



Green Buildings: The Intersection of Law and Development

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It is reported that some famous learned person was once asked: “What is your favorite book?” and they responded, “The Dictionary, because all the other books are in there.” This is an apt analogy to why many of us became a lawyer. All other disciplines and walks of life are “in there.”

The Lawyer as Quarterback

As real estate development lawyers, we deal with architects, contractors, building owners, government officials, accountants, lenders, and even other lawyers. We are involved in discussions and decisions with regard to whether to proceed forward with a project; how to finance a project; how to maximize the available resources (financial and marketing); how to protect and limit liability and risk, how to maximize profits. We are not accountants, or bankers, or architects, or contractors. But we are integral to the process, and depending on the relationship with any particular client, we may play more or less of a “quarterback” role in seeing the process through.

We as lawyers must remember that we are part of a team of professionals focused on a singular goal of completing the development in a timely manner, on budget and within the scope and standards that the client has determined. It is our role as attorneys to manage expectations by expressing very specifically in writing what is expected of each party; how those expectations will be measured, and the ramifications of not meeting the expectations.

The “Green Building” Movement Timeline

“Green buildings” are simply buildings that have been thoughtfully designed and built with engineering best practices related to energy, use, and environmental sensitivity. Since the dawning of *homo sapien* society, the idea of making use of available resources in the most efficient way to avoid scarcity has been a mainstay of survival. Early hunters made use of every part of the animal they felled; for food, shelter, tools, entertainment.



The massive ancient buildings of Greece were sustainably designed. The substantial thermal mass as well as southern facing orientations captured the natural heat of the sun.ⁱ According to Socrates, "In houses that look toward the south, the sun penetrates the portico in winter, while in summer the path of the sun is right over our heads and above the roof so that there is shade."ⁱⁱ

The indigenous people's tradition of caring for the earth, not as if it was owned, but as if it was borrowed from future generations, echoes the essence of sustainability. The idea of providing “enough, for all, forever” is rooted in both environmental as well as economic sensitivities.ⁱⁱⁱ

Although there are now “scorecards” that allow you to claim a certain status as a “LEED” building^{iv} or a “Green Globe” building^v, the concept of “green building” goes back far before anyone considered it as engineering meets the environment. The Anasazi culture lived near the intersections of Colorado, Utah, New Mexico and Arizona. The hot desert sun and cold desert nights prevailed. To respond the Anasazi lived in large open caves that faced south. The homes were intentionally recessed far enough from the opening so that they were shaded in the hot summer months.^{vi} The elevations of the buildings were designed so that the sun would not overheat the living quarters in the summer and would provide maximum heat to fend off cold desert winters. The positioning of the building into the landscape provided for protection against the outside environment as well as maximized the natural heating and cooling. There were no licensed architects, LEED point calculations, Green Globes, ribbon cuttings or plaques, yet their buildings were as “green” as could be at the time.

“Green buildings” speak to environmental sensibilities as well as economic survival. From an environmental perspective, managing the available resources provided in a way that sustains the long term viability of the natural environment is critical. From an economic concern, reducing the cost of development as well as the ongoing cost of maintaining a building speaks to good project management. Assuring raw materials are available to sustain economic activity such as fuels for energy, building materials, etc. is vital to future projects and thus future profits

A lot of what goes into a “green building” is not a sacrifice to enhance the environment, but rather a necessity to maintain the economic viability of the structure. Lower heating costs, less maintenance, and a “healthy building” equal economic success as much as environmental sensitivity. “Green building has become more widespread as people recognize that the positive financial implications of “going green” extend beyond environmental stewardship.”^{vii}

In the 1970s we were focused mainly on energy conservation and efficiency. We missed the bigger picture of a sustainable and “healthy building”. We sealed buildings tight to maintain the heat and cooling that we created and to reduce heating and air conditioning costs but we didn’t consider the impact on air circulation. “Sick building syndrome”^{viii}, sometimes referred to as “multiple chemical sensitivity” became a phenomenon that lawyers had to deal with in the leasing world, as well as torts, insurance and other implications.

Today’s “green building” movement is not monolithic in its approach to environmental sensitivity. It’s not just about energy. It’s also about waste, it’s about landfills, and embedded energy. Today we consider the materials that are used to develop the building, including the design, origin, and location of delivery.

LEED (Leadership in Energy and Environmental Design)^{ix}

I think there is a law, rule, or regulation somewhere prohibiting a discussion about green building without explaining at least on a superficial level the origins of LEED (Leadership in Energy and Environmental Design) and the LEED process.

The United States Green Building Council (USGBC) established a point system and process for implementing that system, which allows developers to claim a certain status as a silver, gold, or platinum rated building.

The LEED system is not a government regulation, but has been incorporated into government rules in a way that has elevated LEED to have legally binding implications. This is also true in leases that reference LEED, or the AIA contracts which reference LEED. It is important to understand then, as lawyers, what exactly the LEED standard and LEED process are.

LEED is not only a designation of the building process itself, but addresses activities both preceding and post-construction. Preceding construction consideration has to be given to the idea of

selecting the “right” development.” Redeveloping an existing building can provide LEED points. Developing a building within certain transportation corridors will garner LEED points.

Post-construction the building has to be commissioned and evidence delivered as to LEED compliance. The building needs to be operated and maintained properly to assure energy efficiencies and maintain transportation accommodations, etc. To address this issue USGBC formed the Building Performance Partnership

“To not only address these concerns, but also lay the groundwork for substantive developments in LEED that address post-occupancy performance, the U.S. Green Building Council has formed the Building Performance Partnership (BPP) — a coalition of LEED-certified residential and commercial projects that have voluntarily committed to providing energy, water and other performance metrics on an annual basis. This data will provide a clearer understanding of the gap between predicted patterns of performance at the time of certification and behavioral patterns which may thwart post-occupancy performance.”^x

The fact that there is now a third-party metric to measure a post-commissioned building means there is a standard to reach, or not reach. As lawyers, anytime there is a goal line, we may be called upon to judge whether the ball has crossed it, or to argue with the ref.

The Lawyers Role in Green Buildings

Green buildings are really just well designed, well executed, thoughtfully planned developments that maximize not only the economic return but environmental conditions and footprints. As lawyers, we need to recognize our role in the Green Building process. It is important that we have a discussion with our client and other players so that the roles are clearly defined and the scope of work established.

Once the building is complete, the attorney plays another role. We must navigate green building issues in lease negotiations. Certain tenants may be willing to pay a premium for space that is designated and confirmed to meet certain green standards. However, the flip side is that the space must indeed meet those standards. If a tenant negotiates a lease and expects to be occupying a “green” space, it is up to the building owner or landlord to assure that the space has been built to the referenced standards. It is up to the attorney to describe and clarify what the standards are and who is responsible

to meet them. The Tenant must be required to assist the Landlord in maintaining through operational requirements the LEED certification.

Contracting

As lawyers, one of the things that bring us great comfort and joy is documentation. We like contracts. We like to negotiate contracts, we like to review contracts, (admit it - sometimes we even like to litigate contracts (if necessary)). There are many contracts involved in the green building process. There are contracts to establish the scope of services and responsibilities of the architect and the constructor. There are contracts with the financial institution to establish the financing process. There may be contracts with regard to member rights and interests in the development. There are leases.

As lawyers we turn to those contracts to remedy disputes among the parties. In green buildings, as in most relationships, those disputes often arise around who has responsibility for what, and when.

A good example is in assigning responsibility to document the project. Documentation is critical for obtaining LEED status and therefore it the contractor and the subcontractors have to be sensitive as to the required documentation: where they obtain their materials, their origins and environmental properties (VOC's), how they dispose of construction and demolition debris, how they use on-site existing landscaping and plants to integrate with the site plan, etc.

“Greenwashing”

There is a phenomenon which is being carefully monitored by the FTC referred to as “green washing.”^{xi} The idea that you are “green” and therefore the market should provide you a certain premium has attracted people who make claims that are unsubstantiated. The concept of what is or is not “green” in the marketplace is elusive.

This concept applies to “green buildings”. What allows you to market your building as “green”? Did the Tenant rely on the designation? Did you purchase products to use in your “green” building because the manufacture marketed them as “green”? Were they? Did that impact your designation?^{xii}

Insurance

There are unique issues with regard to insurance coverage in the green buildings world. This extends beyond the “sick building” issues previously discussed. One broker is marketing a unique insurance product to architects to fill some coverage gaps created by the AIA contract and general duties assumed in green building design and implementation.^{xiii}

LIMIT YOUR RISKS BY GOING GREEN

We are one of the few insurance brokerages with the expertise and experience to structure a comprehensive insurance program that protects "green" certification-from pre-construction consultation through building completion. As members of the U.S. Green Building Council (USGBC), we can facilitate the "greening" of your development or your property portfolio.

"Green" buildings have fewer risks. That's because the certification process ensures that the electrical, HVAC, and plumbing systems are all in optimal working order, reducing the possibility of a loss and decreasing the potential for Construction Defect claims for new projects.

"Green" Insurance

Argo offers specialized insurance coverage crafted to avoid potential gaps in traditional Commercial, Builders Risk, and General Liability coverage. Our coverage is specifically designed for properties that have been "green" certified by the USGBC or the Green Building Institute (GBI). The insurance covers the replacement of all energy efficient materials and systems that qualify as part of the "green" building, and includes Property Upgrade coverage and "Green" Building Commissioning Expense.

<http://argoinsurance.com/green-initiative/>

Leases

Green Buildings require not only attention to detail in the design and construction, but also appropriate follow-through. In order for a building to maintain its green nature and status, it is necessary that the occupants acknowledge the importance of the green design and follow through. A building with impeccable energy efficiency systems is made less so by tenants plugging in electric heaters in the winter, or opening windows inappropriately in the summer.

Tenant expectations and obligations must be factored into lease negotiations. Tenant build outs must be sensitive to LEED or other construction requirements. Any additional cost of the build out must be allocated.

Is My Building Really “Green”?

There are a number of metrics by which the success or failure of a “green building” or project can be measured. The most referenced is undoubtedly the United States Green Building Council (USGBC) LEED standards. But LEED is not the only program. There is also the Green Globe program,^{xiv} as well as energy codes within the international building codes.

The International Building Code (IBC) Green Construction Code^{xv} provides: “... *the first model code to include sustainability measures for the entire construction project and its site — from design through construction, certificate of occupancy and beyond. The new code is expected to make buildings more efficient, reduce waste, and have a positive impact on health, safety and community welfare.*”

It is important to note that USGBC’s LEED standards are not a government program. This is a misconception even among certain architects and contractors. The program is voluntary and serves as a metric, not a mandate. However, as time passed, more localities have begun to “adopt” the LEED standards or reference the LEED standards in mandatory building codes or requirements. New York requires green building efforts in state buildings. “In September, 2009 Governor Paterson signed the State Green Building Construction Act (Article 4-C) into law. The act stipulates that new state buildings and major renovations of existing buildings comply with green building guidelines established by the Office of General Service. The OGS has recognized Green Globes, LEED, and the American National Standards Institute as model green building programs.”^{xvi} Some have suggested that the reference to LEED is an unconstitutional delegation of legislative power.^{xvii}

The Green Building Certification Institute is a third party certification entity to confirm compliance with LEED requirements.^{xviii} The standards and their effectiveness have been attacked. The “Third Party” certification process has been the subject of anti-trust litigation and other legal analysis.

“According to the American Institute of Architects, there has been a 50 percent increase in the number of municipalities with a green building program in place since 2007. And 24 of the country's 25 largest metropolitan areas are built around a city with green building legislation on its books. Reducing buildings' environmental impact is a noble - and critical - goal. But governments' reliance on private, third-party standard-

setting organizations - and the rating systems that they promulgate - as the basis for that legislation may be legally problematic.”^{xxix}

The idea of buildings certified by meeting LEED standards in general being better or meeting certain environmental goals has resulted in litigation.^{xx}

Lawyer, Protect Thyself

NEW YORK STATE UNIFIED COURT SYSTEM
PART 1200
RULES OF
PROFESSIONAL CONDUCT
Dated: May 1, 2013
RULE 1.1.

Competence

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.”^{xxi}

Often we are so caught up in protecting our clients that we lose sight of our own vulnerability as lawyers. We have a responsibility to provide “competent representation” under the rules that govern our conduct. In order to provide that competent representation in today’s real estate development world a lawyer has to have a basic understanding of the green building concepts and pitfalls to know when to ask others for assistance and where this clients (owners, architects, contractors, tenants etc.) may be vulnerable.

Conclusion

“Green buildings” have been around for a long time, even before the moniker was coined. The idea of integrating environmental and energy sensitivity into building design is as much good engineering and economics as good environmental stewardship. How we as lawyers assist our clients with green building issues is the same way we assist with any other issue. We identify where rights and responsibilities are being defined; we review those points and assist the client in creating protection and maximizing the consideration that they are given in any contract.

For instance, when negotiating with an architect, a good lawyer sensitive to green building needs will make sure that the architect’s role includes roles in commissioning, certifying, and documenting the green building design, execution, and commission. The same applies to the contractor. A lawyer needs to understand that those are requirements of the green building process for which someone needs to be made responsible and the client needs to have a mechanism to enforce that responsibility. Lawyers need to make sure that clients do not overreach in marketing their buildings so that they are violating green washing regulations and/or simple fraud with regard to what they are delivering to any tenant or building owner.

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- ⁱⁱⁱ Most often referenced as an unattributed African saying
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