



Crafting a GREEN lease

Incorporating green elements in a tenant-landlord relationship is a relatively new phenomena; here are some tips for getting the most out of the deal.

By Andrea Carruthers

Your company has gone green and you want to incorporate those values into your leases.

Maybe you are moving into a green building and are looking at your first “green lease.” Or perhaps you’re renewing a lease and hoping to incorporate green concepts into your existing space and current landlord-tenant relationship.

While the move toward sustainable building design is an exciting trend, even experienced real estate lawyers are still learning this area. And building owners and tenants have yet to identify routinely troublesome issues — let alone develop standard solutions.

To help mitigate the gray areas in green leasing, keep the following points in mind.

Define “green”

A green lease should define what each side means by “green” and allocate responsibility for achieving and maintaining those objectives.

In some cases, “green” means obtaining third-party certification conferring that status. Certifications are offered through many different organizations, the most prevalent being the U.S. Green Building Council’s Leadership in Energy and Environmental Design program and the Green Building Initiative’s Green Globes program. It is also possible — and in some cases preferable — to incorporate green elements into the design and operation of space without investing the time and money necessary for third-party approval.

Regardless of how the lease defines “green,” if there are particular design elements that you consider essential, specify them in your lease. If any of these critical features are common area improvements, your lease should obligate the landlord to maintain them throughout the lease term, even if these items are in place before you move in.

Integrate green design and construction components

In most cases, leasehold improvements are completed after the lease is signed. Both landlord and tenant will participate in the design process, with each party typically having approval rights over the final design. Time is always of the essence in the design and construction phases, and you will want to make sure that the green aspects of your lease don’t bog down this process.

- If you have to be “reasonable” in your approval of design drawings and construction materials, include language where the landlord acknowledges that you are seeking LEED certification for your space, and agrees that it will be reasonable for you to disapprove elements of the design plans that are inconsistent with that objective.

- Make sure your construction bids,

for both time and cost, take into account your green design. To the extent you solicit preliminary construction figures before signing your lease, discuss your green vision with contractors. Although the gap is shrinking, green construction still

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- Meter utilities separately
- Push for energy conservation and sustainable operation
- Specify obligation to maintain green status
- Consider green building insurance products

tends to cost a little more than conventional.

- If you are specifying materials that have long lead times or limited availability, identify and obtain the landlord’s approval for acceptable substitutes.

Meter utilities separately

Because energy conservation is central to green design and operation, you probably will install conservation devices in your space. Most multi-tenant leases require each tenant in the project to pay its proportionate share of the operating expenses for the entire project. But unless your space is separately metered to measure utility consumption, you may not get the full benefit of the energy conservation equipment you install.

Separate meters may be the best solution if you’re a large user. If, however, you are a small tenant, then metering may not be cost-effective, or your landlord may not allow you to do it.

Historically, the issue of disproportionate use has been addressed by allowing the landlord to reserve some right to operating expenses. Most tenants, assuming they are not the heavy user, will readily agree, believing it will lower their overall operating costs. But for the same reason, other tenants may resist an allocation that reduces the costs of one energy-efficient tenant because it will increase their overall costs.

If you are a tenant planning to install energy-conserving equipment, you may want to obligate your landlord to make this special allocation. Beware, however, that the landlord may find it impractical to make such an allocation, or its leases with the other tenants may not allow it. If you do persuade your landlord to make these special allocations, you may want to consider asking for the right to audit your landlord’s operating expense calculations.

Push for energy conservation and sustainable operation

If you are a green tenant in a conventional building, you may want to obligate your landlord to operate the

building in a green manner. Rather than try to persuade it to commit to a vague “best practices” type of standard, focus instead on obtaining narrowly specified commitments, such as using biodegradable cleaning products as long as the costs are in line with conventional alternatives.

As you consider the degree to which you want to push your landlord to conserve energy and operate sustainably, bear in mind that these efforts may generate unintended consequences. For example, let’s say the landlord’s conservation efforts include minimizing the use of after-hours electricity by performing janitorial work during the day. How will that impact your employees and their productivity?

Specify obligation to maintain green status

If your lease requires achieving a third-party certification of green sta-

will need to further specify the frequency of recertification, and also the definition and consequences of failure.

In most cases, the “nuclear” option of lease termination is probably not a reasonable remedy, and self-help is impractical. The best solution may be an economic consequence — reduced or increased base rent, for example — designed to create appropriate incentives for each party, and also to compensate the nondefaulting party for the harm associated with the loss of green status. Expect these to be difficult and highly case-specific negotiations.

Consider green building insurance products

Explore with your risk management team whether you ought to carry additional insurance coverage to cover the green elements of your space build-out. Because this area is evolving, you may find it worthwhile, for the foreseeable future, to undergo this exercise on each new green lease.

At least one insurance company offers a property insurance product tailored to LEED- and Green Globes-certified buildings. In the event of a covered loss, this product would provide insurance for recommissioning or recertification fees, including fees required to certify at one level higher than before: vegetative roofing systems, debris recycling and the use of green-certified products. It also provides funds to rebuild a conventional building to a green standard.

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