

Environmental/Energy Greening Focus

Green building construction and legal exposure

The incentives to “build green” are strong among U.S. corporations, with 82% of corporate America expected to be greening at least 16% of its real estate portfolio this year.¹ Developers see “green” as a market advantage for new projects, employing words, symbols and other depictions to herald their “sustainable” construction and “green” features to attract high-end tenants. Bragging rights aside, however, what do the terms “sustainable” and “green” really mean, and – absent reliable evidence – are such claims legally defensible? What happens if the buildings fail to obtain whatever specified green building certification is attached to the project? Who is liable when the local government will not issue a use and occupancy certificate because of that failure? These are some of the new legal risks in the field of green building construction. This article discusses sources of legal exposure and talks about the potential nature of “green” lawsuits.

Green Marketing Claims

Industry and consumers are being swamped with vague and confusing claims about the environmental benefits of building products and services. The Federal Trade Commission (FTC or Commission), the agency charged with protecting consumers against false advertising claims, has stepped into the fray, seeking to protect consumers by fast-tracking a long overdue update to its “Green Guides,” the Commission’s cornerstone tool for preventing consumer deception in the ever-expanding arena of environmental claims. The update is expected to include new direction to industry regarding so-called “green building” claims, an area in which the Green Guides had previously provided little instruction.

First issued in 1992 and thereafter revised in 1996

and 1998, the FTC’s “Guides for the Use of Environmental Marketing Claims” (Green Guides or Guides)² provide direction to help industry avoid overstating the environmental qualities of a product or service in violation of the Federal Trade Commission Act (FTC Act) prohibitions against deceptive advertising. Neither the Commission nor the Guides set environmental standards. Rather, the Guides describe the basic elements needed to substantiate specific environmental assertions with regard to consumer products and services. The Guides also contain general examples of acceptable versus unacceptable claims. By standardizing the meanings of terms like “biodegradable” or “carbon neutral,” the FTC Guides help industry to achieve clarity in claims about the environmentally friendly nature of products and services.

To determine how to most effectively update the Green Guides, over the last two years the FTC conducted its own research on consumer understanding of advertising terms currently in vogue, such as “eco-friendly” and “sustainable.” The Commission hosted a series of public workshops to solicit comments on the issue. The third, and perhaps last, workshop included an interactive panel on green marketing of buildings and construction.³ Panelists pointed out that determining whether something is truly “green” requires an in-depth life-cycle analysis of the environmental impact of everything from the embodied energy of the materials for the building or product to what can be done with it once it is obsolete. For example, while the term “PVC-free” tends to connote, in the minds of consumers, a more

environmentally-friendly building material, a PVC (poly vinyl chloride) treated product may actually be more environmentally friendly in the long term, due to its longer life and less frequent need to be replaced, leading to less manufacturing and renovation, and the avoidance of the energy consumption those processes require. Experts also suggested that third party certifications such as Leadership in Energy and Environmental Design (LEED®), Energy Star Qualified Homes, Green Globes and National Association of Home Building (NAHB), all of which may have slightly differing standards, should have a place in reliably substantiating whether or not a building is “green.” This place should, however, depend on the impartiality and balance of the certifying entity.

While the Guides “provide the basis for voluntary compliance” with Section 5 of the FTC Act regarding deceptive advertising, “[c]onduct inconsistent with the positions articulated...may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the behavior falls within the scope of the conduct declared unlawful by the statute.”⁴ The FTC actively pursues civil prosecutions against misleading green claims. In the field of “green” energy efficiency claims, for example, the FTC has undertaken recent actions against marketers of home insulation materials. In one of its enforcement actions against the manufacturer of insulation products, the agency alleged that R-value (measure of resistance to heat flow) of the insulation was only one-quarter of what the advertiser

See BUILDING, Page 20



Suzanne M. Avena

Laws affecting solar energy purchases and installation

There has been a lot written lately about the “green” revolution and the use of solar energy. This article will provide a general overview of solar energy basics and the laws and regulations governing solar energy’s installation and use.

Why solar energy?

A solar energy system generates reliable, long-term clean energy. By installing a solar energy system on your house or commercial building, you can reduce emissions of greenhouse gases, reduce your carbon footprint and help reduce our dependence on foreign oil. Once properly installed, a solar energy system will generate clean energy for at least 20 years with minimal maintenance.

How does it work?

Solar panels installed on your roof¹ (preferably facing south to south west with unobstructed access to the sun) use the sun to generate electricity. The sun shines on the solar panels and the energy is transferred from the panels through an inverter (which converts the power generated by the solar panels from direct current to alternating current) and then into your building’s electric service, which is connected to your local utility’s electric distribution system. The more electricity generated by your solar panels each month, the less electricity you have to buy from your local utility and, therefore, the lower your electric bill for that month.



Robert J. Cassandro

Because your building is connected to the utility’s distribution system, any electricity generated by the solar panels in excess of the building’s electricity requirements goes back into the utility’s distribution system. Many utilities will pay the customer for this excess power (subject to certain rules and restrictions). This is called Net Metering.

How much does it cost?

Currently the rule of thumb for how much a solar power system will cost is anywhere from \$6 to \$8 per watt.² That means, for a typical house installation (5kw to 10kw), the cost is anywhere from \$30,000 to \$80,000. For a business installation (50kw to 1mw or more), the cost could be anywhere from \$300,000 to \$8,000,000 or more. I know that sounds like a lot of money, but there are ways to bring the price down.

Despite the high cost of installing a solar power system, federal, state and local governments and electric utilities help subsidize the cost in several ways because it is commonly recognized that the promotion of renewable energy, and solar power in particular, is important to achieving certain societal goals.

Subsidies come in many different forms. For example, (a) many utilities have rebate programs based on the size of the system installed,³ (b) in some States, your solar system will generate renewable energy credits which can be sold to power plant owners that use coal

and oil to offset their emissions,⁴ (c) the Federal Government has enacted a 30% investment tax credit (for business and residential customers) and allows for accelerated depreciation (for business customers only),⁵ (d) several States have also enacted state tax credits,⁶ (e) several local municipalities have enacted laws allowing for property tax reductions⁷ and sales tax waivers,⁸ and (f) through Net Metering (as described above), you may be able to sell your excess electricity to your local utility, thereby further reducing your electric bill.

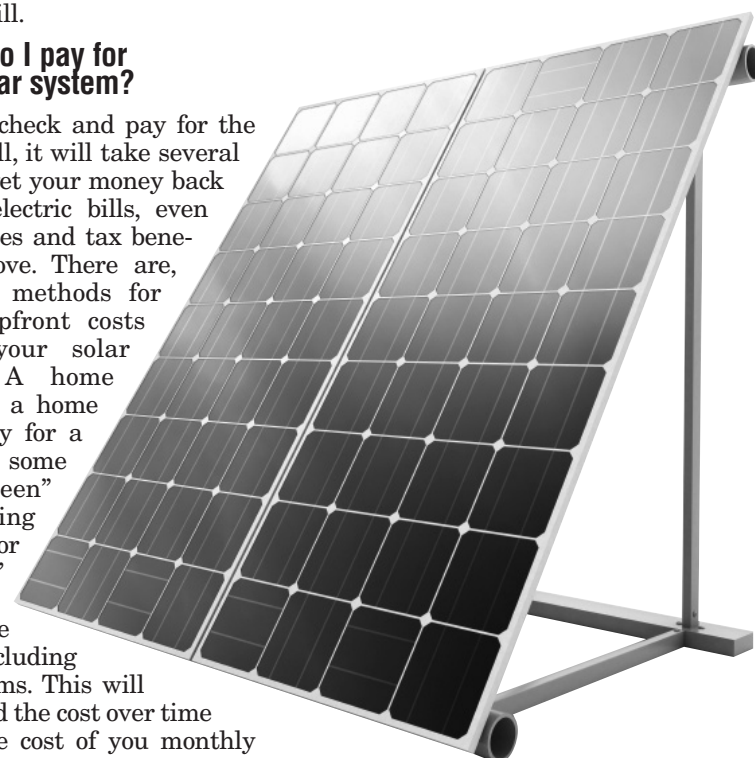
How do I pay for my solar system?

If you write a check and pay for the solar system in full, it will take several years before you get your money back from the lower electric bills, even after all the rebates and tax benefits described above. There are, however, several methods for lowering your upfront costs and financing your solar power system. A home owner can obtain a home equity loan to pay for a solar system and some banks offer “green” financing providing special programs for installing “green” or environmentally friendly home improvements, including solar power systems. This will allow you to spread the cost over time and, hopefully, the cost of your monthly loan payment will be less than the

amount you save on your monthly electric bill.

A business can also use a line of credit or mortgage to fund the solar system. Leasing a solar system is another option; the same way your business would lease any other piece of equipment. No different from the residential example given above, if your business finances its solar system with a lease, you would want the monthly lease payment to be less than

See SOLAR ENERGY, Page 20



BUILDING ...

Continued From Page 3

claimed. A court order required the defendants to pay a \$155,000 civil penalty, revise its claims, and substantiate any future energy-related claims.

If the FTC adds guidance related to green buildings and construction in the next edition of the Green Guides, which is expected either late this year or early 2010, it is fair to assume that there will be increased FTC scrutiny of those entities who market "green" or "sustainable" buildings and building products.

Mandatory Green Building Laws

Mandatory laws that require green building construction may move the question of who is liable for the failure to obtain LEED® certification to the courts. In NYC, for example, the NYC Green Building Law (Local Law 86) requires municipal projects to be LEED® certified, effective January 1, 2007. Before that, the Town of Babylon was the first Long Island town to require LEED® certification to all commercial buildings, office and industrial buildings or multiple residences or senior citizen multiple residences, equal to or more than 4,000 square feet. Every entity who files a building permit application must provide a completed LEED® checklist or other comparable and acceptable reporting mechanism. No Certificate of Occupancy shall be issued unless and until the applicant produces proof acceptable to building inspectors that the building has sufficient points to achieve LEED® status.

The difficulty with mandatory green building legislation, however, is the quandary that independent "green" rating entities and regulators have different definitions of what is "green" or "sustainable." The US Green Building Council (USGBC) introduced the Leadership in Energy and Environmental Design (LEED®) rating system as a pilot program in 1998. LEED® ratings are applied over five factors: (1) sustainable site development; (2) water savings; (3) energy efficiency; (4) materials selection, and (5) indoor environmental quality.

Taking an arguably longer view, the U.S. Environmental Protection Agency defines "Green Building" as "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." The NYS Department of Environmental Conservation focuses on the conditions created by a "green building." Its website pronounces that "Green Buildings use resources-energy, water, materials, and land more efficiently and effectively and they provide healthier environments for working, learning and living."⁵

Fortunately, national efforts are afoot to standardize green building codes, which should assist the businesses in determining what green building claims are appropriate. On June 29, 2009, the International Code Council (ICC), in conjunction with the American Institute of Architects (AIA) and the American Society for Testing and Materials (ASTM) announced the launching of a new initiative, the International Green Construction Code (IGCC). The IGCC will be a model code for commercial and high performance buildings, with a framework based on environmentally sound standards. The goal is to create a sustainable regulatory framework that can be adopted into local, state, and federal law.

Construction Contract Litigation and Insurance Claims

It is critical that builders and manufacturers agree on a certain lexicon appropriate for green representations within their industries, as well as what claims or terms to avoid. Otherwise, disputes as to whether the good or service delivered is what was expected are inevitable. At present, only one instance of private litigation exists which was triggered by vague "green" claims. The case was dismissed before any adjudication on the merits, but the pleadings offer guidance as to future causes of action in this area. In *Shaw Development v. Southern Builders* (No. 19-C-07-011405, Somerset County, Maryland), the contractor agreed that a \$7.5 million, 23-unit luxury condominium and restaurant project in Crisfield, Maryland, called Captain's Galley, would be environmentally friendly. The contract between Southern Builders and Shaw Development was a standard AIA form that included the following representation expressed through specifications and incorporation of a Scope of Work and Project Manual: "Project is designed to comply with a Silver Certification Level according to the US Green Building Council's Leadership in Energy and Environmental Design (LEED®) Rating System."

In January 2007, Southern Builders, the general contractor, commenced a mechanics lien action in the Circuit Court. When USGBC did not certify the completed condominiums, the developer counter-claimed against the contractor for breach of contract and negligence, claiming, *inter alia*, \$635,000 in lost state tax credits. (Maryland offers state tax credits of up to 8 percent of a project's total cost for buildings that are greater than 20,000 square feet and are certified under the USGBC standards.) Significantly, a motion to stay proceedings and compel arbitration was granted by the court, since the contract mandated binding arbitration. However, before the arbitration commenced, the dispute was resolved and a stipulation of dismissal was filed in June 2007. Although not adjudicated on the merits and thus of no precedential value, the *Shaw* case underscores the importance of understanding the Green Building rating process before making representations regarding third party certification or taking on contractual obligations.

Parties will look to the contract documents to see who has liability in green construction disputes. The AIA Document B214™ is an excellent checklist of services required to obtain LEED® certification, but it does not clarify or apportion liability between the architect and the owner as to who will accomplish what to achieve LEED® status. Accordingly, appropriately drafted contracts with consultants and contractors engaged to achieve green building certification are also a must. Suitable representations and warranties of "green" competencies, certifications and materials are imperative. A detailed scope of work and standards of care should clearly articulate performance expectations. The contract should provide for substitution of supplies if certain green materials become unavailable or if delays are incurred due to the unavailability of certain certified products. Allocation of damages should be addressed if there is a failure to achieve the desired certification. Furthermore, as shown by the *Shaw* case, compliance with legal requirements may be necessary to obtain special tax or financial benefits.

Insurance carriers are seeing a rise in construction claims related to green buildings. Claims are being lodged against contractors and design teams under various theories, such as design defect, breach of a green guarantee or green performance specification, and liability for construction and development

delays due to failure to timely receive green materials. Now, in addition to the standard choices of mediation and binding arbitration, the new AIA contracts include "litigation by a court of competent jurisdiction" as a modality of dispute resolution. This is quickly becoming the more commonly invoked check-box. Such changes in protocol foretell the likelihood of more judicial redress in the green building construction industry.

Green Leases

Tenants in commercial green buildings have begun pursuing claims against owners when expectations for green building performance are not met. Drafters of a lease involving space in a green building will want to specify who receives credit for satisfying the performance benchmarks that result in green building certification and whether the landlord or tenant is required to pay for capital expenses incurred in obtaining certification. Several organizations, such as the Building Owners and Managers Association, have developed model green leases or riders to address typical issues. However, these are merely templates and should not be used wholesale in place of individually crafted agreements. Poorly drafted leases that either do not contemplate or in-artfully express green building obligations between the parties for such issues as energy and water efficiency, indoor air quality or building materials, will be fertile ground for litigation in the coming years.

Conclusion

Green building law is an evolving landscape of statutes, regulatory initiatives and private contract rights. The best defense is working with an experienced environmental attorney to precisely craft the appropriate "green" provisions in your purchase and sale, construction, or lease agreement.

Suzanne M. Avena, Esq. is a Partner at Garfunkel, Wild & Travis and Chair of its Environmental Practice.

1. McGraw Hill Construction, Greening of Corporate America SmartMarket Report, 2007.
2. 57 Fed. Reg. 36363 (Aug. 13, 1992); 61 Fed. Reg. 53311 (Oct. 11, 1996); 63 Fed. Reg. 24240 (May 1, 1998). 16 C.F.R. Part 260.
3. "FTC Announces Workshop on "Green Guides and Environmental Claims for Building and Textiles," available at <http://www.ftc.gov/opa/2008/06/greenguides.shtml>
4. 16 C.F.R. § 260.1
5. New York State Department of Environmental Conservation, Green Buildings, available at <http://www.dec.ny.gov/energy/218.html>

SOLAR ENERGY ...

Continued From Page 3

the amount of your monthly electric bill savings. Typically, a solar system lease is for a longer term than other types of equipment leases because the solar system should last at least fifteen to twenty years and the monthly electric savings will not justify a large monthly lease payment.

Another alternative for businesses is to enter into a Power Purchase Agreement.⁹ A Power Purchase Agreement, also known as a PPA, is a long-term agreement whereby you, the customer, get solar power for no or minimal up front costs. The solar developer/installer installs the solar energy system at your business (rooftop, parking area, spare property, etc....) and maintains and operates the system under a long term contract. You in turn purchase the electricity generated by the solar energy system at a set rate, which is usually below the rate you currently pay for electricity and is fixed for the term of the PPA.¹⁰ The developer/installer as the owner of the solar system, will purchase, install, operate, and maintain the turn-key solar energy system and assume the risks and responsibilities of ownership.

There's nothing left for you to do but enjoy clean, cost effective "green" electricity without taking away funds from your capital budget. The only catch is that

the PPA is usually for at least 15 to 20 years. What's in it for the developer/installer? Because the developer/installer is the owner of the solar system, the developer/installer gets all of the financial incentives (investment tax credit, accelerated depreciation, rebates, renewable energy credits to sell, etc...) in addition to monthly revenues from you for the electricity generated by the solar system.

Other legal issues arising from solar energy systems include leasing roof or ground space for the solar system if you are a tenant, roof structural issues, building department issues and warranty issues relating to the equipment and installation of the equipment.

Robert J. Cassandro, Esq. is the Managing Partner of Abelow & Cassandro, LLP a general practice law firm in Jericho, New York. His practice concentrates in renewable energy, real estate and business law. He has been practicing energy law for 20 years. He can be reached by calling (516) 932-0068 or at rcassandro@abelowcassandro.com.

1. While there are other technologies currently in use and in development, when I say "solar panels" I am generally speaking about silicon based photovoltaic panels used to collect energy from the sun. Also, in this article I refer to installing the solar panels on the roof; however, panels can be installed as ground mounted systems, on parking structures, on awnings and other creative locations facing south or southwest that have unobstructed sunlight. In addition to generating electricity from solar panels, solar hot water heaters and solar pool heaters are popular, but not specifi-

cally discussed in this article.

2. Solar power systems are typically measured by the electrical power they produce, in watts, kilowatts (kw), or even megawatts (mw).
3. The Long Island Power Authority offers rebates through its Solar Pioneer Program. For more information, go to www.lipower.org/efficiency/solar.html.
4. New Jersey has a Solar Renewable Energy Certificate Program. For more information, go to www.njcleanenergy.com.
5. The federal business energy tax credits available under 26 USC sec. 48 were expanded and extended by the Energy Improvement and Extension Act of 2008 (H.R. 1424), enacted October 3, 2008, and the American Recovery and Reinvestment Act of 2009 (H.R. 1). A provision of the ARRA also allows business customers to take a cash payment equal to 30% of the project's cost in lieu of taking the 30% investment tax credit.
6. New York State Tax Law section 606(g-1) allows taxpayers to claim a credit for solar energy system equipment that is placed in service on or after January 1, 2006, and is used to heat, cool, or otherwise provide energy for residential use.
7. New York State Real Property Tax Law sec. 487 provides for real property containing a solar, wind, or farm waste energy system approved by the State Energy Research and Development Authority to be exempt from taxation for a period of 15 years to the extent of any increase in assessed value due to the system; however, this exemption is subject to local option.
8. Nassau County's Energy Policy and Action Plan provides for an exemption from the County portion of sales tax to homeowners installing solar energy systems.
9. There are companies working on a PPA for residential customers but it is not yet widely available.
10. Some PPA's have an annual escalation, but the amount is usually less than the local utility's rate increases and allows for more predictable long term electricity expenses.