

LEGALLY SPEAKING: Minimizing the Legal Pitfalls of Sustainable Design and Construction (Part 2)

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In the May-June 2011 issue, we identified some of the ways to minimize the potential legal risks of sustainable design and construction. These included: (1) **Don't Promise More Than You Can Deliver**, which really focuses on your marketing activities and warranties; (2) **Don't Guarantee a Level of Certification**, unless it is somehow required by law; (3) **Identify the Participants, Their Roles, and Their Responsibilities**, which will help you through the design and construction process; (4) **Clarify the Standard of Care**, which is important from a negligence viewpoint in determining liability; and (5) **Only Take Responsibility for Delays You Can Control**, since delays on a green project can stem from any number of reasons. In this second of the two-part series, we look to five more ways to minimize the legal pitfalls on a green project.

6. Include a Mutual Waiver of Consequential Damages. Although many construction contracts include mutual waivers of consequential damages, it is unclear whether courts would consider as "consequential damages" things such as lost tax incentives and/or credits, decreased energy savings, decreased water bill savings, green grants, and future development rights. To be certain that these types of damages are deemed consequential damages and, therefore, waived by the parties, they should be expressly included in the clauses waiving consequential damages.

7. Investigate and Understand Insurance Coverage. Insurance companies and underwriters know that sustainable design and construction may present increased risks for claims associated with the failure to achieve energy and operational cost savings, healthier workspaces, increased productivity, tax incentives, and/or LEED Certification. Currently there are few insurance companies that provide "green insurance" but more are exploring special coverage for green projects. In order to minimize the level of exposure your company has on sustainable design and construction projects or to know what exposure your company will have, show your risk management advisor a copy of the contract before executing it, and talk with him/her about what will be covered by insurance in the event that the building fails to achieve energy and operational cost savings, healthier workspaces, increased productivity, tax incentives, and/or LEED Certification.

8. Don't Tie Payments to Achievement of Certification. The Green Building Certification Institute ("GBCI") is a third party organization that works with the United States Green Building Council ("USGBC") for LEED Certification of buildings. GBCI determines whether various points are achieved in order to reach the various levels of LEED Certification. The submission, review, appeal, and award of credits may take months or up to a year to be completed after substantial completion has been reached. Therefore, if you are a contractor or design professional, then you should avoid tying payment to the achievement of a certain level of certification. Consider including a clause which provides: "Attainment of LEED Certification shall not be a condition precedent to progress payments or the final payment on the project."

9. Understand the LEED Rating System Appeals Process. Be familiar with the LEED Rating System Appeals process and timing established by the GBCI. Updates can be found on the GBCI website at www.gbci.org. The current appeals policy provides for two levels of appeal for decisions on program requirements, prerequisites, credits, or Credit Interpretation Requests: First Level Appeal, and Final Level Appeal. The First Level Appeal must be filed (with the required fee and documentation) with the GBCI through LEED Online within twenty-five (25) business days from the applicable action or determination by GBCI. The Project Team should consider and specify who should pay for appeals of various credits in the contracts. The GBCI will attempt

to render a decision within twenty (20) business days from the initial filing of the appeal. If the Project Team is not satisfied with the GBCI's determination on the First Level Appeal, they can file a Final Level Appeal, using LEED Online, within twenty-five (25) business days after receiving notice from GBCI as to the determination of the First Level Appeal. The owner can submit written briefs to the GBCI within twenty-five (25) business days following submission of the appeal request. The Appeals Board will meet and render a written decision, which shall be final.

10. Include a Notice and Opportunity to Cure. Sustainable design and construction projects tend to use new materials and technologies in buildings, which may not have a proven track record of performance. This may lead to long-term maintenance and performance issues. Specify who will bear the responsibility for maintenance of building components, and who will bear the risk if a manufacturer goes out of business or the component malfunctions. Additionally, incorporate a clause which provides that the owner shall give the contractor notice and an opportunity to cure or correct any alleged defective work, materials, or equipment installed by the contractor prior to withholding amounts from payments or hiring another contractor to repair or replace the work.

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.

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