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## From the Real Estate, Environmental and Natural Resources Law Practice Group

### Going Green

Welcome to the first edition of the Real Estate, Environmental and Natural Resources Newsflash - a periodic email publication brought to you by the Koley Jessen Real Estate, Environmental and Natural Resources Law Practice Group. We are committed to being at the forefront of current trends in our practice area and look forward to sharing information with you about relevant real estate and environmental topics throughout the year. If you have questions or comments about any topic covered in a Newsflash, please feel free to contact any one of the members of our practice group.

#### Green Building Trend - Mandates And Incentives

Many building owners and developers have embraced the green movement and have realized the benefits of implementing green building methods. Benefits such as reduced energy and operating costs, higher rents, community goodwill, employee satisfaction and retention, and ease of resale/leasing, are major factors in determining whether a company or developer decides to build “green.” In certain areas of the country, there are even more compelling reasons to build green as states and localities implement green building initiatives. Despite the sluggish economy, there is a steady increase in mandates and incentives for green building. As of June 1, 2009, at least 33 state governments and 189 local counties and cities have enacted some measure of green building initiative, with at least 26 of these initiatives having been enacted in 2009 alone.<sup>1</sup> Although these initiatives are tailored by the individual state or locality, they typically fit into a handful of categories: (1) mandates for green construction of government/municipal buildings, (2) mandates for green construction of private sector buildings, (3) monetary incentives, including tax credits and discounts or refunds of fees, (4) permitting incentives, including an expedited permitting process or reduction in fees, and (5) incentives through community sponsored marketing and promotion of the project as a “green” project. Many states

and localities have introduced initiatives that incorporate more than one of these categories of incentives and/or mandates.

Following the lead of the federal government, the majority of states and localities with “green” initiatives have implemented green building mandates for government projects. Some states, including the State of Utah, have imposed a global mandate, which, as of May 21, 2009, requires that all new state government buildings must achieve LEED Silver certification. Other states have imposed a minimum size requirement, such as the Commonwealth of Virginia, which requires new executive branch buildings greater than 5,000 gross square feet to achieve LEED Silver certification. In 2009, some communities (*e.g.*, Sonoma, California; Taos, New Mexico; and Mountain City, Colorado) have taken the next step in requiring private sector buildings to meet certain green building requirements. Although direct mandates for green building are the most effective way to ensure that companies and developers build green projects, many governments have been hesitant to implement mandates, especially in the current economy, for fear that they will contribute to the stagnation of new development. Thus, 2009 has shown an increase in initiatives providing incentives rather than mandates.

The State of New Mexico implemented an initiative in April 2009 to provide tax credits to those projects achieving LEED certification, with the amount of the tax credit dependent upon the square footage of the building and the type of construction. Tax credits under the New Mexico legislation range from \$3.50 per square foot for commercial buildings achieving LEED Silver certification, to \$9.00 per square foot for residential buildings achieving LEED for Homes Platinum certification. In Carroll County, Maryland, tax credits can reduce real estate taxes by as much as 75% for five years for a project achieving LEED Platinum certification.

<sup>1</sup> LEED Initiatives in Governments and Schools, <http://www.usgbc.org/government>

Some municipalities, such as Miami Beach, Florida, have enacted ordinances in 2009 to provide for expedited plan review and building inspections for local permits to incentivize developers to implement green building elements. Incentives are also demonstrated through the use of marketing opportunities made available through these municipalities, such as green partner websites hosted by the city.

Nebraska and Iowa have not yet enacted any green building initiatives. However, the trend is showing no signs of stopping and we expect to see such initiatives in our region, in one form or another, soon.

### Drafting & Negotiating Green Leases & Contracts

Green building represents a shift in priorities and corporate mindset – one that also brings a necessary shift in the underlying real estate documents. From construction contracts for “green” projects to leases for “green” buildings, there are several unique concepts and ideas that must be addressed from a legal standpoint. The space constraints of this article do not allow for an exhaustive discussion of these concepts, and every deal will be different, but there are a few major concepts that should always be considered in drafting and negotiating “green” agreements.

For “green” construction contracts, at a minimum the parties should address in writing (1) which green building rating system, if any, will be used and who will be responsible for tracking and submitting which elements of the selected system; (2) who will be responsible for tracking and obtaining incentives, including fee refunds and tax rebates; (3) a requirement that general contractors bind all subcontractors to the terms of the construction contract and ensure that all subs are aware of their responsibilities; (4) warranty issues; and (5) liquidated damages for failure to meet the specified green building rating system or to obtain incentives, and rights of the owner to retain a portion of the contract amount until these goals are met.

In “green” leases, the parties should address (1) whether a gross or net lease is appropriate; (2) operating expenses and maintenance; (3) improvements, both by the landlord and the tenant; (4) operating rules and regulations, including restrictions on smoking and cleaning products, and recycling requirements; (5) insurance issues; and (6) remedies for failure to meet specified green standards.

As always, the facts and circumstances of the particular transaction will shape your agreements. However, addressing the issues above in your “green” documents can help prevent problems down the road.

*This document is intended for informational purposes only and should not be construed as legal advice.*

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