



Green Buildings
New Technology

Green building—the risks and rewards

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Despite its current popularity, green building is a relatively new phenomenon. Until fairly recently, there weren't many people in Minnesota giving much thought to sustainable building, and even fewer thinking about the legal issues associated with building green. Many green buildings were completed using standard architect and construction contracts that did not adequately address (if at all) the issues unique to green building projects. Developers, architects and contractors are now becoming aware of the risk factors involved in these projects and the need to address those factors up front.

At the March 2008 NAIOP conference-DevelopGREEN: Sustainable Solutions for Commercial Real Estate-many presenters discussed the need to allocate risk and appropriately document the expectations of all parties involved in a sustainable project.

As an owner contemplating a green building project, one of the first issues to consider is whether or not to pursue LEED (Leadership in Energy and Environmental Design) certification. LEED is a sustainability standard created by the United States Green Building Council, and adherence to that standard is a good way to define and promote your project. It is worth noting that a project can still be "sustainable" without being LEED certified - there are a variety of other measuring standards emerging in this area. There will be added project



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costs associated with LEED registration and the documentation involved in obtaining project certification. If you decide to seek certification, you will need to assemble the appropriate team and determine who is responsible for administering the process. In addition, it will be important to designate who bears the responsibility to assure that the project reaches its expected level of certification, and what remedies are available in the event the project fails to achieve the target certification.

The issue of remedies can be a difficult one. For example, if a building owner has promised prospective tenants that the project would be LEED certified, and the tenants have signed leases based on that promise, not only is the owner damaged by the failure to achieve certification, the tenants

also may have claims justifying lease termination or damages. An owner may want to be able to pursue an action for specific performance (requiring the responsible party to attain the promised certification at the expense of the responsible party), or a claim for damages based on any decrease in the project's value due to the failure to obtain LEED certification.

Insurance coverage is another important issue. As an emerging area for design and construction professionals, green building commitments may or may not be covered by customary professional liability insurance. An owner should be careful to address the issues of professional liability in the project documentation and to be certain that the promises made are adequately backed up by insurance. If you've hired a consultant to work specifically on the LEED-certification process, you will want to negotiate the consultant's level of responsibility and corresponding liability, making sure the contract documents clearly state his/her responsibilities as well as your own expectations. Consultants should also carry adequate insurance to cover any failure to perform as promised.

Green building techniques may be novel in some cases, and it will be important to be sure that the construction materials, procedures and techniques used in your project to achieve certain green advantages do not inadvertently void a warranty or guaranty on some other aspect of the project. Also, since a critical incentive to build a green project is the promise of

lower operational costs, it will be important to identify the mechanisms and parties responsible to ensure the project meets its long-term performance goals. Attempts should be made to extend warranties far enough into the future to cover those goals.

There are also many unique issues that arise in connection with the leasing of green projects. At Develop-GREEN, representatives from many large organizations discussed their commitment to sustainability and their search for buildings that will help them meet those commitments. Some tenants may be willing to pay more in base rent in exchange for a commitment of lower operational costs. Tenants may also be willing to pay a premium simply because they prefer to be in a "green" building. Some studies have shown that, due to an abundance of natural light and improved air quality, workers are more productive in green buildings than in traditionally constructed buildings. Proposed green benefits only add value if they are actually brought to fruition so, if commitments to sustainability are made in

order to entice a tenant to a building, it will be critical that the owner has the ability to assure that these commitments are met.

Many points can be accumulated toward obtaining LEED certification in the areas of ongoing operation and maintenance - particularly in connection with LEED certification for existing buildings. Leases should address these operational details, which may include specifying policies on recycling, the use of specific cleaning supplies and procedures, and the use of energy-efficient lighting. In cases where a tenant is responsible for constructing its own tenant improvements within a green building, the lease should set forth in detail the green requirements of the tenant improvements to assure continuing compliance with LEED goals.

Finally, an owner will want to be vigilant in identifying and taking full advantage of available governmental green incentives. These incentives may be available at the local, state, or federal level, and may include expedited processing of permits, tax incentives, rebates of certain fees, and

increased floor-to-area ratios. Utility companies and manufacturers may also offer incentives in the form of free consultation, rebates and credits. The owner should include on its team someone charged with maximizing these opportunities.

The shift toward green building is gaining momentum, and many counties and cities are now requiring that all public projects be sustainable. Over 800 mayors across the country, including the leaders of Minneapolis and St. Paul, have committed to the U.S. Conference of Mayors' Climate Change Initiatives. As more cities try to meet the goals of these initiatives, we are likely to see additional green incentives and mandates in the building codes. Owners who are already familiar with the risks and benefits of "green" building will be well positioned in this new construction environment.

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