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Green multifamily projects: assessing legal risks involved

As the U.S. economy emerges from the Great Recession (albeit in fits and starts), it appears that multifamily residential is serving as the vanguard for recovery in the real estate industry. The heightened level of activity has not been relegated to the swapping of existing inventory; new multifamily development is proceeding as well. As is proving to be the case with other real estate sectors, new multifamily development often entails so-called “green” building practices and Leadership in Energy and Environment Design certification. In the Denver metropolitan area, there are a number of new multifamily projects, either recently completed or under construction, that are seeking or have obtained LEED certification.

As green building becomes more prevalent, it remains incumbent upon developers and other players in the real estate industry to be aware of and evaluate the legal liabilities and risks that go with it. The governing body for LEED certification, the U.S. Green Building Council, has likened green building liability to “new wine in old bottles”; that is, green building liability generally will derive from the application of pre-existing common law and statutory frameworks to the specific disciplines, practices and technologies of green development. While green liability issues may not prove to be novel or unique in this sense, these issues are nonetheless serious and require foresight as to how existing legal frameworks may be applied. As in all other facets of their commercial lives, developers and service providers (architects, engineers, contractors and others) must work to anticipate and manage the related legal risks.

In dealing with one another, those parties inevitably will address their relative “green” risks as they have historically when dealing with other development/construction issues: through the vehicle of the written contract. Documentation will be used to shape and define the relative expectations to be attached to sustainable development projects, with corresponding allocations of responsibilities. Service providers will tend to propose terms limiting their exposure to professional negligence and even defining the standard of care (and thereby defining the parameters of negligence claims), while developers will push for an assurance or guaranty of a specific result, especially when a third-party certification like LEED is the Holy Grail being sought. Contractors will be reluctant to give assurances of achieving a certification objective when they view their role as confined to implementing specific design criteria furnished to them. Even if service providers are inclined to give such assurances, their professional liability insurance coverages may preclude them from doing so.

From the developer’s perspective, effective legal protection may depend as much, if not more, on the quality of the party across the table as the care of the developer’s legal counsel. The best legal documents in the world cannot prevent the occurrence of the harms that may be caused by a bad actor. A developer embarking on any LEED



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or other sustainable project should undertake due diligence to verify the green credentials of its service providers.

Aside from structuring relationships with service providers, multifamily developers also must address potential liabilities stemming from dealings with their ultimate consumers: tenants in rental projects, and buyers in for-sale projects. In the latter context, thornier issues may arise. For residential buyers disenchanted with a development’s sustainable features, developers may face claims couched in the usual suspects of legal doctrine: breach of express warranties or other contractual undertakings, construction warranties implied by law and tort claims based on misrepresentation, whether intentional or negligent, or negligent construction. Again, the developer may have some ability to control these sorts of risks by shaping expectations through contractual disclaimers, qualifications and disclosures.

The most prominent issues on the horizon may stem from the USGBC and LEED certification itself: What is its impact and what does it signify? It appears that this question is becoming contentious, especially when it comes to ongoing performance standards. In response to criticisms that LEED certification does not require verified resource efficiencies over time (but instead is a one-time “snapshot”), USGBC adopted LEED 3.0, which now at least requires post-certification reporting on energy and water consumption. The risks associated with a lack of substantiated cost or functional efficiencies are highlighted by a recent court case (*Gifford v. USGBC*), in which building engineering professionals claimed that the USGBC misrepresents the energy efficiencies realized from LEED-certified projects. While the case was dismissed without a decision on the substantive merits, suits regarding the actual economic and performance benefits to be derived from LEED projects could continue to arise. Aside from liabilities that the USGBC may incur for a failure of substantial benefits, developers staking their projects on LEED certifications may face similar pitfalls. (The reader may want to review the claims confronting the developer of the upscale Riverhouse project in Manhattan, which are largely based on performance inadequacies rather than cost concerns.)

Claims based on a lack of concrete efficiencies may be given an effective platform under the federal regulatory scheme. In its environmental marketing regulations, referred to as “green guides,” the Federal Trade Commission – which is generally charged with regulating “unfair or deceptive” practices in interstate commerce – holds that green advertising must be substantiated by competent and reliable evidence, or else be considered deceptive. The FTC regu-



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lations are especially focused on marketing practices that obtusely tout a product as “green,” “sustainable” or “eco friendly,” with no elaboration or substantiation of what that means. These marketing practices have come to be referred to as “greenwashing.” In pending amendments to the green guides, the FTC

specifically proposes to curb perceived marketing abuses associated with the use of green certifications and seals of approval, which for the rank and file of consumers may imply environmental benefits that in fact don’t exist – and therefore are deceptive and misleading.

While LEED may be the present “gold standard” for accrediting sustainable development projects, marketing a project with a simple recitation of LEED certification, without more, could create exposure under the FTC green guides, especially if the pending amendments are adopted. Public perceptions of LEED benefits may outrun the reality, which is exactly what the FTC is targeting as a general policy. Aside from LEED marketing issues, general marketing claims of being “green” or “sustainable” are surely suspect under the FTC regulatory scheme.

The green guides are not without teeth. The FTC may pursue civil remedies on behalf of consumers, including contract rescissions, refunds of moneys, and recovery of damages, as well as pursuing civil penalties in its own right for violations of cease and desist orders (up to \$10,000 per infraction). In addition, the green guides might serve as the basis for direct causes of action by consumers under the federal Lanham Act, which enables false representation claims by private parties for goods and services involved in interstate commerce, or even misrepresentation claims at the state level asserting that the green guides are indicative of the appropriate standard of care. (There is some federal precedent in case law for applying FTC standards in Lanham Act claims.) The significance of these potential claims and remedies should caution developers to be circumspect in marketing the advantages of green projects.

In summary, the issues confronting multifamily developers and others involved in green building practices are akin to those that they already commonly deal with in their businesses. However, they still require thoughtful anticipation of evolving legal consequences that may take shape as the sustainable building arena continues to grow. In order to achieve the intended returns of green development, developers should bear in mind the potential for related liability and take appropriate documentary precautions in their contracting and marketing processes. ▲