

LEGALLY SPEAKING: Minimizing the Legal Pitfalls of Sustainable Design and Construction (Part 1)

By Matthew J. DeVries and Angela Stephens

It really is impossible to put your arms around the number of green building opportunities that are sprouting up all across the nation—whether you are talking about federal, state or local projects. Sustainable design and construction raises unique legal issues for all parties who contribute to the project. It affects design professionals, contractors, sureties, insurance companies, banks, owners, subcontractors, material suppliers, vendors, and their respective employees. In this first part of a two-part article, we will explore ways to minimize the legal pitfalls on a green project.

Preliminarily, design professionals should work with the owner and contractor to develop sustainable goals that are attainable. Owners and banks want to be sure that they have adequate remedies in the event problems arise, including the following: (1) costs exceed what was promised; (2) tax incentives which were being sought by having a sustainable and energy efficient building are lost; or (3) if the design or construction of a project does not attain anticipated certification.

Contractors and subcontractors need to make sure that they understand the unique requirements for “green” projects such as:

(1) following the Erosion and Sedimentation Control Plan adopted for the project;

(2) avoiding disturbance of more areas than necessary or allowed by LEED on previously undeveloped land;

(3) properly installing the right materials (i.e., materials with low VOC limits, high SRI values, which are recycled, reused, regional, or renewable) and equipment;

(4) protecting materials and equipment during construction from moisture or construction debris;

(5) collecting and submitting the required documentation for those materials; and

(6) following the waste management plan for recycling construction waste materials. If a contractor fails to comply with one of these requirements which was tied to a sustainable goal or point needed for certification, then it may be liable for any resulting damages suffered by the owner.

Owners, design professionals, and contractors want to make sure that they have adequate insurance coverage in place to cover any potential risks. However, insurance companies are still evaluating whether special coverage is needed on sustainable design and construction projects and only a few companies are currently offering specialized coverage for “green” projects. In addition to obtaining insurance coverage to help minimize the risks to your company, here are some ways to minimize the potential legal risks of sustainable design and construction.

1. Don't Promise More Than You Can Deliver. In addition to environmental stewardship, there are many recognized benefits to sustainable design and construction such as energy and operational cost savings, healthier workspaces, increased worker productivity, increased tax incentives, and financing incentives. However, what happens when

your marketing materials promise or guarantee these benefits and yet they are not realized or there is a dispute over whether these benefits are actually realized? The parties may end up in a dispute alleging breach of an express or implied warranty, fraud, false advertising, or other similar claims. The key is to monitor your marketing activities. Only promise what you can measurably deliver and include clauses in your contracts which limit all warranties to those expressly provided in the contract.

2. Don't Guarantee the Level of Certification. If you are a contractor, subcontractor or design professional, do not guarantee the level of certification on any project unless required by law. In many cases, the determination of whether a project achieves a certain level of certification is regulated by a third party over which you have no control. For example, under the Leadership in Energy and Environmental Design (“LEED”) rating system, owners who want to design and construct a LEED-certified building must first register the construction project

with the Green Building Certification Institute (“GBCI”), a third party responsible for project registration and LEED certification. During the design and construction phase of the project, the project team submits documentation to the GBCI through LEED Online, verifying that certain points have been achieved. Ultimately, the GBCI determines whether various points are achieved in order to reach the various levels of LEED certification. Therefore, instead of guaranteeing a certain level of certification, warrant that the work will be in accordance with the contract, the plans and specifications, and accepted industry standards.

3. Identify the Participants, Their Roles, and Their Responsibilities. Many disciplines are involved in achieving a project's sustainable goals (whether obtaining LEED certification or following the guidelines of the Green Globes rating system). On most sustainable construction projects, no one party is in control

of obtaining all of the points or goals. The parties must collaborate and work together in order to obtain the project's goals. Most importantly, the parties must understand who is responsible for all of the aspects of meeting the project's goals. For example, if the owner's goal is LEED Silver Certification, the parties should create a version of the LEED 2009 score card which clearly identifies which parties will be responsible (i.e., architect versus the general contractor and subcontractors) for achieving the various points sought within LEED 2009, and make this document an addendum to each of the contracts on the project. Additionally, owners and contractors should select an experienced green building team and consider inserting clauses in their contracts affirming that the contractor and/or subcontractor has read, understands, and will comply with the LEED or green requirements for the project.

4. Clarify the Standard of Care. There is a lot of discussion whether architects and engineers (and potentially LEED APs) are going to be held to a heightened standard of care on sustainable design and construction

If a contractor fails to comply with one of these requirements which was tied to a sustainable goal or point needed for certification, then it may be liable for any resulting damages suffered by the owner.

projects. This potential heightened standard of care may arise from one of two sources. The first is the 2007 AIA Code of Ethics, which provides:

CANON VI – Obligations to the Environment.

Members should promote sustainable design and development principles in their professional activities.

Ethical Standard 6.1 Sustainable Design: In performing design work, Members should be environmentally responsible and advocate sustainable building and site design.

The second source is the 2007 National Society of Professional Engineers Code of Ethics, which provides:

Engineers are encouraged to adhere to the principles of sustainable development in order to protect the environment for future generations.

“Sustainable development” is the challenge of meeting human needs for natural resources, industrial products, energy, food, transportation, shelter, and effective waste management while conserving and protecting environmental quality and the natural resource base essential for future development.

Dissatisfied owners may argue that because these Codes of Ethics require design professionals to promote sustainable buildings, they should be held to a higher standard of care which ensures the building is sustainable. In 2007, the AIA Standard Form of Agreement between Owner and Architect, B101 (2007) expressly identified the standard of care that design professionals would adhere to in the performance of the contract. It provides:

§ 2.2 The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

Similar language can be incorporated into “green” construction contracts in an effort to decrease the risks of being held to a heightened standard of care.

5. Only Take Responsibility for Delays You Can Control. Delays may arise from lack of green material availability, the lack of workers skilled in sustainable construction technologies, longer durations to install new materials and technologies, flushing out the building, or the time to obtain certification from the GBCI. The key is to only take responsibility for delays that you can control. Include or revise force majeure clauses to account for delays from lack of green material availability and/or lack of skilled workers due to unforeseen events. Also, define what is meant by substantial completion and don't tie substantial completion to the achievement of certification.

While these suggestions may not eliminate all of the risks of sustainable design and construction, they will go a long way in minimizing those risks. In the next issue, we will explore five more areas of concern for your green projects.



About the Authors: Matt and Angela are members of the Construction Service Group of Stites & Harbison, PLLC, and both are LEED® Accredited Professionals. Matt lives in Nashville and is the founder of www.bestpracticesconstructionlaw.com. Angela lives in Louisville and is the first attorney in Kentucky to attain the Green Advantage® certification. You can reach the authors at mdevries@stites.com and astephens@stites.com.

Please welcome Matthew J. DeVries as a new contributor to Design Cost Data magazine. Part 2 of Minimizing the Legal Pitfalls of Sustainable Design and Construction will appear in the July/August 2011 DCD.

Why you want it you need it you can't live without it

Bluebeam® PDF Revu® 9 was created for those who want to push their limits and make things happen. Fully-loaded with over 30 new cutting-edge features including Bluebeam PDF Revu eXtreme™ for the power users, Revu 9 has all of the features you want and need to take your workflow paperless. But, don't stop there. Do more. Use Bluebeam's built-in measurement tools to take length, area, perimeter, diameter, volume and radius dimensions, count from PDFs and perform area cutouts electronically. Revu automatically tracks your dimensions in a list that can be summarised and imported into Excel®, or you can add custom formulas to calculate costs. That's right, Bluebeam does all of the hard work for you. What are you waiting for?

Try it. Buy it. Love it.
www.bluebeam.com/doi
Or visit us at AIA in booth #843

bluebeam®
© 2011 Bluebeam Software, Inc.

Circle #xxx On Reader Service Card