

Legal Notes: When Green Goes Wrong

Avoiding the hidden risks of "building green."

By Jay B. Freedman

Building a green project, whether to seek LEED® certification or just to be environmentally conscious, may create risks that are not present in conventional projects. The key is to identify these pre-construction risks so they can be immediately recognized and effectively resolved before disputes arise.

On the risk-management end, builders seeking LEED or Green Globes™ certification need to work with their insurance brokers and carriers to make sure they are covered for items such as re-commissioning if the building is damaged or a contract claim if the building isn't as energy efficient as advertised. Coverage for these items is not contained in a typical CGL policy, and it is too late to correct an oversight after a lawsuit is filed.

Prior to construction, builders should understand that there is not yet a universally accepted standard for "building green," therefore, they need to communicate with their design team to develop common goals at the beginning of the project. A builder seeking basic LEED certification may be focused on reused and recycled materials for marketing reasons while its designers choose to pursue credits that are easier to document. Although certification is achieved, if the builder's expectations are not met, litigation may result.

When pursuing certification, builders also need to pay extra attention to the details of the contracts with their design team. A LEED-accredited professional may have been hired to shepherd the builder through the process, but the builder still needs to make sure that everyone knows who is ultimately responsible for LEED decisions. The contract should clearly dictate the accredited professional's duties and responsibilities. A certification goal can be missed by a few credits because everyone thought someone else was handling the credits that were not obtained.

Most residential builders recognize that homebuyers are more sophisticated than

homeowners will hold builders to that promise, and research shows that the jurors will heavily rely on the written sales brochure.

Homebuyers are also influenced by what they read in the press or find through their own Internet research. The benefits of building green have generated significant media attention both in the news and on various home-oriented cable channels. With homebuyers more likely to expect energy savings, healthier homes, the use of recycled products or other perceived benefits of a green house, builders must take steps to reduce unfounded and unspoken expectations prior to the sale.

The adage that perception equals reality can create new risks for the green builder. The buyer's perception of the project can easily differ from the reality of what is being built, and the builder will be held accountable when the completed project does not measure up to expectations. Builders can avoid problems at the end of the project by taking extra care to foster communication among all of the team members and to address unspoken assumptions at the beginning of the project. When the expectations and responsibilities are clearly defined from the start, the builder can achieve a better result while reducing risks.



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they were even five years ago. They pay closer attention to marketing materials and often remember everything they were told during the sales process. Many take notes, which are then produced during their defect suits. Builders need to carefully monitor the content of their sales brochures and print advertisements — and representations by their sales personnel — to ensure they are not over-promising the benefits of new technologies. If "instant hot water" is advertised, the

Fast Facts



<p>"Green" projects can involve hidden risks to the builder.</p>	<p>Risks can be avoided through communication between the builder and its design team.</p>	<p>Builders must manage their marketing processes to avoid over-promising.</p>	<p>Take steps to eliminate unspoken assumptions held by your buyers.</p>
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