

Summary of Model Performance-Based Lease Provisions

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TOOL

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Author's Note and Acknowledgements

This document is part of a performance-based leasing toolkit produced by the Institute for Market Transformation with assistance from Stuart Kaplan at Blank Rome and Jeff Gracer and Margaret Holden at Sive Paget & Riesel via the NYC Climate Action Alliance. The full suite of resources, which include a mix of high-level documents and templates, can be accessed at imt.org/performance-based-leasing.

Introduction

In the United States, existing buildings account for 39 percent of carbon dioxide emissions, 46.3 percent of which come from commercial buildings.¹ Retrofitting commercial buildings by adopting energy efficiency measures in tenant and common spaces can significantly lower a building's energy consumption and utility bills. However, due to traditional leases that currently obligate landlords to provide extra energy even when it is not needed and split incentives, commercial buildings are not as efficient as they could be. And during the height of the pandemic and shutdown, empty buildings demonstrated their inefficiencies. While building occupancy dropped by as much as 95%, building energy use only dropped between 10%–20% according to a [Johnson Controls study](#).

Under a traditional lease arrangement, energy efficiency may not be addressed, and one party—often, the landlord—may carry the burden of investing in efficiency while the other party benefits from the savings. In those situations, the landlord often has little incentive to provide the capital for such improvements, and the tenant often has little incentive to reduce its energy consumption. In addition, lease provisions act as a barrier for either party to prioritize energy efficiency as current terms require landlords to provide heating and cooling even when leased spaces are unoccupied, permit inefficient tenant buildouts, hardwire lights to stay on 24/7, and mandate excessive plug loads.

Green or energy-aligned leases present a tool to address this market failure. Green leases have the potential to make a significant impact on a building's energy consumption and emissions. One study issued by the Institute for Market Transformation estimated that the adoption of these types of leases could reduce energy consumption in office buildings by as much as 22 percent, which would amount to a \$0.51 per square foot reduction in energy expenditures in commercial buildings.² If such high-performance leases were adopted across the country, an estimated 77–152 million MMBtu of energy could be saved annually. This translates to between \$1.7 billion and \$3.3 billion of savings on utility bills.³

Performance-based leases build upon the foundation of green leases to introduce provisions intended to promote deep energy retrofits and other energy efficiency measures by balancing costs and benefits between landlords and tenants. This model performance-based lease is designed to help buildings in New York City meet the performance targets set forth in Local Law 97. While this template was created in conjunction with New York-based entities with a focus on their requirements under NYC's Local Law 97, it is designed to be applicable nationwide.

¹ "Buildings and their Impact on the Environment: A Statistical Summary," U.S. Environmental Protection Agency, Revised April 22, 2009, accessed July 2021, <https://archive.epa.gov/greenbuilding/web/pdf/gbstats.pdf>.

² Feierman, Andrew. "What's in a Green Lease? Measuring the Potential Impact of Green Leases in the U.S. Office Sector," IMT, May 2015, https://www.imt.org/wp-content/uploads/2018/02/Green_Lease_Impact_Potential.pdf

³ *Id.*

At its core, the performance-based lease includes provisions that:

- Set building performance standards to meet carbon reduction goals;
- Equitably distribute landlord and tenant responsibilities to meet building performance standards;
- Ensure landlord-tenant transparency and accountability by tracking energy use and implementing building performance goals;
- Offer continuous monitoring via periodic recommissioning studies, and mitigating plans where necessary; and
- Present remedies should either party fail to meet building performance goals.

Key Provisions

The Institute for Market Transformation, working with Stuart Kaplan at Blank Rome serving in a volunteer capacity and Jeff Gracer and Margaret Holden at Sive Paget & Riesel working on a pro bono basis with the NYC Climate Action Alliance, has developed a model performance-based lease that seeks to achieve the twin objectives of energy efficiency and carbon reduction by balancing the economic burden and benefits of space design and retrofits to achieve such goals. This document highlights relevant sections and provisions of the model performance-based lease below. The full model lease template is available at imt.org/performance-based-leasing.

Building Performance Standards

The model lease includes a placeholder for Exhibits which articulate a Building Performance Standard that sets forth the energy consumption goals for the building; the capital improvements that will be undertaken to meet this goal; the energy consumption limits for the Premises; and (if applicable) design requirements for the Premises that the Tenant must comply with in order to meet the Building Performance Goal.

Relevant Provisions:

- § 1.3.4: Defines “Building Performance Standards” as “(i) the operational, maintenance, and construction standards set forth on Exhibit C annexed hereto and (ii) modifications to such standards as Landlord may establish from time to time, provided that the modifications do not materially increase Tenant’s obligations or reduce Tenant’s rights under the Lease, unless such modifications are required in order to comply with [applicable law/Local Law 97].”
- § 1.3.7: Defines “Energy Consumption Limit” as “the Tenant’s energy consumption limit set forth in Exhibit D.” The Energy Consumption Limit would be designed to allocate to the Tenant its equitable allocation of power available to the building under the Building Performance Standards.
- § 1.3.14: Defines “Plug Load Standard” as “the plug load standard for the Premises as set forth in Exhibit D.” The Plug Load Standard would be designed to allocate to the Tenant its equitable allocation of power available to the building under the Building Performance Standards.
- § 1.3.15: Defines “Premises Design Criteria” as “the design criteria for the Premises set forth in Exhibit D.” Such criteria would require compliance with the construction standards included in the Building Performance Standards.
- § 5.2(f): The Landlord may withhold approval from any “Initial Improvements” that “fail to comply with the Building Performance Standards, Energy Consumption Limit, Plug Load Standard, and Premises Design Criteria.”
- § 6.2.1: “The Tenant, at its expense, shall comply with Landlord’s Building Performance Standards (though under § 5.3, the Landlord will give the

Tenant an Energy Efficiency Bonus for making improvements within its leased space that comply with the Building Performance Standards), the Tenant's Energy Consumption Limit, the Premises Design Criteria, and the Tenant's Plug Load Standard.”

- § 10.1.1(i): Any future Tenant Alterations must “comply with the Building Performance Standards, the Energy Consumption Limit, the Plug Load Standard, and the Premises Design Criteria.”

Landlord and Tenant Responsibilities to Meet Building Performance Standards

The model performance-based lease sets forth specific landlord and tenant obligations, and offers ways for both parties to share the costs of meeting them. The model lease requires that the tenant comply with the energy consumption limit, the plug load standard, and design criteria for the tenant spaces. To support the tenant's compliance efforts, the model lease requires that the landlord pay the tenant a bonus for making the improvements within its leased space that are necessary to comply with the standards. The bonus is spread out over the term of the lease and payable to the tenant as a credit against monthly installments of rent. This provision enables the landlord and tenant to share the cost of fitting out tenant spaces in a manner designed to meet the building's carbon reduction goals.

The model lease also requires the tenant to contribute its fair share of the landlord's cost of meeting the Building Performance Standards. In a traditional lease, landlords pass certain costs of capital improvements through to tenants as building operating expenses. The model lease extends this concept to include the costs of the improvements necessary to comply with greenhouse gas emissions and energy reduction laws. This enables base building system retrofits and necessary upgrades identified during building recommissioning to be passed through to tenants in proportion to their use of building-wide services.

Relevant Provisions:

- § 4.4.1(m) & (n): “Operating Expense” includes the “costs to comply with Laws and governmental requirements of general applicability to the Building ... the purpose of which is to cause a reduction in greenhouse gas emissions or energy use intensity” and “the costs to comply with Building Performance Standards,” including the costs of recommissioning and implementation of resulting recommendations.
- § 5.3: Landlord shall pay to Tenant an “Energy Efficiency Bonus” equal to []% of Landlord's Contribution [for initial tenant premises improvements], provided that, upon completion of the Initial Improvements, a qualified licensed professional engineer paid for by Tenant and reasonably acceptable

- to Landlord certifies to Landlord that the Initial Improvements have been substantially completed in a manner which meets or exceeds Landlord's Building Performance Standards, which Energy Efficiency Bonus shall be amortized over the Term of the Lease and payable to Tenant as a credit against monthly installments of Base Rent...."
- § 6.1.3: "Should the Tenant implement a hybrid work plan with employees working partly on Premises and partly elsewhere, the Tenant shall use good faith efforts to (i) cluster its employees on the Premises within the fewest possible HVAC zones, (ii) install vacancy sensors that will limit HVAC supplied air and turn off lighting in unoccupied zones, and (iii) ensure that electrical equipment is turned off in unoccupied zones."
 - § 6.2.1: The Tenant, at its expense, shall comply with Landlord's Building Performance Standards. The Tenant shall also comply with any federal, state, or local laws applicable to the reduction of greenhouse gases or the use of sustainable materials, to the extent such laws are applicable to Tenant.
 - § 10.1.1(i): Any future Tenant Alterations must comply with Landlord's Building Performance Standards or Premises Design Criteria.

Landlord-Tenant Transparency and Accountability

The model performance-based lease ensures that landlords and tenants have equal access to information about tenant and building energy consumption. This sharing of information enables all parties within the building to identify and address inefficiencies in energy usage, learn from each other, and foster a more collaborative relationship.

The model lease requires that the Landlord install at the Tenant's expense a submeter in its space, and that the Landlord bill the Tenant according to the Tenant's actual energy usage. This requirement helps ensure that the Tenant retains the economic benefits of complying with the Building Performance Standards. The model lease also requires the Landlord to maintain submeters to measure the electric consumption of the building's common areas, which holds the Landlord accountable for energy consumption in the common areas. In addition, the model lease also requires that the Landlord install real time energy management systems to understand energy consumption at the system level in both common areas and tenant spaces.

Relevant Provisions:

- § 7.2.9: Requires the Landlord to install real time energy management (RTEM) systems and services at the system level in both Common Areas and the Premises.
- § 8.1: Tenant's consumption of electrical energy at the Premises shall be measured by meters (capable of reading demand and KW hours to measure the demand and consumption of electric energy) installed at the Premises by Landlord at Tenant's sole cost and expense.

- § 8.3: Landlord shall provide Tenant with an annual energy use summary indicating the energy consumed in any Building Common Areas (total and kilowatt hours/square foot) and the energy consumed in the Building as a whole (total and kilowatt hours/square foot) the previous year. Landlord shall also provide Tenant the Building's ENERGY STAR score.

Recommissioning

Periodic recommissioning—of both tenant space facility systems and landlord base building systems—is crucial to ensure that Building Performance Standards are met. Sharing professionally accumulated information about these systems will allow the parties to evaluate best practices and identify ways to improve energy efficiencies. The model performance-based lease requires a recommissioning of the tenant space every three to five years. The model lease also requires that the landlord recommission the base building systems and common areas once every three calendar years. The landlord will undertake the recommendations of the recommissioning as an operating expense, which, as noted above, can be passed through to the tenant.

Relevant Provisions:

- § 9.7.1: Prior to the recommissioning set forth in § 9.7.2, every [3] calendar years, Landlord will work with a Tenant point of contact to issue a survey to all occupants of the Premises to evaluate thermal comfort, functionality, transportation methods, health and productivity, and Tenant operations, including the type of equipment used, lighting systems, plug load management, and hours of operations. Survey results will be used to inform recommissioning to improve the functionality and comfort of the Premises. Surveys shall be coordinated through the designated Tenant point of contact and shall not occur more than once per calendar year. Interviews may be used to supplement the surveys, pending approval from the Tenant point of contact.
- § 9.7.2: In order to maintain and enhance performance toward the Building Performance Standard, the Landlord will recommission the Building Systems, including, but not limited to, base building systems and common areas, once every [3] calendar years. The cost of recommissioning will be billed to all tenants of the Building as an Operating Expense. Each recommissioning will comply with ASHRAE Guideline 0.2 (for initial commissioning and retro-commissioning of base building systems). The Landlord will evaluate specific commissioning standards at each [3 year] interval, and update the standards as appropriate. At a minimum, recommissioning will address heating, ventilating, air conditioning and refrigeration (HVAC&R) systems and associated controls, lighting and lighting controls, plug loads, and domestic hot water systems.

- § 9.7.3: The Landlord shall share the results of the recommissioning with the Tenant. The recommendations of the recommissioning will be promptly undertaken by Landlord as an Operating Expense.
- § 9.7.4: If the Building Performance Standard set forth in Exhibit C is not achieved, Landlord will meet with all tenants and review energy use data, recommissioning outputs and recommendations, and the effectiveness of efficiency programs and mutually establish an energy optimization plan (“Energy Optimization Plan”), including energy management and cost-effective savings opportunities for the Building and each premises therein. The cost of any changes or alternations to the base building HVAC or lighting systems and their controls due to the recommissioning will be borne by Landlord and billed as an Operating Expense.
- § 9.8.1: Tenant shall perform a recommissioning study of all systems that consume energy, including, but not limited to all equipment (including plug loads) installed at the leased premises; all systems that consume water; and tenant space operating hours every [3–5] years. Each recommissioning will comply with ASHRAE Guideline 202 (for new commissioning of tenant fit out equipment) or similarly appropriately guidelines. Within [2–3] months after the conclusion of the recommissioning study, the Tenant shall start to implement recommendations identified by the recommissioning study that are deemed cost effective. For purposes of this section, the term “cost effective” means an improvement that will result in material operational cost savings by reducing electricity or fossil fuel consumption, water, or other utility costs and where such operational cost saving over the then-remaining Term of this lease (or some other period of time that is mutually acceptable) is sufficient to pay the incremental additional costs of making the improvements.
- § 9.8.3: Tenant shall perform an audit at night at least 2 times per year, once in the summer and once in the winter, to check set points, equipment that should be powered down leasing hours, night load, and lighting.
- § 9.8.4: If the Tenant’s consumption of energy exclusively serving the Premises exceeds the energy usage limit equitably allocated to the Premises as set forth in Exhibit D, or if the Tenant’s Plug Load Maximum set forth in Exhibit D is exceeded, Landlord will arrange for the Premises to be recommissioned, and cost of any changes or alterations to the Premises or equipment and its controls due to the recommissioning will be promptly done by Tenant at its sole cost.

Failure to Meet Building Performance Goals

For buildings that are subject to a law that requires certain emissions targets and imposes a penalty if those targets are not met, such as New York’s Local Law 97, the model performance-based lease allows landlords to pass through penalties to tenants in proportion to their contribution to such penalties.

Relevant Provisions:

- § 6.2.1(a): Tenant shall ... comply with (i) Landlord's Building Performance Standards set forth in Exhibit C and (ii) all Laws ... with respect to the Premises, including, without limitation, (i) any improvements or Alterations in the Premises and Tenant's occupancy, use and manner of use of the Premises and (ii) the payment of any portion of the penalties or excess emissions charges incurred by Landlord under Local Law 97 equitably attributable to Tenant's consumption of energy exclusively serving the Premises in excess of the energy use limit equitably allocated to the Premises as set forth in Exhibit D based on the Building's emissions limit in the aggregate which causes Landlord to exceed the annual building emissions limit Landlord is required to comply with under such Local Law 97 for such calendar year in question (taking into consideration any and all credits with respect to such limit obtained by Landlord, if the cost of such credit is included in Operating Expenses); provided however, in connection with the foregoing, Landlord shall have the burden to demonstrate to Tenant, through means and methods reasonably acceptable to Tenant, that any such liability of Tenant under this Section 6.2.1, or elsewhere in this Lease in connection with Local Law 97, is equitably attributable to Tenant's consumption of energy; and provided, further, that, Landlord shall be solely responsible, and shall not hold Tenant accountable, for any portion of any penalties or charges levied upon the Building under Local Law 97 due to (i) the failure of Landlord to timely or duly meet reporting obligations under Local Law 97, (ii) to the consumption of utilities by any other tenant or occupant of the Building, (iii) any extraordinary use of Building Systems in the Common Areas during periods outside of a Business Day, or (iv) Landlord's failure to operate and maintain the Building Systems in accordance with the standards from time to time prevailing for comparable first-class office buildings in midtown Manhattan.

About IMT

The Institute for Market Transformation (IMT) is a national 501(c)(3) nonprofit organization that aims to decarbonize buildings by catalyzing widespread and sustained demand for high-performance buildings. Founded in 1996 and based in Washington, D.C., IMT leverages its expertise in the intersection of real estate and public policy to make buildings more productive, affordable, valuable, and resilient.

A trusted, non-partisan leader, IMT focuses on innovative and pragmatic solutions that fuel greater investment in high-performance buildings to meet local market priorities. IMT offers hands-on technical assistance and market research, alongside expertise in policy and program development and deployment and promotion of best practices and knowledge exchange. Its efforts lead to important policy outcomes, widespread changes in real estate practices, and lasting market demand for high-performing buildings—resulting in greater benefits for all people, the economy, and the environment. Visit us at www.imt.org.