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Developing Green into Green

Strategies for green building success

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The rise of so-called “green” building initiatives at every level of government in New Jersey, combined with private sector incentives and pressure to “go green” in the midst of the current economic chaos, has created a green perfect storm of sorts for New Jersey developers and businesses trying to sort out their legal obligations and business strategies in 2008.

Developers and businesses generally evaluating their green building objectives first must assess what they need to do under existing regulations from the local level on up, then make the call on whether green building options not mandated by government are nevertheless worth the investment. Contemplating these options under the weight of the escalating economic pressures makes each “green” call a critical one. To address these issues, New Jersey businesses should first evaluate the local regulatory climate, carefully select professionals capable of implementing whatever options are chosen, and most importantly negotiate critical elements of the design and construction contracts

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to clearly define the responsibilities and allocate the risks associated with green building.

From a practical standpoint, there is little empirical data to suggest that green building — shorthand for sustainable design, construction and operation — positively impacts the economics of any given project. Yet for the past year, the green building boom has proceeded pretty much unabated. While the real estate industry is retrenching in today’s economic climate, and no one can predict the fate of any forward-thinking approach to construction projects, the National Association of Homebuilders (NAHB) and McGraw Hill not long ago estimated that by 2010, as much as 10 percent or \$8 billion dollars of U.S. residential construction activity will be green. This past year alone saw a 400 percent increase in the number of NAHB state and local associations with green committees, councils and working groups. Though the pace may be slowed somewhat by the economic downturn, the trend toward green building is clear and will not reverse course.

Green builders first must understand how to comply with green mandates at every level of government so they know what it takes to get a certificate of occupancy, obtain permits, earn tax credits and access other incentives. A diligent review of state and local requirements and incentives should include preservation ordinances, neighborhood design controls

and local sustainability requirements such as regional sourcing of materials, emissions controls for construction equipment and utilization of recycled or sustainable harvested materials. It is also worth knowing what regulations and ordinances are in the pipeline, and which requirements are being challenged. For example, in July, a group of HVAC and water heating equipment contractors, distributors and trade organizations sued the City of Albuquerque to block the energy efficiency provisions in the city’s high performance building code on the basis that the code is pre-empted by the Energy Policy and Conservation Act of 1975 and other federal laws.

At the state level, New Jersey has a growing number of green building initiatives overseen by NJDEP, the Board of Public Utilities, Economic Development Authority, Housing and Mortgage Financing Agency, Commerce and Economic Growth Commission and the New Jersey Redevelopment Authority. On the legislative side, the high performance green building standards enacted for new buildings greater than 15,000 square feet apply only to buildings solely for state use. Under these requirements (N.J. Stat. Ann. 52:32-5.3 et. seq.), the buildings must meet the “Silver” standard set by the U.S. Green Building Council’s Leadership in Energy and Environmental Design, or LEED program, or an accepted equivalent such as the Green Globe standards developed in Canada.

In what may signal a shift to a more local focus, this August the New Jersey legislature authorized municipal planning boards to adopt green building standards

and environmental sustainability as part of their municipal plan element (N.J. Stat. Ann. 40:55D-28 et. seq.).

Numerous green building bills are pending in New Jersey's 2008-09 legislative session. Pending bills include: (1) *A1626/S701*, requiring that affordable housing be built to green building standards to be set by the Commissioner of Community Affairs; (2) *A2065/S1066*, permitting developers to qualify for low-interest loans from the New Jersey Economic Development Authority; (3) *A2070/S1077*, the Green Building Tax Credit Act; (4) *A2854*, the Retrofitted Green Building Tax Credit Act; and (5) *S696/A278*, establishing the New Jersey State Building Green Building Technology Task Force.

Once the regulatory landscape is evaluated, considerable care should be given to selecting design and construction professionals familiar with the green building rating systems, certification processes and materials. Equally important, principals need to be sure via their main contractors that green building expertise is carried down the line to subcontractors. Some level of green experience is important, but this is not to say that every contractor or subcontractor must be a green building expert. Specialized training in new components, materials and assemblies can compensate for depth of experience to some degree. In evaluating their potential contractors and designers, prospective green builders should be wary of overselling the availability and patent status of the materials proposed, and make certain the suitability of the materials are independently verified.

Perhaps most importantly, counsel for green builders must recognize the potential risks associated with green construction, and carefully craft their contracts with design professionals and contractors to cement the parties' expectations and allocate those risks. Too many contracts contain vague references to standards such as LEED without clear language on green goals and responsibilities. Such ambigu-

ous contract language can lead to disputes and even litigation down the road.

For example, green building contracts must not only state which green building rating system is chosen for the project, but which version of the specified system will apply. Major projects can span several years, during which a selected rating system will be updated. In other words, the standard that applied when the contract was signed may be obsolete when the project is completed. The responsibility for and cost of compliance with the most up-to-date green standard must be explicitly addressed in the contracts.

Additionally, because green standards allow for significant variability in the way projects can achieve certification, green building contracts should specifically describe not only the standard itself, but how it will be achieved. LEED ratings, for example, are achieved by accumulating points in six categories described in the USGBC's Registered Project Checklist (e.g., materials and resources, indoor environmental quality, energy and atmosphere). Each category has prerequisite, or required green measures with corresponding points, but beyond the requirements multiple combinations of optional green measures can be put together to achieve the desired rating. So simply specifying that LEED certification or a LEED Silver or Gold rating will be achieved is not enough. A contract relying on LEED standards must specify how the most cost-effective combination of options in each category will be employed to achieve the desired rating. Ambiguity in contractual terms can lead to significant cost overruns and projects delays, and can jeopardize financial incentives keyed to timelines for achieving certification.

Parties to green building contracts must also carefully specify who bears the costs and assumes the risks associated with achieving the green building objectives. More specifically, the contract must delineate who will track, collect, assemble and submit documentation, and who bears responsibility for failure to

meet the green certification contemplated by the contract. Failure to do so risks disputes which may give rise to litigation. In *Shaw Development v. Southern Builders*, a recently settled Maryland case, a project's failure to achieve LEED Silver certification resulted in negligence and breach of contract claims against a green contractor, which the developer claimed lost it \$635,000 in green tax credits. In *Shaw*, neither the standard form AIA construction contract nor the referenced project manual spelled out who bore the risk of failure to achieve certification.

Beyond completion of the project, builders seeking to market their product as green must carefully consider the representations they are making to avoid consumer backlash. Whenever possible, it is advisable to replace vague marketing claims such as "more durable materials," "energy savings" and "enhanced indoor air quality" with concrete correlations to standards. Perhaps equally important, green builders should manage consumers' expectations by disclosing to prospective buyers what "green" does not mean with respect to the specific project. Consumers buying green and potentially paying more for it will be more demanding, and the risks associated with marketing to them will rise accordingly.

Amid the real estate industry's economic struggles, the potential rewards — and pitfalls — of green building may take a back seat to more pressing concerns, but should not be ignored. Green building, although still a relatively nascent part of the industry, is a fact of life, and public pressure is ramping up legislation at all levels of government. Counsel for prospective green builders must be knowledgeable about the evolving government requirements and incentives, if needed assist clients in evaluating their contractors and design professionals, and devise contract language to properly apportion the costs of green construction and allocate risks associated with green construction. ■