

New Green Building Efforts Harbor Litigation Risks: Attys

By **Jacqueline Bell**

Law360, New York (November 17, 2011, 6:06 PM ET) -- The growing demand for sustainable buildings has set the stage for a wave of legal disputes as developers work to adhere to complex green standards while relying on construction contracts that have yet to catch up with the times, attorneys say.

Amid the prolonged real estate slump, states and cities have been rapidly incorporating the international green building rating system known as Leadership in Energy and Environmental Design — commonly called LEED — certification into ordinances, laws and incentive programs.

Now that the market is showing signs of recovery, developers are confronting LEED requirements that can be complicated and tricky to meet, and many existing construction contracts fail to adequately address liabilities stemming from a failure to meet green standards.

A LEED certification gone awry can lead to a variety of costly consequences, including project delays, loan problems and city-imposed penalties, creating a recipe for legal disputes, attorneys say.

"There's going to come a day when these projects aren't certified and people are more motivated to pursue claims and they're going to be looking at a contract that does not address these issues," said David Blake, a partner at Seyfarth Shaw LLP and a LEED accredited professional.

Many commercial construction contracts largely avoid the issue, either by using standard industry language that says nothing about the green nature of the project and the different rights and responsibilities of the parties, or by incorporating language that shifts 100 percent of the risk to a single party, Blake said.

Since so many LEED-linked regulations and incentives by local governments went into effect just as real estate development stalled in the wake of the economic crisis, there have been few opportunities to witness legal disputes over green building projects gone wrong, which would provide at least some guidance about what contract provisions could be best used to mitigate risks.

"It's usually a bad lawsuit that produces good contractual language," said Thomas R. Petty, a partner at Anderson Kill & Olick PC and a LEED accredited professional.

A rare case launched in 2007 in Maryland state court, Southern Builders Inc. v. Shaw Development LLC, ended in a confidential settlement. But it does provide a clear example of how these fights are likely to start as increasingly more projects are LEED-linked.

Southern Builders initially filed the lawsuit seeking a final payment under an approximately \$7 million contract with Shaw Development to construct a waterfront condominium with 23 residential units, a restaurant and six boat slips. But Shaw filed a counterclaim, alleging breach of contract and negligence and arguing that Southern Builders failed to construct an environmentally sound green building achieving a specified LEED rating, causing the developer to lose \$635,000 in tax credits under a state green building initiative.

Developed by the U.S. Green Building Council in 2000, LEED is a rating system used to certify that buildings are environmentally friendly. Projects earn points towards certification by implementing a variety of sustainable building strategies, including maximizing water and energy efficiency, using sustainable building materials and reducing construction waste. The number of points earned by a project determines what level of LEED rating a project can earn: certified, silver, gold or platinum.

According to the Green Building Council, 45 states encompassing 442 cities and 58 counties now incorporate LEED into laws, resolutions, ordinances, policies or incentive programs. The council adds that more than a dozen different federal agencies also have LEED-related obligations.

Washington, for example, will require all new commercial buildings more than 50,000 square feet to achieve LEED certification starting in 2012. Chicago and New York now require all new city-funded projects to earn LEED certification. Other jurisdictions have programs that give developers tax credits, zoning waivers or expedited approvals if they set and achieve a LEED certification goal.

For some new LEED projects, pushing for updated contract language may be tough, attorneys say, since there's little standardization on language for green project agreements. A bid for LEED certification can also raise questions about a seemingly endless array of building concerns — including the types of materials a builder uses, what materials or products can be adequate substitutes if there's a shortage, how waste is disposed of at a construction site, and who keeps records of construction material recycling.

"It's all hand-crafted, it's all customized and it's all expensive," said Emerson Lotzia, a partner at Foley & Lardner LLP. "People pull forms off the shelf to save money — and that works until you run into a problem. Even with the experts this language is still forming."

Blake says he typically advises developers to create a detailed list of the credits a project need to get in order to secure LEED certification and to have designers, builders and others involved in the project agree on who will be responsible for each credit.

"It's a living document. It may not be the final answer — but I think it's going to be a lot better than what I currently see, which is either ignoring the issue or shifting the responsibility completely to one party," Blake said

Bruce Merwin, a partner at Haynes and Boone LLP, says attorneys are also starting to consider — on a project-by-project basis — provisions designed to provide building owners some protection against the possibility that a large LEED-certified corporate office building could lose its certification down the road, which could create problems with all of the most important contracts that relate to the building, especially loans and leases.

“If a green building loses its certification, there’s going to be defaults and there’s going to be litigation,” Merwin said. “All of this is going to be flushed out in the next few years.”

--Editing by Christie Smythe and Eydie Cubarrubia.

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