A Greener Landscape on the Horizon

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Public and private sector entities are increasingly concerned with the energy costs associated with the built environment. These costs, including extraction and production of materials as well as construction, maintenance and eventual disposal, constitute a sizeable chunk of the energy consumption of most developed countries. In these countries, the U.S. included, forty percent or more of all the materials extracted annually end up in the built environment. Similarly, thirty percent of all primary energy consumption in the U.S. (even more in other areas such as Europe) can be attributed to the built environment. A large portion of all energy is used to heat, cool, ventilate and light the buildings and infrastructure that support the built environment. In addition, the demolition of existing portions of the built environment and waste from construction projects themselves constitute almost one-third of all domestic materials being land-filled annually. It is not surprising, then, that the U.S. and other countries, via international and domestic organizations, have understood the need for "internalizing" these costs to society and are implementing governmental and private mechanisms for sustainable development.

When buildings are designed, built, maintained and operated without regard to the underlying hard-costs of energy, these assets often prove to be poor long-term investments. Consciousness of this situation has begun to have an impact on the construction industry and its varied stakeholders. Most involved in architecture, engineering or construction are aware of the rapidly increasing attention being paid to sustainable building and its most important and visible organization, the United States Green Building Council (USGBC). Developers, lenders and other players in the real estate industry also recognize the economic and non-economic potential of sustainable buildings, as made evident at a recent conference held by the Urban Land Institute in conjunction with the USGBC called "Developing Green: The Case for High-Performance Buildings and Sustainable Development."

The USGBC seeks to transform the construction and building marketplace through education, advocacy and its most potent strategy-the Leadership in Energy and Environmental Design (LEED) certification system. LEED allows owners to obtain voluntary third-party certification from the USGBC for buildings by earning points in such areas as energy conservation, indoor air quality, reduction in water usage and day-lighting. If the certification, given at levels ranging from simple certification to Silver, Gold and Platinum, provided only a feel-good marketing advantage, adoption of the system would have little significance. Instead, demonstrating the potential for substantial economic benefits as well as less quantifiable intangible benefits, LEED certification has become a sought-after goal for many stakeholders in the construction process.

The most important catalyst for bringing sustainable building into the mainstream has been the early adoption of LEED certification by major federal, state and municipal entities. The General Services Administration, Office of Management and Budget, Federal Park Service, Department of Defense, Department of Energy at the federal level; the states of Washington, New York, Arkansas, California, Maryland, among numerous others; and, at the municipal level, Chicago, Seattle, Boston, Austin, New York, and San Francisco, among many others, have all moved to implement the LEED certification standards, either explicitly or implicitly.

Chicago Mayor Richard M. Daley has personally taken on the cause of "green" or sustainable building, so much so that he is currently implementing an expedited permitting process for buildings seeking LEED certification in the city. Under the new process, a building seeking LEED Platinum certification can be

approved in as little as fifteen days instead of several months. LEED projects at other levels of certification can be approved in less than 30 days. This program is only one example of the systemic changes already occurring or under consideration in Chicago and elsewhere in the country.

These changes are presenting new opportunities for owners, contractors and design professionals. Design professionals have been particularly involved in pursuing sustainable building issues and are at the forefront of activities in this area. Owners' prime interest in sustainable design remains economically driven, since many. LEED projects show clear life-cycle cost advantages and will often help smooth the way for community approval. Contractors, on the other hand, are interested in responding to the changing marketplace (this is especially the case for contractors involved in the public sector) and seek to obtain first-in-time status to acquire a competitive edge.

Predictably, with these new opportunities come new risks. Owner expectations regarding energy savings may be misplaced and the contractor and Architect/Engineer may find himself having to explain any actual or perceived performance deficit. Owners may represent in marketing a specific certification level which fails to transpire. Lenders, lessees, purchasers or others may seek redress for decisions made relying on these representations. General contractors may find themselves in the difficult position of ensuring that subcontractors supply the documentation required for submission to the USGBC to obtain the certification. Contractors and owners may both find themselves in situations where a default or bankruptcy of a contractor on the project may prove fatal to achieving the requisite certification as well as implicate complex performance bond issues.

Design professionals may be particularly at risk since they are disproportionately sympathetic to the sustainable design and building agenda. The most prominent issues arise around standard of care and warranty dilemmas. Design professional liability insurance coverages may not exclude coverage for services proffered at a level beyond or outside the general standard of care, but it certainly makes it more difficult to defend a design professional. This difficulty increases litigation costs for the design/professional or insurer and skews the settlement value of any claim in the plaintiff's favor.

The scope of a design professional's exposure to a successful suit involving design services is most often based on a showing that the professional standard of care was not met. A plaintiff seeking to prove negligence, if there was injury to person or property, or a breach of contract, must demonstrate that the design professional did not exercise the appropriate "learning, skill and care ordinarily possessed and practiced by others in the same profession in the same locality, at the same time." *Paxton v. Alameda County*, 119 Cal. App. 2d 393, 406 (1953). This standard is commonly met by expert testimony provided by other design professionals. In the area of sustainable design and building, few if any "experts" are available or can say with any certainly what the characteristics constitute the heightened standard of care.

There are a number of ways in which the standard of care for a design professional in the LEED context can be changed, either voluntarily or involuntarily. Although, as I indicated above, a voluntary change can take place via contract or volunteering extra services, the most important conduit is through certification. A design professional that specializes in sustainable design and has obtained a LEED accreditation through the USGBC, as almost 20,000 architects and engineers have, may be measured by a different standard than the average design professional unless the standard of care is explicitly addressed. Thus, even if the liability carrier agrees to defend a design professional, the defense may be forced to show conformance to a higher standard. Ultimately, the strategy of many firms to substantially increase the number of LEED accredited staff and principals may constitute a voluntary increase in the standard because a court or jury

may conclude that if all or a substantial portion of the office is accredited, this is the appropriate applicable standard.

Involuntary increases in the standard of care are also in the offing. As the number of LEED accredited professionals continues to grow, at some point in the near future a tipping point may be reached whereby all architects, whether accredited or not, will be expected to possess the typical skill, ability and judgment associated with LEED or some comparable standard. This is particularly the case in places such as Chicago, California or Arkansas, where such a standard has been statutorily or administratively adopted. It is easy to imagine that ten years from now an owner might seek redress from a design professional for not suggesting or including design options that would have saved him 30% of his energy costs for the lifecycle of project. In the same way that the standard of care for physicians is subject to change depending on the state of the field and certifications in the various specialties, design professionals may too find themselves judged by an evolving standard of care.

Sustainable design and building are here to stay. In fact, many design professionals are convinced that building codes will begin to reflect many of the attributes of the LEED or some comparable system. Managing the risks in a changing environment requires greater care and vigilance. Each of the parties involved in the production of sustainable buildings faces its own set of legal issues and concerns. The owner, the contractors and the design professionals are only the most obvious participants in the task of producing a sustainable building. At the same time, all the parties in this process share some common goals, such as reducing litigation and insurance costs.

The economic and marketing advantages of LEED certification, sustainable planning, renewable energy use and energy management can now be plausibly demonstrated, but project owners and funders cannot take full advantage of these options if the appropriate legal and risk transfer mechanisms are not in place. A studied examination of the exposures of all the parties to this endeavor will create a more efficient outcome and a more palatable choice for the decision-makers. A better understanding of the risks - and how to manage them properly - will help design professionals and others to convince owners, organizations and institutions that sustainable design is not only good for their bottom line, but it often poses less risk than traditional projects.

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