



# Green building

The risks of “almost rated”

JUDAH LIFSCHITZ

It was about two years ago when I first cautioned that green building might not prove to be as rosy as predicted. At the time, I argued that green building can present many potential liabilities, and that owners, architects, contractors, subcontractors and suppliers are vulnerable to lawsuits because of over-the-top marketing hype, defective and underperforming systems and products, and contracts lacking appropriate protections.

A recent dispute proves my point: A condominium owner in the Riverhouse Condominiums, one of New York’s pre-eminent eco-friendly luxury buildings, filed a lawsuit seeking \$1.5 million in damages for alleged construction defects (including green defects) and the underperformance of green building systems.

The owners of a 16th-floor unit in the Riverhouse high-rise in Battery Park City (Leonardo DiCaprio and Tyra Banks own units in the building) have sued the building’s developer, principals, managers, design professionals and marketing agents for fraud, misrepresentation and breach of contract.

They have also alleged professional malpractice against the architect and an engineering firm, complaining that the building’s performance and as-built conditions have “deviated grossly from what was promised.”

The plaintiffs allege, among other things, that the building was marketed as a LEED

Gold-rated building boasting fresh filtered air, filtered water, eco-friendly materials and low energy consumption. Instead, say the plaintiffs, the building enclosure system leaks, the heating system does not adequately heat the building, the water system is not

delivering the specified hot water temperature, and the building is not nearly as energy efficient as promised.

The Riverhouse lawsuit points to the potential liabilities

associated with developing, designing and building green buildings. It should serve to put developers, owners, design professionals and builders on notice that unfulfilled marketing promises and underperforming buildings mean green trouble. In this case, marketing missteps and alleged substandard performance led plaintiffs to file their complaint.

Among the claims against the defendants: touting the benefits of a LEED Gold certification before a LEED rating was in fact earned; a problematic air-filtration system; a supposedly super-efficient HVAC system which, it is alleged, fails to adequately warm units in the winter; and an HVAC design that missed certain LEED standards by 49%.

How to avoid claims like these? Follow these basic precautionary rules:

## 1. DON'T OVERSTATE OR OVERSELL.

The surest way to get sued is to overstate or oversell. For example, do not advertise a LEED certification until it has in fact been achieved.

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If the certification has not yet been obtained use the monikers “LEED seeking” or “LEED hopeful” to describe the building. As the Riverhouse Complaint reveals, the defendants are alleged to have marketed the building as Gold-rated even though it had not been awarded a Gold rating at that time. The LEED rating system is point-based. Certain building methods and use of environmentally friendly materials earn points, which are then tallied. A building is LEED Certified if it earns 40 to 49 points, Silver with 50 to 59, Gold with 60 to 79 and Platinum with 80-plus points. The final rating is not awarded until at least after the commissioning phase. Today, Riverhouse remains a LEED Gold hopeful building. The lawsuit points to the dangers of representing the building as Gold-rated before the designation is actually obtained.

## 2. DON'T MAKE PROMISES THAT CAN'T BE FULFILLED.

Avoid grandiose claims such as improved resident health due to green design systems. All too often companies advertise their products, policies and buildings as being environmentally friendly by promising cost savings, resource use reduction and even health benefits. On its website, Riverhouse advertises that the building’s sustainable design positively impacts residents’ health, promising that the condo’s green design will, among other things, reduce blood pressure; promote cleaner hair, skin and lungs; lower one’s allergy risk; and even cure a resident’s seasonal affective disorder. This type of marketing can lead to claims of greenwashing—misleading consumers regarding the environmental benefits of a product or service—when, as is alleged in the Riverhouse case, the actual performance of the building and its systems falls way too short of the marketing claims.

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**3. DON'T PROMISE WHAT YOU CAN'T PROVE.**

Refrain from guaranteeing future performance of a building or system unless you have solid engineering data that the building or system has either in the past or will in fact perform in a manner consistent with your statements. Avoid promises such as reduced energy costs for the life of the building or general, nonspecific references to “climate-friendly” or “sustainable” design unless you have reliable data to support such claims. Instead, promise use of specific materials and systems, but do not promise results that you may not be able to achieve. Secondly, avoid overstating your experience or holding yourself out as a sustainable construction expert unless you have the necessary credentials and experience.

The Riverhouse lawsuit is but one of

the first high-profile lawsuits alleging defects in green construction and deceptive green marketing. Developers, owners, design professionals and builders, beware: This suit is but a precursor of more to come. **▣**



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