

CONSTRUCTION LAW

A Closer Look

CAN THE CONSTRUCTION TEAM APPLY TRADITIONAL CONTRACTS WHEN USING THE GREEN BUSINESS MODEL? **By Kevin Hudson and Matt Spivey**

The green concept of conservation of resources and sustainable development began decades ago with environmentalists and anthropologists. Green achieved mainstream recognition through LEED certification initiatives and similar programs, yet some attorneys, owners, contractors and developers are still struggling to take hold of what green really means and how it is changing the construction business.

The concept of green construction appears in a wide range of global projects. International examples include China's laudable efforts in 2007 to minimize the environmental impact of its new Qinghai-Tibet Railway – the highest in the world at its time in 2007 – and efforts in Australia in the past five years to study the impacts of environmental standards in construction. Domestic examples include reconstructing all areas of the World Trade Center under strict green standards and the Washington Nationals' recent attempt to make its new stadium in the nation's capital a green ballpark. Moreover, these goals can be seen on a daily basis in projects including residential construction, commercial construction, interior redesign, road work and general space planning.

Whether one agrees with the policy or not, there are owners, developers and contractors who have committed to providing quality buildings and an overall product – whether it is office or condominium space in a metropolitan area or your next-door neighbor's home – while at the same time focusing on meeting set standards and certifying the end-result.

All players in the construction and business industries are deeply affected by the movement to go green. Because of this, the traditional contracts and project models don't necessarily deal with these issues and will have to be re-evaluated on a project-by-project basis from both a cost-and-risk-based perspective for owners, contractors and designers. We simply seek to point out that the ship is sailing – or arguably has sailed – and that those in the construction industry need to become educated on these standards, while at the same time realizing that the difficulties in meeting new green goals call for change within the business model and overall atmosphere of modern construction. The real question becomes whether there is a defined and repeatable green standard, and what the implications are.

What Drives the Result?

The decision to go green is arguably a moral decision. Like most moral decisions, however, there is an underlying financial component in the form of tax breaks that incentivize individuals to take the morally higher ground. The benefits, however, are often one-sided in favor of the owner, while the risk falls to others to achieve the results. The true costs of going green must be analyzed from the perspectives of all parties involved. For the green movement to succeed, it must be presented from an economic, as well as moral, perspective, and the costs of the same must be built into the project on the front-end.

Until the industry as a whole truly studies and has time to digest the effect and impact of this green movement, the buzz may continue, but the end-results will fall short of the true purpose of the green movement and overall sustainability. Otherwise, the danger is that the parties will focus more on meeting arbitrary standards and less on what impact the project itself has on the environment surrounding it and the direction of today's business model for how we in the industry move to build our future.

Defining Green Construction

An ideal plan for sustainability in new and existing construction takes into account conservation of fossil fuels onsite, recycling of waste and building materials, the use of local suppliers and materials or the construction of buildings designed to withstand changes in climate and environment through alternative interior design features. However, a good design can't fix a broken business model, and the current construction mechanism and model makes it difficult to adopt a one-size-fits-all standard of evaluating construction projects for their green efforts or results. What green construction really means and just how it affects owners, contractors, architects and the attorneys representing them is truly yet to be determined.

The most common method seems to be using the standards first developed in 1998 by the USGBC, commonly referred to as Leadership in Energy and Environmental Design (LEED). The group's goal is to promote the development of sustainable and energy-efficient buildings. The mechanism for doing so is through the development, registration and ultimate rating of buildings as certified silver, gold, or platinum. LEED standards

are available for homes, neighborhood development (in a pilot program), and a wide range of areas for interiors, new construction and schools/retail/healthcare.

LEED standards however, are updated and changed and still suffer from some arbitrary determinations and weighting on a point system that makes it costly and difficult to determine if they truly meet the goal of sustainable development. One thing is certain: If LEED is not achieved, an owner may have committed substantial additional resources and failed to achieve the financial benefit that underscores the moral approach of green construction.

Challenges Ahead

Three examples illustrate the issues which may arise in the modern construction environment and help to shed light on the difficulties in going green, absent development and alternative project structuring.

With the added benefit of green building comes the loss of flexibility necessary to adapt to the ever-changing environment on any construction project. The focus on local supplies as one way of meeting LEED standards provides an example of this lost flexibility. It will require the parties to analyze and allocate risk in detail to determine who shoulders the burden of guaranteeing the end-result and whether such local products are used during a time-strapped project. Contractors have generally allocated this risk by using different suppliers across a wide range of localities, especially in a time crunch. Will the contractor now risk breaching a warranty by failing to use pine lumber from Mississippi or shale from Virginia when the local supplier is overwhelmed? This potential catch-22 could place the contractor in the untenable position of facing liquidated damages by failing to complete the project on time. At the same, the contractor could lose points under the LEED system and risk a claim by the owner if the project doesn't become certified under the green goal originally set by the owner.

Cost issues and public projects raise the question of who foots the bill of going green to whether it is really worth the cost. The Washington Nationals' new stadium might become the first major league baseball stadium in the United States to obtain LEED certification. It used innovations ranging from low-flow restroom fixtures and the recycling of 5,500 tons of materials from the building site to the use of a sophisticated super sand filter system located in six areas throughout the stadium, to protect the nearby Anacostia River from trash and contaminants from the stadium. However, the citizens of Washington, D.C., may have different ideas about footing the mammoth bill for this project through the use of tax dollars. This serves as an example of the attitudes that all parties on a private project may be forced to deal with, as well.



Meeting green standards is not going to be easy. The difficulty in meeting LEED standards and their overall impact on the surrounding neighborhood is being analyzed, but continues to demand review. The laudable goal of redevelopment in New York after 9/11 focused on going green around Ground Zero. However, reviewing the larger picture in New York demonstrates the difficulty of meeting such standards. As of January, there were only 15 LEED-certified buildings total in New York City. The cost of certification and the need to plod through the point system make it seem restrictive and unfeasible for many small and medium-sized developers and firms. Further, there is concern over the focus on single projects, without reviewing their impact on the surrounding neighborhood. These issues are being dealt with through the development of LEED for Neighborhood Development standards, but this simply adds another piece to a developing puzzle that the construction industry as a whole has failed to grasp. ■