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Sustainable Building: Anticipate Potential Liability to Manage Risk

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Special to the Legal

Whether motivated by environmental responsibility, economic efficiency or regulatory necessity, construction project stakeholders are increasingly incorporating “sustainable” or “green” design into their projects. As what was once a trend becomes the norm, it will likely impact your clients, be they builders, architects, engineers, manufacturers, hospitals, banks or individuals. While sustainable building aims to achieve waste reduction, energy conservation and even cost savings, without appropriate planning, it can also result in liability. This potential for liability must be anticipated when advising clients involved with sustainable construction.

LEGAL MANDATES AND STANDARDS

New legal mandates for sustainable building continue to emerge at a brisk pace at the federal, state and local levels. For example, in March, the borough of West Chester, Pa., passed an ordinance stipulating that certain private commercial buildings must conform to EPA Energy Star building standards. Stakeholders would be well advised to task a specific individual with responsibility to stay abreast of legal developments that might impact their project. New legislation may include strict enforcement mechanisms for failure to meet mandated sustainability standards (e.g.,

withholding certificates of occupancy, requiring forfeiture of posted security). Further, contracts may contain language requiring parties to “comply with all applicable laws,” potentially burdening stakeholders to comply with sustainable building laws not enacted at the time that a project was commenced.

More often than not, legislation or other legal mandates calling for sustainable building require that projects be consistent with the U.S. Green Building Council’s LEED rating system. The LEED system awards points for achieving certain environmental and efficiency standards in construction or renovation projects and ranks buildings as certified, silver, gold or platinum based on the level of sustainability achieved. As with legal mandates for sustainable building, sustainability standards continue to evolve. The draft LEED 2009 Rating System, which will affect LEED standards for new construction, existing buildings, core and shell, commercial interiors and schools, is open for public comment until June 22. Proposed revisions include re-weighting and point re-allocation of LEED credits and the addition of available regional bonus credits in order to facilitate regional environmental priorities.

Construction project stakeholders should anticipate that sustainable building requirements and standards may change over the life of their projects and that they may find themselves subject to new or additional sustainability requirements even when they are well into the planning and design stage. They should consider the possibility of increased costs associated



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with bringing projects into compliance with new requirements and should determine in advance how to allocate such costs in the event that they arise.

FAILURE TO ACHIEVE REQUIRED OUTCOMES

Where, either by regulation or by contract, a construction project is required to achieve certain sustainability outcomes or certification, stakeholders face liability in the event that the required outcomes are not reached. Developers, contractors and architects may face breach of contract claims or even liability under fraud or consumer protection legislation such as Section 5 of the Federal Trade Commission Act, which declares unlawful “unfair or deceptive acts or practices in or affecting commerce,” Pennsylvania’s Unfair Trade Practices and Consumer Protection Law or New Jersey’s Consumer Fraud Act.

Stakeholders paying more for a sustainable building may expect a higher construction standard, savings on energy costs and even products with longer lives and less maintenance. Disclosures may help to mitigate risk. For example, contractors and design professionals should disclose that sustainable or green does not mean that a specific level of energy efficiency or performance has been promised or will necessarily be achieved. Additional or special maintenance requirements associated with sustainable design elements should be disclosed. Marketing materials should be scrutinized for subjectivity and possible misrepresentations.

Potential damages for failure to achieve a required sustainability outcome could include: cost of repair or diminution in value; unrealized savings resulting from failing to meet a specified performance requirement; loss of a rent premium for tenants contracting for a sustainable space; loss of security posted; or loss of tax incentives or loss of grant monies.

NEGLIGENCE IN SUSTAINABLE BUILDING

If the failure of sustainable building design, materials or construction techniques results in damage to a property, stakeholders responsible for their use may find themselves subject to a negligence cause of action. Because many sustainable building materials, methods and designs are not well established in the marketplace, the applicable standard of care may be difficult to gauge until there is more data available on their expected performance.

Professionals with specialized backgrounds in sustainable building, such as those designated as LEED accredited professionals, may be subjected to a higher standard of care than their peers. At the same time, as sustainable building becomes more widespread, professionals who fail to keep pace with sustainability developments may face claims for performing below a heightened standard of care. Developers, contractors and design professionals may consider mitigating possible risks arising from a deemed increased standard of care by clearly qualifying their knowledge with respect to matters related to sustainable building in a contract provision.

INSURANCE EXCLUSIONS AND COVERAGE

Certain exclusions from traditional insurance coverage may be triggered by sustainable building projects. Where contractors or design professionals make warranties or guarantees about particular sustainable outcomes, they may trigger warranty exclusions in insurance policies. By negotiating the addition of qualifying language such as "to the best of ability," they may be able to avoid warranty exclusions. Where it remains necessary to warrant certain elements of a project, contractors and design professionals should ensure that the warranted obligations are clearly specified and in their complete control. In the context of LEED certification, the stakeholder assigned responsibility for submitting and certifying the credit templates required to obtain certification should consider a contract provision establishing that its signature on the submittals is solely for the purpose of LEED certification and does not constitute a warranty or guarantee.

On the other end of the spectrum, some insurers have begun to introduce products that guard against traditionally uncovered exposures for sustainable buildings and sustainable renovation projects, including policies with coverage definitions expanded to include structures like green roofs and solar panels and coverage of re-engineering and recertification expenses in the event of a loss of a certified sustainable building. Coverage is also available that enables insureds to rebuild not-yet sustainable buildings to a sustainable standard following a loss. Building owners who commit to sustainability standards may even qualify for discounted pricing.

STRATEGIES FOR MANAGING RISK

Building owners should carefully consider their sustainable building goals and explore the options available to achieve their goals. Once a set of sustainability standards is selected, such as a LEED certification standard, they must clearly specify who is responsible for meeting the chosen standards and should define what sort of damages will flow from a failure to meet such standards. The stakeholder responsible for handling documentation

and inspection of work required in order to demonstrate that the selected standard has been achieved should also be specified from the outset. Building owners should also confirm that there is adequate insurance coverage for their project.

Contractors must ensure that they understand the specific sustainable building standards they have been asked to follow. They should pursue subcontractors experienced with sustainable building and define expectations for their subcontractors through clear language regarding sustainable building requirements in their contracts. Contractors should work carefully with insurance professionals to offset some of the risks of building according to new standards by obtaining applicable exclusions and endorsements. Because the selected sustainability standards may require additional procedures or paperwork, contractors should ensure that their internal processes and procedures will comply with the requirements for meeting those standards.

Design professionals may be most at risk in the context of a sustainable building project as they often play the role of adviser on sustainability standards. Their advice may give rise to a perceived or actual warranty regarding performance and, as discussed above, can create a risk that their professional liability insurance will not provide coverage. Design professionals should ensure their contracts include clearly articulated performance expectations and be certain that any reference to an anticipated sustainable outcome is not phrased so as to create an unintended performance guarantee.

CONCLUSION

Because unique legal issues and liability risks are raised by sustainable building projects, they are best addressed from the outset of a project. Stakeholders who fully examine the risks associated with a sustainable building project and who clearly define performance expectations in their contracts are most likely to succeed both in avoiding potentially costly dispute resolution or litigation and in achieving the desired environmental and economic outcomes for their projects. •