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“Legal Issues Relating to Green Building”

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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. Additionally, the government is now even mandating going green (in some shape or form) and even those property owners who thusfar were reluctant to “convert” to sustainable building practices, will soon be forced to adopt them anyway.

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, metering, monitoring and reporting in mind. Development of real estate has turned a new corner as the beginning of the second decade of the 21st century is here, 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 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 unimproved, 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, water/energy monitoring) 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 many players in the sustainable building world, attorneys should be well versed in green building requirements.

We are no longer in a world where going “green” is just the right thing to do. It now does not make sense to ignore it. The existing economic incentives to go green are unrefuted. Though certifications through LEED or other organizations are extremely important, even if a property owner is unwilling to meet those minimum requirements, it still behooves them to adopt green building policies wherever they can (even if only on a dollar saving basis). As such, it is incumbent upon everyone involved in the green building process to be mindful of all legal ramifications that may present themselves. This is true from the perspective of the property owner, property manager, contractors, engineers, architects, designers, vendors supplying products or services to the property, attorneys and other consultants.

In addition, the hiring of professionals to get the purchaser to the green finish line will also relate to attracting the tenants who will occupy the project and who also share “green concerns”. Green buildings are attractive to owners and tenants alike, not only for the environmental good, but also for the bottom line monetary benefits. Studies have shown that overall operating expenses in a green building are lower than those not fitting the green standard. Furthermore, green buildings are shown to have healthier occupants, resulting in lower absenteeism and health care costs. Other studies show that worker productivity increases in green buildings.

The prospective sophisticated tenant is cognizant of these benefits and is now beginning to seek out relocation to green buildings. Green building leases are, however, a two-edged sword. If a landlord wishes to maintain a green building, it will be incumbent upon it to require all tenants to adhere to the landlord’s green building requirements. The failure by a tenant to meet such standards may not only relate to that tenant’s premises but have a greater impact on the entire project. If a building’s green certification could be jeopardized by a tenant, the legal implications are enormous. On the other hand, if a tenant requires a landlord to maintain a green building, the lease could contain landlord default provisions and subject the landlord to damages (clearly a large tenant or the sole tenant in a building would have better leverage to include this in the lease negotiations). So similarly, a failure of a landlord to deliver to a tenant or to maintain a green building could result in termination of the lease and possibly other damages. Keep in mind that in order to get to the green building delivery stage the developer has counted on its contractor, architect, engineers and others and to keep it green includes those parties and others. Every party involved in the process is therefore responsible for successful delivery and maintenance of the green project and each would have some culpability if the project is ultimately found to be undeserving of “green status”.

When a purchaser of commercial property considers an acquisition, when all the preliminary numbers are being run (and 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). This is important not only from a numbers crunching perspective, but also from a long-term, big picture planning view. As a result, the purchaser should seriously consider whether it may be beneficial to orient the building toward green construction/retrofit at the time of acquisition since there is a strong potential for future local, state, or federal mandates that will require all buildings to meet some sort of green building standards. When the decision to go forward with the purchase has been made, and if this includes developing a green building, the developer's counsel should insure that (i) all applicable agreements to reach that status have been carefully drafted and (ii) maintenance of the green building is also considered.

Once a commercial property is developed as a green building, a developer will need to maintain that status, determine whether this is done in-house (either partially or entirely) or by an outside vendor (either partially or entirely), and promulgate policies and agreements which 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 written agreements requiring them to fully understand their responsibilities relating thereto and how it interrelates with the overall maintenance of the property. Similarly, if the property is maintaining LEED or other organization certifications and/or the local municipality requires it, 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 written policies to do so. Furthermore, since now many local, state or federal governments direct green building standards for existing buildings or new construction, additional paperwork will be required to confirm compliance. Well-drafted documents for all of the above are paramount to assist the developer in keeping its building green.

The first step in going down the green path is to become educated about it. From there, the possibilities are endless and the results are a "win-win" for everyone.

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