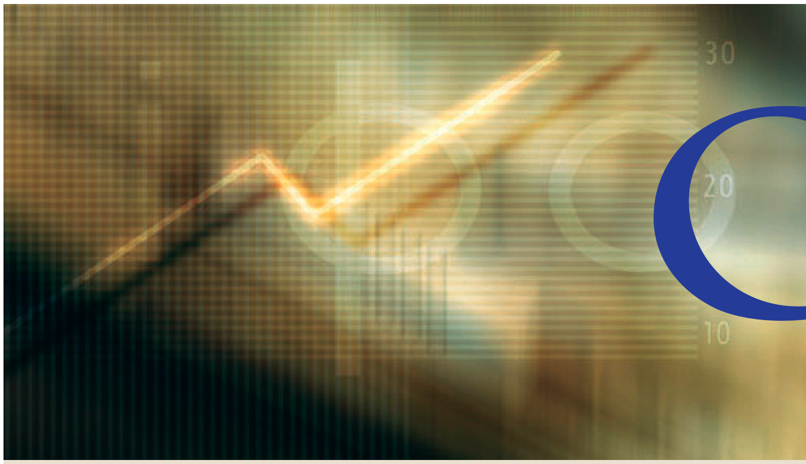

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Green Building Leases
By Sally Longroy

Climate change legislation approved by the House Energy and Commerce Committee on May 21, 2009 would, if signed into law, require buildings to use 30% less energy in 2012 and use 50% less energy in 2016 than buildings built in accordance with the current national standard. In addition, a growing number of U.S. cities are already mandating the construction of green buildings within their jurisdictions, including several Texas cities such as Dallas, Austin, and Frisco. Green buildings can also be good for the bottom line because of improved operational efficiencies, improved employee performance, and a growing market demand for green buildings. Whatever the force behind the development of green buildings, it has pushed landlords and tenants to begin grappling with some of the issues presented by the construction and the ongoing operation and maintenance of these buildings.

Even if federal law or a municipal ordinance mandates the building must meet certain requirements, decisions may still need to be made about what enhanced green construction standards the building and tenant improvements will actually meet and who will pay for any required certifications, ratings, or accreditations. Several green building standards exist, so the parties will need to think about what is important to them so they can choose wisely the goals they intend to seek. The two most well known standards in the United States include the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) certifications and the U.S. Environmental Protection Agency's Energy Star ratings. Choosing the appropriate standard requires an understanding of what the standards require and what benefits they offer. For example, achieving LEED certification means the design and construction has received a minimum number of points in some or all of multiple categories addressing site selection, water efficiency, energy efficiency, the use of materials and management of waste, and indoor environmental quality. LEED certification can be obtained under alternative rating systems and may require the landlord and tenant to work together to achieve the desired result. Alternatively, if the parties want to target only utility costs, achieving an Energy Star rating of 75 means that the building performs better in energy and water consumption than 75% of all similar buildings nationwide, based upon a survey conducted by the Department of Energy.

Although lease negotiations often focus on defining landlord and tenant responsibilities for operation and maintenance of the common areas and leased premises and how the costs for such activities will be shared, the operation and maintenance of green buildings adds another dimension to these negotiations. A typical net lease, in which operating costs are generally passed through to the tenant, creates little incentive for the landlord to apply efficient management or sustainable principal to minimize operating costs. However, if a tenant has selected a particular building because of certain operating efficiency expectations, it will want the lease to create incentives for delivering these operating efficiencies throughout the lease term. Meanwhile, a landlord may have made capital investments to gain operating efficiencies and want to seek the best way to reap the benefits of its investments. Consequently, the parties may want to negotiate cost allocations and maintenance obligations that differ from a typical lease.

In addition to operating efficiencies, green leases often need to address responsibilities and cost sharing for the collection and reporting of data on building performance or greenhouse gas emissions, re-commissioning all or portions of the building, seeking further green certifications, properly training janitorial and maintenance personnel to address green building features, purging the building air of off-gasses from furnishings and other materials brought into the building, or otherwise maintaining the green building goals of the parties. The parties to a green lease may also want to define in some detail requirements for furnishings, cleaning products, and other materials allowed in the building in order to maintain healthful indoor air quality, how recycling and waste management will be handled, energy or water efficiency standards for equipment and fixtures allowed in the building, and construction procedures and standards for any alterations made after lease execution. Finally, it will be worthwhile for the parties to negotiate how to manage future changes in green building requirements to maintain the building's certification status or to comply with changes in law.

Climate change legislation under consideration by Congress contemplates a cap and trade program where the government would place a cap on allowed greenhouse gas emissions and companies would be allowed to trade offset credits created by certain emission reductions. The purchase of offset credits can be used to avoid implementation of equivalent greenhouse gas emission reductions.

Although it remains to be seen what facilities will be subject to the cap and trade program, the possibility exists that commercial buildings will at some point be brought into the program. Consequently, whether or not a building includes any green features, parties should be thinking now about who will pay for any required greenhouse gas emission reductions and who will get the benefit of any offset credits awarded. Similarly, the parties should take into account the allocation of any tax or other charges levied on the consumption of energy from fossil or other fuels.