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Getting to green without seeing red: Legal issues in green building design and construction

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"Green used to be for sissies; now it's a tough-nosed profitable way to make your way through life. Green could be the largest economic opportunity of the 21st Century," said J. Doerr, Outside Magazine.

Green building is a booming business that is changing the face of real estate and construction law. A 2007 Siemens Smart Market Report entitled, "The Greening of Corporate America" surveyed large corporations and reported that by 2009, 82% of them will have "greened" 16% of their portfolios.

The most widely recognized measure for defining a "green building" is the Leadership in Energy and Environmental Design (LEED) certification developed by the U.S. Green Building Council (USGBC). The USGBC is a non-profit organization which established voluntary, consensus-based national rating standards for sustainable building design. The standards cover existing and new commercial construction and renovation, core and shell projects, and neighborhood developments. The written certification is a point-based system that covers six categories: sustainable sites, water efficiency, energy and atmosphere, materials and resources, indoor environmental quality, and the innovation and design process.

LEED projects have grown from over 80 million s/f in 2002 to over 642 million s/f in 2006, primarily driven by energy cost savings. In NYS, over 66 local governments have adopted incentives for green buildings and executive order 111 mandates the use of green standards in constructing state buildings.

Green building tax credits are available for eligible buildings under the federal Energy Policy Act of 2005. NYS offers a tax credit for green construction or energy efficient retrofits meeting eligible building requirements, and a brownfields tax credit if the project revitalizes a previously industrialized site. Some lenders offer discounted rates for green buildings.

The available tax credit and incentive programs, and the proliferation of emerging green technologies that have not yet withstood the test of time, have created a number of new legal issues to be considered by counsel for owners and developers:

* Conformity to design criteria: Whatever criteria are being used to satisfy lender requirements or to qualify for tax credits, counsel must provide for recourse against the designers and contractors if the building as designed or constructed fails to meet applicable criteria. Documentation must be negotiated at all levels of the process. Representations and warranties must be crafted to backstop traditional design and construction warranties without becoming overly broad or unenforceable.

* Timing: Green building and brownfields tax credits require triggering events (including when the building is put in service) to occur in specific tax years or when certain certifications are issued, requiring an integrated design process to avoid unpleasant surprises associated with ineligible costs or rejected tax credits.

* Negotiating agreements: Green projects can alter conventional understandings about what constitutes a design defect (that may be covered by the architect/engineer's professional liability insurance) and what constitutes a construction defect (that may be subject to the contractor's warranty). The 2007 edition of the AIA owner-architect agreement, for example, requires the architect to "consider environmentally responsible design alternatives" in developing its schematic design based on the owner's program. Also, equipment being incorporated into buildings may require licenses, post-construction maintenance or pose challenges for integration with other building systems. These issues require careful contracting with equipment providers, architects, contractors, lenders, environmental agencies, taxing authorities and others to secure appropriate recourse, adequate insurance, performance bonds and warranties.

* Warranties: Green building has led to "performance contracting," which is a method for implementing energy efficiency by allowing money saved with new technologies to be used to offset the cost of purchasing, installing, and operating the technology. A "performance contract" for a high-rise building retrofit may provide for guaranteed energy savings that will "pay for themselves" over a specified period of time. Some performance contractors will offer to "front" the design and construction costs otherwise borne by the builder in return for a financing charge. Such guaranteed energy savings may be secured by letters of credit and performance bonds, and may constitute inadvertent warranties requiring special expertise to address.

The chief barriers to adopting green building methods are (a) that the business case is not sufficiently convincing; (b) the tax benefits are not well understood; or (c) the process is viewed as costly and complex. An experienced and creative legal team can help secure substantial tax, financial, and energy/conservation benefits and guide the owner/developer through an efficient construction process to avoid nasty surprises or project delays.

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