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Here Come the Lawyers

The rapid increase in sustainable design and construction comes with an abundance of legal issues related to green building

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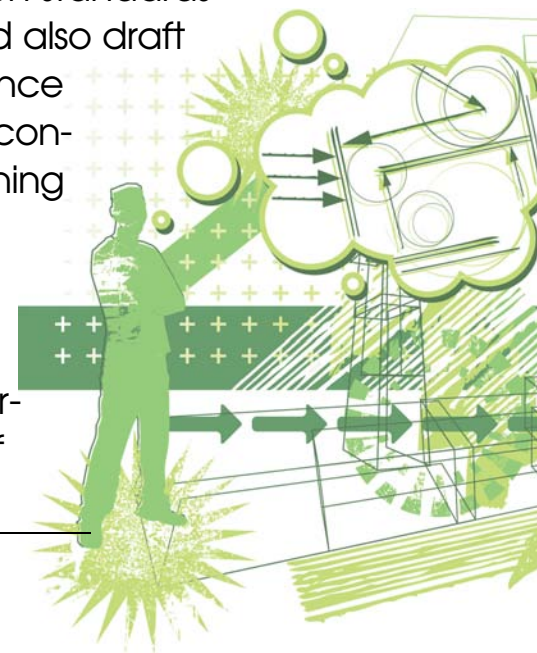
This is the first in a three-part series on legal green issues. Subsequent installments will appear in Green and Design in July/August and September/October.

Sustainable development works, not only for fighting global warming, preserving animal habitats, vegetation, ground water, the ozone, and air quality, but also economically. The prudent developer in the 21st century is building and renovating/retrofitting for tomorrow, and saving money for tomorrow as well. When one considers that the payback period for most energy efficient/water efficient/environment-friendly materials and apparatus is only a few years, it no longer makes sense to postpone a retrofit or not to adopt this type of construction.

However, there are myriad legal issues to consider in the development of green buildings—those meeting either the USGBC LEED certification requirements or other standards to qualify for status as a sustainable, environmentally friendly, energy efficient building. Some of these relate to construction/renovation, some

to leasing, and others to owner/manager aspects of property development and operation. While real estate developers may, prior to acquisition, only be concerned with traditional aspects of the acquisition, new construction, or renovation of an existing property, they may neglect to focus on the possibility of meeting green building standards in the future, either for LEED or similar certification, or to meet newly promulgated local, state, or federal requirements. Examples of this would be a failure to address these “green” opportunities in due diligence and professional engagements. Similarly, though commercial property owners/managers may be concerned with meeting green standards today, they should also draft service/maintenance agreements with continued commissioning in mind.

Development of real estate has turned a new corner as the end of



the first decade of the 21st century approaches, and it is incumbent upon all professionals involved in the acquisition and operation of real property to focus on the “greening process.” It is therefore important for developer’s counsel to address this concept in all related contracts.

When acquiring a commercial property, most purchasers naturally must focus on the issues concerning the applicable use of that particular property and related lender requirements. If the land is vacant, the due diligence would include environmental studies, surveys, and an examination of zoning restrictions, easement agreements, covenants, conditions, and restrictions, development agreements, and local and state code requirements. If the land is already improved, it would include all of the above plus in-depth engineering studies of the structure(s) and their many building systems. Similarly,

if the property is already improved but the purchaser will be further improving the site or building(s), additional architectural and engineering studies may need to be performed. In addition, as some lenders are now jumping on the

“green bandwagon,” the developer may consider at the due diligence phase how to qualify for financing dependent on the building obtaining green certification. A professional should be engaged for each of these functions (attorneys, engineers, architects, and vendors performing routine maintenance, such as cleaning, pest control, HVAC work), and written agreements should be drafted for each. However, in order to best take advantage of their “green” opportunities, the property owner should insure that all those engaged in the acquisition and/or construction/renovation acknowledge their understanding of green construction practices, and if applicable, those requirements for LEED certification and the maintenance thereof. To effectuate this and to protect the developer, the developer’s counsel should be well versed in green building requirements. ☺

Richard J. Sobelsohn, LEED® AP is an associate in the Real Estate practice at Moses & Singer in New York, with in-depth knowledge of the LEED® Green Building Rating System™. (Having a LEED® AP attorney on a project team allows clients to earn one point toward LEED certification.) He has lectured extensively on legal aspects relating to sustainable buildings and is an adjunct professor of law at Brooklyn Law School.

