LEED EBOM AND EXISTING LEASES – A SQUARE PEG IN A ROUND HOLE?

Among the many significant changes under LEED v3 was the inauguration of the Existing Building Operations and Maintenance (EBOM) standard designed to certify the sustainability of ongoing operations of existing commercial and institutional buildings, and to encourage building owners and tenants to implement sustainable practices and reduce environmental impacts over a building's life cycle. EBOM is a welcome development from several perspectives, including the fact that it implements measurement standards that actually can document whether or not a building has lived up to its "design" potential. It also creates a path toward green building certification for owners and tenants of existing buildings willing to make the requisite investments.

Notice that I said "owners and tenants", not "owners or tenants". Leased buildings that already are occupied present significant challenges to parties wishing to pursue LEED EBOM. Because the EBOM standard can be achieved only for an entire building, occupants of at least ninety percent (90%) of the total square footage must agree to be part of the certification process. For owner-occupied and single tenant buildings, this is not a major hurdle, but for multi-tenant facilities, the challenges can be substantial, especially if the existing leases do not provide a process allocating costs and benefits associated with "greening" the premises. The old "triple net" paradigm under which building owners absorb up-front capital costs and tenants pay ongoing operating costs does not square with the lifecycle cost assessment paradigm employed under LEED. This could leave a landlord in the position of making substantial capital investments (for example, in a more energy efficient HVAC system) that reduces the tenant's operating costs yet does not allow the landord to share in that benefit. These are not simple issues to negotiate mid-way through the term of a lease.

If both a landlord or tenant wish to consider a plan for achieving EBOM certification, step one is a careful review of the underlying lease and identification of those provisions that may require adjustment to accommodate an effective EBOM certification process. These would normally include provisions covering the characterization and allocation of building operating expenses, provision of building services, including utilities and cleaning, tenant alterations and improvements, and building rules and regulations. There are several useful starting points when considering potential approaches to these issues, including BOMA's *Guide to Writing a Commercial Real Estate Lease, Including Green Lease Language* (available for purchase here:

http://shop.boma.org/showItem.aspx?product=GL2008&session=6F58873E218F4130B4F3D75A006E0C8A), REALPac's *Office Green Lease National Standard* (available for download here: http://www.realpac.ca/green-office-leases), the Corporate Realty, Design and Management Institute's *Model Green Lease* (available for purchase here: http://www.squarefootage.net/TMGL.html), and the USGBC's Green Office Guide (available for purchase here (under LEED Integration Gudes): http://www.usgbc.org/Store/PublicationsList_New.aspx?CMSPageID=1518). While all of these publications have useful and thought-provoking approaches to common green lease issues, they all share in common one key advantage: *a clean slate*.

It is the lack of that clean slate that creates perhaps the greatest challenge for landlords and tenants bound by an existing lease contract. Assuming the parties are nonetheless motivated to at least explore the possibilities, I recommend the following:

1. ***Assess the Triple Bottom Line:*** What are the economic, environmental and social benefits that are sought? Are the benefits exclusive to one or the other parties, or are they shared? (For example, would implementation of a lighting control system benefit only the tenant and its employees? Or would it also constitute a capital investment in building systems that would make the premises more valuable to other prospective tenants, thereby benefiting the landlord as well?)

2. ***Do the Math:*** Fundamental concepts of investment and return on investment must support the rationale for the transaction. In the triple bottom-line context, however, ROI can be measued by more than just economic benefit. If a tenant, as part of its corporate social responsibility program, desires to achieve a net reduction in greenhouse gas emmissions connected to its operations at the premises, perhaps the "value" of that environmental benefit is allocated solely to the tenant. If the capital investment required to realize that benefit involves installation of equipment or systems the useful life of which extends far beyond the lease termination date, the landlord should certainly contribute something, but perhaps the amount isproportiontely less than what a "straight-line" analysis would dictate.

3. ***Don't Negotiate for Advantage:*** If both parties pursue this path from a sincere desire to do the right thing, they should approach negotiations from a win-win paradigm. Some shift in the allocation of risks, responsibilities and rewards

that are established under the parties' existing lease is inevitable. Nonetheless, all parties must approach the discussion with a willingness to share in both the downside risks and upside rewards.

4. ***Be Committed:*** Do not approach this exercise lightly, or without proper support and buy-in from the corner office. Prior to initiating discussions, make sure that all stakeholders understand the range of potential outcomes and associated cost implications. Know where the hard limits are, and be prepared to live within them.

While pursuing LEED EBOM certification for an existing, multi-tenant facility presents a unique set of difficulties, it is by no means impossible. Like any other business deal, the fundamentals must work. Even if the task proves too daunting (because, for example, one 30% tenant whose lease expires in 24 months is not willing to join the effort), other parties can always take the opporunity to devise a longer-term stragegy to obtain the certification once the present impediments are removed. This will require some forethought and, like any other action slated for future implementation, is subject to an enhanced "changed circumstances" risk (particularly with respect to changes in the EBOM standard itself). However, it is the only approach to LEED EBOM certification that is likely to succeed in a leased multi-tenant building.

LEED EBOM is not ideally suited for facilities subject to existing leases, and in particular those with multiple tenants. In certain situations, pursuing LEED for Commercial Interiors may provide a viable option. In others, it may be necessary to implement "green" improvements without qualifying for LEED EBOM. But in all situations, careful assessment of the terms of the existing lease or leases is a necessary pre-requisite to avoid the proverbial "square peg in a round hole" dilemma.