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LEGAL IMPLICATIONS
OF GREEN BUILDING

The US Litigation and Claims Experience

The construction industry will be transformed over the next few years by the green building movement. There is an increased demand in North America for buildings and construction procedures with a reduced impact on the environment. In particular, it is becoming relatively common for public and private owners to require that their buildings achieve a particular level of LEED™ certification (Leader in Energy and Environmental Design).

The practical and legal implications for owners, design consultants, contractors, and suppliers or manufacturers of construction products of committing to design and build a LEED™ project are not yet fully understood, but past experience with new developments in construction would suggest that a careful consideration of the legal risks and appropriate mitigation measures is warranted at this time.

In the first section of this article, we focus on the experience with green building in the United States, from which lessons can be learned. In a future newsletter, we will identify the legal risks associated with green building as well as specific steps that can be taken in drafting and administering construction contracts in order to minimize the risks.

A commonly cited American case in relation to green building is *Southern Builders v. Shaw Development* No. 19-C-07-11405, (Somerset Co. Cir. Ct., filed Feb 7, 2007). Although the case settled before trial, thus depriving us of judicial reasoning on the issues, it does provide insight into some of the potential risks on LEED™ projects.

The project which was the subject of the litigation was the Captain's Galley, a \$7.5 million condominium project located on the Chesapeake Bay in Crisfield, Maryland. It was intended to achieve a Silver LEED™ rating, which under the laws of Maryland, would have resulted in tax credits for the owner. However, there were significant delays during construction, and the contractual completion date was not achieved. As a result, the Captain's Galley failed to achieve the LEED™ certification within the time limit specified in the tax credit application, and the credits were denied.

The contractor, Southern Builders, commenced an action to enforce a lien of approximately \$50,000, based on amounts claimed to be owing under the construction contract. Shaw Development counterclaimed, seeking damages in the amount of \$1.3 million from Southern Builders, of which \$635,000 related to the building's failure to achieve the tax credits. The relevant claim made by Shaw Development was that Southern Builders had breached the construction contract and been negligent in failing "to construct an environmentally sound 'green building' in conformance with the LEED™ rating system".

The only reference in the contract to the project's LEED™ requirements was in the Specifications, which stated simply that the project was "designed to comply with a Silver Certification Level according to the USGBC's LEED™ Rating System, as specified in Division 1."

The contract was a standard American Institute of Architects (AIA) A101-1997 Owner/Contractor Agreement. While it required Southern Builders to build the project in conformance with the contract design, it did not obligate the contractor to achieve any particular LEED™ certification,

nor did it specify the contractor's responsibilities in relation to achieving the certification, or address the fact that the certification had to be achieved within a specific time frame.

More will be said on the topic of the need for specific contract language dealing with roles and responsibilities relating to LEED™ certification in the next edition of this newsletter.

It should be noted that while there are very few reported judicial cases on green building issues, there are many reports in the United States of claims made under liability insurance policies and otherwise on green projects, arising from failures, unexpected consequences and unfulfilled expectations. These include:

- failure to achieve the represented LEED™ level of certification
- delay claims
- claims for breach of warranties or representations made in the LEED™ certification documents
- claims arising from inexperience with new products
- claims of overstated experience
- water damage, mould and air contaminants
- failure to meet changing regulatory requirements
- claims by occupants of failure to meet their expectations (“greenwashing”)
- operational failures
- increased maintenance costs.

In our next newsletter, we will offer tips on risk mitigation steps that can be taken in the contract drafting and administration phases of a green project in order to assist in avoiding such claims.

Practical Tips to Reduce Risk

In the first section of this article, we reported on the American experience with legal claims arising from the green building movement. At this time, there have still been relatively few litigation cases and to our knowledge, no reported cases with helpful judicial reasoning on green building issues. However, based on experience, we expect that there will soon be significant green building disputes making their way through the American and Canadian legal systems.

Lessons learned from litigation often fuel new approaches in contract drafting and construction project management, however, prudent owners, contractors and design professionals are taking steps now to reduce the risks inherent in construction projects with a focus on sustainability, such as projects seeking LEED™ certification. The fact that no one participant has complete control over the ability to achieve the desired LEED™ certification creates significant legal risk.

At the front end of a project, drafting contracts during the construction phase, best practices are being developed to reduce risk. In the balance of this article, we outline some of our recommendations for prudent steps to take to minimize risks on these exciting projects.

Project Development and Procurement Phase

- retain consultants and contractors with demonstrated expertise and experience
- develop processes to ensure your team is fully aware of all current regulatory requirements, as these are changing rapidly
- develop a written overall strategy and detailed plan early in the project for achieving LEED™ certification
- all parties should be cautious of making promises in relation to green issues. These could result in an enhanced standard of care or form the basis of misrepresentation claims
- consult an experienced construction lawyer for a review of your procurement documents to ensure they give you the desired ability to consider important green issues in bid evaluation and contract award decisions
- consider the potential impacts on the project as well as legal liabilities associated with the use of new products, designs, technologies and construction methods
- analyze early and account for the impact on project schedule of the use of new approaches and of the implications of the LEED™ certification process

Contact Drafting

- Do not use the standard form construction and design contacts without consulting an experienced construction lawyer for advice on recommended amendments to address and allocate appropriately the risks of green building. There are significant changes to be made to these contracts to address the risks.
- Avoid the use of vague terms like "green" and "sustainable" in contracts unless defined.

- Identify in your contracts expressly and specifically the party responsible for particular steps in relation to achieving green goals such as for obtaining specific categories of LEED™ points, preparation of required documentation or taking steps in the certification process.
- Specifically address what happens if certification is not achieved, including considering contractual provisions such as holdbacks that take account of the fact that certification is typically not achieved until long after substantial completion.
- Consider and address available insurance.
- Address the desired scope of "no consequential damages" and limitation/exclusion of liability clauses. These typically eliminate a remedy for owners who lose tax credits, rents or sales, and other financial consequences due to a failure to achieve LEED™ certification. They also typically prevent claims for recovery of losses flowing from claims by third parties, such as purchasers or users of the building. An owner to whom achieving LEED™ certification is important may want to amend these clauses to ensure there is a remedy for failure to achieve certification.
- In design consultant contracts, avoid language amounting to a guarantee or warranty of performance, which will be excluded from the consultant's insurance coverage.

Design and Construction Phases

- Designers should take care to fully investigate (not relying solely on manufacturer's sales literature), test as required, and report the risks clearly to their clients in relation to the selection of new materials so that fully informed decisions can be made.
- Contractors and designers should allow for additional time in the schedule and budget for the time associated with using new materials and methods, increased designer inspections and approvals, and enhanced quality assurance progress.
- Establish a written procedure for dealing with LEED™ issues such as ensuring proper documentation is being maintained, contemplated changes that may affect a LEED™ point, or Credit Information Requests to the Canada Green Building Council.
- Since no one party will be responsible for achieving all LEED points, project procedures that enhanced communication and cooperation are warranted.
- Consider necessary training for construction personnel in relation to new materials and methodologies.
- Devote greater time, effort, and expertise to commissioning to fully address green issues.
- Devote more resources to operating and maintenance manuals and training of owner staff.

Disputes will arise on green building projects. When they do, a proactive and pragmatic approach to investigation, analysis and resolution of the dispute will help you avoid your project becoming the first reported green building case in Canada.