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Green Building Liability: Promises, Promises

By **Bob Fisher, LEED® AP**
OTTEN JOHNSON ROBINSON NEFF + RAGONETTI

AS THE REAL ESTATE economy continues to improve, the employment of sustainable or "green" building practices for new development may continue to proliferate, perhaps to the point of becoming commonplace and a market norm. As green building measures become more pervasive, there may be a corresponding increase in related disputes and accordingly legal risks for green developers.

This is not to imply that green building legal issues are necessarily novel. The governing body for Leadership in Energy and Environmental Design certification, the U.S. Green Building Council, has likened green building liability to "new wine in old bottles": Legal liabilities associated with green building practices will generally result from well-worn common law and statutory frameworks as applied to green development practices. However, while they may not be unique, green building legal issues still require forethought to assess the risks.

The challenges for developers may be most pronounced in the consumer milieu. Buyers and tenants may wield claims for failed sustainability expectations pursuant to the usual suspects of legal doctrine: e.g., breach of express warranties or other contractual undertakings, habitability and similar warranties implied by law, and tort claims based on intentional or negligent misrepresentation or negligent construction. In dealing with consumers, developers may be constrained in regulating their exposure through contract because of public policy limitations (e.g., the Colorado Construction Defect Action Reform Act, which is widely interpreted to prohibit contractual waivers of the Colorado implied warranty of habitability and perhaps other remedial rights of residential buyers).

Developers can further worsen their position by promising more than they can deliver — or exposing themselves to claims that they have made such promises. A recent example arose in Colorado's own back yard, in Snowmass Village. In the case of Keefe v. Base Village Owner

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LLC, the defendant developer allegedly marketed its new residential condominium project with statements that it would be LEED certified and that the accompanying proposed "Base Village" would be a LEED certified neighborhood. While the building council does now offer a vehicle for neighborhood certification, through its "LEED-ND" program, the pleadings in the case indicate that the Base Village would constitute a pilot project under that program, which would likely exacerbate the risks of making good on the promoted project. The failed LEED certifications constituted part of the grist for the condominium buyers' claims, which were ultimately settled.

The Keefe case also frames the hazards entailed with pre-construction marketing and sales: Overtures made in marketing materials may effectively become part of the bargain regardless of contractual disclaimers. The risks in this regard are especially acute under the anti-fraud provisions of the federal Interstate Land Sales Full Disclosure Act, which parallel those in the Securities Act of 1933.

Making promises one cannot keep could also result in liabilities to parties other than consumers. In the case of Destiny USA, a large-scale commercial mall/mixed-use development in Syracuse, N.Y., the developer took advantage of a limited tax-exempt "green bonds" program for private projects and then reneged on providing the sustainable features that served as the basis for the bonds' issuance, citing changing market conditions.

The Internal Revenue Service initiated and then abandoned an audit, apparently (and surprisingly) deciding that the developer's mere initial promise to institute the sustainability features was sufficient to support the tax-exempt status of the bonds. The IRS's determination rescued the developer from incremental debt service liabilities on the $228 million issuance in the tens of millions of dollars.

Other liability risks are evolving from the inherent question of what it means (or should mean) to be green or sustainable and even what LEED certification does and should signify. LEED certification does not require verified resource efficiencies over time.

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In Gifford v. U.S. Green Building Council, building engineering professionals claimed that the USGBC misrepresents the energy efficiencies realized from LEED-certified projects. This particular case was dismissed because of plaintiffs' lack of standing, but litigation regarding the actual economic and performance benefits associated with LEED projects may continue to arise.

While the Gifford case raises the question of whether manufacturers, suppliers and service providers may have viable claims for damages due to the exclusionary nature of the LEED process, it is not difficult to envision consumer actions for frustrated expectations associated with energy and cost efficiencies (readers may wish to acquaint themselves with the case of the upscale Riverhouse project in Manhattan's Battery Park City).

There is a specific federal regulatory framework that might be used to attack green developments without substantiated benefits. The Federal Trade Commission is charged with regulating "unfair or deceptive" practices in interstate commerce. In its environmental marketing regulations, commonly referred to as "green guides" and set forth in 16 C.F.R. Part 260, the commission mandates that sustainability advertising must be supported by competent and reliable evidence, or else be considered deceptive. The regulations are particularly focused on so-called "greenwashing," i.e., marketing practices that obtusely promote a product as "green," "sustainable" or "eco-friendly" without substantiation.

The green guides indicate that marketing programs should not use third-party environmental certifications as a promotional basis if they imply far-reaching environmental benefits that are not demonstrable. This standard at least calls into doubt whether the marketing of an achieved LEED certification is necessarily a safe legal course, especially when coupled with generalized assertions of related advantages (e.g., "an energy-efficient LEED gold facility"). Public perceptions of LEED benefits may outrun the reality, which is what the commission is targeting as a general policy. In any event, bald, vague assertions that a development is "green" or "sustainable" are most certainly out of bounds.

To conclude, sensible sales, marketing and promotional programs, in concert with protective documentary practices, are essential for sustainable developers to manage their risks in an evolving industry. •

— Bob Fisher is a director with Otten Johnson Robinson Neff + Ragonetti. He can be reached at bfisher@ottenjohnson.com