

## **Green-building claims present opportunities, risks for homebuilders**

**By Pete Berman**

Growing consumer interest in green construction, energy efficiency and sustainable building gives developers an opportunity to distinguish themselves from competitors and improve buyers' confidence. This is especially true for builders of homes that are inspected by third-party experts and certified as meeting green-building standards.

Targeting the green-construction market can raise legal risks, though, should a buyer be dissatisfied and accuse a builder of fraud or breach of contract. This means builders should carefully draft contracts and marketing materials and train employees on how to accurately describe a structure's green features and benefits. Builders who overstate a home's potential energy savings or who make claims that cannot be proven could expose themselves to potential complaints and lawsuits by irate buyers.

There is no doubt that homebuyers are becoming more aware of green-construction techniques and energy efficiency. Skyrocketing energy costs, concern about global warming and increased environmental sensitivity have combined to make homebuyers more aware of how a house is built and how much energy it will consume, and this has changed consumer's purchasing habits. The figures are compelling:

- McGraw Hill Construction estimates that the green market was 2 percent of residential starts in 2005; 6-10 percent in 2008; and will be 12-20 percent by 2013
- More than 3,623 homes have received LEED for Homes certification, the USGC says
- Nearly 21,000 homes are registered for LEED certification

Government agencies and construction-industry groups have responded to consumers' interest in green homes by creating programs that certify a structure's energy efficiency as exceeding the basic requirements in building codes. These voluntary programs include Energy Star, the National Green Building Standard (sponsored by the National Association of Home Builders) and Leadership in Energy and Environmental Design (commonly known as LEED), which was developed by the U.S. Green Building Council,

a nonprofit environmental organization with more than 14,000 member organizations dedicated to sustainability in building design and construction.

Being able to say a home is Energy Star approved or LEED certified can be a powerful marketing tool – it’s akin to receiving the Good Housekeeping Seal of Approval or a “Best Buy” rating in Consumer Reports. The certification gives buyers a degree of assurance that they are making a good decision and helps them know what they are paying for. Certifications also provide an emotional reward by letting buyers think they are “doing the right thing,” and even could be something a homeowner can boast about. It’s easy to imagine someone at a cocktail party boasting “My house received Platinum LEED certification. You can’t be more green than that!”

The programs’ criteria for certification vary, but there are some common themes, particularly in the area of energy conservation. All of the green-building certification programs require homes to have more insulation and be better constructed (sealed tighter and less drafty) than mandated by building codes. In addition to providing extra insulation in walls and roofs, many builders install high-quality insulated doors and triple-paned windows that control drafts better and provide higher R ratings than conventional components. Builders also often include providing high-efficiency furnaces, air conditioners, kitchen appliances and lighting to receive certification. These items may cost more to initially purchase, but usually pay for themselves many times over during their lifetimes because of their energy savings. “Based on their Home Energy Rating System scores,” the USGC says, “the average home certified under LEED for Homes since its launch in February 2008 is predicted to use an estimated 30 percent to 60 percent less energy than a comparable home built to International Energy Conservation Code.” )

Architects and builders also can use design features and site planning to provide low-cost, passive energy efficiency gains. Simple steps like providing large, overhanging eaves to reduce the amount of hot sunlight entering a room during the summer while allowing warming light in during the winter can reduce energy consumption for heating and cooling and help a structure be approved for certification. How a building is positioned

on a site also can be a consideration, particularly if plans call for solar panels on the roof. Depending on a home's location, a builder may want to maximize or minimize the amount of sunlight to which a building is exposed. (A developer in southern Arizona obviously faces different energy-efficiency challenges than his counterpart in northern Vermont.) Creative builders and architects can use sensitive design and site planning to help homes they build receive certification.

In order to receive final approval for certification, a building's design specifications and the quality of its construction usually must be reviewed by an independent expert. The reviews can be exhaustive, particularly in the LEED program. In addition to energy efficiency, LEED reviews consider innovation and design; how homes interact with the larger community; the impact on the site's vegetation and topography; water efficiency; materials used and the use of environmentally preferable supplies; indoor air quality and how consumers are educated about the operation and maintenance of their home's green features. These criteria are used to calculate a house's score, which can range from zero to 136, with 45 being the minimum score for certification. LEED has four recognition levels: Certified, Silver, Gold and Platinum.

The reviewer will evaluate a building's design specifications for items such as the insulation's R values and the type of windows used. They also check the quality of workmanship by inspecting the structure and conducting tests such as a "blower-door" test that evaluates how well sealed (or drafty) a home is. If the inspector concludes a home's design and construction meet the required standards, the building will receive the appropriate certification.

Despite the growing consumer interest in green-construction certifications, some developers and homebuilders have decided not to make them a standard part of their business because they believe promising to receive a LEED or Energy Star approval on every home poses a double-edged sword for builders. Being able to say a house is Energy Star approved or has a particular LEED rating can be a powerful marketing tool and help attract buyers. But there also are potential risks to making such claims. Some aspects of

these ratings and certifications, for example, are subject to the reviewer's interpretations, so it is possible that the person issuing the final certification might disagree with a builder's calculations and reject an application. Under the best of circumstances this might force a costly and time-consuming appeals process, and under the worst of circumstances it could scuttle a sale or force the builder to compensate the buyer for failing to receive the promised certification.

One way to avoid this potential problem is to say homes will be "built to meet or exceed" Energy Star or LEED standards while avoiding a commitment to have the final product actually receive certification. This gives the consumer the confidence of knowing they are buying an energy-efficient home while letting the builder avoid the potential problems caused by disagreements with the inspector. The developer will have to fulfill his pledge to meet the guidelines, of course, and should be prepared to demonstrate how this was done by citing features such as enhanced insulation or high-quality building components.

Another approach is available to developers of large projects who can have prototype homes receive certification and then build subsequent homes to the same specifications. This lets the developer state (and demonstrate) that their design and workmanship "meet green standards" while avoiding the expense and risks of having every residence certified. This approach provides the best of both worlds: It gives builders the ability to benefit from claims of "green-ness" while avoiding the potential pitfalls of failing to receive certification on a particular home because of technicalities or differing interpretations of the guidelines.

As these situations show, semantics – the careful and accurate choice of words – can be essential for builders making green-construction claims. A little bit of "puffery" might be allowed in marketing, but builders must be careful to avoid truly overstating green claims or misrepresenting their product. Developers may be able to learn a thing or two from carmakers when it comes to semantics. Automobile ads are filled with boasts about how much "fun" or how "exciting" a car is – claims that are entirely subjective and cannot be

quantified, cannot be proven or disproven. Homebuilders can similarly use words like “outstanding,” “environmentally friendly” or “excellent” because these are subjective opinions, not facts. But builders should be careful how far they push even subjective claims. For instance, if a builder claims their product is “superior” in some way, how would they prove it if challenged by a dissatisfied buyer? In the realm of green construction and energy efficiency, being “superior” might be quantifiable, so semantics are very important.

When carmakers make specific claims, they often cite an authoritative independent source such as EPA miles-per-gallon ratings, a JD Power survey or a magazine. These citations improve the claim’s credibility and insulate the advertiser from complaints. Homebuilders also can cite third-party sources to make favorable representations about their buildings or components while protecting themselves from claims of fraud, breach of contract or deception. Window and door manufacturers, for example, often provide test results that a builder could refer to, and efficiency ratings are available for most HVAC components and appliances. Some builders’ marketing materials even include footnotes citing the sources of information in their marketing materials. A disclaimer saying claims are based on sources believed to be accurate and reliable but not proven by the builder also could provide a degree of protection against claims of fraud or misrepresentation.

Unfortunately, there aren’t firm rules governing where “puffery” becomes a fraudulent misrepresentation. Courts allow a degree of boasting and hyperbole in sales and marketing – that’s why “caveat emptor” is a good rule of thumb. Consumers understand this, but also expect businesses they deal with to be honest. Knowing when proud boasts stray into the area of fraudulent misrepresentations sometimes can be difficult. The standards for fraudulent misrepresentation vary from jurisdiction to jurisdiction, and even between judges – claims one judge finds acceptable might be deemed misleading and fraudulent by another judge. The inability to use clear, objective standards for assessing subjective marketing statements means it is prudent for developers and homebuilders to err on the side of caution and avoid overstating the benefits of green construction.

As the saying goes, “the best defense is a good offense,” and in this situation, a good offense is careful, pro-active planning and clear communication with the buyer throughout the sales process. It is important for developers to clearly explain why their buildings are “green” and what the benefits will be, while avoiding making claims that can be hard to fulfill or quantify. Using carefully worded literature and statements that describe the benefits of green construction without creating exaggerated expectations is essential. Receiving certifications promised to buyers obviously is another defense against potential lawsuits or complaints, although even this cannot always prevent nuisance suits and complaints. A buyer, for instance, still might complain that their power bills are higher than expected. Builders must try to prevent buyers from having heightened expectations that won’t be met. Homes built to LEED standards should cost less to heat and cool, but owners still will receive a utility bill every month.

Many of the benefits of green construction are hard to quantify or prove to consumers. Architects and builders may know that installing triple-paned windows with inert gasses and high-R insulation will reduce heating and cooling costs, but how do they prove the savings for a particular homeowner? It’s basically impossible. You almost never have identical homes near each other where one house meets enhanced LEED standards while its twin next door only meets the basic building code. And even if this situation did exist, the owners’ different lifestyles and personal energy-consumption habits would make a direct comparison difficult.

This difficulty providing quantifiable, empirical information about a green home’s energy savings means developers should avoid making specific claims that can’t be proven. The more specific a builder’s claims are – especially including figures for expected savings – the more vulnerable they are to a successful lawsuit or complaint to a consumer-protection agency. Instead, it is better to use descriptive words such as “significant” or “large.” These words convey a sense of the scale of savings and appeal to consumers’ desires and emotions without presenting specifics that can be challenged in court.

Targeting the green-construction market and making certain types of statements can expose builders to legal risks that usually can be avoided by carefully drafting marketing materials and contracts while also avoiding unattributed or confusing claims about a green building's benefits. Growing public awareness of programs such as LEED and ever-rising energy costs will continue to stimulate increased interest in green construction and energy efficiency

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