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Housing is bust, but construction LAW IS BOOMING

A local construction law attorney offers some predictions on the future of real estate-related litigation.

Mark A. Bloomquist, a partner with Meagher & Geer law firm in Minneapolis, holds up a piece of fiber cement siding that has been the subject of recent litigation. (Photo by Bill Klotz)

BY DAN HEILMAN

The housing market meltdown hasn't meant a slowdown in legal issues related to real estate and construction.

In fact, according to attorney Mark A. Bloomquist, the practice area is growing in both the number of cases and their complexity.

Bloomquist is a partner with Meagher & Geer law firm in Minneapolis and chairman of the Minnesota State Bar Association's construction law section. We sat down with him to discuss areas of construction law that are on the rise — along with others that are crumbling down.

Sustainable building

The watchword in construction these days isn't a word at all, but rather an acronym: LEED. Short for Leadership in Energy and Environmental Design, LEED is a third-party certification program and benchmark for the design, construction and operation of "green" buildings.

LEED promotes a whole-building approach to sustainability by recognizing performance in five areas of human and environmental health: sustainable site development, water savings, energy efficiency, materials selection and indoor environmental quality.

"It's pervasive throughout the construction industry," Bloomquist said. "The consumers — whether that's government, private industry, residential builders or wastewater treatment plants — want to know if it's LEED-certified any time there's construction that alters the Earth."

LEED building standards are developed by members of the U.S. Green Building Council to promote saving energy, water and other materials, and encourage the use of materials that don't degrade as fast as traditional materials.

Bloomquist said that while LEED is fairly new, there isn't much litigation related to the standards at the moment. But that could change rapidly in years to come.

"Potential litigation will be things like one party saying, 'You said you would build a structure that was LEED-certified and you didn't. Because it's not LEED-certified I can't get my government funding, or I can't promote it to my customers,'" Bloomquist said.

Mechanic lien foreclosure suits

Fallout from the collapsing housing market is leading to a number of scenarios in which the value of a new home ends up being much

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less than the cost of the labor and materials that went into its construction. This has caused an uptick in litigation regarding mechanic lien foreclosures.

Bloomquist said the current climate has pitted suppliers of materials and services — tradesmen, carpenters, plumbers and roofing material suppliers — against lenders who want loans repaid.

"The lender will say, 'We've disbursed X amount of dollars for the building of the property. If the property is sold at a sheriff's sale, we should get first dibs on the proceeds,'" Bloomquist said. "The materials suppliers and contractors say, 'No, we should get first dibs.' There are various rules as to who gets priority."

Another example could involve a house that's completed, but not yet sold. The house might be worth $300,000, but there's a $250,000 loan on it and a $200,000 contractor bill.

"How are you going to divide that $300,000 to pay $450,000 in bills?" Bloomquist asked. "You could call it litigating over scarce resources."

Rules of renting

In areas such as north Minneapolis, where a sharp rise in foreclosures has led to an abundance of cheap property, some investors are looking to the area as a means of accumulating inexpensive homes to offer as rentals.

While the city doesn't want blocks of abandoned homes, it doesn't want an influx of offsite slumlords, either. Minneapolis has been considering a number of options, including restricting the number of rental properties that can be owned by one party, or possibly using eminent domain to buy up whole blocks of untenable homes. Either scenario is likely to lead to a legal battle, Bloomquist said.

Regarding the issue of eminent domain takeovers, "I think the argument will be that these are blighted sections, and the city has the power to condemn and raze the whole block and sell it to a private developer," Bloomquist said. "I don't know how that will fly. It's really a political issue."

Recent laws regarding eminent domain have restricted the government's ability to condemn property for private development, hampering future scenarios like the one that allowed Richfield to condemn properties in an effort to lure Best Buy into building its corporate headquarters.

"You can't really do that anymore, but one of the exceptions is for blighted neighborhoods," Bloomquist said. "Then the city does have the power to condemn."

Material disputes

Petroleum was $66 a barrel two years ago. Since then it has more than doubled, only to drift back down recently. But the price drop hasn't prevented some disputes between general contractors and suppliers of petroleum-based materials used for roofing, waterproofing and other necessary parts of construction.

That creates tension if, for instance, a contractor agrees to build a school and relies on firm quotes from suppliers when submitting a bid, only to find that the cost of materials has risen sharply after the bid was accepted.

"The suppliers usually have a caveat saying their price is subject to drastic cost increases," Bloomquist said. "Somebody has to absorb that. The owner is usually entitled to a firm price, so either the contractor or the materials supplier has to [pay what's left over]. That can lead to litigation, too."

Bloomquist said these situations usually aren't anyone's fault. "It's kind of like the real estate market," he said. "It's just the result of unexpected changes in the economy causing stress between people in business with each other."

Predatory lending suits

When the mortgage meltdown first reached crisis mode, it led to a spate of suits against what litigants considered to be unscrupulous lenders. But in a lot of those cases, it was found that the lender didn't do anything illegal, and as a result, predatory lending suits are cooling off.

While there are certainly still cases against truly predatory lenders, most foreclosures are due to market forces — home prices not increasing or holding steady the way borrowers expected.

"There's less of an attitude of, 'Let's go after the lending industry as the cause of this whole thing.' People are realizing that the real estate market isn't performing the way we all thought it would. It's not anyone's fault in particular, especially not locally," Bloomquist said.

"So now the attitude is more, 'Let's just deal with what we've got, which is unfinished houses or unoccupied houses where people weren't able to keep up the mortgage. We're not going skewer the mortgage lenders,'" he said.

Stucco-related residential construction defect suits

The late 1990s saw a trend for stucco-finished homes being built in new developments. Locally, that was especially true in east metro cities such as Woodbury and Oakdale.

But applying stucco is a tricky process that can be prone to water leakage around doors and windows, and there turned out to be entire neighborhoods in which houses experienced water infiltration — followed by a flurry of homeowner lawsuits.

These suits have ebbed, but nobody's sure of whether that's because stucco construction techniques have improved, or because contractors are avoiding using stucco because it might lead to litigation.

"There still are a lot construction defect lawsuits involving things like window installation and bad roofing, but the stucco cases seems to have slowed down," Bloomquist said.

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HOT OR NOT: Construction Law

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