



Briefing Note

Environmental Good Practice

This Briefing Note is not part of the Code for Leasing Business Premises

Introduction

In the public interest, landlords and tenants should each adopt environmental good practice policies so far as they can do so without adversely affecting the value of their buildings or the viability of their businesses.

Environmental issues range from simple day-to-day activities such as sorting rubbish for recycling or reducing the water consumption of toilets to capital works such as constructing buildings with sustainable materials and installing solar panels or wind-powered generators. Between these extremes are measures such as fitting water meters and replacing inefficient heating or cooling plant.

Circumstances vary so greatly that no single solution to any particular environmental issue can be appropriate or acceptable to all parties in every situation. Imposing rigid rules through lease clauses may lead to unfairness and would be contrary to the aim of the Code, which is to promote flexibility.

Landlords will often be able to apply environmental good practice policies to a sensible degree under the existing balanced lease clauses that the Code promotes, without needing special provisions. If the lease provides that landlord's consent for particular alterations cannot be unreasonably withheld, the landlord acting reasonably can take account of all relevant circumstances when deciding whether to give consent and this might include considering any adverse impact of the proposed works on the energy efficiency of the building. In arriving at a "reasonable" decision the landlord would have to weigh that against all other relevant factors. This should achieve a fairer outcome than imposing a rigid rule in the alterations clause.

Where service charges can cover costs "reasonably incurred" in relation to the building, the perfectly proper desire of the landlord to improve the environmental impact of the building would be balanced against what the tenant can reasonably be expected to pay for in the circumstances, reflecting the length of the lease term and other relevant factors. Again this is likely to produce a fairer result than having more specific provisions in the lease.

In cases where a tenant voluntarily upgrades the landlord's heating or cooling plant in a premises, a landlord who, under the terms of the lease, can require the tenant to reinstate at the expiry of his lease only if "reasonable" could not force the tenant to strip out the new plant without justification, which is fairer than being able to require it arbitrarily.

We therefore recommend a voluntary approach. It may be best to do this by using a Memorandum of Understanding to guide the behaviour of the owner and occupier towards each other and the environment. We have prepared a guide ('Memorandum of Understanding') as an addendum to the Code for Leasing Business Premises in England and Wales 2007 which will support both landlords and tenants in drafting an MoU to support environmental good practice. The Lease Code Heads of Terms have also been updated to reflect this approach.

Memorandum of Understanding

1. Sustainability Clauses

- 1.1. It is recognised that responsible owners and occupiers are likely to want to incorporate language into their leases and/or ancillary documents that encourage the conservation of energy and the use of environmentally sustainable technologies and behaviours.
- 1.2. There are no easy templates for drafting appropriate clauses for particular buildings because buildings are different and many occupiers use space for different purposes and in different ways.
- 1.3. This document sets out some of the considerations that both owner and occupier should reflect upon when agreeing clauses within a lease and/or ancillary documents as a means of encouraging sustainable behaviour in relation to the property.

2. Memorandum of Understanding

- 2.1. It will usually be simpler to include environmental good practice clauses in a Memorandum of Understanding between the owner and the occupier. This should be agreed at the same time as the lease is being negotiated but will set out the respective roles and responsibilities of the owner and occupier with regard to each other and the building. It is not expected that the MoU will be a legally binding document.
- 2.2. A Memorandum of Understanding (MoU) is likely to have the following components:
 - 2.2.1. Information (to be) provided by the owner to enable the occupier to use the building in the most responsible and efficient manner;
 - 2.2.2. Information (to be) provided by the occupier to indicate characteristics of (initial) proposed use;
 - 2.2.3. Principle of Co-operation – the risk and reward of ownership should remain with the owner; the responsibility for and benefit of occupation should remain with the occupier. Broadly this suggests that capital expenditure should be the responsibility of the owner and revenue expenditure should fall to the occupier;
 - 2.2.4. Basis of flexibility to ensure the occupier is always able to have beneficial use of the property at the same time as operating the property in the most efficient way it can;
 - 2.2.5. Variation to reinstatement obligations for environmental improvement works – it is anticipated that this should inform the drafting of Licences for Alterations but not affect the lease as a whole. Occupiers should consider energy saving measures when proposing alterations.

- 2.2.6. Sharing costs of compliance with Government regulations – it is recognised this is a crucially important element and, in the spirit of 2.2.3 above, this should be proportionate, fair and affordable.
- 2.2.7. Service Charge and Central Services Management in multi-let property – this may require a Management Agreement for the Building including provisions such as are contained in the attached section: Environmental Management of Building Agreements
- 2.2.8. Carbon Trading issues are only just beginning to affect the drafting of leases but they represent a complex area of increasing significance. From April 2010 the Carbon Reduction Commitment will focus attention on the operational efficiency of buildings for both owners and occupiers through financial and other incentives. The parties to a lease should agree how such issues are to be handled during the lease negotiations.
- 2.2.9. Provisions for Alienation – it must be recognised that an occupier's environmental footprint may differ from anyone to whom they may wish to assign or sublet. Ideally new occupiers will be encouraged to enter into a similar Memorandum of Understanding with the owner upon assignment or underletting but refusal to do so would not be a ground for refusing consent to the assignment or underlease. It should be noted that the same should apply to owners who sell to new investors who would need to enter into a new MoU with existing occupiers.
- 2.2.10. Data Sharing – there may be good reasons for some occupiers not to wish to share environmental performance data with owners and vice versa; however, for most businesses it is desirable for each party to be encouraged to share data they hold on energy and water use and waste production and recycling on at least an annual (and confidential) basis.
- 2.2.11. Both owner and occupier to be encouraged to ensure the building is managed in as energy efficient a way as is reasonably possible.
- 2.2.12. Duration of the Memorandum of Understanding if not ending simultaneously with the lease and provision for amendment or updating by agreement.

3. **It should be understood that an MoU will not override specific lease provisions, and also that it will not automatically transfer to a new landlord or tenant. Wherever either landlord or tenant changes ownership, a new MoU will be required. When the property is part of a larger estate or industrial or retail park the landlord might normally seek to enter into a similar MoU with its other tenants on that estate or park.**

4. Useful Sources of Additional Information

4.1. Links

Business Link

The Business Link website has a range of information on environmental issues useful to business under the Environment and Efficiency section
www.businesslink.gov.uk

LES-TER

Landlord's Energy Statement – Tenants Energy Review (LES-TER) is an industry led initiative funded by the Carbon Trust, which provides a standardised method for collecting energy data for buildings.
www.les-ter.org.uk

The Committee on Climate Change (CCC)

The Committee on Climate Change is an independent body established under the Climate Change Act to advise the UK Government on setting carbon budgets, and to report to Parliament on the progress made in reducing greenhouse gas emissions
<http://www.theccc.org.uk/>

The Royal Institution of Chartered Surveyors' Ska Rating is an environmental benchmarking tool for fit out which helps tenants measure their impact and which can be specified within a lease.
www.rics.org/ska

4.2. Organisations

The Carbon Trust

The Carbon Trust works with businesses to help them reduce carbon emissions and energy.
www.carbontrust.co.uk/energy/

Better Buildings Partnership

The Better Building Partnership, an initiative developed by the London Climate Change Agency, brings together a number of the largest commercial and public property owners in London under one recognition scheme. They are all working to improve the sustainability of London's existing building stock and accelerate the reduction in CO2 emissions from those buildings. The Better Buildings Partnership has also developed An MoU to support environmental good practice in leasing. This can be accessed from their website.
<http://www.lcca.co.uk/>

British Council for Shopping Centres

The BCSC has produced information and guidance on sustainability issues for retailers, including a guidance document specifically relating to Green Leases.
www.bcsc.org.uk/research/sustainability/index.asp

RICS

The RICS publishes research reports and guidance notes on energy efficiency, environmental and sustainability issues.
www.rics.org

4.3. Legislation

- Climate Change Act
- Carbon Reduction Commitment

Information on the Climate Change Act and the Carbon Reduction Commitment can be found on the Department for Energy and Climate Change websites at <http://www.decc.gov.uk/>

- Energy Performance of Buildings Directive
- Part L Building Regulations

The BPF has launched a guide on the carbon reduction commitment (CRC), a mandatory cap and trade scheme that could have significant costs for firms or public sector who fail to control their carbon emissions.

The guide has been published by the British Property Federation (BPF) in conjunction with the British Retail Consortium, BCSC, British Council for Offices, the UK Green Building Council, Royal Institution of Chartered Surveyors and the Investment Property Forum.

<http://www.bpf.org.uk/topics/document/23672/carbon-reduction-commitment-crc---a-guide-for-landlords-and-tenants>

Information on the Building Regulations and the legislation implementing the Energy Performance of Buildings Directive can be found on the Communities and Local Government Website at <http://www.communities.gov.uk/planningandbuilding/theenvironment/energyperformance/>