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“Legal Green: Navigating Sustainable Design Law”

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Sustainable development has evolved into a win-win for all parties concerned. Not only does it work to fight global warming, preserve ground water, the ozone, air quality, animal habitats, and vegetation, but it no longer makes sense not to go green, even if just for the economic reasons. The prudent developer today is building and renovating/retrofitting sustainably because it directly affects the bottom line. But there are additional reasons to go green. The government now is mandating it (in some shape or form), and even those property owners reluctant to “convert” to sustainable building practices soon will be forced to adopt them. As a result, architects, engineers, and interior designers now need to focus on what legislation is being promulgated and what new liabilities will affect their given practices.

Green building has morphed into an ever-evolving system. Getting a building certified used to be the ultimate goal. A property owner (and its construction, design, and other team members) devoted much energy and resources to obtaining the “green seal of approval”—whether that was certification by USGBC’s LEED program, Green Building Initiative Green Globes, Energy Star, or any of the various certifications out there—and then they thought they were done paying attention to sustainability until the recertification period began. Now there is a continual requirement to keep a building green and prove it with metering, monitoring, and recommissioning. Thus the professionals involved in sustainable building have become continual service providers.

With this benefit of more work for the A&D community, there is the related burden of dealing with myriad legal issues to consider in the development and continuing maintenance of sustainable buildings. Some of these relate to construction/renovation, some to leased premises, and others to owner/manager/service provider aspects of property development and operation. While real estate developers may, prior to acquisition, be concerned only with traditional aspects of the acquisition, new construction, or renovation of an existing property, they now also must focus on the possibility of meeting green building standards already enacted, or those which will be enforced in the future (either for LEED, Green Globes, or similar certifications, or to meet local, state, or federal requirements).

Failure to address these “green” opportunities at the outset of a project in the due diligence phase, and especially in the contracts with all professionals related to the sustainable property, whether it be for the initial project or ongoing recommissioning, could be costly to all parties involved. Drafting agreements to reflect a sharing of responsibility and risk relating to a property’s sustainability should be the new platform from which most agreements are written. The old days when architects, engineers, contractors, and other service providers relied on tried and true contracts (AIA or others) that have been used for years can no longer neglect to have

their agreements reflect the possibility that they (the service providers) will be held to a higher standard of care and the liabilities relating thereto.

So where does this leave those professionals who provide services to property owners and tenants that are intended to result in sustainable certified premises? The first player that needs to come on board is the insurance carrier. Though many insurers already have embraced sustainable construction with green endorsements for property damage, more coverage development is needed in professional liability. The developer or tenant seeking certification by one or more of the certifying bodies out there (such as LEED) counts on the design professional and the contractor to deliver the certification level sought. When that certification level is not realized, who is responsible for the resulting damages (both direct and consequential)? The design professional's insurance company will need to cover this type of risk and, as of today, none of the carriers have underwritten policies to do so because they are unwilling to take on the risk that comes with the design professional promising the delivery of a certified property.

To be fair to the carriers, direct damages in not delivering a certified building are one thing. This could be loss of tax credits, failure to obtain a certificate of occupancy by a certain date, or other delivery issues. (Delay in delivery of premises to a commercial tenant has been an issue for landlords for many years and provisions for such delays are not new.) Consequential damages are a different animal. These can arise when, although the premises are delivered in a timely manner, it may not be at the certification level required pursuant to the terms of a lease. Who is responsible if the tenant in its lease has a termination right for such an occurrence and other related damages occur? What party will be on the hook if the building (though when delivered to the developer met the required standards) does not maintain the level of sustainability that the property owner is counting on?

When a purchaser of commercial property considers an acquisition, when all the preliminary numbers are being run (this is especially applicable to existing structures), the purchaser may wish to consider the possibility of having the building meet green standards (either at the time of acquisition or thereafter) or may envision the property being subject to sustainable standards. This is important, not only from a numbers crunching perspective, but also from a long-term, big-picture planning view. When the decision to go forward with the purchase has been made, especially if this includes developing a green building, the developer's counsel should insure that (1) all applicable agreements to reach that status have been carefully drafted, and (2) maintenance of the green building is also considered. Counsel for the design professionals will be similarly cognizant of what will be required of their clients in delivering the sustainable product and what will be involved in ensuring the recommissioning process.

Once a commercial property is developed as a green building, a developer will need to maintain that status and to determine whether this is done in-house (either partially or entirely) or by an outside vendor (either partially or entirely), and then promulgate policies and agreements that will need to be in place to insure compliance. Though routine maintenance may include building systems (HVAC, plumbing, electrical, grounds), it will also relate to other components of the green building operation, such as maintaining recycling and storage areas, use of low-VOC products in all renovations, integrated pest control, exterior building management, site disturbance, landscaping, parking areas, cleaning, interior alterations, and more. Those contracted to perform the maintenance of and to adhere to the green building standards and

policies should have their attorneys draft agreements that specifically spell out what each party's responsibilities are and how they relate to the overall maintenance of the property.

Similarly, if the property is maintaining LEED or other certifications, audits, reports, education of staff, and other record keeping will need to be in place, and parties responsible to carry out these functions should have their own written policies to do so. Future local, state, and federal government directives for green building standards will also need to be taken into account and this is especially important for the architects and engineers who will be in charge of fine-tuning the property after it has been up and running for a while. The bottom line is simple. Always be aware of what is expected of you and make sure your contracts do not over-extend those expectations.

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