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Is your project development team a green professional short?

Every component of environmental performance requires the careful assemblage of the project team for a green development, from site selection, design and construction to waste management, the calibration and commissioning of building systems, and even the education of the building users. Why, then, would green-project owners or users choose to formalize their relationships with one another or their contractors by utilizing counsel that cannot be conversant about the demands and requirements of a green project?

Document negotiation requires an understanding of the motivations of the parties, knowledge of market expectations and the ability to leverage the expected benefits from entering into a relationship with the other party. The codification of that negotiation into a document demands no less than full comprehension of that relationship. This is particularly true when dealing with two parties who have such widely divergent motivations as do a landlord and tenant. Negotiating for a landlord or tenant in a green project requires the understanding that this project may afford these parties advantages that the property across the street cannot offer. Moreover, generating transaction documents for a green project mandates the appreciation of what makes this statement true.

For example, if some common lease provisions are formalized in accordance with long-held industry assumptions about allocating costs and obligations they may require the parties to act contrary to project goals:

■ **Lease conditions.** If either a landlord or tenant plans to seek



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LEED certification, it will require the cooperation of each party and so necessarily impact the rights and obligations of the other. For a tenant who chooses a project because of anticipated certification, for instance, the ultimate certification will be critical to realizing the desired benefits. For such a tenant, should certification be a condition to effectiveness of the lease, however? Likewise, an owner undertaking building certification without the right to enforce the tenants' cooperation could find its certification in jeopardy. Imagine an enhanced commissioning program where a tenant may refuse necessary modifications to building systems.

■ **Lease restrictions.** The use re-strictions in a lease, as well as the landlord's rules and regulations for operation, must anticipate the needs of a green project. If a tenant is required to comply with the landlord's efforts to get a building certified, but is prohibited from installing solar panels or is required to use "all new" materials (a common requirement) in the completion of tenant improvements, or if the lease fails to require the tenant's compliance with the landlord's low-VOC finish requirements, then the drafter has misunderstood the nature of the project. In fact, many of the issues faced by an owner in attempting to operate a green project (materi-

als to be integrated, air quality, systems management, recycling programs) are not adequately addressed by common lease provisions because they require the integration of requirements supporting the project goals.

■ **Pass-throughs.** Voluminous research aims to quantify the long-term savings of energy conservation, among the other myriad benefits, in order to justify the immediate expenditure of time and money to produce not just another aesthetic, efficient and well-located project, but also a project that attests to the dedication of the owner and users to energy conservation and environmental consciousness. If both parties are reaping the reward of this initial investment of time and money to differentiate this project from the one across the street, then the typical industry allocation of capital expenditures, financing expenses, additional up-front supervision and education programs may work to undermine a green project.

Leases are a balancing act of allocating project costs and the responsibilities of the parties. If your counsel does not understand the costs or the responsibilities that need to be allocated, then the document will not address the complex interplay of project goals and user operations.

The same is true of other transaction documents. If the attorney negotiating and drafting the transaction documents lacks environmental acuity, then the relationship between the parties will be formalized into documents that are similarly devoid of the project's environmental purpose.

■ **Development.** The analysis of due diligence in site selection,

such as a brownfield redevelopment or proximity to public transportation, may draw utterly opposite conclusions from the norm if the goal is a green project that may want to utilize either or both of these characteristics to its advantage.

■ **Performance-based contracting.** As more projects integrate conservation and environmental design, and as local codes continue to change to reflect environmental policy concerns, there will be a corresponding pressure on all projects to dexterously adapt legal documents to address allocation of obligations to ensure the project's compliance. Each component in the project must be successful in order to attain the project goals. If each player does not accomplish his respective component, it could threaten the success of the project; as a result, contracts with project personnel should integrate the project goals into their performance obligations and incentives.

Parties' agreements must fundamentally reflect their anticipated costs and benefits. A green-property developer would not think of assembling a team that does not understand the site, the project goals and any applicable certification standards, nor should it risk that the unique costs and benefits of a green project are not leveraged during the course of negotiation, or disregarded in the transaction documents by utilizing counsel that does not understand, and cannot support, the project goals. A team assembled for a green project without the assistance of qualified counsel is one green professional short of a team.▲