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## Commercial-Property Leases as a Means for Private Environmental Governance

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## **COMMERCIAL-PROPERTY LEASES AS A MEANS FOR PRIVATE ENVIRONMENTAL GOVERNANCE**

**Darren A. Prum\***

### ABSTRACT

Commercial-property leases as a means for private environmental governance routinely get overlooked despite their noticeable presence. The applicable theoretical models used in environmental law and the standards that typically measure legal activity fail to detect the commercial-property lease as a regulatory action as well. Moreover, the public and positive law and policy approach of the past that heavily relied on administrative authority now follows more of a private law and governance approach. The private law and governance approach responds to the marketplace where standards are set, enforcement occurs, and dispute resolution takes place between parties involved in the transaction outside of the supervision of the legislative process, the governmental agencies, or the courts. This approach toward private environmental governance in commercial-property leases occurred in response to legislation that imposed liability on landlords and other parties for a tenant's ecological transgressions and mounting pressure from highly publicized unethical and irresponsible behavior that stimulated a heightened corporate consciousness to embrace sustainability benchmarks. This article evaluates and provides evidence that the private activities of the parties involved in commercial-property leases fit within the paradigm of a new model tied to environmental governance. To this end, commercial-property leases offer a unique insight into the motivations and approaches taken by the engaging parties while providing guidance as to how best to encourage and craft ecological and sustainable solutions under a private environmental-governance model for land use.

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## INTRODUCTION

Prior to the passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) on December 11, 1980, by Congress,<sup>1</sup> landlords, tenants, and lenders expressed little concern over the environment when entering real estate transactions.<sup>2</sup> This approach fundamentally changed after this legislation, and subsequent enactments, because landlords could now find themselves responsible for their tenants' environmental transgressions on their property.<sup>3</sup> As a result, leases now address a tenant's liabilities with respect to CERCLA, which undoubtedly include compliance requirements with the vast array of environmental protection laws and regulations.<sup>4</sup>

Similarly, a lease may include specific provisions that emanate from nongovernmental requirements.<sup>5</sup> These provisions may occur due to covenants included in a mortgage loan or from suggestions made by property insurers.<sup>6</sup> Although not always a requirement, a landlord may elect to specifically include these suggestions into a lease as a means for reducing potential liabilities at a later point in time.<sup>7</sup>

Accordingly, the desire by some landlords and tenants to impose their overarching social and environmental goals upon another party in a lease for real property creates a private regulatory framework.<sup>8</sup>

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1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767.

2. STUART M. SAFT, *COMMERCIAL REAL ESTATE LEASING* § 15:2 (2d ed. Supp. 2018).

3. *Id.* Beginning with CERCLA and followed by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, and the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002), a party with an interest in a parcel of land may find itself liable for the costs of cleaning up a contaminated site due to the benefits derived from generating and disposing of waste materials at that location. TERRENCE M. CLAURETIE & G. STACY SIRMANS, *REAL ESTATE FINANCE: THEORY & PRACTICE* 484 (6th ed. 2010).

4. SAFT, *supra* note 2, § 15:2.

5. *Id.*

6. *See* ALVIN L. ARNOLD & MYRON KOVE, *CONSTRUCTION & DEVELOPMENT FINANCING* § 4.313 (3d ed. Supp. 2018); SAFT, *supra* note 2, § 15:2.

7. *See* SAFT, *supra* note 2.

8. *See generally* PETER S. BRITELL, *GREEN BUILDINGS: LAW, CONTRACT AND REGULATION* § 7 (1st ed. 2010).

This may occur, for example, when a landlord builds a core-and-shell structure that achieves some type of environmental certification followed by a requirement in subsequent leases that obligates a tenant to attain a similar recognition with any tenant improvement.<sup>9</sup> Conversely, a tenant with considerable leverage may demand that a landlord receive some type of environmental certification on a building that the tenant intends to lease prior to occupancy as a precondition to any agreement.<sup>10</sup>

In considering the real property lease as a tool for private environmental governance with respect to green buildings, the analytic and synthetic approaches offer an excellent understanding of this discrete new model.<sup>11</sup> The analytic approach offers the opportunity to assess the incentives for each participant in the green building lease, the likely areas of influence, and the strengths and weaknesses of the leasing document as a form of governance; whereas the synthetic analysis identifies the shared characteristics of apparently contrasting undertakings that fall outside the standard regulatory model of positive law.<sup>12</sup> As such, this article explores the applicable legal doctrines alongside the motivations of the participants and the standards available for implementation and adoption to achieve the overarching goal of private environmental governance through the leasing instrument.

Part I of this article considers the leasing instrument.<sup>13</sup> It turns to the longstanding property doctrines that began in medieval England, followed by the application of contract law and subsequent regulatory requirements that began governing the modern leasing document when urbanization and the Industrial Revolution occurred. Special situations that apply to the commercial real estate transaction such as ground leases, a master lease of an entire building or

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9. *Id.*

10. *Id.*

11. Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 133–34 (2013).

12. *Id.*

13. *See infra* Part I.

development, and a designation of a space within a structure also receive attention.

Part II examines the parties involved in the leasing agreement and evaluates whether the landlord and tenant maintain sufficient willingness to pursue the private regulatory framework needed to address a green building requirement, along with sufficient measurement tools for meeting the obligations.<sup>14</sup> This section evaluates the corporate social responsibility (CSR) reports from market participants on the tenant and landlord sides of the transaction to gauge their interest in green buildings, followed by a survey of the various green-building assessment programs available for compliance within the agreed upon private regulatory framework.

Finally, Part III turns toward the private-governance model as applied to green buildings and leases.<sup>15</sup> Beginning with a recognizable definition of the private environmental-governance model, the applicability of third-party certification standards, along with the manner in which the parties to a leasing agreement arrive at and incorporate the green-building provisions, receives consideration. Part III concludes with an identification of the various ways that governmental, nongovernmental, and external stakeholders may incentivize and influence private environmental governance through leases that compel green buildings.

### *I. Leases*

As a longstanding practice that traces its roots back to medieval England, the landlord-tenant relationship describes the situation in which a lord held a large estate and conveyed the same or a smaller portion of the real property to a tenant in exchange for the performance of specified duties during the duration of the tenancy.<sup>16</sup> A “subinfeudation” would occur when a tenant would parcel out a portion of the conveyed land to a subtenant and create a subsequent

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14. *See infra* Part II.

15. *See infra* Part III.

16. ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 6.1, at 249 (2d ed. 1993).

landlord-tenant relationship along with an additional level on the feudal hierarchy.<sup>17</sup>

Moreover, the owner of a freehold estate would commonly “lease” real property to another party for a stated period of time in order to avoid the illegal practice of usury.<sup>18</sup> Because the economy was predominantly agrarian, a tenant would borrow money from a lender and make an agreement, in exchange for the loan, to pay back the principal along with a significant profit out of the revenues generated by working the land for a term of sufficient duration.<sup>19</sup> This meant that the courts of the time applied contract law to those disputes concerning a lease.<sup>20</sup>

Beginning in the late twelfth century, fixed-term leases that required the payment of rent along with the farming of the land became commonplace.<sup>21</sup> Over time, issues arose as to whether or not a tenant could recover possession from someone who ejected him from the land using contract law doctrine.<sup>22</sup>

By 1499, the approach toward leases changed due to the importance of the agricultural land and the inability of a tenant to eject a wrongful possessor.<sup>23</sup> The new viewpoint, which applied property law doctrine, considered the transaction as a conveyance of the landlord’s entire interest for the stated duration of the lease.<sup>24</sup> Subsequently, the Industrial Revolution, in conjunction with a rise in urbanization, significantly increased the number of commercial and residential leases, which are more analogous to contracts than conveyances.<sup>25</sup>

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17. *Id.*

18. *See id.* § 2.17, at 80; John M. Brittingham, *Financing the Leasehold Estate*, 30 TENN. B.J. 22, 22 (1994).

19. *See* CUNNINGHAM ET AL., *supra* note 16, § 2.17, at 80.

20. ROBERT J. AALBERTS, *REAL ESTATE LAW* 435 (9th ed. 2015); *see* CUNNINGHAM ET AL., *supra* note 16, § 2.17, at 81 n.7.

21. *See* CUNNINGHAM ET AL., *supra* note 16, § 2.17, at 80.

22. *Id.*

23. *Id.* at 81.

24. *See* AALBERTS, *supra* note 20, at 436.

25. *Id.*

Today, the landlord-tenant relationship describes the “possessory estate in land held by a tenant for a determinate period or at will by permission of another, the landlord, who holds an estate of larger duration in the same land.”<sup>26</sup> Thus, a tenant receives a nonfreehold estate for a specific period of time or at will from a landlord in exchange for certain contractual provisions and covenants, which many people refer to as a lease.<sup>27</sup>

Because the lease yields a nonfreehold or leasehold estate, an interest in real property is created and is classified as a personal property interest in real estate, or a “chattel real.”<sup>28</sup> This classification allows the leasehold estate to pass as personal property to the deceased tenant’s personal representative, whereas real property transfers straight to the decedent’s heirs.<sup>29</sup>

In addition, the tenant only receives the right to possess the property for a specified period of time, a right which then reverts to the landlord upon termination.<sup>30</sup> The tenant does not receive title to the real property, but the landlord retains a reversionary interest during the time of the lease.<sup>31</sup> Hence, this section discusses the general provisions common to a commercial landlord-tenant transaction and is followed by the distinctive features associated with specific types of leases.

#### *A. In General*

As a unique legal instrument, a modern-day lease fuses property and contract doctrines by bringing together an agreement and a conveyance of a leasehold interest at the same time.<sup>32</sup> This combination creates contractual assurances along with the rights and obligations found in property law for landlords and tenants.<sup>33</sup>

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26. CUNNINGHAM ET AL., *supra* note 16, § 6.1, at 249.

27. *Id.* at 250.

28. *See* AALBERTS, *supra* note 20, at 425.

29. *Id.*

30. *See* CUNNINGHAM ET AL., *supra* note 16, § 6.12, at 260–61.

31. *Id.*

32. 52 C.J.S. LANDLORD & TENANT § 334 (Supp. 2018).

33. *Id.*



In forming the lease agreement, various courts around the country explain that the pertinent elements necessary for enforcement include identification of the parties, description of the premises, time for performance, and the amount of rent.<sup>34</sup> Of the four requirements, the description of the premises tends to frequently see litigation over whether or not a given lease meets the standard.<sup>35</sup>

Interestingly, the description of the premises within the lease document does not need to conform to any particular standard.<sup>36</sup> Common law permits any description that allows for the identification of the leased property, but it must supply a sufficiently accurate description.<sup>37</sup> Courts will even accept the parties' conduct when it demonstrates the property's location, even if the written document fails to include a proper description.<sup>38</sup> As a result, street addresses and nicknames will often suffice, but each jurisdiction's standards may slightly vary.<sup>39</sup>

Turning to the duration of a lease, the relationship between the landlord and tenant needs to cover "any fixed or computable period of time."<sup>40</sup> This means that a starting date is imperative, because the courts cannot determine the type of tenancy without it.<sup>41</sup> In order to

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34. See, e.g., *Cook v. Hargis*, 435 P.2d 385, 389 (Colo. 1967); *McCarter v. Uban*, 166 N.W.2d 910, 914 (Iowa 1969). When applying common law, one commentator writes that none of these elements are necessary for a leasehold estate to occur. See CUNNINGHAM ET AL., *supra* note 16, § 6.1, at 250. For example, a leasehold estate could be conveyed as a gift with no covenants by either the landlord or tenant. *Id.*

35. CUNNINGHAM ET AL., *supra* note 16, § 6.13, at 262.

36. *Johnson v. City of Lincoln*, 120 N.W.2d 297, 303 (Neb. 1963).

37. *Id.*

38. *Id.*

39. CUNNINGHAM ET AL., *supra* note 16, § 6.13, at 262.

40. RESTATEMENT (SECOND) OF PROPERTY § 1.4 (AM. LAW INST. 1977). Four different types of estates may occur based on the language used in the lease to describe duration: estate for years, periodic tenancy, tenancy at will, or tenancy at sufferance. See AALBERTS, *supra* note 20, at 426. An estate for years has a defined beginning and ending and lasts for a definite period of time established by the landlord and tenant. *Id.* A periodic tenancy takes place on a repetitive basis for a specified time period and automatically renews until one party to the lease gives notice of termination. *Id.* at 427. A tenancy at will occurs when a landlord and tenant agree to a relationship of indefinite duration that may terminate at any time after delivering proper notice. *Id.* at 428. A tenancy at sufferance happens when a tenant wrongfully remains in possession of the leased property despite the termination of the right. *Id.* at 429.

41. See CUNNINGHAM ET AL., *supra* note 16, § 6.13, at 261–62. The commentators explain that if the only question concerns the length or extent of the term, then the courts can find a tenancy at will. *Id.*

avoid the Rule Against Perpetuities, the commencement of the lease must happen within twenty-one years,<sup>42</sup> but the courts will also accept an occurrence of an uncertain event in the future.<sup>43</sup>

Because common law allows uncertain events in the future, a unique situation occurs with commercial leases that commence and require the completion of construction such as a tenant improvement or certificate of occupancy for a building.<sup>44</sup> These preconditions for the commencement of the term will depend on the substantiality of the structure and may require sufficient details on the construction deliverable in order to overcome a claim against enforcement of the lease.<sup>45</sup> Where some courts require the incorporation of the construction documents into the lease for enforceability,<sup>46</sup> other courts consider the “reasonableness” or “good faith” that occurs when the landlord and tenant exchanged the plans, specifications, and drawings.<sup>47</sup>

Moreover, most jurisdictions require a written document for leasehold interests that involve more than one year for performance.<sup>48</sup> These requirements codify the underlying Statute of Frauds, enacted by the English Parliament in 1677, which required a writing for leases that met certain conditions.<sup>49</sup> In order to avoid unfounded or fraudulent claims, pure common law will prohibit a claimant from enforcing a lease or contract absent a written document.<sup>50</sup>

However, a tenancy at will is created by permissive possession when a landowner grants permission to a tenant, and the tenant takes

42. *Id.* at 263.

43. *Bacon v. Bowdoin*, 39 Mass. (22 Pick.) 401, 405 (1839).

44. *See CUNNINGHAM ET AL.*, *supra* note 16, § 6.13, at 262–63.

45. *Id.* at 263. One court found that a disputed agreement in which commencement occurred after construction of a building was “at most an agreement to lease rather than a lease.” *Target Stores, Inc. v. Twin Plaza Co.*, 153 N.W.2d 832, 840 (Minn. 1967).

46. *See FutureSource, LLC v. Reuters Ltd.*, 312 F.3d 281, 286 (7th Cir. 2002); *Target Stores, Inc.*, 153 N.W.2d at 840–41.

47. *Wonderfair Stores, Inc. of Ariz. v. Walgreen Ariz. Drug Co. (In re Interest of Wonderfair Stores, Inc.)*, 511 F.2d 1206, 1210 (9th Cir. 1975).

48. *See CUNNINGHAM ET AL.*, *supra* note 16, § 6.15, at 265. An oral transaction that creates a leasehold interest is also proper at common law. *Id.* § 6.1, at 250.

49. 9 WILLISTON ON CONTRACTS § 21:1:3 (4th ed. Supp. 2018).

50. *Id.* § 21:1.

possession.<sup>51</sup> A periodic tenancy may follow if the landlord and tenant agree on a recurring payment that the parties execute in a timely manner.<sup>52</sup> To this end, some jurisdictions recognize the periodic tenancy just described and will enforce the lease, except for the term, as a substitute agreement.<sup>53</sup>

Considering the equitable doctrines of part performance and estoppel, the same scenario might also turn out to be enforceable.<sup>54</sup> Under the doctrine of part performance, a court applying equitable remedies would look to see if a party took actions that it would not normally take unless some type of agreement was in place, such as making major permanent improvements.<sup>55</sup> For example, an Oregon court used this doctrine when it upheld a lease for a tenant who took possession, paid rent, planted rosebushes, installed expensive carpet, painted, and stored enough coal and wood for the winter.<sup>56</sup> The court explained that “she did everything that a tenant would have done who understood that his occupancy was for a greater length of time than from month to month.”<sup>57</sup>

Likewise, the doctrine of estoppel prohibits a party from asserting that a lease does not exist on the basis of detrimental reliance by the other participant.<sup>58</sup> Thus, an “informal” lease occurs when the agreement falls short of meeting the Statute of Frauds requirements, and it fails to form a leasehold estate or attach duties.<sup>59</sup>

Beyond the four essential provisions, many jurisdictions may require some or all of the following: a witness to the lease, a certificate of acknowledgement from a notary public on the landlord and tenant’s signatures, or a recording of the document.<sup>60</sup> For example, Ohio compels all leases three years or longer to be signed

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51. See CUNNINGHAM ET AL., *supra* note 16, § 6.15, at 265.

52. See AALBERTS, *supra* note 20, at 427.

53. See CUNNINGHAM ET AL., *supra* note 16, § 6.15, at 265.

54. *Id.*

55. *Id.* at 266.

56. Wallace v. Scoggin, 21 P. 558, 559 (Or. 1889).

57. *Id.* at 558–59.

58. See CUNNINGHAM ET AL., *supra* note 16, § 6.15, at 266.

59. *Id.* at 265.

60. See AALBERTS, *supra* note 20, at 437.

and notarized,<sup>61</sup> whereas Washington maintains the same requirement for an acknowledgement of the parties and witnesses for a term longer than one year.<sup>62</sup>

Based on these situations, the type of recording statute adopted by a jurisdiction can also play a crucial role in the event that a dispute between two leases occurs.<sup>63</sup> In those states that adopted a pure race recording statute, the first tenant to record prevails notwithstanding any notice of another leasehold interest.<sup>64</sup>

Hence, the leasing document contains numerous requirements that arise out of property and contract doctrines, in conjunction with regulatory requirements. These requirements fuse together to allow a landlord to convey to a tenant for a period of time a nonfreehold or leasehold estate that is enforceable by a court of law against other would be possessors.

### *B. Types of Leases*

Because the various commercial leasing mechanisms that apply to property and require a party to comply with a specific environmental goal may fundamentally differ, the underlying scope of the agreement requires consideration. In some instances, the landlord

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61. OHIO REV. CODE ANN. §§ 5301.01, .08 (West 2018). Upholding this statute, an Ohio appellate court invalidated a lease that did not comply with the notary requirement and held that the leasehold became a month-to-month tenancy. *Burger v. Buck*, No. 2008-P-0041, 2008 WL 4964670, at \*7, ¶ 53 (Ohio Ct. App. 2008).

62. WASH. REV. CODE ANN. § 59.18.210 (West 2018); *Richards v. Redelsheimer*, 78 P. 934, 936 (Wash. 1904). More specifically, the Washington Supreme Court held that only the landlord's signature requires the acknowledgement of a notary, not the tenant. *McKennon v. Anderson*, 298 P.2d 492, 495 (Wash. 1956). The court further explained that a tenant only needs to take possession of the property, start paying rent, and perform according to the lease in order for a lease to become enforceable regardless of whether or not an acknowledgement occurred. *Id.*

63. See AALBERTS, *supra* note 20, at 437. In considering the various state systems, approximately half of the jurisdictions follow a "notice" approach where a bona fide purchaser for value receives protection regardless of the recording of the encumbrance or lease. Ray E. Sweat, *Race, Race-Notice and Notice Statutes: The American Recording System*, 3 PROB. & PROP. 27, 28 (1989). This makes the recording of an encumbrance or lease irrelevant so long as value occurred for the exchange. *Id.* Nearly all of the remaining states use a "notice-race" system that includes a bona fide purchaser and recording requirement. *Id.* This means that the first to record and receive value for his encumbrance or lease will receive priority over all others claiming an encumbrance. *Id.* Finally, some states award priority based on the recording order of the encumbrance or lease, which is known as a pure "race" system. *Id.*

64. Sweat, *supra* note 63, at 28.

will transfer only the land and retain a right of reentry along with ownership of any improvements when the term ends.<sup>65</sup> Other times, the landlord will transfer all or a portion of a building to a tenant.<sup>66</sup>

Courts will sometimes distinguish between a commercial and residential lease; however, most of the previously discussed principles of landlord-tenant law pertain to both situations.<sup>67</sup> Nonetheless, the difference in sophistication of individuals, coupled with the impact relating to a person's housing, influences the courts to interpret a residential lease using contract doctrine; whereas the superior knowledge and access to resources by the parties in a commercial lease tends to favor a less protective approach.<sup>68</sup> As such, a commercial lease is "still by and large governed by a body of [property] law that crystallized in medieval times"<sup>69</sup> along with a reticence on the part of the courts to leave property law applications in favor of contract doctrines.<sup>70</sup>

However, differences in the legal applications between residential and commercial leases occur in situations such as enforcing an implied warranty of habitability, remedies associated with rent, and the furnishing of amenities.<sup>71</sup> At least one court recognized that many commercial tenants contract for "a package which includes not merely walls and ceilings[] but also adequate heat, light, and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance" in a similar manner to residential leases.<sup>72</sup> These types of marketplace requirements that prospective tenants place upon landlords make the

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65. 31 C.J.S. ESTATES § 197 (Supp. 2018). Examples of this approach include the land under Rockefeller Center in New York—which was previously owned by Columbia University—and the land under the Empire State Building. See SAFT, *supra* note 2, § 22:1.

66. See SAFT, *supra* note 2, § 2:3.

67. See AALBERTS, *supra* note 20, at 436.

68. *Id.*

69. Gerald G. Greenfield & Michael Z. Margolies, *An Implied Warranty of Fitness in Nonresidential Leases*, 45 ALB. L. REV. 855, 855–56 (1981).

70. See John F. Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 452 (1972).

71. See AALBERTS, *supra* note 20, at 436.

72. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970).

commercial lease for a designated space appear more similarly associated with a residential lease—leading one commentator to suggest that the courts may continually consider applying more contract doctrine over property principles when settling disputes that raise similar issues.<sup>73</sup>

Moreover, many commercial leases include covenants by the landlord and tenant that restrict conduct or allow others to partake in enumerated activities on the property surrounding the leasehold estate.<sup>74</sup> This creates a benefitted estate on the tenant's property and a burdened estate on the landlord's remaining land, which common law recognizes as a restrictive covenant.<sup>75</sup> Although permissible under common law, courts take the position that the restrictive covenants require a strict interpretation.<sup>76</sup> Despite the preference against liberal enforcement and interpretation, one reason given for this approach is that the common law policy counsels against free trade restrictions and that similar covenants in a lease against business activities should be void as well.<sup>77</sup>

Accordingly, the different types of commercial leasing situations present additional and meaningful differences beyond those just discussed. Hence, this section addresses those differences along with the pertinent distinctions found within each type of situation.

### 1. *Ground Leases*

With landlord-tenant law deeply rooted in medieval times, the ground lease harkens back to the days when a lord owned land and collected rent from the peasants and serfs that lived and worked upon it.<sup>78</sup> Originally, common law only recognized rent service whereby

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73. See AALBERTS, *supra* note 20, at 436.

74. See CUNNINGHAM ET AL., *supra* note 16, § 6.26, at 278.

75. *Id.*

76. See *Postal Tel. Cable Co. v. W. Union Tel. Co.*, 40 N.E. 587, 591 (Ill. 1895).

77. See CUNNINGHAM ET AL., *supra* note 16, § 6.26, at 278.

78. See 33 E. GEORGE DAHER ET AL., MASSACHUSETTS PRACTICE SERIES: LANDLORD AND TENANT LAW § 1:1 (3d ed. Supp. 2018).

the tenant demonstrated allegiance to a lord by paying rent, providing services, or both.<sup>79</sup>

However, common law doctrine began making a legal distinction when the grantor maintains the right to take the property back when a default occurs, should the parties use a deed as a means for providing a tenant with an interest in the land.<sup>80</sup> In situations that allow the grantor to reclaim the land, common law doctrine labeled the relationship as a rent-charge, whereas those deeds that do not provide for a recovery were described as a “rent-seck.”<sup>81</sup>

Evolving from these past approaches, a modern commercial ground lease occurs when a landlord conveys for a period of time a commercial property interest to a tenant that may include vacant land or acreage for development or with existing structures in order to maximize value.<sup>82</sup> The conveyance reserves the rent for the grantor and the grantor’s heirs along with any improvements built by the tenant when the term ends.<sup>83</sup> Although, the lease will not generally terminate should the structures on the land be partially or totally destroyed.<sup>84</sup>

Typically, the term for a commercial ground lease is flexible but includes many of the incidents of ownership in the rent by using a “triple net” approach.<sup>85</sup> The designated duration usually occurs over a long term such as a 35- to 99-year period;<sup>86</sup> the tenant normally pays his share of ad valorem real property taxes, insurance, and common

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79. *Ingersoll v. Sergeant*, 1 Whart. 337, 347 (Pa. 1836). The term “rent-service” derived from the lease provisions that allowed a tenant to receive compensation credit for allowing military or other services to use the land due to underlying obligations and burdens placed upon it. *Wallace v. Harmstad*, 44 Pa. 492, 495 (1863).

80. *Ingersoll*, 1 Whart. at 347.

81. *Id.*

82. See SAFT, *supra* note 2, § 22:1.

83. 31 C.J.S. *Estates* § 197 (Supp. 2018).

84. PETER S. TITLE, LOUISIANA PRACTICE SERIES: LOUISIANA REAL ESTATE TRANSACTIONS § 18:33 (2d ed. Supp. 2017). Unless the buildings suffer partial or total destruction near the end of the ground lease, the tenant will likely maintain an obligation to rebuild the structures on the land. *Id.*

85. See SAFT, *supra* note 2, § 22:1.

86. See *id.*; see also TITLE, *supra* note 84, § 18:33.

area-maintenance costs incurred by the landlord, as well as rent, in what is known as a triple net lease.<sup>87</sup>

Accordingly, the ground lease will provide the tenant with more leeway than found within an operating lease of a building.<sup>88</sup> The lease will generally obligate the tenant to develop and improve the existing land by constructing buildings and the like in exchange for an opportunity to sublet the structure to operating subtenants.<sup>89</sup> As a result, the inclusion of a broad use clause combined with the long term length of a ground lease essentially turns the tenant into an equitable owner of the property during the agreement's duration, which opens up the opportunity to obtain financing for any developments or improvements via leasehold mortgage financing.<sup>90</sup>

## 2. *Master Lease of an Entire Building or Development*

Similar to a ground lease, a master lease occurs when a landlord conveys a commercial property interest to a tenant for an entire building or development.<sup>91</sup> In this conveyance, the tenant receives the landlord's consent to sublease any portion of the real property and collect rent from the subtenants in exchange for assuming all of the risks of ownership, such as building repair, operation, and

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87. See AALBERTS, *supra* note 20, at 440.

88. See SAFT, *supra* note 2, § 22:1.

89. *Id.* Often times, when a landlord agrees to a ground lease with an opportunity to sublet any part of the structure on the underlying property, the rent will be divided into a fixed portion plus an additional percentage based on the profit or sales of the tenant. *Id.*

90. *Id.* For example, "Indian country" officially describes the federal government's holding of many pueblos and tribal lands in trust for the specific benefit of Native Americans. 18 U.S.C. § 1151 (2018). Because the Native Americans do not own their land and initially need financial assistance to develop the land in Indian country, many tribes turn to leasehold mortgage financing made available pursuant to the Indian Long-Term Leasing Act. Act of Aug. 9, 1955, ch. 615, Pub. L. No. 84-255, 69 Stat. 539 (1955) (codified at 25 U.S.C. § 415 (2018)); 25 C.F.R. § 162.610 (2018). Based on this legislation, a tribe must obtain approval for their ground lease and the accompanying security interest, which typically lasts twenty-five years with one twenty-five year renewal or ninety-nine years for specific tribes, from the Secretary of the Interior. 25 U.S.C. § 415(a) (2012); 25 C.F.R. § 162.610. As a result, the ground lease coupled with leasehold financing provides opportunities for many different types of developments such as casinos, entertainment facilities, and retail and commercial complexes on land located in Indian country. See Jesse A. Millard, *Developing on Tribal Land: Benefits and Challenges Developers Face*, AZ BIG MEDIA (Mar. 16, 2017), <https://azbigmedia.com/developing-tribal-land-benefits-challenges-developers-face/>[<http://perma.cc/94XW-4YP2>].

91. See BRITELL, *supra* note 8, § 7.08.



maintenance.<sup>92</sup> Essentially, the master tenant takes the place of the building owner but must pay rent to the landlord for the term of the lease.<sup>93</sup>

Borrowing further upon the ground lease precedent, common law considers the rental payments in a master lease for an entire building to emanate from the land itself notwithstanding any improvements upon it.<sup>94</sup> Courts take the position that as long as the tenant could occupy or use a portion of the land after a casualty, then the decision to rebuild or beneficially utilize the land becomes discretionary.<sup>95</sup> Consequently, tenants under a master lease may unexpectedly find themselves liable for continuing to pay rent in circumstances where a casualty occurs that destroys or damages the leased building.<sup>96</sup>

Moreover, ensuring a proper description of the property under a master lease is made difficult due to different jurisdictional interpretations of what is included in the conveyance.<sup>97</sup> For example, the courts in Massachusetts have held that a master lease of an entire building encompasses the ground beneath it but does not automatically include the land surrounding it.<sup>98</sup> However, courts in New York have found that the vacant land surrounding a building and dedicated to use with the structure gets included with a master lease despite the fact that it is not explicitly stated in the conveyance.<sup>99</sup>

With these differing approaches in mind, simply including the minimum of a street address as the description in the leasing documents is less preferable than attaching an updated property

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92. *Id.*

93. *Id.*

94. ROBERT F. DOLAN, RASCH'S NEW YORK LANDLORD AND TENANT, INCLUDING SUMMARY PROCEEDINGS § 25:1 (5th ed. Supp. 2018).

95. *Smith v. Kerr*, 15 N.E. 70, 70 (N.Y. 1888).

96. *Id.*

97. *Compare* RESTATEMENT (SECOND) OF PROPERTY § 1.4 (AM. LAW INST. 1977), *and* AALBERTS, *supra* note 20, at 426, *and supra* text accompanying note 40 *with* CUNNINGHAM ET AL., *supra* note 16, § 6.13, at 261–62, *and supra* text accompanying note 41.

98. *Hooper v. Farnsworth*, 128 Mass. 487, 488 (1880); *Bacon v. Bowdoin*, 39 Mass. (22 Pick.) 401 (1839).

99. *See, e.g., Doyle v. Lord*, 64 N.Y. 432, 438 (1876).

survey that delineates all of the dimensions included as part of the leasehold estate.<sup>100</sup> The inclusion of a survey or plot plan gains added significance when the building is part of a larger development like an office park, industrial complex, or retail center, and it may also trigger the need for a detailed floor plan.<sup>101</sup>

As a result, the master lease offers a symbiotic relationship to the landlord and tenant.<sup>102</sup> The landlord receives a continuing stream of income for a long period of time, maintains ownership of an appreciating asset along with the land, and transfers the ownership and operational risks to the tenant.<sup>103</sup> The tenant essentially becomes an owner of the building without having to outlay significant capital to buy it and receives the right to earn a profit or take a loss from any difference between the subtenant income and the operational, repair, and maintenance costs.<sup>104</sup>

### 3. *Designated Space within a Building or Development*

As society transformed toward more urbanization from its agrarian roots, leases in which tenants obtained places to do business and shelter became more common.<sup>105</sup> This urban shift in society, along with the manner in which those conducting business transacted, also altered the approach to commercial leases.<sup>106</sup>

In many situations, the decision factors for the transaction now place a greater weight on the structures on the land over that of the real estate itself.<sup>107</sup> The property description contained in the leasing documents will also reflect this change by designating a unit in a multitenant building.<sup>108</sup> In some cases, the unit number or floor will

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100. See SAFT, *supra* note 2, § 2:3.

101. *Id.*

102. See BRITTELL, *supra* note 8, § 7.08.

103. *Id.*

104. *Id.*

105. See Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 508 (1982).

106. *See id.*

107. See Hicks, *supra* note 70, at 451.

108. See SAFT, *supra* note 2, § 2:3.

designate the space in the lease; other times, a landlord may reference and attach a floor plan listing the exact dimensions.<sup>109</sup> These dimensions will indicate the length of the space in feet using the inside walls to describe the usable area, along with the total amount of square footage based on the outside of the front wall to the outside of the rear wall.<sup>110</sup>

Furthermore, the lease should describe any included appurtenances.<sup>111</sup> An appurtenance denotes the tenant's right to use and enjoy the devised property, along with the overall structure, either exclusively or along with cotenants or the public.<sup>112</sup> Although an appurtenance is not a requirement, it is highly suggested to avoid future and continuing disagreements, and a court may find an appurtenance by implication in the lease itself should the parties fail to include language that addresses it.

Due to these new complexities, the quality, condition, maintenance, and terms of use for the commercial space gained significance to both parties, which resulted in a lengthier written leasing document.<sup>113</sup> Landlords and tenants to commercial leases negotiated to include numerous detailed covenants in an effort to safeguard and address their respective responsibilities and liabilities.<sup>114</sup> Consequently, the commercial lease now appears more like a contract with all of the additional covenants than it does a conveyance or deed of a nonfreehold estate in land based on its agrarian origin.<sup>115</sup>

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109. *Id.* In situations where the building is under construction, the landlord should incorporate a site plan that indicates the location of the space referenced in the lease as well as a floor plan with exact dimensions. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* The most frequently addressed appurtenances in leases for designated spaces within a building or development include the entrances and exits from the building, elevators, signs and directories, and sightlines of significance outside the structure known as view corridors. See SAFT, *supra* note 2, § 2:3.

113. See Glendon, *supra* note 105, at 508.

114. Hiram H. Lesar, *Landlord and Tenant Reform*, 35 N.Y.U. L. REV. 1279, 1281 (1960).

115. *Id.*

Thus, the composition of landlord-tenant law maintains historical roots coupled with modern statutory regulation that evolved alongside society to form a unique legal doctrine. This doctrine draws upon elements of contracts and conveyances, personal and real property, and promises and covenants to form a distinct instrument called the commercial lease.

## *II. Environmental and Sustainability Goals*

Increasingly, public concern surrounding the conduct of private and public institutions has materialized.<sup>116</sup> This mounting pressure, emanating out of highly publicized unethical and irresponsible behavior, has stimulated a heightened corporate consciousness to embrace sustainability reporting as the new standard for transparency.<sup>117</sup> In demonstrating their commitment to the principles of sustainability, a vast number of corporations began acknowledging their organizations' social and environmental impacts and began driving the sustainable development paradigm.<sup>118</sup>

As part of their comprehensive response, these organizations began to recognize that a change in the built environment that housed their businesses also impacted their companies' operational and social interactions, along with the occupants' physical, emotional, and intellectual well-being.<sup>119</sup> Accordingly, the high-performance green-building movement gained momentum.<sup>120</sup>

### *A. Goals from Parties to a Commercial-Property Lease*

In 1994, Professor Elkington introduced the term "triple bottom line" associated with people, planet, and profit to describe the economic value added by corporations in conjunction with their

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116. CHARLES J. KIBERT, SUSTAINABLE CONSTRUCTION: GREEN BUILDING DESIGN AND DELIVERY 8-9 (4th ed. 2016).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

environmental and social value.<sup>121</sup> Although no longer an alternative management philosophy, nearly 90% of Fortune 500 companies have already embraced and implemented corporate social-responsibility programs.<sup>122</sup> As a means of further communicating their goals, philosophies, and accomplishments, many companies publish CSR reports on an annual basis in addition to their normal financial reports.<sup>123</sup> Through these reports, each company provides a unique insight into their culture, commitments, and goals—including environmental and sustainability goals within their business model—which transfer accordingly to commercial-property leases from their particular perspective as a tenant or landlord.<sup>124</sup>

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121. JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS 70 (1999).

122. Ramon Mullerat, *Corporate Social Responsibility: New Trends*, 3A ROCKY MTN. MIN. L. FOUND. 44 (2007).

123. See, e.g., CAPITAL ONE, CORPORATE SOCIAL RESPONSIBILITY REPORT 2015 (2016); CBRE, CORPORATE RESPONSIBILITY REPORT 2016 (2017); CLARION PARTNERS, CORPORATE RESPONSIBILITY REPORT 2016 (2017); CVS HEALTH CORP., CORPORATE SOCIAL RESPONSIBILITY REPORT 2016 (2017); DDR CORP., CORPORATE RESPONSIBILITY AND SUSTAINABILITY REPORT 2016 (2017); DUKE REALTY, CORPORATE RESPONSIBILITY REPORT 2016 (2017); GEN. GROWTH PROPERTIES, INC., CORPORATE RESPONSIBILITY REPORT 2016 (2017); GOOGLE, ENVIRONMENTAL REPORT (2016); INTEL, 2016 CORPORATE RESPONSIBILITY REPORT (2017); KIMCO REALTY CORP., 2016 CORPORATE RESPONSIBILITY REPORT (2017) [hereinafter KIMCO CRR]; KOHL'S, 2016 CORPORATE SOCIAL RESPONSIBILITY REPORT (2017); NIKE, INC., FY14/15 SUSTAINABLE BUSINESS REPORT (2015); THE PNC FIN. SERVS. GRP., 2016 CORPORATE SOCIAL RESPONSIBILITY REPORT (2017); PROLOGIS, 2016 SUSTAINABILITY REPORT (2016); RREEF REAL ESTATE, 2011 SUSTAINABILITY REPORT (2011); SIMON PROP. GRP., SUSTAINABILITY REPORT 2016 (2017); STARBUCKS, 2016 GLOBAL SOCIAL IMPACT PERFORMANCE (2017) [hereinafter STARBUCKS 2016]; TIAA, LEADERSHIP IN CORPORATE SOCIAL RESPONSIBILITY 2015 REVIEW (2016); VERIZON, 2016 CORPORATE RESPONSIBILITY SUPPLEMENT (2017); VORNADO REALTY TR., SUSTAINABILITY 2016 (2017); WESTFIELD CORP. LTD., SUSTAINABILITY REPORT 2017 (2017); WHOLE FOODS MKT., GREEN MISSION REPORT 2012 (2012); YUM BRANDS, 2014 CORPORATE SOCIAL RESPONSIBILITY REPORT (2015).

124. See generally CAPITAL ONE, *supra* note 123; CBRE, *supra* note 123; CLARION PARTNERS, *supra* note 123; CVS HEALTH CORP., *supra* note 123; DDR CORP., *supra* note 123; DUKE REALTY, *supra* note 123; GEN. GROWTH PROPERTIES, INC., *supra* note 123; GOOGLE, *supra* note 123; INTEL, *supra* note 123; KIMCO CRR, *supra* note 123; KOHL'S, *supra* note 123; NIKE, INC., *supra* note 123; THE PNC FIN. SERVS. GRP., *supra* note 123; PROLOGIS, *supra* note 123; RREEF REAL ESTATE, *supra* note 123; SIMON PROP. GRP., *supra* note 123; STARBUCKS 2016, *supra* note 123; TIAA, *supra* note 123; VERIZON, *supra* note 123; VORNADO REALTY TR., *supra* note 123; WESTFIELD CORP. LTD., *supra* note 123; WHOLE FOODS MKT., *supra* note 123; YUM BRANDS, *supra* note 123.

### 1. Possible Tenants

Because tenants to a commercial-property lease come from many different industries and have varying levels of business sophistication, determining a commitment to environmental and sustainability objectives regarding a building or designated space within a development becomes difficult to ascertain. However, corporate tenants provide a good starting point because they may occupy an entire building or serve as an anchor tenant in a larger development either directly or through its franchises.<sup>125</sup> These corporate tenants offer an opportunity to see how a sophisticated party with access to resources and experience approaches environmental and sustainability issues within their business and leasing agreements.

Across the various CSR reports and industries, almost every company publicized a single location that received recognition as a green building by a third-party organization.<sup>126</sup> Quite a few companies pointed out that they include sustainable design elements, construction techniques, or materials in their new buildings or in their renovations even though third-party certification may not occur.<sup>127</sup> Nike even pointed out that their retail stores realized energy savings and reductions in greenhouse gas emissions directly related to the growing numbers of buildings that adhered to green building standards throughout the retail setting.<sup>128</sup>

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125. See, e.g., CAPITAL ONE, *supra* note 123; CVS HEALTH CORP., *supra* note 123; GOOGLE, *supra* note 123; INTEL, *supra* note 123; KOHL'S, *supra* note 123; NIKE, INC., *supra* note 123; THE PNC FIN. SERVS. GRP., *supra* note 123; STARBUCKS 2016, *supra* note 123; VERIZON, *supra* note 123; WHOLE FOODS MKT., *supra* note 123; YUM BRANDS, *supra* note 123.

126. See, e.g., CAPITAL ONE, *supra* note 123; CVS HEALTH CORP., *supra* note 123; GOOGLE, *supra* note 123; INTEL, *supra* note 123; KOHL'S, *supra* note 123; NIKE, INC., *supra* note 123; THE PNC FIN. SERVS. GRP., *supra* note 123; STARBUCKS 2016, *supra* note 123; VERIZON, *supra* note 123; WHOLE FOODS MKT., *supra* note 123; YUM BRANDS, *supra* note 123.

127. See, e.g., CAPITAL ONE, *supra* note 123; CVS HEALTH CORP., *supra* note 123; GOOGLE, *supra* note 123; INTEL, *supra* note 123; KOHL'S, *supra* note 123; NIKE, INC., *supra* note 123; THE PNC FIN. SERVS. GRP., *supra* note 123; STARBUCKS 2016, *supra* note 123; VERIZON, *supra* note 123; WHOLE FOODS MKT., *supra* note 123; YUM BRANDS, *supra* note 123.

128. See NIKE, INC., *supra* note 123, at 36.

Echoing Professor Elkington, Yum Brands states that its vision includes the development of holistic “green building solutions that meet the bottom line objectives of people, planet, and profits.”<sup>129</sup> Yum Brands seeks to meet this commitment through its corporate goals to attain 100% third-party certification on all newly constructed company owned stores by the end of 2015 and through its “Blueline” program.<sup>130</sup> The company developed its “Blueline” program to establish a streamlined guide for achieving third-party certification in its restaurants.<sup>131</sup> Although the company only attained an 85% certification level for its new corporate restaurants, it continues to move toward fully meeting its goals.<sup>132</sup>

Similarly, in 2010 Starbucks established the same target as Yum Brands by setting the objective to build all of its new company-owned stores to meet and receive a third-party certification standard as a green building.<sup>133</sup> The company also set the goal of building 10,000 stores with third-party certification by 2025.<sup>134</sup>

As an anchor store in larger developments, Kohl’s started requiring all of its stores built after 2008 to receive a third-party green building certification.<sup>135</sup> The company further elevated its certification requirements to higher standards in 2012.<sup>136</sup> This initiative means that 492 buildings attained certification, which accounts for one-third of the company’s overall building portfolio.<sup>137</sup>

Moreover, financial companies that straddle the retail and office environments set green building objectives as well.<sup>138</sup> For example,

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129. See YUM BRANDS, *supra* note 123, at 133.

130. *Id.*

131. *Id.*

132. *Id.*

133. See STARBUCKS, 2010 GLOBAL SOCIAL IMPACT PERFORMANCE 13 (2011). So far, Starbucks reports seventy-five percent in 2011, sixty-nine percent in 2012, sixty-five percent in 2013, sixty-four percent in 2014, and seventy-four percent in 2015 of new company-owned stores achieving third-party green-building certification. See STARBUCKS, 2015 GLOBAL SOCIAL IMPACT PERFORMANCE 8 (2016).

134. See STARBUCKS 2016, *supra* note 123, at 8. In the latest CSR Report, Starbucks reported that it has 1,200 stores with third-party green-building certification in twenty different countries.

135. See KOHL’S, *supra* note 123, at 30.

136. *Id.*

137. *Id.* at 29.

138. See, e.g., CAPITAL ONE, *supra* note 123; THE PNC FIN. SERVS. GRP., *supra* note 123.

PNC Bank explains that in 2002 it became the first major bank to apply green building standards to all of its newly constructed or renovated retail branches and office buildings.<sup>139</sup> Capital One followed suit by announcing that all new office projects and comprehensive renovations will be required to attain a third-party certification standard as a green building.<sup>140</sup>

In the technology industry, many leaders such as Google and Intel pledge to construct all new buildings in accordance with an elevated third-party certification standard.<sup>141</sup> At Intel, forty-five buildings received certification, equaling over 14.5 million square feet and accounting for 25% of Intel's operational space.<sup>142</sup> Google's goal for its built environment incorporates green or sustainable rating systems alongside human health and wellness but elevates them to target a standard that only occurs if the actual performance of the structure meets or exceeds the theoretical one as a top-tier building.<sup>143</sup>

Hence, the pervasive trend among industries, along with their willingness to recognize and implement green building standards into the structures they occupy, demonstrates a desire on the part of corporate tenants to demand a landlord to deliver the appropriate solution. In some cases, the desire to demand a green building or office space from a landlord will be greater than with other companies and will depend on how large a commitment the management team makes toward their CSR goals compared to other competing needs.

## 2. Possible Landlords

Among some of the largest commercial real estate companies, environmental and sustainability objectives appear in varying degrees

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139. See THE PNC FIN. SERVS. GRP., *supra* note 123, at 71.

140. See CAPITAL ONE, *supra* note 123, at 48.

141. See INTEL, *supra* note 123, at 45; see also GOOGLE, *supra* note 123, at 44; Traci Rose Rider, *How Health Factors into Green Building Rating Systems: Living Building Challenge*, AM. INST. ARCHITECTS (Sept. 15, 2017), <https://www.aia.org/articles/149291-how-health-factors-into-green-building-rati> [https://perma.cc/77YW-7HA6].

142. See INTEL, *supra* note 123, at 45.

143. See GOOGLE, *supra* note 123, at 44; Rider, *supra* note 141.



as core values based on their annual CSR reports.<sup>144</sup> Most of the companies tout at least a representational development that received third-party certification, whereas others detail the number of buildings or the amount of square feet that received a sustainability designation.<sup>145</sup> Several companies maintain goals to have 100% of their new construction or development projects attain third-party certification;<sup>146</sup> however, others use a green building checklist and leave the decision on whether or not to gain recognition based on each structure.<sup>147</sup>

A few commercial real estate companies addressed their commitment to sustainability and environmental issues through leases.<sup>148</sup> RREEF Real Estate specifically points out that it believes that “[s]ustainability achieves the greatest value at properties that align owner and tenant interests[] while offering tangible benefits that matter to tenants.”<sup>149</sup> RREEF along with other participants accepted the challenge to find solutions to the obstacles relating to energy and sustainability associated with commercial office space leases.<sup>150</sup> It agreed to:

1. Establish green lease principles to influence owner/occupier agreements and act on these principles

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144. See, e.g., CBRE, *supra* note 123; CLARION PARTNERS, *supra* note 123; DDR CORP., *supra* note 123; DUKE REALTY, *supra* note 123; GEN. GROWTH PROPERTIES, INC., *supra* note 123; KIMCO CRR, *supra* note 123; PROLOGIS, *supra* note 123; RREEF REAL ESTATE, *supra* note 123; SIMON PROP. GRP., *supra* note 123; TIAA, *supra* note 123; VORNADO REALTY TR., *supra* note 123; WESTFIELD CORP. LTD., *supra* note 123.

145. See, e.g., CBRE, *supra* note 123; CLARION PARTNERS, *supra* note 123; DDR CORP., *supra* note 123; DUKE REALTY, *supra* note 123; GEN. GROWTH PROPERTIES, INC., *supra* note 123; KIMCO CRR, *supra* note 123; PROLOGIS, *supra* note 123; RREEF REAL ESTATE, *supra* note 123; SIMON PROP. GRP., *supra* note 123; TIAA, *supra* note 123; VORNADO REALTY TR., *supra* note 123; WESTFIELD CORP. LTD., *supra* note 123. Of the twelve different CSR Reports reviewed, only General Growth Properties and DDR Corporation failed to mention a single green building in its portfolio that received certification by a third party; although, both companies pointed out their initiatives toward specific sustainable practices. See DDR CORP., *supra* note 123; GEN. GROWTH PROPERTIES, INC., *supra* note 123.

146. See PROLOGIS, *supra* note 123, at 14; TIAA, *supra* note 123, at 29.

147. See SIMON PROP. GRP., *supra* note 123, at 6.

148. See, e.g., CBRE, *supra* note 123; KIMCO CRR, *supra* note 123; RREEF REAL ESTATE, *supra* note 123, at 24; VORNADO REALTY TR., *supra* note 123, at 12–13.

149. See RREEF REAL ESTATE, *supra* note 123, at 24.

150. *Id.*

across the portfolio over time.

2. Require leasing agents who work on behalf of participating organizations to complete a basic orientation about sustainability, green lease principles, and ways to resolve barriers to sustainability in leases.
3. Establish and adopt green site selection criteria for tenants and consider these criteria for new space acquisition.
4. Establish a standard for landlords to communicate key energy and environmental ratings to tenants and prospective tenants and deploy this process at [fifty] percent of their properties within three years.<sup>151</sup>

As a result, RREEF Real Estate internally established and implemented a standard green lease form. The new form included both identifying language and the assignment of responsibilities relating to environmental and sustainability in its commercial office spaces.<sup>152</sup> The RREEF managers now incorporate the green lease provisions into their normal negotiation processes, along with discussions relating to energy and resource efficiency.<sup>153</sup>

Moreover, Kimco Realty views the leasing process as a means for promoting sustainability in both the management of its properties and through its tenant improvements.<sup>154</sup> Its approach includes the adoption of green leasing standards into its documents, specifications for tenant build-outs that emphasize sustainable materials, and process improvements.<sup>155</sup>

Finally, a small number of CSR reports included an update on the company's progress toward achieving its environmental goals.<sup>156</sup> Based on a 2015 baseline year, CBRE set its 2016 goals to reduce its

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151. *See id.*

152. *Id.*

153. *Id.*

154. *See KIMCO CRR, supra note 123, at 13.*

155. *Id.*

156. *See, e.g., CBRE, supra note 123; PROLOGIS, supra note 123; VORNADO REALTY TR., supra note 123.*

operational carbon footprint by 30% in 2025 and 50% in 2035.<sup>157</sup> Its 2016 CSR report indicates a 12.6% reduction of indirect emissions due to the generation of purchased energy. Despite an increase in 470,000 square feet of occupied space due to acquisitions that placed it 9.6% ahead of its plan, this reduction compares to its 2015 year.<sup>158</sup> Additionally, CBRE intends to determine direct emissions goals by the end of 2018 from owned or controlled sources.<sup>159</sup>

Meanwhile, Vornado Realty Trust decided to participate in the Carbon Challenge for Commercial Landlords and Tenants for its New York portfolio, which created an obligation to decrease its landlord emissions by 30% to 50% prior to 2026.<sup>160</sup> This drove the company into launching a larger commitment across its entire portfolio to reduce total emissions by 35% before 2026 using a 2009 baseline.<sup>161</sup> The Vornado plan places a 40% emissions reduction target on the landlord through operational changes, energy efficiency and other capital projects, and onsite generation through renewable energy.<sup>162</sup> Vornado's tenants must agree to achieve a 30% emission reduction through publicly sponsored commitments, lease-driven provisions, and meaningful stakeholder engagement.<sup>163</sup>

Thus, the CSR reports provide a unique insight into how different landlords and tenants seek to address environmental and sustainability issues that they confront in a changing marketplace. They also demonstrate varied approaches toward implementing their goals with respect to commercial-property leases. To this end, a strong commitment coupled with the demonstrated ability toward implementing green building requirements through a private regulatory instrument, such as a commercial-property lease, appears to have support and momentum on both sides of the landlord-tenant relationship.

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157. See CBRE, *supra* note 123, at 17.

158. *Id.* at 18.

159. *Id.*

160. See VORNADO REALTY TR., *supra* note 123, at 12.

161. *Id.*

162. *Id.* at 13.

163. *Id.*

### *B. Tools for Achieving Goals*

As with any agreement, enforcement of green building requirements through a private regulatory framework will face uncertain outcomes should the parties lack access to proper assessment programs. The selected program needs to prescribe a specific method for compliance or provide for alternatives. As such, several private organizations, along with state and local governments, offer various tools to evaluate the sustainability aspects of a building.<sup>164</sup>

#### *1. Private Green-Building Certification*

Historically, interest in green buildings in the United States began in the late nineteenth century, but the energy crisis of the 1970s brought about a resurgence in the practice.<sup>165</sup> Subsequently, many major environmental organizations began insisting on the application of holistic methods and requirements when designing their office buildings in the 1990s.<sup>166</sup> These conditions and demands set the groundwork for the “Architecture at Crossroads” meeting in 1993 where the International Union of Architects and the American Institute of Architects (AIA) released the Declaration of Interdependence for a Sustainable Future.<sup>167</sup> This document recognized the primary principles and practices for qualification as a sustainable development.<sup>168</sup>

Following the release of the Declaration of Interdependence for a Sustainable Future, the AIA published its “Environmental Resources Guide” in 1994 with a more extensive revision published in 1996.<sup>169</sup> Similarly, the Rocky Mountain Institute published “A Primer on Sustainable Building” in 1995, and the U.S. Department of Energy

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164. See KIBERT, *supra* note 116, at 1.

165. *Id.* at 73–76.

166. *Id.* at 74.

167. *Id.* at 73.

168. *Id.*

169. *Id.* at 75.

and Public Technology Inc. jointly developed the “Sustainable Building Technical Manual” in 1996.<sup>170</sup>

Based on these early efforts, several organizations recognized the need to offer an identifiable system that could measure and validate the sustainability features of a given building and its various components.<sup>171</sup> The most commonly recognized and used system in the United States is the Leadership in Energy and Environmental Design (LEED) building rating system.<sup>172</sup> Green Globes offers the next most popular rating system option; and most recently, the Living Building Challenge (LBC) appears to capture the attention of those seeking the ultimate recognition for their sustainability efforts.<sup>173</sup>

*a) USGBC—LEED*

One of the most popular systems, the United States Green Building Council (USGBC) developed a rating-and-verification system called LEED.<sup>174</sup> The LEED program emerged out of the very first attempt to develop a building rating system at the American Society for Testing and Materials (ASTM) in 1993 and eventually transferred over to the newly formed USGBC in 1995.<sup>175</sup> Continuing with the development of a green-building standard, the USGBC released the LEED program in beta form in 1998 followed by the first operational market version in 2000.<sup>176</sup>

In structuring the program to gain acceptance by as many of the industry participants and the public as possible, the USGBC members involved with LEED’s development decided to pursue a market-driven approach where the building owners would determine the program’s fate rather than compelling compliance through

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170. See KIBERT, *supra* note 116, at 76.

171. *Id.* at 73–76.

172. *Id.* at 155. Outside of the United States, projects in 150 different countries have used the LEED standard. *Id.*

173. *Id.* at 77, 155.

174. See U.S. GREEN BLDG. COUNCIL, LEED V4 USER GUIDE 3 (2014).

175. See KIBERT, *supra* note 116, at 155.

176. *Id.*

regulations.<sup>177</sup> These early developers sought a broad-based program that could meet the diverse needs of the various participants in the building industry.<sup>178</sup>

To assist the greatest number and variety of adopters and applications, the LEED program actually represents a set of rating systems that measure the sustainable attributes of a building in a variety of situations.<sup>179</sup> This means that the LEED moniker represents a group of rating systems that tries to quantify, measure, and denote the sustainable qualities associated with a given building or its various ecosystems.<sup>180</sup> To address varying levels of achievement in attaining greater levels of sustainable qualities within the rating system, the program also allows for the recognition of Silver, Gold, or Platinum as a badge of distinction.<sup>181</sup>

Under the latest iteration of LEED, the v4 program maintains different rating systems for Building Design and Construction (BD+C), Interior Design and Construction (ID+C), Building Operations and Maintenance (O+M), and Neighborhood Development (ND).<sup>182</sup> Accordingly, the LEED v4 program offers adaptations of its main rating system rubric to address twenty-one different market sectors.<sup>183</sup>

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177. *Id.*

178. *Id.* at 156.

179. *Id.* at 155.

180. See U.S. GREEN BLDG. COUNCIL, *supra* note 174, at 4–5.

181. See KIBERT, *supra* note 116, at 162.

182. See U.S. GREEN BLDG. COUNCIL, *supra* note 174, at 13–15. Within the Building Design and Construction (BD+C) program, LEED offers specific rating systems for New Construction and Major Renovation, Core and Shell Development, Schools, Retail, Data Centers, Warehouses and Distribution Centers, Hospitality, Healthcare, Homes and Multifamily Lowrise, and Multifamily Midrise. *Id.* at 13–14. Under the Interior Design and Construction (ID+C) program, LEED offers specific rating systems for Commercial Interiors, Retail, and Hospitality. *Id.* at 14. LEED for Building Operations and Maintenance (O+M) include rating systems for Existing Buildings, Retail, Schools, Hospitality, Data Centers, and Warehouses and Distribution Centers. *Id.* at 15. Finally, LEED for Neighborhood Development (ND) addresses separate programs for Plans and Projects. *Id.*

183. *Id.* at 5.

b) *GBI—Green Globes*

Offering its own approach to assessing a building's sustainable characteristics, Green Globes provides another popular rating system.<sup>184</sup> This system originates from the United Kingdom's Building Research Establishment's Environmental Assessment Method (BREEAM), developed in 1990, and encompasses the oldest efforts to advance high performance standards when constructing office buildings in England.<sup>185</sup> The Canadian government and trade organizations adopted this program in 1996.<sup>186</sup> The Green Building Institute (GBI) owns and operates the Green Globes system around the world and became the first private green-building certification system to receive accreditation by the American National Standards Institute (ANSI) as a standards developer.<sup>187</sup>

Accordingly, Green Globes is an online green-building certification-and-rating tool that assists developers in meeting market demand for environmentally sensitive buildings.<sup>188</sup> The rating tool includes a module for New Construction or Significant Renovations as well as one for Commercial Interiors.<sup>189</sup> The GBI points out that the modules offer numerous applications such as commercial, institutional, and multi-residential structures that encompass "offices, school[s], hospitals, hotels, academic and industrial facilities, warehouses, laboratories, sports facilities and multi-residential buildings."<sup>190</sup>

In quantifying a building's sustainability qualities, the Green Globes assessment system provides a rating on a scale of one to four green globes based on the percentage of points achieved compared to the maximum available for the given structure.<sup>191</sup> When the

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184. See KIBERT, *supra* note 116, at 76, 129.

185. *Id.*

186. See *About Green Globes*, GREEN GLOBES, <http://www.greenglobes.com/about.asp> [<https://perma.cc/E5VD-8L2B>] (last visited Oct. 6, 2018).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. See KIBERT, *supra* note 116, at 189.

assessment tool achieves a minimum of 35% of the available points, the project qualifies for formal certification.<sup>192</sup> At that time, an independent, third-party assessor reviews the documentation and visits the project to complete an evaluation.<sup>193</sup> The assessor then gives a recommendation to the GBI for the appropriate level of certification for the project.<sup>194</sup> Hence, Green Globes offers a document-based tool followed by a physical inspection to cover a diverse set of applications for determining the sustainable features of a given building.<sup>195</sup>

*c) Living Building Challenge*

Finally, the International Living Future Institute (ILFI) offers a building certification that tackles the same underlying topics as LEED and Green Globes but maintains a more challenging set of tolerances and expectations.<sup>196</sup> In its program, called the LBC, the ILFI begins with the premise that “[l]iving buildings give more than they take, creating a positive impact on the human and natural systems that interact with them.”<sup>197</sup>

To that extent, the LBC utilizes a demanding collection of compulsory criteria that a building must meet in order to receive certification.<sup>198</sup> The stated criteria are mandatory under the LBC and compel the participant to demonstrate actual performance over a consecutive twelve-month period.<sup>199</sup> This means that an LBC participant takes measures to greatly exceed the normal efficiency

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192. *Id.*

193. *Id.* at 190.

194. *Id.*

195. *Id.* at 204.

196. See Rider, *supra* note 141. The Cascadia Green Building Council, which was established to represent the Pacific northwest and Vancouver, Canada, in the USGBC, originally developed the Living Building Challenge. See KIBERT, *supra* note 116, at 77.

197. *Living Building Basics*, INT’L LIVING FUTURE INST., <https://living-future.org/lbc/basics/> [<https://perma.cc/93ML-WRGY>] (last visited Oct. 2, 2018).

198. *Id.* Among the unique criteria for an LBC, “the building must be net-zero energy, net-zero water, and nontoxic; provide for habitat restoration on sister sites; and incorporate urban agriculture.” KIBERT, *supra* note 116, at 77.

199. INT’L LIVING FUTURE INST., *supra* note 197.



standards applied to a green building and that makes the built environment “sustainable.”<sup>200</sup>

Thus, the LBC offers the most rigorous standard for green buildings that goes beyond LEED and Green Globes along with verification that any development receiving certification actually met or exceeded its predicted performance models. Accordingly, a variety of nongovernmental organizations that maintain programs with varying degrees of stringency to environmental and sustainability principles targeted at a diverse set of situations offer landlords and tenants an assortment of tools to evaluate the sustainability aspects of a building.

## 2. Government Programs

On a couple of occasions, state and local governments decided to create their own certification programs to assess the environmental and sustainability qualities of a building. These programs could be used in a leasing situation for compliance.<sup>201</sup> The first instance of a nonregulatory governmental standard occurred when the Austin Energy Green Building program (AEGB) began in 1985, which was created in response to more stringent government requirements of the city council of Austin, Texas.<sup>202</sup> This initiative introduced the country’s first comprehensive rating system for evaluating the sustainability of buildings.<sup>203</sup> The developers of the innovative rating system created a structure that scored a building on a five-star scale for its impact on the environment and community.<sup>204</sup> The more stars awarded to a building signified an increase in the green features.<sup>205</sup>

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200. See KIBERT, *supra* note 116, at 77.

201. See generally Mary Tuma, *Nation Follows Austin’s LEED*, COMMUNITY IMPACT NEWSPAPER (Austin, Tex.), Jan. 15, 2010, at 1; Craig Kneeland, *New York State’s Green Building Tax Credit*, N.Y. STATE ENERGY RESEARCH & DEV. AUTH. 1 (2006).

202. Tuma, *supra* note 201, at 1, 18.

203. *Id.* Two years prior to the founding of the USGBC, the AEGB program certified its first structure. *Id.* As a charter member of the USGBC, AEGB hosted the organization’s first conference and allowed its staff to participate in the development and creation of the LEED program. *Id.*

204. *Id.*

205. AUSTIN ENERGY GREEN BLDG., 2016 COMMERCIAL RATING GUIDEBOOK 3 (2016).

Following this original approach, the AEGB program released the first commercial green-building program in 1995.<sup>206</sup> At the center of the program is a computerized rating program that awards points for following sustainable practices followed by site visits for verification purposes.<sup>207</sup> An AEGB representative routinely inspects the site throughout the project to ensure compliance.<sup>208</sup> As a result, the AEGB program encourages development into preferred growth corridors in the Central Texas region while providing a locally created and established certification system that works cohesively with local codes and building regulations.

Subsequently, the state of New York decided to incentivize green buildings through a tax-based program in 2000 but ended up prescribing its own requirements due to a state law preventing the use of third-party standards and the novelty of the newly released LEED program at the time.<sup>209</sup> The state's requirements for obtaining the Green Building Tax Credit were similar to those of the LEED program but had some differences.<sup>210</sup> Essentially, the New York program generally corresponded with the LEED requirements, but also included the Additional Commissioning Credit with Systems, an Energy Management manual, and post-occupancy review.<sup>211</sup>

Although the program allocated funding in two phases, the New York legislature only allowed the tax credits to last until 2014.<sup>212</sup> Consequently, the termination of the New York program makes it

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206. *Commercial Green Building Program*, AUSTIN ENERGY GREEN BLDG., <https://greenbuilding.austinenergy.com/aegb/programs/commercial> [<https://perma.cc/42FS-9CQK>] (last visited Oct. 2, 2018).

207. *See* AUSTIN ENERGY GREEN BLDG, *supra* note 205, at 5.

208. *Id.* at 19.

209. *See, e.g.*, Kneeland, *supra* note 201, at 5.

210. *Id.* These differences occur in the areas of energy usage, indoor air quality plans prior to and during construction as well as in the operation and maintenance of the building following its commissioning, and the documentation of utility usages after occupancy. *Id.* at 5–6.

211. *Id.* at 6.

212. *See* N.Y. TAX LAW § 19(c)(1)(c) (McKinney 2017). The initial program was highly successful and the original twenty-five million-dollar tax credit required a second round from the New York legislature of the same amount because seven projects qualified for the entire allotment of the initial funding. *See* Darren A. Prum, *Creating State Incentives for Commercial Green Buildings: Did the Nevada Experience Set an Example or Alter the Approach of Other Jurisdictions?*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 171, 192 (2009).

highly unlikely that a lease would independently call for its use as a standard. Therefore, it serves as an example of an adoptable governmental standard but currently lacks any of the necessary support to ensure compliance.

Thus, the only government standard readily available as a mechanism to verify that a structure and its improvements adhere to its green-building obligations of a lease comes from the AEGB program.<sup>213</sup> However, the AEGB program maintains geographical limits and limited applicability because it is tailored to the Central Texas area.<sup>214</sup> To this end, AEGB—along with the nongovernmental organization programs of LEED, Green Globes, and LBC—provides sufficient mechanisms and standards that will allow enforceability by a landlord or tenant of a private regulatory framework included in a leasing document.

### *III. Toward a Private Environmental-Governance Approach*

With a shift away from a positive law approach as applied to environmental governance, some scholars believe that a move has already occurred toward private oversight.<sup>215</sup> One scholar explained that: “Private governance institutions provide governance without government. They are rules and structures by which individuals, communities, firms, civic organizations, and other entities govern their interests without the direct involvement of the state or its subsidiaries.”<sup>216</sup>

Further refining this definition, another scholar considers that private environmental governance occurs when nongovernmental organizations develop and enforce requirements in a manner such that they achieve traditional governmental results.<sup>217</sup> These nongovernmental organizations achieve environmental protection by

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213. *Commercial Green Building Program*, *supra* note 206.

214. AUSTIN ENERGY GREEN BLDG., *supra* note 205.

215. *See* Vandenberg, *supra* note 11, at 134.

216. Tracey M. Roberts, *Innovations in Governance: A Functional Typology of Private Governance Institutions*, 22 DUKE ENVTL. L. & POL’Y F. 67, 67 (2011).

217. *See* Vandenberg, *supra* note 11, at 147.

overcoming or bypassing collective action barriers without any major participation or control by the government or its agencies.<sup>218</sup>

Based on this combined definition, the migration to private environmental governance with respect to green buildings occurred sometime ago.<sup>219</sup> The AEGB program began under a positive law approach in the 1990s, but the rest of the country elected to follow a new paradigm by the end of the decade eschewing governmental oversight.<sup>220</sup> AEGB provided a solid foundation with its green building rating program, but LEED eventually developed its own standard independent of any governmental oversight and surpassed the regional certification system.<sup>221</sup>

Today, the USGBC, GBI, and ILFI are all nongovernmental organizations that establish, modify, and administer their respective programs with input from all stakeholders involved in the construction industry. This may include the government but not in a significant way above any other party.<sup>222</sup> All three organizations charge participants in their voluntary certification program fees that cover the cost of privately verifying compliance.<sup>223</sup> These charges alleviate any dependency on the government for subsidization or a single revenue source, a dependency that could significantly affect the independence of the nongovernmental organizations to set

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218. *Id.*

219. *Id.* at 146.

220. See U.S. GREEN BLDG. COUNCIL ET AL., GREEN BUILDING CITY MARKET BRIEF 7 (Feb. 2015); Jennie Richards, *Green Building: A Retrospective on the History of LEED Certification*, SUSTAINABLE INDUS. MAG. 3 (Oct. 2012), <http://enviroinstitute.org/wp-content/uploads/2012/09/GREEN-BUILDING-A-Retrospective-History-of-LEED-Certification-November-2012.pdf> [<https://perma.cc/BSF7-YFVC>].

221. Richards, *supra* note 220.

222. See generally GREEN BUILDING INITIATIVE (2018), <https://www.thegbi.org/about-gbi/> [<https://perma.cc/Y4MF-SJMU>]; INTERNATIONAL LIVING FUTURE INSTITUTE (2018), <https://living-future.org/contact-us/faq/> [<https://perma.cc/QRR7-RP5Q>]; U.S. GREEN BUILDING COUNCIL (July 1, 2016), <http://usgbc.org/articles/about-usgbc> [<https://perma.cc/Y38V-ZHHR>].

223. See U.S. GREEN BUILDING COUNCIL (2018), <https://new.usgbc.org/membership-level-dues> [<https://perma.cc/H5C3-YDB7>]; 2018 *Green Building Initiative (GBI) Membership Benefits*, GREEN BUILDING INITIATIVE (2018), [https://www.thegbi.org/content/misc/GBI\\_2018MEMBERSHIP\\_Benefits.pdf](https://www.thegbi.org/content/misc/GBI_2018MEMBERSHIP_Benefits.pdf) [<https://perma.cc/2EUW-ZBUQ>]; INTERNATIONAL LIVING FUTURE INSTITUTE (2018), *supra* note 222.

objective and independent standards that deliver the stated goal of a superior building for the environment over conventional methods.<sup>224</sup>

In fact, trade organizations now lobby the USGBC, GBI, and ILFI regarding policies and content within their respective programs similar to how their efforts might have occurred with Congress or other regulatory agencies.<sup>225</sup> For example, the USGBC continues to only award credit for products certified by the Forest Stewardship Council (FSC) within the LEED program while excluding products from other prominent certification systems.<sup>226</sup> Upon the adoption of LEED v4 on July 2, 2013, the USGBC continued its policy that only gave credit for FSC products over other prominent certification systems even though it received letters of opposition from eighty-nine members of Congress, fourteen governors, and numerous affected parties.<sup>227</sup> Hence, the programs offered in the marketplace by the USGBC, GBI, and ILFI exemplify the characteristics of the private environmental governance model.

#### *A. Can Private Environmental Governance Occur Between Parties?*

Although the systems in place to oversee green-building certification likely fit within the parameters of the private environmental-governance model, obstacles still exist with regard to the leasing relationship between the landlord and tenant. In many situations, the landlord and tenant will share the same environmental and sustainability goals, but this does not always happen. This leaves two basic outcomes: the parties maintain the same goals or a mismatch occurs.

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224. See, e.g., Letter from Cassie Phillips, Vice President, Weyerhaeuser Co., to Lynda Stanley, The Nat'l Acads. (Oct. 22, 2012) (on file with author).

225. See, e.g., Letter from Chris Isaacson, Exec. Vice President, Ala. Forestry Assoc., et al., to Allan Skodowski & S. Richard Fedrizzi, U.S. Green Bldg. Council (Aug. 1, 2013) (on file with author); see also Gabriel Nelson, *Green Building: Major Overhaul of LEED Rating System Won't Happen in 2012*, E&E NEWS (June 5, 2012), <http://www.eenews.net/stories/1059965405> [<https://perma.cc/97S8-V29Z>].

226. See Isaacson, *supra* note 225.

227. *Id.*

As explained by a standard law-and-economics approach, the landlord and tenant view the environment—in this situation the parcel of land—as a common pool of resources that allows for its overuse because the parties gain all of the advantages and share the costs.<sup>228</sup> To this end, the landlord and tenant will individually complete a cost-benefit analysis to determine their respective positions and then bring it to the lease negotiations.

Often, landlords and tenants will place an emphasis on the economics of a green building.<sup>229</sup> Historically, an overwhelming majority of market participants believes that a green building costs significantly more than a traditional one.<sup>230</sup> However, a review of various studies looking at a wide range of structures found that the average cost for a green building as compared to a non-green one did not differ significantly.<sup>231</sup> Accordingly, the perspectives brought to the lease negotiations by the landlord and prospective tenant may be founded on the same or different conclusions, which will create outcomes based on a bilateral or unilateral basis.

### 1. *Bilateral Basis*

When the landlord and tenant can find common ground regarding the requirement for a green building, a bilateral situation will occur. Both parties to the lease will enter negotiations for the lease based on very similar beliefs regarding a green building. This bilateral scenario will lead to one of two extreme outcomes: the landlord and tenant will either agree to a green building and the associated tenant improvements, or they will not.

Regardless of the manner in which the landlord and prospective tenant arrive at their positions, the private environmental-governance approach only occurs when both parties desire a green building and the corresponding tenant improvements. With both the landlord and

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228. See Vandenberg, *supra* note 11, at 141.

229. See Chad Mapp et al., *The Cost of LEED—An Analysis of the Construction Costs of LEED and Non-LEED Banks*, 3 J. SUSTAINABLE REAL EST. 254, 255 (2011).

230. *Id.*

231. *Id.* at 255–57, 269–70.

prospective tenant desiring an environmentally friendly outcome, the negotiation can move toward focusing on the program and level of compliance instead of whether or not to seek a green building. Consequently, the private environmental governance approach will succeed in delivering governmental results without any need for regulatory action.

Should the landlord and tenant recognize that the added costs of constructing an environmentally friendly structure, along with the subsequent tenant improvements, do not surpass the perceived benefits, the private environmental governance approach falls short of achieving governmental results. This means that the parties elected to mitigate the risks of not supporting or fostering an environmentally friendly approach by approaching land use and management in other ways.<sup>232</sup> The private environmental-governance approach cannot compel the parties to follow the more sustainable path, absent governmental mandates under a positive law approach.<sup>233</sup>

Therefore, a bilateral situation whereby the parties to a lease maintain the same perspective toward including a provision in their agreement to address the program and level of compliance from a third-party certification program will qualify as private environmental governance, whereas an approach that shuns green building practices and verification requirements will fall short without a government directive.

## 2. *Unilateral Basis*

At other times, the responsible party for demanding a green building may come from either the landlord or the tenant side of the leasing agreement. In these types of situations, the party desiring a green building will need to persuade its proposed landlord or tenant that such an outcome is beneficial to both parties.

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232. See Vandenberg, *supra* note 11, at 138–39.

233. *Id.*

For instance, CBRE represented a landowner in Denver's Union Station District who desired a green building.<sup>234</sup> The owner initially constructed a structure that received LEED Gold recognition for its Core and Shell components, but the landlord decided to convince and require all of the building's twenty-one tenants to obtain LEED Commercial Interior certification.<sup>235</sup> This resulted in the building receiving a LEED Platinum designation as an Existing Building in September 2014.<sup>236</sup>

In this example, the motivation to construct a green building started with the landowner.<sup>237</sup> The landowner used his leverage as a landlord to convince and entice prospective tenants to share his environmentally friendly vision.<sup>238</sup> The leasing document created the legal mechanism for enforcement of the environmental priorities should any of the tenants choose to ignore the agreed-upon obligations.<sup>239</sup>

In contrast, Kohl's and Whole Foods represent major anchor tenants with deep-rooted environmental commitments that tend to locate their buildings in mixed-use shopping centers.<sup>240</sup> Large real estate investment trusts own many of the mixed-use shopping centers where Kohl's and Whole Foods tend to locate their stores.<sup>241</sup> Should a particular landlord desire to attract tenants such as Kohl's or Whole Foods to its property, the retailers will gain a position of leverage in which they can demand that their lease address and require that any structures they occupy will comply with their company's underlying

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234. See *forteadvert, 1900 16<sup>th</sup> Street—Platinum LEED Certification*, YOUTUBE (Oct. 29, 2014), <https://www.youtube.com/watch?v=WHqn5zD4sBo&feature=youtu.be> [<https://perma.cc/AW4J-JW4S>].

235. *Id.*

236. *Id.*

237. *See id.*

238. *See id.*

239. *See id.*

240. *See, e.g., WHOLE FOODS MKT., supra* note 123, at 45.

241. *See, e.g., KIMCO REALTY CORP., KIMCO FACT SHEET* (Sept. 30, 2017), <http://investors.kimcorealty.com/interactive/newlookandfeel/102965/Kimcofactsheet.pdf> [<https://perma.cc/T8DW-YDW6>] [hereinafter *KIMCO FACT SHEET*]; *WEINGARTEN REALTY, FACT SHEET 3RD QUARTER 2017* (2017), <http://www.sn1.com/Cache/1001228654.PDF?O=PDF&T=&Y=&D=&FID=1001228654&iid=103037> [<https://perma.cc/JHV6-5CV5>].



policies on green buildings.<sup>242</sup> As a result, Kohl's and Whole Foods maintain large portfolios of occupied stores that registered or received third-party certification for attaining a recognized green building standard.<sup>243</sup>

In this type of situation, the tenant comes to the negotiations with a stronger bargaining position than the landlord. Landlords will need to evaluate whether they want to meet the requirements of a high-profile tenant or possibly lose that tenant.<sup>244</sup> Should the landlord agree to supply a certified green building or provide subsidies to the tenant to construct one, the leasing document will include the appropriate legal obligations for the private enforcement of any breach of the required environmental commitments.

Based on these two illustrations, private environmental governance may occur on a unilateral basis when the landlords impose a green-building philosophy upon a tenant or vice versa. Although the parties did not enter into their negotiations with the same position regarding a green building, the ultimate language of the leasing agreement included provisions to require the compliance with a third party's standard.<sup>245</sup> The decision to privately comply with a green building standard occurred without any government involvement, but ends up achieving traditional governmental results.<sup>246</sup>

Likewise, a landlord or tenant may be unwilling to accept the green building terms proposed in a lease. Should the green building terms become an insurmountable obstacle to the leasing agreement, then a leasehold estate will fail to occur. This will also fit within the

242. See generally BRITELL, *supra* note 8, § 7.

243. See KOHL'S, *supra* note 123, at 29–31; WHOLE FOODS MKT, *supra* note 123, at 45–50.

244. A landlord placed in this type of situation usually must consider more than just losing a tenant and the base rent associated with the lease. Frequently, the base rent is only a monthly component of the total rent. See AALBERTS, *supra* note 20, at 440. The total rent usually includes a component that is calculated based off an agreed upon percentage of sales generated at the location. See *id.* Should a major tenant fail to materialize or leave, the landlord faces the possibility that fewer patrons will visit the property, which may reduce sales, and likely rent, for the other tenants in the same development.

245. See KIMCO FACT SHEET, *supra* note 241, at 2 (showing Kohl's and Whole Foods are both Kimco tenants); see also KIMCO CRR, *supra* note 123, at 13 (implementing national company standards for their tenants based off third-party standards).

246. See KIMCO CRR, *supra* note 123, at 13.

definition of private environmental governance, because the outcome effectively functions like a limiting regulatory action whereby the leasehold estate fails to materialize because the parties refused to agree to a green building standard.<sup>247</sup>

Thus, private environmental governance occurs in two different circumstances when the parties to a lease come with opposing philosophies toward green buildings under a unilateral basis. Should one party convince the other to include a green building requirement or a failure to come to terms between the prospective landlord and tenant occur, the resulting action ultimately achieves traditional governmental results without using positive law approaches. Accordingly, the underlying lease agreement serves as the mechanism toward achieving private environmental governance with respect to green buildings.

*B. Incentivizing Private Environmental Governance Through Leases*

Pursuant to Kimco Realty's CSR report, "Leases define the roles and responsibilities of retail tenants and landlords and can promote or disincentivize sustainable activities at a shopping center."<sup>248</sup> With this philosophical approach in mind, external policies can significantly influence the private environmental-governance model. These policies may come from federal, state, or local governments, as well as the other nongovernmental sources such as lenders, insurance companies, and trade organizations.<sup>249</sup> In addition, public pressure and the media may play a role in shaping the actions of those participants in the private environmental-governance model.<sup>250</sup>

To this end, an incentive that provides something of value to the landlord and tenant may create an inducement to include a green-building provision in a lease. These inducements may come from

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247. See Vandenberg, *supra* note 11, at 146.

248. See KIMCO CRR, *supra* note 123, at 13.

249. *Id.*

250. See Vandenberg, *supra* note 11, at 168.

financial or nonfinancial sources but will need to tie any benefits to the inclusion of green building requirements and standards into the leasing document. Hence, these different types of incentives will serve as a catalyst to encourage and foster marketplace forces that will induce landlords and tenants to seriously consider green building provisions within their commercial-property leases.

### 1. *Financial Incentives*

When considering the realities of the commercial leasing market, one of the main considerations for many participants centers on financial gain.<sup>251</sup> Many government leaders recognize that financial incentives offer a valuable tool to encourage more green buildings in their jurisdiction while advancing their own environmental policies.<sup>252</sup> Based on these principles, the four main financial strategies to induce green buildings include tax incentives, reducing fees associated with construction, sustainability grants, and revolving loans.<sup>253</sup>

For example, many jurisdictions turned to tax incentives as an inducement to voluntarily further their green building agenda.<sup>254</sup> As previously mentioned, in 2000, New York pioneered this approach along with its own compliance standard that shared many similarities with LEED.<sup>255</sup> Subsequently, Oregon and Maryland offered tax incentives in 2001 followed by Nevada in 2005 and New Mexico in 2007.<sup>256</sup> Each of these programs tied their tax-incentive benefit to attaining recognition from a third-party certification organization.<sup>257</sup>

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251. Darren A. Prum, *Creating State Incentives for Commercial Green Buildings: Did the Nevada Experience Set an Example or Alter the Approach of Other Jurisdictions?*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 171, 174 (2009).

252. KIBERT, *supra* note 116, at 2–3.

253. See U.S. GREEN BLDG. COUNCIL, *Good to Know: Green Building Incentive Strategies*, LEED (May 2, 2014), <https://www.usgbc.org/articles/good-know-green-building-incentive-strategies-0> [<https://perma.cc/6T38-TBRF>].

254. Prum, *supra* note 251, at 171.

255. See *supra* text accompanying notes 209–11. In New York, seven projects claimed the initial \$25 million in funding; so an additional \$25 million was later allocated. See Prum, *supra* note 251, at 190–92.

256. Prum, *supra* note 251, at 188–99. In most states, the programs became popular with developers

Interestingly, the Oregon approach made its incentives portable, so the entity or person receiving the benefit could transfer their rights to someone else for a cash payment equivalent to the net present value of the tax credit.<sup>258</sup> This type of an approach strongly lends itself to the leasehold situation where the ultimate purchaser of the construction services, like a landowner, could receive the tax credit regardless of whether or not the landlord or tenant received the benefit from the state. A lease provision could take this financial gain into account and adjust the rent accordingly so that either the landlord or tenant could financially gain while the leased building or space would receive an upgrade to a more environmentally friendly construction standard.

As another option, the government could reduce the fees it charges a project owner for meeting green building requirements.<sup>259</sup> Many jurisdictions charge a series of fees for the assortment of required permits or the processing of the project through its agency reviews.<sup>260</sup> This option could provide a financial break for those projects that meet certain green-building requirements before, during, or after construction.<sup>261</sup> The agency collecting the fees could either discount the relevant charges or offer a rebate at the proper time.

In a leasing situation, this potential incentive for a green building or improvement could help both parties to the lease as well as either the landlord or tenant individually. The landlord could see direct benefits from any type of improvements on the underlying land in addition to any remodeling. These types of benefits could come from upgrades to more efficient climate control systems, lighting, water

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while benefitting the environment; but Nevada's approach provided extremely generous benefits that created a critical financial response in the next meeting of the state's legislature. *Id.* at 173–88.

257. *Id.* at 188–99.

258. *Id.* at 193.

259. See Carl J. Circo, *Should Owners and Developers of Low-Performance Buildings Pay Impact or Mitigation Fees to Finance Green Building Incentive Programs and Other Sustainable Development Initiatives?*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 55, 66 (2009).

260. JUSTIN SWEET & MARC M. SCHNEIER, *LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS* § 8.08A (9th ed. 2013).

261. See, e.g., BABYLON, N.Y., CODE § 89-86 (2006) (offers a rebate for projects that achieve LEED certification).

heating, and other utility-dependent equipment. At the same time, tenants might pay lower rent or building maintenance costs if landlords elect to pass the savings their way. Alternatively, the renter could see reduced costs for any out-of-pocket improvements that require government approval.

Furthermore, some jurisdictions offer revolving loans to those improvements that achieve specific green-building objectives.<sup>262</sup> A revolving loan fund supplies money with a subsidized interest rate to those seeking to build or renovate to green-building standards.<sup>263</sup>

These programs attempt to reduce the costs attributable to complying with the high-performance building practices in two ways.<sup>264</sup> First, the loan repayments occur at a rate lower than the operational cost savings from the improvements in order to lower the up-front costs linked to these high-performance structures.<sup>265</sup> This allows the building's owner and the fund to equally participate in the cost savings by incorporating the most efficient and latest technologies. Second, the payments made by the borrowers replenish the fund for future loans.<sup>266</sup>

As applied to the private commercial lease, the revolving loans could provide a good financing tool for a tenant looking to upgrade utility-dependent equipment to more efficient models but who remains concerned about how the outlay might impact their cash flow. The same type of consideration may apply to landlords who wish to reduce their capital outlay on a property. This type of financial assistance could facilitate an upgrade of the major building components while greatly reducing the cost of a major renovation or tenant improvement as required under a leasing agreement.

Finally, grants distributed by the government for selecting green or high-performance alternatives may encourage reluctant landlords and tenants when constructing or remodeling a structure. A grant program

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262. See U.S. GREEN BLDG. COUNCIL, *supra* note 253.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

happens when the local government or its captive utility gives money to a property owner, landlord, or tenant for an express purpose related to a green or high-performance outcome on a building.<sup>267</sup> Generally, this type of program tries to offset the above-normal costs associated with the design and construction of these types of sustainable developments or encourage the installation of the latest, most efficient equipment.<sup>268</sup>

In the leasing situation, a grant may provide the additional technical expertise to upgrade a construction project or building renovation to meet a third-party certification standard. The grant may also cover the costs charged by the third-party certification organizations to complete its standard review. This approach may provide enough assistance to a cost-conscious landlord or tenant that aspires to follow green-building standards but falls short on capital. Thus, the financial incentives may foster sufficient encouragement to a landlord, tenant, or both parties to include green-building provisions in the leasing document.

## 2. *Nonfinancial Incentives*

Sometimes, an incentive that returns a meaningful benefit will generate a greater stimulus than a financial inducement.<sup>269</sup> In trying to make the built environment more sustainable while accomplishing policy goals at little or no cost, some jurisdictions use nonfinancial incentives such as expedited permit processing and additional density bonuses to encourage green buildings and renovations.<sup>270</sup>

Given that many of the regulatory authorities in a jurisdiction can find themselves inundated with requests for permits, the length of time to receive approval for a project may face extended delays, which can add significant costs to a construction project.<sup>271</sup> By

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267. *Id.*

268. See U.S. GREEN BLDG. COUNCIL, *supra* note 253.

269. *Id.*

270. *Id.*

271. See SWEET & SCHNEIER, *supra* note 260, § 8.08A. In some locations, the plan review and permitting process can take up to eighteen months. See U.S. GREEN BLDG. COUNCIL, *supra* note 253.

offering this type of inducement, a jurisdiction may encourage sustainable practices without giving direct financial incentives.<sup>272</sup>

For example, Hawaii directed all counties that issue building, construction, or development related permits to establish a mechanism for expedited processing when a project includes energy or environmental design standards.<sup>273</sup> After Hawaii issued this 2006 directive to its counties, many municipalities decided to join this approach to encourage green buildings within their authorities.<sup>274</sup> The jurisdictions that follow this approach do so by either offering a priority building permit process or expediting the development plan evaluation after it gets submitted for review.<sup>275</sup>

Because the expedited permit processing or plan check could offer valuable time savings for those tenants looking to enter a property quickly, this incentive may find particular value in the commercial lease. A landlord may offer financial incentives for tenant improvements to attract renters; so the value of an expedited process could provide for a more valuable inducement. Alternatively, the savings could help the landlord's bottom line; but to realize the benefit, the documentation for the lease would need to specifically address the tenant's obligations to complete a green-building renovation pursuant to the government's policy addressing environmentally friendly structures.

From a tenant's perspective, many new locations will need renovations prior to opening for business in a leased space or building; so an expedited permit in exchange for including green-building features could translate into earlier than expected and potentially increased sales along with reduced costs by avoiding unnecessary delays. With this in mind, tenants could request that

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272. See BROOKS RAINWATER, AMERICAN INST. OF ARCHITECTS, LOCAL LEADERS IN SUSTAINABILITY: A STUDY OF GREEN BUILDING PROGRAMS IN OUR NATION'S COMMUNITIES 10-11 (2008).

273. HAW. REV. STAT. ANN. § 46-19.6 (West 2018).

274. See YUDELSON ASSOCS., THE NAT'L ASS'N OF INDUS. AND OFFICE PROPERTIES RES. FOUND., GREEN BUILDING INCENTIVES THAT WORK: A LOOK AT HOW LOCAL GOVERNMENTS ARE INCENTIVIZING GREEN DEVELOPMENT 16 (2007).

275. *Id.* at 27.

landlords complete their shares of underlying green-building improvements and use the leasing agreement as the legal mechanism for compliance and possible financing of the upgrades.

Utilizing another nonfinancial tool, density bonus programs for developers that voluntarily institute sustainable construction practices occur in other jurisdictions.<sup>276</sup> Many local governments choose to establish zoning requirements based on height or density; so an easing of those constraints as a tradeoff for other environmentally friendly undertakings offers a good compromise for both sides.<sup>277</sup> Consequently, a landowner may gain significant extra square footage and additional structures on a given parcel of land, which provides for additional income through leases by assisting the local government in accomplishing its environmental policy goals through green-building practices.

By taking advantage of density bonus programs, a landlord may need to require all tenants to complete green-building renovations in order to fulfill any obligations with the government. The commercial lease provides the mechanism to require tenants to follow green-building practices for any improvements they intend to complete. More importantly, it provides landlords tangible proof that they are keeping their commitment to the government.

Therefore, nonfinancial incentives can impact landlord and tenant decisions to include green-building requirements in their leasing documents. The nonfinancial incentives coupled with the financial ones create various opportunities for landowners, landlords, tenants, and all of the parties to unilaterally, as well as bilaterally, seek the inclusion of green-building standards within a commercial-property lease. As a result, the governmental, nongovernmental, and media stakeholders play a role in shaping the market forces as influencers, which make a commercial-property lease fits squarely within the private environmental-governance model.

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276. See RAINWATER, *supra* note 272, at 19.

277. *Id.*



## CONCLUSION

Upon applying both the analytic and synthetic approaches to understanding how a green-building lease supports the private environmental-governance model, the landlord-tenant arrangement appears to back the notion that many regulatory advancements are occurring outside of the positive law and policy structure of yesterday. The emergence of this new model gained momentum due to the prior dominance of positive law that created groundbreaking legislation in conjunction with external parties that began holding property owners responsible for a tenant's environmental transgressions on the land.<sup>278</sup>

Historically, the precedent attached to leases followed property law due to its roots back to medieval England. Along the way, however, contract law became an important aspect of the mechanism used to create a leasehold estate due to the various assurances included in the agreement.<sup>279</sup> However, commercial leases still follow property law precedent, whereas residential leases receive a more progressive treatment, which now includes many additional protections that emanate out of contract doctrine.<sup>280</sup> Blending the two doctrines together creates an enforceable instrument with time-limited obligations and duties imposed upon both landlords and tenants.<sup>281</sup>

In considering the scholarly definitions used to describe the private environmental-governance approach, the commercial-property lease, along with the provisions to compel certification from a third-party organization for a green building, falls well within the model.<sup>282</sup> This occurs because crucial factors, such as the support for green buildings from market participants on both the landlord and tenant sides of the transaction, along with the dominance of meaningful

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278. *See supra* Introduction.

279. *See discussion supra* Part I.

280. *See discussion supra* Section I.B.

281. *See discussion supra* Part I.

282. *See discussion supra* Section III.A.

third-party certification standards that lack any direct involvement from the government but deliver similar types of results, successfully work together to support environmental concerns and goals.<sup>283</sup>To this end, the unique melding of property and contract doctrines to form a legally binding instrument that exists within the confines of a regulatory structure while also adhering to social norms routinely occurs in the realm of a commercial lease, ultimately achieving private environmental governance in plain sight.<sup>284</sup>

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283. See discussion *supra* Part II; Section III.B.

284. See discussion *supra* Part I; Part II; Part III.