

## **Green Building and California's Mandatory Green Building Standards Code** *...What will it mean for future construction and design claims?*

In the absence of a uniform federal strategy on climate change, the states – led by California – are taking action. On January 12, 2010, Governor Arnold Schwarzenegger announced that the California Building Standards Commission unanimously adopted the first-in-the-nation mandatory Green Building Standards (“CALGREEN”) Code. These mandatory building regulations will apply to all new construction in California including, but not limited to, all residential and commercial buildings. The CALGREEN Code will take effect on January 1, 2011, and will become the baseline for regulating green construction statewide. CALGREEN is being evaluated as a possible model by other states and local governments as they develop their own green construction standards.

### **Requirements**

Generally, the CALGREEN Code's requirements are divided into two chapters of mandatory measures – a residential chapter and a nonresidential chapter. Those two chapters are broken down further into a number of divisions, including: planning and design; energy efficiency; water efficiency and conservation; material conservation and resource efficiency; and environmental quality.

Each of the divisions establishes mandatory means and methods designed to achieve positive environmental impact within that particular division. The planning and design division, for example, establishes methods for environmentally responsible site selection, building design and development. The water efficiency and conservation division establishes means for conserving any water used indoors, outdoors and in wastewater conveyance. The material conservation and resource efficiency division establishes means for material conservation and resource efficiency, including construction waste reduction, disposal and recycling requirements. The environmental quality division establishes means for reducing air contaminants that are odorous, irritating and/or harmful. The energy efficiency division is unique in that - using residential buildings as an example - the Code does not establish minimum energy efficiency requirements beyond those required by the California Energy Commission.

The Code's specific requirements under each of the divisions are varied and numerous, but are nevertheless relatively straightforward. Among other things, the code requires that every new building in California:

- Reduce water consumption by 20%;
- Divert 50% of construction waste from landfills;
- Install low pollutant-emitting materials;
- Install separate water meters for nonresidential buildings' indoor and outdoor water use;
- Install moisture-sensing irrigation systems for larger landscape projects;
- Have mandatory inspections of energy systems for nonresidential buildings over 10,000 square feet to ensure working at maximum capacity and according to design efficiencies.



Notably, in addition to the mandatory regulations, CALGREEN also includes strong *voluntary* provisions designed to encourage local communities to take further action to green their buildings, if they so choose.

For the time being, the CALGREEN Code applies only to “every newly constructed building or structure” in California; excluded from the code are “additions, alterations or repairs.” Of course, building codes are evolving documents. There are numerous “reserved” sections within the code that are clearly intended for new provisions that will expand the scope and strength of the building standards in the future. CALGREEN will undoubtedly be adjusted as new technologies, materials and practices are developed, and as some provisions are recognized as unworkable. For example, California’s seismic code has gone through numerous revisions with general industry acceptance.

### **Comparison of CALGREEN and Private Standards**

A number of differences may be drawn between CALGREEN and private third party certification standards (e.g., Leadership in Energy and Environmental Design (LEED) and ANSI’s National Green Building Standard (NGBS)).

The development of CALGREEN was done publicly and transparently. Conversely, point-based systems are generally developed by private entities through membership-driven commentary, and without public hearings. The incorporation of private standards into public building codes has resulted in Constitutional due process objections. Others have argued that it takes power away from state and local building inspectors and places power in the hands of an unregulated third party.

The mandatory CALGREEN provisions will be administered by state and local building departments using a pre-existing enforcement infrastructure that currently enforces health, safety, fire, energy and structural building codes. It is therefore predicted that verification of the CALGREEN Code for state and local building inspectors should be a relatively simple transition. Although some private standards have post-certification inspection provisions (such as the new version of LEED announced in June 2009), many others do not.

The commissioning and certification process using a private standard can be costly. LEED certification for some buildings can cost as much as \$30,000 to \$50,000. Compliance with CALGREEN, while mandatory, will not require property owners to pay additional fees. Moreover, the instructional materials for CALGREEN will be found in the existing state building code, while private programs can require builders and businesses to purchase additional educational materials during construction. The simplicity of the CALGREEN system is further seen in the use of one code for all occupancy types, while third party certification programs can use various point-rated systems and different sets of guidelines for each occupancy covered (hospitals, schools, etc.).

Upon passing state building inspection, property owners will have the ability to label their facilities as “CALGREEN compliant.” Compliant building should be comparable to a current LEED Silver rating. Opponents say the new label will result in market confusion and “green washing,” while others argue that the label will inadvertently set new ceiling for green building standards. The intent of CALGREEN is to set a baseline standard for new construction, and local governments are encouraged to set higher standards. Indeed, over 40 cities in California currently have some form of green building ordinances.

The CALGREEN Code should not be seen as a replacement for LEED or the other private certification programs. Owners who want to distinguish their buildings may now be more inclined to build to the LEED Gold or Platinum standards. CALGREEN will likely put pressure on the private certification programs to increase their standards, but the new code nevertheless should make higher private ratings more easily achievable and cost effective by increasing both supply and demand for green building techniques and materials.

### **Risks**

The risks of green building vary depending on the party involved. For owners and developers, higher buyer expectations may lead to claims of fraud, breach of warranty, or even claims of unfair or deceptive trade practices when buildings marketed with green attributes fail to live up to expectations.

Landlords, property managers and real estate brokers and agents also need to be careful in describing the expected benefits of green buildings.

For design professionals, liability may result from alleged misrepresentations in interactions with owners, or from the failure to meet assurances regarding certification or certain attributes of a building's design, leading to allegations of breach of contract, breach of warranty or fraud. Negligence actions may be brought against design professionals on the theory that the failure of the building to meet certification or design standards was caused by design defects. Design professionals should be careful not to overstate experience with green building. They should also go into a green project being aware that they may be held to a higher standard of care. Design professionals should also carefully review construction contracts that may contain warranties and guarantees relating to green certification or performance levels because contractually-assumed liabilities are often excluded from professional liability insurance policies.

The risks faced by contractors and subcontractors include breach of contract claims, breach of warranty claims (including the implied warranty of fitness and suitability of construction materials, workmanship and purpose), and tort claims, including fraud or negligence-related claims. These claims may result from the failure to deliver promises in project contracts, as well as construction-related defects, such as improper installation or construction techniques. They may also result from alleged misrepresentation regarding the origin or the nature of materials the contractors and subcontractors have supplied for the project. Green products may present unique challenges if they are untested and without proven reliability, resulting in claims related to their durability or reliability. Additionally, because green products may be in high demand and in low supply, they could give rise to delay claims against contractors. Contractors may also expect to be held to a higher standard of care when working on green projects.

### **Minimizing Risks**



Much of the risk of green building can be mitigated during the contracting process. A well-drafted contract will precisely define otherwise vague terms, including construction terms of art that may take on new meanings when applied to green building projects. The contract should also set forth the specifications and responsibility for certification, sustainability standards, and green products, and explicitly allocate the risks relating to them, including identifying which parties will be responsible in the event of a failure or defect. A good contract should increase the chance that any error regarding products or building techniques is discovered and corrected sooner rather than later.

In particular, owners, contractors and design professionals can mitigate risks through contracts with indemnification provisions, liquidated damages clauses and waivers of consequential damages. For example, contractors can prepare the clause so as to cap their potential exposure for various types of green damages, or limit the owner's right to demand corrective work other than what is necessary for the owner to achieve certification, or to ensure that risk transfer provisions are in place so liability to the owner flows to the subcontractors.

Ideally, contractors and design professionals should avoid guarantees relating to green building certification. The contractor should only promise to construct the building in accordance with an approved design and with approved materials.

Another way all parties can mitigate risks in green building is through insurance. Currently, policies that specifically insure against risks created by the use of green products or construction techniques are uncommon. New insurance products will likely enter the market as the demand for green building develops. In the meantime, parties should be on the lookout for relevant insurance exclusions, such as the common exclusion for warranties and guarantees assumed by design professionals.

Parties should pay careful attention as to how green designs and performance are described in order to shield themselves from potential claims for misrepresentation, fraud and other claims of “green washing.” Claims relating to green products or services should be clear and should be capable of substantiation. Environmental qualifications or green attributes should not be overstated, expressly or impliedly.

Finally, risk can be minimized through good construction supervision and management practices, including field inspections, testing, and manuals. It is important for all parties involved to focus on clear communication throughout the green building process. Disputes and claims often develop because unrealistic, unclear or conflicting expectations developed between the parties. Managing the legal risks of green building should be much the same as it always has been in the construction industry by using a combination of the same tools.

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