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Green Building Risks

What You Need to Know

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Minimum green building standards promulgated by the International Code Council (ICC) and American Society of Heating, Refrigeration, Air-Conditioning Engineers (ASHRAE) may dramatically impact the U.S. construction and real estate markets. The primary goal of these standards is to articulate minimum code requirements for sustainable building practices. However, with the introduction of new rules always comes risk. More specifically, when these minimum criteria for green building practices are incorporated into building codes, architects, engineers, and builders will face increased litigation risk for green building.

In January 2010, ASHRAE released the first comprehensive green building standard written in mandatory code language – ASHRAE 189.1, *Standard for the Design of Hi-Performance Green Buildings Except Low-Rise Residential Buildings*. ASHRAE developed this standard with the assistance and partnership of U.S. Green Building Council (USGBC). The ICC is developing its own green building code titled the International Green Construction Code (IgCC) – to be finalized in March 2012 in collaboration with ASTM International and the American Institute of Architects (AIA). Neither standard is a green building rating system, but rather a green building code to be adopted on a mandatory basis by jurisdictions across the country and around the globe. IgCC will include ASHRAE 189.1 as a jurisdictional compliance option, meaning 189.1 can be used in any jurisdiction that also adopts the IgCC. Unlike the plethora of green building certification systems flooding the market these days, 189.1 and IgCC will be the green building codes.

What does this mean for architects, engineers, and builders? It means that these and other building stakeholders should be mindful of jurisdictions that adopt and incorporate the requirements of 189.1 or IgCC into their building codes. Again – these are not voluntary provisions. In such a jurisdiction, architects, for example, will be required to design a building that satisfies the mandates of these green building codes. If the building design violates a code provision, which results in damages, the architects could be held negligent per se.

Have any jurisdictions adopted 189.1 or IgCC? Not yet. The ICC's IgCC will not even be finalized until next year. But these authors believe that green building codes will proliferate in the next five years. The ICC is a big-time player in the building code business. It develops the codes used to construct residential and commercial buildings such as homes, schools, and hospitals. So the ICC's active involvement in advancing sustainable building practices is significant because, historically, local building regulations have been based on model building codes. Meeting green requirements will likely become as critical to code compliance as satisfying electrical and fire safety requirements.

Unfortunately, the adoption of green building codes may increase the litigation risks for architects, engineers, and builders involving three critical areas: (1) building code non-compliance; (2) deficient employee training/defective design or installation in relation to new green building materials; and (3) inadequate contract language.

It sounds obvious, but at a minimum, building designers and contractors must construct buildings according to code. That means they need to (1) understand the green code requirements of their jurisdiction, and (2) effectively inform and train their employees and subcontractors on green techniques and methods in order to satisfy green building code requirements. The education and training component

cannot be overstated. While subcontractors may be familiar with green code categories like site selection and energy efficiency (based on experiences with LEED certification), the stakes are a bit higher with an occupancy permit on the line and perhaps the risk of liquidated damages for delays.

An integral piece of the education and training component involves the use of “new” green building materials. Shortly after LEED’s introduction in 2000, a wave of innovative green products entered the market with the promise of helping builders achieve certification. As LEED’s popularity grew, so did the number of available green building materials (i.e., green roof, air barrier system installation, low consumption urinals). While such devices are exciting and new, they may not be as reliable (or at least as tested) as the more “traditional” building materials. It is critical for engineers and contractors to select and use these new green devices with care. Research your products, as well as the manufacturers who supply them. If feasible, encourage your green suppliers to install the materials themselves (that would probably be their preference). And if you the contractor (or more likely subcontractor) are going to oversee or actively participate in the installation, proceed with caution. An improperly insulated green roof can be a very messy and expensive problem.

It is essential for each building stakeholder to specify their obligations within the four corners of the green building contract and, to the extent possible, allocate their risk accordingly. “Form” green building contracts, even those from the AIA, may not accomplish these objectives. Don’t be foolish. Retain a lawyer to review the contract. Negotiate terms and specify which party is responsible for what action step(s) in terms of the overall building project. If a green building is ultimately not code-compliant or underperforms in terms of energy efficiency, a clear contract can resolve (or at least help clarify) complicated questions about potential liability.

Voluntary green building certifications like LEED, green building tax incentives, and innovative green building materials exploded in popularity within the last decade. Building sustainability was exciting, new, and the possibilities were limitless. Like being in love for the first time, building stakeholders were smitten. But now the green building industry is looking for a bigger “commitment” from its stakeholders. Mandatory green building codes, reduced state and federal dollars, and more rigorous energy performance metrics merit careful attention from architects, contractors, and builders. Green building goals are transforming into green building requirements, which means greater green building risks. In sum, proper preparation and timely attorney consultation can reduce liability exposure.