

## GREEN BUILDING DISPUTES ARISE

Get better outcomes with mediation

» PETER G. MERRILL

Building Green is a new and emerging specialized field in the construction industry that is quickly gaining global popularity. Many municipalities are beginning to mandate Green building guidelines and in some instances, they are trying to develop and adopt mandatory Green building codes that carry the same enforceable weight as general building codes in those areas.

Regardless of whether your area will recommend or require construction to follow Green building guidelines or codes, there certainly will be many disputes related specifically to Green building in the future. These Green disputes will not necessarily center on construction issues but rather on the efficiency and performance of the structure related to energy, air quality, water efficiency and similar Green issues.

In addition to these Green performance-based disputes, there are several legal issues to be aware of related to Green building/remodeling. Making Green claims in your advertising, on your website or in your construction contract subjects you to false advertising, breach of contract and even fraud if those Green promises do not materialize in the finished construction project. Be certain that you can deliver what you promise. As an example, if you specify that a house is to be built that will achieve the "NAHB Gold Level," be certain that the house will perform according to the gold criteria established for gold-level residences after the house has been completed. You may have attained sufficient points for the gold level prior

## THESE GREEN DISPUTES WILL NOT NECESSARILY CENTER ON CONSTRUCTION ISSUES, BUT RATHER ON THE EFFICIENCY AND PERFORMANCE OF THE STRUCTURE.

to construction; however, if the finished product does not meet the established performance levels of Green, you will be subject to several legal claims by your customer.

### A SPECIALIST FOR EVERY PROBLEM

It is a recognized fact that a construction dispute can best be settled by an individual or group of individuals who are familiar with construction. In an attempt to eliminate the costly and lengthy litigation process, many builders and remodelers are choosing to utilize alternative dispute resolution (ADR) methods such as mediation, binding mediation and binding arbitration to settle their disputes. In addition, they are seeking out construction-knowledgeable individuals to assist them with their disputes.

If you were ailing, you would go to a hospital or visit a doctor to cure your illness. You see a doctor because he or she knows how you are built and which remedy will cure your medical problem. If you had a major injury, you would not go before a judge or seek the assistance of an attorney—you would go to your doctor. And, if your injury were of a particular type, your doctor would refer you to a specialist. Likewise, if your construction project has a problem or dispute that requires attention, you



This home is constructed of straw bale, at some point in the future, similar Green homes may generate disputes over Green claims of performance and efficiency as builders advertise more of this popular product.

should go to a construction-knowledgeable individual to help cure and remedy your conflict. With construction disputes, you also should seek a specialist to handle your mediation or arbitration (depending on the ADR process specified in your construction contract).

If you end up in front of an arbitrator, judge or jury that does not have construction knowledge, the best presentation will usually win, not necessarily the party that is right. The insurance industry has raised its premiums drastically over recent years, largely because of the outlandish awards and verdicts

rendered by arbitrators, judges and juries that did not understand the construction issues. Some insurance companies have completely stopped offering insurance to general contractors. They blame high claims payouts caused by the litigation or arbitration process provided by individuals with little or no construction knowledge related to the specific dispute.

The new and fast growing Build Green program will have disputes between builders and certifying agencies, between contractors and subcontractors, material suppliers and service providers, and of course, between owners

and builders/remodelers. In addition, when a dispute is handled through litigation, it is not unusual for all parties to be named in the suit—raters, certifiers, Green designers and anyone else associated with the design and construction of that Green building will undoubtedly be named in the dispute.

If arbitrators, judges or juries with no Green knowledge handle Green disputes, it is likely that the awards or verdicts will be outlandish and unfair. I anticipate that insurance companies may charge very high premiums, exclude Green building issues from coverage, or worse, not offer insurance to any Green builder or remodeler.

#### A CALL FOR GREEN EXPERTS

As a result of these disputes, the industry needs “Green experts” who can help instruct and testify before arbitrators, judges and juries on Green-related disputes. There is an increased need for Green specialists who can offer Green testing services, such as blower door tests, indoor air quality tests, heat loss and other testing, to demonstrate or check on the sustainable performance issues that go beyond the traditional scope of structural or cosmetic issues most common in today’s

construction disputes.

As mentioned, the best Green building dispute resolution is to seek an experienced Green building expert who is trained and experienced in mediaion and/or arbitration. If the dispute appears before a judge or arbitrator naive to sustainability, the best attorney presentation will most likely carry more weight that it should, whether the decision is right or wrong. If the dispute comes before a Green ADR specialist, the decision will be based not only on the presentation, but also on the technical issues associated with Green building. The outcome has a better chance of being “fair and equitable” to all parties if it is made by a construction-knowledgeable dispute resolution specialist.

#### PLANNING AHEAD

In anticipation of those Green disputes, our company is in the process of assembling its National Green Panel of Construction ADR Specialists. Many GCs specify mediation and arbitration in their construction contracts and specify a “Provider of ADR Services” to ensure that if a dispute develops, it will be handled by a provider who understands the issues germane to


that project and dispute. Contractors who specify ADR methods and a provider virtually guarantee that they will never be sued or entwined in lengthy and costly court litigation. Both contractors and owners will benefit by utilizing an ADR service provider who understands construction. Specifically, firms with Green ADR specialists can provide an expeditious, simple and inexpensive ADR process.

#### IN CASE OF EMERGENCY

Green programs vary greatly across the U.S. A Green program in Florida will differ from a Green program in Arizona or New Mexico. It is imperative to have Green specialists familiar with each regional Green program.

During a major sporting event, a medical emergency crew is on-call just in case someone is injured. Response time can mean life or death in some instances. A construction project can utilize this same planning idea. If you have a construction-knowledgeable specialist on standby, he or she can render the emergency treatment you need to minimize injuries to the project.

It is virtually impossible to teach construction or Green building to an experienced mediator or arbitrator to bring them up to speed with construction-specific disputes. Instead, it is better (and a relatively easy process) to train a construction-knowledgeable individual in mediation and arbitration processes. Firms, such as CDRS, are forming expert panels to serve in Green-related arbitrations or litigations, to provide testing services and to analyze and verify Green ratings.

Experienced Green builders with ADR experience or experienced Green builders, raters, testers, energy experts, etc., who are interested in learning about and assisting in the construction ADR process are in demand. If you would like to discuss specific issues, please contact the author. 



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