

As Green Building Moves Forward, Claims and Disputes Will Follow

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Green building—which decreases energy, water, and materials use in building design and the construction process—has seen a significant increase in popularity in 2008. This increase is due to rising energy costs, elevated demand, increased profits, a decrease in associated cost premiums, and the incorporation of green building strategies in state and local codes and regulations.

In Virginia alone, there are more than 54 green building projects that have been certified through the U.S. Green Building Council (USGBC) Leadership in Energy and Environmental Design (LEED) rating system and 344 registered projects seeking LEED certification. Virginia counties and cities have followed the nationwide trend of incorporating regulations and incentives for green building, while the state legislature has mandated that public projects incorporate green building practices.

Just as construction claims and disputes often follow construction projects, it is only a matter of time before green building construction claims and disputes follow green building projects. Due to the unique and unknown aspects of green building and inexperience with this type of construction, it is likely green building disputes will become prevalent in the near future.

Green Building Basics

Green building incorporates design and construction practices that reduce a building's impact on health and the environment through better siting, design, construction, operation, and maintenance. Green projects result in lower operating costs, improved public and occupant health, and less effect on the environment.

The preeminent system for measuring a building's greenness is the LEED rating system

created by the USGBC. Under the LEED rating system, buildings are scored based on five major categories: sustainable sites, water efficiency, energy and atmosphere, materials and resources, and indoor environmental quality.

Different LEED scoring systems apply to different types of projects and increased green performance results in higher ratings: certified, silver, gold, or platinum. The USGBC determines certification after construction is complete, when an applicant submits documentation that demonstrates compliance with the requirements of the applicable rating system.

Other rating systems have recently been introduced to compete with the LEED rating system. For example, the Environmental Protection Agency's Energy Star program offers an energy management strategy that has been used for more than sixty-two thousand buildings across the country. In 2004, the Green Globes system was introduced to the United States by the Green Building Initiative as an adaptation of a Canadian system. Green Globes has emerged as the main challenger to the LEED rating system.

The opportunities and benefits associated with green building also result in increased expectations. As more parties undertake green building—because of anticipated increased profits or government mandates—the possibility of failed expectations will increase. These failed expectations will result in disputes, claims, and litigation.

Green Building Legal Issues

Construction projects often result in claims and litigation, and it is naïve to assume that green building will not follow the same course. Owners, contractors, designers, and insurers should assess where green building risks exist and continue to monitor legal developments in this emerging industry. Green building disputes are most likely to include contract claims and non-compliance with regulations and codes.

Contract Claims

With the emergence of green building, parties have learned and adapted to new construction

techniques and practices. These new methods have created fertile ground for disputes and litigation, because parties' expectations of the end result invariably differ. In particular, certification of green building projects, new or modified terms of art, and the interrelated components of green projects create scenarios ripe for litigation.

Owners and developers move forward with green building projects with the goal of achieving a specific certification. For example, on June 24, 2008, the joint venture of The PNC Financial Services Group Inc. and Vornado/Charles E. Smith unveiled a plan for the District of Columbia's first office building designed to achieve LEED Platinum certification. However, they may not reach this certification level.

Obviously, if an owner announces before construction that they plan to achieve a specific certification level, that owner will have certain expectations of the completed building. So what happens if a building fails to achieve the green building certification level anticipated by the owner? The owner may blame the architect or its consultants, contractors, and subcontractors. The liability of these parties will be determined by the relevant contract terms. Lawyers who represent the project participants must recognize this risk during contract formation, counsel their clients on how the contract documents address the risk, and determine ways to allocate or mitigate the risk. The participants and their counsel must understand the process so they can avoid pitfalls that accompany this industry.

The owner wants to achieve the stated level of certification for financial and reputational reasons. Damages that result from the failure to achieve that level could include lost rents, lost tax credits, and diminished asset value. Some of the probable damages could be characterized as "consequential damages." Owners should make sure that there is no consequential damages waiver in the design or construction contract, and that recoverable damages are specifically defined. The owner also must consider whether the risk of failure is covered by the architect's professional liability insurance or the contractor's performance bond.

The architect is retained to design a building that meets a predetermined certification level. The architect should understand what it is promising and how it can achieve that level.

Precontract considerations include:

- Is there a limitation of liability clause?

- What is the standard for imposing liability — strict liability or negligence?
- Does professional liability insurance cover the failure to achieve certification, and what are the limits of that coverage?

Because changes in the design can result in an unforeseen impact on certification, the architect should either limit the owner's right to make changes during construction or make the owner assume the risk of a lower level of certification where changes are made.

The contractor should ensure that the contemplated certification is not construed as a performance specification, and should avoid guarantees. The contractor should agree only to construct the building in accordance with the approved design and using the approved materials. If the contractor complies with the contract, there should be no liability even if the building does not achieve the desired certification level. Because the lack of certification can have a significant financial impact on the owner, the contractor should avoid suggesting changes through substitution or value engineering that could have a negative impact on certification.

Counsel also must consider the owner's remedy if the contractor's acts or omissions result in the building not achieving the desired certification. Although specific damages may be difficult to prove with certainty, a contractor may be exposed to significant liability if it is responsible for the building's failure to achieve the desired certification.

A liquidated damages clause is a good option to limit liability. Limits on an owner's right to demand corrective work also should be considered. Tearing out and replacing installed work that is otherwise acceptable may be necessary to achieve the certification. Ironically, such economic waste contradicts the intent of green building. The contractor also should make sure that potential liabilities flow down to its subcontractors.

Green building claims also are likely to arise where previously used construction terms, when applied to green building, lead to confusion and disputes. Construction terms of art may take on new meanings when applied to green building projects and practices. For example, how parties interpret "substantial completion" may differ if green practices are incorporated into a project. Substantial completion has been defined as "the stage in the progress of the work when the work or designated portion thereof is sufficiently com-

plete in accordance with the contract documents so that the owner can occupy or utilize the work for its intended use.” *AIA Document A201*, § 9.8.1.

While parties to a typical construction project have a general understanding of “substantial completion,” incorporation of green building practices, such as Environmental Quality (EQ) credit 3.2 under the LEED for New Construction Rating System, may change when substantial completion occurs. Under EQ credit 3.2, after all interior finishes have been installed but prior to occupancy, a party must perform a building “flush-out” by supplying a specific volume of air to the project area. If the flush-out requirement is incorporated into the contract, a contractor that bases its schedule on the typical definition of substantial completion may be surprised to learn of additional time, and perhaps liquidated damages, associated with the flush-out.

Finally, it is important for all project participants to recognize that design changes during construction also could result in significant disputes. Green building projects comprise specific interrelated practices and strategies. Removing or modifying one strategy will most likely have a direct corollary effect on another strategy. Consequently, a single change, whether it results from a design error or an owner preference, could have a ripple effect on other aspects of the design.

As an example, one of the primary green building strategies that is directly affected by other strategies is a building’s level of energy performance. A project may achieve points based on increased levels of energy performance above the baseline energy level. A building that uses less energy to heat, cool, ventilate, and power building components will achieve more points. The number of points a building can earn will be affected by changes to or the elimination of other green strategies that affect energy performance.

A green building design may call for a specific window that provides necessary light. If the window type is changed later, more or less light may be transmitted into the building, resulting in increased heating or cooling needs. By changing the specified window, the entire energy performance of the project may change, costing the project precious LEED points required for certification. If the architect is unable to promptly recognize and address the ripple effect, the contractor is likely to be delayed and may have to replace installed work. If the architect fails to recognize the impacts, certification may be lost. In either case, claims are likely to be asserted. How the design and construction contracts address this circumstance is important to all project participants.

Green Building Codes and Regulations

Owners, contractors, and designers not only must evaluate and manage special risks related to green building during contract formation and administration. They also must keep apprised of green building legal developments and review and evaluate new and proposed green building codes and regulations. These codes and regulations can have a significant impact on construction projects, forcing parties to incorporate green strate-

gies at the risk of noncompliance. While East Coast cities—particularly Washington, D.C., and New York City—have enacted progressive codes and regulations that require green building components, Virginia is just now entertaining the idea of regulating green building practices.

During the 2008 legislative year, Gov. Timothy M. Kaine and the General Assembly grappled with how to require green building practices, including which rating system is most appropriate for Virginia. As part of the 2008 budget process, the legislature added the following provision to the governor’s budget: “All new and renovated state-owned facilities ... that are over 5,000 gross square feet shall be designed and constructed consistent with the ... U.S. Green Building Councils [*sic*] LEED rating system or the Green Globes rating system.” Design and construction entities undertaking public project developments will need to be aware of this important amendment.

While the Commonwealth of Virginia is just now dabbling in green building regulations, Virginia counties and cities have approved more progressive regulations. For example, Alexandria has set a goal to achieve LEED-Silver rating for all new city-owned facilities larger than 5,000 square feet. Arlington County encourages private developers to evaluate the environmental impacts of all site plan projects.

Additionally, Arlington County allows special exceptions from zoning ordinances and more flexibility in building form, use, and density than is normally allowed in specific zoning districts if the following five requirements are met:

- LEED Accredited Professional— Each project must include a LEED accredited professional as part of the project team.
- LEED Scorecard— A LEED Scorecard must be submitted as part of the site plan application. A specific number of LEED credits will be negotiated and included in the project.
- Construction Waste Management Plan— All site plan projects must prepare and implement a construction waste management plan.
- Energy Star— For multifamily residential projects, appliances, and fixtures must meet the U.S. Environmental Protection Agency’s Energy Star standards. (*see* <http://www.energystar.gov>)
- Green Building Fund— All site plan projects that do not receive LEED certification from the U.S. Green Building Council must make a contribution to the County’s Green Building Fund, calculated at three cents per square foot.

Furthermore, Arlington County has created an incentive program to encourage green building. Within the incentive program, there is an enforcement mechanism— a contribution to the Green Building Fund— if parties do not meet the other four green building requirements.

While the commonwealth and its cities and counties have incorporated some green building requirements into regulations, the future of green building regulations and codes can be seen in Washington, D.C. On March 8, 2007, the District passed the Green Building Act of 2006 (Green Building Act), becoming the first major U.S. city to require private projects compliance with the LEED rating system. After January 1, 2012, all privately owned buildings that involve new construction or substantial improvements must comply with LEED certification requirements.

Since enacting the Green Building Act, the District of Columbia has also moved forward to green its building codes. The top priority for the amendments is to remove impediments to green building.

Conclusion

As demand for and profit from green building continue to increase, more parties will become involved with this type of construction. Unsuspecting parties could face liability for green building projects if expectations are not met, confusion arises as to the content of contract, or codes and regulations are not complied with. Parties should fully analyze both legal and political aspects of green building before entering the fray. The green building legal and regulatory fields are dynamic and must be monitored in order to mitigate any potential risk. ■