

perspectives

Seven Tips for Managing Risk While Building Green

Are You Prepared to Face the Risks — and Rewards — of 'Going Green'?



Don Neff is president of La Jolla Pacific, Ltd., a leading construction risk and quality assurance firm headquartered in Irvine. Jay Freedman is a partner in the Newport Beach office of Newmeyer & Dillion LLP, a prominent statewide law firm, and specializes in construction and business litigation.

Although green building has become more prevalent, there is still no generally accepted definition or standard. "Green" means many things to different people, from recycled products to energy efficiency to indoor air quality. Here are several tips for builders deciding to build green.

Don't be shy — ask questions!

To ensure a successful project, the builder must take active steps to understand his or her — or, in the context of working with or acting as a general contractor, the owner's — objectives and then communicate those goals to the entire design and construction team. Builders and designers need to ask questions to make sure that the goals of all parties have been identified and communicated. As sustainability garners more and more media attention, many people will simply assume that green features and design will be incorporated into new projects. Reaching agreement on what and how the approach to green is accomplished will determine the overall success of the project.

Various voluntary green building programs are offered at national, regional, and local levels that provide certification of compliance to builders. These include the California Green Building program supported by CBIA, and LEED (Leadership in Energy & Environmental Design), and they offer differing levels of rigor and performance standards.

Put a new focus on risk management and insurance.

Good risk management practices call for a holistic approach, encompassing the design/pre-construction, construction, and

post-construction/maintenance phases. The builder or owner setting up a green project must identify a single "green" point-person, whether it is a LEED Accredited Professional (AP) or someone else, who must have ultimate responsibility for making and documenting green decisions throughout the project (and these duties should be properly documented in a contract).

In the pre-construction phase, there needs to be plan and specification reviews for green building designs and components to verify conformance with the identified goals and objectives. For example, an objective to achieve higher indoor environmental quality will require that low-VOC (volatile organic compound) materials, such as paints, sealants, and adhesives, be included in the specifications. This level of detail is rarely found in the architectural plans, though it is typically addressed in the project manual, trade scopes, and the procurement process.

Builders need to re-examine all of their standard contracts to ensure that they address issues that will be encountered in the green project. They should specify that innovative products and technologies may be used and that all of the project objectives may not be realized. The builder should also expressly disclaim any warranty or guarantee that any certification will be achieved.

Builders must also pay attention to their insurance and how to cover possible economic losses arising from green issues. Contract or warranty claims concerning air quality or energy efficiency, and costs for re-commissioning systems, are generally not covered by standard CGL policies.

During-construction field observation

and documentation processes provide the forum to verify that not only the actual design and green specification is implemented in the field construction practices, but the quality of that installation is per industry standards of care. For example, one such project five years ago required low-VOC paint products. Upon field observation, the painter's supply bin at the job site revealed that the wrong paint was delivered and used in the model phase of the project. After the fact, the model homes had to be redone to correct the mistake of the trade contractor.

The post-construction component of risk management for green building is more complex and worrisome. Homebuilders can easily influence their design, purchasing, and construction process, but are somewhat more constrained to manage the homeowner's lifestyles, which bear directly on how green or sustainable a home can become. Educational awareness thus becomes an important requirement for homeowners also.

Be aware of the perceived heightened standard of care.

At least in the short term, building green will require builders to use different materials and construction practices. While some of those materials and practices may have been used for years in other construction areas, they will be considered new to residential construction.

Unfortunately, many experts are now using the phrase "rising standard of care." At the very least, we can expect plaintiffs' attorneys to argue that green builders should be subject to a different standard of care. This message is being reinforced by the U.S. Green Building Council, promulgator of the LEED standards, which states that "[i]t is likely that juries will expect builders to do more to ensure proper construction and builders must be prepared to meet the juries' expectations."

Know when to be quiet, and when to communicate.

Builders must recognize that buyers bring to the process unspoken assumptions and expectations as to what constitutes "green." Project marketers need to determine the particular buyer's interest, take steps to reduce

any unfounded expectations and document the process. Plaintiffs often recall motives during their depositions that they did not have at the time of sale or construction.

Simply put, a lack of communication at the beginning of the project or during the sale may lead to a lawsuit even though there are no defects.

Builders must pay close attention to marketing materials and sales presentations. They should not promise anything themselves, but, if possible, refer to manufacturer's materials, governmental agencies, public utilities or other groups, such as one

Plaintiffs often assert fraud claims because they think that they create settlement leverage, a prospect that will likely become even more commonplace in green building.

of the voluntary certification programs, to support any claims being made.

Plaintiffs often assert fraud claims because they think that they create settlement leverage, a prospect that will likely become even more commonplace in green building. Generic claims of increased energy efficiency, decreased energy costs, and improved air quality are both subject to interpretation and to homebuyer lifestyle choices, potentially creating liability for the builder. These issues will also be a likely source for contract and warranty claims.

Pay attention to local rules.

Building green often means building differently. Before committing to design and construction, builders need to ensure that their means and methods comply with the local building codes. A project based on the use of reclaimed water, for example, may be moot if the local jurisdiction does not allow its use. This may also present an opportunity to educate officials as to the benefits of various green building products and techniques.

Be wary of new technology and building materials.

As builders incorporate new technology, they may encounter unexpected conflicts. For example, one Southern California builder discovered that mixing a tankless water heater with low-flow shower heads resulted in too little water passing through

the system to cause the water heater to activate. In a second scenario, if a builder's goal is to achieve high indoor air quality, recycled hard-surface flooring may be a better option than recycled carpeting. This is another example of the need for a holistic approach to incorporating different finishes and assemblies in conjunction with each other.

Another factor to consider is that some new products or technology may not be readily available. If a builder is depending on a very specific building product to meet project goals, how would a last-minute materials change affect the outcome?

Perhaps the builder was depending on that specific product for a LEED credit and the project misses its targeted certification level by one point. There should be ample research beforehand, both on the product itself and its availability.

With new technology also comes an installation learning curve in the field. As noted earlier, when incorporating new products or assemblies into a project, trade partners need to be trained and comfortable working with them. No matter how great the product is, a poor installation job in the field is always a liability.

Be aware of heightened scrutiny.

Many states, counties, and cities are now providing economic incentives to build green. Builders can receive tax credits, rebates, reduced permit fees, and expedited permits (which speed up the project and can reduce carrying costs). As economic incentives to go green increase, there will be an increased exposure to "green washing," meaning an exaggeration of the actual environmental performance of the home or substitution of inferior goods for specified "green" materials. Builders can expect to see more public scrutiny of their projects and claims. ☐

Don Neff may be reached at drneff@lajollapacificltd.com; Jay Freedman may be reached at jay.freedman@ndlf.com.