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Real Estate, Construction and Business Law Alert

GREEN DESIGN, GREEN CONSTRUCTION AND SUSTAINABLE BUSINESS PRACTICES

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2010 promises an expansion of “green” design and construction along with other sustainable business practices. In the construction area, LEED® (Leadership in Energy and Environmental Design) design standards will remain common reference points in both the residential and commercial sectors (e.g., education, public, health care, non-profit, office). Experts predict that tens of billions of dollars will be spent on green construction in the next few years. (As for prime examples of sustainable business practices, see the significant investments being made by Wal-Mart and General Electric.)

Green design and green construction create several unique legal issues for owners and investors, architects, designers, and engineers, and contractors and subcontractors. Challenges include the lack of a regulatory body and definitive, universal standards for what constitutes “green”; owner, designer and contractor expectations that may not be in line with common contractual risk management provisions; innovative green products and methods that may not be durable, reliable or readily available; and, the key role of proper operation and maintenance (O&M) of a building’s systems beyond their initial installation. In view of these challenges, it is important for owners, designers and contractors to understand their respective rights and responsibilities on

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green projects, and to develop clear project scopes, risk management approaches, and contract provisions to address green issues.

Published reports have described claims and lawsuits concerning green design and construction, including claims alleging: failure to construct an environmentally sound building not meeting LEED® ratings or in breach of project plans, causing lost tax credits, loan defaults and other damages; poor quality and lack of availability (causing project delays) of specified green products; and, indoor air quality and energy and resource use not meeting promised levels. Hence, it is important to adopt specific contract provisions in an effort to manage green risk.

1. **Owners, Operators and Investors:** Owners should clearly identify their green expectations for the project beyond traditional design parameters. This could include provisions specific to indoor air quality, lighting, energy and water usage, or particular levels of LEED® certification (e.g., certified, silver, gold, platinum). Specific green materials or process methods should be identified if they are important to the owner's goals.

The parties should agree on clear, enforceable standards, including defining certain terms, as a way to measure the designer's and contractor's performance on specified items. The individual responsible for each LEED® rating criteria and building element should be identified to avoid "finger pointing" later on. The owner should know the scope and cost of future O&M responsibilities for green elements so they can be budgeted and performed. Otherwise, the owner could risk losing LEED® certification, upsetting building systems, violating warranties or other problems.

The owner should check with its insurance carrier to ensure there is coverage for green materials and green systems if there is a partial or total loss. For instance, if there is a casualty and rebuilding is necessary, the owner may need insurance proceeds to incorporate sustainable products and systems on the restoration, which could be more expensive than traditional items. Also, the owner would want to meet at least the same level of environmental certification as the original installation, and perhaps a new level applicable at the time of loss. In considering the contractor's insurance, the owner should ensure that the builder's risk policy addresses green reconstruction and rebuilding if there is a covered loss.

2. **Architects, Designers, and Engineers:** The American Institute of Architects (AIA) advocates sustainable design in its ethical and contract provisions, where the architect is to consider and discuss with the owner environmentally responsible design alternatives. These types of provisions, as well as the qualifications of a LEED® Accredited Professional (LEED AP), may impose a higher standard of care

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on architects, designers and engineers working on green projects, with implications for possible claims of alleged negligent services.

Designers need to be mindful of design risk liability in the green area and measures to manage that risk. Such measures could include precautions to avoid inadvertent guaranty of a specific material or building performance, the effectiveness of certain energy or water consumption systems, indoor air quality, or obtaining LEED® certification, because such a guaranty could implicate the professional liability insurance policy (see below). For instance, it is important to not guaranty that a product will perform a certain way, or that a method will achieve a certain performance, or that a building will achieve a specific LEED® standard.

It is also important for designers to not assume liability for a contractor's means and methods to achieve green goals or for the results of an owner's failure to perform O&M on the building's green systems. Designers should consider reviewing technical manufacturer's data before specifying a sustainable product, and inform the owner of the various post-construction O&M requirements as well as the ramifications of not performing O&M. The designer should clearly identify the individual LEED® criteria for which it assumes design and reporting responsibility. Similarly, if another professional is handling certain green elements, the designer should consider specifically disclaiming that responsibility.

Of particular concern is not triggering an exclusion in the errors and omission (E&O) or professional liability insurance policy by signing LEED® credit templates and declarations. The designer should consider contract language providing that signing such forms is solely for the certification process and does not constitute a guaranty or warranty.

3. **Contractors, Subcontractors and Builders:** Many contractors have trained their staff in green techniques, with a large number of individuals obtaining the LEED AP qualification. This experience should help minimize claims pertaining to workmanship and defects on green projects.

Contract provisions should attempt to limit contractually assumed damages, including not assuming new, expanded liability pertaining to green construction. Contract provisions should address potential delay claims arising out of the difficulty in procuring specialized materials or equipment that may be unfamiliar to the contractor. Protection is needed in case a specified innovative material is not accessible, reliable or durable. The contractor should obtain specific instructions on the individual LEED® criteria for which the contractor is responsible, such as construction waste management or building or materials reuse. The contractor should provide that it will comply with

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those instructions and specifications, but be careful to not guaranty that it will provide specific LEED® points or certifications.

The contractor should consider due diligence on the qualifications of each subcontractor who will be charged with performing green elements. The contractor should also carefully document the O& M requirements for the owner and operator so they are aware of their responsibilities after construction. On the insurance side, endorsements to the builders risk policy should be considered to ensure replacement and rebuilding to specified green standards and using sustainable products if there is a covered loss.

Please contact me if you or a colleague has a question or green design or construction or the LEED® certification process.

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