



Commercial Property MANAGEMENT *insider*

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Report Predicts Slow but Steady Office Recovery

Things are starting to look up for the country's office real estate market, according to Cassidy Turley's latest National Office Trends Report.

The commercial real estate services provider's study showed that, with demand up, national office vacancy rates remained flat when compared to the previous quarter. But the report showed a mix of positive and negative developments: Demand has improved in many areas—especially Washington, D.C., New York City, and various parts of California that are clearly outperforming the rest of the country—but national rents are stabilizing, not appreciating.

For the office market, 2010 will be the year of positive demand for office space, 2011 will be the year of stabilizing vacancy, and 2012 will be the year of rental appreciation, the report predicted.

FEATURE

Provide Accurate, Defensible Water Usage Bills with Submetering

Because of the slow economic recovery, commercial property managers have been under more pressure than ever from struggling tenants to lower CAM costs. And tenants that may not have questioned their CAM costs in the past are asking to see detailed bills—including water charges, which can be costly—to ensure they are not being overcharged.

These requests may strain property managers who are busy with other time-consuming responsibilities. To simplify the process, you can provide tenants with a record of the exact amount of water they have consumed and accurate charges based on their consumption by submetering your property's main water meter using wireless technology. And submetering also can cut out the time that you spend on monitoring the main water meter to split the total monthly charges into individual water bills for each tenant.

Benefits of Submetering

Submetering the main water meter at an office building, shopping center, or mixed-use property alleviates pressure on property man-

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HAZARDOUS CONDITIONS

Stop Bed Bug Infestation from Spiraling Out of Control

Bed bug infestations, a significant public health problem in the United States, have been considered a mostly residential health hazard—until recently. Increasing reports of bed bug infestations in commercial properties have been getting national media attention since the fast-growing urban pests were found at investment bank Goldman Sachs' Jersey City, N.J., office tower—where exterminators sprayed the affected areas and moved workers to other floors—and two of national clothing retailer Abercrombie & Fitch's Manhattan stores—which were closed for remediation.

It's critical to deal with bed bug infestations appropriately to protect your tenants' employees, customers, and reputations—and avoid negative attention that could turn prospective tenants away from the

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Submetering (continued from p. 1)

ers to keep the CAM costs that they are responsible for charging individualized and lower than in the past. A wireless submetering system is especially useful for larger properties because it collects water usage data for each tenant and calculates the tenant's charges based upon how much water only *that tenant* uses. Submetering can be performed by wireless technology companies that partner directly with owners after submeters corresponding to each tenant's space have been installed.

Wireless submetering systems provide water consumption data to third-party billing companies that administer meter readings and provide a fee report that property managers can use to bill tenants. Because an independent billing company collects the data from the submeters and provides the fee report, submetering provides more accurate bills for tenants *without* creating extra work for the property manager.

Subjective billing methods can open the door for disputes. Submetering provides fair and defensible charges that can't be disputed by tenants claiming that unusually high bills are incorrect. "Wireless submetering takes the argument out of the bill," says Chris Larcinese, vice president of product management and marketing at Inovonics, Inc., a provider of high-performance wireless sensor networks for commercial and life safety applications. Water usage data recorded from Inovonics' wireless submetering systems is sent to Read, Bill & Collect (RBC) companies that generate fee reports for property managers.

A recent Connecticut case highlights the importance of providing accurate water bills for tenants. There, a dispute over the amount of a water bill that a tenant owed to its owner resulted in protracted litigation that could have been avoided if the owner had used a wireless submetering system. The owner's failure to bill tenants individually for usage made it difficult for the court to determine if the tenant's unusually high bill was correct. Although the court eventually decided that the tenant wasn't at fault for the overages, the dispute could have been settled without having to go to court if there had been an objective calculation of the charges such as the method used in RBC reports [*Blasco v. Commercial Linens, LLC et al.*, December 2009].

Reduce Costs with Long-Term Investment

Submetering increases productivity because tenants that are paying for exactly the amount of water they use tend to report and respond to water-related maintenance needs more quickly than they typically would if they were paying a proportionate share of the water bill for the entire property. When tenants quickly report their own problems, property managers can respond to and fix issues that could become long term if left unchecked.

"A wireless submetering system encourages tenants to respond to maintenance needs, reducing costs for the property manager," notes



Larcinese. “A tenant with a leaky toilet or faucet knows that the problem will be costly for them and will report it immediately, which helps the property manager fix the problem before it causes real damage,” he points out.

Wireless systems also are a good investment because, unlike hard-wired systems, they don’t have to be removed and reinstalled to accommodate retrofitting or buildouts. They can be installed in an office building or center’s current infrastructure. “A wireless system allows flexibility for installing submetering equipment at a commercial property, even if it is a challenge because of structural limitations,” says Larcinese.

Keep Property Competitive

In addition to saving time and money, a wireless submetering system also can help you make your office building or center more competitive than similar proper-

ties by increasing net operating income. Since the economic downturn, property managers have focused on driving net operating income by minimizing operating expenses. To do so, they are spending money on areas of their properties that have been damaged because tenants have not reported issues—such as leaks and other utility problems—in a timely manner. Installing a wireless submetering system helps catch those issues before they become costly.

A wireless submetering system not only gives tenants more control over their water costs, it also creates an incentive for them to conserve water, helping you “green” your building or center—a feature that is important to many prospective tenants. Green buildings and centers with efficient utility systems have higher face rates, resale values, operating income, and occupancy rates than those that don’t—all major factors in

increasing their marketability. Additionally, providing more equitable billing improves tenant satisfaction and retention.

It’s worth discussing the option of submetering your building’s or center’s main water meter with the owner. Submetering will allow you to save time on your water metering, collection, and billing process and make a green improvement that can increase net operating income in an economy where it is critical to take advantage of every opportunity to get an edge over competing properties.

Insider Source

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water submetering; net operating income; CAM costs

Hazardous Conditions (continued from p. 1)

office building or shopping center you manage.

Identify, Understand Scope of Infestation

Office building and retail property managers typically are alerted to a bed bug problem by employees who have been bitten while at work or complain about seeing the insects. Bed bugs can be brought into an office or store by customers, employees, or shipments they have hidden in. It’s more common for office buildings to experience a bed bug infestation because the insects can easily migrate from neighboring tenants within the

building. However, retail property managers also should be vigilant about checking for bed bugs because heavy foot traffic at their shopping centers creates a greater risk that someone carrying bed bugs will visit their center.

If you’re dealing with a bed bug infestation, there are some steps that you can take to resolve the problem. “With any kind of pest control problem, you need to identify and understand the scope of it,” says Jeremy Ecker, vice president of New York-based The Bed-bug Inspectors, an independent inspection company that specializes in identifying bed bugs using

canines. “A property manager needs to bring in an inspection team to identify where and how deep the problem is in the office or store,” advises Ecker, who has worked in the pest control industry for 17 years.

Use Protocol to React Appropriately

“Because there is no way to prevent a bed bug infestation, it’s really a matter of reaction,” says Ecker. “If you are alerted to a problem, don’t be passive,” he stresses. After an inspection company has identified a bed bug

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Hazardous Conditions

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infestation, property managers generally use a remediation company to exterminate the affected space. And most property managers have the inspection company come back to follow up after the remediation is done.

Failing to treat an infestation immediately could damage tenants' businesses either by driving away employees or discouraging customers. For example, a NYC Transit contractor's office is still infested with bed bugs almost three months after the agency tried to exterminate the pests, prompting some workers to take a leave of absence because they have had to exterminate their own living spaces after unknowingly carrying the insects home. The employees claim that they are working in a hazardous environment and cannot risk

having to perform second or third home exterminations at their own expense. Many see the property manager's one-week delay before killing the bed bugs after canines tracked their location as a major mistake.

Ecker recommends designing a protocol for what steps you will take if you are faced with a bed bug infestation so that it doesn't get out of control. A protocol will help you prevent the problem from escalating from an infestation in tenants' spaces to bad publicity and ruined reputations for the office building or center and your tenants' businesses. "If word that an office or store has a bed bug problem starts spreading, it can quickly spiral out of control, leading to the types of stories we've seen in newspapers lately," says Ecker.

Solving a bed bug problem isn't easy, but it definitely can be

done. If you let it go and ignore it because you are afraid of negative publicity or don't want to pay for a potentially costly remediation, a problem that could have been caught and eradicated early can turn into a very hazardous situation, very fast. "When you have employees, customers, and shipments coming in and out of a space, you can never *stop* a bed bug problem from starting or coming back. You just have to understand whether you have a problem, and if you do, treat it," Ecker emphasizes.

Insider Source

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RECENT COURT RULINGS

► Mall Manager Responsible for Replacing Faulty Ladder

Facts: A sporting goods store tenant at a shopping mall hired a contractor to hang its sign and provided a ladder for him to use while working. The contractor claimed that he had warned the tenant and mall manager that the feet on the ladder were worn out, but was told to "just continue working with it." The contractor fell off the ladder while hanging the sign, suffering severe injuries.

The contractor sued the mall owner, tenant, and manager, claiming that he fell because the tenant and manager failed to provide him with a secure ladder that he could use while working at an elevated height. The contractor asked the court for a judgment in his favor without a trial. The mall owner, tenant, and manager asked the court to dismiss the contractor's lawsuit.

Decision: The court denied the mall owner's, tenant's, and manager's request to dismiss the lawsuit.

Reasoning: The court noted that the state's labor law required owners and their agents, such as the mall owner and manager, to provide workers—including contractors—with appropriate safety devices to protect against specific gravity-related accidents, such as "falling from a height." The duty to provide scaffolding, ladders, and similar safety devices was nondelegable—that is, the duty could not be assigned to another person, the court pointed out. The court explained that the duty was nondelegable because the purpose of the law is to protect workers by placing the ultimate responsibility to provide adequate safety equipment on the owners and owners' agents of the properties where the work is being done.

To prove that the mall owner, tenant, and manager had violated the law, the contractor had to



establish that: (1) they were aware that the ladder was faulty; and (2) their failure to replace it with a safe ladder was the direct cause of his injuries. Here, the contractor showed that the ladder's feet were worn out; the tenant and manager were aware that the ladder was faulty but did not take any measures to stop him from working or to replace the ladder; the ladder slipped while he was in the process of installing the sign; and, as a result of the slip, he fell off the ladder, suffering serious injuries.

■ Shim v. Vornado Realty Trust, et al., June 2010

► **Tenant Can't Use Lease Drafts to Dispute Owner's Termination**

Facts: A drugstore tenant signed a lease with the owner of property that was about to be developed into a shopping center. The tenant and owner agreed that unless the center had been built by a specified date, either party would have the right to terminate the lease—for any reason. Because the owner was unable to obtain approval for a traffic signal to be installed at the center, it stopped developing the property and terminated the lease prior to the specified date.

The tenant sued the owner, claiming that under the provisions in drafts of the lease that had been

written before the tenant and owner signed the final version, the owner's failure to build the center altogether was not a valid reason for terminating the lease. The owner asked the court for a judgment in its favor without a trial.

The court ruled in the owner's favor, stating that drafts of the lease or any other communications between the tenant and the owner prior to signing the final version could not be used to dispute the termination. The tenant appealed.

Decision: The appeals court upheld the lower court's judgment in favor of the owner.

Reasoning: The appeals court stated that because the language in the final lease clearly gave both the owner and tenant the absolute right to terminate, the tenant could not use "extrinsic" evidence—that is, evidence other than the final lease provisions, such as drafts of the lease—to prove that the owner was not entitled to termination. Additionally, the owner's termination was valid because it had notified the tenant of its intent to terminate the lease before the date specified in the final version's mutual termination provision.

■ Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC, June 2010

IN THE NEWS

► **Nonretail Moratorium Extended for Illinois Centers**

A ban on office and other nonretail tenants filling vacant space in Vernon Hills, Ill.'s most concentrated commercial areas will continue through at least September. Vernon Hills officials recently decided to extend an ongoing moratorium to protect its sales tax base, as the town does not levy a property tax. Mayor Roger Byrne stressed the importance of having sales tax revenue: It is the only tax money that the town can collect.

The decision trumped the concerns of some shopping center operators, who said the moratorium was making it more difficult to fill vacancies, especially small spaces. Any type of restriction is of concern, according to a representative for Inland Commercial Property Management, which operates two Vernon Hills shopping centers. The objective is to drive traffic into the center, he told town trustees during a recent

public meeting where the issue was discussed. Vacancy breeds vacancy, the representative pointed out. He asserted that there is a place for nonretail users within Inland Commercial's centers.

The ban was instituted in January and originally applied to a broader area, which later was condensed. However, the ban allows center managers to fill nonretail spots that become vacant with like uses. Because of a downturn in the economy, village leaders wanted to stop further erosion of sales tax revenue.

In response to complaints, town officials have commissioned an analysis of which users occupy the core commercial area and will use the findings to determine possible alternatives to the moratorium. One option that has been discussed is a mandatory payment to the town from mall management companies that rent to nonretail tenants, to compensate for the loss in revenue.

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In the News (continued from p. 5)

► **Major Mall Managers Lead Charge Towards Fixed CAM Fees**

National retail chains have been switching from variable common area maintenance (CAM) charges—the standard practice for calculating tenant fees for maintenance, property improvements, and utilities—to fixed CAM charges at a record pace, prompting shopping center and strip mall owners to follow suit. Commercial real estate experts have noted that the switch has led to a shift in owner and retail manager-tenant relations, easing tensions with retailers trying to rein in costs. However, the change in how CAM fees are calculated has not been easy for tenants facing resistance from mall managers who fear that fixed CAM charges could affect profitability.

Nonetheless, mall management companies that have been willing to try fixed CAM charges have agreed to them in an effort to simplify administrative duties that go into calculating variable CAM costs, which can be complicated and the source of disputes with tenants. The companies are also hoping to avoid costly and time-consuming CAM audits initiated by disgruntled tenants.

Mall management giant General Growth Properties was the first of an increasing number of commercial retail management companies to abandon variable CAM charges in favor of flat fees.

Now, Simon Property Group, North America's largest mall owner and management company, has followed General Growth's lead by charging retail tenants a predetermined amount to cover occupancy costs, rather than billing for actual expenses.

Almost all mall owners and managers are dealing with the debate over variable versus fixed CAM fees, according to a Morgan Stanley REIT analyst who predicts that fixed CAM soon will become standard practice, partly because of General Growth and Simon's willingness to give it a try. And many owners and managers already have been experimenting with leases that incorporate fixed CAM, according to industry experts.

The new movement towards this significant structural change in the way business is done between owners and tenants hinges largely on whether retailers, who have fueled the change by clamoring for more predictable occupancy costs, continue to

demand them. Ostrower, CBL & Associates Properties, and Taubman Centers spokespersons have said that they are evaluating a flat CAM structure for their properties and are starting to bend to requests by tenants. Midwest-based Macerich Co. has begun using it on an ad hoc basis, primarily at the request of tenants.

Open-air centers may soon make the switch. New Plan Excel Realty Trust is among the growing number of retail property management companies that have begun experimenting with fixed CAM, though they face far less pressure than mall management companies to reevaluate their calculation formulas. That's because operating costs at open-air centers usually are a fraction of those at enclosed malls, where CAM and other costs can account for as much as a third of a tenant's total occupancy costs. Several major open-air center management companies now sign fixed CAM leases with tenants—but only at the tenants' request. They have not made a final decision as to whether they will make that standard lease language, according to spokespersons at those companies. And some are testing the new structure with small tenants to get an idea of whether it will be feasible for them overall.

High occupancy costs at closed centers and large malls may make it difficult for mall management companies to offer fixed CAM leases and remain profitable. As long as the big mall management players that are going to fixed CAM continue to manage their properties as well as they did when CAM was pro rata, the trend will continue, said a retail economist. He predicts that it will pressure other companies to turn to fixed CAM to retain tenants that like the predictability of it.

► **BOMA Conference Provides Industry Outlook**

Over 5,000 attendees from around the world assembled in Long Beach, Calif., in late June for the Building Owners and Managers Association (BOMA) International annual conference. Conference attendees tapped into the power of the BOMA network by connecting with commercial real estate colleagues to exchange ideas and information, meeting with solutions providers, and taking advantage of the strategies for success in today's marketplace that commercial property management industry leaders shared with them.



In a state of the industry address, Kurt Padavano, chief operating officer of Advance Realty Group, and Henry Chamberlain, president of BOMA International, predicted opportunities for high-performance real estate assets, despite a host of challenges. “Value is king,” Chamberlain told attendees. “Managing proactively and providing exceptional tenant relations have never been so important.” A panel of industry experts agreed that property and asset management are critical to success in today’s market.

“The ‘new normal’ is that the people who manage buildings are no longer just ‘property managers,’” said Sandra Boyle, executive vice president of development and project management at Glenborough LLC. “They are enterprise leaders, managing their assets like businesses,” she noted.

Conference panelists from Colliers International, Cushman & Wakefield of California, Inc., and JP Morgan Asset Services agreed that to understand how operations affect the bottom line, property managers need to think like asset managers. The panelists stressed the importance of collaboration between property and asset managers and also with vendors and service providers in compressing expenses and creating value.

Attendees also were encouraged to “step out of their norm” and challenge themselves to learn how to manage new property types, as experts predicted a boom in mixed-use properties in central business districts. A major theme of the conference was that expanding a property manager’s expertise will position him for success.

DOS & DON'TS

✓ **Require Tenants to Get Permission for A/C Unit Installation**

Take measures to avoid liability that can be caused by your office building tenants installing their own window air conditioners without professional assistance from an outside contractor. Window units that are improperly installed by a tenant can cause serious and costly accidents, which you—not your tenant—may have to pay for.

Someone who does not know what he is doing can easily drop an air conditioner out a window while trying to install it, says Joe Kay, a New York air conditioner specialist. Also, if somebody accidentally opens a window that has an air conditioner in it, the air conditioner can fall out. Even when an air conditioner is supported with brackets and screws, if it is not well secured to the window frame or amply supported from beneath, it may still fall out of the window,” notes Kay.

Ask the owner of the office building you manage to include a provision in its leases with tenants prohibiting them from installing an air-conditioning unit without first obtaining your express written permission. This can help you avoid being held liable for negligently contributing to an air conditioner-related accident because you were aware of the installation but permitted it to be done without professional

supervision or the necessary precautions—even though you may not have been directly involved in the installation.

✗ **Don't Let Tenant Use Maintenance Staff to Install A/C Units**

Legally, once your maintenance staff member undertakes the task of installing a window air-conditioning unit in a tenant’s space, he is expected to do it right. Assuming your staff member is not properly trained, one mistake and you could be liable for your employee’s negligence. But this is not the case when an independent contractor does the job. If the contractor makes a careless mistake, he’s the one who is legally responsible.

Ask the owner of your office building to use a lease clause that conditions any A/C installation that you have approved on, among other things, the tenant obtaining and bearing the cost of professional installation of the air conditioner by a competent independent contractor specially trained in the proper installation of air-conditioning units.

Insider Source

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BEST COMMERCIAL LEASE CLAUSES

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