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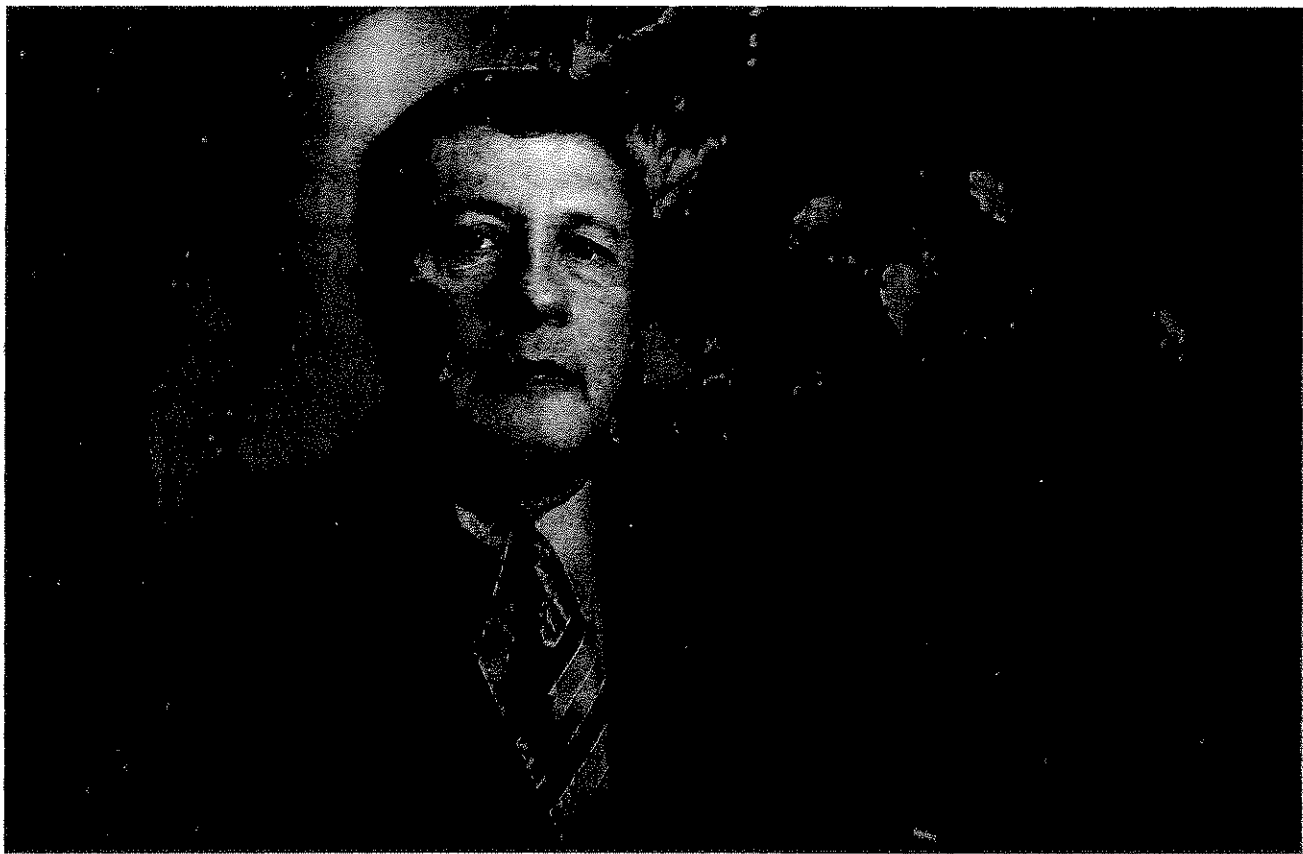


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THREE KEYS TO AVOIDING LEGAL PROBLEMS IN YOUR GREEN BUILDING PROJECT

By Roger W. Bradley

Central New York is enjoying an entrepreneurial renaissance, with numerous research institutions and startup businesses all focusing their attention on new opportunities created by the green movement. Overlooked by many is that Syracuse was the home to green innovation long before \$4-a-gallon gasoline made it the cool — and smart — thing to do.

For example, the U.S. Green Building Council was founded by our own Rick Fedrizzi more than 10 years ago. USGBC's Leadership in Energy and Environmental Design Green Building Rating System has become the de facto standard for green building, and the organization's membership has grown to more than 15,000 organizations across the country. Locally, other groups making a significant contribution in green building include the USGBC New York State Upstate Chapter, GreeningUSA and the Syracuse Center of Excellence in Environmental and Energy Systems.

I have encountered a number of issues critical to green building. They range from securing LEED certification to ensuring expected tax incentives or government rebates. Unfortunately, however, words like "green," "sustainable" and "renewable" are tossed around casually in marketing materials and contract proposals. This creates a serious risk of misunderstanding, which, in turn, can all too quickly spawn the disputes out of which litigation is borne. Design professionals, architects and contractors should all be careful not to create unrealistic expectations among their clients

in the planning and execution of green building projects.

With those thoughts in mind, there are three keys to avoiding legal problems in relation to a green building project: communication, project integration, and risk recognition and management.

Communication. One of the biggest challenges of a green building project is communicating the potential benefits of a green building to a client in a manner that doesn't put you at unnecessary risk. Avoid the use of terms like "green," "renewable" and "sustainable" in marketing materials and project proposals if you cannot connect those terms to tangible, and preferably measurable, aspects of the completed project.

For example, if the project will achieve certain energy or water-use efficiency, describe those aspects of the project in terms of existing standards of measurement. It is essential to draft contracts with specificity and certainty, so the parties clearly understand what they are bargaining for.

It is highly advisable for contractors, architects and design professionals to regularly consult and use the U.S. Green Building Council's Web site for the use of proper terminology, and the LEED point system to ensure that they don't overpromise and underdeliver on the finished project. Remember, only USGBC can certify a building. Others can only promise. Unmet promises can quickly turn into disputes, leaving the parties in a stalled project and a welter of litigation.

Integration. This is a key factor in the success of any green »

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project. Owners, tenants and other project stakeholders are concerned with the performance of the entire completed building, not simply the construction of any particular system, as is typically the case in an "ordinary" construction project. It is therefore often beneficial, if not essential, for larger projects that the general contractor, architect, interior design professionals, subcontractors and material suppliers all meet with the client for one or more planning meetings. These meetings are known as "design charrettes" and are meant to lay out the respective responsibilities of the parties, how their systems will interact, construction time lines and how the interplay of various systems can impact overall design.

For instance, site orientation of a new green building on a property can impact how much direct sunlight it receives and from which direction. Working in conjunction with those responsible for the selection of building envelope and roofing materials, the team may be able to reduce the size requirements of mechanical systems such as HVAC as originally designed.

Although "soft costs" of a project increase with these early planning meetings, the overall cost of the project may be reduced because of fewer delays, change orders and claims in the construction process attributable to the better integration of team members, while reducing the future operating and maintenance costs associated with the completed building.

Another key benefit of an integrated team is to identify the party who has responsibility for ensuring compliance and certification at the conclusion of a project. In ordinary construction projects, once a certificate of final completion is secured, the process ends. In green building, however, there is still much work to be done, in terms of securing certification from the U.S. Green Building Council and complying with the filing requirements for tax incentives and government rebates in relation to the project. It is these financial benefits that help make many green projects cost-effective. Inattention to details in specific integration responsibilities can leave the parties in the throes of litigation while the much-anticipated benefits of the project are lost.

Risk Recognition and Management. Finally, and perhaps most importantly, each party must be aware of the

allocation of risks in any construction project. This is especially so in green construction, where certifications, compliance and tax incentives are at stake. Careful drafting of contracts is therefore essential. All parties must know the systems and activities for which they are responsible so they can plan accordingly. For example, architects must be careful to avoid giving warranties or else risk losing coverage under their professional liability insurance.

Of significant concern is the availability of green building materials as may be specified for the project. Increasing demand may lead to project delays or the substitution of materials by subcontractors that may not be acceptable to the client.

The questions that all parties to a green building project should ask themselves are: "What happens if I fail to meet my performance obligations? Who is accountable, what are the remedies, and how can I protect myself?" Although green building is an emerging area, these are not theoretical concerns. Eileen Clinton of the risk management team at Brown & Brown Empire State and a member of the Greater Syracuse Chamber of Commerce's Green Team, has already seen potential claim scenarios arising out of just these types of concerns. So be prepared and review your potential risks and liabilities closely.

Green building has slowly been taking root over the past 10 years around the country, and that trend is rapidly accelerating. The benefits of more efficient use of energy and water and living and working in healthier environments are self-evident. Green building accounted for only 2 percent of all new construction in 2005 but is expected to account for 10 percent of all construction by 2010. If you plan accordingly, communicate and work well with your partners and your customers and understand and manage your risks, green building will be a "win-win" situation for all. Failure to do so, however, could lead to consequences that may prove ominous. ■

Roger W. Bradley is a member of the firm of Melvin & Melvin, where he has specialized in construction law for more than 30 years. He is actively involved in the green building movement and provides legal services and counsel to clients in the development and implementation of alternative/renewable energy projects including wind, solar, water and biomass as well as other technology applications.