

ABA Green Lease Task Force

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Introduction

The Leasing Group of the American Bar Association's Section of Real Property, Trust & Estate Law established a Green Lease Task Force in the fall of 2009 in order to develop practice-oriented materials and commentary for attorneys to use in this emerging area of the law. As discussed in the materials that follow, green building certifications and green building requirements are proliferating both in the United States and internationally. While "green" can mean a lot of different things, for purposes of this discussion, "green" generally means issues involving environmental impact and sustainability.

As the basic document governing third-party use of a building, a lease must assign responsibility for obtaining and/or maintaining green building certifications and requirements, and of course, allocate the cost of doing so. Many existing leases, however, do not directly address these issues because green issues likely still were "below the radar" at the time the leases were negotiated. So, of equal or greater importance to drafting green provisions on a going-forward basis, is the analysis of existing leases to determine how green building requirements or upgrades will be handled.

A threshold question to consider is "What exactly is a green lease?" Simply put, a green lease is just a lease that specifically addresses the handling of green building issues, either through inclusion of appropriate language in applicable lease clauses (such as operating expenses, maintenance, compliance with applicable law or a work letter) or through the attachment of a rider that addresses the issues. Other than including specific language to address green building issues, a green lease will not be qualitatively different from any other lease.

The Green Lease Task Force has approached the issues by first providing an overview of current developments in the field (which seems to be rapidly evolving), including green leasing resources and forms that currently are available and green building codes and requirements that currently are in effect. We then divided the analysis by practice area (office, retail and industrial/warehouse) and developed hypothetical fact scenarios that a practitioner may encounter in each such area. While fact patterns may vary by practice area, because basic lease issues (e.g., who does what and how is it paid for) do not vary that much, the issues addressed in a specific practice area should be relevant to all areas of leasing practice.

On behalf of the Green Lease Task Force, I would like to thank all of the attorneys who have graciously volunteered their time and effort to this project.

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Provisions of Existing Leases to Review Regarding Green Building Issues

- **Applicable Law:**
 - If a new law is passed that mandates green standards for building alterations, operations or maintenance, who bears the cost?
 - Can the Landlord pass these costs through (see discussion below regarding operating expenses and capital expenditures)?
 - What if the new law mandates energy conservation measures, but the tenant has a 24/7 operation or other high energy consumption use (also, see discussion below regarding utilities).

- **Operating Expenses and Capital Expenditures:**
 - The Landlord decides to install a roof-top garden. According to the Landlord, it will be a nice amenity for all tenants (sounds like a common area expense as long as all tenants have access, but also sounds like a marketing expense) and it *might* save some energy costs (sounds like the landlord is trying to justify tenants paying for capital expenditures).
 - Issues to consider: What is the nature of the “green” expenditure?
 - Is it capital? If so, what, if any, capital expenditures can the landlord pass-through?
 - Is it routine operating or maintenance? If it costs the Landlord more to use “green” materials as part of its routine building maintenance, can the Landlord pass-through those increased costs?
 - Is the Landlord touting the green expenditure in its latest promotional material for the building? What does the lease say about the Landlord’s ability to pass-through marketing expenses?
 - Leases sometimes use a “comparable building” standard when trying to define reasonable operating expenses. What happens to operating expense pass-throughs if other similarly situated properties are (or are not) adopting green maintenance programs?

- **Utilities:**
 - How is utility consumption measured and paid for?
 - Does the Landlord have a way to impose additional charges on a Tenant with above-average utility consumption or above-“green” average utility consumption?

- **Alterations:**
 - The manner in which alterations are performed (e.g., ventilation, disposal of construction debris, etc.), as well as types of materials (e.g. paint), fixtures (plumbing) and equipment (HVAC) used can be important factors in the LEED rating of a building.
 - LEED, EnergyStar or similar criteria might not have applied to a tenant’s initial build-out 5 to 10 years ago, but when it is time to refurbish or remodel the tenant space, the Landlord’s construction requirements and standards may include green building factors.
 - Is there additional cost to the Tenant in complying with the Landlord’s new green standards and if so, is there anything the Tenant can do about it, i.e., could the Tenant argue that it is unreasonable for the Landlord to impose green building requirements?

- **Maintenance:**
 - Depending on the parties’ respective maintenance obligations:
 - Can the Landlord impose new “green” maintenance requirements on the Tenant with regard to the Tenant’s space?
 - As noted above, what if the Landlord’s new green program materially increases Landlord’s cost to maintain common areas? Can the Landlord pass those costs through to the Tenant?

- **Rules and Regulations:**
 - Can the Landlord amend the rules and regulations to impose green operating requirements on tenants, and, if so, what are the Landlord’s remedies in the event of a violation?