

The Legal Implications of Green Building

Although the policy and economic merits of green building are still being debated, the legal implications of developing a green project are just starting to be considered.

AS THE GREEN BUILDING TREND continues to rapidly spread throughout the United States, a number of local jurisdictions have legislated either mandatory or voluntary green building regulations. Yet, as with any emerging trend, there is no consensus as to what constitutes “green building.” The U.S. Environmental Protection Agency vaguely defines it as the practice of increasing building efficiency and protecting and restoring human health and the environment through a building’s life cycle, but other organizations such as the National Association of Home Builders and the U.S. Green Building Council (USGBC) define green building by other metrics.



Consequently, defining a project’s green objectives within the broad spectrum of green building is critical to project participants seeking to minimize their legal exposure. For example, project owners should establish a project’s green goals early in the process, particularly if a tenant or government agency requires that certain sustainability standards be met or, alternatively, if the project’s financial feasibility relies on it obtaining green building tax credits.

Likewise, design and construction professionals should seek to determine a project’s “greenness”

as soon as possible to understand what will be required of them during the project’s development. Clearly defining these requirements will also help avoid or, if necessary, defend possible design and construction defect claims.

Government regulators should also seek to define a project’s greenness in order to give clear directives to the project team. Unambiguous green building guidelines not only will protect the environment and public welfare, but also could encourage future green building by minimizing entitlement and regulatory risk.

To reduce the cost and uncertainty related to defining a project’s green objectives, it may be worthwhile to use a third-party green building certification process such as the USGBC’s Leadership in Energy and Environmental Design (LEED) rating system. One possible reason for LEED’s popularity may stem from the difficulty in defining green building. But regardless of whether such a certification process is used, all project participants should define the project’s green objectives; agree how those objectives will be met; settle on a benchmark, if any, that those objectives will be measured against; and, importantly, manifest those intentions in all project documents.

Another issue that green building participants should consider is the apportionment of short- and long-term “green liabilities.” Many green building features require an increased level of collaboration among project owners, design professionals, the construction team, building system manufacturers, and materials producers.

For example, one of the credits that may be earned under the LEED rating system requires that a minimum of 50 percent of a project’s wood-based materials and products be certified in accordance with the

Forest Stewardship Council’s principles and criteria. Thus, numerous building professionals, including cabinet designers, framers, and wood providers, must collaborate to ensure that this credit is met. If, for some reason, only 49 percent of the wood is properly certified, who bears the cost of this shortcoming? Associated contractual damages could be substantial if, say, a large corporate tenant required that a certain LEED benchmark be obtained as a condition of its lease and the wood shortcoming prevented the project from meeting that benchmark. Project teams that fail to anticipate and address these kinds of risks may be inviting complex litigation if any green building construction issue arises.

After the certification process, green building creates contractual duties that extend beyond those of a traditional project. Specifically, most green building standards seek to optimize the efficiency of an edifice throughout its life. As a consequence, potential liability may arise many years after a project’s completion if the structure fails to meet long-term performance goals. Such damages could be difficult to determine, and because the interplay between statutes limiting building warranty liability and a green building’s long-term efficiency objectives has yet to fully play out in the courts, project participants may face unknown liability if a structure’s long-term performance is not properly addressed in leases, disclaimers, construction and design contracts, and other project documents.

Accordingly, project participants should proactively define the scope of their potential liability. Although green building often incorporates the worthy goal of increased collaboration among development professionals, green building participants should

be aware of the potential litigation morass that a green project could create if liability related to a building's greenness is not carefully apportioned early in the development process. The last thing green building participants should do is spend a green structure's energy savings on a long and expensive lawsuit.

Because green building technologies and strategies are relatively new, and because green building is an inherently collaborative process, problems may arise as to who owns intellectual property stemming from a green project. To address this concern, project participants should establish to the extent possible the ownership interests of any intellectual property developed during the building's construction.

Also, many third-party green building rating systems, including LEED,

claim an ownership interest in any intellectual property related to the certification process. For example, tucked away in the LEED policy manual is a provision that reads, "as a condition to participation in the LEED certification process, project teams must agree to allow [the Green Building Certification Institute (GBCI)] full access and unfettered rights to ownership in all data and underlying information that is submitted to GBCI in accordance with LEED project requirements." Although the LEED policy manual excludes drawings and plans from this claim of ownership, project participants should be aware of any special rules governing intellectual property when choosing a green building certification program.

Many third-party green building certification providers also seek

to retain some regulatory control over a green building even after certification. For example, certifying a project under LEED authorizes the USGBC to access and review a project's utility records for a period of 20 years after certification. This requirement is imposed on all tenants and subsequent property owners. Thus, knowing the long-term regulatory effects of a third party's certification is important in selecting a certification regime as well as properly contracting for and disclosing any regulatory authority.

Ultimately, green building creates legal relationships that do not exist in traditional construction. By undertaking a green project, unsuspecting owners, government regulators, and design and construction professionals may be exposing themselves to both short- and long-term liabili-

ties. To avoid unnecessary legal risk, the implications of a green building must be comprehensively addressed in documentation early in the development process. To that end, project documents, including entitlements, should clearly establish the parties' green objectives and the obligations necessary to meet those expectations. Well-tailored contracts, leases, disclosures, and indemnities may limit, if not avoid, the short- and long-term risks associated with constructing a green building. **UL**

FERNANDO LANDA is an associate at the San Diego-based law firm of Hecht Solberg, where he focuses on land use and real estate matters.