

Emerging Green Building Legal Issues

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About the Authors

Roger Haerr has experience in complex construction; commercial; real estate; business; environmental and insurance litigation; trial; appeal; AAA and JAMS arbitration; and mediation. Mr. Haerr is leader of the Construction Law group and assistant practice group leader of the Real Estate & Environmental Litigation Group.
rhaerr@luce.com
www.luce.com/rogerhaerr

Erin Maysent represents clients in all aspects of real estate litigation, including easement disputes, purchase and sale disputes, commercial contract disputes, construction defect litigation, and commercial landlord/tenant disputes. Additionally, Ms. Maysent has experience advising clients in environmental disputes before administrative agencies and advising clients on compliance with product safety laws.
emaysent@luce.com
www.luce.com/erinmaysent

> **Roger C. Haerr** > *Partner*

Erin E. Maysent > *Associate*

Green design and construction are more than a fashion trend. The federal government requires that new construction and major renovation of agency buildings comply with certain green guiding principles. At the state level, California's Green Building Standards Code (CALGREEN) - the first legislation of its kind - goes into effect next year for all new buildings in California. There may be other mandates adopted by local or state government entities, including the University of California. This article highlights legal issues associated with green buildings.

What is green building?

The answer is: it depends. Perhaps the most well known certification is the Leadership in Energy and Environmental Design (LEED) promulgated by the US Green Building Council. Another is the Green Building Initiative's Green Globes program. Yet another is the National Green Building Program created by the National Association of Home Builders. All of these standards hold in common various environmentally conscious goals, including reduction of energy, water, and waste.

Why is green building important?

In addition to the environmental benefit of sustainability, there may be substantial tax, energy, and financing incentives available for green buildings. In addition, green buildings contain prospective benefit in the form of reduced operations expenses over the life of the building. The idea is that incremental increased costs paid upfront will be returned in a relatively short period of time in the form of incentives and/or operations savings.

What legal issues does green building raise?

Aside from compliance with performance standards and regulations, a myriad of legal issues arise from green buildings. For example, the failure to achieve green certification may result in the loss of important financial incentives. That is exactly what happened in *Shaw Development v. Southern Builders*, where an owner sued its contractor for over \$600,000 in lost tax credits when green condominiums failed to achieve required LEED certification. In addition, there may be tail liability exposure for green buildings long after completion because of unachieved anticipated savings in energy efficiencies.

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Contractual allocation of risk for achieving green standards in design and construction becomes critical. Contract language has been developed by various industry groups, such as the Associated General Contractors of America and the American Institute of Architects. Depending upon whose interests are at stake, legal consideration should be given to, among other things, green building experience, due diligence, agreed performance standards, warranties, allocation of responsibility, risk shifting to subcontractors, indemnity, maintenance obligations, and consequential damages.

Like consideration should be given to obtaining available insurance and bonds because green buildings may present difficult coverage questions. For example, a design professional's liability policy may attempt to exclude coverage for express contractual warranties. Similarly, coverage questions might emerge on whether a performance bond would include liability for anticipated energy savings after the building is completed.

Finally, participants in the green building industry need to be aware of possible exposure to misrepresentation and/or unfair competition claims because of aggressive green marketing and differing green performance standards. Advertising materials should be scrutinized and disclosures enhanced. Designers and builders should be particularly concerned about inaccurate promises or forecasts of future building performance.

Green building is here to stay. Recognizing the associated legal issues assists industry participants in achieving business objectives and meeting performance expectations. Ignoring green building issues may not only deprive projects of valuable incentives, but may also compound significant exposure to design and construction risk.

> About CREST

Luce Forward's Climate Change, Renewable Energy & Sustainable Technology (CREST) group takes an interdisciplinary approach to the needs of clients in this cutting edge sector. Attorneys from virtually every practice area in the firm combine their expertise to provide comprehensive solutions to the industry's diverse and complex legal problems.

As a result, Luce Forward is able to offer a full spectrum of legal services to clients across the industry, from the sponsors, developers, power purchasers, and financing sources of renewable energy projects, to the manufacturers and providers of new sustainable technologies, to the companies that insure evolving categories of climate change risk.

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