

*by Roy Pachecano*

Today, the topic of "green litigation" is seldom talked about, but it remains an area of awareness that should pique the interest of business owners engaged in adopting sustainable projects. The arrival of green design--that new discipline that has been the buzz word in the boom years--will become subjected to a new stricture: the testing of sustainable design and construction in the down cycle as seen through the lens of design and construction litigation.

It is no surprise for any seasoned professional working in the design and construction industries over the past several decades to see a basic trend in boom-bust cycles. A decline in design/construction activity precipitates increased defaults, claims and related design/construction disputes. Added to this is the quality of workmanship that declines when projects are stressed financially and underwriting pressures require value-engineering studies that likely compromise the performance of vital building components. This has occurred as a result of underlying financial changes in the design/construction industry. Thus, a building's ability to perform at a higher standard than non-green certified dwellings--performance being a key element in complying with green guidelines--will be heavily scrutinized and place the design and construction professional at increased risk.

While compliance with green standards is not mandatory, once a builder agrees to adhere to these new rules, he/she does so voluntarily and bears the full burden of proof of compliance. Because the US has not adopted federal mandatory regulations, municipalities across the country are governing how they implement green codes. The result is that there have emerged regions in the US where there is a much greater awareness than ever before of the need for risk management and a greater awareness of understanding a lack

With a new generation of dwellings completed during the boom, many will face new hurdles: mainly, did energy savings projections meet design expectations? As consumers have become more sophisticated and knowledgeable about green elements and their cost savings, they have to come to expect results. The concept of overpromising and underdelivering suggests that project sponsors fail by misrepresenting the expected, or forecast, building performance. The failures can then result in higher than expected energy costs, higher waste consumption, and/or higher off-gassing of volatile organic compounds resulting from the various building materials selected, including millwork, insulation, paints, and finishes. These particular products and their specifications are intended to create buildings that are healthy to occupy. The movement toward green building in commercial and residential settings has brought more complexity and an

increased risk of "green litigation."

Green, or sustainable, development has expanded from its application originally to commercial office buildings to the development of individual homes, attached townhomes and condominiums, and small and large-scale rental properties. Large-scale master-planned communities are also being developed with the goal of being sustainable.

The concept of risk management in connection with green building requires a focus on three essential elements: 1) integrated design and construction; 2) third-party verification; and 3) measurement of actual system performance through a commissioning (testing) process. It is in the added layers of coordination where builders and developers become frustrated with green design/construction in large part because they did not factor this into their financial proformas.

What appears consistent with the real estate cycle is design/construction lawsuits increase when design/construction activity decreases. Added to this is skyrocketing construction insurance premiums which sets up an environment ripe for litigation as opposing parties have untapped insurance policy reserves. Builders' general experience is that insurance and litigation costs are significantly higher in states like California, Texas and New York than in other states. Counsel representing owners argue that unfettered construction-defect litigation is necessary to protect the rights of owners. Complicating factors in the real estate market--not lawsuits--are driven by a compendium of time-value-of-money problems and decreased debt/equity available for financing. This triggers decreased cash distribution for project labor, whose side effect is a lower standard of workmanship. Design/construction-defect litigation, many argue, is caused by poor construction and a prevailing mindset to refuse to fix costly mistakes.

The paradigm shift from conventional to green building is creating further confusion and increasing the risk of litigation through a lack of clearly defined standards specific to building product, construction processes, commissioning, and actual building performance. While the Leadership in Energy Efficient Design (LEED) rating system administered by the U.S. Green Building Council (USGBC) is a step in the right direction, LEED programming itself cannot control means and methods. As expectations for performance grow, so, too, does the risk of failure for not delivering the promised performance. We will be monitoring this trend closely as it will greatly impact the second generation of green buildings.

The professional advisers at UTSA's Sustainable Business Program can assist business owners develop an internal road map for their sustainable projects to help avoid confusion and

delays and to produce a smoother transition to owning or operating a more sustainable business. Visit the "Contact Us" link above.