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Legal Considerations of Green Development in Florida

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Public and private entities throughout Florida and the United States have recognized that green development is a necessary step in the evolution of the real estate development industry. This realization is evidenced by the green development programs and legislative efforts that are emerging across the state and county. Although the definition of what constitutes green (also “sustainable” or “high-performance”) development is evolving, the term is generally applied to development projects that have been designed and built with the goals of promoting resource efficiency (energy, water, etc.); minimizing the impacts on the surrounding environment; and promoting occupant health. This article will briefly discuss legal considerations concerning green development, summarize national and Florida-specific green development rating systems and standards, examine the dynamic green development regulatory landscape in Florida, and identify future trends in green development.

Legal Considerations

Parties that are involved in green development should be aware that there is a significant amount of legal risk associated with green development activities and services. In parts of the United States where green development is prevalent, there has been increasing amounts of litigation related to green development activities primarily be-

cause there is no universally accepted standard for what qualifies as green development and consumers that have paid a premium for green development activities have heightened performance expectations. Consequently, architects, engineers, planners and environmental consultants offering green development services may face accusations of fraud, negligence, breach of contract, or violations of unfair competition laws (such as the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (2007), and Florida’s Deceptive and Unfair Trade Practices Act, Florida Statutes, §§ 501.201-501.213 (2007)), if such parties fail to accurately define the scope of services in their marketing materials and service agreements; do not meet previously quantified green performance expectations; or do not attain final certification under the applicable rating system. Therefore, parties offering green development services should obtain legal counsel with experience in green development to confirm marketing materials, service agreements and insurance policies related to green development in order to mitigate the new and evolving risk of litigation in this area. Further, consumers and local governments that engage third parties to provide green development services should obtain legal counsel with experience in green development to explain the nature and extent of green development services being contracted, and

the potential means of recourse in the event that their contractual expectations are not satisfied.

In addition to legal liability, green development will also impact many areas of Florida land use and local government law. Currently, despite efforts to promote green development, many jurisdictions have conflicting structural constraints in their zoning, land use and land development codes, especially in the areas of stormwater management design, transportation management, and landscape regulations, which effectively prohibit the use of green development strategies. Further, if local governments mandate that projects achieve certification from a rating system or standard as a condition of a development approval, despite the fact that certification may only be achieved following construction, there are questions as to how such mandates may be enforced or interpreted by the courts. For example, if a local government requires a project to achieve LEED certification as a condition of receipt of a zoning approval and the project ultimately does not obtain LEED certification, could the project lose its zoning after it is already constructed? See, e.g., *Sindel v. Pincrest Lakes, Inc.*, 75 So.2d 191 (Fla. 4th DCA 2001). Finally, local governments must determine how they will ensure that green development projects will maintain their applicable rating or certifications once construc-

tion is complete and the operation and maintenance phase of the green development project begins.

As the aforementioned legal considerations gain increasing attention across the country and in Florida, it is important to understand that green development is comprised of intricate rating systems, standards, and programs, as well as a dynamic regulatory landscape, which requires increasing specialization to avoid legal liability and ensure the success of a green development project.

National Rating Systems and Standards

The foremost green development rating system, Leadership in Energy and Environmental Design (“LEED”), was developed by the U.S. Green Building Council (“USGBC”) through an open, consensus-based process. Over the years, the USGBC has developed a series of LEED programs, each designed for a different type of construction. There are currently nine LEED programs: LEED for New Construction and Major Renovations; LEED for Existing Buildings; Operations & Maintenance; LEED for Commercial Interiors; LEED for Core & Shell; LEED for Schools; LEED for Retail; LEED for Healthcare; LEED for Homes and LEED for Neighborhood Development. Through the twostep certification process, a project earns points in the various categories such as sustainable sites and indoor environmental quality. If the project achieves a specified level of points, it will receive a rating of Certified, Silver, Gold or Platinum. Across the country, various LEED initiatives have been implemented in 72 cities, 22 counties, 16 towns, 27 states, 12 federal agencies, 10 public school jurisdictions and 35 institutions of higher education. U.S. Green Building Council, <http://www.usgbc.org/> (last visited June 20, 2008). In addition, the USGBC has proposed a comprehensive revision to the LEED for New Construction (“LEED-NC”) rating system. LEED-NC Version 3.0, currently out for public comment, includes changes to technical components such as energy usage and greenhouse gas emission; changes to the point scale (From 69 to 110 total points available); and changes to the credits for addressing regional environmental challenges. Other major changes “include transparent weightings of LEED credits so the highest-priority credits achieve the

most points, a new mechanism for incorporating bioregional credits, and a more nimble framework that supports rapid response to emerging environmental and human health issues.” U.S. Green Building Council, <http://www.usgbc.org/News/Press-ReleaseDetails.aspx?ID=3701> (last visited June 20, 2008).

Green Globes is an environmental design and management tool composed of an online assessment protocol, rating system and guidance for green building design, operation and maintenance. History of the Green Globes System, <http://www.thegbi.org/commercial/about-green-globes/> (last visited June 20, 2008). The Green Globes system is primarily used in the Canadian market, but is making its way into the U.S. green building movement. Green Globes is owned and operated by the Green Building Initiative (“GBI”). The Green Globes system operates similar to LEED in that a project earns points and achieves a rating based on the number of points received. Green Globes is designed for all commercial building uses, such as office, multi-family, health care, schools and universities, labs, industrial and retail. Green Globes can also be a better alternative for smaller projects as the cost for certification is significantly less than under the LEED system.

The National Association of Home Builders (“NAHB”) is nearing completion of its Green Building Standard (“GBS”), which will be the only American National Standards Institute (ANSI) accredited standard for green residential construction. The new GBS is based on the NAHB Model Green Home Building Guidelines, which were developed in 2004. Unlike LEED for Homes, the NAHB GBS is designed so that local governments can use it as a foundation for their own green building program and can easily accommodate customization to reflect local geographic and climate conditions. Further, the GBS does not require use of a third party verification system or certifier. While the NAHB Research Center is providing education programs to certify the Green Certified Professionals (“GCP”) provided for in the GBS, certification by a GCP is not required. They are merely provided as a service to those local governments that don’t have the staffing to implement the program themselves.

Florida Specific Standards and Programs

In response to the unique climate and land characteristics in Florida, several Florida specific programs have been developed and are being utilized either independently or in concert with the national rating systems to allow development to occur in an environmentally sensitive manner.

The Florida Green Building Coalition (“FGBC”) was developed to provide a statewide green building program with environmental and economic benefits. The Florida Green Building Coalition, <http://www.floridagreenbuilding.org/db/> (last visited June 20, 2008). The FGBC has devoted considerable efforts to designing technical standards to provide third-party verification of a project’s green planning and actions. The FGBC has developed five standards: the Green Home Standard; the Green Development Standard; the Green High Rise Standard; the Green Local Government Standard for Green Cities and Counties and the Green Commercial Buildings Standard. The benefit of these standards over LEED is that they are Florida-specific. Our climate and land characteristics were taken into account when developing these standards, making them more practical in their usage. For example, the LEED for Neighborhood Development requires certain prerequisites such as limitations on development in the floodplain that make it virtually impossible to achieve in Florida, making the FGBC Green Development Standard more practically applicable to neighborhood development in Florida.

The members of the USGBC Florida chapters have developed the Florida LEED Application Guide, which is still in draft form, but has been forwarded to regional USGBC for comment. This Application Guide is not a separate standard, but instead provides guidance and direction in applying the LEED for New Construction system to development in Florida. The Application Guide provides a point by point analysis of the LEED criteria with specific guidance based on the existing Florida regulatory system and unique land features. This Application Guide can be used by the USGBC when reviewing an application from a Florida project and by an applicant for the program in designing its project to meet the LEED criteria.

The Florida Water StarSM program is coordinated by the St. Johns River Water Management District and was

designed to “encourage water efficiency in household appliances, plumbing fixtures, irrigation systems and landscapes.” Florida Water Star, <http://www.floridawaterstar.com/> (last visited June 20, 2008). The Water Star program offers incentives to builders and home buyers for efficient new home construction that follows the program’s guidelines. Homes are assessed on a point system to determine certification worthiness and are granted the “water star certified” label if they achieve the requisite number of points. Homes that achieve the water star certification typically save between 20-26% on their indoor water use and about 40% on their outdoor use. Florida Water Star for Home Buyers, <http://www.floridawaterstar.com/homebuyers/index.html> (last visited June 20, 2008).

Florida Yards & Neighborhoods is a University of Florida Extension program that encourages homeowners and professionals to create and maintain Florida-Friendly landscapes that protect the natural environment. According to the Florida Yards program’s website, irrigation of lawns and landscaping in Florida represents the single largest use of water from our municipal water supplies. Why Go Florida Friendly?, <http://www.floridayards.org/> (last visited June 20, 2008). The Florida Yards program provides a sample Declaration of Covenants that implements the nine principles of Florida-friendly landscaping and can either be adopted independently or can be incorporated into a community’s overall homeowner’s association documents.

The Florida Energy Star certification program (“Florida Energy Star”) is a subsection of the national Energy Star program, which is a joint effort by the U.S. Environmental Protection Agency and the U.S. Department of Energy and is designed to increase energy efficiency in homes. The Energy Star program provides guidelines for builders, tips for home buyers, realtors and product manufacturers. For residential construction, the Energy Star program provides different guidelines for each county in Florida based on the climate zone that it has been assigned. This information can be found on the Florida Energy Star website. Builder Option Packages for Florida, http://www.energystar.gov/index.cfm?c=bop.pt_bop_florida (last visited June 20, 2008). If a home meets the Energy Star criteria, it will be at least 15% more energy efficient than

homes built to the 2004 International Residential Code. Energy Star Qualified New Homes, http://www.energystar.gov/index.cfm?c=new_homes.hm_index (last visited June 20, 2008). The guidelines utilize a variety of tried and true energy efficient measures such as effective insulation, high performance windows and efficient heating and cooling equipment. Features of Energy Star Qualified New Homes, http://www.energystar.gov/index.cfm?c=new_homes.nh_features (last visited June 20, 2008). Commercial Buildings may also apply for the “Designed to Earn Energy Star” rating. Commercial Building Design, http://www.energystar.gov/index.cfm?c=new_bldg_design.new_bldg_design (last visited June 20, 2008). In order to achieve this rating, it is evaluated at the design phase and must achieve a rating of 75 or higher. Green Building and Energy Efficiency, http://www.energystar.gov/index.cfm?c=green_buildings.green_buildings_index (last visited June 20, 2008). Resources for achieving these energy performance goals include specifying Energy Star design in contract documents, providing benchmark performance in operating buildings and having consultants attend training sessions.

Related 2008 Florida Legislation

The 2008 legislative session saw more green and energy/climate change-related legislation than any previous session. It remains to be seen whether these bills will survive the Governor’s veto (and some have already fallen victim), but as they represent a major shift in the environmental policy for this state we thought it worth while to discuss a sample of these bills.

CS/HB 697 covering the issue of Building Standards related to Energy Planning and Conservation Practices imposed new requirements on local governments to adopt comprehensive plan requirements in the Future Land Use, Traffic Circulation, Conservation and Housing Elements to address energy efficiency and greenhouse gas emissions in the next Evaluation and Appraisal Report. H.R. 697, 2008 Gen. Sess. (Fla. 2008). This bill has been signed into law by the Governor.

The Comprehensive Energy/Climate Change Legislation embodied in HB 7135 represents major legislation that moves Florida to the forefront of the various states’ initiatives on climate change and green energy. H.R. 7135, 2008 Gen. Sess. (Fla. 2008). This leg-

islation provides for a new Florida gas standard, requiring E10 statewide by 2010. It also establishes a cap and trade system that applies to major Florida as a first step. HB 7135 directs the Florida Department of Environmental Protection to develop rules for this cap and trade system by 2010, subject to the Legislature’s approval and ratification. This bill also requires the Public Service Commission to develop a Renewable Portfolio Standard rule by February 2009, again subject to the Legislature’s approval and ratification. This legislation also set an Enhanced Statewide Recycling Goal at 75% statewide recycling by 2020. It also requires gradually increasing energy efficiency requirements for new buildings: a 20% increase by 2010 and a 50% increase by 2019. Most relevant to this article, HB 7135 requires essentially all new or renovated state, local government or university buildings to meet LEED, Green Globes, FGBC or any other nationally recognized green building rating or certification. Finally, it creates a new state agency, the Florida Energy and Climate Commission. Like the previous bill, this bill has not yet been signed by the Governor.

SB 682 would have directed the Florida Department of Transportation (“FDOT”) to establish a methodology for “planned, sustainable” Developments of Regional Impact (“DRI”) that would recognize that these developments, when fully developed, will likely achieve internal capture rates greater than 30 percent. S. 682, Gen. Sess. (Fla. 2008). This bill would have been a major departure from FDOT’s current modus operandi and would have given a real incentive to developers to commit to green development; however, the Governor vetoed this bill for reasons not related to this measure on June 17, 2008.

SB 2530, also entitled the “Florida Green Building Act,” was stymied in committee, but would have been landmark in providing a corporate tax credit for private green buildings that met a minimum level of “green” certification through one of the nationally recognized green building programs. S. 2530, Gen. Sess. (Fla. 2008). It also Green Development from page 3 would have created the Florida Green Building Council. While this legislation was not successful this year, it is expected to surface again in the coming legislative session with a better chance of success.

Regional Actions

At the regional level, certain regional planning councils are beginning to take a more active approach to requiring green development to be incorporated into DRIs. For example, the East Central Florida Regional Planning Council ("ECFRPC") issued a guidance letter that provides that certain recommended conditions will be included in the ECFRPC's conditions for approval for a DRI. See Memorandum from the ECFRPC Staff to all DRI Applicants dated August 20, 2007 ("Memo"). Recommendation #1 of the Memo states that "Construction Standards shall meet the USGBC LEED program, the FGBC, the Green Globes program, or any other nationally recognized green building system that is approved by the Department of Management Services." *Id.* The remaining three recommendations require compliance with the Energy Star and Water Star standards as well as implementation of "Dark Skies" measures. *Id.*

Local Initiatives

As a proactive measure, certain local governments in Florida have developed incentive programs to support green development in their jurisdictions. The City of Gainesville has a priority permitting program, an expedited review incentive, offers marketing materials and publicity and offers reduced building permit and plan review fees. City of Gainesville Green Building Program Procedures for Permitting and Certification, http://cityofgainesville.org/common/docs/bldg/bldg_GreenBuildingProcedures.pdf (last visited June 20, 2008). Sarasota County offers expedited review, priority permitting and until recently gave rebates on certain fees for green development projects. Sarasota County, Fla., Resolution No. 2006- 174 (Aug. 22, 2006). Miami-Dade County also has an expedited review incentive. Miami-Dade, Fla., §8-6 (June 6, 2005). The City of Tallahassee currently offers gas and hydronic heat rebates. Go Green Tallahassee, <http://www.tal.gov.com/green.cfm> (last visited June 20, 2008). Orange County is developing its "Orange to Green" program and is exploring expedited review for projects that will agree to pursue LEED certification. Help Make Orange County Green, <http://www.orangecountyfl.net/cms/AWARE/environment/orangetogreen/default.htm> (last visited June 20, 2008).

Future Green Development Trends

While green development has only recently gained notoriety in Florida, other jurisdictions throughout the United States have developed a variety of green development programs, incentives, and mandates. For instance, the new "Green Dallas" program was adopted in April 2008 with a goal of being carbon neutral by 2030, which will require reducing current building energy usage by 50%. Green Dallas, <http://www.greendallas.net/index.html> (last visited June 20, 2008). Phase I of the program, which begins on October 1, 2009, focuses on energy efficiency and water conservation requirements for all residential and commercial developments, including a requirement that all buildings be 15% better than the 2006 International Energy Conservation Code, use Energy Star appliances and drip irrigation systems. Citywide Green Building Program, http://www.dallascityhall.com/pdf/OEQ/green_building_ordinance040908.pdf (last visited June 20, 2008). Phase II, which begins on October 1, 2011, focuses on expanding the initiatives for new buildings into a comprehensive green building standard requirement, requiring all new construction to be LEED-certifiable, although formal certification is not required. *Id.* The implementation of this program is key to its success and provides for an extensive training program for the "greening of City staff" and establishing specific green building plan review teams in the building inspection department. The "Green Dallas" program is particularly innovative because it involves a substantial partnership between a local government and the USGBC, which previously had not been effective. Consequently, if Dallas and the USGBC are successful in implementing the "Green Dallas" program, it will serve as an important case study for other local governments desiring to implement a green development program with the aid of private green development entities.

Conclusion

Green development has been internationally recognized as a necessary step in the evolution of the real estate development industry. Across the United States and in Florida, state and local entities have begun to implement a wide variety of green development programs, involving incentives and mandates, to facilitate the adoption of green

development practices. Further, architects, engineers, planners and environmental consultants have begun to offer green development services to satisfy this market demand. Because green development is an evolving concept that involves a cost premium, there are substantial legal considerations that should be considered prior to entering a green development services agreement or incorporating aspects of third party green development verification programs into a local government or planning commission's development review process. While the legal considerations of green development may appear daunting at first, through the assistance of attorneys and professional consultants who understand the green development rating systems, standards, and programs available today; are actively involved in monitoring and facilitating the evolution of green development programs at a state and national level; and who have the expertise to manage the various land use, real estate, environmental, and financial green development expectations, all parties should benefit from this new era of development.

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