THE LEGALITIES: A Presentation and Discussion of Legal Concepts and Issues in Green Leasing

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“Greening” Existing Buildings

- **Step #1**: Do the Building’s existing leases provide Landlord sufficient flexibility to “green” the Building in the desired manner?

- **Step #2**: Assuming that the Building’s existing leases do not provide Landlord sufficient flexibility to “green” the Building in the desired manner, how can a Landlord implement “green” lease provisions into existing leases?
Analyzing Existing Leases – Generally

- The implementation of a “green” program will require “buy-in” from existing Tenants – whether voluntary or involuntary – as Landlords will likely seek to:
  - Pass-through certain of the costs associated with the “greening” process; and
  - Increase Tenants’ various obligations under the Leases in order to comply with the “green” program.
- The content of existing Leases will determine how aggressive a Landlord can be in extracting this “buy-in”.
- How “green” you want to go will likely dictate how much the Landlord can rely on existing lease provisions to implement a “greening” program.
Analyzing Existing Leases – Required or Desired Lease Provisions

- **Operating Expenses.** Do the leases’ operating expense provisions permit Landlord to pass through capital improvements? If so, what portion of the capital improvements associated with the “green” program can be passed through?
  - Cost-Saving Improvements (e.g., improvements that are intended to reduce Operating Expenses).
  - Required Capital Improvements (e.g., improvements required to comply with changes in laws).
Analyzing Existing Leases – Required or Desired Lease Provisions

- **Design and Construction Standards.** Do the leases contain sufficient design and construction standards to obligate tenants to design and construct tenant improvements in accordance with the “green” program?

- **Rules and Regulations.** Are the leases’ rules and regulations provisions broad enough for a Landlord to introduce a “green” program and compel the tenants’ compliance?
My leases do not provide me the flexibility I need to implement a “green” program in a desired fashion – now what?
Implementing “Green” Lease Provisions Into Existing Leases

- Obtaining the Tenant’s Buy-In:
  - **Extol the Virtues of Going “Green”**.
    - Reduced energy costs and other cost-savings;
    - Marketing and brand-enhancement (e.g., tenants can “sell” their commitment to “green” philosophies); and
    - Increase the value of a tenant’s lease (e.g., easier to sublease and/or assign a “green” lease).
  - **Buy the “Buy-In”**. If a tenant’s “buy-in” cannot be obtained through persuasion, a Landlord may need to buy a tenant’s cooperation through economic and other concessions.
Implementing “Green” Lease Provisions Into Existing Leases

- **The “Green Lease” Addendum.** Landlords will need to create form lease amendments that contain all the items necessary in order to implement and operate the green program.

- **Risks to Landlords.** Sophisticated tenants will look to extract something from a Landlord in exchange for the tenant’s cooperation.
Specific Lease Provisions: The Environmental Management Plan

- The Environmental Management Plan. A comprehensive plan that addresses various elements of a Building’s “green” program. Like standard rules and regulations, the Environmental Management Plan needs to be flexible and can be amended from time-to-time to adapt to changing requirements and standards.
Specific Lease Provisions: The Environmental Management Plan

- The Environmental Management Plan should address, among other items:
  - Compliance with a general environmental standard;
  - Recycling obligations;
  - Air-quality and -temperature management;
  - Use of energy-efficient improvements (e.g., motion-sensor light fixtures, low-volume water fixtures, ENERGY STAR®-qualified equipment, etc.); and
  - Sub-metering or “smart”-metering of utilities.
Specific Lease Provisions: The Environmental Management Plan

- The Environmental Management Plan is in many ways the controlling element of a Building’s “green” program.

- As a result, Landlords will likely want to retain an environmental consultant (e.g., LEED-certified professional, Green Globe professional, etc.) to assist with the creation and maintenance of a Environmental Management Plan.
Specific Lease Provisions: Operating Expenses

- **Operating Expenses.** What costs associated with a “green” program may or should be passed through to tenants?
  - *Capital Improvements:*
    - Cost-Saving Improvements (*e.g.*, improvements that are intended to reduce Operating Expenses);
    - Required Capital Improvements (*e.g.*, improvements required to comply with changes in laws); and
    - All capital improvement costs associated with implementing, monitoring, updating and complying with the Environmental Management Plan.
Specific Lease Provisions: Operating Expenses

- **The Environmental Management Plan**: Landlords will want to be able to pass through all costs – not just capital improvement costs – of implementing, monitoring and updating the Environmental Management Plan (e.g., fees and costs paid to professionals engaged to create and monitor the EMP).

- **Caps on “Controllable” Operating Expenses**: Landlords will want to classify all “green” costs as “uncontrollable” and therefore not subject to any year-over-year caps on “controllable” operating expenses.
Specific Lease Provisions: Utility Consumption

- Consumption “Targets” or Requirements: Soft “targets” or hard requirements that set forth specific utility consumption levels. For instance:
  - Electricity use averaging not greater than [xx] kilowatt hours per square foot per year (Kwh/sf/yr);
  - Natural gas consumption averaging not greater than [xx] cubic meters per square foot per year (M3/sf/yr);
  - Water consumption levels averaging not greater than [xx] cubic meters per square foot per year (l/sf/yr);
  - A waste diversion rate not less than [xx] % per year; and
  - Indoor carbon dioxide (CO₂) levels compared to outdoor CO₂ levels of not greater than [xx] parts per million (PPM) measured in accordance with the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) standards 62.1-2007 or equivalent standards.
Specific Lease Provisions: Utility Consumption

- **Sub-metering and “smart” metering.** Landlords will want the ability to require the use of sub-meters or other “smart”-metering techniques to monitor and meter utility consumption – even if the Tenant’s use is not excessive.

- **Landlord’s right to survey and inspect utility consumption.** Landlords will want the ability to survey and inspect a Tenant’s utility consumption – by entering the Premises or otherwise.
Specific Lease Provisions: Alterations & Repairs

- Alterations & Repairs:
  - \textit{Generally}. All alterations and repairs performed by or on behalf of Tenant will need to be in compliance with the Environmental Management Plan.
Specific Lease Provisions: Alterations & Repairs

- **Alterations & Repairs:**
  - **Procurement & Contractor Requirements.** Obligation to:
    - Use equipment and materials that comply with the Environmental Management Plan (e.g., motion-sensor light fixtures, low-volume water fixtures, ENERGY STAR®-qualified equipment, etc.); and
    - Engage, or to cause Tenant’s contractor to engage, a third-party Green Globe or LEED-accredited professional to oversee and validate that the alterations conform to and comply with the Environmental Management Plan.
A Tenant’s Perspective:

- What retrofitting and “green” costs should a Tenant pay?
  - Costs that actually reduce Operating Expenses or otherwise add value to Tenant.
  - Costs incurred due to changes in laws.
- What obligations should be imposed on Landlord as part of a “green” program?
  - Landlord should be required to comply with the Environmental Management Plan – especially as it relates to Common Areas.
- What concessions can I extract in return for agreeing to go “green”?
Conclusion

- As many existing leases will not provide sufficient flexibility to mandate compliance with a “green” retrofit, Landlords will be required to either (i) obtain tenant “buy-in” or (ii) entirely self-fund the cost of implementing the “green” program.
Conclusion

- **New Buildings.** As obtaining an existing tenant’s “buy-in” will often be a Landlord’s biggest challenge, owners of new construction are at an advantage as they can craft their lease documents in advance to address these issues.

- **New Leasing.** Correspondingly, an owner that intends to retrofit an existing building can revise its existing lease documents on a go-forward basis to address these issues in connection with new leasing activity.
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