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ENVIRONMENT

The concept of environmentally sound development practices remains relatively new for the commercial real estate sector, but already the courts are breaking new ground with decisions that will have long-term impacts. In this article, the authors highlight a series of representative lawsuits that illustrate the unique aspects of green building and the courts' dispositions of such cases. They also note that the legal system has just begun addressing these newly emerging environmental and legal issues and that many more will work their way through the courts as the sustainability movement becomes common practice.

Developments in 'Green' Litigation at the Dawn of the Era of Sustainability



By David Blake, Christa Dommers, and Michael Bauer

INTRODUCTION

Since the first Earth Day in 1970, Americans have become more aware of their impact on the environment. In more recent years as the impact of human activities has been studied, people around the world have become more demanding that the planet needs to be protected. They have become resolute that something must be done to save natural resources, reduce carbon emissions, and reduce waste. These sustainability goals have been captured in the ''green'' movement. Countries, counties, cities, towns, and other localities have enacted legislation to foster these goals, while government and private organizations, like the Environmental Protection Agency (EPA) and the U.S. Green Building Council (USGBC), have made it their mission to accomplish these goals. In our litigious society, these new laws and goals have also spawned new bases for lawsuits. The goal of this article is to provide information on ''green'' litigation.

While much of the litigation mentioned herein may settle before a full trial on the merits, it is worthwhile to gain an understanding of the areas of litigation that have been considered thus far. In light of the fact that litigation in this area has also commenced in the last several years, there are few cases that have been completed to form a body of reference without including those cases that are in their early stages.

GREEN CASES

Challenges to Laws. In *The Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque*, 2008 U.S. Dist. LEXIS 106706 (D.N.M Oct. 3, 2008), and 2010

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U.S. Dist. LEXIS 141814 (D.N.M Sept. 30, 2010), national trade associations challenged three city of Albuquerque green ordinances on the basis that they are preempted by the U.S. Energy Policy and Conservation Act (EPCA), as amended by the National Appliance Energy Conservation Act and the Energy Policy Act of 1992. The EPCA establishes energy efficiency standards for major appliances and expressly prohibits state regulation concerning the energy efficiency of such appliances. The city of Albuquerque's green ordinances apply to commercial, multi-family, and single family buildings, and require that those buildings either satisfy one of two performance-based standards (one of which is LEED Certification at the Silver level or higher) or a set of prescriptive standards that establish minimum energy performance ratings for heating, ventilation, and air conditioning (HVAC) and water heating products, which may exceed those required by the EPCA.

In October 2008, and based on a limited record, the court granted the trade associations' motion for a preliminary injunction enjoining the city of Albuquerque from enforcing its green ordinances pending the resolution of the case. In September 2010, the court granted in part and denied in part the trade associations' motion for summary judgment. The court found that the prescriptive aspects of the ordinances were preempted by federal law because they impose minimum efficiency standards for covered products that exceed those required by the EPCA. However, the court found that the trade associations failed to carry their burden for summary judgment as to the performance based aspects of the ordinances. Thus, although the court did not determine that requiring LEED certification at the Silver level is preempted by federal law, the court allowed that issue to survive to proceed to trial.

Similarly, in *Building Industry Assoc. of Washington, et. al v. Washington State Building Code Council*, 2011 U.S. Dist. LEXIS 12316 (W.D. Wash. Feb. 7, 2011), a trade association, construction companies, and others asserted that Chapter 9 of Washington's 2009 Building Energy Code is preempted by the EPCA. Chapter 9 of Washington's 2009 Building Energy Code requires that residential buildings use 8 percent less energy than a target building, and provides various options for meeting that requirement, some of which require covered products to have energy-efficiency standards that exceed the EPCA. Even if a state regulation concerns the energy efficiency of products covered by the EPCA, it is not preempted by the EPCA if it is contained within a building code and satisfies a seven-part test. The court determined that Chapter 9 satisfied this ''building code'' exception, and granted defendants' motion for summary judgment dismissing all of plaintiffs' claims. The court noted that there appear to be significant differences between Chapter 9 of Washington's Building Energy Code and the city of Albuquerque's green ordinances.

Bid Protests. In *Burchick Constr. Co. v. Pennsylvania State Sys. of Higher Ed.*, 2010 Pa. Commw. Unpub. LEXIS 749 (Pa. Commw. Ct. Nov. 3, 2010), a general contractor appealed the denial of its protest that a public university improperly used a sealed proposal process (instead of sealed bids). Pennsylvania's public procurement code generally requires competitive sealed bidding for public construction contracts unless such bidding is not practicable or advantageous to the commonwealth, in which case sealed proposals may be used. Further, if sealed proposals are to be used, the contracting officer must specify with particularity why sealed bidding is not appropriate. In this case, a public university used sealed proposals for the construction of a student union building. Burchick filed a bid protest arguing that the university was not permitted to used sealed proposals and instead must use sealed bids. The university denied the protest and Burchick filed an appeal. The contracting officer's written justification for using sealed proposals stated, among other things, that the project was seeking LEED certification, which made the coordination and cooperation of the prime contractors essential. The court held that the contracting officer's explanation failed to explain why the LEED aspects of the project rendered the use of sealed bids impracticable, and upheld the protest.

In *Hampton Technologies, Inc. v. Dept. of Gen. Services*, 22 A.3d 238 (Pa. 2011), a disappointed bidder filed a protest alleging that the commonwealth of Pennsylvania inappropriately considered the awardee's experience on LEED projects because that factor was not included in selection criteria of the RFP relating to a $20 million dollar electrical contract for a public project in Philadelphia. Accordingly, the disappointed bidder argued that the commonwealth's consideration of that factor was arbitrary and capricious. The protest was denied and the bidder filed an action to stay the award, which the Supreme Court of Pennsylvania denied. In doing so, the court pointed out that experience on LEED projects was in fact mentioned in the RFP.

Failure to Obtain LEED Certification. In *Southern Builders, Inc. v. Shaw Development, LLC*, Circuit Court for Somerset County, Maryland - Counterclaim Filed February 16, 2007, the parties sued each other for obligations relating to a construction contract to construct a luxury condominium. In particular, Southern filed an action to enforce a mechanic's lien and Shaw filed a counterclaim for breach of contract and negligence. Among other things, Shaw alleged that Southern failed to construct the project such that it complied with LEED certification at the Silver Level, and that such failure caused Shaw to lose tax credits worth $635,000. The case was ultimately settled out of court, the terms of which settlement are unknown.

In *Keefe v. Base Village Owner, LLC*, District Court of Colorado, Pitkin County - Fifth Amended Complaint Filed Feb. 25, 2011, 61 condominium unit purchasers brought suit against the condominium developer, alleging in part that in marketing the condominium, the developer represented that the condominium would be a LEED-certified building within a LEED-certified neighborhood. The purchasers further alleged that neither the building nor the neighborhood are LEED-certified. Each purchaser rescinded his or her purchase contract and sought the return of his or her deposit, as well as damages in an amount to be proven at trial, based upon alleged violations of the Interstate Land Sales Full Disclosure Act (ILSA), the Colorado Consumer Protection Act, fraud and misrepresentation. On March 30, 2011, the court held that the developer violated ILSA by selling the units with untrue statements about the actual square footage of the units as filed with the U.S. Department of Housing and Urban Development.

In *Bain v. Vertex Architects, LLC*, Circuit Court of Illinois, Cook County - Complaint Filed Nov. 4, 2010, a

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homeowner filed suit against its architect for breach of contract alleging, among other things, that the architect failed to diligently pursue and obtain LEED certification for its house. The homeowner seeks damages in an amount to be proven at trial, but no less than $50,000.

Finally, three suits were filed against West Chelsea Development Partners, LLC by condominium purchasers based on the condominium developer's alleged failure to construct in accordance with applicable law, alleged failure to construct a LEED certified green building and other specific alleged failures relating to each purchase agreement. See *Jasty v. West Chelsea Dev. Partners, LLC*, Supreme Court of New York, New York County - Verified Complaint Filed Dec. 14, 2009; *EAI Four, LLC v. West Chelsea Dev. Partners, LLC*, Supreme Court of New York, New York County - Verified Complaint Filed March 8, 2010; and *Barber v. West Chelsea Dev. Partners, LLC*, Supreme Court of New York, New York County - Verified Complaint Filed April 8, 2010. In each case, the sponsor allegedly attempted to force the purchasers to close on the noncompliant unit and threatened to retain each purchasers' deposit. Each case has since been discontinued with prejudice, indicating a likely settlement between the parties.

LEED Certification Obtained With Deviations Standards. In *Gidumal v. Site 16/17 Development, LLC*, Supreme Court of New York, New York County - Complaint Filed May 6, 2010, the owners of a condominium unit filed suit against the condominium developer and architect seeking damages of at least $1.5 million for alleged breach of contract, negligence, fraud, negligent misrepresentation, and professional malpractice. The owners allege that the developer marketed the condominium as being on the cutting edge of ''green'' technology. Further, they allege that although the building is supposedly LEED certified at the Gold level, it deviates from LEED standards with regard to the ''cumulative size of holes and cracks allowing infiltration of cold air.'' Thus, the complaint is based in part on the allegation that the building does not satisfy certain LEED requirements even though it is LEED-certified. On July 20, 2010, this case was transferred to the Civil Court for the City of New York, which hears and determines civil matters, seeking monetary damages up to $25,000.

Delay In *JLB Realty, LLC v. Capital Development, LLC*, United States District Court for the District of Maryland - Complaint Filed March 13, 2009, JLB sued to recover money invested in a failed three-city-block development deal. JLB contracted to purchase two parcels of land from Capital. During the due diligence and title review period of the contract, JLB noted an encumbrance on the property. The encumbrance was a Land Disposition Agreement (LDA) that limited buildable density. The parties negotiated a First Amendment to the contract, which specified if Capital did not obtain the release of the LDA by Oct. 6, 2008, JLB had the right to terminate the contract and recover its earnest money. Capital did not obtain the release of the LDA by that date, but it was not until Feb. 16, 2009, some four months later, that JLB formally terminated the contract. Thereafter, Capital refused to return JLB's earnest money, and JLB filed suit.

As part of its opposition to JLB's motion for summary judgment, Capital argued that JLB should be equitably estopped from recovering its earnest money because JLB's delay in terminating the contract financially harmed Capital. Specifically, Capital argued that because it would not be in a position to obtain a building permit by July 1, 2009, under Baltimore city regulations it would be forced to construct its buildings at the LEED - Silver Level at substantial additional cost. JLB estimated that the additional cost of developing the property based on LEED Silver would be $4 million, and Capital estimated it would be no less than $1.8 million. The court rejected Capital's equitable estoppel argument and granted JLB's motion for summary judgment based upon the fact that JLB had never waived its right to terminate the contract and recover its earnest money. The court further held that JLB had properly exercised its termination right. In its disposition, however, the court did not specifically address the LEED Silver issue. On March 21, 2011, the United States Court of Appeals for the Fourth Circuit affirmed the district court's judgment that JLB was entitled to the return of its earnest money because it had never waived its termination right.

Green Damages. In *Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp.*, 69 A.D.3d 212 (N.Y. App. Div. 2009), Destiny, a developer, filed suit against its lender for breach of contract for failing to fund three draw requests in connection with the development of a mega shopping/tourist destination center in Syracuse, N.Y., known as Destiny USA. Citigroup, which provided financing for the first phase of the project, declared the loan in default and refused to fund three draw requests. Destiny, among other things, requested an injunction to force Citigroup to fund the draw requests. The lower court granted Destiny's request for a preliminary injunction, and Citigroup appealed.

One element required for a preliminary injunction is the prospect of irreparable harm if the relief is not granted. Irreparable harm generally exists when damages cannot be calculated because the party seeking the injunction does not have an adequate remedy at law. In analyzing this issue, the court focused on the green nature of the project. Specifically, it noted that the project is a ''visionary project,'' which has created a ''new financing paradigm for green economic development,'' that it uses newly-created Federal Green Bonds, and that it ''incorporates sustainable design, energy conservation and renewable energy sources on a large scale.'' Based on those green attributes, the court found that the project has no established market value and that any damages that Destiny might sustain if the project did not proceed cannot be calculated with reasonable precision. Accordingly, the court found that Destiny would suffer irreparable harm if the project did not proceed, and it affirmed the portion of the lower court's order granting Destiny's request for a preliminary injunction that compelled Citigroup to fund Destiny's pending draw requests.

CONCLUSION

The cases discussed above are likely the tip of the iceberg, as it seems that ''green'' disputes will only increase as the real estate and construction industries climb out of the ''Great Recession'' and sustainability becomes the rule instead of the exception. The outcomes of these cases and others that continue to arise

will assist all professionals involved in green development, construction, leasing and lending with appropriate predicates for contract drafting and remedies in the event things go wrong in the process.

David Blake is a Leadership in Energy and Environmental Design (LEED) Accredited Professional and partner in the Construction Group in the Washington, D.C., office of Seyfarth Shaw LLP, where he prepares contracts, provides project counseling, and prepares and defends claims in connection with all types of private and public construction projects, including those with sustainable requirements. Christa Dommers is a partner in the Real Estate Group in the Washington, D.C., office of Seyfarth Shaw LLP, where she represents clients in all aspects of transactional real estate, including issues involving sustainability. Michael Bauer is an associate in the Construction Group in the Washington, D.C., office of Seyfarth Shaw LLP, where he has experience representing clients in the transactional aspects of construction projects, as well as the litigation of disputes.

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