

Legally Green

Summer 2009

The recent popular focus on “green buildings” and “green products” is the result of a flurry of campaigns promoting the development of properties having a low impact on the environment, and constructing buildings that integrate the latest building materials and systems technologies targeting goals for energy efficiency, resource conservation and healthier indoor environments. The purpose for this series of “Legally Green” newsletters is to provide a general overview of the legal issues associated with this new set of property development practices.

Sustainability and the Economic Stimulus Plan

The American Recovery and Reinvestment Act of 2009, which was signed into law in February has allocated monies for renewable energy as follows:

- \$16.8 billion to promote energy efficiency and renewable energy
- \$2 billion to promote development of advanced battery technologies
- \$4.5 billion to fund "smart grid" research and improvements.
- \$3.25 billion in loans to the Western Area Power Administration for transmission system upgrades,
- \$3.25 billion in loans to the Bonneville Power Administration authority improve its transmission system
- The production tax credit for wind energy has been extended to 2013, and
- Tax credits for other renewables has been extended to 2014.
- Section 1603 of the Act. allows renewable projects of all types to receive a grant from the Department of Energy of up to 30% of the cost basis of the facility, in lieu of tax credits.. To qualify for a grant, construction of the project must start by December 31, 2010.

The legislation is located at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.pdf or you can view www.recovery.gov for more information about the Act.

Legal Issues Relating to Marketing Vague or Undefined “Green” or “Sustainable” Qualities *by Brian Duggan, Esq.*

Anyone who has been paying attention to the media coverage of the Green Building industry, or those matters associated with the concerns about global warming and the environment has no doubt come across a claim that includes the word “green” as some modifier of a product description, service, service provider, building feature, property development, professional services, etc. In the building trades and property development industry, “green building” and “sustainable development” are newer terms that are also widely used, and in some cases used interchangeably. Legal concerns associated with any claim of some new quality fall in the legal concepts of warranty, either expressed or implied, or in evaluating the intentions (or expectations) of parties to an agreement. By using these newer terms interchangeably, with no clear definition, a person or business entity marketing its goods or services may create differing expectations as to the meaning of these terms within the target audience. If an agreement is made on this basis, there may be initial confusion between the parties as to their expectations for the bargain, and a later dispute, and suit, may arise whereby its ultimate outcome will be that the good or service provider failed to deliver what was promised.

It is therefore critical that any marketing/promotion of a good or service as



having “green” or “sustainable” qualities be clearly defined. Many current discussions of this topic report that there are no clearly defined standards for what is “green” or “sustainable.” Therefore, it would be my suggestion that a company wishing to promote their goods or services in this new industry perform some measure of due diligence in the targeted industry group to determine the proper usage of the term within that industry, or what claims or terms to avoid. I have summarized a few examples below.

The Federal Trade Commission has developed its Guides for the Use of Environmental Marketing Claims, codified in 16 CFR Part 260. The purpose of these guides is stated to provide a basis for voluntary compliance with FTC rules against deceptive marketing practices (§260.1) which are not enforceable regulations, but may be used by the FTC as a basis for enforcing its laws against deceptive advertising.

The FTC Guides provide direction against using vague or undefined terms, or overstating the environmental qualities or benefits of the product or service. The Guides contain some general examples of acceptable versus unacceptable claims.

In 1993, the US Green Building Council (USGBC) was founded, and it later introduced the Leadership in Energy and Environmental Design (LEED) rating system as a pilot program in 1998. Green Building is defined by the USGBC through its LEED rating system, in that it "evaluates environmental performance from a whole building perspective over a building's lifecycle, providing a definitive standard for what constitutes a "green building." (USGBC New Construction & Major Renovation, Version 2.2, Reference Guide, Third Edition, October 2007).

Green Building is defined by the USEPA on its website as: "Green Building is the practice of creating structures and using processes that are environmentally responsible and resource-efficient throughout a building's life cycle from siting to design, construction, operation, maintenance, renovation and deconstruction. This practice expands and complements the classic building design concerns of economy, utility, durability, and comfort. Green building is also known as a sustainable or high performance building." (<http://www.epa.gov/greenbuilding/pubs/about.htm>).

New York State's Department of Environmental Conservation defines "Green Buildings" on its website accordingly: "Green buildings use resources-energy, water, materials, and land more efficiently and effectively and they provide healthier environments for working, learning and living." (<http://www.dec.ny.gov/energy/218.html>).

As can be understood from these examples, the industry definitions themselves are not exact. In order to avoid promoting your products or services in a manner which could result in a legal dispute over what may be found to be vague or confusing claims

relating to green or sustainable qualities, it important to perform some targeted research in the industry group where you will be transacting business. It is recommended that the usage of the term in your marketing literature matches the industry's definitions, and that the stated qualities are measurable and capable of meeting the industry standard, and also capable of withstanding third party scrutiny according to the acceptable industry standard.

Brian R. Duggan, Esq. also has an M.S. in Geology and is a LEED AP, having 25 years of environmental industry experience.



The Dollars and Sense of Designing Green

On Friday June 26, John E. Osborn, Esq. will be presenting *The Dollars and Sense of Designing Green* at NYU's Real Estate Institute. The program runs from 9:00am to 4:00pm and is for continuing education credits for architects and engineers. (AIA/HSW-6 hours. PDH-6 hours)

Attendees will learn to identify and work with materials, methods and systems; construction documents; and contract administration in order to facilitate LEED certification while maintaining schedule, quality, budget, and life cycle savings. Topics include an examination of the architect's responsibility for achieving sustainable design and the role of site selection, hazardous waste cleanup, and storm water and erosion control in achieving LEED certification.

For more information visit ww.scps.nyu.edu

Attorney Spotlight



John E. Osborn, Esq.
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John E. Osborn has over 30 years of experience in practicing construction and environmental law.

He has tried multi-million dollar cases, has achieved successful jury verdicts and has handled arbitrations, administrative hearings and complex commercial litigation in federal and state courts. Mr. Osborn prepares and negotiates contracts, advises construction clients in resolving disputes during construction and renovation and resolves construction disputes through mediation, arbitration and litigation. He has litigated insurance coverage disputes, has defended mass toxic tort claims and has been retained by clients to oversee environmental assessments of their real estate and facilities.

Mr. Osborn teaches Planning, Design and Development as well as Hospitality and Tourism Law and Legal Issues in Hospitality at NYU's Preston Robert Tisch Center for Hospitality, Tourism and Sports Management.

John teaches a day long continuing education class for architects and engineers entitled "The Dollars and Sense of Designing Green" for NYU's Real Estate Institute and earlier this year he presented part of a CLE class for attorneys entitled "It's Not Easy Being Green."

Mr. Osborn has published over 80 articles on subjects relating to construction law, effective contract drafting, real estate litigation, dispute resolution environmental risk management and regulations. Publications include the *National Law Journal*, *New York Law Journal*, *Real Estate New York*, *New York Construction News*, and *The Metropolitan Corporate Counsel*, *The New York Real Estate Journal*. He has also been quoted in *The New York Times* and *New York Construction News*.

John is a member of the Hotel Association of New York City, the Hotel Engineers' Association of New York and the American Hotel and Lodging Association.