



## **Opportunities and mitigating risks in green building, renovation and leasing**

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Embrace it or dread it, green building, renovation and leasing are here to stay. Leadership in Energy and Environmental Design (LEED) certified projects doubled in 2008. A recent study predicts the green construction market will triple in the next five years - in spite of recession conditions. Rapid growth also generates new risks. Owners, developers, designers, contractors and tenants are now subject to new forms of legal exposure. All sectors must come to grips with newly (and perhaps hastily) drafted legislation, the need for new green contracts, and green claims and litigation. Adept businesses are anticipating emerging risks and engaging in early risk mitigation planning. Consider incorporating both principles. The maneuver will foster growth, minimize risk, and hopefully protect your business from the missteps others are experiencing in this shifting landscape. Here are some of the most common issues underpinning legal exposure and significant loss.

\* **Local Zoning and Building Codes:** Green building mandates are expanding into zoning and permitting laws as well as building codes. These laws typically mandate that projects of a certain size or type comply with third-party certification rating systems, like LEED. Involving an attorney in the early development planning stages is helpful in identifying local laws that apply to your project. An attorney can also assist in anticipating the potential for local permitting issues relating to sustainable elements of the project. An evaluation of the local government's sustainability laws is also important.

\* **Managing Building Certification and Contracting Relationships:** Pursuit of third-party certification, such as LEED, is a complex process. It is important to make the decision as early as possible. This allows stakeholders and contracting professionals to define and manage their relationship network as well as their respective duties and obligations throughout the project. Conventional form contracts are ineffective. New and carefully drafted contracts are the order. Such a contract will be as unique as the fingerprint of each green project. Green contracts must incorporate sustainable objectives, anticipate warranty or delivery issues, define roles, duties and assumptions of risk, and include practical remedies to issues that arise in green projects. Careful drafting must also address the possibility that LEED certification may not ultimately be achieved - a failure that could impact financing, public entitlements, and tax credits, as well as a host of related issues such as bonding and insurance coverage. A mistake by one participant can compromise or damage the project's eligibility for certification. Careful drafting facilitates compliance with green building objectives, minimize risks, and advances the timely delivery of a properly commissioned and successfully certified building.

\* **Statements About the Green Project:** The potential for legal liability begins with the first statements about the project. Statements are commonly made in early press releases and throughout financing stages that the project "is" or "will" be LEED certified, result in significant energy savings, or create a

healthier environment. In fact, no project can be certified until after its completion; nor can its performance or savings be known for a period of time thereafter. Unfortunately, these misstatements are often relied on and become a part of the decision-making process of investors, lenders, and commercial tenants. What happens if the marketing promises do not materialize? Unintentional misrepresentations and omissions are likely to have a cascading effect on the project participants. Legal claims of misstatement, misrepresentation and false advertising can be avoided. Legal review of materials and statements about the green building project, its projected pro forma and performance is an appropriate way to mitigate this risk.

\* Insurance Issues: Building owners and commercial tenants should carefully consider insurance issues in connection with green/sustainable properties. Green construction and third party certified properties present unique issues in the event of a loss. Traditional insurances are unlikely to restore a property to its certified condition, may disclaim coverage for liability or product failures related to renewable energy, or exclude coverage for the unavailability of green materials, etc. Green endorsements are now available for many professional, property and commercial general liability policies. Legal counsel can assist in evaluating the forms and scope of coverage appropriate for each green project.

Attorneys knowledgeable in sustainability issues are available if you know where to find them. Protect your investment through proactive risk mitigation strategies rather than ignoring the existence of unknowns or suffering through litigation that could have been avoided. Legal counsel with a LEED AP or equivalent background in green project development may prove an invaluable resource to advance your project from both the construction and legal perspective.

Kirstin Lowry Sommers is of counsel to Hurwitz & Fine, P.C., Buffalo, N.Y.

New York Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540