

GREEN BUILDING AND GREEN LEASES

LANDLORD-TENANT LAW IN OKLAHOMA

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If you think of green building as simply outfitting a home with things like solar panels and a gray-water recycling system, you might be surprised to learn that the 50 floor, 850-foot Devon Energy tower currently under construction in Oklahoma City will be a “LEED-certified” green building. Here are some other recent examples of how green building is taking root in Oklahoma:

On March 23, 2010, the American Automobile Association (AAA) opened a new 147,000-square foot operations center in northwest Oklahoma City. The three-story building features branded, high-performance green office space, incorporating under-floor air distribution and raised access flooring. The facility has won the U.S. Green Building Council's Silver LEED certification.

<http://www.okcommerce.gov/Site-Selection/rc/AAA-Celebrates-Grand-Opening-Of-OKC-Operations-Center>

On January 21, 2010, the U.S. Department of Labor announced that Oklahoma will receive a \$6 million green-job grant to train workers in emerging industries such as energy efficiency and renewable energy. The goal is to train 1,000 workers in two years for jobs that pay above the state's per capita income. The award is among 34 totaling nearly \$190 million State Energy Sector Partnership and Training Grants authorized by the American Recovery and Reinvestment Act of 2009. The project will create a Center of Excellence for Energy Innovation at Tulsa Community College's northeast campus to provide state-of-the-art practical applications in building retrofitting and green landscaping. The center will serve as a regional model for sustainability and a resource

hub for emerging energy technologies, best practices, innovative curriculum and training opportunities.

[http://www.okcommerce.gov/Grants-And-Funding/rc/Oklahoma-Receives-\\$6-Million-For-Green-Job-Training](http://www.okcommerce.gov/Grants-And-Funding/rc/Oklahoma-Receives-$6-Million-For-Green-Job-Training)

A. Overview of Green Building and the Rating Systems.

1. What is Green Building?

According to the U.S. Environmental Protection Agency (EPA), “Green building is the practice of creating structures and using processes that are environmentally responsible and resource-efficient throughout a building's life-cycle from siting to design, construction, operation, maintenance, renovation and deconstruction. This practice expands and complements the classical building design concerns of economy, utility, durability, and comfort. Green building is also known as a sustainable or high performance building.” <http://www.epa.gov/greenbuilding/pubs/about.htm>

Green buildings are designed to reduce the overall impact of the built environment on human health and the natural environment by:

- Efficiently using energy, water, and other resources
- Protecting occupant health and improving employee productivity
- Reducing waste, pollution and environmental degradation

For example, green buildings may incorporate sustainable materials in their construction (e.g., reused, recycled-content, or made from renewable resources); create healthy indoor environments with minimal pollutants (e.g., reduced product emissions); and/or feature

landscaping that reduces water usage (e.g., by using native plants that survive without extra watering).

2. Benefits of Green Building

Buildings have a significant impact on the environment, human health, and the economy. Green building can maximize both the economic and environmental performance of buildings. In the United States, buildings account for:

- 39 percent of total energy use
- 12 percent of the total water consumption
- 68 percent of total electricity consumption
- 38 percent of the carbon dioxide emissions

Environmental benefits of green building include:

- Enhance and protect biodiversity and ecosystems
- Improve air and water quality
- Reduce waste streams
- Conserve and restore natural resources

Economic benefits of green building include:

- Reduce operating costs
- Create, expand, and shape markets for green product and services
- Improve occupant productivity (buildings with good overall environmental quality can reduce the rate of respiratory disease, allergy, asthma, sick building symptoms, and enhance worker performance)
- Optimize life-cycle economic performance

Social benefits of green building include:

- Enhance occupant comfort and health
- Heighten aesthetic qualities
- Minimize strain on local infrastructure
- Improve overall quality of life

<http://www.epa.gov/greenbuilding/pubs/whybuild.htm>

3. Developments in Green Building

Green building is a rapidly changing, evolving area. Climate change and greenhouse gas emission control emphasis and de-emphasis (note fluctuations in support for these programs over the last year as recession affected public opinion and in turn the Obama administration and Congress) is but one of the outside developments in the environmental arena that impacts the progress of the green building movement.

As time goes on, more businesses and home buyers seem to be interested in green building. According to McGraw-Hill Construction's 2008 SmartMarket Report, "The Green Home Consumer," 70% of home buyers are more inclined to buy a green home over a conventional home in a down housing market. That number is 78% for those earning less than \$50,000 a year, reflecting increasing interest in and access to green buildings for all members of our society. In fact, 56% of respondents who bought green homes in 2008 earn less than \$75,000 per year; 29% earn less than \$50,000.

During recent years, the U.S. government and many states have passed legislation or created initiatives to systematize and encourage green building. For example, the federal government's recent stimulus package contains money for work that can be

considered green building, including training and weatherization. On the state level, coastal states like California and Washington seem to be in the forefront of the green building movement. But Oklahoma's public and private sectors are also getting involved. Oklahoma has recently required new state buildings to be LEED-certified, begun to work on updating building codes, and is improving training and information regarding green building.

In this state, one leading green building-related organization is the Oklahoma Sustainability Network (OSN), which is a statewide nonprofit organization. In October 2009, the State Energy Office of Oklahoma and the US Department of Energy accepted OSN's proposal to use American Recovery and Reinvestment Act funds to update Oklahoma's building codes and promote energy efficient construction technologies across the state. See <http://www.oksustainability.org/>.

The purpose of the two year OSN project is to update Oklahoma's building codes and promote energy efficient construction technologies across Oklahoma as a matter of public policy, economic development and environmental stewardship. The project addresses two critical areas: (1) reducing future development's energy costs/impacts by using modernized building codes, thereby creating an economic competitive edge for Oklahoma, while protecting our state's environment, and (2) retaining and growing jobs in Oklahoma by developing an existing and emerging workforce trained to be competitive in an energy wise economy.

The goal is to rebuild Oklahoma through modern building codes and construction practices, and create high-performance, cost-competitive, sustainable homes and

buildings - smarter, better-constructed, greener buildings that reduce excessive utility bills, lower emissions, and spark Oklahoma's energy efficient industries for Oklahoma's economy and environment.

In its grant proposal, OSN stated that in 77 Oklahoma counties and over 500 Oklahoma cities there are a range of out-dated building code versions and numerous local modifications that effectively downgrade established standards. This patchwork of codes has led to construction techniques and planning that has worsened Oklahoman's economic competitiveness, cost of energy and cost of living. While the State of Oklahoma has recently taken steps to adopt the most recent International Energy Conservation Code (IECC) 2009 and American Society of Heating, Refrigeration, and Air Conditioning Engineers (ASHRAE) 90.1, for its own state facilities, the great majority of construction activity falls outside of this ideal. OSN believes that Oklahoma businesses and Oklahoma home owners could reap enormous economic and environmental benefit from modernized building codes and construction.

<http://www.oksustainability.org/oklahoma-building-codes.php>

In support of this program, OSN stated: By 2013, the overall green building market (both residential and non-residential) is likely to more than double from today's \$36-49 billion to \$96-140 billion. OSN's grant proposal will help Oklahoma's response to this market shift be an economically positive one. The Center for American Progress and the Political Economy Research Institute at the University of Massachusetts Amherst, in a September 2008 study, found that a national green economic recovery program investing \$100 billion over 10 years in six infrastructure areas would create 2 million new

jobs. Adoption of the IECC 2009 and ASHRAE 90.1 standards provide the regulatory framework for even more efficient building designs, such as the U.S. Green Building Council's building standard, Leadership in Energy and Environmental Design (LEED), which was adopted in 2008 by the state for state facilities. Commercial building payback for green designs yield a simple payback in about two and half years.

http://www.oksustainability.org/pdf/osn_arra_grant_proposal.pdf

4. LEED (Leadership in Energy and Environmental Design) Certification

In the United States and in a number of other countries around the world, LEED certification has become the recognized standard for measuring building sustainability. Achieving LEED certification is the best way for a company or individual to demonstrate their building project is truly "green."

The LEED green building rating system is developed and administered by the U.S. Green Building Council (USGBC), a Washington D.C.-based, nonprofit coalition of building industry leaders formed in 1993. The USGBC promotes design and construction practices that increase profitability while reducing the negative environmental impacts of buildings and improving occupant health and well-being.

LEED certification, which includes a rigorous third-party commissioning process, offers compelling proof that a project has achieved environmental goals and is performing as designed. Getting certified allows the builder to take advantage of a growing number of state and local government incentives, and can help boost favorable publicity for a project.

As with green building in general, LEED continues to evolve. The USGBC unveiled LEED v3 in 2009 (version 3). LEED v3 takes advantage of new technologies and advancements in building science while prioritizing energy efficiency and CO2 emissions reductions, demonstrating LEED's flexibility to deal with changes in technology and regulation.

The LEED rating system offers four certification levels for new construction -- Certified, Silver, Gold and Platinum -- that correspond to the number of credits accrued in five green design categories: (1) sustainable sites, (2) water efficiency, (3) energy and atmosphere, (4) materials and resources, and (5) indoor environmental quality.

There are a variety of LEED Rating Systems for different types of buildings, including:

New Construction: LEED for New Construction and Major Renovations is designed to guide and distinguish high-performance commercial and institutional projects.

Existing Buildings: Operations & Maintenance. LEED for Existing Buildings: Operations & Maintenance provides a benchmark for building owners and operators to measure operations, improvements and maintenance.

Commercial Interiors. LEED for Commercial Interiors is a benchmark for the tenant improvement market that gives the power to make sustainable choices to tenants and designers.

Core & Shell. LEED for Core & Shell aids designers, builders, developers and new building owners in implementing sustainable design for new core and shell construction.

Schools. LEED for Schools recognizes the unique nature of the design and construction of K-12 schools and addresses the specific needs of school spaces.

Retail. LEED for Retail recognizes the unique nature of retail design and construction projects and addresses the specific needs of retail spaces.

Healthcare. LEED for Healthcare promotes sustainable planning, design and construction for high-performance healthcare facilities.

Homes. LEED for Homes promotes the design and construction of high-performance green homes.

Neighborhood Development. LEED for Neighborhood Development integrates the principles of smart growth, urbanism and green building into the first national program for neighborhood design.

See <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=222>.

The U.S. Green Building Council's LEED website provides tools for building professionals, including:

- Information on the LEED certification process.
- LEED documents, such as checklists and reference guides. Standards are now available or in development for the following project types:
- The different rating systems listed above, e.g., New commercial construction and major renovation projects (LEED-NC).

- A list of LEED-certified projects
- A directory of LEED-accredited professionals
- Information on LEED training workshops
- A calendar of green building industry conferences

See <http://www.usgbc.org/DisplayPage.aspx?CategoryID=19>.

LEED is flexible enough to apply to all building types – commercial as well as residential. It works throughout the building lifecycle – design and construction, operations and maintenance, tenant fitout, and significant retrofit. LEED for Neighborhood Development extends the benefits of LEED beyond the building footprint into the neighborhood it serves.

The five principal LEED design categories, with comment, are:

Sustainable Sites: Choosing a building's site and managing that site during construction are important considerations for a project's sustainability. The Sustainable Sites category discourages development on previously undeveloped land; minimizes a building's impact on ecosystems and waterways; encourages regionally appropriate landscaping; rewards smart transportation choices; controls stormwater runoff; and reduces erosion, light pollution, heat island effect and construction-related pollution. (This category is one of the chief ways that LEED is integrated with smart growth and development concepts.)

Water Efficiency. Buildings are major users of potable water supply. The goal of the Water Efficiency credit category is to encourage smarter use of water, inside and

out. Water reduction is typically achieved through more efficient appliances, fixtures and fittings inside and water-wise landscaping outside.

Energy & Atmosphere. According to the U.S. Department of Energy, buildings use 39% of the energy and 74% of the electricity produced each year in the United States. The Energy & Atmosphere category encourages a wide variety of energy strategies: commissioning; energy use monitoring; efficient design and construction; efficient appliances, systems and lighting; the use of renewable and clean sources of energy, generated on-site or off-site; and other innovative strategies.

Materials & Resources. During both the construction and operations phases, buildings generate a lot of waste and use a lot of materials and resources. This credit category encourages the selection of sustainably grown, harvested, produced and transported products and materials. It promotes the reduction of waste as well as reuse and recycling, and it takes into account the reduction of waste at a product's source.

Indoor Environmental Quality. The U.S. Environmental Protection Agency estimates that Americans spend about 90% of their day indoors, where the air quality can be significantly worse than outside. The Indoor Environmental Quality credit category promotes strategies that can improve indoor air as well as providing access to natural daylight and views and improving acoustics.

USGBC's regional councils, chapters and affiliates have also identified the environmental concerns that are locally most important for every region of the country. LEED credits that address those local priorities have been selected for each region. A

project that earns a regional priority credit will earn one bonus point in addition to any points awarded for that credit.

Third-party certification through the independent Green Building Certification Institute (GBCI.org) assures that LEED buildings are constructed as intended. GBCI includes a network of ISO-compliant international certifying bodies, ensuring the consistency, capacity and integrity of the LEED certification process. The Green Building Certification Institute (GBCI) assumes administration of LEED certification for all commercial and institutional projects registered under any LEED Rating System.

4. Other Rating Systems

LEED is not the only green building certification program available. Although EPA does not have a green building certification program, the agency is involved with the U.S. Department of Energy's ENERGY STAR® program, which addresses one of the most important aspects of green building – energy efficiency. ENERGY STAR qualifies new and renovated buildings as energy efficient, and awards the ENERGY STAR label.

There are also a variety of private and non-profit green building certification programs in the marketplace. One of the most prominent is Green Globes. According to its web site, the Green Globes system is a green management tool that includes an assessment protocol, rating system and guide for integrating environmentally friendly design into commercial buildings. Once complete, it also facilitates recognition of the project through third-party review and assessment. Green Globes is intended to be an interactive, flexible and affordable approach to environmental design. See <http://www.thegbi.org/commercial/>.

The Public-Private Partnership for Advancing Housing Technology maintains a list of national and state Green Building Certification Programs for housing. See <http://www.pathnet.org/sp.asp?id=20978>.

5. Green Building Codes

On March 11, 2010, the International Code Council (ICC), the American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE), the U.S. Green Building Council (USGBC), and the Illuminating Engineering Society of North America (IES) announced the launch of the International Green Construction Code (IGCC), representing the merger of two national efforts to develop adoptable and enforceable green building codes. The IGCC provides the building industry with language that establishes a comprehensive model green building code designed to rapidly advance green building practice across the U.S.

For decades, ICC and ASHRAE have worked to develop codes and standards that become the industry standard of care for the design, construction, operations and maintenance of residential and commercial buildings in the U.S. and internationally. In coordination with the efforts of ICC and ASHRAE, USGBC has been leading a nationwide green building movement centered on the LEED Green Building Rating System since LEED was launched in 2000. The convergence of these efforts in the IGCC is perhaps the most significant development in the buildings industry in the past 10 years.

A landmark addition to the technical content of the IGCC is the inclusion of ANSI/ASHRAE/USGBC/IES Standard 189.1, Standard for the Design of High Performance, Green Buildings Except Low-Rise Residential Buildings, as an alternate

path of compliance. Standard 189.1 is a set of technically rigorous requirements, which like the IGCC, covers criteria including water use efficiency, indoor environmental quality, energy efficiency, materials and resource use, and the building's impact on its site and its community. Standard 189.1 was written by experts representing all areas of the building industry, who contributed tens of thousands of man hours. Developed in a little over three years, the standard underwent four public reviews in which some 2,500 comments were received.

See <http://www.iccsafe.org/cs/IGCC/Pages/default.aspx> and www.ashrae.org/greenstandard.

B. Green Legislation Affecting Landlords and Tenants

1. Federal Legislation

On the federal level, the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007 included energy efficiency and sustainable design requirements for Federal and other buildings. Additionally, there have been a series of Executive Orders and agency-specific rules promoting green building since the early 1990s and the federal government has instituted sustainable practices at many of its buildings. See generally <http://www.epa.gov/greenbuilding/pubs/about.htm#4>.

The Federal Commitment to Green Building: Experiences and Expectations, a report of the Office of the Federal Environmental Executive, provides a history of these rules and the greening of federal facilities. The Library of Congress THOMAS Web site has the most current information about federal legislation. Search Bill Text for "green building" to find relevant legislation.

Many state and local governments also have green building laws, mainly applying to public buildings, though an increasing number are applicable to private buildings as well. State green building programs are also receiving increased federal funding as a result of the stimulus package. On February 17, 2009, President Obama signed the “stimulus package,” which is formally known as the American Recovery and Reinvestment Act (ARRA), into law. The ARRA provides grant money to states for improvements in energy efficiency and other incentives that support green building, including money for weatherization of homes. Much of the ARRA green building-related money will start being spent in 2010, making the current year the first to see real impact from this program. The biggest test of the administration’s energy goals may come in spending the billions that have been devoted to states and cities for improving energy efficiency. To get the money out quickly, the plans sends it through a range of programs that are not accustomed to seeing funding on this scale. State energy offices that annually receive less than \$100 million combined from Washington are slated to receive \$3.4 billion.

2. Oklahoma Green Building Legislation

Effective July 1, 2009, Oklahoma requires that public buildings of a certain size (10,000 square feet or more) be constructed using LEED or Green Globes standards. See 61 Okla. Stat. 213. This statute is set forth in full below because it illustrates many of the concepts of green building. .

A. The purpose of this section is to promote effective energy and environmental standards for the construction, renovation, and maintenance of public buildings in this state which will improve the capacity of the state to design, build, and operate high-performance buildings thus

creating new jobs, contributing to economic growth, and increasing energy independence. To accomplish the objectives of this section, the state shall adopt construction standards for public buildings that:

1. Optimize the energy performance of public buildings in the state;
2. Increase the demand for environmentally preferable building materials, finishes, and furnishings;
3. Reduce the dependence of the state on imported sources of energy through buildings that conserve energy and utilize local and renewable energy sources;
4. Protect and restore the natural resources of the state by avoiding development of inappropriate building sites;
5. Reduce the burden on municipal water supply and treatment by reducing potable water consumption;
6. Reduce waste generation and manage waste through recycling and diversion from landfill disposal;
7. Establish life-cycle cost analysis as the appropriate and most efficient analysis to determine the optimal performance level of a building project;
8. Ensure that the systems of each building project are designed, installed, and tested to perform according to the design intent and operational needs of the building through third-party postconstruction review and verification; and
9. Authorize the Department of Central Services to pursue ENERGY STAR designation from the United States Environmental Protection Agency to further demonstrate the energy independence of a public building project.

B. For purposes of this section:

1. "High-performance certification program" means a public building design, construction, and renovation standard which meets either the standards of the United States Green Building Council's Leadership in Energy and Environmental Design Rating System (LEED) or the standards of the Green Building Initiative's Green Globes Rating System, and which:

a. is quantifiable, measurable, and verifiable as certified by an independent third party,

b. reduces the operating costs of public buildings by reducing the consumption of energy, water, and other resources,

c. results in the recovery of the increased initial capital costs attributable to compliance with the program over a time period by reducing long-term energy, maintenance, and operating costs,

d. improves the indoor environmental quality of public buildings for a healthier work environment,

e. encourages the use of products harvested, created, or mined within Oklahoma, regardless of product certification status, and

f. protects the environment of Oklahoma;

2. a. "Public building" means a facility that:

(1) is constructed or renovated in whole or in part with state funds or with funds guaranteed or insured by a state agency and the state funds constitute at least fifty percent (50%) of the project cost,

(2) contains ten thousand (10,000) or more gross square feet,

(3) includes a heating, ventilation, or air conditioning system, and

(4) has not entered the design phase prior to July 1, 2008.

b. A public building shall not include:

(1) a building constructed or renovated with funds from a public school in the state as defined in Section 1-106 of Title 70 of the Oklahoma Statutes, and

(2) a building constructed or renovated where the primary purpose of the building project is for the storage of archived documents;

3. "State agency" means any agency, board, commission, counsel, court, office, officer, bureau, institution, unit division, body, or house of the executive or judicial branches of state government, whether elected or appointed. State agency shall include institutions within The Oklahoma

State System of Higher Education. State agency shall not mean a public school district or technology center school district; and

4. "Substantial renovation" means any renovation of a public building the cost of which exceeds fifty percent (50%) of the replacement value of the facility.

C. The Department of Central Services shall adopt and update from time to time a high-performance certification program.

D. A state agency designing, constructing, or controlling the substantial renovation of a public building shall carry out the design, construction, or substantial renovation so as to achieve the highest performance certification attainable as certified by an independent third party pursuant to the high-performance certification program adopted by the Department pursuant to subsection C of this section. For purposes of this subsection, a certification is attainable if the increased initial costs of achieving the certification, including the time value of money, can be recouped from decreased operational costs within five (5) years.

E. If the state agency estimates that the increased initial costs of achieving certification will exceed five percent (5%) of the total cost of the design, construction, or substantial renovation project, the Department of Central Services shall specifically examine the estimate before authorizing the design, construction or substantial renovation.

F. If a public building undergoing substantial renovation cannot achieve a high-performance certification due to either the historical nature of the building or because the increased costs of renovating the public building cannot be recouped from decreased operational costs within five (5) years, an accredited professional shall assert in writing that, as much as possible, the substantial renovation was executed in a manner that is consistent with the standards in the high-performance certification program adopted by the Department of Central Services.

G. Any facility that is designed or newly constructed with state funds with less than five thousand (5,000) gross square feet that except for the size would be a public building subject to the high-performance certification program, any minor renovation of a public building, and any controlled maintenance of a public building shall, as much as possible, be executed in a manner that is consistent with the standards in the high-performance certification program adopted by the Department of Central Services.

H. A public building may be exempted from complying with this section upon a determination by the Department of Central Services that extenuating circumstances exist such as to preclude compliance with the high-performance certification program.

I. The Department of Central Services shall identify and seek to have any public building which has been designed, constructed, or renovated in accordance with the standards of the high-performance certification program designated as an ENERGY STAR building by the United States Environmental Protection Agency.

J. The Department of Central Services shall develop and implement a process to monitor and evaluate the energy and environmental benefits associated with designing, constructing, or renovating a public building in accordance with the standards of the high-performance certification program. The Department shall issue an annual report regarding program guidelines, monitoring and evaluation procedures, and the energy and environmental benefits related to the implementation of the high-performance

3. Oklahoma Building Codes

In July 2009, Oklahoma passed the Oklahoma Uniform Building Code Commission Act, 59 Okla. Stat. 1000.20 *et seq.* The Uniform Building Code Commission (Commission) has the power and the duty to review and adopt all building codes for residential and commercial construction to be used by all entities within the state. Codes and standards adopted by the Commission shall be the minimum standards for residential and commercial construction in the state. All public projects shall abide by such minimum standards and requirements; however, nothing in the act shall prevent or take away from state agencies the authority to enact and enforce requirements containing higher standards and requirements than such minimum standards and requirements. Municipalities and other political subdivisions shall abide by such minimum standards and requirements; however, they too can have “higher” standards.

Beginning July 1, 2009, the 11-member Commission (to be appointed by the governor) has the power to begin the rulemaking process to adopt new building standards. The bill does not direct the Commission to adopt any specific codes (such as the 2009 IECC). An article in the Journal Record discussed the Commission's role:

"This state has been part of the wild, wild west for a long time," said Tulsa architect Alan Hewitt, co-chair of AIA Oklahoma's government affairs committee. "The less regulation, the better, has been kind of the premise in this state, and a lot of developers are the same way."

Embracing such standards would put Oklahoma on par with 35 other states, most of those applying the international family of codes.

"There's a lot of merit to have that type of standard adopted in Oklahoma," said Hewitt, co-founder of the Tulsa architectural firm Chase Fetters Hewitt. "It would lend a lot of continuity by having a single building code throughout the state. When you order a certain material for a certain type of project, you know that's going to meet the state building code, so you don't have to meet a different standard for every little town."

It also could demand minimum structural standards for everything from fire and materials safety to energy and environmental performance.

"My suspicion is you will see most of those smaller municipalities adopting the uniform code as a minimum standard and then apply their own modifications," Tapp said.

That, Hewitt said, would simply extend the practice of most Oklahoma communities today. Many now adapt international building codes to suit their needs.

Uniform state codes could provide a better platform, Chaffee said.

"Everybody should be on the same playing field," said the mayor, who has developed several properties in Alva. "Each community can then choose to strengthen the code as needed."

As for finding and employing licensed inspectors and other needed infrastructure to comply with such codes, Chaffee suggested smaller cities may devise a system of circuit travelers, following the expanding trend of sharing city managers.

"In the long run, there's less expense for all if there's a uniform code that we're all working under where the rules don't change wherever you go," Tapp said. "I would be concerned if it would come online shorter than two years."

Oklahoma Leaders Prepare Statewide Building Codes, Journal Record, Oklahoma City, Jul. 16, 2009.

4. Oklahoma Incentives Related to Green Building

Oklahoma has enacted several tax credits to encourage energy efficiency, including:

Credit for energy-efficient residential property. SB-610 allows individuals who construct new homes an income tax credit of up to \$4,000 for construction of homes that are up to 40% more energy efficient than the standards set by the International Energy Conservation Code (IECC) 2003.

More specifically, a contractor who is the primary builder of an energy efficient home or manufactured home substantially completed after December 31, 2005 may claim an income tax credit beginning in tax year 2006. The home must be less than 2,000 square feet. Improvements eligible for the credit include energy efficient heating and cooling systems, windows, doors, roofs and insulation to minimize heat loss and gain.

The contractor can take a tax credit for the amount of the eligible expenditures, not to exceed \$2,000 for a home that is between 20% and 39% above the International Energy Conservation Code 2003 or \$4,000 for a home that is 40% or above of the Code. In addition, the heating and cooling efficiencies must meet the minimum requirements established by the National Appliance Energy Conservation Act of 1987 and building

envelope improvements must account for a certain percentage of the reduced annual heating and cooling energy consumption levels.

The contractor can carryover any unused portion of the tax credit for up to four subsequent years. As the result of a 2006 amendment, credits earned after August 25, 2006 are freely transferable to any taxpayer upon the filing of a transfer agreement.

See 67 Okla. Stat. 2357.46.

This year, proposed legislation seeks to extend the tax credit to larger homes. SB0481, introduced by Sen. Todd Lamb, R-Edmond and Rep. Jason Nelson, R-Oklahoma City, modifies the criteria for receiving tax credits in the construction of energy efficient homes. It provides for an income tax credit on eligible expenditures incurred by a contractor in the construction of any-size energy efficient residential property beginning after Jan. 1, 2010.

Corporate tax credit for renewable energy resources. For tax years beginning on or after January 1, 2003, a state income tax credit is available to producers of electric power using renewable energy resources from a zero-emission facility located in Oklahoma. The zero-emission facility must have a rated production capacity of one megawatt (1 MW) or greater. The facility must be placed in operation after June 4, 2001, and the electricity must be sold to an unrelated party.

The amount of the credit varies depending on when the electricity is generated (see below) and may be claimed for electricity generated on or after January 1, 2003 during a 10-year period following the date that the facility is placed in operation (after June 4, 2001).

Eligible renewable energy resources include wind, moving water, sun, and geothermal energy. The construction and operation of the zero-emission facility must result in no pollution or emissions that are or may be harmful to the environment, as determined by the Department of Environmental Quality.

See 68 Okla. Stat. § 2357.32A

5. Preemption Issues (Building Codes)

In the development of green building regulations, it remains to be seen whether or to what extent federal regulations – existing or future – will affect the ability of state and local governments to enact their own provisions. In a recent case, a federal district court enjoined the City of Albuquerque from enforcing Volumes I and II of the Albuquerque Energy Conservation Code and the High Performance Building Ordinance based on preemption, *i.e.*, the existence of federal energy efficiency standards for appliances which Albuquerque’s new codes exceeded. *Air Conditioning, Heating And Refrigeration Institute, et al., v. City Of Albuquerque*, Civ. No. 08-633 MV/RLP (D.N.M. Oct. 3, 2008). (Note: among other things, Volume I of the Albuquerque code provided two performance-based paths to compliance--LEED certification at the silver level and 30% efficiency improvement.)

C. Green Lease Agreements; Considerations, Incentives, Operating Costs, Tenant Improvements, Operations, and Maintenance

1. Green leasing

Increasingly, many owner/landlords and tenants are finding they have common interests in better commercial leasing agreements to achieve the purposes of green building. A landlord who constructs or improves a building to meet LEED or other

environmental standards wants the operation of the building to be consistent with the goal or sustainability. More tenants want a healthy, energy-efficient building and assurances to that effect.

To achieve real sustainability in a building, the landlord (owner or manager) and the tenant (the user) must cooperate. A tenant who is not incentivized through a well-designed lease agreement to save energy, conserve water, and recycle can undermine a landlord's green building efforts. Likewise, a landlord who does not deliver what a tenant bargains for and expects in terms of a green building can frustrate the building's users. Many tenants are now seeking to reduce their carbon footprints and meet corporate sustainability reporting requirements. They need to be in an energy-efficient building that will be managed as such by their current and future landlord.

Some tenants may seek LEED for Commercial Interiors (LEED-CI) certification, which gives points to the tenant: a) if the lease term is 10 years or longer, and b) for leasing space in a LEED-certified building and for leasing space in buildings with certain green attributes, such as meeting ultra-efficient water-usage standards. In such cases, the tenant needs assurance that these conditions will be met.

“In the commercial leasing context, it's hard to say how to structure a lease to encourage a tenant to behave in ways that are aligned with how the building is designed,” says Ralph DiNola, Principal with Green Building Services, a consulting firm with offices in Portland. DiNola says developers and landlords often make sustainable design a major component of the marketing strategy for new construction. However, tenants that

fail to engage on energy efficiency, green maintenance and other measures can negate those efforts.

According to Karen Penafiel, vice president of advocacy for the Building Owners and Managers Association (BOMA), tenant cooperation is a key aspect of green building that the industry hasn't comprehensively addressed. "One of the hardest things about going green is user behavior," Penafiel says. "You can upgrade all your systems and achieve a lot of energy efficiency that way, but if the tenants use more and more energy, you're not really doing anything on the conservation side."

<http://www.sustainableindustries.com/greenbuilding/12110276.html?viewAll=y>

Green leases are nothing more than standard leases modified to remove barriers to sustainability, communicate shared environmental standards and goals, and provide greater assurance that these standards will be met by everyone. Green leases should be made flexible and easily adaptable to rapid changes and the needs of the future.

The use of a "green lease", as opposed to traditional lease, is essential to any commercial green building operation. Green leases are becoming more common as sophisticated real estate operators clearly see the benefit of making sustainability a part of their investment strategy.

2. Model Green Leases

There have been a few model green lease agreements developed by several organizations that are available for purchase on the internet:

The Model Green Lease is available by download at www.squarefootage.net. As explained in <http://modelgreenlease.wordpress.com/>, the Model Green Lease is distinct from other green lease efforts in three critical areas:

1. Resolves the critical financial problem of the split-incentive that has hobbled the progress of greening existing office buildings and constructing new green buildings.
2. It is equitably balanced to meet the financial and operational needs of landlords, lenders, investors, and tenants.
3. Preliminary estimates show that buildings adopting the structure of the Model Green Lease, with appropriate construction and operating standards can cut energy use by 30 to 50 percent over comparable office buildings, with corresponding financial benefits accruing to landlord, investors and tenants.

Historically, the industry is polarized. If a tenant signs a net lease, the building owner sees little benefit from investing time and money in saving energy. A tenant that signed a gross lease doesn't care how energy efficient a building is – because the tenant never sees the savings. Ironically under both types of leases, tenants that manage their energy use wisely often subsidize tenants that waste energy or operate beyond normal business hours. The Model Green Lease changes the game, says Whitson, “We redesigned the modified gross lease to put the economic incentives in the right spots to get the economic and environmental results everybody wants. Plus, it's written in plain English.

3. Gross v. Net Leases

One fundamental question is what type of green lease results in maximum operating performance for both the tenants and the owner – a “gross lease” or a “net lease?” During the last three decades, the net lease has gained favor over the gross lease, although practices vary by locality. In the Oklahoma City area, the net lease is most common.

In gross leases, landlords originally incorporated rent escalation clauses to protect the landlord from inflation and cover increases in operating costs. However, energy costs, property taxes and the costs of complying with government mandates, such as the Americans with Disabilities Act (ADA), began to rise faster than inflation, and so landlords added clauses to gross leases to pass through any increase in operating costs to tenants using the base year or expense stop method.

With a net lease, the tenant pays a base rent plus a separate charge for all operating costs, i.e. utilities, maintenance, insurance and taxes. The net lease is similar to the gross lease in that it typically includes some form of rent escalation. The main benefit to a landlord is that a net lease effectively transfers all risks for building operating costs to the tenants. The downside side is that the landlord gets none of the benefits from reducing operating costs, since this has no impact on the building's NOI.

Proponents of the net lease say it creates a more transparent lease arrangement, and creates an incentive for tenants to use less energy, but it may not work that way in practice. Many commentators believe net leases create an unnecessary hurdle for green buildings; under a net lease the landlord has little incentive to aggressively control a building's operating costs.

Advances in technology and improved O&M practices make it easier than ever before for landlords to manage operating costs and reduce energy use. Simultaneously, operating costs such as energy have become a smaller percentage of an office tenant's cost of doing business. The net lease fails to take these facts into account, and punishes operational excellence, environmental performance and energy efficiency.

Alan Whitson argues that to create a green lease the gross lease format must be used. The gross lease, with the appropriate language, transfers the fiscal responsibility for controlling operating costs back to landlords, who are far more qualified to do so than the tenants. It creates a financial incentive for landlords to effectively design, build and manage high-performance and sustainable buildings without sacrificing comfort or service while maximizing the landlord's return on investment.

See Alan Whitson, Green Lease, July 17, 2006, Environmental Design & Construction,

<http://www.edcmag.com/Articles/Column/cc0c0b5ca1e7c010VgnVCM100000f932a8c0>

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4. Typical Green Lease Provisions

There seems to be a difference of opinion whether a green lease should consist of an entirely new lease or whether well-considered amendments are sufficient. One possible approach is to review your existing lease item by item and look for opportunities to improve the language, introducing green best practices wherever reasonably possible. If this approach is followed, some common sections to focus on are:

- 1) Description of Operating Charges
- 2) Permitted Uses
- 3) Recycling and Waste Management
- 4) Assignment and Subletting
- 5) Repairs and Maintenance
- 6) Description of Services Provided (janitorial, etc.)

7) Building Rules and Regulations

8) Contractor Workletter/Rules and Regulations for Tenant Improvements

9) Sublease Agreement

If a new lease is used, it should include these 10 essential elements:

1. Gross lease format with appropriate escalation clause and expense stop clause to reward landlord for operating a high-performance building.

2. Appropriate operational procedures and building control/management systems for charging tenants for after hours/excess energy usage, supported by appropriate lease language.

3. A comprehensive and equitable definition of building operating costs in the lease to protect the interest of both the landlord and tenant.

4. As part of the definition of building operating costs, the lease should contain language that allows the landlord to amortize the cost of projects that will reduce operating costs and treat those amortization costs as operating costs, as long as they do not exceed savings.

5. Right to Audit – This lease clause protects the tenant from overcharges and defines the audit process to protect the landlord from frivolous audits.

6. Hazardous Materials – A clause that defines what it is and that neither the landlord or any tenant violates laws or regulations regarding the hazardous materials.

7. Green Cleaning Specifications – This lease exhibit should define the materials, procedures and protocols for cleaning the building in a sustainable manner.

8. Building Rules and Regulations – This lease exhibit stipulates a building-wide recycling program.

9. Tenant Construction Agreement – This lease exhibit defines sustainable product requirements and construction practices.

10. Tenant Manual & Development Guidelines – A guide to explain the building's sustainable features and benefits, procedures and operating parameters, that should provide insights into how to maximize the building's features to create a sustainable workplace.

See Alan Whitson, Green Lease, July 17, 2006, Environmental Design & Construction,

<http://www.edcmag.com/Articles/Column/cc0c0b5ca1e7c010VgnVCM100000f932a8c0>

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In many cases, green leases should be structured so that all tenants are practicing the same environmentally beneficial measures (energy-efficiency, recycling, water conservation, etc.). This will prevent any one tenant from obtaining the benefit of the landlord's investment in green building construction or operations without sharing in the cost. One of the most common examples is an electricity submetering system that makes each tenant aware of, incentivized, and responsible for controlling and reducing its energy-related occupancy costs.