

## GREEN LEASE FORMS IN THE MARKETPLACE 2011

Steven A. Teitelbaum  
sat27@columbia.edu

“The birth of the green lease” was one of the top ten events in CoStar Group’s annual listing of significant events for sustainable buildings -- and that was back in 2008. Yet, three years later, relatively few have heard of “green leasing” and, while some have negotiated leases in green buildings, few have negotiated or seen a “green lease.”

Among the early adopters of green are various trade associations and entrepreneurs who have created “green lease” forms or conceptual guidelines for use by the private sector. These vary considerably in their approach and utility. If anything, they prove that there is no one answer to “greening” a lease and that the expansion of knowledge, not merely the propagation of forms, is the key to success.

The shared concept of these projects is that green *operations*, not merely green design or construction, are critical elements in achieving energy efficiency and an overall healthier and more productive environment for building occupants. It is important to note that it is not essential that a building be designed and constructed green in order to be operationally green. While green design and construction may give a building a head start -- depending on how the particular building achieved its level of greenness in the first place -- it is possible to green the operations of a non-green building, just as it is possible to operate a green building in a non-green manner.

Beyond that, each of these lease forms assumes, consciously or not, that one party or the other -- the landlord or the tenant -- is the driving force in greening the particular building and imposing its green will on the other, and therefore has to address the allocation of responsibility and cost incident to that.

Some of the better-known entrants in the field are the following, which are presented largely in chronological order so as to not imply any qualitative preference:

- Early out of the gate was a “Green Leases Toolkit” issued by the California Sustainability Alliance, available at no charge at [www.sustainca.org](http://www.sustainca.org). This product assumes that the tenant is the driving force in being green. The Toolkit includes a “Green Request for Proposal” that asks the landlord for a very thorough explanation of the green elements of its building, a “Due Diligence Scorecard” to compare how different buildings fare on various green criteria, and a “Lease Provision Database” that provides sample lease clauses. However, perhaps because these materials were early adopters, much of the material is aspirational or makes open-ended statements -- such as the parties “will work together” or “mutually establish an energy optimization plan” or “pursue commissioning programs.” While the sentiments may be admirable, most leasing practice in the U.S. prefers hard-and-fast covenants and does not rely on

vague statements about working together in the future on collaborative efforts. Thus, the Green Leases Toolkit is probably of more value in issue-spotting or in crafting a request for proposals than in crafting an actual lease.

- A more formal lease effort is provided via the Real Property Association of Canada's "National Standard Green Office Lease for Single-Building Projects." This ground-breaking work is available for free on the internet at [www.realpac.ca](http://www.realpac.ca). The REALpac green lease attempts to green a traditional lease form largely by adding a green rider, although there are also some green provisions incorporated into the body of the document. Despite its Canadian heritage, this form is quite similar to an American lease. What is perhaps most interesting about this particular green lease is its rapid evolution from an extremely and expressly aspirational model in the initial 2008 version, quite similar in that regard to the California Sustainability Alliance's materials, to a hard-nosed and extremely pro-landlord form upon re-issuance in March 2009. REALpac issued a re-revised version in February 2010, but the changes between the 2009 and 2010 versions are evolutionary, not revolutionary.

- Shortly after the first REALpac lease was issued in 2008, the Building Owners and Managers Association International (more familiarly known as BOMA) issued its own "Guide to Writing a Commercial Real Estate Lease, Including Green Lease Language." That publication was replaced by an improved version in 2011 under the new name "Commercial Lease Guide: Guide to Sustainable and Energy Efficient Leasing for High Performance Buildings." Given those mouthfuls, both editions are more commonly referred to as the BOMA Green Lease Guide. (Disclosure: The author of this article is the author of the BOMA Green Lease Guides.) The BOMA Green Lease Guides green a lease by incorporating green provisions directly into the text of a standard lease, instead of simply adding a green rider to an existing form. As a result, the BOMA Green Lease Guides are a bit less adaptable to other lease forms -- although their green provisions are printed in green ink so they can be easily spotted and utilized -- but they are probably more comprehensive in their green clauses and their overall approach. It is also arguable that the integrative BOMA approach avoids the simplistic response of non-green tenants to a green lease rider, i.e. simply deleting it. Not surprisingly given their source, the BOMA Green Lease Guides assume the landlord is the driving force behind going green and adopt a pro-landlord approach. On the other hand, the BOMA Green Lease Guides contain their own internal and extensive commentary on their provisions, thus critiquing their own terms, so they are useful to tenants as well. The BOMA Green Lease Guides can be purchased on BOMA's website, [www.boma.org](http://www.boma.org).

- The Natural Resources Defense Council (NRDC) attempted to come up with its own green lease rider. The effort quickly ended amid a Tower of Babel debate among the several dozen committee members (including the author of this article) as to what subjects should be addressed and how. This object lesson in the non-monotheism of green gave rise instead to a project focused on lease clauses that address energy efficiency. The NRDC's "Lease Energy Efficiency Guidance" issued in 2009 advocates greater transparency and greater information sharing between landlords and tenants, traditionally an anathema to landlords but a direction in which the USGBC seems to heading with its new requirement of energy efficiency reporting. Although the Lease Energy Efficiency Guidance doesn't provide actual lease language, it does raise interesting concepts and attempts to strike some balance between the

parties by allowing landlords more favorable amortization of capital costs incurred in saving energy. The Lease Energy Efficiency Guidance is available at [http://cycle-7downloads.com/Downloads\\_files/Energy%20Efficiency%20Lease%20Guidance%203-18-09.pdf](http://cycle-7downloads.com/Downloads_files/Energy%20Efficiency%20Lease%20Guidance%203-18-09.pdf).

- Most recently, the work done by the NRDC task force resulted in a sample lease clause addressing the “split incentive.” This is a problem common to net leases where the landlord doesn’t get reimbursed by the tenants for capital expenses and the tenants bear the benefit of cost savings resulting from capital upgrades, the outcome naturally being that too often the landlord has no direct financial incentive to upgrade the capital facilities. This new clause proposes cost sharing based on projected (instead of the more customary actual) savings in operating expenses, uses a “payback period” instead of the more customary “useful life” as the amortization schedule, and thus is attractive to landlords. The clause offers tenants the carrot that the pass-through covers only 80% of the projected savings. The clause has been adopted by the Real Estate Board of New York, evidencing its palatability to landlords, and is also being adopted by the New York City Government for its own leases, evidencing its palatability to at least some tenants. The clause can be found at no charge at [http://www.nyc.gov/html/planyc2030/downloads/pdf/110517a\\_energy\\_aligned\\_lease\\_official\\_packet.pdf](http://www.nyc.gov/html/planyc2030/downloads/pdf/110517a_energy_aligned_lease_official_packet.pdf).

- The privately published “Model Green Lease Reference Guide” followed the NRDC’s Lease Energy Efficiency Guidance in the Summer of 2009. Somewhat similar to the REALpac green lease, the Model Green Lease Reference Guide attempts to create a lease form with most of the green provisions contained in riders attached at the back. The chief selling point of this product is its attempt to promote gross leases as the greenest lease because the gross lease incentivizes the landlord, who controls about 70% of the building’s energy use, to reduce building operating expenses for its ultimate own profit. Unfortunately, the Model Green Lease itself is actually a “modified gross” lease, and therefore is probably financially closer to the net lease than to the true gross lease. (Also, if FASB accounting standards change, as proposed, to require that leases be capitalized on corporate balance sheets, it is possible that gross leases, which amplify apparent liabilities under the proposed system, will be disadvantageous to tenants.) The Model Green Lease achieves its admirable brevity by omitting the nuance found in the REALpac and BOMA products and the commentary found in the BOMA products. Also, although the Model Green Lease’s marketing materials imply that it is a balanced document, it is actually quite pro-landlord. The Model Green Lease Reference Guide is available for purchase at [www.squarefootage.net](http://www.squarefootage.net).

- Finally, an entrant in late Summer 2009 was the USGBC’s own “Green Office Guide.” This is more of a gentle “how-to” guide for the uninitiated tenant, demystifying the process of greening space. Like the California Sustainability Alliance material, it includes excellent questionnaires, language for requests for proposals, and scorecards. Like the REALpac green lease, the BOMA Green Lease Guide and the Model Green Lease, the USGBC’s Green Office Guide provides sample green lease language. Unlike those peer products, however, the provisions in the USGBC’s Green Office Guide are provided on a stand-alone basis, not as part of an entire lease, so it is a bit harder to assess and understand them in context. Also, this USGBC Guide assumes that it is the tenant who is the driving force in going green so it suggests

more pro-tenant clauses than do its peer products. One result is that its lease clauses are occasionally somewhat more aspirational and, as the introductory language to the lease provisions states, there is no expectation that an alert landlord will agree to a significant amount of this. The Green Office Guide can be purchased on the USGBC's website, [www.usgbc.org](http://www.usgbc.org).

In summary, the standards and expectations of green buildings and green leasing are still in their relative infancy and evolving rapidly. There are many different approaches, most of which have at least some merit and no one of which seems to represent absolute truth. Blindly parroting whatever any of the forms and guides say will not necessarily successfully implement green. An understanding of the nature of the particular building and of the interests of the parties to the lease is necessary.