

LEED:

(Leadership in Energy and Environmental Design)

Overview & Issues for Legal Professionals

By Christopher G. Hill, Esq.

Sustainable or “green” construction is here to stay. Future energy requirements, environmental issues, and government mandates either require or will soon require that construction professionals and their attorneys deal with a brave new world of building.

The LEED (Leadership in Energy and Environmental Design) rating system, created by the United States Green Building Council (USGBC) has become the leading method to determine the “greenness” of a building or neighborhood. This system assigns “points” for various environmentally friendly and/

measure its environmental friendliness. Everything from the recycling of materials, to the location from which materials are purchased and shipped, to the orientation of the building and the efficiency level of its HVAC systems, is taken into account. Based on the number of “points” a project gains from these practices, a project is rated as “Certified” (40-49 points), “Silver” (50-59 points), “Gold” (60-79 points) or “Platinum” (80 points and above).

Several municipalities (some in my home state of Virginia) have sought to make LEED part of their regulatory framework. For instance, the City of Richmond requires any city building to meet LEED Silver standard. Some states and municipalities seek to use

will need to be able to set themselves apart by showing their ability to adapt to the new construction world they will soon face. They must learn new technologies and terms such as “Green Globes” (another less frequently used rating system) and “LEED” in order to compete for the smaller number of dollars currently available.

Our clients know this, so we must be prepared to properly advise them on the risks that go along with the potential rewards made possible by any new use of technology. We must also be attuned to occasional pitfalls along the way.

“Those in the construction world who master this new construction paradigm will flourish in this new environment.”

or energy-efficient construction methods, building techniques, and occupancy controls. Because of the almost universal nature of this system (both privately and in public regulation), LEED is a system worth learning for all legal professionals in the construction area whether lawyer or paralegal.

LEED provides a system by which a newly-constructed or renovated building or neighborhood can

LEED much the same way as zoning or as part of their building codes (the wisdom of this is the subject of debate, but not the subject of this article).

Because of this trend toward “green construction,” attorneys and the legal professionals who support them need to learn to “speak green” in order to properly advise construction professionals in both the business growth and risk management arenas. Our clients in the construction arena

While the move to sustainable building is a laudable one, this new paradigm brings with it new legal risks that have yet to be explored. New technologies are being created and old methods are being used in new ways. This trend alone creates liability risks for the simple reason that we do not have years (or even decades) of applicable engineering data.

Third-Party Action Issues

Issues of third-party actions relating to energy efficiency and appeals of or challenges to the certification of a building under LEED require that contracts be drafted in such a way as to protect the parties from unforeseen liability well beyond the time frame of any warranties.

The USGBC requires energy reporting at certain intervals and also allows for challenges to the LEED certification of a project by third parties after the fact—possibly well after the project is complete. While USGBC does not require that buildings meet energy benchmarks to maintain a certain LEED rating, the energy reporting requirements create a pool of information that a smart owner could use to create a longer term specification to be met by the design and construction team. Such an extended time horizon could very easily lead to a liability pitfall for a contractor who does not carefully read and understand the contractual language being considered.

Additionally, this sort of a requirement by an owner is subject to many factors well beyond the control of the general contractor or architect. The simplest and most obvious of these is human

interaction with the building. Anything from an annoyed office worker overriding timers on the overhead lighting to a door being propped open on a humid 100 degree Virginia summer day can affect the energy performance of even the most energy efficient and excellently designed and constructed building.

Another area of potential third-party issues relating to LEED certification in construction specifications is the fact that the USGBC presently allows anyone to challenge the certification of a building after the fact. Presently, no time limit or real procedural guidelines exist for such challenges. Should such a challenge occur and be sustained, the LEED certification level of a building can be at risk for a theoretically unlimited time frame. One such instance was the challenge to the LEED certification of the Northland Pines High School Building in Vilas County, Wisconsin. While this challenge was denied by the USGBC, the specter of other such challenges is a real one.

These two points create the possibility that a contractor could be held responsible for the energy efficiency or state of LEED certification of a building long after the contractor leaves the project. Because of the potential that a contractor's involvement in a construction project may not actually be complete when the building is finished and built to the specifications presented by the architect and owner, those of us who represent contractors and subcontractors must be clear in our advice that any construction contract assures that any contractual



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liability for the builder ends when the project is complete. Potential “fixes” for this problem are to use certification or energy efficiency “goals” as opposed to specifications that must be met or even to explicitly state that the contractor or design professional has met the requirements of the contract when certification is obtained and the project is complete.

Insurance Issues

Insurance companies continue to struggle with comprehensive general liability and errors-and-omissions coverage relating to these issues as well as design and construction related issues.

Questions abound relating to how insurance carriers will insure (if at all) for potential failure of certification or for the specter of de-certification or failed energy performance benchmarks (discussed below).

As with any new area of potential liability, underwriting lags behind technology. Attorneys need to make sure their clients in the construction world are working closely with their insurers to assure that coverages are adequate to the task.

Furthermore, bonding companies seeking to provide payment and performance bonds will struggle with the possibility of LEED certification as an aspect of performance. “At what point should the bond be released?” This is only one of the many questions yet to be answered by the bonding and insurance industries.

Integrated Project Delivery

Other areas which construction professionals, attorneys, and other legal professionals must become familiar with are Integrated Project Delivery (IPD) and Building Information Modeling (BIM). Both the American Institute of Architects

(AIA) and the ConsensusDOCS (another set of form documents spearheaded by the Associated General Contractors [AGC]) form document sets include IPD among their number.

The advantage of IPD, and the reason that attorneys and paralegals must be familiar with it, is in the initial phases of the project. When performed correctly, the owner, design professional, and general contractor (and a LEED Accredited Professional [LEED AP] if the job is to be LEED certified) get together and plan out the project ahead of time, hopefully using BIM to avoid conflicts on the front end through BIM's ability to model by computer how different parts of construction work together.

How does IPD enter into the sustainable building discussion? Most rating systems, including LEED, require that all parties to the project get together to discuss how the various parts of the project and how each credit is going to be achieved. Additionally, in order to achieve the best results from an energy efficiency standpoint (regardless of rating system) the parties must know how things will work together.

For example, the lighting must fit with the HVAC and the building orientation in order for the optimal rating or energy efficiency to be met. If each of these items was designed in a vacuum, unforeseen issues could occur down the road, ranging from a simple problem with compressor placement to a failure to achieve the required energy performance. As you can see, IPD (in concert with the three dimensional modeling of BIM) is a great tool to use in achieving the “green” project goals when properly applied by parties willing to use them.

Conclusion

In summary, the new world of sustainable or “green” construction presents great opportunities for construction attorneys, paralegals, and their clients. Those in the construction world who master this new construction paradigm will flourish in this new environment. This opportunity also comes with risks (some new, others old but in new packages). Form contracts, insurance, and technology have yet to catch up with the desire to build a more sustainable future.

For this reason alone, paralegals will need to familiarize themselves with these and other issues in order to properly support and team with the lawyers and clients that they so diligently represent. To properly represent their clients and assist the attorneys with whom they work, paralegals must have at least a general knowledge of the issues listed above. Without at least this level of knowledge, discovery could be mishandled or a negotiating point missed by even the most talented and conscientious paralegal.

The use of LEED and other “green” techniques and technologies is relatively new. For this reason, many of the issues listed above have yet to be resolved. Until they are, paralegals and the attorneys they assist must keep asking questions and seeking answers before the courts solve these issues for us.

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