

REAL ESTATE & ENVIRONMENTAL LEGAL UPDATE



WHAT IS A "GREEN" LEASE?

by Leslee M. Lewis

"Green," meaning energy efficiency, environmental responsibility and ecological sustainability, is the new currency of responsibility. Sustainability initiatives are blossoming. Green is coming of age, and with voluntary national certification programs like Leadership in Energy and Environmental Design (LEED®), Green Globes, and Energy Star, green building is becoming mainstream.

Green building, renovation and leasing offers potential energy, water, waste, maintenance and other operating cost savings. Studies suggest that it adds to property value, occupancy rates, building light, air quality and comfort, and even rental rates. Investments in green can garner tax rebates and other incentives such as accelerated zoning approval and increased density. In some jurisdictions, it is the law: green building is required for certain new commercial construction or renovations. Green office space can have a marketing advantage where the perception of environmental and energy consciousness is at a premium. And the fact that it reduces the strain on natural resources, energy and water, and infrastructure does not hurt.

How do you know, though, if the office space you lease is green? Experts are debating this right now as green leases currently run the gamut. A lease of office space in an environmentally friendly or a LEED® Certified, Silver, Gold or Platinum building is called green. Leases requiring compact fluorescent lightbulbs and Energy Star appliances are called green. Some green leases only require energy efficient and environmentally friendly buildout, with recycling of construction materials. All of these call themselves green.

But true green leases typically go beyond sustainable design and construction to sustainable operations. They do not just want your old construction materials and an upgraded HVAC system. They want your paint, paper and cleaning products, too.

PRACTICE TIP

Because there is a range of what is considered to be a green lease, the tenant and landlord must share some of the same basic goals and understandings of going green, and then actually act on them.

Leasing green can mean:

- The building base and shell, down to the leased interior, is certified by a third party rating system such as LEED® Core and Shell, for meeting such factors as Sustainable Sites, Water Efficiency, Energy and Atmosphere, Materials and Resources, Indoor Environmental Quality, and Innovation and Design Process. To obtain LEED® Core and Shell Certified, Silver, Gold or Platinum

ratings, the developer must certify that 100% of the leased square footage complies with the credit requirements and 100% of the unleased square footage will comply. Often this means that the developer or owner provides tenants with design and construction guidelines, which outline the



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project's intent and sustainability goals and educate tenants on implementing appropriate features in buildout.

- The buildout of the interior of the leased premises is certified by a third party rating system such as LEED® Commercial Interiors. While interior layout, finishes, lighting mechanical distribution and other tenant systems are often not under the developer or owner's direct control, a program such as LEED® Commercial Interiors is meant to work in tandem with LEED® Core and Shell to produce a harmoniously sustainable building.

- If an existing building is involved, a third party rating program intended for retrofits and continuing operations such as LEED® Existing Buildings: Operations and Maintenance may be utilized. This type of program thrives on tenant buy-in to the concepts of sustainability. For example, improved tenant commuting practices alone (such as better use of mass transit, carpooling or bike racks) can impact between 4 and 15 credit points of the rating system, depending upon the version used.
- Building and interior maintenance uses sustainable practices and products such as water and energy saving techniques and cleaning products low in volatile organic compounds (VOCs). Cleaning may be centralized through one company to ensure compliance.
- Trade fixtures, tenant improvements and even tenant furniture and equipment are consistent with green goals. Low-emission, low-VOC, energy efficient and sustainable are the buzz-words here. This may mean plant-based ink, recycled paper, low-VOC paint, energy efficient office equipment and appliances, recycling bins, gray water toilets, water conserving fixtures, daylight or motion-sensing lighting, low-emission equipment and much more.
- Utilities usage may be separately metered, strictly limited or assigned a surcharge. Often a tracking, recordkeeping and benchmarking process is put in place to assure that energy, water, waste and maintenance records are retained and analyzed.
- Operating costs or common area maintenance charges generally include expenses related to sustainability practices, commissioning and tracking. Green building capital expenditures and repairs may also be included. Sometimes a tenant audit procedure is available to keep the landlord on a sustainable (and expense reducing) track.
- Alterations are subject to increased review, often by an expert in sustainable design or a LEED Accredited Professional.
- Building rules and regulations may be set up with a specific emphasis on sustainable practices and with incentive and enforcement mechanisms meant to ensure compliance. Sorting, recycling and reuse may be required. Smoking may be prohibited. Print parameters may be set.
- Insurance may include specialty policies or endorsements intended to cover green buildings. The landlord may be specifically released from tenant claims of utility unavailability, discomfort, or damage to personal property related to the green tenets or features of the building.
- Assignments and subletting may be conditioned on an assignee's suitability to the building's sustainable model and agreement to comply with its practices.
- Even tenant vacating is affected. Leases may prescribe reuse or disposal techniques for tenant trade fixtures, furniture, equipment or other waste or charge a surcharge for landlord-prescribed recycling or freecycling techniques.

SUGGESTED RESOURCES

REALpac National Standard Green Office Lease for Single Building Projects – www.realpac.ca

US Green Building Council – www.usgbc.org

Energy Star – www.energystar.gov

United States Environmental Protection Agency – www.epa.gov

United States Government Services Administration Solicitation for Offers - [http://contacts.gsa.gov/webforms/nsf/0/16A3F7C2E0044E4485256F4D00628BE3/\\$file/SFO_8-29-08.pdf](http://contacts.gsa.gov/webforms/nsf/0/16A3F7C2E0044E4485256F4D00628BE3/$file/SFO_8-29-08.pdf)

- In a well-planned and sincere green lease, a building environmental management plan may be put in place, as a virtual Magna Carta of agreed sustainable tenets and intents.

In short, there is a range of what is considered to be a green lease. For an effective green lease, the best course is to have the tenant and landlord share some of the same basic goals and understandings of going green, and then actually act on them.

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A NEW “STANDING” TEST FROM THE MICHIGAN SUPREME COURT

by Karolyn A. Zande

The Michigan Supreme Court just articulated a new test for determining whether a plaintiff has legal standing in its decision in *Lansing Schools Education Association v. Lansing Board of Education*, ___ Mich. ___, No. 138401 (July 31, 2010). Legal standing is a term used to describe whether a potential plaintiff can show a sufficient nexus with his or her claim in order to maintain a lawsuit. The new rule provides plaintiffs with greater latitude to bring a claim than the previous test, which was based on federal law and articulated in *Lee v. Macomb County Board of Commissioners*, 464 Mich. 726 (2001). As such, the *Lansing Schools* decision has considerable implications for Michigan plaintiffs, particularly in environmental and zoning and land-use cases where standing is often contested. In short, the ultimate effect of *Lansing Schools* appears to be a significantly broadened standing doctrine which will make it easier for plaintiffs to maintain lawsuits.

The Test for Standing Under *Lansing Schools*

The Michigan Court of Appeals held that the *Lansing Schools* plaintiffs lacked standing to bring their claims. In its order granting the *Lansing Schools* plaintiffs' appeal, the Supreme Court requested that the parties brief the issue of whether *Lee* was “correctly decided.” This request foreshadowed the decision in *Lansing Schools*, as the majority opinion framed the issue in the case as whether *Lee* and subsequent caselaw applying that test were properly decided, not whether the Court of Appeals had erred in holding that the plaintiffs lacked standing under *Lee*. The Supreme Court concluded that in these cases Michigan departed from Michigan's historical “prudential” approach to standing, and disputed *Lee*'s conclusion that Michigan's Constitution and jurisprudence required a “case” or “controversy” to exist before a court could hear a claim. *Lansing Schools*, ___ Mich. at *8, 12-15.

The Supreme Court, despite its lengthy discussion on the importance adhering to precedent, overruled *Lee* and the cases that followed it. *Id.* at *15-21. In doing so, the court articulated a new test for determining whether a plaintiff has standing. Under this test, a plaintiff has standing any time a statute sets forth a legal cause of action. If there is no legal cause of action, the Supreme Court ruled that a plaintiff has standing if he or she “has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large, or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.” *Id.* at *22. Further, if a plaintiff is seeking declaratory relief, the Court determined that a plaintiff need only meet the requirements of Michigan Court Rule MCR 2.605 to have standing.

The dissent criticized the majority for adopting a vague test for standing without any “meaningful limitations” and for overruling *Lee*, which had brought

consistency to Michigan's standing jurisprudence. The dissent noted that Michigan's Constitution required a plaintiff have standing to bring a claim, and questioned the majority's statement that Michigan precedent did not require an actual “case” or “controversy”, giving examples from Michigan cases and the record from Michigan's Constitutional Convention. The dissent further questioned the majority's motives for overruling *Lee* as “bankrupt and self-serving”, noting that the four majority justices failed to agree on any standardized test for deviating from precedent.

Impact on Environmental and Real Estate Cases

The test for standing adopted under *Lansing Schools* is significantly broader than the previous test and gives more power to the Legislature. Under *Lee*, courts inquired into a plaintiff's standing even when there was a statutory cause of action. This change alone will increase the ability of plaintiffs to bring claims, as showing an injury separate from the public at large proved a significant—if not fatal—hurdle for environmental and land-use plaintiffs under *Lee* test.

Problems with the Decision

Though the *Lansing Schools* decision appears to simplify the standing analysis, it does present several problematic issues. One issue confusing matters is the existence of individual causes of action under other environmental and land-use laws which are predicated on the plaintiff having “standing”. For instance, at least one provision of NREPA states that a cause of action is available “[i]f a person has legal standing.” Similarly, under many zoning ordinances, an “aggrieved” party has a cause of action. This typically requires that a plaintiff show an injury separate from the public at large—the same inquiry employed under *Lansing Schools* to prove standing when a plaintiff does not have an express cause of action available. Thus, in some instances, *Lansing Schools* seems to create a circular analysis whereby a plaintiff must meet the test for standing as a condition precedent to the availability of a statutory cause of action (which, under *Lansing Schools*, automatically confers standing on the plaintiff).

Conclusion

The bottom line is that *Lansing Schools* decision will likely assist environmental and land-use plaintiffs in showing that they have standing to bring claims. The exact implications under many of the relevant laws are unclear, particularly as to the extent of the distinct injury a plaintiff must show in environmental and land use cases. We can expect to see these issues litigated in the courts in the near future.

“LEGAL STANDING” is a term used to describe whether a potential plaintiff can show a sufficient nexus with his or her claim in order to maintain a lawsuit.

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LEGISLATIVE UPDATE, APRIL 2010 – SEPTEMBER 2010

Uniform Real Property Electronic Recording Act

Enrolled SB 791, 2010 PA 123 which is effective July 19, 2010, provides for the recording of electronic documents by a county register of deeds, such that an electronic document satisfies any requirement that a document be an original for recording purposes and an electronic signature satisfies a requirement that a document be signed for recording purposes. A requirement that a document or signature be notarized, acknowledged, verified, witnessed or made under oath is satisfied if the electronic signature of the person authorized to perform that act and all other information required to be included, is attached to or logically associated with the document or signature. Effective January 1, 2011, an Electronic Recording Commission is established to adopt standards to implement this Act. A county register of deeds is still required to continue to accept paper documents and to place entries for electronic and paper documents in the same index. Electronic documents accepted prior to this Act are not invalidated by the Act.

Deletion of Broker Requirement to Submit Information to DELEG Regarding Sales in Michigan of Property Located Outside of the State; Repeal of Land Sales Act

Enrolled HB 5200, 2010 PA 48 which is effective April 22, 2010, amends MCL 339.2511 to delete the requirement that a broker who proposes to sell in Michigan property located outside of the state submit information to DELEG regarding the property and the proposed sale. Enrolled HB 5201, 2010 PA 49 which is effective April 22, 2010, amends MCL 565.801 et. seq. to entirely repeal the Land Sales Act, which regulates the disposition of subdivided land.

Occupational Code, Board of Real Estate Appraisers Amendment

Enrolled HB 5313, 2010 PA 90 which is effective June 10, 2010, amends MCL 339.2603 to alter the composition of the Board of Real Estate Appraisers to allow the two members that must be state licensed real estate appraisers to be either state licensed real estate appraisers or additional certified residential real estate appraisers. It also makes the inclusion of a financial institution as a professional member permissive rather than mandatory.

General Property Tax Act Amendments

Enrolled HB 5621, 2010 PA 24 which is effective March 26, 2010, amends MCL 211.53b (which is part of the General Property Tax Act) and pertains to making current law permanent. In 2008, the Act was amended to add additional "qualified errors" to the definition of that term, but that amendment expires at the end of 2009. Enrolled HB 420, 2010 PA 17 which is effective on March 18, 2010, amends MCL 211.7cc and 711.7dd to extend the principal residence exemption to unoccupied timber-cutover property adjoining or contiguous to the property owner's home, beginning on December 31, 2007. SB 887 proposes to amend MCL 211.7d

to streamline the process for claiming an exemption for nonprofit housing for the elderly or disabled.

Planning Enabling Act Amendments

Enrolled SB 726, 2010 PA 105 which is effective June 29, 2010, amends MCL 125.3815 (Michigan Planning Enabling Act) to eliminate exceptions to the general rule that members of a local planning commission must be qualified electors (a person who is 18 or older, has lived in Michigan for at least six months and meets the requirements of local residence provided by law) of a local unit of government. Enrolled HB 6152, 2010 PA 134 which is effective August 2, 2010, amends MCL 125.3803, MCL 125.3807 and MCL 125.3833 to require



a local unit's master plan to provide for safe and efficient movement of people and goods by motor vehicles, bicycles, pedestrians and other legal users of streets, the general location, character and extent of the interconnectivity of all components of transportation and expand the definition of street to include public ways intended for use by bicycles, pedestrians and other legal users, in addition to motor vehicles.

Neighborhood Enterprise Zone Act Amendment

Enrolled HB 5567, 2010 PA 9, which is effective March 8, 2010, amends MCL 207.772 to expand the definition of "Homestead Facility" to allow abatements for subdivisions ten years old or younger.

Obsolete Property Rehabilitation Act Amendment

Enrolled HB 6203, 2010 PA 137 which is effective August 4, 2010, amends MCL 125.2786 to extend the deadline for granting new exemptions under the Act from December 31, 2010 to December 31, 2016 and add an exception to the requirement that the effective date of an exemption certificate issued under the Act is December 31 immediately following the date the certificate is issued.

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Land Division Act Amendment

Enrolled HB 5698, 2010 PA 63 which is effective May 6, 2010, amends MCL 560.102 et seq. to replace references to the State Treasurer with references to the Director of the Department of Energy, Labor and Economic Growth.

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