Opportunities and Risks in Green Buildings

Be careful not to overstate certifications and other environmental achievements.

Adopting green business practices in a challenging economy may seem like a luxury, but some tactics, such as reducing a commercial building's energy usage, actually can save money and make a business more competitive. Problems, however, can arise when the building's green attributes are oversold. Caution is advised when touting a green certification or using terms like "green building" or "sustainable" because mismatches between expectations and outcomes can lead to protracted disputes.

Commercial buildings account for more than a third of our energy consumption, so reducing energy usage through strategies such as changing lighting is a simple step that can reap greater benefits. Right now, 73 buildings in Washington state are competing with nearly 3,000 other buildings around the country in the Environmental Protection Agency's (EPA) "Battle of the Buildings" to see which can achieve the greatest reductions in energy use intensity. The result of these efforts is sure to reduce costs, but adopting a host of other green practices, together with third-party certification, also can make an otherwise traditional building more marketable at higher rents.

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Green buildings come in all sizes, shapes and ages, as do the certification programs to rate them. The more well-known are Energy Star through the EPA, the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) certification and the Green Building Institute's Green Globes. While the certifications vary in their requirements and methodologies, energy usage is at the core of all the programs. In addition, local governments, such as Seattle's, have adopted energy benchmarking and reporting requirements.

Right now, information about a particular building's energy usage is not widely available, but the Seattle Energy Benchmarking and Reporting Ordinance requires that an owner provide performance data, upon request, to specified users such as tenants, lenders, prospective tenants and purchasers. Seattle's ordinance applies to approximately 864 commercial buildings and will add another 634 multifamily buildings this fall. Next April, smaller non-residential buildings (between 20,000 and 49,999 square feet) will have to start reporting. While most buildings won't have a problem, it's likely that the data will show some buildings are not living up to their marketing, which could sow the seeds for a dispute.

Whether the lease even contemplated green may be a threshold problem. Traditional leases typically do not address green issues, such as whether or how to apportion any energy savings between the owner and the tenants. Risk allocation is a particular concern if the building doesn't perform as designed—such as the space being too hot or cold, leading to users supplementing with personal heaters or fans, which then can lead to further erosion of building performance. Both parties should know who bears the risks of less-than-advertised performance.

As the number of green buildings has grown substantially over the past few years, even outperforming the recent economy, so too has the opportunity for disputes. EPA now has more than 16,000 buildings certified as Energy Star, while more than 12,000 buildings are certified under LEED. Tracking actual building performance is becoming even more critical and, in Seattle's case, required. Thus, it's inevitable that litigation will arise when a building doesn't perform as promised. No lease, green or otherwise, can prevent all disputes, but it is important to recognize that green building leases require just as much additional care and attention as the design, construction and operation of the green building. Besides the expense in time and money, a dispute over a building's green attributes also can harm marketing efforts and, potentially, the overall value of the building.

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