

The Green Scene in 2010

By Michelle R. Daley, Shulman, Rogers, Gandal, Pordy & Ecker, P.A.

Although the home building industry has been struggling, the green building industry evolved and grew by leaps and bounds in 2009. Consumer interest in greening their lives has led to Energy Star homes accounting for nearly 17 percent of all homes built in 2009, and although the green building industry is still focused primarily on commercial construction and retrofitting—driven by government, private industry, and educational facilities—statistics show that the residential sector will begin to see more demand for environmentally-conscious construction. As a result of this “green” movement, much “green” legislation has surfaced in an attempt to quickly regulate this booming and profitable industry. Early last year, the Obama Administration and Congress passed the \$787 billion American Recovery and Reinvestment Act with more than \$25 billion dedicated to “green” programs and the United States Green Building Council introduced the new LEED v. 3.0 rating system which, among other changes, introduced the concept of project de-certification. With many changes in a new frontier come uncertainty and a minefield of new liabilities.

This year, green interests set their sights on storm water. The Environmental Protection Agency has announced that it will implement new storm water management requirements for homebuilders, which will not only place more significant burdens on the industry by requiring that storm water run-off from a construction site after a rainfall be nearly free of soil or sediment, but it will raise costs, while not effectively addressing water

quality and environmental issues, according to the National Association of Home Builders. The Maryland General Assembly will be addressing storm water user charges for impervious surfaces—a flat fee for homeowners that would be based on the area of paved surface. This legislation is part of a program called “Maryland 2010: Legislation for a Green Economy Protecting Maryland’s Water, Land and People.”

Because of the onslaught of both federal and state “green” legislation, homebuilders must be extremely careful during contract drafting and keep a keen eye on risk avoidance; practice prudent marketing to avoid Consumer Protection Claims as the Federal Trade Commission, among others, are quickly promulgating environmental marketing guidelines; and weigh the return on investment through tax incentives. “Going green” is no longer a feel-good activity and new legislation and litigation prove it truly isn’t so easy to be green. Unless homebuilders carefully navigate this new frontier, they will quickly find themselves entrenched in disputes that will only be fodder for litigators as very little legal precedent exists at this time. Maryland is at the forefront of “green” litigation as the seminal LEED case, *Shaw Development v. Southern Builders*, was tried on our own Eastern Shore. *Shaw Development* was a dispute involving claims of breach of contract and negligence as a result of the alleged failure by Southern Builders to meet the LEED Silver certification level required under its contract with Shaw Development for a \$7 million condo project. Shaw Development claimed that it lost \$635,000 in tax credits from the State. The case is a good primer for some of the contractual pitfalls involved in green building. Other recent cases have addressed construction defects that result from using “green” materials. As such, consider closely what your contract promises to deliver, the long-term durability and vitality of materials used in construction when providing warranties to buyers, and the consequences that may result if your project fails to meet a certain green certification or, worse yet, faces de-certification.

What you should remember:

- Green building is growing, but is increasingly more regulated—check city and county ordinances and codes, as well as the Maryland Code, and **monitor new legislation**
- **Storm water regulations** are a hot “green” topic in 2010
- Consider all of the **risks and consequences**, especially issues under express and implied warranties, before making guarantees in contracts
- After *Shaw Development*, **how you make a guarantee is vital**—guaranteeing that a project will conform with, comply with, meet, adhere to, and/or be designed or constructed according to a certain standard or certification can and will be interpreted in different ways
- Guarantees of certification and energy efficiency in contracts are risky, especially since de-certification is now possible if projects don’t maintain minimum requirements—**don’t increase your liability**
- Be careful when **marketing** any “green” activity or product
- Pay attention to **tax incentives** that may be available on the federal, state, and/or county levels

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