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Drafting, negotiating 'green' lease

Building "green" is an effort that appears to be here to stay. Nearly all new projects are now constructed with sustainability in mind, and the practice of building "green" has been recognized as a business best practice throughout the country. The more recent trend of green leasing is an offshoot that is gaining attention for its ability to improve worker productivity and satisfaction, provide cost savings over the life of the building and improve a building's overall marketability. Consequently, most landlords, tenants and property managers eventually will draft or negotiate a green lease.

There are three major rating systems for green buildings in the United States: 1) the U.S. Environmental Protection Agency's Energy Star; 2) the Green Building Initiative's Green Globes system; and 3) the U.S. Green Building Council's Leadership in Energy and Environmental Design Green Building Rating System. Additionally, those interested in LEED certification for current retail projects must pursue LEED 2009 for New Construction or LEED 2009 for Commercial Interiors. LEED 2009 for Commercial Interiors addresses specifics of tenant spaces primarily in office, retail and institutional buildings. Pursuant to the USGBC's Web site, the LEED for Retail rating system is scheduled to launch in late 2010.

Regardless of rating system, green leases address unique aspects of lease documents that conventional leases often miss, particularly when it comes to the relationship between landlord and tenant. If the landlord or tenant is renting an office,



Sumaya Vanderhorst
Associate, Snell & Wilmer LLP,
Denver

retail or other space that has sustainability and energy goals, one or both parties will want to ensure that the lease provides adequate protection to maintain the value of the investments being made. Green

lease documents must clearly define the ongoing relationship between landlord and tenant and sufficiently address the obligations of each party with respect to the design, operation and maintenance guidelines.

One dilemma of green leasing is the decision regarding whether to adopt a gross lease or a net lease. In a gross lease, tenants are not responsible for their own utility costs, instead paying a fixed amount determined by the parties at the beginning of the lease to cover rent and operating expenses. In a traditional triple-net lease, a tenant will pay the base rent in addition to the share of operating costs. Gross leases encourage the landlord to improve energy efficiency building-wide. A net lease is more risky for the tenant because of the potential for operating-expense increases since the landlord has less incentive to improve a building's energy efficiency. The current trend in addressing this dilemma is to modify the traditional triple-net lease to allow a landlord to pass through costs of capital improvements that directly improve the energy efficiency of the building, lower total operating costs



Margy Wilson
Associate, Snell & Wilmer LLP,
Denver

or otherwise contribute to the sustainability of the building. The pass-through of these expenses may be a critical lease component for a landlord whose budget may otherwise not permit

the cost expenditures and maintenance that are typically a part of a green building. Landlords also should pass along the costs for commissioning, maintaining, managing, reporting and re-commissioning the building to conform to a green certification or rating program. In return, tenants should request lease provisions requiring landlords to regularly take inventory and ensure that the building is optimizing its green potential.

Landlords who are committed to owning and managing commercial properties that incorporate energy efficiency and green standards should consider adopting language into their leases that encourages tenants to: 1) reduce consumption of energy, water and materials; 2) produce less waste; 3) recycle; and 4) choose energy-efficient and environmentally friendly office equipment and/or furnishings. Landlords also may want to include language that requires the tenant to comply with the building's green practices that include consequences for failing to comply.

Green leases, like all leases, should identify consequences for noncompliance. With green leases, there are several unique pro-

visions to consider. For example, a green lease should prohibit any action that jeopardizes the sustainability or rating/certification of the building. The lease also should define requirements and methods of enforcements for ongoing compliance of energy efficiency standards, such as required use of energy-efficient appliances or other electrically powered equipment in addition to establishing an electrical load standard. Rules and regulations applicable to all tenants can clearly define a landlord's green building criteria or sustainability program as well as the ongoing requirements for the building to maintain or obtain a specific rating/certification. Improvements and alteration provisions should clearly define building material and finish requirements that include the design, construction, upgrades, appliance and electrical standards and recycling methods for unused building materials. A specific recycling and waste management program should be implemented and referenced in the lease. Tenant and landlord responsibilities for all green components of the lease should be clearly outlined with remedies for non-compliance. Failure to comply should be included as an event of default with standard remedies such as notice/right to cure, self-help, injunctive relief and specific performance, actual, consequential and liquidated damages and termination.

Drafting and negotiating a green lease may take a little more time and effort than the traditional lease, but the time spent will ensure that the parties are working together to maintain a green building that meets everyone's expectations.▲