

The Legal Risks of Building Green

by Shari Shapiro

The sudden popularity of all things green is exposing builders — whether they know it or not — to new legal risks. There are risks associated with drafting the contract, navigating the permit approval process, and resolving disputes over projects that fail to achieve their sustainability goals.

As a builder, your main line of defense is a well-written contract — one that spells out what the project is trying to achieve and who is responsible for achieving it. These are

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important parts of the agreement and need to be negotiated in advance during frank discussions among the architect, the contractor, and the client.

Referenced Standards

It's not enough to say the project will be green — the contract must specify the particular standard you want to meet. This could be LEED, GreenPoint Rated, NAHB Green, or some other standard that you and the clients choose.

In some cases, owners are planning to get tax credits or other financial incentives for building green. It's important to know which incentives they're considering because the government may mandate a particular standard. For example, some municipalities require LEED certification or the equivalent to qualify for tax credits.

Who Handles the Paperwork?

There is a formal process for receiving a green certification. To obtain LEED certification, for instance, someone associated with the project must pay a fee and submit a specific set of documents to the U.S. Green Building Council. The construction contract should specify who will pay the fee and who will handle the paperwork.

Typically, the owner is responsible for paying the fee and the designer or the builder is responsible for filing

the paperwork. But these are not hard and fast rules, so if you do not intend to be responsible for the fee or the paperwork, you need to establish that up front with the owner and make sure that it's noted in the contract.

Be Careful What You Promise

Be very cautious about the language you use when discussing or drafting contracts for green building projects. Make it clear to the client that you do not “guarantee” or “warranty” that the project will achieve a green certification.

As an example of what can happen when the contract is not clear on this point, consider the recent case of Shaw Development vs. Southern Builders, a lawsuit involving the construction of a luxury condo development. Southern Builders signed a contract that said it would construct an environmentally sound “green building” in conformance with a “Silver certification level according to the USGBC’s LEED rating system.”

The developer was counting on getting a tax credit from the state — a credit that required the project to be LEED Silver certified. When the project failed to receive the necessary certification, the developer sued the builder. Although the suit was settled out of court, it was clear that the contract language had been a problem.

The builder would have had a much stronger case if the contract had said he would “seek” or “aim for” a LEED Silver certification. Saying that a project will “conform” to a particular green building standard implies a guarantee to achieve it.

New Materials and Methods

The designers and builders of green projects are sometimes asked to use materials and methods that don't yet have a track record in the construction industry. You certainly don't want to refuse to use them — but you may want to consider getting an explicit waiver from the client acknowledging the risks associated with using untried technologies.

Trade contractors. Since subcontractors may play

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a significant role in achieving green certification for the project, make sure they are on board with the green building process. For example, the hvac contractor may need to provide a certain amount of air exchange or have the system tested to prove that it performs to a particular standard. The painter might have to use different products than he is accustomed to. And everyone on site may be required to separate waste materials so they can be recycled.

Whatever the exact requirements for green certification, you need to reference them in your subcontracts so the subs know what they have to do and are legally responsible for doing it. As a matter of good business practice, you should remind them that this is a green building project and that there will be certain things they have to do on this job that they don't do on others.

Local Regulations

Green building regulations are being enacted all over the country, sometimes as local ordinances and sometimes as part of the state code. As with anything in the building codes, you the builder are responsible for knowing and complying with the rules.

This part of the law is changing rapidly. Consider going over your contract with an attorney to make sure it allocates responsibility for complying with the green building regulations that apply where you build. For instance, large projects may be required to undergo energy modeling or commissioning, which is the process of verifying the performance of the building. These services are expensive, and you need to make sure that the contract specifies who will pay for them.

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