



Teaching an Old Dog (and hopefully a few others) New Tricks about “Green”

by Tom Alexander

I, like many, am a proponent of natural resource preservation and energy conservation. And while I have practiced commercial real estate law for 16 years, it was only until recently that I began to be exposed to green buildings or sustainable development issues. When clients first started coming to me with questions on the impact of green development on leasing and local regulations, I found that I had many of the same questions. Fortunately, I work at a law firm with three attorneys whom I would describe as “green gurus.” They are all LEED® AP, meaning they are recognized by the US Green Building Council (“USGBC”) for their knowledge on green building systems and operations. For those that may not know, the USGBC is a private, non-profit organization that created the LEED building rating system. Collectively, I would say these three attorneys have the answers to all things green.

As I thought about the questions I have faced from my clients, it occurred to me that there may still be many small businesses or property owners out there that have many of the same questions. So, I sat down with our green attorneys — Joey Vossen, Julie Perrus and Mike Mergens — and asked them to share their thoughts and comments on the issues facing businesses/landowners and their outlook for the future of green building.

What is a “green” building?

PERRUS: Green means different things to different audiences. There are a variety of standards applied to green buildings - examples include: Energy Star; Minnesota’s B3 Standard; USGBC’s LEED rating systems; and Minnesota GreenStar for residential homes. Green may mean anything from simple energy updates to entire remodels or construction projects that incorporate everything from recycling on-site waste to utilizing grey

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water to high-performance indoor air quality systems. It may even mean positioning windows in a way that enhances day lighting and outside views, which has been found to increase employee performance.

VOSSEN: A green building may also take into account the site specifics and the location. For example, was there environmental remediation at the site? Or is the building on a transit line or located in a business corridor, thereby increasing opportunities to use multi-modal transportation? Many of the LEED rating systems take into account the site specifics of the building. So from a property owner/developer perspective, a green building often involves not just the building but the land and associated land use regulations.

MERGENS: From a litigation perspective, the answer to this question is very important. If you advertise to potential tenants that you have a green building, you could face a lawsuit for misrepresentation or violation of the Minnesota Consumer Protection Statutes if the building is not in fact green. The same is true for contracts. If your construction contract requires you to build a green building or your lease requires you provide the tenant a green building, you could face a breach of contract lawsuit or termination if your building does not meet the definition. That is where the standards come into play. They provide an objective basis to demonstrate that you have a green building.

What are the issues related to building performance and green rating systems for residential and commercial buildings?

PERRUS: Currently, there isn’t a true common language relating to building energy performance that would allow business and property owners the opportunity to appropriately disclose or label their buildings or for buyers to understand the energy consumption of the building that they are purchasing. The federal Energy Star program, which is an energy efficiency rating system for buildings and products, is probably the closest thing we have. There has been a move to authorize the EPA to develop model energy labels, possibly based on Energy Star, for communicating in a straight-forward way the actual energy use and the potential performance levels of both residential and commercial buildings. The best model would provide this type of rating system as a voluntary disclosure on both new and existing buildings which would allow consumers to review building performance in a way that is equivalent to the “miles-per-gallon” disclosure we see when we purchase a car. Consider a home-buyer who can actually factor the monthly energy costs of the various homes they are looking at into their budget. When consumers are given this opportunity, high-performance buildings will become the norm.

We have some clients developing to LEED or other green standards; while others are wondering why build green. What are the benefits and costs of a green building?

VOSSEN: The benefits are going to be specific to client needs. For some, it is a marketing advantage. Their tenants want to be in a green building, to market a specific sustainable product or capitalize on a core sustainability initiative. Some clients value energy efficient buildings for cost savings. For other clients, we may need to strategically respond to pending regulation either at the local or state level and changes to building and zon-

ing codes. As local, state and federal government review environmental implications of buildings and costs of infrastructure, we will undoubtedly see an increase in development incentives and regulations.

MERGENS: As for the costs to go green, the amount, if any, of increases in costs is dependent on a wide variety of circumstances such as the rating system used, the experience of the contractor working with that system, and when the decision is made to incorporate sustainable features. When sustainable features are an add-on to a conventional building it is likely to cause an increase in cost. When sustainability is part of the first design phases there does not need to be an additional cost. I would also note that studies have shown that green buildings have lower operating costs, fetch higher rents with greater occupancy rates, lead to greater productivity for its occupants, and result in higher building values.

What are some of the current or future permitting and regulatory issues surrounding green buildings or sustainable development, and why do I need an attorney knowledgeable in this area?

MERGENS: Anticipated federal climate change and energy legislation will have a significant impact on the real estate industry. Legislation now pending in Congress includes provisions to increase a building's energy efficiencies. Further, most believe that in the very near future we will be functioning in a carbon-constrained world, whether that is through a cap and trade program or a carbon tax. In a carbon-constrained world, large-scale real estate developments, especially those in colder climates, will need to account for their emissions and high performing buildings could be eligible for offset credits or other climate-change related incentives.

PERRUS: Regulatory requirements for development become more complex all the time. Minnesota's environmental permitting structure is up for major reform in the next couple of years. State and local incentives and mandates relating to energy performance and sustainability are also growing in number. Across the country, cities are beginning to require LEED certification for private development – Washington, D.C., Boston and Los Angeles all require strict environmental standards on private-sector construction. Boston's zoning code requires all new and renovated building projects of more than 50,000 square feet to earn either LEED certification or approval by the Boston Inter-

agency Council, which incorporates LEED checklist items and Boston-specific credits. Multiple smaller jurisdictions have followed in their footsteps. Locally, we are seeing an uptick in sustainability-minded planning, including the incorporation of LEED standards into zoning codes – more are expected in the near future as local governments bring zoning in line with their recent comprehensive plan updates. Having an attorney that understands the details of all aspects of green development can really assist in the approval process – from communicating with planning staff, to navigating the application process, to negotiating entitlements.

VOSSSEN: For the developers I work with, the key advantage in having an attorney knowledgeable in this area is that specific references to LEED are used in lease negotiations, purchase agreements with government entities and development approvals. It gives my clients a competitive advantage to know that I understand not only the concepts behind these standards, but also the impact on their business.

MERGENS: The short answer is that the decisions involving green buildings and sustainable development involve legal rights, obligations, and incentives. If you do not have an attorney well versed in this area, you risk losing rights or missing incentives, creating legal exposure for you or your business, and making long-term business decisions that do not account for potential changes in regulatory framework that many consider inevitable.

While we see a lot of articles and seminars on green development, how popular is it here and across the county? Is it here to stay?

MERGENS: If anything, the presence of sustainability in building codes, zoning ordinances and environmental regulation is going to grow. The world population is nearing 7 billion and is expected to pass 8 billion by 2020, causing ever increasing pressure on the world's limited supply of resources like potable water, food and fossil fuels. Cities must also account for ever-increasing waste water treatment, refuse disposal, and storm water management. That is not to say that it will remain a hot button issue. Much as compliance with the Clean Air Act or Clean Water Act, I believe that sustainable development will be standard operating procedure for the real estate industry with federal legislation providing nationwide minimum compliance standards.

PERRUS: This has been the standard on the coasts. The Midwest is catching up. Participation in conferences and seminars continues to increase. The regional Greening the Heartland Conference will take place in Minneapolis this spring and is expected to have over 1,000 participants. This is the seventh annual conference, which moves around the Midwest, and provides significant local and regional exposure for companies focused on green. I don't see any of this going away.

VOSSSEN: Tenants, employees and consumers are demanding a sustainable option. The business case for green has improved dramatically over the last several years reducing the typical initial cost increases from 10 to 2 percent for green building. Locally, metropolitan cities just completed their comprehensive planning process, and many cities included sustainability initiatives. Next on these cities' agendas is to adopt zoning regulations to implement the sustainability goals. With the market and government both demanding green, we will only continue to see increases in green development.

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