to relocate tenants to a different space within the building or the center. The typical provision will require the landlord to relocate the tenants to a similar space of approximately the same size. A green lease should include a provision that the landlord's relocation of the tenants will be to a space that meets or exceeds the applicable certification that the tenants bargained for pursuant to their lease. If the new space is within the same building, it would have the same certification, but if it is a multibuilding site, another building might not meet the standard. The relocation provision in a green lease should also require the landlord to use commercially reasonable efforts to relocate tenants in a manner that will minimize the waste of resources that typically occurs in connection with moving tenants from one space to another. For example, relocation to a space with similar layout and dimensions will minimize the need to build out or reconfigure the new space, thus minimizing consumption of materials and energy.

DEFAULT

A typical commercial lease will treat the tenant's failure to comply with a lease obligation as a default and then allow the tenant a certain period in which to cure the default after receiving notice from the landlord. But building owners may want to treat certain environmental obligations differently from general defaults because the consequences of a tenant default that prevents the owner from obtaining recertification under LEED-EBOM (LEED for Existing Buildings: Operation and Maintenance) could be significant, even causing the owner to lose other tenants whose leases are contingent upon the building maintaining LEED certification. In such a situation, the building owner may want to expand its self-help remedies. Such remedies enable the landlord to perform the tenant's obligations to allow it to comply with the tenant's environmental obligations on the tenant's behalf, and then bill the tenant for the resulting costs.

Even with single-tenant buildings, a default by the tenant under certain green provisions could cause serious problems for the property owner. For example, if a lease requires the tenant to use certain green cleaning materials throughout the building and to train its personnel in the use of those materials, the building owner may be concerned about potential liability if those requirements

are not met and any health problems occur as a result. In such a case, the building owner may want to be able to require the tenant to use a landlord-approved cleaning service in order to ensure that its environmental practices are complied with on an ongoing basis.

On the other hand, if continuation of the environmental practices are as important to the tenant as to the building owner, the parties may want to have a lease provision that simply requires them to work together in good faith to remedy any breach of the environmental provisions of the lease.

BUILDING RULES AND REGULATIONS

Most commercial leases include a list of Rules and Regulations for the applicable building or project, which typically are attached to the lease as an exhibit. Generally speaking, unusual rules or those especially important to the landlord are better placed in the body of the lease where they may not be so easily overlooked during the tenant's lease review. Whether in the body of the lease or in the Rules and Regulations exhibit, a green lease should include a provision requiring the tenant to comply with the building owner's sustainability practices, as they may be modified from time to time by the building owner.

TENANT IMPROVEMENTS AND ALTERATIONS

Most office and retail space will require substantial improvements or alterations prior to a new tenant taking occupancy. How extensive the tenant improvements are and whether those improvements will be constructed by the landlord or the tenant, and the allocation of costs for those improvements between the parties, is obviously subject to negotiation. The more extensive the tenant improvements and the higher the building's certification (or targeted certification) level, the more important it is that the lease clearly specifies the green design and construction standards and practices to be followed. These requirements are best set forth in detail in the construction work letter that should be attached to the lease as an exhibit. Some of the more important green provisions to include in the work letter are noted below.

WORK LETTER

If there are substantial tenant improvements to be constructed, the work letter exhibit will be one of the most important parts of the lease. The work letter, like the body of the lease itself, should include a statement that the building is (or may be in the future) certified under LEED, ENERGY STAR, Green Globes, CALGreen or other relevant program. It should also contain a clear statement that all purchases of construction materials and all disposals of waste must comply with the construction and maintenance methods required by the relevant green program rating or certification for the building.

Here are several examples of green provisions and requirements that landlords should consider adding to their form work letters for green buildings:

- **Green Design and Implementation.** The tenant should be required to work with a LEED-Accredited Professional, or a similarly qualified professional if the landlord is not seeking LEED certification. That professional will coordinate and integrate all design and construction plans, material procurements and construction waste management plans, and oversee the entire project from design through occupancy to confirm that the project meets the building owner's sustainability requirements and practices.
- **Tenant Reports.** In order to gauge building performance, the landlord should require the tenant to provide specific information about all materials purchased for tenant improvements and alterations. The information should include data on cost, recycled content, salvaged content, rapidly renewable materials and geographic origin of the materials.
- **Soil Erosion Control.** If any exterior ground work is required, the construction management plan should address the methods to be used to prevent the loss of topsoil through wind or storm water erosion, and to prevent dust and particulate matter from escaping into the surrounding air during the construction process.
- **Indoor Air Quality/Volatile Organic Compounds.** The construction management plan must also address indoor air quality by establishing procedures to reduce emissions from the materials used in the construction and furnishing processes. This would include requirements for the use of low- or no-VOC paints, solvents, adhesives, furniture, carpeting and fabrics. When construction is complete, the building should be flushed out using 100 percent outside air for at least two weeks or until indoor air testing indicates that the concentration levels for chemical air contaminants are below specified levels, and then the filtration media should be replaced.[31]
- **Water Efficiency.** To reduce the use of potable water and the burden on the building's wastewater system, low-flow faucets, toilets and shower heads (if appli-

cable) should be required. Fire systems, domestic water systems and landscape irrigation systems should be maintained and metered separately.[32]

- **ENERGY STAR Equipment.** Installation of ENERGY STAR-rated equipment and appliances should be required including, but not limited to, lighting, electrical ballasts and controls, and kitchen equipment, if applicable. Such equipment and appliances must conform to the building's standards for energy management and connect into the building controls and monitoring systems. Daylight-responsive controls should also be required in all occupied spaces within 15 feet of windows and under skylights.
- **Construction Waste.** The tenant should provide documentation certifying the amount and types of construction waste that was recycled, salvaged or otherwise diverted from landfills and/or incineration.
- **Landlord-Constructed Improvements.** If the landlord, rather than the tenant, is the party responsible for constructing the tenant improvements, the costs associated with the green design and sustainability practices, documentation, registration and certification should be included in the definition of tenant improvement work to be reimbursed by the tenant or to which any applicable tenant improvement allowance would apply.

CONCLUSION

A confluence of factors over the past decade is leading to the inevitable conclusion that green building is not a mere trend or an idealized pursuit, but rather the new reality of commercial development. The reasons for the growth of green building include the desire of individuals and local governments to reduce energy use and other environmental impacts associated with the construction and operation of commercial buildings, and the financial incentives inherent in reducing operating costs and in attracting high-quality, long-term tenants.

Savvy tenants are passing over traditionally constructed buildings, choosing instead to lease space in buildings that are designed, built and operated using environmentally sustainable practices that reduce energy use and create a more healthy environment for the building occupants. Building owners want to take advantage of the targeted tax deductions, lower operating costs and higher rents attributable to green buildings. Unfortunately, most commercial lease forms in use today do not adequately address these new standards of building construction and operation, or fairly allocate the costs and benefits associated with such standards.

As a result, landlords and tenants should revise their lease forms to address the sustainability practices applicable to the building. Due to the many motivating factors promoting green building, voluntary and mandatory, this is a good time for landlords and tenants to discuss their needs and expectations for any future development or remodeling of the property and to document their agreements in an amendment to their lease. Landlords and tenants negotiating for new space in a green building should be sure to address the building sustainability practices up front in their lease negotiations. This will pave the way for a mutually beneficial, long-term relationship, the standards for which will be memorialized in a comprehensive, equitable green lease. ■

ENDNOTES

1. See report entitled "Why do Companies Rent Green?" by Piet Eichholtz, Nils Kok, and John Quigley, published by RICS Research, November 2009, available at *www.rics.org/site/scripts/download_info.aspx?fileID=5071.* Last visited April 7, 2010.
2. For more information on LEED®, visit *www.usgbc.org/DisplayPage.aspx?CMSPageID=1988*. Last visited Feb. 12, 2010.
3. For more information on the U.S. Green Building Council (USGBC), visit *www.usgbc.org/DisplayPage.aspx?CMSPageID=124.* Last visited Feb. 12, 2010.
4. For more information on Green Globes, visit *www.greenglobes.com/about.asp*. Last visited April 27, 2010.
5. For information on the Green Building Initiative, visit *www.thegbi.org/about-gbi/*. Last visited April 27, 2010.
6. LEED® project registration and certification fees can be found at w*ww.gbci.org/main-nav/building-certification/resources.aspx* and typical cost estimates for Green Globes certification can be found at *www.greenglobes.com/about-faq.asp#cost*. Last visited April 27, 2010.
7. See, for example, San Francisco Environment Code, Chapter 7, Section 707(e).
8. See "Green Building Initiative Certifies 100th Green Globes Building," Jan. 14, 2010, on *www.thegbi.org/news/news/2010/news_201001_100th-GG-Building.asp*. Last visited March 25, 2010.
9. USGBC Green Building Facts, April 2009, on *www.usgbc.org/ShowFile.aspx?DocumentID=3340.* Last visited March 25, 2010.
10. For more information on ENERGY STAR®, visit *www.energystar.gov/*. Last visited Feb. 10, 2010.
11. *www.energystar.gov/index.cfm?c=cbd_guidebook.cbd_guidebook_apply_3*. Last visited April 7, 2010.

12. *www.energystar.gov/index.cfm?c=cbd_guidebook.cbd_guidebook_apply_3*. Last visited April 7, 2010.
13. *www.energystar.gov/index.cfm?c=cbd_guidebook.cbd_guidebook_apply_3*. Last visited April 7, 2010.
14. USGBC Green Building Research, Green Building Facts, *www.usgbc.org/DisplayPage.aspx?CMSPageID=1718*. Last visited March 25, 2010.
15. 2008 Green Building Market Barometer, Turner Construction Company, *www.usgbc.org/DisplayPage.aspx?CMSPageID=77#market*. Last visited April 27, 2010.
16. ENERGY STAR® Snapshot, Fall 2009, at *www.energystar.gov/ia/business/downloads/ENERGY_STAR_Snapshot_Fall_2009.pdf*. Last visited April 27, 2010.
17. U.S. Green Building Council Web site *www.usgbc.org/DisplayPage.aspx?CMSPageID=1718*. Last visited Feb. 9, 2010.
18. "Assessing Green Building Performance, a Post Occupancy Evaluation of 12 GSA Buildings," *GSA Public Building Service Office of Applied Science*, June 2008, p. 4.
19. Ibid.
20. 26 USC § 179D. Landlords and tenants should seek the advice of their tax consultant to determine whether this, or other tax incentives, might be available for their specific project. (For a summary of federal tax and other governmental incentives, visit the Interstate Renewable Energy Council's Web site at *www.dsireusa.org/.)* Last visited April 27, 2010.
21. California Revenue & Tax Code §73.
22. California Revenue & Tax Code §73(b).
23. "Assessing Green Building Performance, a Post Occupancy Evaluation of 12 GSA Buildings," op. cit.
24. "Why do Companies Rent Green?" op. cit.
25. Ibid., p. 6.
26. Visit Marin County's Web site at *www.co.marin.ca.us/depts/CD/main/comdev/advance/Sustainability/greenbuilding/incentives/incentives.cfm* (last visited Feb. 6, 2009) for more information. For information regarding other incentive programs for jurisdictions within California, see the Database of State Incentives for Renewables & Efficiency prepared by the Interstate Renewable Energy Council's Web site available at *www.dsireusa.org/incentives/index.cfm?re=1&ee=1&spv=0&st=0&srp=1&state=CA*. Last visited April 27, 2010.
27. San Francisco Environment Code, Chapter 7, Section 707(e).
28. California Code of Regulations Title 24, Part 11.
29. For a more detailed summary of the CALGreen requirements, see the Office of the Governor Press Release dated Jan. 12, 2010, at *http://gov.ca.gov/PRESS-RELEASE/14186*. Last visited Feb. 10, 2010.
30. For more information about the Green Seal™ Environmental Standards, see *www.greenseal.org/certification/ standards/industrial_institutional_cleaners_general_bathroom_glass_carpet_GS_37.pdf*. Last visited Feb, 12, 2010.
31. See Sections 4–7 of ASHRAE Standard 62.1–2007, Ventilation for Acceptable Indoor Air Quality.
32. Among the requirements for LEED® 2009 for Commercial Interiors certification is that all available actual whole-project energy and water usage data be shared with USGBC and/or GBCI for at least five years. See the LEED 2009 for Commercial Interiors requirements at *www.usgbc.org/ShowFile.aspx?DocumentID=5543*. Last visited Feb. 12, 2010.