



*presents*

# Building Green: Navigating the Legal and Regulatory Challenges of Sustainable Real Estate

**A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

**Today's panel features:**

Don Neff, President, **La Jolla Pacific, Ltd.**, Irvine, Calif.

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Sean M. O'Brien, Partner, **Seyfarth Shaw**, Boston

Jeffrey D. Masters, Partner, **Cox Castle Nicholson**, Los Angeles

**Thursday, January 21, 2010**

The conference begins at:

**1 pm Eastern**

**12 pm Central**

**11 am Mountain**

**10 am Pacific**

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# BUILDING GREEN:

## Navigating the Legal and Regulatory Challenges of Sustainable Real Estate



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## **I. Current Trends and Opportunities**

### **A. "Green" has become mainstream, and like it or not, is here to stay**

### **B. Why now? What are the driving forces?**

- 1) Economics
- 2) Awareness of global warming issues
- 3) State and local government mandates
- 4) International green building influences
- 5) Desire for healthier living and working environments
- 6) Tightening energy codes and future green building codes
- 7) Environmental regulation and stewardship
- 8) Governments looking into feasibility of energy audits for existing housing stock
- 9) Recent speculation suggests REO properties and investment funds are looking into greening up projects and portfolios to move housing stock

### **C. What does "green" really mean?**

- 1) Manage expectations of all parties involved throughout the process
- 2) Risk mitigation techniques

### **D. Implementing a green building program**

- 1) Prescriptive vs. performance-based programs
- 2) Select the right program based on your projects goals and objectives
- 3) Manage buyer expectations
- 4) Leverage marketing and media opportunities
- 5) Third party verification and commissioning

### **E. Overcoming green building challenges**

- 1) Start early!!!

- 2) New technology and materials
- 3) Trade partner awareness and training
- 4) More complex assemblies need detailed drawings and specs
- 5) Consumer awareness and education

# # #

### ***About La Jolla Pacific***

With an extensive background in direct construction experience, La Jolla Pacific Ltd. is an industry leader in construction risk management, third-party peer review, green/sustainable building, quality assurance, and forensic investigation services. For more than a decade, the firm has provided its exclusive Shark Repellent® package of proactive defensive strategies to single-family, multi-family and commercial builders across the US. For further information about La Jolla Pacific Ltd.'s array of services, please visit [www.lajollapacificltd.com](http://www.lajollapacificltd.com).

# *GREEN LENDING*

**Peter J. Korda and Sean M. O'Brien**

**January 21, 2010**

Breadth. Depth. **Results.**

# *GREEN LENDING*

## **I. Practice Checklist for Green Lending Issues**

1. Does the underwriting process vary significantly from conventional, non-green financed projects?
2. What are the lender's "green" requirements for constructing or retrofitting the building?

# *GREEN LENDING*

## **I. Practice Checklist (Cont'd)**

3. If the lender incorporates a third party rating standard into their loan requirements,
  - are there specific criteria that the lender will require to go into the rating?
  - what if the rating standard change after closing?
4. Are the “green” requirements a one-time obligation or an on-going maintenance obligation?

# *GREEN LENDING*

## **I. Practice Checklist (Cont'd)**

5. When do the lender's "green" criteria need to be satisfied?
6. How will the lender verify compliance with its "green" criteria?
7. Does the lender require that the building comply with any voluntary incentive programs?

# *GREEN LENDING*

## **I. Practice Checklist (Cont'd)**

8. Certain loan document provisions to consider:
  - Leasing (e.g., build-outs, operations, maintenance, reserves, etc.)
  - Use of the premises
  - Construction provisions (e.g., construction schedule, bonds, guaranties, etc.)
  - Representations and warranties

# *GREEN LENDING*

## **I. Practice Checklist (Cont'd)**

8. Certain loan document provisions to consider (cont'd):
  - Alterations and repairs
  - Insurance and casualty
  - “Green” reporting requirements
  - Property management

# *GREEN LENDING*

## **I. Practice Checklist (Cont'd)**

9. Certain due diligence issues to consider:
  - Construction documents
  - Appraisal
  - Environmental site assessment and climate impact assessment
  - Property condition report

# *GREEN LENDING*

## **II. Certain Challenges for Lenders and Borrowers**

1. Development and implementation of underwriting standards for green buildings.
2. Having a consistent approach among real estate professionals involved in the underwriting and closing process, including brokers, appraisers, environmental consultants and insurance consultants.
3. Finding the right match—the borrower's requirements and the institutional philosophy of the lender.

# *GREEN LENDING*

## **III. Commercial Real Estate and the Green Lending Industry**

- 1. Green Lending Programs.**
- 2. Green Banks.**
- 3. Future— Profitability?**

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# “Managing Legal Liability Risks in Green Building”

## Building Green: Navigating the Legal and Regulatory Challenges of Sustainable Real Estate



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# Managing Legal Liability Risks in Green Building

# I. Legal Liability Issues for Green Builders.

- A. High claim and litigation potential from green building.
  - 1. Lack of universally accepted definitions and standards.
  - 2. Increased consumer expectations.
- B. Possible legal theories.
  - 1. Fraud.
    - a. Intentional or negligent misrepresentation that the building is green or sustainable.
    - b. Intentional or negligent misrepresentation regarding performance of the building.
    - c. Nondisclosure of required maintenance obligations and potential increased maintenance costs.
    - d. Remedies can include damages or rescission.
    - e. Misrepresentation also could be the basis for state law unfair competition acts claims.
  - 2. Negligence.
    - a. Negligence per se.
    - b. Design, workmanship and materials defects.
    - c. Remedy is damages (generally, cost of repair or diminution in market value).
  - 3. Breach of Contract.
    - a. Failure to deliver the building as contracted for.
    - b. Remedy is damages, plus attorneys' fees (if the contract provides for them).
  - 4. Breach of Warranty.
    - a. Express warranty.
    - b. Implied warranty.
    - c. Remedy is damages, plus attorneys' fees (if the warranty or contract provides for them).
  - 5. Violation of unfair competition acts.

## II. Risk Mitigation Strategies.

### A. Contract strategies.

1. Use of Definitions. Manage end user expectations and decrease liability exposures by defining terms such as “green” and “sustainable” objectively and in a manner that these standards can be satisfied by the builder.
2. Disclosures.
3. Minimize Actionable Representations.
  - a. Avoid puffing and representations about subjective qualities of the building or the construction.
  - b. Be factual and objective.
  - c. Watch for potential representations in collateral materials, advertising, website, model units and sales offices.
4. Maintenance Obligations; Operations and Maintenance (“O&M”) Manuals.
5. Residential Homeowner Association (“HOA”) Issues.
  - a. HOA assessments and budgets need to take account of green building inspection and maintenance costs.
  - b. Provide in the CC&Rs for reasonable approval of green modifications to homes and to common area (avoid unreasonable disapprovals by the architectural review committee).

## II. Risk Mitigation Strategies.

### B. Subcontracting and Purchasing Strategies.

1. When prequalifying subcontractors, evaluate their green building experience. Invest in training.
2. Confirm that the subcontract performance standards extend to applicable green building standards.
3. Confirm that the compliance with laws provision extends to applicable green building laws, codes and standards.
4. Include green building components in the contract warranty and guaranty provisions.
5. Is the builder qualified to evaluate proposed green products, technologies and assemblies? If not, obtain expert assistance.

### C. Design Professional Issues.

1. Need peer review of plans and specifications.
2. Design professionals need to take responsibility for their green design in the contract scope of services, performance standards and indemnification provision.
3. Will the design professionals take responsibility for assembling, reviewing and managing the documents and obtaining the certification timely?
4. Caution: Exculpatory provisions.
5. Will the architect sign off as required to obtain LEED certification? Will the architect's professional liability insurance be compromised?
6. A LEED-accredited design professional may be subject to a higher standard of care.

## III. Concluding Thoughts and Big Questions.

- A. Which parties will be responsible for compliance with LEED criteria? For obtaining LEED certification?
  - 1. In a documentation-based rating system, who is responsible for assembling, reviewing and managing the documentation? Important in ongoing design and construction operations and in connection with completion and post-completion activities.
  - 2. Who is responsible for interim and final certification submissions?
  - 3. Who bears the costs?
  - 4. How is responsibility allocated for failure to meet LEED criteria? For failure to obtain certification?
    - a. How are damages measured?
    - b. Will performance bonds respond?
- B. How can end-user expectations be managed and met, where the rating system does not encompass building performance?
  - 1. What representations (express or implied) have been made by the owner, the design professionals and the contractor?
  - 2. Will there be independent post-completion evaluation of building performance?
  - 3. How is responsibility allocated for failure to meet performance expectations?